



MILITARY LAW REVIEW

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Military Law Review

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Issue 4

2016

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Headquarters, Department of the Army, Washington, D.C.

Academic Journal No. 27-100-224-4, 2016

Military Law Review

Volume 224

Issue 4

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Reprints of published works are not available.

POSTMASTER: Send address-change requests to *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781.

CITATION: This issue of the *Military Law Review* may be cited as 224 MIL. L. REV. page number (2016).

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MILITARY LAW REVIEW

Volume 224

Issue 4

NUCLEAR WEAPONS TARGETING: THE EVOLUTION OF LAW AND U.S. POLICY

LIEUTENANT COLONEL THEODORE T. RICHARD*

The world will note that the first atomic bomb was dropped on Hiroshima, a military base. That was because we wished in this first attack to avoid, insofar as possible, the killing of civilians. But that attack is only a warning of things to come. If Japan does not surrender, bombs will have to be dropped on her war industries and, unfortunately, thousands of civilian lives will be lost. I urge Japanese civilians to leave industrial cities immediately, and save themselves from destruction.¹

I. Introduction

Hiroshima was not a military base, but a city in Japan, when it was struck with the first ever military atomic bomb strike at 8:15 A.M. on August 6, 1945. President Truman's diary entry from July 25, 1945, recorded his recollection of a conversation that he had with Secretary of War Henry Stimson the previous day during which the President instructed Stimson to use the atomic bomb "so that military objectives and soldiers and sailors are the target and not women and children."² He also wrote

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that he and his Secretary of War were agreed that “[t]he target will be a purely military one.”³ Nothing else in the historical record appears to corroborate President Truman’s recollection of events. President Truman’s classification of the bombing as a purely military objective has caused some historians to speculate that the President engaged in “self-deception.”⁴ Under the mid-twentieth century military’s targeting lexicon, however, the President’s understanding of Hiroshima as a military target was accurate.

Although Hiroshima was not a military base as understood today, it was a “military city” as it housed the 2d Army Headquarters, which commanded the defense of all of southern Japan.⁵ The city was also a communications center, a storage point, and an assembly area for troops.⁶ While no specific warning to the residents of Hiroshima preceded the nuclear attack, a general warning was issued in the form of the Potsdam Declaration on July 26, 1945, where the allies promised the “complete destruction of the Japanese armed forces” and “utter devastation of the Japanese homeland” if Japan failed to surrender its armed forces.⁷ Up until the time of the strike, Hiroshima had been spared from the conventional fire-bombing that devastated other Japanese military-related cities.

also wishes to thank Dr. Justin Anderson, Professor Scott Sagan, Brigadier-General (Ret’d.) Kenneth Watkin, Colonel Michael Smidt, Lieutenant Colonel Sarah Mountin, Lieutenant Colonel Kelli Hooke, and Lieutenant Commander Christopher Fletcher for their assistance on drafts. The views expressed in this article are solely those of the author and do not reflect the official policy or position of the DoD or the U.S. Government.

¹ President Harry S. Truman, Radio Report to the American People on the Potsdam Conference, August 9, 1945, *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS, HARRY S. TRUMAN, <http://www.trumanlibrary.org/publicpapers/?pid=104>.

² Notes by Harry S. Truman on the Potsdam Conference, July 25, 1945, *reprinted in* PAPERS OF HARRY S. TRUMAN: PRESIDENT’S SECRETARY’S FILE, https://www.Trumanlibrary.org/whistlestop/study_collections/bomb/large/documents/index.php?pagenumber=5&documentid=63&documentdate=1945-07-17&studycollectionid=abomb&groupid.

³ *Id.*

⁴ Barton J. Barnstein, *The Struggle over History: Defining the Hiroshima Narrative*, in JUDGEMENT AT THE SMITHSONIAN, 177 (Phillip Noble, ed., 1995); J. SAMUEL WALKER, PROMPT AND UTTER DESTRUCTION: TRUMAN AND THE USE OF ATOMIC BOMBS AGAINST JAPAN 62 (2004); WILSON MISCAMBLE, THE MOST CONTROVERSIAL DECISION 71 (2011).

⁵ The Manhattan Eng’r Dist. of the U. S. Army, *The Atomic Bombings of Hiroshima and Nagasaki*, June 29, 1946, at 19 [hereinafter Manhattan Eng’r Dist.].

⁶ *Id.* at 19.

⁷ Proclamation Calling for the Surrender of Japan, Approved by the Heads of the Government of the United States, China, and the United Kingdom, July 26, 1945 *reprinted in* U.S. Dep’t of State, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS: THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE), 1945 1474–76 (1960).

Between 70,000 and 140,000 Japanese were killed by the resulting atomic attack, many of whom were civilians.⁸

On the day the Hiroshima bomb was dropped, the White House issued a press release announcing the new weapon and its use. The statement repeated the Potsdam warning and explained:

We are now prepared to obliterate more rapidly and completely every productive enterprise the Japanese have above ground in any city. We shall destroy their docks, their factories, and their communications. Let there be no mistake; we shall completely destroy Japan's power to make war.⁹

The United States waited for the Japanese reaction.

Japanese leadership received reports of devastation in Hiroshima and the media reports of U.S. warnings. In response, Emperor Hirohito told his foreign minister to “make such arrangements as to end the war as quickly as possible.”¹⁰ Surrender, however, was not immediate. While the Japanese civilian leadership began deliberating over acceptable terms for surrender, the military remained highly resistant to the notion of surrendering.¹¹

At 11:02 A.M. on August 9, 1945, Nagasaki became the second city to be struck by an atomic bomb.¹² Nagasaki was an alternate target for the

⁸ An estimated 70,000 people were killed in Hiroshima on August 6, 1945. U.S. DEP'T OF ENERGY, *THE MANHATTAN PROJECT: MAKING THE ATOMIC BOMB* 96 (2010), https://www.osti.gov/opennet/manhattan-project-history/publications/Manhattan_Project_2010.pdf. The death toll rose to 140,000 by the end of 1945, and to 200,000 by the end of five years. *Id.*

⁹ Press release by the White House, August 6, 1945, at 2. Ayers Papers, Subject Files, http://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/documents/index.php?documentdate=1945-08-06&documentid=59&pagenumber=1.

¹⁰ WALKER, *supra* note 4, at 81.

¹¹ MISCAMBLE, *supra* note 4, at 96.

¹² Manhattan Eng'r Dist., *supra* note 5, at 5. Due to time zone differentials, the evening of August 9 in Washington, D.C., would have been the morning of August 10 in Japan. The second atomic bomb was originally to have been dropped on August 11, 1945, but was moved forward due to weather concerns. MISCAMBLE, *supra* note 4, at 90; WALKER, *supra* note 4, at 78.

second bomb; the primary target was the city of Kokura.¹³ Nagasaki's military industry made it significant. The atomic bomb landed between the two principal targets in the city: the Mitsubishi Steel and Arm Works and the Mitsubishi-Uramaki Ordnance Works (Torpedo Works).¹⁴ The designated Nagasaki bomb site was obscured by clouds, so the B-29 crew dropped the bomb over a stadium and it detonated over a Roman Catholic cathedral.¹⁵ According to a 1946 post war analysis, the location of the actual detonation point was ideal for destroying the military related industries; other locations would have destroyed more residential areas and been less effective at destroying industrial targets.¹⁶ Unfortunately, a hospital and medical school, located 3000 feet from the stadium, were also annihilated.¹⁷ The bomb killed between 40,000 and 70,000 people.¹⁸

The atomic strikes on Hiroshima and Nagasaki were lawful under the laws of war existing in 1945. These attacks also represent the only two instances of atomic weapon strikes in history. They illustrate the definitional confusion existing with respect to the U.S. classification of lawful military objects exclusive of civilian objects. If some historians believe President Truman was engaged in "self-deception" in labeling Hiroshima a military target, those historians may be equally perplexed by modern American usage of law-of-war target labels.

This article explores the history of the legal aspects of targeting, specifically addressing the evolution of the law of war related to strategic bombing and belligerent reprisals—both prior to August 1945 and in the seventy years since.¹⁹ The article also examines the interaction between the law of war and U.S. nuclear weapon targeting policy during those

¹³ WALKER, *supra* note 4, at 78. Kokura housed one of the largest arsenals in Japan, a structure surrounded by other industrial structures. Memorandum for Major General L.R. Groves, Summary of Target Committee Meetings on 10 & 11 May 1945 at 3, May 12, 1945 [hereinafter Target Committee Meeting of May 12, 1945].

¹⁴ Manhattan Eng'r Dist., *supra* note 5, at 24.

¹⁵ WALKER, *supra* note 4, at 79; MISCAMBLE, *supra* note 4, at 93.

¹⁶ Manhattan Eng'r Dist., *supra* note 5, at 35.

¹⁷ WALKER, *supra* note 4, at 79.

¹⁸ An estimated 40,000 people were killed by the bomb on August 9, 1945. U.S. DEP'T OF ENERGY, *supra* note 8, at 97. The death toll rose to 70,000 by the end of 1945, and to 140,000 by the end of five years. *Id.*

¹⁹ Common alternative terms for "law of war" are the "law of armed conflict" and "international humanitarian law." U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL (Dec. 2016) [hereinafter LAW OF WAR MANUAL]

periods.²⁰ While nuclear targeting policy was consistent with law at the close of the Second World War, it subsequently struggled to justify its conformity with international law norms as they continued to evolve. This struggle is evident when assessing Cold War concepts like city targeting, “bonus damage,” and retaliation against law-of-war principles such as distinction and proportionality. During the Cold War the U.S. and its allies faced an existential threat to survival from a block of nuclear-armed states ideologically seeking world domination. This threat forced policy makers to develop terrifying strategies to deter war—threatening evil so as not to do it.²¹ In this environment, legal restraints could not credibly support deterrence. Since the end of the Cold War, nuclear threats have become more varied and regionalized. In this new international security environment, the U.S. accepted law-of-war limitations on nuclear weapons.²² Understanding and applying those limitations, however, is challenging to say the least. The unique nature of nuclear weapons, combined with treaty obligations, has created a *lex specialis* of nuclear targeting.²³

In outlining these legal and policy developments, certain trends become evident: limiting attacks to military objectives has become a

²⁰ The history and law in this paper are based exclusively on unclassified documents and sources in the public domain.

²¹ MICHAEL WALZER, *JUST AND UNJUST WARS* 274 (4th ed., 2006).

²² This article does not engage in the broader debate on the legality of nuclear weapons, other than to discuss the targeting implications of proceedings at the International Court of Justice (ICJ) from 1994 to 1996. The challenges to the lawfulness of nuclear weapons can be found elsewhere. See, e.g., *Shimoda v. State*, digested in 58 AM. J. INT’L L. 1016 (1964) (Japanese case in which the Government of Japan defended the nuclear strikes on Hiroshima and Nagasaki as lawful, but the Tokyo district court found the attacks violated international law); CHARLES MOXLEY, JR., *NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD* (2000) (notable for Robert McNamara’s foreword as well as the book’s constant use of extended extracts of U.S. military service manuals and other sources to argue that the principles of law make nuclear weapons unlawful); JAMES SPAIGHT, *THE ATOMIC PROBLEM* (1948) (notable because of the author’s significant influence in early airpower law). The contrary position can be found in sources cited throughout this article. The most complete debate on the subject can be found in the statements by nations flowing from the 1995 ICJ litigation in response to the Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=93&code=anw&p3=1>.

²³ *C.f.* LAW OF WAR MANUAL, *supra* note 19, ¶6.5.1. The MANUAL states: “The law of war governs the use of nuclear weapons, *just as* it governs the use of conventional weapons.” *Id.* ¶6.18 (emphasis added). As will be made clear throughout the paper, the law of war is applicable to nuclear weapons, but it is not necessarily identical to that applicable for conventional weapons.

critical legal requirement; the doctrine belligerent reprisals remain an important part of nuclear weapon policy and deterrence theory; public expectations of minimizing collateral damage are increasing and may drive policy debates on the nature of the nuclear force; and the law of war applicable to nuclear war remains abstract due to the extraordinary levels of destruction posed by the weapons. These trends inform two conclusions: first, abstractions in the law, while terrifying to populations living with the specter of nuclear war, may help the nuclear deterrence mission by keeping potential adversaries unsure of the exact parameters of possible responses; second, legal concerns with nuclear weapon targeting should shape policy debates over the nature of the U.S. arsenal.

II. Law and Practice Developments Prior to Nuclear Weapon Use

A. Early Law of War Customs and Rules

Prior to the twentieth century, the humanitarian aspects of the law of war developed slowly based upon state practices and scholarly works. Christian just war theory arose over the medieval period, but it did not prevent outright slaughter of civilians. The Seventeenth Century jurist Hugo Grotius and the Eighteenth Century diplomat Emmerich de Vattel were highly influential scholars, but their works did not represent a codified, internationally accepted set of specific rules enforced by a court. International law would generally be upheld on concepts of reciprocity.²⁴

Nations developed sanctions beyond general reciprocity to address breaches of international law.²⁵ Grotius recognized that such violations could be enforced by violent means.²⁶ He found historical examples of a state's right to seize or detain citizens of other states in violation of international law as compensation for wrongs, as well as the right of reprisal, where states authorized the seizure of private property of the subjects of another state.²⁷ Reprisals amounted to "informal war" as they could be undertaken to enforce rights short of a full declaration of war.²⁸ Reprisals, as Letters of Marque, were also regularly authorized during

²⁴ See generally Sean Watts, *Reciprocity and the Law of War*, 50 HARVARD INT'L L. J. 365 (2009).

²⁵ FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 1-10 (2d ed., 2005).

²⁶ HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 284 (1949).

²⁷ *Id.*

²⁸ *Id.*

warfare.²⁹ Vattel explained that violations of the law of war would be “condemnable at the tribunal of conscience.” While he also recognized the right of reprisal, he expanded on retorsion and retaliation as additional responses for violations.³⁰ Retorsion allowed a sovereign to treat the citizen of another country in the same manner as that country treated the sovereign’s citizens.³¹ Retaliation responded to a law violation with a violation in kind. Vattel cautioned against retaliation as unjust because the penalties would be felt by people other than those who decided to violate the law in the first place.³² Nonetheless, Vattel recognized that retaliation was lawful so long as punishments were proportionate to the original evil.³³ In 1836, the American lawyer Henry Wheaton viewed retaliation as lawful only to bring an enemy back into observance of the law after it had violated “the established usages of war” and no other means of restraining the enemy existed.³⁴ One of the major shortcomings with these remedies for violations of law was uncertainty and disagreement over the specific rules, especially when the rules were articulated by individual lawyers rather than by governments.

²⁹ Theodore Richard, *Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUBLIC CONTRACT L. J. 411, 423-28 (2010).

³⁰ EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* Book 2, Chap. 18 § 342; Book III, Chap. 8 § 137 (1758), <http://oll.libertyfund.org/titles/2246>; Randall Lesaffer, *Siege Warfare and the Early Modern Laws of War* 37 (Tilburg Working Paper Series on Jurisprudence and Legal History, Paper No. 06-01, 2006), <http://ssrn.com/abstract=926312>.

³¹ VATTEL, *supra* note 30, § 341.

³² Vattel wrote:

Retaliation, which is unjust between private persons, would be much more so between nations, because it would, in the latter case, be difficult to make the punishment fall on those who had done the injury. What right have you to cut off the nose and ears of the [a]mbassador of a barbarian who had treated your [a]mbassador in that manner? . . . The only truth in this idea of retaliation is, that, all circumstances being in other respects equal, the punishment ought to bear some proportion to the evil for which we mean to inflict it,—the very object and foundation of punishment requiring thus much.

Id. § 339.

³³ *Id.*

³⁴ HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 253-54 (1836), <https://archive.org/details/elementsinterna02wheagoog>. Wheaton also recognized reprisals for property seizures during war (general reprisals) or as remedies to obtain satisfaction from another nation short of war (specific reprisals). *Id.* at 210. He cast retorsion as reciprocity. *Id.* at 218.

B. Early Codification Efforts

In May of 1863, the United States War Department issued General Orders No. 100, commonly called the “Lieber Code” after its author, Professor Francis Lieber, a veteran of the Prussian Army during the Napoleonic Wars. Lieber’s work was an early, comprehensive, government-issued codification of the rights and obligations of all parties to a conflict and was immediately influential throughout Europe.³⁵ It defined military necessity as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”³⁶ This regulation recognized that the death of civilians and destruction of their property during war may be unavoidable, but should never be wanton.³⁷ It also codified an early form of the principle of distinction, stating, “the unarmed citizen is to be spared in person, property, and honor so much as the exigencies of war will admit.”³⁸ At the same time, the Lieber Code also recognized that a besieged area could be lawfully starved during war, and that the civilian population in such an area could lawfully be prevented from leaving by besieging forces.³⁹ Lieber understood that retaliation was an essential aspect of international law and the law of war, but characterized it as “the sternest feature of war.”⁴⁰ It was only to be used as “a means of protective retribution” after careful inquiry into the facts and character of the underlying misdeeds.⁴¹ Lieber’s construct of retaliation suggested that it could be used to punish an adversary.⁴² Harsh measures like starvation of civilian populations and retaliation were all permitted under the Lieber Code, which held, “The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”⁴³ The Lieber Code became the building block for

³⁵ JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 2, 343 (2012).

³⁶ U.S. WAR DEP’T, *THE 1863 LAWS OF WAR*, General Orders No. 100, *Instructions for the Government of the Armies of the United States in the Field*, art. 14 (2005) [hereinafter *THE LIEBER CODE*].

³⁷ *Id.* arts. 15, 44.

³⁸ *Id.* art. 22.

³⁹ *Id.* arts. 17, 18.

⁴⁰ *Id.* art. 27.

⁴¹ *Id.* art. 28.

⁴² Watts, *supra* note 24, at 392. The wording has also been read to indicate that Lieber Code reprisals would not include measures for revenge, but to “halt and prevent the recurrence of the original, or similar, offending acts.” Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 *MIL. L. REV.* 184, 188 (2003).

⁴³ *THE LIEBER CODE*, *supra* note 36, art. 29.

subsequent international agreements.⁴⁴ It also left the door open for wartime destruction on a massive scale.

In 1874 delegates from major European nations met in Brussels to consider questions on the conduct of wars and issued a declaration on the laws and customs of war based on the Lieber Code.⁴⁵ The convention addressed several concepts relevant to targeting issues. For example, belligerents were forbidden from destruction “not imperatively required by the necessity of war.”⁴⁶ The delegates also agreed that fortified places alone could be besieged.⁴⁷ An attacking force was required to warn civilian authorities in advance of attack unless surprise was necessary, and was required to take steps to spare “as far as possible, buildings devoted to religion, arts, sciences and charity, hospitals, and places where sick and wounded are collected”⁴⁸ Despite discussions, delegates were unable to reach agreement on retaliation.⁴⁹ Belgium’s delegate believed the doctrine was odious and refused to enshrine it in a treaty.⁵⁰ The declaration produced by the conference was not ratified because major countries, including Great Britain and Germany, rejected it.⁵¹ While the conference failed to garner support from governments, it influenced military manuals.⁵²

C. The Hague Conventions

Negotiated around the turn of the century, the Hague Conventions were the first major multilateral treaties to address targeting rules.⁵³ These

⁴⁴ A. PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR* 256-57 (1909); WITT *supra* note 35, at 3.

⁴⁵ Original delegates were from Austria, Belgium, France, Germany, Great Britain, Greece, Italy, the Netherlands, Russia, Spain, Switzerland, and Sweden. Delegates from Turkey and Portugal came to later sessions. HIGGINS, *supra* note 44, at 257.

⁴⁶ Brussels Draft Declaration, art. 13(g), *reprinted at* HIGGINS, *supra* note 44, at 273-80.

⁴⁷ *Id.* art. 15.

⁴⁸ *Id.* art. 16-17.

⁴⁹ ISABEL HULL, *A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR* 64-66 (2014).

⁵⁰ *Id.* at 65; KALSHOVEN, *supra* note 25, at 48.

⁵¹ HULL, *supra* note 49, at 257-58.

⁵² HIGGINS, *supra* note 44, at 258.

⁵³ The Hague Conventions were not the first treaties. The Declaration of Paris outlawed privateering and required naval blockades to be effective. Declaration of Paris, 1856,

treaties were subsequently ratified by the United States, and thereby create binding law for employment of force in the modern era—to include potential restrictions on the use of nuclear weapons.

The annexes to the Second 1899 and Fourth 1907 Hague Conventions contained the specific law-of-war rules. These prohibited the “attack or bombardment of towns, villages, habitations or buildings which are not defended”⁵⁴ The words “by any means necessary” were added to clarify that this prohibition included bombardment from the air, although the delegates were primarily concerned with projectiles from aerial balloons.⁵⁵ By its terms, the prohibition on attack or bombardment of localities only applied to those which are undefended. The representatives to the Hague conferences believed that undefended locations would be taken without a fight, so attacking them was unnecessary.⁵⁶ The regulations also required belligerents to spare buildings devoted to religion, art, science, charity, historic monuments and hospitals not otherwise used for military purposes, while simultaneously imposing a requirement for defenders to clearly mark such sites.⁵⁷ Finally, the regulations said an attacking commander “should do all he can to warn the authorities” of the impending attack, “except in the case of an assault”.⁵⁸

The 1907 Hague Conference also produced a new convention on naval warfare. Convention IX, *Bombardment by Naval Forces in Time of War*, was significant because it was the first treaty to list lawful targeting objectives and, by implication, require attacks to be directed at objects or

reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 1055 (Dietrich Schindler & Jiri Toman, eds., 4th ed. 2004) [hereinafter SCHINDLER & TOMAN]. The Declaration of St Petersburg prohibited “any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.” Declaration of St Petersburg, 1868, reprinted in SCHINDLER & TOMAN, at 91. Geneva Conventions, primarily dealing with the treatment of wounded soldiers, were established in 1864, then were updated in 1868 and 1906. *Id.* at 365-96.

⁵⁴ Annex to 1899 Hague II and 1907 Hague IV, *Regulations Respecting the Laws and Customs of War on Land*, art. 25, reprinted in SCHINDLER & TOMAN, *supra* note 53, at 74 [hereinafter Hague II and Hague IV, respectively].

⁵⁵ *Id.*; HIGGINS, *supra* note 44.

⁵⁶ W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 15 (1990); Tami Davis Biddle, *Air Power*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 140, 143 (Michael Howard et. al., eds., 1994).

⁵⁷ Hague II and Hague IV, art. 27, *supra* note 54, at 237. “Historic monuments” were added in 1907.

⁵⁸ Hague II and Hague IV, art. 26, *supra* note 54, at 237.

people with military significance.⁵⁹ The Convention prohibited attacking undefended towns, villages, habitations or buildings.⁶⁰ The Convention made clear, “Military works, military or naval establishments, depots of arms or war material, workshops or plant [sic] which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbor, are not, however, included in this prohibition.”⁶¹ Furthermore, the Convention acknowledged that military commanders would not be responsible for unavoidable collateral damage against a legitimate target.⁶² The Convention also required commanders to spare buildings devoted to “public worship, art, science or charitable purposes, historic monuments, hospitals and places where the sick or wounded are collected, provided they are not used at the time for military purposes.”⁶³ As with the rules for land warfare, the defenders had a duty to mark these protected objects.⁶⁴ Finally, the Convention imposed a warning requirement on the attacker unless military exigencies did not permit.⁶⁵ Although the 1907 verbiage differed between Convention IX and regulations in Convention IV, the targeting rules as well as obligations and authorities were intended to be the same.⁶⁶ The U.S. delegation, for example, reported that Convention IX brought “the rules of land and naval warfare into exact harmony.”⁶⁷

No provision in any of the Hague Conventions clearly prohibited or otherwise defined reprisal or retaliation, thereby keeping those doctrines alive, although undefined by international convention.⁶⁸ The United States

⁵⁹ Parks, *Air War and the Law of War*, *supra* note 56, at 18.

⁶⁰ Convention (IX) Concerning Bombardment by Naval Forces in Time of War, art. 1, Oct. 18, 1907, *reprinted in* SCHINDLER & TOMAN, *supra* note 53, at 1080-81.

⁶¹ *Id.* art. 2.

⁶² *Id.*

⁶³ *Id.* art. 5.

⁶⁴ *Id.*

⁶⁵ *Id.* art. 6.

⁶⁶ Parks, *Air War and the Law of War*, *supra* note 56, at 17-8.

⁶⁷ Report of the Delegates of the United States to the Second International Peace Conference Held at the Hague from June 15 to Oct. 18, 1097, *reprinted in* U.S. Dep’t of State, II PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS DECEMBER 3, 1907, 1162 (1910).

⁶⁸ Dutch jurist Frits Kalshoven thoroughly studied the treatment of reprisals during the Conferences of 1874, 1899, and 1907, and found that the delegates did not openly address reprisals and could not deny their use in reality; however, many delegates believed reprisals prohibited by customary international law despite a lack of unanimity on the issue. Ultimately, Kalshoven concluded that reprisals, to some extent, formed a part of customary

defined reprisals as “acts of retaliation, resorted to by one belligerent against the enemy individuals or property for illegal acts of warfare committed by the other belligerent, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.”⁶⁹ To the United States, retaliation, the “sternest feature of war”, remained an indispensable feature of international law.⁷⁰ The United States distinguished the doctrine from revenge and characterized it a “means of protective retribution” after “careful inquiry.”⁷¹

Not only were the Hague Conventions the first multilateral treaties to address targeting issues, they were the only such treaties in place through two world wars.⁷² They were of limited impact during the world wars, however, because of ambiguous language in both versions as well as differences in interpretation. First, the preamble to the Conventions recognized that military necessity would invariably dictate the conduct of belligerents.⁷³ As preamble language, this application of military necessity would theoretically yield to specific rules in the main document. Germany’s delegation, however, uniquely saw military necessity as an exception to virtually every Hague rule and unsuccessfully attempted to have this view reflected in every article.⁷⁴ Despite the lack of clear language within individual articles, Imperial Germany treated the Hague rules as subordinate to military necessity.⁷⁵

Second, the Conventions contained *si omnes* or “general participation” clauses which provided that when a non-party to the Conventions joined a

international law, but the doctrine was left undeveloped during the Conferences. FRITS KALSHOVEN, *supra* note 25.

⁶⁹ U.S. WAR DEP’T, 1914 RULES OF LAND WARFARE para. 379 (1914), http://www.loc.gov/rr/frd/Military_Law/pdf/rules_warfare-1914.pdf.

⁷⁰ *Id.* para. 380.

⁷¹ *Id.* para. 381.

⁷² Parks, *Air War and the Law of War*, *supra* note 56, at 19. The treaties are still in force today.

⁷³ Preamble to Hague II and Hague IV, *supra* note 54, at 209.

⁷⁴ HULL, *supra* note 49, at 73, 75, 77 (2014). A 1917 decision from the German Imperial Military Court, Reichsmilitärgericht, held the Hague rules were guidelines rather than law. *Id.* at 109.

⁷⁵ *Id.* at 280.

conflict the rules would no longer be binding.⁷⁶ Several belligerents in subsequent conflicts were not parties to either Hague Convention.⁷⁷

Third, the Hague Conventions admitted that where particular rules or prohibitions did not exist, belligerents would still be bound by the principles of international law, which was undefined.⁷⁸ This was a

⁷⁶ 1899 Hague II and 1907 Hague IV, art. 2, *supra* note 54, at 211.

⁷⁷ The degree that the *si omnes* clauses were actually used by the belligerents to justify ignoring Hague Conventions during the wars remains unclear. The Post-World War II Nuremberg Tribunal dealt with the issue. None of the major war criminals cited the *si omnes* clause to justify totally ignoring the Hague Regulations. Reich Marshal Hermann Göring thought the regulations were outdated based on modern methods and means of warfare. 9 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 362-64 (1947) [hereinafter TRIALS OF THE MAJOR WAR CRIMINALS]. Reich Commissioner Arthur Seyss-Inquart also thought the Hague Conventions were obsolete. *Id.* vol. 16, 6. Field Marshal Albert Kesselring claimed to have followed the targeting rules in Hague Regulations. *Id.* at vol. 9, 175. German Field Marshal Alfred Jodl, claimed to have kept the Hague Regulations and Geneva Conventions on his desk and to have observed them and international law as far as possible. *Id.* vol. 15, 341-42 and 468. German Field Marshal Wilhelm Keitel explained that Hitler was outraged over sabotage by military commando units, which Hitler characterized as terrorism in violation of the Hague Conventions justifying countermeasures. *Id.* vol. 10, 547. Reich Minister Alfred Rosenberg testified that the Hague Conventions did not apply to the fight against the Soviet Union because of the Soviet attitude towards the conventions. *Id.* vol. 11, 574-75.

Nonetheless, Albert Speer's defense lawyer argued that Article 2 of the Hague Regulations nullified the Hague rules between Germany, a Party to the Conventions, and the Soviet Union, a non-Party. *Id.* vol. 19, 180. The Tribunal rejected the argument, explaining, "[B]y 1939 these rules laid down in the [1907 Hague C]onvention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war . . ." *Id.* vol. 22, 497. On the other hand, the United States and U.K. both signed and ratified a 1907 Hague Declaration relating to the discharge of projectiles and explosives from balloons, but subsequently ignored it because of a *si omnes* clause and because other major nations like France, Germany, Italy, Japan and Russia did not sign it. JAMES SPAIGHT, AIR POWER AND WAR RIGHTS 42 (3d ed. 1947) [hereinafter AIR POWER AND WAR RIGHTS 3D]; U.S. War Dep't, 1934 BASIC FIELD MANUAL, VOL. VII, MILITARY LAW, PART TWO: RULES OF LAND WARFARE ¶ 27. Because no nation followed the restriction, it never became customary international law.

⁷⁸ This came from the clause, usually attributed to the Russian minister to the Hague conferences, F.F. de Martens. JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 2, 350 (2012). The clause reads:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among

compromise to avoid having contentious areas of disagreement derail the overall treaty efforts.⁷⁹ Some thought the clause would encourage progressive legal developments.⁸⁰ Germany's military representative to the Hague Conventions, however, believed that international law was exclusively formed by the use of force by great military powers and rejected any notion to the contrary.⁸¹ Others have taken the preamble's language to mean that if the rules did not clearly apply to facts, then the legal obligations of the Hague Conventions were not applicable.⁸² The lack of clarity contributed to dire humanitarian consequences during the wars of the twentieth century.⁸³

civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Preamble to 1899 Hague II and 1907 Hague IV, *supra* note 54, at 209–11. The proposal for the clause actually originated from the Belgian delegation to give protections to occupied populations. Peter Holquist, *The Russian Empire as a "Civilized State": International Law as Principle and Practice in Imperial Russia, 1874–1878*, THE NATIONAL COUNCIL FOR EURASIAN AND EAST EUROPEAN RESEARCH, COUNCIL CONTRACT No. 818-06g, 10 (2004), www.ucis.pitt.edu/nceeer/2004_818-06g_Holquist.pdf. The Belgians asked Martens to introduce it to the sub-convention in order to bridge differences between parties. *Id.* at 10, n.29. Martens thought the declaration was full of “empty phrases” and saw the declaration as a means to achieve the Convention on land warfare. *Id.* (citing Martens diary, entry for 8/12 July 1899).

⁷⁹ HULL, *supra* note 49, at 74.

⁸⁰ *Id.* at 74–75.

⁸¹ *Id.* at 75–76.

⁸² Parks, *Air War and the Law of War*, *supra* note 56, at 50.

⁸³ The problems in unspecified rules for targeting within the Hague Convention were similarly found with the rules for naval blockades. The silence for the naval rules arose from the failure of states to ratify the 1909 Declaration of London, an effort to further advance the maritime law of war beyond the 1856 Paris Declaration. The Declaration of London categorized types of goods which could pass through a naval blockade and types which could be interdicted and thereby stopped from reaching a blockade country. Declaration of London, arts. 22–29, *reprinted in* SCHINDLER & TOMAN, *supra* note 53, at 1115–17. Food, clothing and certain other goods were to be classified as “conditional contraband.” *Id.*, art. 24. As such, these items were only subject to capture during a blockade when destined for the armed forces or Government of the blockaded state. *Id.*, art. 33. Germany held that the Declaration of London's rules had become binding as customary international law, while other nations, like Great Britain, commented that only portions of it were law. HULL, *supra* note 49, at 146–47. The disagreement as to the effect of non-ratified Declaration of London would create issues during the First World War when the United Kingdom placed a naval blockade on Germany to cripple the German economy. The controversial blockade resulted in between 300,000 and 424,000 civilian deaths from starvation. *Id.* at 169.

During the First World War, for example, the Hague Regulations' prohibition on attacking undefended towns and buildings seemed to be inapplicable. This was due, in part, to the language of the convention permitting targeting of war related industry and infrastructure as well as the understanding of "undefended" towns as places which would be captured without resistance.⁸⁴ This concept did not seem to apply to areas behind enemy lines, especially when the objective of air attacks was to destroy a place rather than capture it.⁸⁵ Moreover, the Hague Regulation's language no longer fit the destructive power of new weapons like airplanes and long-range artillery.⁸⁶ These weapons, although advanced in destructive power, were only capable of area attacks and were often grossly inaccurate.⁸⁷ Aerial attacks were regularly perceived to be indiscriminate by the bombed.⁸⁸

Therefore, civilian areas during the First World War were viewed as containing lawful targets under many conditions: when they contained defensive forces, housed national leadership, or featured industry supporting the war effort.⁸⁹ Officially, the U.S. definition of a defended town was one that was fortified, adjacent to a fort, occupied by military forces, or was one where military forces were passing through.⁹⁰ In

⁸⁴ Parks, *Air War and the Law of War*, *supra* note 56, at 15.

⁸⁵ Paul Williams, *Legitimate Targets in Aerial Bombardment*, 23 AM. J. OF INT'L L. 570, 573 (1929).

⁸⁶ Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 125 (Michael Howard et. al., eds., 1994).

⁸⁷ Biddle, *supra* note 56, at 145.

⁸⁸ COLEMAN PHILLIPSON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 178-80 (5th ed. 1916). Spaight noted, "[E]ach country was convinced that the bombardments carried out by the enemy airmen were indiscriminate" and "each was equally convinced that its own airmen exercised care and discrimination in its bombardments . . ." JAMES SPAIGHT, AIR POWER AND WAR RIGHTS 217 (1924).

⁸⁹ For example, London was a legitimate object of attack because it contained administrative offices concerned with the direction of the war, factories which manufactured weapons, and military personnel on leave or in training. Biddle, *supra* note 56, at 144, 255.

⁹⁰ U.S. WAR DEP'T, 1914 RULES OF LAND WARFARE ¶ 214. The United States' law-of-war training materials later pointed out that "undefended" was not synonymous with "unfortified." U.S. ARMY JUDGE ADVOCATE GENERAL SCHOOL TEXT NO. 7, LAW OF LAND WARFARE 40 (1943, reissued 1945). The materials also explained that undefended areas could be bombarded when they contained military objectives unreachable by other means or if a defender could fall back on the location. *Id.* at 41.

practice, the idea of “open towns” seemed to have little or no bearing on the actual conduct of the belligerents.

D. Legal Developments Between the World Wars

Air war doctrine, concepts, and its relation to international law matured between the World Wars. The concepts and discussions remain relevant to the strategic bombing campaigns that followed and remain relevant to modern nuclear war targeting theories.

In 1921, the veteran Italian Airman Giulio Douhet published *The Command of the Air*. Douhet prophesized that the future aim of air power would be to “inflict the most possible material and moral[e] damage on the enemy in the least possible time” by directly attacking “the defenseless population of his cities and great industrial centers.”⁹¹ Douhet’s concept was free from legal constraints, as he recommended using poison gas in these strikes to prevent fire fighters from containing fires produced by incendiaries.⁹² Douhet saw this unrestrained warfare as an eventuality—one where rules would never stop an enemy from destroying cities at home.⁹³ Despite Douhet’s influence, or perhaps because of it, legal concerns over bombing were frequently discussed during the interwar period. Yet in the years leading to the Second World War, the precise legal protections covering civilian populations remained undetermined.⁹⁴

American air war doctrine was influenced by Douhet. Brigadier General William “Billy” Mitchell publically advocated for bombing “centers of production of all kinds, means of transportation, agricultural areas, ports and shipping” to make warfare shorter and more humane through quick and lasting results.⁹⁵ The Air Corps Tactical School (ACTS) further developed concepts for effective use of air power. The 1926 text for a “Bombardment” course pointed out that attacks on an enemy’s political centers may be prohibited by the law of war generally,

⁹¹ GIULIO DOUHET, *THE COMMAND OF THE AIR* 282 (Dino Ferrari, trans., 1998).

⁹² *Id.* at 20.

⁹³ *Id.* at 283.

⁹⁴ Parks, *Air War and the Law of War*, *supra* note 56, at 38, 41.

⁹⁵ William Mitchell, *Winged Defense: The Development and Possibilities of Modern Air Power—Economic and Military* (1925), *as reprinted in* *THE ART OF WAR IN WORLD HISTORY* 903 (Gérard Chaliand, ed., 1994).

but would be “important targets for bombardment in reprisal for attaches made by the enemy on such centers in our own country.”⁹⁶

Major William Sherman wrote a detailed book which may generally be reflective of U.S. air war concepts, since he based the book on his notes as an instructor at Air Service Field Officer’s School (which was later renamed ACTS) and Army Command and General Staff School.⁹⁷ Sherman advocated the use of strategic bombardment to cripple an enemy’s military supply system through systematic attacks on key industrial plants, transportation hubs, bridges or tunnels, rather than through inefficient attacks on the entire industry of the state.⁹⁸ Moreover, Sherman wrote that “the status of air bombardment in international law is a matter of profound concern[.]”⁹⁹ After discussing Allied and German practices in the Great War, he concluded that the “present trend of international law . . . definitely forbids the bombardment of civilians for the purpose of intimidation, and restricts legitimate attacks solely to military objectives.”¹⁰⁰ Sherman specifically resisted the idea of attacks on civilians under the logic of a “war worker” theory based more on an appeal to humanitarian principles rather than legal ones, since he viewed international law as a political matter.¹⁰¹ Even without binding law, Sherman viewed the fear of reprisals as providing restraints against population attacks.¹⁰²

J. M. Spaight, an employee in the British Air Ministry trained in law, was a prolific and influential writer on legal aspects of air warfare.¹⁰³ Spaight presented several theories of airpower. British Air Ministers predicted that air power would be used to attack civilian governmental,

⁹⁶ TAMI DAVIS BIDDLE, RHETORIC AND REALITY IN AIR WARFARE 139 (2002) (quoting AIR CORPS TACTICAL SCHOOL (ACTS), BOMBARDMENT (1926), 63-64).

⁹⁷ Wray Johnson, *Introduction to WILLIAM SHERMAN*, AIR WARFARE xvi (Air University Press 2002) (1926).

⁹⁸ SHERMAN, *supra* note 97, at 197-99.

⁹⁹ *Id.* at 190. Sherman served as a military advisor on aviation to the Rules of War Commission of Jurists at The Hague from November 1922 to February 1923. Johnson, *supra* note 97, at xiii.

¹⁰⁰ SHERMAN, *supra* note 97, at 193.

¹⁰¹ *Id.* at 190-93.

¹⁰² *Id.* at 194.

¹⁰³ Spaight’s work was regularly cited in U.S. Army Judge Advocate General supplement to the law of land warfare, JUDGE ADVOCATE GENERAL’S SCHOOL, *J.A.G.S. Text No. 7, The Law of Land Warfare*, (Sept. 1, 1943, reissued July 1, 1945), http://www.loc.gov/rr/frd/Military_Law/pdf/law-of-land-warfare_7.pdf.

industrial, and population centers.¹⁰⁴ One characterized modern war as being directed against the economic life of the adversary. Spaight also quoted the French expert, Commandant Marcel Jauneaud, who believed that air campaigns would be waged against “the large cities and industrial centres of the enemy as well as his aerodromes and lines of communication.”¹⁰⁵ Spaight concluded, “There is ample evidence that purely military objectives are by no means solely contemplated as the legitimate targets of air attack.”¹⁰⁶ Modern war, unless regulated, would represent a return to barbarism.

Spaight recognized what would later become the principle of distinction: “The distinction between the combatant and the non-combatant elements of a community is the essential condition precedent of the humanizing of warfare.”¹⁰⁷ Yet Spaight was realistic enough to foresee that belligerents would attack each other’s cities in future wars to break the will of the opponent.¹⁰⁸ Spaight, recognizing that purely military objectives would no longer be the sole objects of attack, advocated for regulation to prevent unmitigated destruction of civilizations.¹⁰⁹ He opposed direct attacks on civilians to reduce their morale.¹¹⁰

He also emphasized an early version of the principle of proportionality, explaining that lawful military objects in urban areas could not be bombed if the result would be “widespread and wholly disproportionate loss of life throughout the district.”¹¹¹ Importantly, Spaight classified people as quasi-combatants when they worked in war supporting industries like armament factories, mobilization stores, depots,

¹⁰⁴ SPAIGHT, AIR POWER AND WAR RIGHTS 3D, *supra* note 77, at 14-16.

¹⁰⁵ *Id.* at 17.

¹⁰⁶ *Id.* at 16.

¹⁰⁷ JAMES SPAIGHT, AIR POWER AND WAR RIGHTS 59 (2d ed. 1933) [hereinafter AIR POWER AND WAR RIGHTS 2D]. To Spaight, military objectives included supply sources of armies and navies. *Id.* at 5.

¹⁰⁸ JAMES SPAIGHT, AIR POWER AND THE CITIES 6-7 (1930).

¹⁰⁹ SPAIGHT, AIR POWER AND WAR RIGHTS 2D, *supra* note 107, at 16-18.

¹¹⁰ *Id.* at 17, 30. In 1928, Spaight articulated an expanded vision of lawful objects of attack. He considered military objectives to be barracks, military storehouses and depots, and munitions factories. *Id.* at 244. He considered attacks on private dwellings and food crops to be “repugnant to humanitarian sentiment” and a waste of resources. *Id.* at 245. Finally, Spaight acknowledged that reprisals were lawful, but wrote that they should either be prohibited or limited. *Id.* at 40-46.

¹¹¹ SPAIGHT, AIR POWER AND THE CITIES *supra* note 108, at 201.

metal works, aircraft and engine factories, and petrol refineries.¹¹² These quasi-combatants, according to Spaight, would not enjoy immunity from attack when at work.¹¹³ Spaight did not believe that all citizens of an enemy state should be classified as war-workers. He rejected the legality of attacking civilians on the fringes of the war effort like clothing makers.¹¹⁴ He similarly rejected the legality of attacking civilians providing material support for a war effort if the nature of their work was not warlike. The quasi-combatants would be limited to “armourors” during periods of work in specific war supporting industries. “What justifies the deliberate attack on the people concerned is that they are engaged on work which is akin to that done by the uniformed men in the field. They are helping to pass the ammunition.”¹¹⁵ Spaight, however, went further and asserted that uninhabited, non-military industry and commercial buildings would also be eligible for bombardment, but not if the attack was also likely to result in civilian casualties.¹¹⁶ Thus Spaight found a legal difference between killing civilians and destroying civilian property.

Efforts to establish legal parameters for air war extended beyond individual authors. Nations unsuccessfully tried to form international law for aerial bombardment.¹¹⁷ Rules drafted in 1923 by delegates from several nations were never adopted because of the limited definition of valid military objectives and protection to be afforded civilians living near them.¹¹⁸

Despite the lack of consensus, concerns over civilian casualties became paramount in the late 1930s when U.S. officials condemned Japanese aerial bombardment of Chinese cities and similar bombing practices during the Spanish Civil War. The U.S. State Department took

¹¹² *Id.* at 150.

¹¹³ *Id.* at 151. Spaight thought that the homes of these workers should not be regarded as a legitimate objective for attack so as to encourage absenteeism. *Id.* at 152-53.

¹¹⁴ SPAIGHT, AIR POWER AND WAR RIGHTS 3D, *supra* note 77, at 46.

¹¹⁵ *Id.* at 47.

¹¹⁶ SPAIGHT, AIR POWER AND WAR RIGHTS 2D *supra* note 107, at 246. Examples included factories (regardless of goods produced), large financial and commercial corporations, waterworks, electric generating stations, and “possibly” empty recreation facilities like theaters, sports stadiums, and casinos. *Id.* at 246-47.

¹¹⁷ Commission of Jurists at The Hague, *Hague Rules of Air Warfare* art. 24(1) (Dec. 1922-Feb. 1923) reprinted in SCHINDLER & TOMAN, *supra* note 53, at 315 [hereinafter *Draft 1923 Hague Air Rules*].

¹¹⁸ Williams, *supra* note 85, at 577.

the position that “any general bombing of an extensive area wherein there resides a large population engaged in peaceful pursuits is unwarranted and contrary to the principles of law and of humanity.”¹¹⁹ President Franklin D. Roosevelt decried the “reign of terror and international lawlessness” where “[w]ithout a declaration of war and without warning or justification of any kind, civilians, including vast numbers of women and children, are being ruthlessly murdered with bombs from the air.”¹²⁰ The U.S. Senate likewise passed a resolution condemning the “inhuman bombing of civilian populations.”¹²¹

E. World War II Conventional Strategic Bombing

Over the course of the Second World War hundreds of European cities, towns and villages were bombed from the air, directly resulting in estimated 600,000 civilians killed.¹²² At the outset of the war, leaders of the warring nations hoped to avoid these results. In 1939, Germany, England and France agreed to limit targets to military objectives, but this proved short-lived as inaccurate strikes created perceptions, real or imagined, of indiscriminate attacks.¹²³ When Germany bombed Warsaw in 1939 and Rotterdam in 1940, it received harsh criticism for its lack of discrimination.¹²⁴

¹¹⁹ The American Ambassador in Japan (Grew) to the Japanese Minister for Foreign Affairs (Hirota), Tokyo, September 22, 1937 *reprinted in* U.S. Dep’t of State, I PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES JAPAN: 1931-1941, 504 (1943) [hereinafter JAPAN PAPERS] *See also* Press Release by the Department of State on September 28, 1937, *reprinted in* JAPAN PAPERS, at 506; Statement by the Secretary of State, “Revolution in Spain; Bombing of Civilian Populations,” March 21, 1938 *reprinted in* Department of State, XVIII:443 PRESS RELEASES 396 (March 26, 1938); Statement by the Acting Secretary of State, June 3, 1938 *reprinted in* JAPAN PAPERS, at 595.

¹²⁰ President Franklin D. Roosevelt, Address at Chicago, October 5, 1937, *reprinted in* PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT, <http://www.presidency.ucsb.edu/ws/index.php?pid=15476&st=&st1=>.

¹²¹ S. Res. 298, 75th Cong. (1938) (enacted).

¹²² RICHARD OVERY, THE BOMBING WAR xxiii (2013).

¹²³ Biddle, *supra* note 56, at 151.

¹²⁴ *Id.*; James Spaight, *The War in the Air*, 18 FOREIGN AFFAIRS 359–36 (Jan. 1, 1940). After the war, Kesselring explained, “In the German view, Warsaw was a fortress, and, moreover, it had strong air defenses. Thus the stipulations of the Hague Convention for land warfare, which can analogously be applied to air warfare, were fulfilled.” TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 77, vol. 9, 175. Kesselring also insisted that only military objectives were targeted. *Id.* Historian Richard Overy analyzed the aerial bombardments of Warsaw and Rotterdam and found that they were, in fact, directed at

Winston Churchill was not troubled by the developments in aerial warfare. As Minister of Munitions in the First World War, he advocated long range bombing of German industrial targets.¹²⁵ In May 1940, Churchill's new War Cabinet agreed that bombing Germany should not be bound by moral or legal concerns because Germany had already provided the Allies with ample justification for reprisals.¹²⁶ On May 15, the Cabinet gave formal approval to bomb German industrial targets which could result in civilian casualties, as long as they were "suitable military objectives."¹²⁷ The first major bombing raid on German industrial targets was launched that night.¹²⁸ By June 1940, the Cabinet rescinded Chamberlain-era rules which made it illegal to negligently kill civilians.¹²⁹ Intentionally killing civilians remained illegal and causing undue loss of life was to be avoided.¹³⁰ By July, British pilots were given discretion to choose targets if they could not strike their primary objective.¹³¹ In August 1940, the day after German bombs fell in central London, Churchill raised the stakes and ordered bombers to attack Berlin in retaliation.¹³² Starting in September, the Luftwaffe responded with the devastating Blitz on London and other British cities.¹³³ Hitler was so incensed at British air raids, he promised to drop one million kilograms of explosives on them in one night, declaring, "[If] they will greatly increase their attacks on our cities, then we will erase their cities!"¹³⁴

military objectives. OVERY, *supra* note 122, at 62–65. Perceptions of indiscriminate attacks probably arose due to the inaccuracy of the bombardment and proximity of military objects to civilian ones. *Id.* at 63.

¹²⁵ OVERY, *supra* note 122, at 243.

¹²⁶ *Id.* at 244.

¹²⁷ *Id.* (quoting War Cabinet minutes: Confidential Annex, May 15, 1940).

¹²⁸ OVERY, *supra* note 122, at 244.

¹²⁹ *Id.* at 245.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*; WINSTON CHURCHILL, *THEIR FINEST HOUR* 342 (1949); MAX HASTINGS, *BOMBER COMMAND* 108 (2010). The Commander-in-chief of RAF Bomber Command sought to drop bombs in the "middle of Berlin" while aiming at the German War Office and Air Ministry, but the Chief of Air Staff substituted "Railway Communications" as the target. Peter Gray, *The Gloves Will Have to Come Off: A Reappraisal of the Legitimacy of the RAF Bomber Offensive Against Germany*, 13 *ROYAL AIR FORCE AIR POWER REV.* 3, 9, 25 (2010).

¹³³ OVERY, *supra* note 122, at 83. The German attacks were planned well in advance, but the British raids allowed Hitler to characterize the German offensive as a reprisal; the plan for the first raid was titled "revenge attack." *Id.*

¹³⁴ Adolf Hitler, Speech at the Berlin Sportpalast, Sept. 4, 1940 translated transcript located at <http://der-fuehrer.org/reden/english/40-09-04.htm> quoted in Peter Lee, *Return from the Wilderness: An Assessment of Arthur Harris' Moral Responsibility for the German City*

The British Air Ministry never seemed to believe that their forces were indiscriminately attacking civilian populations *per se*, but the Air Ministry did not restrain Bomber Command from attacking urban objectives. In October 1940, Bomber Command was directed to focus on causing heavy material destruction in large towns and thereby degrade enemy morale.¹³⁵ Official British policy still prohibited direct attacks on civilians and required attacks to be directed against military objectives using reasonable care to “avoid undue loss of civil life in the vicinity of the target.”¹³⁶ This policy, however, seemed contrary to the strategy and tactics that employed the limited technology available. It also evolved into wide-spread and devastating city bombing by the end of the war.¹³⁷

Once the United States joined the war, American leadership agreed with British counterparts on the ultimate goal of the bombing campaign against Germany: “the progressive destruction and dislocation of the German military, industrial and economic system, and the undermining of the morale of the German people to a point where their capacity for armed

Bombings, 16 THE ROYAL AIR FORCE AIR POWER REVIEW 70, 76 (2013). Despite the rhetoric, Hitler disapproved requests to deliberately bomb residential areas in September 1940. OVERY, *supra* note 122, at 86. Germany targeted Britain’s military, industry (iron ore fields, steel works, aluminum plants and armaments industry, with a special emphasis on aircraft engine plants) and economic facilities (such as ports, docks, warehouses, silos, oil storage, and shipping). *Id.* at 70, 90–93. Morale was an indirect target in 1940–41. *Id.* at 85. Hitler expressly authorized terror attacks on British residential areas after destruction of historical German ports in March 1942, but Göring failed to see a benefit in doing so and ordered air crews to attack useful military or economic objectives instead. *Id.* at 118. Later in the war Germany resorted to *Vergeltungswaffe* (the revenge weapon), the V-1 flying bomb and subsequent V-2 rockets to retaliate against Britain and break the morale of its people. LAWRENCE FREEDMAN, THE EVOLUTION OF NUCLEAR STRATEGY 13 (3d ed., 2003). These weapons were only capable of being aimed at general areas, like cities. Roberts, *supra* note 86, at 131. Hitler also tried to starve Britain through a combined air and naval blockade, which included aerial attacks on food storage and transport systems. OVERY, *supra* note 122, at 161.

¹³⁵ OVERY, *supra* note 122, at 245.

¹³⁶ Parks, *Air War and the Law of War*, *supra* note 56, at 46; Richard Davis, *American Bombardment Policy Against Germany: 1942-1945*, 6 ROYAL AIR FORCE AIR POWER REV. 3, 49, 50 (2003). Historian Richard Overy observed, “When attacks against ‘industrial populations’ was included in a draft directive in August 1942, the Air Ministry insisted that the term be altered to ‘industrial centres’ to avoid the impression that civilians were deliberate targets, ‘which is contrary to the principles of international law—such as they are.’” OVERY, *supra*, at 122 (quoting The National Archives, Kew, London, AIR 9/424, Slessor (Deputy Chief of the Air Staff) to Director of Plans, Aug. 17 and 24, 1942). Overy ultimately rejected the British claim that civilians were not deliberately targeted and characterized such claims as subterfuge. OVERY, *supra* note 123, at 629.

¹³⁷ OVERY, *supra* note 122, at 245.

resistance is fatally weakened.”¹³⁸ The attack priorities were to destroy invasion barges, aircraft industry, submarine works, as well as communications and oil resources.¹³⁹ The British and Americans, however, pursued these goals with different tactics.

Early in the war, experience taught the British that enemy fighters were relatively absent at night and anti-aircraft fire was less effective.¹⁴⁰ They also believed night attacks would have the advantage of keeping enemy citizens awake due to air raid warnings, thereby affecting their morale and productivity.¹⁴¹ As night raids started, the British realized that bombers were not accurately striking industrial targets due to difficulties in target identification. RAF Bomber Command therefore adopted an area-bombing tactic, also known as mass night bombing:

[A] district would be chosen for bombardment in which was concentrated the highest possible proportion of vital industrial installations. Every hit would be of value, to be sure, but the attack could be launched with the prospect that many bombs which missed industrial targets—the overwhelming majority of those dropped—would hit the homes and shops and cinemas and cafés of the industrial workers and their families upon whom the German war effort must depend.¹⁴²

Urban area bombing, with its anticipated collateral damage, could not have accounted for law-of-war concepts of proportionality or distinction which so concerned Spaight in the inter-war years.¹⁴³ Indeed, historian Richard Overy characterized the British approach as inverting the view of

¹³⁸ MAURICE MATLOFF, STRATEGIC PLANNING FOR COALITION WARFARE: 1943–1944 28 (1959) (quoting *The Bomber Offensive from the United Kingdom*, Combined Chiefs of Staff (CCS) 166/1/D, January 21, 1943).

¹³⁹ MATLOFF, *supra* note 138, at 28.

¹⁴⁰ BIDDLE, *supra* note 96, 184–85.

¹⁴¹ *Id.* at 185.

¹⁴² HASTINGS, *supra* note 132, at 110.

¹⁴³ Spaight later defended the practice of area bombing as necessary for the “effective destruction of the enemy’s sources of munitionment”; civilian casualties were caused by the proximity of workers to the targets and German defenses. SPAIGHT, AIR POWER AND WAR RIGHTS 3D, *supra* note 77, at 271–73. Spaight also explained the area to be bombed must be proportional to that which the actual objectives occupy. *Id.* at 274. To Spaight, this was one factor distinguishing area bombing from the use of atomic bombs. *Id.*

collateral damage by focusing on killing and displacing the German industrial workforce to achieve a collateral effect of the factory damage.¹⁴⁴

British bombing departed further from concepts of proportionality or distinction once Sir Arthur Harris became the chief of Bomber Command in February 1942. He said that bombers would aim for the center of cities because of the direct correlation between concentrated urban devastation and lost industrial man-hours.¹⁴⁵ To Harris, city attacks were the most efficient use of bombers against an industrialized enemy.¹⁴⁶ The Americans appear to have developed a similar view, characterizing valid targets as “industrial” cities using criteria fitting virtually every city with over 50,000 people.¹⁴⁷

The logical flaw in this approach was that population centers were not necessarily industrial centers. Moreover, not all industrial centers were in direct support of the German war machine. According to historian Max Hastings, “The Allies’ major misunderstanding from start to finish was that they saw Hitler’s Germany as an armed camp, solely dedicated since at least 1939 to the business of making war. They thus assumed that any damage done by bombing represented a net loss to the German war effort.”¹⁴⁸ This is not to say that strategic bombing was a wasted effort. Germany was also forced to allocate massive amounts of manpower and resources away from its front lines to defend against Allied air attacks.¹⁴⁹ Furthermore, economist Adam Tooze demonstrated that starting in 1943, sustained bomber attacks on German war industry, notably the steel, coal

¹⁴⁴ OVERY, *supra* note 122, at 259.

¹⁴⁵ HASTINGS, *supra* note 132, at 160. Targeting industry in Germany was problematic for many reasons. One was due to the strategy of aiming at city centers when the industrial areas of the cities were in the suburbs. *Id.* at 421. An attack on the city of Darmstadt destroyed 49% of the city’s civilian housing, but caused relatively small losses in industrial production. *Id.*

¹⁴⁶ BIDDLE, *supra* note 96, at 199.

¹⁴⁷ *Id.* at 55. The American and British militaries tried to develop criteria for an open city to be spared from bombing when deliberating the aerial bombardment of Rome. OVERY, *supra* note 123, at 528. The American criteria was the removal of all enemy forces, evacuation of all government agencies, cessation of all war production, and cessation of using roads and rails for military purposes. *Id.* The British rejected the American proposal. *Id.* According to Overy, “Churchill worried that if Rome were made an open city, it would hamper Allied military efforts to pursue Germans up the west side of the peninsula.” *Id.* at 533.

¹⁴⁸ HASTINGS, *supra* note 132, at 283-84.

¹⁴⁹ OVERY, *supra* note 122, at 627.

and component manufacturing plants in the Ruhr, and caused critical problems in the Nazi armament program.¹⁵⁰

Area bombing was a ruthlessly effective way to destroy industrial facilities and their workforce. The devastation of area bombing is perhaps best illustrated by the 1943 aerial attack on Hamburg, a bustling port city.¹⁵¹ The Hamburg assault, which saw the first use of incendiaries, also illustrates the lack of distinction between military and civilian entities:

42,000 Germans were estimated to have died. A million refugees fled the city. In one week, Bomber Command had killed more people than the Luftwaffe had achieved in the eight months of the blitz in England in 1940-41. In Hamburg, 40,385 houses, 275,000 flats, 580 factories, 2,632 shops, 277 schools, 24 hospitals, 58 churches, 83 banks, 12 bridges, 76 public buildings and a zoo had been obliterated.¹⁵²

Rather than viewing area bombing as a means to destroy specific industries, Sir Arthur Harris saw it as the mechanism to wipe out the German economic system by destroying homes, public utilities, transportation systems and people, as well as creating massive refugee problems and attacking enemy morale.¹⁵³ The British Air Ministry refused to concur, explaining “that the widespread devastation is not an end in itself but the inevitable accompaniment of an all-out attack on the enemy’s means and capacity to wage war.”¹⁵⁴

¹⁵⁰ ADAM TOOZE, *THE WAGES OF DESTRUCTION* 597–98 (2006). The Allied bombing campaign against Germany ultimately contributed to Germany’s defeat, but could have been more effective with better target selection and more systematic attacks on key war supporting industries. See, e.g., Robert Ehlers, *Bombers, ‘Butchers’, and Britain’s Bête Noire: Reappraising RAF Bomber Command’s Role in World War II*, 14 *THE ROYAL AIR FORCE AIR POWER REVIEW* 5 (2011); Richard J. Overy, *The Bombing of Germany*, in *THE WAR IN THE AIR: 1914–1994*, 107, 111 (Alan Stephens, ed., 2001).

¹⁵¹ HASTINGS, *supra* note 132, at 259.

¹⁵² *Id.* at 261. Historian Richard Overy reports the same number of homes and apartments destroyed, but says German casualties were between 34,000 and 40,000. OVERY, *supra* note 122, at 436.

¹⁵³ BIDDLE, *supra* note 96, at 220.

¹⁵⁴ *Id.* (quoting correspondence from Sir Arthur Street, Under Secretary of State, Air Ministry, to Sir Arthur Harris, December 15, 1943).

Destroying the morale of the German people was a subordinate objective of the British bombing campaign.¹⁵⁵ This was considered lawful, but not through direct attacks on civilians; it was only to be obtained as a secondary effect of an attack directed at an otherwise legitimate military objective.¹⁵⁶ In February 1942, Bomber Command's strategic priority was to focus on "the morale of the enemy civilian population and in particular, of the industrial workers."¹⁵⁷ Reprisal doctrine occasionally authorized direct attacks on the enemy's population. After a German attack on Coventry in 1940, the U.K. authorized an indiscriminate bombing raid on Mannheim.¹⁵⁸ In October 1942, the Air Staff circulated another memorandum invoking reprisal: "Consequent upon the enemy's adoption of a campaign of unrestricted air warfare, the Cabinet have authorized a bombing policy which includes attack on enemy morale."¹⁵⁹ The British military historian and retired Air Commodore, Dr. Peter Gray, points out that morale bombing echoed "the place of retaliatory action in the culture of the times . . ."¹⁶⁰ While morale was a subordinate objective, it was not frequently emphasized by the military. Furthermore, British civilian political leadership was often deceitful about whether attacks on morale were even occurring.¹⁶¹ Politicians may have been concerned with how they might justify attacks on civilian morale without admitting to

¹⁵⁵ HASTINGS, *supra* note 132, at 160.

¹⁵⁶ J.M. Spaight, *Morale as Objective*, 3 THE ROYAL AIR FORCE QUARTERLY, 287, 290 (1951). Max Hastings implies that the Air Staff authorized terror bombing on Berlin by authorizing occasional attacks while admitting "there are no objectives in the Berlin area of importance to our major plans . . ." HASTINGS, *supra* note 132, at 111. The Air Staff quote was taken from a 1940 directive outlining major plans for strikes on German U-boat facilities and oil industry. Ken Delve, BOMBER COMMAND: 1936-1968: AN OPERATIONAL & HISTORICAL RECORD 11-12 (2005). Not only was Berlin the administrative center of Germany, it was a major arsenal, a major communications and transportation hub, and contained several major war-related industries. MARTIN MIDDLEBROOK, THE BERLIN RAIDS: RAF BOMBER COMMAND WINTER 1943-44, 21-22 (1988). A RAF pilot from one of the 1940 air raids on Berlin confirmed that aircrews had clear instructions "to bomb the target and the target only." SPAIGHT, AIR POWER AND WAR RIGHTS 3D, *supra* note 77, at 268 (quoting G. GIBSON, ENEMY COAST AHEAD 75 (1946)). Confusion over the policy remains, however, because bombs regularly fell far from the target areas due to weather, technology and navigation problems. MIDDLEBROOK, at 22-23.

¹⁵⁷ Lee, *supra* note 134, at 75.

¹⁵⁸ OVERY, *supra* note 122, at 262.

¹⁵⁹ HASTINGS, *supra* note 132, at 211.

¹⁶⁰ Gray, *supra* note 132, at 26.

¹⁶¹ HASTINGS, *supra* note 132, at 44-46, 212-13.

potentially inflammatory direct attacks on enemy civilians. They simply wanted to avoid provoking public controversy.¹⁶²

United States military leaders elected not to copy the British.¹⁶³ The enemy's morale was not a targeting priority, but its war industry was.¹⁶⁴ The American approach embraced daylight precision bombing, relying on the Norden bomb-sight.¹⁶⁵ Of course, the "precision" of bombing in the 1940s was imprecise by modern standards, especially when factoring crew training, enemy defenses, nature of the targets, smoke and dust from earlier bombing, and weather effects.¹⁶⁶ In 1943, the U.S. Army Air Forces (AAF) also made use of a type of area bombing—that of radar guided area raids—when weather prevented precision attacks.¹⁶⁷ Furthermore, AAF still bombed the same sets of target categories as British allies. Ultimately, the British and the Americans agreed to disagree about tactics while publically emphasizing their combined "round the clock" bomber offensive.¹⁶⁸

Perhaps the most controversial allied bombing in the European theater was directed against the German city of Dresden in February, 1945. The destruction of Dresden, a cultural center, caused 25,000 to 135,000 deaths and resulted in widespread condemnation that continues to this day.¹⁶⁹ Churchill was briefed that the city, among others, would be targeted to impair German communications and troop movements supporting the

¹⁶² Gray, *supra* note 132, at 28.

¹⁶³ MATLOFF, *supra* note 138, at 29.

¹⁶⁴ The American air war plan was developed by the Air War Plans Division (AWPD). The plan, AWPD-1, was updated to AWPD-42 in September 1942. "According to AWPD-I, the priority assigned targets in Europe was the [German Air Force], the electric power system, transportation systems (rail, road, water), refineries and synthetic oil plants, and, more generally, the morale of the German people." As the RAF concentrated on German morale, "that target priority disappeared from AWPD-42." *PIERCING THE FOG: INTELLIGENCE AND ARMY AIR FORCES OPERATIONS IN WORLD WAR II*, 151–52 (John F. Kreis, ed., 1996).

¹⁶⁵ HASTINGS, *supra* note 132, at 226.

¹⁶⁶ Davis, *supra* note 136, at 52.

¹⁶⁷ HASTINGS, *supra* note 132, at 346; Davis, *supra* note 136, at 54.

¹⁶⁸ BIDDLE, *supra* note 96, at 215.

¹⁶⁹ HASTINGS, *supra* note 132, at 443–48; OVERY, *supra* note 122, at 395. The estimate of 25,000 deaths—confirmed by a Dresden historical commission—is probably the most accurate. OVERY, *supra*, at 395; BIDDLE, *supra* note 96, at 255–56. Shortly after the attack, Nazi propaganda minister Goebbels told the media that ten times that number were killed. OVERY, *supra*, at 395.

Eastern front.¹⁷⁰ Aircrews were told Dresden had “developed into an industrial city of first-class importance, and like any other large city with its multiplicity of telephone and rail facilities, is of major value for controlling the defense of that part of the front now threatened”¹⁷¹ While Dresden was an important rail hub, it was not a major industrial center; the educated British public was also familiar with the city for its culture and architecture.¹⁷² Public outrage was fueled by a press report of an interview given by Air Commodore C. M. Grierson. Even though Grierson denied the attack was terror bombing, his indication that refugees and relief efforts would block movement of military supplies implied reduction of enemy morale by increasing suffering.¹⁷³ The Associated Press correspondent reported the Allies had made the “long awaited decision to adopt deliberate terror bombing of German population centres as a ruthless expedient to hastening Hitler’s doom.”¹⁷⁴ Churchill responded by writing to Air Chief Marshall Charles Portal, chief of the air staff, explaining that bombing “for the sake of increasing the terror, though under other pretexts, should be reviewed.”¹⁷⁵ After objections from Portal and Harris, Churchill moderated his position.¹⁷⁶ Harris definitively rejected the terror characterization and defended the attack: “Dresden was a mass of munition works, an intact government centre and a key transportation point to the East. It is now none of those things.”¹⁷⁷

While American military leaders always insisted their bombing policies of attacking industrial targets with precision bombing remained in effect, Harris struck a far more callous and politically insensitive tone. In 1943, he wrote “The German economic system, which I am instructed by my directive to destroy, includes workers, houses, and public utilities, and it is therefore meaningless to claim that the wiping out of German cities is ‘not an end in itself’”¹⁷⁸ He added that the devastation cause by night bombing was deliberate, not incidental.¹⁷⁹ While the United States never endorsed Harris’ characterization of strategic bombing in Europe,

¹⁷⁰ Gray, *supra* note 132, at 30.

¹⁷¹ HASTINGS, *supra* note 132, at 446.

¹⁷² BIDDLE, *supra* note 96, at 256.

¹⁷³ RICHARD DAVIS, CARL A. SPAATZ AND THE AIR WAR IN EUROPE 558–59 (1993)

¹⁷⁴ *Id.* at 559.

¹⁷⁵ OVERY, *supra* note 122, at 396.

¹⁷⁶ *Id.*

¹⁷⁷ Gray, *supra* note 132, at 30.

¹⁷⁸ *Id.* at 28.

¹⁷⁹ *Id.* at 28–29.

American leaders certainly learned to embrace similar techniques in the campaign against Japan.

The U.S. Pacific air campaign developed differently than the allied efforts in Europe. The air campaign supplemented an unrestricted submarine warfare campaign against Japanese shipping ordered within hours of the attack on Pearl Harbor.¹⁸⁰ Another difference from the European bombing campaign was the distance between the Japanese mainland and allied airfields. Japanese mainland targets, including its industry, could not be effectively struck until June 1944.¹⁸¹ The regular strategic bombing of Japan did not get underway until the arrival of the long-range B-29 in August 1944. By then, the submarine blockade against Japan was slowly choking industry and starving the population.¹⁸² Strategic bombing was to transform this slow strangulation to a relatively quick death.¹⁸³

The objective of the AAF bombing plan against Japan was to reduce the Japanese war effort to impotency, neutralize its air force, and reduce its navy and merchant shipping to a level allowing occupation of Japan.¹⁸⁴ The AAF systematically selected Japanese industrial targets.¹⁸⁵ As in Germany, the objectives were not limited to destroying war-supporting infrastructure, but also included the destruction of the economic

¹⁸⁰ JOEL HOLWITT, EXECUTE AGAINST JAPAN 141 (2009). The U.S. submarine strategy was to cut off military supplies from Japanese occupied islands, to deprive the mainland of food and other raw materials, and to sever transportation lines necessary for Japanese foreign commerce. THEODORE ROSCOE, UNITED STATES SUBMARINE OPERATIONS IN WORLD WAR II 304 (1949).

¹⁸¹ U.S. STRATEGIC BOMBING SURV., OVER-ALL ECONOMIC EFFECTS DIV., THE EFFECTS OF STRATEGIC BOMBING ON JAPAN'S WAR ECONOMY (Dec. 1946) at 36, <http://babel.hathitrust.org/cgi/pt?id=mdp.39015019347510;view=1up;seq=1..>

¹⁸² HOLWITT, *supra* note 180, at 166–68. Historian and U.S. Navy Submarine officer Joel Holwitt explained, “The exact toll on the Japanese military population due to starvation and privation during and immediately after the war may never be known, but the number is probably staggering.” *Id.* at 167. Following the surrender, the Japanese finance minister told U.S. authorities that 10 million people would starve without immediate food assistance. *Id.* While this estimate may be exaggerated, it gives a rough idea of the magnitude of the starvation problem facing Japan.

¹⁸³ U.S. STRATEGIC BOMBING SURV., URBAN AREAS DIV., THE EFFECTS OF AIR ATTACK ON JAPANESE URBAN ECONOMY 45 (Mar. 1947), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015022928447;view=1up;seq=3> [hereinafter U.S. STRATEGIC BOMBING SURV. (URBAN)].

¹⁸⁴ MATLOFF, *supra* note 139, at 329.

¹⁸⁵ PIERCING THE FOG, *supra* note 164, at 330–31.

framework on which the enemy state depended.¹⁸⁶ The overall objective was to bring about surrender by forcing the adversary to realize that it “could no longer supply the basic needs upon which the population relied for its life and social survival.”¹⁸⁷

In January, 1945, General Arnold was frustrated by the limited results from the strategic bombing campaign and placed Major General Curtis LeMay in command. LeMay shifted tactics away from high-altitude precision bombing to massive, night low-level attacks using incendiaries, in keeping with intelligence recommendations endorsing Japanese urban-area fire bombing.¹⁸⁸

The first major fire-bombing attack on Tokyo occurred on the night of March 9, 1945, killing 90,000 to 100,000 people and leaving one million homeless while destroying one-quarter of the city’s buildings, 63% of its commercial district, as well as 18% of its industrial capacity.¹⁸⁹ After the attack, the spokesperson for the AAF emphasized the industrial nature of the targets and that industrial workers had been rendered homeless.¹⁹⁰

In Japan, the results of the strategic air campaign were catastrophic. Bombs directly caused damage, but also had the indirect effect of dispersing industry. Raw materials were cut off due, in part, to air-dropped mines in harbors. Workers were left homeless and needed to forage for food and essentials for themselves and their families.¹⁹¹ LeMay later explained his perspective in terms of retaliation:

I was not happy, but neither was I particularly concerned, about civilian casualties on incendiary raids. I didn’t let it influence any of my decisions because we knew how the Japanese had treated the Americans—both civilian

¹⁸⁶ HAYWOOD HANSELL, JR., *THE STRATEGIC AIR WAR AGAINST GERMANY AND JAPAN: A MEMOIR* 248 (1986).

¹⁸⁷ *Id.* at 248.

¹⁸⁸ *PIERCING THE FOG*, *supra* note 164, at 340; 388–39. LeMay did not completely abandon selective targeting of specific industries, and hit those targets when weather permitted. HANSELL, *supra* note 186, at 232 and 238. U.S. STRATEGIC BOMBING SURV. (URBAN), *supra* note 182, at 45.

¹⁸⁹ JAMES BRADLEY, *FLYBOYS* 276–77 (2003).

¹⁹⁰ *Id.* at 279.

¹⁹¹ HANSELL, *supra* note 186, at 246.

and military—that they'd captured in places like the Philippines.

We had dropped some warning leaflets over Japan, which essentially told the civilian population that we weren't trying to kill them, but rather that we were trying to destroy their capability to make war.¹⁹²

By July 1945, Japan's economic system was shattered.¹⁹³ By the end of the war, attacks on industrial areas resulted in more than sixty-five cities being completely burnt down.¹⁹⁴

The law of war applicable to targeting, notably the concepts of distinction and proportionality, appeared to be marginalized by practice towards the end of the Second World War. Rhetorical justification for strategic bombing (as well as unrestricted submarine warfare) may have used terms such as reprisal and retaliation during the war, but it was less the traditional doctrine of belligerent reprisal than the escalation of warfare by all parties.¹⁹⁵ Not only did belligerents invoke retaliation to justify attacks on otherwise questionable targets, the British and Americans leveraged the law of war to stress that their attacks were justified as strikes on military objectives. Thus, attacks on civilian morale usually required

¹⁹² CURTIS LEMAY & BILL YENNE, *SUPERFORTRESS: THE B-29 AND AMERICAN AIRPOWER* 125 (1988).

¹⁹³ HANSELL, *supra* note 186, at 248.

¹⁹⁴ LEMAY & YENNE, *supra* note 192, at 132

¹⁹⁵ The explanation for not prosecuting Germans for bombardment of cities during the war was based on widespread conduct by all parties:

If the first badly bombed cities—Warsaw, Rotterdam, Belgrade, and London—suffered at the hands of the Germans and not the Allies, nonetheless the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy, and bore eloquent witness that aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nations from the U.S. Chief of Counsel for War Crimes at Nuremberg, General Telford Taylor, who succeeded Justice Jackson as the Chief of Counsel in October 1946.

TELFORD TAYLOR, *FINAL REPORT TO THE SEC'Y OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10* at 250 (Aug. 15, 1949).

an attack on a lawful military objective as the primary target.¹⁹⁶ Military objectives, however, were defined so broadly that they provided no meaningful restraint.¹⁹⁷ Attacks on industry would result in civilian deaths. Such civilians were seen as supporting the war effort—as quasi combatants, they were not distinguished from lawful combatants. Attacks on the enemy's economy, as Harris admitted, authorized attacks on cities. This is where law, as customary practice, stood at the dawn of the nuclear age.¹⁹⁸

D. Targeting Hiroshima and Nagasaki

Atomic bomb targets were a matter of considerable deliberation. Early discussions between members of the Manhattan Project and AAF representatives were formally elevated to a targeting committee chaired by Major General Leslie Groves, the commander of the Manhattan Project.¹⁹⁹ The committee first met on April 27, 1945. It was tasked to choose four targets and, based on indications from the Army Chief of Staff, General George Marshall, to consider the major ports on Japan's west coast, which were essential links between Japan and the Asiatic mainland.²⁰⁰ As the committee met over the next month, it settled on important target selection

¹⁹⁶ H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 368 (1952) (explaining that it remained "unlawful to resort to bombing of the civilian population for the mere purpose of terrorization. For in this case the civilian population becomes the direct object of attack regardless of any connexion [*sic*] with a military objective.").

¹⁹⁷ *Id.* ("[T]he phenomenon of total war has reduced [the distinction between combatants and civilians], in most respects, to a hollow phrase.").

¹⁹⁸ Lester Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 Am. J. Int'l L. 680, 696 (1945); see also Harry Almond, Jr., *Deterrence and a Policy-Oriented Perspective*, in NUCLEAR WEAPONS AND LAW 58-59 (Arthur Selwyn Miller & Martin Feinrider eds. 1984) (explaining that the lack of governmental protests following the Second World War conventional and nuclear bombing of cities fully established the legitimacy of cities as "strategic" military targets). On the other hand, Overy characterizes the bombing activities supported by WWII belligerents as violating "every accepted norm in the conduct of modern warfare[.]" OVERY, *supra* note 122, at 630. In support of his finding civilian population bombing as "legally problematic" he points to post war Geneva Conventions and Additional Protocols. As will be discussed later, the Geneva Conventions did nothing to prohibit similar bombing activities. *Infra* section III.A. The Additional Protocols were not universally adopted. *Infra* section IX. Furthermore, subsequent law logically indicates more the absence of law prior to enactment, rather than its existence.

¹⁹⁹ VINCENT JONES, MANHATTAN: THE ARMY AND THE ATOMIC BOMB 528 (2007).

²⁰⁰ *Id.*

factors. The first issues were practical considerations, such as the range of the bombers, attacking during the day to insure accuracy, anticipated weather conditions, and ability to have alternate targets during a single mission.²⁰¹ The committee's initial target selection criteria were also based on more subjective needs such as generating a "morale effect upon the enemy" and "to produce the greatest military effect on the Japanese people and thereby most effectively shorten the war."²⁰² The emphasis on the morale effect was based on the belief that the physical damage caused by an atomic bomb would be similar to a conventional bombing attack of the same dimensions, with the principle difference being the visual effect of "a brilliant luminescence, which would rise to a height of 10,000 to 20,000 feet."²⁰³ The initial criteria led to more advanced considerations: (1) targets should contain a large percentage of closely-built frame buildings and other construction that would be most susceptible to damage by blast and fire; (2) targets should be a densely built up area of at least one mile in radius, the anticipated blast area of the bomb; (3) targets should be of a high military strategic value; and (4) the first target should be relatively untouched by previous bombings to better determine the effect of the atomic bomb.²⁰⁴ On May 28 the committee decided on four targets: Kokura Arsenal, an eight million square-foot munitions plant; Hiroshima, a major military embarkation point, military headquarters, and home to railway yards, storage depots and industry; Niigata, an important seaport with an aluminum reduction plant, ironworks, oil refinery and tanker terminal; and Kyoto, with three-square miles of industry.²⁰⁵

On May 29, 1945, General Marshall, Secretary of War Henry L. Stimson and Assistant Secretary of War John J. McCloy had a separate discussion on the bomb. Marshall recommended the atomic bomb be dropped on "straight military objectives such as a large naval installation."²⁰⁶ He went on to recommend that if the bomb were to be used on manufacturing areas, a general warning should first be issued so that people could evacuate the areas.²⁰⁷

²⁰¹ Manhattan Eng'r Dist., *supra* note 5, at 16–17.

²⁰² *Id.* at 17.

²⁰³ U.S. WAR DEP'T, NOTES OF THE INTERIM COMM. MEETING, Thursday May 31, 1945, at 13 [hereinafter WAR DEP'T NOTES].

²⁰⁴ Manhattan Eng'r Dist., *supra* note 5, at 17.

²⁰⁵ JONES, *supra* note 199, at 529.

²⁰⁶ WALKER, *supra* note 4, at 51.

²⁰⁷ *Id.*

The next day, Stimson had an unrelated meeting with General Groves and asked about the committee's target choices.²⁰⁸ When Groves told the Secretary that Kyoto was on the list, Stimson expressed strong objections because that city had great religious and cultural significance to the Japanese.²⁰⁹ Groves would continue to try and change Stimson's mind, but was unsuccessful.

Further discussions on target selection were held on May 31, during a meeting of a special committee formed and chaired by Secretary Stimson with the President's approval. This committee, known as the "Interim Committee," was composed of high-level advisors to discuss atomic energy matters, which included issues relevant to the new weapon.²¹⁰ The committee's meeting summary explains their target selection considerations:

After much discussion concerning various types of targets and the effects to be produced, the Secretary expressed the conclusion, on which there was general agreement, that we could not give the Japanese any warning; that we could not concentrate on a civilian area; but that we should seek to make a profound psychological impression on as many of the inhabitants as possible. At the suggestion of Dr. [Karl] Compton [President of the Massachusetts Institute of Technology] the Secretary agreed that the most desirable target would be a vital war plant employing a large number of workers and closely surrounded by workers' houses.²¹¹

The Interim Committee discussion is insightful. In keeping with the ongoing conventional industrial and economic attacks during the war, none of these experts considered military-industrial areas to be "civilian" in nature. Therefore, workers at these plants were not considered to be protected from attack in any way. As far as the committee members were concerned, these targets were purely military.

²⁰⁸ JONES, *supra* at note 199, at 529.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 530; WALKER, *supra* note 4, at 14.

²¹¹ WAR DEP'T NOTES, *supra* note 204, at 13-14.

On July 21, Stimson was at the Potsdam Conference with the President when he received a request to reconsider his rejection of Kyoto as a target.²¹² Stimson replied two days later, explaining that the President confirmed that Kyoto was off-limits for the atomic bomb.²¹³ On July 25, Stimson approved a directive to strike one of four cities after August 3.²¹⁴ The final list of possible targets consisted of Hiroshima, Kokura, Niigata, and Nagasaki.²¹⁵ Nagasaki was added to the list because of its military-industrial facilities. The city produced ordnance, ships, military equipment, and other war materials.²¹⁶ It was a densely populated city with wooden residences built close together and adjacent to factories.²¹⁷

The Potsdam Proclamation warning Japan to surrender or face prompt and utter destruction was issued the next day. After the war, Truman claimed he gave the final order to drop the bombs while returning from Potsdam.²¹⁸ No documentation has been found to substantiate a direct order from him during his return trip.²¹⁹ The final written order to the military was Stimson's July 25 directive.²²⁰ The AAF dropped atomic bombs on Hiroshima and Nagasaki on August 6 and 9, respectively. Japan soon surrendered; had it not done so, the U.S. military anticipated building and employing up to nine more atomic bombs for tactical use during an invasion of the Japanese mainland.²²¹

²¹² JONES, *supra* note 199, at 530.

²¹³ Manhattan Eng'r Dist., *supra* note 5, at 16.

²¹⁴ JONES, *supra* note 199, at 534.

²¹⁵ *Id.*

²¹⁶ Manhattan Eng'r Dist., *supra* note 5, at 20.

²¹⁷ *Id.* at 21.

²¹⁸ JONES, *supra* at note 199, at 533–34 n.32.

²¹⁹ WALKER, *supra* note 4, at 61.

²²⁰ MISCAMBLE, *supra* note 4, at 78.

²²¹ Interview by Forrest Pogue with General George Marshall, U.S. Army (Ret.), February 11, 1957, 424 http://marshallfoundation.org/library/wp-content/uploads/sites/16/2014/05/Tape_14.pdf

There were supposed to be nine more bombs completed in a certain time, and they would be largely in time for the first landing in the southern tip of Japan. . . [W]e were having in mind exploding one or two bombs before these landings and then having the landing take place, and reserving the other bomb or bombs for the later movements of any Japanese reinforcements that might try to come up. And it was decided then that the casualties from the actual fighting would be very much greater than might occur from the after-effects of the bomb action. So there were to be three bombs for each corps that was landing. One or two, but probably one, as a preliminary, then this

Photographs of Hiroshima damage reached President Truman in the days after the strike. On August 10, 1945, he informed his cabinet that no further atomic bombs would be dropped without his express approval.²²² He didn't like "killing all those kids."²²³ The U.S. atomic policy was not immediately refined at the Presidential level, nor were there significant efforts at clarity on the laws of war governing the new weapons.

Overall, the law of war does not appear to have been a specific discussion point during the target selection process for the atomic bombs.²²⁴ Decision makers picked targets based on criteria consistent with the broad definition of military objectives, but their discussions were not framed in exactly the same terms used by military air war planners elsewhere. Secretary Stimson removed Kyoto from the target list based on concerns over irreversible damage to Japan's cultural and religious heritage—perhaps an instinctive acknowledgement of the rules adopted at The Hague. Moreover, decision makers did not appear to appreciate that nuclear weapons would have different effects from the equivalent mass of conventional weapons, other than a visual effect and corresponding psychological impact.²²⁵ In the end, the atomic bombs were employed consistently with the law of war as it existed for aerial bombardment in August 1945: the attacks were directed at broadly defined military

landing, then another one further inland against the immediate supports, and then the third against any troops that might try to come through the mountains from up on the Inland Sea. That was the rough idea in our minds.

Id.

²²² WALKER, *supra* note 4, at 86.

²²³ *Id.*

²²⁴ Although there is no documentation of legal discussions regarding the use of the bomb prior to August 1945, Truman later wrote,

In deciding to use this bomb I wanted to make sure that it would be used as a weapon of war in the manner prescribed by the laws of war. That meant that I wanted it dropped on a military target. I had told Stimson that the bomb should be dropped as nearly as possible upon a war production center of prime military importance.

HARRY TRUMAN, MEMOIRS, VOL. I: YEAR OF DECISIONS 420 (1955).

²²⁵ WAR DEP'T NOTES, *supra* note 203. No systematic requirement to conduct legal reviews on new weapons existed at this time. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 230 (2013).

objectives and achieved through the destruction of large areas, while civilians working at or living near the objects were given little consideration. As Professor Tammy Davis Biddle pointed out, “On 6 August, over Hiroshima, no moral threshold was crossed that had not been crossed much earlier in the year.”²²⁶

III. Dawn of the Cold War: The Truman Years

By the end of the Cold War, nuclear war strategy and targeting seemed to differ from the law of war. At the beginning of the Cold War this difference did not exist. War plans called for nuclear strikes on cities, which carried the legal regime from the end of the World War II forward wholly intact. Cities were synonymous with military industry. In the face of the emerging threat of communist domination, the U.S. military began embracing concepts foresworn during the world war, such as using bombing to undermine enemy morale and to abandon precision targeting in favor of creating “bonus” collateral damage. The new United Nations Charter and Geneva Conventions did nothing to moderate targeting plans for atomic weapons.

A. International Law in the Aftermath of World War II

While the law of war relating to nuclear conflicts was dormant, international law was getting increasing attention. On June 26, 1945, barely two months prior to the end of the Second World War, the Charter of the United Nations was signed. The Charter aspired to “save succeeding generations from the scourge of war” and contained terms intended to prevent conflict.²²⁷ With this purpose in mind, the U.N. Charter is widely understood to have established the modern *jus ad bellum*. Parties to the charter agreed to “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.”²²⁸ Self-defense against “armed attack” was

²²⁶ BIDDLE, *supra* note 96, at 270.

²²⁷ U.N. Charter Preamble. Aspirations of a U.N. Charter could be found in the 1928 Kellogg-Briand Pact, which renounced war as an instrument of policy and required disputes to be settled peacefully. Treaty Providing for Renunciation of War as an Instrument of National Policy, Aug 28, 46 Stat. 2343, 2 Bevans 732.

²²⁸ U.N. Charter art. 2(4).

authorized.²²⁹ The Charter, however, created no specific obligations on how wars would be fought, once started.

Nations were also able to agree on new *jus in bello* rules governing armed conflicts. These had been developed in Geneva after the Second World War with the intention of filling the serious gaps in international humanitarian law. Nations agreed upon four conventions, known as the Geneva Conventions for the Protection of War Victims of August 12, 1949. They supplemented older treaties, like the Hague Conventions, with rules designed to protect war victims and those who were out of combat and replaced preceding iterations of the Geneva Conventions. The four Geneva Conventions collectively prohibited reprisals from being carried out against enemy wounded, sick, or shipwrecked, prisoners of war, or civilians in the hands of their nation's enemy or in occupied territory.²³⁰

The 1949 Geneva Conventions had few implications relevant to targeting principles in general. Hospitals and mobile medical units were placed off limits as object of attack, but potential defenders were obligated to keep them away from military objectives.²³¹ Medical personnel, transport and supplies received similar protections with similar duties for the defender.²³² Enemy civilian populations, however, did not receive blanket protection from attack because the drafters of the Conventions were careful "not to undermine the validity of Geneva Law or the credit attached to it by introducing rules whose observance could not be assured."²³³ The purpose of the Convention Relative to the Protection of Civilian Persons in Time of War was to "protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to the military operations themselves."²³⁴

²²⁹ U.N. Charter art. 51.

²³⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I), art. 46; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II), art. 47; Geneva Convention Relative to Treatment of Prisoners of War (GC III), art. 13; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), art. 33.

²³¹ GC I art. 19; GC IV art. 18.

²³² GC I arts. 20, 24–25; GC IV arts. 20–23. Chaplains are also protected under GC I art. 20. *Id.*

²³³ COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 5–6 (Jean Pictet, ed., 1958).

²³⁴ *Id.* at 10.

B. Historical and U.S. Policy Developments

Despite the positive developments in international law, the U.S. military's initial nuclear strategy echoed the darkest aspects of the Second World War. The Joint Chiefs of Staff understood the Soviet Union's objective to be world domination, and that it believed peaceful coexistence between communist and capitalist countries to be impossible over the long run.²³⁵ In light of this threat, the U.S. military prepared for war. Atomic bombs would be used against industrial areas and "centers of population with a view to forcing an enemy state to yield through terror and disintegration of national morale."²³⁶ This planning statement suggests that as much as the United States had previously avoided any express support of terror bombing, the Joint Chiefs now endorsed it.

The Joint Chiefs developed initial war plans for potential hostilities with the Soviet Union, calling for bombing the same type of industry struck by the Allies during the Second World War.²³⁷ They officially began preparing war plans through studies known as the PINCHER series.²³⁸ These led to the first joint war plan, BROILER, which assumed the Soviets would use atomic weapons against the U.S.²³⁹ To counter the

²³⁵ JAMES SCHNABEL, *THE JOINT CHIEFS OF STAFF AND NATIONAL POLICY, 1945-1947*, 48 (1996). The Soviets subjugated satellite states, thwarted U.S. peace settlement efforts, and kept excessive forces in occupied areas. *Id.* In Eastern Europe, were deployed in a manner to facilitate attacks on the west. *Id.* The Soviets also built air bases in eastern Siberia, threatening U.S. territory. *Id.* In 1946, Soviet Premier Stalin declared that a peaceful international order was impossible under the system of capitalistic development of the world's economy. *Id.* at 40.

²³⁶ Gian Gentile, *Planning for Preventive War, 1945-1950*, *JOINT FORCE QUARTERLY* 69 (2000) (quoting *JOINT CHIEFS OF STAFF, OVER-ALL EFFECT OF ATOMIC BOMB ON WARFARE AND MILITARY ORGANIZATION, OCTOBER 30, 1945 in AMERICA'S PLANS FOR WAR AGAINST THE SOVIET UNION, 1945-1950*, vol. 1, 4 (David A. Rosenberg & Steven T. Ross, eds., 1989)).

²³⁷ SCHNABEL, *supra* note 235, at 74. Planners and the Joint Intelligence Committee within the Joint Chiefs of Staff organization developed a concept for a joint war plan prior to the PINCHER studies, but did not forward it to the Joint Chiefs. *Id.* at 70-72.

²³⁸ KENNETH CONdit, *THE JOINT CHIEFS OF STAFF AND NATIONAL POLICY, 1947-1949*, 153 (1996). The PINCHER plans were not clear about whether the U.S. would use atomic bombs, but did assert that the any war with the Soviet Union would become a total global conflict. STEVEN ROSS, *AMERICAN WAR PLANS 1945-1990* 28 and 34 (1988).

²³⁹ *Id.* Although BROILER was drafted and slightly modified in a version named FROLIC, neither version was transmitted to the services. *Id.* at 156. The BROILER/FROLIC plans were designed for a near-term war; long range plans known as CHARIOTEER and BUSHWHACKER were also drafted, but were not high development priorities. *Id.* at 154.

Soviets, the primary objective of BROILER was the destruction of the Soviets' war-making capacity, while the suffering of the civilian population was seen as "bonus damage."²⁴⁰ These early Cold War plans also had to recognize the scarcity of atomic bombs in the U.S. inventory as well as the limited range of bombers and available bases.²⁴¹ Thus, early plans were dominated by the conventional war-fighting component; atomic bombs were reserved for targets of sufficient size and importance to Soviet war making capabilities, which mainly resided in cities.²⁴²

During the 1948 Berlin Crisis, international tensions ran high and the Truman administration developed the first nuclear war policy, known as National Security Council 30 (NSC-30).²⁴³ This document officially gave broad authority to the military for planning, with the President retaining ultimate employment authority.²⁴⁴ The principal objective of NSC-30 was to affect Soviet military operations, the long-term logistical support to the military, and the Soviet will to fight.²⁴⁵

In keeping with the policy's priorities, military planners maintained the model of striking military-industrial targets in a new emergency war plan, titled HALFMOON.²⁴⁶ This plan, like BROILER before it, considered destroying enemy morale through direct attacks on urban population centers.²⁴⁷ The rationale was likely based on the atomic bomb's effectiveness against urban centers²⁴⁸ and a lack of specific

²⁴⁰ Gentile, *supra* note 236, at 69.

²⁴¹ FREEDMAN, *supra* note 134, at 48.

²⁴² EDWARD KAPLAN, *TO KILL CITIES* 27 (2015). In July 1947, the Joint War Plans Committee (JPWC) submitted a pre-BROILER plan that called for dropping thirty-four atomic bombs on twenty-four Soviet cities. ROSS, *supra* note 238, at 56. The JPWC believed this atomic offensive would eliminate 86% of Soviet airframe production, 99% of aircraft engine plants, 56% of arms plants, 99% of tank and self-propelled gun plants, and 52% of crude oil refineries. *Id.*

²⁴³ NSC-30 *reprinted in* United States Department of State, *FOREIGN RELATIONS OF THE UNITED STATES*, 1948 vol. 1, 625-628 (1976); David A. Rosenberg, *Nuclear War Planning*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 169 (Michael Howard et. al., eds., 1994).

²⁴⁴ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 169.

²⁴⁵ Desmond Ball, *Toward a Critique of Strategic Nuclear Targeting*, in *STRATEGIC NUCLEAR TARGETING*, 25 (Desmond Ball & Jeffrey Richelson, eds., 1986).

²⁴⁶ *Id.* at 168; FREEDMAN, *supra* note 134, at 52.

²⁴⁷ Gentile, *supra* note 237, at 54.

²⁴⁸ The military's focus on military-industrial targets was supported by a 1947 Joint Chiefs of Staff report on atomic blasts in Japan and tests in the Bikini islands, which recommended against making ships at sea or troop concentrations primary targets. "The Evaluation of

intelligence, which would have been needed to identify specific systems within the Soviet Union.²⁴⁹ According to the official 1948 evaluation of the plan, the destruction of the Soviet urban-industrial systems constituted a valid military objective, finding that the atomic attacks on these systems “should so cripple the Soviet industrial and control centers as to reduce drastically the offensive and defensive power of their armed forces.”²⁵⁰ HALFMOON specifically called for the use of 133 atomic bombs against 70 Soviet cities, including Moscow and Leningrad.²⁵¹ After urban-industrial areas, which were the highest-priority targets, the plans called for destruction of petroleum refining facilities to “practically destroy the offensive capabilities of the USSR and seriously cripple its defensive capabilities[.]” then for major attacks against the Soviet hydro-electric system, and finally for attacks on the Soviet transportation system.²⁵²

The 1949 updated plan for responding to Soviet aggression, TROJAN, contained a detailed strategic bombing annex. It contemplated using atomic bombs against “selected industrial units” in urban areas . . . which available intelligence indicates to include the heart of known industry most essential to the war-making capacity of the U.S.S.R.”²⁵³ No atomic weapons were planned for attacks outside the Soviet Union.²⁵⁴ The rationale was likely based on the atomic bomb’s effectiveness against

the Atomic Bomb as a Military Weapon.” The Final Report of the Joint Chiefs of Staff Evaluation Board for Operation Crossroads, June 30, 1947, 12. The report found, “the bomb is pre-eminently a weapon for use against human life and activities in large urban and industrial areas, as well as seaports.” *Id.* at 32. The report went on to say that the bomb could be used against “Dams, ship canals, naval bases, immobilized naval and merchant fleets concentrated in storage areas, air fields, troops engaged in amphibious landings or concentrated in staging areas” if special circumstances gave them sufficient value. *Id.*

²⁴⁹ David Rosenberg, *U.S. Nuclear War Planning*, in STRATEGIC NUCLEAR TARGETING 40 (Desmond Ball & Jeffrey Richelson, eds., 1986).

²⁵⁰ Joint Chiefs of Staff (JCS) 1952/1, Memorandum, Chief of Staff, USAF to Joint Chiefs of Staff, Evaluation of the Current Strategic Air Offensive Plans, December 21, 1948, reprinted in CONTAINMENT: DOCUMENTS ON AMERICAN POLICY AND STRATEGY, 1945–1950 357–58 (Thomas Etzold & John Gaddis, eds., 1978) [hereinafter JCS 1952/1].

²⁵¹ Jeffrey Richelson, *Population Targeting and U.S. Strategic Doctrine*, in STRATEGIC NUCLEAR TARGETING 238 (Desmond Ball and Jeffrey Richelson, eds., 1986); FREEDMAN, *supra* note 134, at 52.

²⁵² JCS 1952/1, *supra* note 250, at 358.

²⁵³ Joint Chiefs of Staff (JCS) 1953/1. Report by the Ad Hoc Committee to the Joint Chiefs of Staff on Evaluation of Effect on Soviet War Effort Resulting From the Strategic Air Offensive, May 12, 1949 at 34 [hereinafter JCS 1953/1]. This analysis contain no discussions of legal issues.

²⁵⁴ *Id.* at 35.

urban centers²⁵⁵ and a lack of specific intelligence, which would have been needed to identify specific systems within the Soviet Union.²⁵⁶ TROJAN specifically called for the use of 133 atomic bombs against seventy Soviet cities, including Moscow and Leningrad.²⁵⁷ The military recognized that the effects of the bombing would not be limited to the destruction of specific targets, but treated the additional damage as a benefit. As the analysis of the plan explained:

Although aiming points are selected primarily to focus the damage on specific industries and industrial concentrations, it is inevitable that actual damage will be indiscriminate as to types and functions of other installations within the target areas. This will affect adversely all phases of Soviet economy and the ability of the Soviet people to carry on effectively with work necessary for the prosecution of a war.²⁵⁸

Although the military believed bombing cities would create immense hardships on the population, the analysis of the plan recognized that the “atomic offensive would not, *per se*, bring about capitulation, destroy the roots of Communism or critically weaken the power of the Soviet leadership to dominate the people.”²⁵⁹ Instead, it would validate Soviet propaganda, stimulate resentment against the United States, unify the population, and increase their will to fight.²⁶⁰ The atomic bombs would not stop a Soviet advance into Western Europe, but would “produce certain psychological and retaliatory reaction detrimental to the

²⁵⁵ The military’s focus on military-industrial targets was supported by a 1947 Joint Chiefs of Staff report on atomic blasts in Japan and tests in the Bikini islands, which recommended against making ships at sea or troop concentrations primary targets. “The Evaluation of the Atomic Bomb as a Military Weapon.” The Final Report of the Joint Chiefs of Staff Evaluation Board for Operation Crossroads, June 30, 1947, 12. The report found, “the bomb is pre-eminently a weapon for use against human life and activities in large urban and industrial areas, as well as seaports.” *Id.* at 32. The report went on to say that the bomb could be used against “Dams, ship canals, naval bases, immobilized naval and merchant fleets concentrated in storage areas, air fields, troops engaged in amphibious landings or concentrated in staging areas” if special circumstances gave them sufficient value. *Id.*

²⁵⁶ Rosenberg, *U.S. Nuclear War Planning*, *supra* note 249, at 40.

²⁵⁷ JCS 1953/1, *supra* note 253, at 1; CONDIT, *supra* note 238, at 158.

²⁵⁸ JCS 1953/1, *supra* note 253, at 95.

²⁵⁹ *Id.* at 30.

²⁶⁰ *Id.*

achievement of Allied war objectives”—nevertheless, the atomic bomb was ultimately seen as necessary to deny Soviet military objectives and as it was “the only means of rapidly inflicting shock and serious damage to vital elements of the Soviet war-making capacity.”²⁶¹

In 1949, TROJAN gave way to OFFTACKLE, an emergency war plan based on National Security Council and Presidential guidance from the previous year.²⁶² The new guidance endeavored to use means short of war to reduce Soviet power and influence and to bring the Russians into conformity with the purposes and principles of the UN Charter; U.S. military action would only be needed if the Soviets miscalculated U.S. resolve or intentions, or if the U.S. miscalculated Soviet reactions.²⁶³ OFFTACKLE was similar to its predecessor, but was more directive in the need to “destroy” Soviet war-making capacity.²⁶⁴ It also included a new objective to thwart Soviet advances in Western Europe.²⁶⁵ According to the official history of the Joint Chiefs of Staff, OFFTACKLE would use 292 atomic bombs (and 17,610 tons of conventional bombs) over three months to disrupt Soviet industry, eliminate political and administrative controls of the Soviet government over its people, undermine the will of the Soviet government and people to continue the war, and disarm the Soviet military.²⁶⁶ The plan’s target list consisted of petroleum refineries, electric power plants, submarine construction facilities, aviation fuel production, and other war-supporting industries.²⁶⁷ The destruction of these targets was expected to bring an immediate stoppage of major sectors of the Soviet war-supporting industry through loss of electrical power, prolonged by chaos and possible panic among the civilian workforce.²⁶⁸

²⁶¹ *Id.* at 32.

²⁶² CONDIT, *supra* note 238, at 160. The policy guidance was found in NSC 20/4. The DROPSHOT plan was also developed by the Joint Chiefs of Staff in 1949—it was a long term contingency plan for potential war in 1957. DROPSHOT THE AMERICAN PLAN FOR WORLD WAR III AGAINST RUSSIA IN 1957 1 (Anthony Brown, ed., 1978).

²⁶³ NSC 20/4, *U.S. Objectives with Respect to the USSR to Counter Soviet Threats to U.S. Security*, November 23, 1948, reprinted in CONTAINMENT: DOCUMENTS ON AMERICAN POLICY AND STRATEGY, 1945–1950, *supra* note 250, at 203, 208-09.

²⁶⁴ CONDIT, *supra* note 238, at 161.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

In August, 1949, the Soviets broke the United States' monopoly on atomic weapons.²⁶⁹ Following the Soviet test, the United States decided to develop thermonuclear weapons.²⁷⁰ The new weapons harnessed fusion reactions with yields many times greater than the atomic bombs that relied upon fission.²⁷¹ As United States nuclear weapon capabilities and stockpile increased, the nuclear targeting list expanded to counterforce options in addition to city targets.²⁷² For example, Eastern Bloc military installations were added to the target set in 1949 in order to slow a potential invasion of Western Europe.²⁷³

The concerns over the Soviets increased. The U.S. national security policy, published in 1950, emphasized the dangers of Soviet aggression and advocated a more energetic response by the United States and its allies.²⁷⁴ The imbalance in conventional forces between the West and the Soviet Bloc meant that nuclear weapons could not be held in reserve, which precluded the United States from being able to make any "no first use" declarations.²⁷⁵

The resulting war plan focused on efficient use of atomic weapons. It dedicated 231 weapons against 104 cities to destroy 90% of Soviet aircraft assembly locations, 65% of military shipbuilding, 74% of iron production, and 88% of tank production.²⁷⁶ Planners also recognized the need to protect the American homeland and added Soviet atomic weapon delivery capabilities to the list of targets.²⁷⁷ General LeMay, as the Commander of Strategic Air Command, strongly opposed targeting isolated objectives like electrical power generating complexes because they required

²⁶⁹ Freedman, *supra* note 134, at 60.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 62.

²⁷² "Counterforce" may be generally thought of as countering the enemy's military forces. For example, when asked about the origins of counterforce strategy, LeMay explained, "Its origins predate Roman times. You attack the enemy armed force and you defeat it in the field. It is a basic principle of war." Max Rosenberg, *Oral History Interviews of General Curtis LeMay*, Jan. 1965 (on file with author).

²⁷³ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 170.

²⁷⁴ FREEDMAN, *supra* note 134, at 66. NSC-68 supplemented NSC-30 by laying out a rationale for a more active national policy toward the USSR; NSC-30 dealt with the narrower issues of who had authority to order nuclear attacks (the President) and under what conditions (whenever he thought they were warranted).

²⁷⁵ Freedman, *supra* note 134, at 71.

²⁷⁶ KAPLAN, *supra* note 242, at 29.

²⁷⁷ *Id.* at 83; Rosenberg, *Nuclear War Planning* *supra* note 243, at 170.

reconnaissance, would be difficult for strike crews to identify, and lacked the “bonus damage” found in urban area targets.²⁷⁸ The “bonus damage” concept harkened back to the Second World War’s emphasis on primarily striking military objectives with the secondary effect of killing workers and sending a psychological message. It also appears to stand in contrast to the 1949 report from a multi-service committee chaired by Air Force Lieutenant General H.R. Harmon. The Harmon Report concluded that attacks on Soviet cities would harden enemy resolve and validate Soviet propaganda rather than reducing morale.²⁷⁹

At the outset of the Korean conflict, the Truman administration considered counter-force options for potential nuclear strikes. Truman was concerned about the Soviets joining the fight on the North Korean side and asked if the United States could “knock out their bases in the Far East.”²⁸⁰ The military answered that the task could be accomplished, but only through the use of atomic bombs.²⁸¹ Truman then ordered the Air Force to “prepare plans to wipe out all Soviet air bases in the Far East.”²⁸² He clarified that the order was not to take action; it was limited to making plans.²⁸³

²⁷⁸ Rosenberg, *U.S. Nuclear War Planning* *supra* note 249, at 40–41.

²⁷⁹ Gentile, *supra* note 236, at 70; FREEDMAN, *supra* note 135, at 53. Perhaps influenced by the Harmon Report, LeMay eventually backed away from “bonus damage” as an effect to be sought, at least publically. During a 1955 interview, he stated:

I don’t think it is humane or effective to attack a people or a population as such. You bring a war to a close when you destroy the capability and break the will of a people to fight. If they have nothing to fight with, you have gone a long way toward breaking their will to continue the struggle

You don’t win wars by terrorizing people. You win wars by destroying targets. Targets are something tangible, not something in people’s minds.

We Must Avoid the First Blow: Interview with Gen. Curtis E. LeMay, Chief of U.S. Strategic Command, U.S. NEWS & WORLD REPORT, Dec 9, 1955, at 45.

²⁸⁰ Memorandum of Conversation, by the Ambassador at Large (Jessup), *reprinted in* FOREIGN RELATIONS OF THE UNITED STATES, 1950 vol. 7, 159 (1976).

²⁸¹ *Id.*

²⁸² *Id.* at 160.

²⁸³ *Id.*

Truman's deferential view of target selection also manifested itself during the Korean conflict. During a news conference in November 1950, the President was asked about the potential use of atomic weapons in the conflict. He refused to rule out the atomic bomb, but then explained, "I don't want to see it used. It is a terrible weapon, and it should not be used on innocent men, women, and children who have nothing whatever to do with this military aggression. That happens when it is used."²⁸⁴ The President's answer could be understood to be a reference to collateral damage. Truman had expressed a strong desire to avoid killing innocents in his July 25, 1945, journal, and again after seeing the photographs of the Hiroshima devastation.²⁸⁵ The President's answer during the news conference elicited a follow-on exchange:

Q. Does that mean, Mr. President, use against military objectives, or civilian—

The President. It's a matter that the military people will have to decide. I'm not a military authority that passes on those things.²⁸⁶

Through his answers, President Truman showed concern over civilian casualties. He understood war to be a terrible force and understood the consequences of the atomic bomb, especially after Hiroshima. This—along with related fears of escalation—weighed on his decision to reject calls to use atomic weapons against China during the Korean War.²⁸⁷

The legal construct for the early Cold War nuclear targets appears to assume the necessity of total war against the Soviet bloc, focusing on eliminating not only military forces, but also on an adversary's capability

²⁸⁴ The President's News Conference, November 30, 1950, *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS, HARRY S. TRUMAN, <https://trumanlibrary.org/publicpapers/viewpapers.php?pid=985>.

²⁸⁵ See Notes by Harry S. Truman on the Potsdam Conference, July 25, 1945, *supra* note 2; WALKER, *supra* note 4, at 86. Truman later said that atomic bomb use was "far worse than gas or biological warfare because it affects the civilian population and murders them by wholesale." MISCAMBLE, *supra* note 4, at 117.

²⁸⁶ The President's News Conference, *supra* note 284. Although Truman did not intend it, his discussion of the bomb was perceived as a threat to use it. The British Prime Minister travelled to the United States to discuss preventing the Korean conflict from becoming a major war. HARRY TRUMAN, MEMOIRS, VOL. II: YEARS OF TRIAL AND HOPE 396 (1956).

²⁸⁷ S. David Broscious, *Longing for International Control, Banking on American Superiority: Harry S. Truman's Approach to Nuclear Weapons*, in COLD WAR STATESMEN CONFRONT THE BOMB 34 (John Gaddis et al., eds., 1999).

to wage war through attacks on military industrial centers, which were thought of as synonymous with cities. This policy appeared to be consistent with the law of war, which still embraced Second World War customs.

IV. Massive Retaliation: The Eisenhower Years

The presumption that a war with the Soviets would be a total war continued during the Eisenhower administration; nuclear targeting grew in scale so as to avoid war. As will be discussed, Eisenhower and his administration did not see nuclear weapons as legally different from conventional weapons, but they did understand the catastrophic risks of a nuclear war. Nuclear targeting departed from the traditional laws of war in order to deter nuclear war in light of declared Soviet military strategy, which was to destroy the enemy's economic and political-morale base through bombing.²⁸⁸

A. Historical and U.S. Policy Developments: Korean Armistice and New War Plans

Dwight D. Eisenhower was elected to the Presidency in 1952 and war planning against the Soviet bloc continued. In October 1953, Admiral Arthur Radford, Chairman of the Joint Chiefs of Staff, recommended reprioritizing nuclear targets for graduated nuclear strikes.²⁸⁹ He proposed making the Soviet's military forces the top priority, followed by military support-type targets. Under Radford's proposal, total "unrestricted" responses would only be available in retaliation for attacks on the United States or its allies. President Eisenhower did not follow the recommendation. Throughout his presidency, Eisenhower believed in averting disaster by rapidly responding to any Soviet attack in strength.²⁹⁰

²⁸⁸ Raymond L. Garthoff, *Air Power and Soviet Strategy*, in *THE IMPACT OF AIRPOWER* 534 (Eugene Emme, ed. 1959). The Soviets announced doctrine calling for long range "attacks on targets deep in the rear of the enemy with the objectives of undermining his military-economic power, affecting the morale of his armies and population, disorganizing communications, and gaining air supremacy." *Id.*

²⁸⁹ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 171.

²⁹⁰ Rosenberg, *U.S. Nuclear War Planning*, *supra* note 249, at 53.

The nuclear strategy under the Eisenhower administration was known as “massive retaliation.” It focused on immediate, massive, nuclear, retaliatory strikes on Soviet military-industrial population centers.²⁹¹ For example, early administration war plans dedicated over 450 weapons to attacking Soviet sea, air, and air defense targets, with an additional 1226 dedicated to collapsing the Soviet war economy; by the end of the administration over 3300 weapons were dedicated to countering Soviet atomic forces, controlling airspace and retarding land and sea operations, with 245 weapons dedicated to economic targets.²⁹² This strategy emphasized deterrence. It presumed that any war with the Soviet Union would necessarily escalate into a nuclear war. This approach thereby made the Soviets understand the terrible consequences of starting any war with the West.

In reality, Eisenhower’s policy was more “flexible retaliation” with a massive response as one of many options.²⁹³ The massive response was emphasized because of its deterrent value.²⁹⁴ Flexibility was achieved, in part, due to developments in tactical nuclear weapons that gave the shrinking conventional forces more firepower.²⁹⁵

The Eisenhower administration saw significant value in nuclear deterrence and rhetoric. For example, it viewed the threat of nuclear

²⁹¹ George Bunn, *US Law of Nuclear Weapons*, NAVAL WAR COLLEGE REV. 59 (1984). In this context, “retaliation” is simply a response-in-force and is not necessary being used as a legal term. The implication of a retaliatory nuclear exchange resonates with the doctrine of belligerent reprisals. See *supra* section II.A-B. The United States maintained the validity of the reprisal doctrine in the 1950s. See also U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 497 (1956) [hereinafter 1956 FM 27-10]. Reprisals required an enemy violation of the law of war, careful inquiry into facts and proportionate response for the purpose of enforcing future compliance. *Id.*

²⁹² KAPLAN, *supra* note 242, at 99.

²⁹³ FREEDMAN, *supra* note 134, at 72, 82.

²⁹⁴ *Id.* at 69.

²⁹⁵ *Id.* at 83. Tactical nuclear weapons do not have a precise definition, but are thought of as having relatively short range and less explosive power (in relative terms when compared to the weapons associated with long-range, “strategic” delivery systems), deployed at or near a combat area, and used for striking military targets in that area or directly behind it. Hugh Lynch, *Presidential Control of Nuclear Weapons in Limited War Situations*, 62 U.S. NAVAL WAR COLLEGE INT’L L. STUDIES 504 (1980). The Hiroshima and Nagasaki bombs would likely qualify as tactical weapons, although they had strategic effects. *Id.* The smallest tactical nuclear weapon in 1957 had approximately one-quarter of the explosive power of the Hiroshima and Nagasaki bombs. Ernest May, *Introduction*, in *COLD WAR STATESMEN CONFRONT THE BOMB 5* (John Gaddis et al., eds., 1999).

weapons as critical to ending the Korean War. During the deadlocked armistice discussions, the United States suggested if progress was not made, it would “move decisively without inhibition in the use of weapons and would no longer be responsible for confining hostilities to the Korean Peninsula.”²⁹⁶ This got the stalled talks moving in February 1953. When they started to break down again, similar statements about expanding the battle area were made.²⁹⁷ The Administration’s words were not merely empty threats. When Eisenhower was briefed that the Communists were building up forces in the “Kaesong sanctuary” created during the armistice negotiations, Eisenhower expressed the view to “consider the use of tactical atomic weapons on the Kaesong area, which provided a good target for this type of weapon.”²⁹⁸ As the National Security Council discussed whether to consult allies, Secretary of State John Foster Dulles then wanted to begin working on breaking down the “false distinction” between nuclear weapons and conventional ones.²⁹⁹ After the armistice finally suspended the Korean War, Eisenhower also told the military to be prepared to use nuclear weapons to counter a major Communist attack.³⁰⁰

Eisenhower again used rhetoric about nuclear weapons to deter Communist China from invading offshore islands held by the Nationalists.³⁰¹ Secretary of State John Foster Dulles spoke of reinforcing the Nationalists with the “deterrent of massive retaliatory power.”³⁰² A reporter asked President Eisenhower about the United States will to use small atomic weapons in the event of a war. He replied,

Now, in any combat where these things can be used on strictly military targets and for strictly military purposes, I see no reason why they shouldn’t be used just exactly as you would use a bullet or anything else.

²⁹⁶ FREEDMAN, *supra* note 134, at 80.

²⁹⁷ *Id.*

²⁹⁸ Memorandum of Discussion at the 131st Meeting of the National Security Council Wednesday, February 11, 1953, in *FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954* vol. 15, part 1, 770 (1984).

²⁹⁹ *Id.*

³⁰⁰ Memorandum of Discussion at the 179th Meeting of the National Security Council, Friday, January 8, 1954, in *FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954* vol. 15, part 2, 1706 (1984).

³⁰¹ Andrew Erdmann, *War No Longer Has Any Logic Whatever: Dwight D. Eisenhower and the Thermonuclear Revolution*, in *COLD WAR STATESMEN CONFRONT THE BOMB 100* (John Gaddis et al., eds., 1999).

³⁰² *Id.*

I believe the great question about these things comes when you begin to get into those areas where you cannot make sure that you are operating merely against military targets. But with that one qualification, I would say, yes, of course they would be used.³⁰³

As the former Supreme Allied Commander in the European theater of the Second World War, Eisenhower would have understood the importance of target selection. His press conference, in conjunction with his guidance elsewhere, demonstrates his belief that striking military objects with atomic weapons would be as lawful as any other weapon. He was also aware of the “great question”—asking how to account for proportionality and collateral damage when employing massive weapons near civilian populations.

In 1956, Strategic Air Command issued a study on requirements for future atomic weapons reflected the emphasis on a massive nuclear response, but with little apparent concerns for proportionality or collateral damage concerns.³⁰⁴ The study identified the top mission priority in a potential war as the destruction of Soviet bloc air power, while the secondary mission would be the systematic destruction of Soviet bloc war-supporting infrastructure.³⁰⁵ In discussing the need for using surface bursts of nuclear weapons, which were primarily needed to destroy adversary airfields and underground facilities, the report said it considered the impact on “friendly forces and peoples”, but “the requirement to win the Air Power Battle is paramount to all other considerations. If the Air Power Battle is not won, the consequences to the friendly world will be far more disastrous than the effects of fall-out contamination in the peripheral areas.”³⁰⁶ The study’s authors showed no concern for the Soviet bloc civilians, as an analysis of the report explained that the “systematic destruction” mission explicitly targeted the “population” as a distinct category in all cities, including Beijing, Moscow, Leningrad, East Berlin,

³⁰³ The President’s News Conference, March 16, 1955, *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS, DWIGHT D. EISENHOWER, <http://www.presidency.ucsb.edu/ws/index.php?pid=10434>.

³⁰⁴ Strategic Air Command, *Atomic Weapons Requirements Study for 1959*, SM 129-56, (June 15, 1956), <http://nsarchive.gwu.edu/nukevault/ebb538-Cold-War-Nuclear-Target-List-Declassified-First-Ever/documents/section1.pdf>.

³⁰⁵ *Id.* at 6.

³⁰⁶ *Id.* at 13.

and Warsaw.³⁰⁷ While the Strategic Air Command authors still believed in “bonus damage,” specifically targeting the adversary’s population would have been abandoning all pretenses of needing an underlying concrete military objective to destroy morale or create a psychological effect. Eisenhower probably did not object because he believed that all sides in a nuclear war would attack each other’s population centers, which perfected deterrence.³⁰⁸

The U.S. military also began preparing an alternative “retaliatory target list” in 1956.³⁰⁹ The concept was a list of the highest priority targets to be struck in the event of a Soviet first strike wiping out all but 25% of the American nuclear capability.³¹⁰ This list emphasized Soviet government control and population centers, and allocated remaining strike packages to target the adversary’s nuclear capabilities.³¹¹ Eisenhower rejected the concept of a significant alternative strike list in favor of an integrated, simultaneous attack plan; he did not want to withhold a large amount of forces from the initial U.S. response.³¹² This simultaneous attack plan appeared to emphasize deterrence, the effectiveness of the U.S. first strike against Soviet aggression, and marked a concern over the inability of U.S. forces to strike back. Retaliatory targeting was not a recognized formal legal doctrine, but it certainly echoes the broader notions of reciprocity underlying international law.³¹³ Moreover, technical legal concerns did not override national security imperatives when the very survival of the Western democracies was at stake.

³⁰⁷ William Burr, ed., *U.S. Cold War Nuclear Target Lists Declassified for First Time*, *National Security Archive Electronic Briefing Book No. 538* (Dec. 22, 2015), <http://nsarchive.gwu.edu/nukevault/ebb538-Cold-War-Nuclear-Target-List-Declassified-First-Ever/>.

³⁰⁸ KAPLAN, *supra* note 242, at 124–25.

³⁰⁹ Rosenberg, *Nuclear War Planning*, *supra* note 242, at 174.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Rosenberg, *U.S. Nuclear War Planning*, *supra* note 249, at 54.

³¹³ According to a customary international law study by the International Red Cross, the obligation of a State to respect international humanitarian law does not depend on reciprocity. JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I: RULES 498* (2005). The law of war, however, traditionally has been conditioned on notions of reciprocal obligation and observation. Watts, *supra* note 24, at 368. The United States DoD has explained that while many law-of-war rules do not require reciprocal compliance, reciprocity may nonetheless play a role in the application, operation or enforcement of specific rules. *LAW OF WAR MANUAL*, *supra* note 19, ¶ 3.6.

Nuclear targeting guidance was refined based on studies and analysis. In 1958, Eisenhower directed the NSC to determine the type of targets to best deter aggression.³¹⁴ A Navy initiative had argued that strikes on urban-industrial sites should be primary targets, not population centers or military forces.³¹⁵ Contemporaneously, a RAND Corporation study recommended targeting Soviet nuclear capabilities while avoiding urban targets.³¹⁶ The RAND theory was that if the United States avoided attacking Soviet cities, the Soviets would reciprocate.³¹⁷ The argument against attacking Soviet nuclear forces was centered on not wasting U.S. strike assets on Soviet weapons that had already been launched; such attacks would be directed against deserted airfields and empty silos.³¹⁸ The NSC staff issued its report in 1960, recommending a mix of counterforce and urban-industrial targets.³¹⁹

The effort ultimately resulted in a comprehensive attack plan, known as Single Integrated Operational Plan (SIOP) 62, designed to eliminate the military capabilities of the Soviets, Chinese, and their satellite nations—the Sino-Soviet Bloc.³²⁰ The plan, which built in considerable redundancies to ensure destruction of the adversary's critical assets, was designed to be implemented wholesale and was thereby inflexible. Soviet nuclear weapon capabilities received top priority, followed by primary military and government control centers.³²¹ The plan also called for attacks on 151 urban industrial targets.³²² Major cities and targets in China

³¹⁴ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 174.

³¹⁵ *Id.*

³¹⁶ Herbert Goldhamer and Andrew Marshall, with the assistance of Nathan Leites, *The Deterrence and Strategy of Total War, 1959-1961: A Method of Analysis*, U.S. Air Force PROJECT RAND Research Memorandum RM-2301, April 30, 1959.

³¹⁷ *Id.* at 186-87.

³¹⁸ Rosenberg, *U.S. Nuclear War Planning*, *supra* note 249, at 50.

³¹⁹ Desmond Ball, *The Development of the SIOP, 1960-1983*, in STRATEGIC NUCLEAR TARGETING, 40 (Desmond Ball & Jeffrey Richelson, eds. 1986); Rosenberg, *Nuclear War Planning*, *supra* note 243, at 174-75. Secretary of Defense Thomas Gates established the Joint Strategic Target Planning Staff (JSTPS) under the Joint Chiefs of Staff in August 1960. Gen. Thomas Power, *The U.S. Nuclear Team: Unification in Action*, speech at Armed Forces Day Luncheon, Detroit, Mich., May 14, 1964 *reprinted in* 30:18 VITAL SPEECHES OF THE DAY 553 (July 1, 1964). The JSTPS was responsible for integrating requirements from the different services and then preparing the National Strategic Target List and the SIOP for attacking them. *Id.* at 554.

³²⁰ Ball, *The Development of the SIOP, 1960-1983*, *supra* note 319, at 62; Rosenberg, *Nuclear War Planning*, *supra* note 243, at 175.

³²¹ Rosenberg, *U.S. Nuclear War Planning*, *supra* note 249, at 35.

³²² *Id.*

and Soviet satellite states could be spared, but doing so risked degrading the overall plan.³²³ Furthermore, sparing cities would not have necessarily saved significant civilian casualties due to the proximity of military targets to cities and the effects of radioactive fallout.³²⁴ The SIOP-62 may have maximized operational simplicity, but it did so by trading off some of its strategic rationale, especially by treating China, the Soviet Union and other nations as a singular adversary.³²⁵ These nations had formed a military alliance, although they did not always act in unison or agreement.³²⁶ Potential legal concerns over such an attack plan against multiple countries would have been mitigated by the fact that the document was only a plan for a worse-case scenario and not an execution order.

³²³ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 175. President Kennedy was told that executing a portion of the plan involved “certain grave risks”—notably the fact that U.S. weapons withheld for later use could be destroyed by the adversary’s strikes. *SIOP-62 Briefing*, JCS 2056/281 reprinted at Scott Sagan, *SIOP-62: The Nuclear War Plan Briefing to President Kennedy*, 12 INT’L SECURITY 22, 50 (1987), <http://belfercenter.ksg.harvard.edu/files/CMC50/ScottSaganSIOP62TheNuclearWarPlanBriefingtoPresidentKennedyInternationalSecurity.pdf>.

³²⁴ *SIOP-62 Briefing*, JCS 2056/281 reprinted in Sagan, *SIOP-62: The Nuclear War Plan Briefing to President Kennedy*, *supra* note 323, at 50.

³²⁵ Sagan, *SIOP-62: The Nuclear War Plan Briefing to President Kennedy*, *supra* note 323, at 23.

³²⁶ The Soviet Union formed a multilateral treaty of friendship, cooperation, and mutual assistance with Eastern European Communist nations at Warsaw in 1955, which became known as the Warsaw Pact. Editorial Note, FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, EASTERN EUROPE, vol. 25, 33 (1990). The Soviet Union and People’s Republic of China entered a mutual defense treaty in 1950. Editorial Note, FOREIGN RELATIONS OF THE UNITED STATES, 1950, EAST ASIA AND THE PACIFIC, vol. 6, 311 (1976). Although it later deteriorated, the Sino-Soviet alliance was viewed as a strong during its first decade. By 1954, the U.S. Secretary of State was reporting, “the ChiComs are engaged in building up a war establishment and are motivated by a hostility to the United States which is, on the surface, more virulent than that of Soviet Russia” Report by the Secretary of State to the National Security Council, reprinted in United States Department of State, FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, CHINA AND JAPAN, vol. 14, 809, 811 (1985). See also National Intelligence Estimate (NIE) 10-7-54, reprinted in United States Department of State, FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, 930, 935; NIE 100-3-60, reprinted in United States Department of State, FOREIGN RELATIONS OF THE UNITED STATES, 1958–1960, CHINA, vol. 19, 703, 704 (1996); NIE 13-60, reprinted in United States Department of State, FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, 740-41. While NIE 13-60 predicted the Sino-Soviet alliance would hold together against the West, it did make note of the growing estrangement between the two allies.

B. Legal Considerations and Early Arms-Control Treaties

National war plans under the Eisenhower Administration did not appear to consider nuanced law-of-war questions. Nuclear weapons were, as a matter of policy, considered the same as conventional weapons from a military point of view—although the President still reserved release authority.³²⁷ They were to be used when required to achieve national objectives.³²⁸ From one legal perspective, war plans appeared to be a continuation of strategic and retaliatory bombing concepts existing at the end of the Second World War.³²⁹ Nuclear weapons were no longer just directed at enemy cities, specific counterforce objectives were prioritized. On the other hand, including enemy “population” as a distinct category represented an abandonment of the law of war.³³⁰ For the most part, no legal restraints on potential nuclear war plans were articulated during this period. *Lex specialis* for nuclear weapons did begin to emerge, however, in the form treaties barring the use of nuclear weapons in specific locations.

While Eisenhower did not give nuclear weapons special legal status, he did understand their devastating potential, especially as Soviet capabilities increased. During escalating tensions over Berlin in 1959, Eisenhower held a series of press conferences where he tried to deter Soviet aggression by explaining that it would be in everyone’s interests to avoid armed conflict because of potential escalation.³³¹ He warned that war was not a way to maintain order:

³²⁷ NSC-5810 reprinted in United States Department of State, FOREIGN RELATIONS OF THE UNITED STATES, 1968-1960 vol. 3, 102 (1996).

³²⁸ *Id.*

³²⁹ GEORGE SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS 19 (1958); LASSA OPPENHEIM, INTERNATIONAL LAW, vol. II, 350 (H. Lauterpacht, ed., 7th ed. 1952).

³³⁰ Law-of-war norms prohibiting the targeting of civilian populations without a nexus to a military objective was well documented in the 1950s. *See e.g.*, SPAIGHT, AIR POWER AND WAR RIGHTS 3D, *supra* note 77, at 277; OPPENHEIM, *supra* note 329, at 526; Hamilton DeSaussure, *International Law and Aerial Bombing*, AIR U.Q. REV. 22, 32 (1952); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 337 (1959); Lauterpacht, *supra* note 196, at 368; Myres McDougal & Florentino Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771, 832 (1958). Legal scholar William O’Brien attributed the lack of international law to nuclear war before 1960 to three broad possibilities: (1) legal regulation of nuclear war was impossible; (2) the fear of jeopardizing the defense of the free world against Communism; and (3) the belief that the law of war functions to prevent or mitigate suffering and reduce battlefield passions, but not to regulate hostilities. WILLIAM O’BRIEN, LEGITIMATE MILITARY NECESSITY IN NUCLEAR WAR, II WORLD POLITY Y.B. 35, 35-38 (1960).

³³¹ Erdmann, *supra* note 301, at 114.

Destruction is not a good police force. You don't throw hand grenades around streets to police the streets so that people won't be molested by thugs.

This is exactly the way that you have to look at nuclear war, or any other. Indeed, even in the bombing of the, you might say, relatively moderate type that we had in World War II, we destroyed cities, but not to compel anything except the enemy to allow our ground forces to move forward.

And, I must say, to use that kind of a nuclear war as a general thing looks to me a self-defeating thing for all of us. After all, with that kind of release of nuclear explosions around this world, of the numbers of hundreds, I don't know what it would do to the world and particularly the Northern Hemisphere; and I don't think anybody else does. But I know it would be quite serious.³³²

If full scale nuclear war would end civilization, legal restraints on targeting—*lex specialis* or otherwise—would have no practical meaning. The primary objective national security goal needed to be deterrence; nuclear weapon employment planning and targeting supported that goal.³³³

³³² The President's News Conference, Mar. 11, 1959, reprinted in PUBLIC PAPERS OF THE PRESIDENTS, DWIGHT D. EISENHOWER, <http://www.presidency.ucsb.edu/ws/index.php?pid=11678>.

³³³ National Security Council Report, NSC 5602/1, March 15, 1956, reprinted in FOREIGN RELATIONS OF THE UNITED STATES, 1955-57, National Security Policy, vol. XIX 246 (1990); KAPLAN, *supra* note 242, at 124-25. Bernard Brodie explained the rationale for nuclear deterrence theory in an international environment where legal constraints offer no protections. He argued for the ability to conduct retaliatory strikes against potential Soviet aggression by targeting their cities, explaining that in major wars the distinctions imposed by international law between "military" and "non-military" targets had disintegrated. Bernard Brodie, *War in the Atomic Age*, in THE ABSOLUTE WEAPON 36 (Bernard Brodie, ed. 1946). His influential conclusion summarizes the primacy of deterrence: "Thus far the chief purpose of our military establishment has been to win wars. From now on its chief purpose must be to avert them. It can have almost no other useful purpose." *Id.*, at 62. See also Bernard Brodie, *Anatomy of Deterrence*, RAND Corporation Research Memorandum, RM-2218, July 23, 1958, http://www.rand.org/content/dam/rand/pubs/research_memoranda/2008/RM2218.pdf (arguing for the "super-dirty bomb" to make retribution as "horrendous as possible" and thereby improve the weapons deterrent effect.)

Against this backdrop of Armageddon, international law relating to nuclear weapon testing and deployment found a way to advance. From 1959 to 1972 the United States, Soviet Union and other nations agreed to some restrictions.³³⁴ The first of these was the Antarctic Treaty, signed in 1959.³³⁵ This multilateral treaty reserved Antarctica for peaceful purposes and prohibited military bases, fortifications, maneuvers and weapons testing in the area south of 60 degrees South Latitude.³³⁶ It expressly prohibited nuclear explosions.³³⁷ The second major treaty was the 1963 Limited Test Ban Treaty, which prohibited nuclear weapon testing or explosions in the atmosphere, outer space, or under water.³³⁸ A third major treaty, the 1967 Outer Space Treaty, prohibited the placement of nuclear weapons in orbit, in outer space, or on any celestial bodies.³³⁹ It also prohibited military bases, maneuvers and weapons testing on celestial bodies. The fourth of these treaties, the 1972 Seabed Arms Control Treaty, prohibited the emplacement of nuclear weapons, other weapons of mass destruction, or their support structures on the ocean floor at any point outside the 12-nautical-mile territorial seas of a nation.³⁴⁰ These restrictions were possible because they did not create advantages for any of the Cold War adversaries, nor did they detract from deterrence by creating expectations that anyone would be spared the horrors of a nuclear war.

³³⁴ Bunn, *supra* note 291, at 51; AIR FORCE OPERATIONS AND THE LAW 258–59 (2002).

³³⁵ The Antarctic Treaty, 12 U.S.T. 794 (Dec. 1, 1959).

³³⁶ *Id.* art. I.

³³⁷ *Id.* art. V.

³³⁸ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 14 U.S.T. 1313 (Oct. 10, 1963). The original parties to the treaty were the United States, Soviet Union, and United Kingdom. Many other nations, with notable exceptions of China, France, and North Korea, subsequently acceded to the terms of the treaty. It paved the way for the Comprehensive Test Ban Treaty which has yet to be ratified by the United States.

³³⁹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 U.S.T. 2410, art. IV (Jan. 27, 1967).

³⁴⁰ Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701.

V. Flexible Response and Assured Destruction: The Kennedy & Johnson Years

The *lex specialis* for U.S. nuclear targeting under the Kennedy and Johnson administrations began to emerge as target sets were both broadened and restricted. With a focus on deterrence, any pretense of limiting targets to military-supporting industry was abandoned. During this same era, the United States declared that law-of-war principles applied to nuclear weapon use generally, and specifically prohibited deliberate targeting of enemy populations. Furthermore, the United States entered into nonproliferation treaties restricting the use of nuclear weapons.

A. Historical and U.S. Policy Developments: Evolution of Strategy

The military strategic approach to the Soviets under the Kennedy Administration became conceptually dynamic. Kennedy disagreed with what he perceived as an over-reliance on nuclear weapons, which would deter military invasions, but not guerrilla campaigns, local insurrections, or political deterioration—techniques an adversary might calculate as sufficiently inoffensive as to avoid the risk of nuclear war.³⁴¹ Kennedy's new strategy was known as "Flexible Response" and was characterized as a menu of options varying from conventional, to select nuclear strikes, to total nuclear war.³⁴² It theoretically provided alternatives in the event of a conventional attack by the Soviets.³⁴³ Despite the rhetorical shift in military strategy, though, the Kennedy administration was slow to make changes to SIOP-62, developed by the previous administration.³⁴⁴

The SIOP-63 plan, written in 1962 to take effect the following year, established multiple attack options against potential adversaries like the

³⁴¹ Phillip Nash, *Bear Any Burden? John F. Kennedy and Nuclear Weapons*, in *COLD WAR STATESMEN CONFRONT THE BOMB* 122 (John Gaddis et al., eds., 1999).

³⁴² Bunn, *supra* note 291, at 59.

³⁴³ FRANCIS GAVIN, *NUCLEAR STATECRAFT* 30 (2012). Gavin argues that the differences between the Kennedy and Eisenhower strategies were not as drastic as rhetoric may indicate. *Id.* at 53.

³⁴⁴ *Id.* at 34; Rosenberg, *Nuclear War Planning*, *supra* note 243, at 176–77. Kennedy was briefed on SIOP-62 on September 13, 1961. Sagan, *SIOP-62: The Nuclear War Plan Briefing to President Kennedy*, *supra* note 323, at 22.

Soviet Union or the People's Republic of China.³⁴⁵ The tiered plan first allowed for strike packages against the adversary's nuclear forces, then allowed the addition of other military targets, and then added urban-industrial targets.³⁴⁶ The new plan also allowed withholding attacks against satellite countries or command and control centers in the capitals to keep open the possibility of negotiated settlements.³⁴⁷ The plan even contained options to vary warhead sizes and heights of nuclear bursts.³⁴⁸ Rather than presenting a range of options from conventional to nuclear, SIOP-63 appeared to offer different nuclear options.

Defense Secretary Robert McNamara was briefed on the RAND studies that recommended minimizing urban strikes and he endorsed a so-called "No-Cities" approach.³⁴⁹ In February 1962, he explained his logic in a commencement speech at the University of Michigan:

The [United States] has come to the conclusion that to the extent feasible, basic military strategy in a general nuclear war should be approached in much the same way that the more conventional military operations have been regarded in the past. That is to say, principal military objectives, in the event of a nuclear war stemming from a major attack on the Alliance, should be the destruction of the enemy's military force, not of his civilian population.³⁵⁰

After McNamara's speech, he was pressured to backtrack. The policy was publicly criticized: attacking adversary nuclear forces after they had been employed was seen as a wasted effort.³⁵¹ Worse, the approach would theoretically imply a strategy of preemptive U.S. strikes. Furthermore, President Kennedy refused to rule out a nuclear first strike if the Soviets

³⁴⁵ History and Research Division Headquarters Strategic Air Command, "History of the Joint Strategic Targeting Planning Staff: Preparation of SIOP-63", January 1964, at 5 at 14, GEORGE WASH. U., <http://nsarchive.gwu.edu/nukevault/ebb236/SIOP-63.pdf>.

³⁴⁶ *Id.* at 14-16.

³⁴⁷ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 177.

³⁴⁸ *Id.* at 63.

³⁴⁹ Ball, *The Development of the SIOP, 1960-1983*, *supra* note 319, at 62. The briefing was presented with data compiled by RAND analysts. FRED KAPLAN, *THE WIZARDS OF ARMAGEDDON*, 260-62 (1983).

³⁵⁰ Richelson, *supra* note 251, at 240.

³⁵¹ Ball, *The Development of the SIOP, 1960-1983*, *supra* note 319, at 67.

threatened vital U.S. interests.³⁵² The Soviets also refused to entertain notions of restraint or limiting escalation, as their avowed strategy was to strike military targets, governmental and administrative centers, and cities immediately upon the outbreak of hostilities.³⁵³ U.S. allies in Europe believed the new strategy undermined deterrence and created a possibility that Europe would be decimated by nuclear strikes while the homelands of the principals would be left intact.³⁵⁴ Finally, McNamara's strategy required expensive procurement of additional capabilities.³⁵⁵ Interestingly, the push-back against McNamara's strategy of what seemed to be greater humanitarian considerations was based on practical realities.

As McNamara's strategy was being challenged, President Kennedy was briefed on contingency plans.³⁵⁶ He asked if the United States could preemptively attack the Soviet Union in a manner to prevent unacceptable losses.³⁵⁷ The answer was no: significant Soviet nuclear capabilities would survive any first strike.³⁵⁸ This generated studies to confirm the ineffectiveness of potential first strikes.³⁵⁹

The realization that preemptive strikes would be ineffective caused McNamara to rethink nuclear war plans, focusing on the concept of "Assured Destruction,"³⁶⁰ eventually referred to publically as "Mutually Assured Destruction."³⁶¹ McNamara never abandoned "Flexible Response" in military planning, but the public face of war strategy emphasized the new "Assured Destruction" concept.³⁶² It basically assumed massive retaliation by each side in response to a nuclear attack.³⁶³ If nuclear war broke out, the United States would inflict what McNamara

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* at 67–68.

³⁵⁵ *Id.* at 68. The U.S. nuclear arsenal reached its highest historical level of 31,255 weapons in 1967. Frank Rose, *Comments to the 2015 United National General Assembly First Committee*, U.S. DEP'T OF STATE (Oct. 12, 2015), <https://www.state.gov/t/avc/rls/2015/248112.htm>.

³⁵⁶ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 180.

³⁵⁷ *Id.*

³⁵⁸ *Id.* The ineffectiveness of preemption existed under SIOP-62, and Kennedy was so informed in 1961. Sagan, *SIOP-62: The Nuclear War Plan Briefing to President Kennedy*, *supra* note 323, at 30.

³⁵⁹ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 180.

³⁶⁰ *Id.*

³⁶¹ Bunn, *supra* note 291, at 59.

³⁶² Ball, *The Development of the SIOP, 1960–1983*, *supra* note 319, at 70.

³⁶³ *Id.*

considered “intolerable punishment” on the Soviets by destroying one-half to two-thirds of their industrial capacity and one-quarter to one-third of their population.³⁶⁴ Industrial capacity was not limited to that in direct support of the military. According to Professor Desmond Ball, “it did not matter whether the industrial capacity destroyed consisted of machine goods or rolling stock, tank factories or garment factories, bakeries or toy factories.”³⁶⁵ If “Assured Destruction” really did not distinguish military supporting industry from general industry, then the law of war seemed to have no bearing on nuclear targeting policy and created justifiable skepticism about international law’s ability to regulate nuclear war.³⁶⁶ Rather than relying on promises of legal protections for national survival, which historically offered little insurance against aggression, U.S. policy continued to rely upon preventing nuclear war through realistic promises of Armageddon.³⁶⁷ One senior defense department attorney later justified

³⁶⁴ Ball, *Toward a Critique of Strategic Nuclear Targeting*, *supra* note 245, at 25; Richelson, *supra* note 256, at 240. As a matter of law, the doctrine of belligerent reprisal allows proportional responses to attacks on illegal targets in order to ensure future compliance with the law. *See* 1956 FM 27-10, *supra* note 291, ¶ 497. The doctrine does not contemplate “punishment” as a permissible rationale. The question of the legality of population attacks, however, was receiving new attention at this point in the nuclear age.

³⁶⁵ Ball, *Toward a Critique of Strategic Nuclear Targeting*, *supra* note 245, at 26.

³⁶⁶ Richard Falk expressed the skepticism. Richard Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT’L L. 793 (1965). The duty to distinguish war making industries from general industry was articulated by some legal experts. *See, e.g.*, GREENSPAN, *supra* note 330, at 334-35 (explaining legitimate targets included factories producing finished war products and also those that supply the materials, such as steel); 1956 FM 27-10, *supra* note 296, ¶ 40 (“Factories producing munitions and military supplies . . . may also be attacked and bombarded”), but it was not a universally held norm. *See, e.g.*, OPPENHEIM, *supra* note 329, at 207 (legitimate targets for bombardment include “centres of industry”); DeSaussure, *supra* note 330, at 32 (“*military objective* has been redefined to include the industrial and economic potential of a country.” (emphasis in original)).

³⁶⁷ McNamara later explained his position:

I do not believe we can avoid serious and unacceptable risk of nuclear war until we recognize—and until we base all our military plans, defense budgets, weapon deployments, and arms negotiations on the recognition—that nuclear weapons serve no military purpose whatsoever. They are totally useless—except only to deter one’s opponent from using them.

Robert McNamara, *The Military Role of Nuclear Weapons: Perceptions and Misperceptions*, 62 FOREIGN AFFAIRS 59-80 (1983). In 2000, McNamara said, “I have for years believe that the use of nuclear weapons on any basis would be immoral and unlawful in the broad sense in which I as a non-lawyer conceive of the matter.” Robert McNamara,

this construct by explaining that the legality of nuclear weapons was understood in the context of deterrence: behavioral restraints on international conduct was governed by perceptions of the utility of a course of action; since treaties and other norms could be readily breached or circumvented, nuclear deterrence necessarily needed to inspire fear.³⁶⁸ Planning for widespread use of nuclear weapons against adversarial industry without distinction between military and civilian entities certainly would inspire terror.

B. Legal Developments: Law of War Declarations and Nonproliferation Treaties

Even though “Assured Destruction” seemed to leave no room for the law of war, this era did see significant efforts made to address humanitarian concerns over possible nuclear war. In 1965, the XXth International Conference of the Red Cross (ICRC Conference) met in Austria with eighty-four nations in attendance. One product of the ICRC Conference was a pronouncement on the laws of war.³⁶⁹

- that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- that it is prohibited to launch attacks against the civilian populations as such;
- that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
- that the general principles of the Law of War apply to nuclear and similar weapons[.]³⁷⁰

Forward, in MOXLEY, *supra* note 22, at xv. The record is unclear as to when McNamara came to this understanding.

³⁶⁸ Harry Almond, Jr., *Deterrence and a Policy-Oriented Perspective on the Legality of Nuclear Weapons*, in NUCLEAR WEAPONS AND LAW 57, 63-64 (Arthur Selwyn Miller and Martin Feinrider, eds. 1984). Almond wrote in his personal capacity.

³⁶⁹ *XXth International Conference of the Red Cross*, 1965 INT’L REV. RED CROSS, 567, 568.

³⁷⁰ *Id.* at 26.

This pronouncement became the subject of United Nations General Assembly Resolution 2444 (XXIII) in 1968.³⁷¹ The U.N. General Assembly resolution was unanimously adopted, but without expressly rearticulating the fourth bullet of the ICRC Conference pronouncement on the general law-of-war principles applying to nuclear war.³⁷² During the debate for the resolution, the U.S. representative to the United Nations stated:

The . . . principles set out in that [ICRC Conference] resolution constitute a reaffirmation of existing international law. These principles, though drafted in general terms, clearly state that:

- (1) There is a limit to the permissible means of injuring the enemy, a limit which is inevitably affected by the actions of all parties to the conflict.
- (2) Civilian populations may not be attacked as such, but we recognize that the co-location of military targets and civilians may make unavoidable, certain injury to civilians. Moreover, we should recognize soberly, that none of these principles offers any significant protection to civilians in the catastrophic event of nuclear war.
- (3) There are indeed principles of law relative to the use of weapons; and these principles apply as well to the use of nuclear and similar weapons. The United States believes the above principles are statements of existing international law on this subject.³⁷³

United States nuclear employment directives would thereafter prohibit targeting populations *per se*. As will be evident, however, this had little actual effect on employment planning.

A few other legal developments during the Kennedy-Johnson years have implications for nuclear weapon employment and should be addressed. First, after the Cuban Missile Crisis, a treaty was established

³⁷¹ BOTHE ET AL., *supra* note 225, at 220.

³⁷² G.A. Res. 2444 (XXIII), at 50 (Dec. 19, 1968); BOTHE ET AL., *supra* note 225, at 316; Parks, *Air War and the Law of War*, *supra* note 56, at 69.

³⁷³ BOTHE ET AL., *supra* note 225, at 220; Bunn, *supra* note 296, at 58.

to limit the deployment and use of nuclear weapons.³⁷⁴ This was the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, known as the Treaty of Tlatelolco.³⁷⁵ It established Mexico, Central America, South America and the Caribbean as a nuclear weapons free zone (NWFZ). State parties to the treaty agreed not to possess, test, use or threaten to use, manufacture, produce, or acquire nuclear weapons. The United States was not eligible to be a party to the treaty, but ratified two additional protocols with statements of understanding.³⁷⁶ As a result, the United States is precluded from stationing of nuclear weapons within the NWFZ and from using, or threatening to use, nuclear weapons against a state party unless that party would be assisted in an armed attack by a nuclear weapon state.

Another development produced one of the most critical treaties of this period: the promulgation of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) of 1968, in which countries without nuclear weapons agreed not to “manufacture or otherwise acquire” them, or receive direct or indirect control over them.³⁷⁷ The nuclear weapon possessing state parties to the treaty agreed not to transfer nuclear weapons or control thereof to any country, terrorist group or other recipient. In return, the non-nuclear weapon states received peaceful nuclear technology and agreed to accept safeguards and inspections from the International Atomic Energy Agency. The treaty could be extended after twenty-five years. Despite apparent progress through international treaties, McNamara’s “Assured Destruction” strategic approach dominated the nuclear legacy of the Kennedy-Johnson years.

These two new legal restrictions were possible because they, like others before them, did not put rules on paper to create false expectations of protection from the effects of nuclear war between adversaries, nor did they give any parties an advantage. While these arms control treaties represented some humanitarian progress, McNamara’s “Assured Destruction” continued to define the nuclear legacy of the Kennedy-Johnson years.

³⁷⁴ Bunn, *supra* note 291, at 51.

³⁷⁵ Treaty for the Prohibition of Nuclear Weapons in Latin America (Tlatelolco Treaty), U.N. Doc. A/6663 (Feb. 14, 1967).

³⁷⁶ Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 33 U.S.T. 1792; Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754.

³⁷⁷ Treaty on the Non-Proliferation of Nuclear Weapons, Jul. 1, 1968, 21 U.S.T. 483.

VI. Controlling Escalation: The Nixon and Ford Years

The law applicable to nuclear weapon employment did not significantly change during the Nixon and Ford administrations, but this era did see more attention paid to potential discriminant use of nuclear weapons to prevent conflicts from escalating to a full nuclear exchange. The United States maintained its position that the Second World War legal regime for targeting remained intact. During this period the United States also committed to refrain from intentionally changing the environment as a means of war.

A. Historical and U.S. Policy Developments: New Technologies and Strategies

President Nixon's National Security Advisor, Henry Kissinger, rejected "Assured Destruction." Kissinger was concerned that the Soviets might launch limited nuclear strikes, contrary to their public statements, and began a review of the U.S. military posture and strategic needs immediately after taking office.³⁷⁸ Motivated more by strategic pragmatism than the law of war, President Nixon told Congress in 1971, "I must not be—and my successors must not be—limited to the indiscriminate mass destruction of civilians as the sole possible response to challenges."³⁷⁹ In mid-1972, Nixon directed Kissinger to head a team

³⁷⁸ Ball, *The Development of the SIOP, 1960–1983*, *supra* note 319, at 70.

³⁷⁹ *Id.*, at 72. As careful as Nixon professed to be regarding all-out war with the Soviets, at times he was willing to contemplate using nuclear weapons. As Eisenhower's Vice President, he recalled how the suggestion of nuclear weapons helped conclude the Korean War armistice and discussed using the same tactic to conclude the Vietnam War. Conversations between Nixon and Kissinger, April 23, 1971, and April 19, 1972, *reprinted in* DOUGLAS BRINKLEY & LUKE NICTER, *THE NIXON TAPES* 96–97, 495 (2014); Nina Tannenwald, *Nuclear Weapons and the Vietnam War*, 29 *J. STRATEGIC STUD.* 708 (2006). On April 25, Nixon and Kissinger discussed escalation options for Operation Linebacker, the pending U.S. air campaign against North Vietnam:

Nixon: See, the attack in the North [Vietnam] that we have in mind . . . power plants, whatever's left—POL [petroleum, oil and lubricants], the docks . . . And, I still think we ought to take the dykes out now. Will that drown people?

Kissinger: About two hundred thousand people.

Nixon: No, no, no . . . I'd rather use the nuclear bomb. Have you got

to develop additional strategic nuclear war options, including selective attack options.³⁸⁰

Meanwhile, the understanding of secondary effects of nuclear weapons had been increasing. At the time of Hiroshima and Nagasaki, military planners understood that an atomic explosion would generate blast, heat, and gamma radiation. By the mid-1960s, with increased warhead size, new aspects of detonations needed to be accounted for: electromagnetic pulse, atmospheric ionization, as well as radioactive dust and fallout.³⁸¹ Not only would these effects affect attack plans, they meant that even if attacks were limited to military forces, collateral civilian casualties would be unavoidable.³⁸² Technological advances permitting more accurate targeting of military objectives partially mitigated these concerns in the early 1970s.³⁸³

James Schlesinger, another skeptic of “Assured Destruction,” became Secretary of Defense in 1973 and continued in the office into the Ford Administration.³⁸⁴ Schlesinger took advantage of the selective attack options and new technology to articulate a new strategy with a wide range of nuclear options from very small to very large, focusing smaller strike options on counter-force rather than counter-city targets.³⁸⁵ The emphasis was on controlling escalation by hitting “meaningful targets with a sufficient accuracy-yield combination to destroy only the intended target and to avoid widespread collateral damage.”³⁸⁶

that, Henry?

Kissinger: That, I think, would just be too much.

Nixon: The nuclear bomb, does that bother you? . . . I just want you to think big, Henry, for Christsakes.

DANIEL ELLSBERG, *SECRETS* 418 (2002); Tannenwald, *supra*, at 716 (quoting White House Tapes, 25 April 1972, Executive Office Building, Tape 332–25). Despite the crass language at the time, Nixon later said he ultimately decided against using the nuclear bomb and against taking out dykes because they were not military targets. Tannenwald, *supra*, at 709.

³⁸⁰ Ball, *The Development of the SIOP, 1960–1983*, *supra* note 319, at 70.

³⁸¹ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 179.

³⁸² *Id.*

³⁸³ Bunn, *supra* note 291, at 58–59.

³⁸⁴ FREDMAN, *supra* note 134, at 361.

³⁸⁵ *Id.* at 361–62.

³⁸⁶ *Id.* at 361.

The targeting strategy of the Ford administration, developed during the Nixon years, added emphasis on destroying the Soviet's economic objects.³⁸⁷ The new policy emphasized that the "fundamental mission of U.S. nuclear forces is to deter nuclear war[.]"³⁸⁸ Nuclear weapon employment planning supported deterrence. If deterrence failed, the conflict needed to be terminated at the lowest level feasible.³⁸⁹ Escalation would be controlled with options that "(a) hold some vital enemy targets hostage to subsequent destruction by survivable nuclear forces, and (b) permit control over the timing and pace of attack execution, in order to provide the enemy opportunities to reconsider his actions."³⁹⁰ If escalation could not be controlled, then the United States would destroy "the political, economic and military resource[s] critical to the enemy's post-war power, influence and ability to recover at an early time as a major power."³⁹¹ Implementing guidance provided:

Every reasonable effort will be made to limit attacks in the vicinity of densely populated areas. Further, damage to non-military targets and friendly military forces will be minimized through selection of the lowest weapon yields necessary, delivery vehicles with suitable accuracies, and alternative targets to accomplish the desired objective.³⁹²

Despite the guidance, the resulting military war plan called for destruction of 70% of the Soviet economic and industrial base.³⁹³ This economic recovery strategy apparently included targeting Soviet fertilizer factories in order to affect post-war food production—an indirect attack on the adversary's population.³⁹⁴

³⁸⁷ Ball, *Toward a Critique of Strategic Nuclear Targeting*, *supra* note 245, at 26.

³⁸⁸ *National Security Decision Memorandum 242*, 1, NIXON LIBRARY (Jan. 17, 1974), http://www.nixonlibrary.gov/virtuallibrary/documents/nsdm/nsdm_242.pdf.

³⁸⁹ *Id.* at 2.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² Nuclear Weapon Employment Policy, 7, April 10, 1974, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB173/SIOP-25.pdf>

³⁹³ *Id.* at A-7; Ball, *The Development of the SIOP, 1960–1983*, *supra* note 319, at 74.

³⁹⁴ SCOTT SAGAN, *MOVING TARGETS* 46 (1989).

B. Legal Developments: The Environmental Modification Convention

At this stage in history, the United States complied with its understanding of law-of-war obligations, but the rules appeared to have minimal impact on nuclear targeting considerations.³⁹⁵ In 1973 the Office of the Legal Advisor to the State Department validated the legitimacy of attacking enemy industrial centers based upon customary international law as indicated by the language of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.³⁹⁶ The legal standard for such attacks would be whether “the war making potential of such facilities to a party to the conflict may outweigh their importance to the civilian economy and deny them immunity from attack.”³⁹⁷ Furthermore, the U.S. legal position was:

The existing laws of armed conflict do not prohibit the use of weapons whose destructive force cannot be limited to a specific military objective. The use of such weapons is not proscribed when their use is necessarily required against a military target of sufficient importance to outweigh inevitable, but regrettable, incidental casualties to civilians and destruction of civilian objects.³⁹⁸

This position captured the interplay between the law-of-war principles of military necessity, discrimination, and proportionality. The law appeared to maintain its Second World War incarnation with broad notions of

³⁹⁵ Air Force Colonel Jay Terry, the Director of International Law for the U.S. Air Force in Europe (writing in his personal capacity), surveyed the existing law applicable to aerial warfare and added, “nuclear weapon employment is now subject only to social and political controls rather than legal.” Jay Terry, *The Evolving Law of Aerial Warfare*, AIR U. REV. (1975), <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1975/nov-dec/terry.html>.

³⁹⁶ The State Department Legal Advisor explained that article 8 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, defined entities legally subject to armed attack as “any large industrial center or . . . any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.” Arthur Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT’L L. 118, 123 (1973).

³⁹⁷ *Id.* at 123-24.

³⁹⁸ *Id.* at 124.

military objectives and toleration for civilian casualties.³⁹⁹ No restrictions, apart from vague proportionality considerations, were placed on the potential annihilation of an adversary's economic and industrial areas. The inability of United States to restrain itself through legal mechanisms was likely due to the recognition that the Soviets would not reciprocate.⁴⁰⁰ The legal construct for economic targeting would not be revisited until decades later.⁴⁰¹

The law, however, did not stagnate during this period. One of the legal legacies of the Nixon-Ford years was the effort to develop a treaty to prevent weather modification as a means of war. The treaty was finalized in the 1977 Convention of the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), which prohibited the "deliberate manipulation" of environmental forces *as the means* of causing injury or destruction to an adversary.⁴⁰² As a practical matter, it prohibited the use of nuclear weapons, or any other weapons, to hurt an enemy by purposely causing earthquakes, tsunamis, or changes in weather patterns that would be expected to last for months.⁴⁰³ The United States and other nuclear weapons states were willing to prohibit such intentional changes of the environment as a means of war, but they refused to prohibit broader use of weapons that would be expected

³⁹⁹ The U.S. Air Force Judge Advocate General's reportedly told the service's Director of Plans that legitimate military objectives remained unchanged since 1945, they remained, "includes the entire military, economic and industrial strength of the enemy." Hamilton DeSaussure & Robert Glasser, *Methods and Means of Warfare: Air Warfare—Christmas 1972*, in *LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE* 127 (Peter Trooboff & Arthur Goldberg, eds. 1975) (quoting "Law of War Regulating Aerial Bombardment," Memorandum for Director of Plans, Deputy Chief of Staff Plans and Operations, United States Air Force (unpublished memorandum, Apr. 28, 1971)).

⁴⁰⁰ The Soviets showed no interest in restraints on potential nuclear weapon use despite the spokesmen for Western governments emphasizing the need to limit collateral damage. Herbert York, *The Nuclear 'Balance of Terror' in Europe*, *BULLETIN OF ATOMIC SCIENTISTS* (May 1976) at 10.

⁴⁰¹ See *infra*, Section XI.B

⁴⁰² Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (hereinafter "The ENMOD Convention"), May 18, 1977, 31 U.S.T. 333.

⁴⁰³ The ENMOD Convention, Understandings Regarding the Convention, Understanding Relating to Article II, <http://www.state.gov/t/isn/4783.htm#understandings>; Written Statement of the Government of the United States of America before the International Court of Justice, (Request by the World Health Organization for an Advisory Opinion on the Question of the Legality Under International Law and the World Health Organization Constitution of the Use of Nuclear Weapons by a State in War or Other Armed Conflict), at 30 (June 10, 1994), <http://www.icj-cij.org/docket/files/93/10947.pdf>.

to cause widespread and severe environmental damage as a side effect of a weapon's intended purpose.⁴⁰⁴ The 1977 ENMOD convention, like other treaties before it, provided no advantage to either side of the Cold War standoff and did not promise significant protections should conflict arise.

VII. Minimum Deterrence Upended: The Carter Years

The nuclear targeting strategy under President James E. "Jimmy" Carter returned to distinguishing between general industry and war-supporting industry. While military related industry was to be attacked early in a conflict, general industry was reserved for retaliatory strikes to prevent economic recovery. The Carter administration fully recognized that rules prohibited population targeting *per se*, but still allowed economic recovery targeting—a legal construct that undermined theoretical civilian protections.

President Carter initially intended to emphasize minimum deterrence, but was stopped by intelligence reports of an unprecedented Soviet military buildup.⁴⁰⁵ An assessment of Soviet doctrine informed him that they considered victory in nuclear war possible.⁴⁰⁶ This forced the President to determine the best way to deny Soviet Union objectives should war break out.

Thus, President Carter directed a Nuclear Targeting Policy Review (NTPR) be conducted in 1977.⁴⁰⁷ Defense Secretary Harold Brown forwarded the review to President Carter. Brown explained that while the Soviet population had not been targeted in recent years, the United States should conduct high-level discussions on whether populations should be targeted since the Soviets continued to develop plans to shelter and

⁴⁰⁴ See e.g., Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL'Y 419, 424 (1987); Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom 56 (Request by the World Health Organization for an Advisory Opinion on the Question of the Legality Under International Law of the Use of Nuclear Weapons by a State in War or Other Armed Conflict).

⁴⁰⁵ Rosenberg, *Nuclear War Planning*, *supra* note 243, at 184.

⁴⁰⁶ *Id.* at 185.

⁴⁰⁷ Ball, *Toward a Critique of Strategic Nuclear Targeting*, *supra* note 245, at 16.

evacuate civilian populations.⁴⁰⁸ The NTPR stated that the United States should “continue current policy with respect to the targeting of population, in which population, as such, is not an objective target.”⁴⁰⁹ It explained,

We find no reason to believe that targeting population *per se*, would be a more effective deterrent or a more useful objective in general war than targeting the specific economic objectives suggested above along with the control apparatus and military power which the Soviets appear to consider of high value. Furthermore, targeting population would require substantial additional allocation of weapons if we assume that the Soviet civil defense is implemented and effective, and therefore would divert weapons from other objectives. However, estimates of population fatalities will continue to be an important criterion for any decision maker contemplating the use of nuclear weapons. Our data and methodology for making such estimates should continue to be improved. We should also keep under continuous examination the feasibility and the implications for other targeting objectives of adjusting our targeting so as to be able to attack some defined portion of Soviet population even if it is evacuated and/or sheltered. Whether we should have a specific target set for use in such a case remains an unresolved issue.⁴¹⁰

The NTPR called for maintaining the targeting of populations and general industry supporting long-term recovery as “an assured destruction capability (to be withheld so long as the Soviets spared U.S. cities and industries)[.]”⁴¹¹ Neither Brown’s letter, nor the NTPR specifically mentioned legal concerns with targeting civilian populations. They implied the application of the doctrine of belligerent reprisal. They also highlighted the uncomfortable truth of the dark side to Second World War

⁴⁰⁸ Harold Brown, *Nuclear Targeting Policy Review, Memorandum for the President*, Nov. 28, 1978, NAT’L ARCHIVES 4, (2011), <https://www.archives.gov/files/declassification/iscap/pdf/2011-064-doc39.pdf>

⁴⁰⁹ Nuclear Targeting Policy Review, *Summary of Major Findings and Recommendations*, NAT’L ARCHIVES xiii (Nov. 1, 1978), <https://www.archives.gov/files/declassification/iscap/pdf/2011-064-doc39.pdf> [hereinafter Nuclear Targeting Policy Review Summary].

⁴¹⁰ *Id.* at xiii-xiv.

⁴¹¹ *Id.* at ix.

strategic bombing approaches: Targeting the adversary's economy meant targeting the adversary's cities. Walter Slocombe, a senior Carter administration DoD official, confirmed as much when he explained that the cumbersome Soviet economy had relatively few facilities that would be considered critical, thus, "Massive attacks on industrial production, transportation, and material resource targets" were needed to destroy the Soviet economy; these "would not be distinguishable from attacks on the population as such."⁴¹²

NTPR also called for recommendations on "more effective targeting of Soviet military and war-sustaining capacity[.]"⁴¹³ The report emphasized that submarine launched nuclear weapons, while having the capacity to survive a Soviet attack, were less effective against hardened Soviet facilities than intercontinental ballistic missiles, which were more vulnerable to attack.⁴¹⁴ Thus, the report recognized the need for greater "hard target capabilities"—which were projected to be ready in the form of air launched cruise missiles in the 1980s.⁴¹⁵ The NTPR also called for improvements in selecting Soviet targets to effectively attack Soviet military capabilities—noting that attacks on conventional force home bases during a conflict may simply mean destroying empty facilities.⁴¹⁶

The NTPR resulted in Presidential Directive 59 (PD-59), Nuclear Weapons Employment Policy, which Carter signed in July 1980.⁴¹⁷ The new "countervailing" strategy has been generally viewed as a refinement of the escalation control efforts emphasized by Schlesinger, rather than being driven by legal concerns.⁴¹⁸ Under PD-59, deterrence of nuclear and non-nuclear attacks remained the most fundamental policy objective.⁴¹⁹ Deterrence would require the Soviets to realize that their aggression would not result in "any plausible definition of victory."⁴²⁰ It did so by prioritizing targets based on those objects and people most valued by the

⁴¹² Walter Slocombe, *Preplanned Operations*, in *MANAGING NUCLEAR OPERATIONS* 129 (Ashton Carter et al. eds., 1987).

⁴¹³ Brown, *supra* note 408, at 2.

⁴¹⁴ Nuclear Targeting Policy Review Summary, *supra* note 409, at v.

⁴¹⁵ *Id.* at vi.

⁴¹⁶ *Id.*

⁴¹⁷ Ball, *Toward a Critique of Strategic Nuclear Targeting*, *supra* note 245, at 17.

⁴¹⁸ FREEDMAN, *supra* note 134, at 375; Ball, *The Development of the SIOP, 1960–1983*, *supra* note 319, at 82.

⁴¹⁹ Presidential Directive 59 (PD-59), 1, July 25, 1980, <https://www.jimmyCarterlibrary.gov/documents/pddirectives/pd59.pdf>

⁴²⁰ *Id.* Walter Slocombe, *Countervailing Strategy*, 5 INT'L SECURITY 4, 18, 21 (1981)

Soviets: their leadership and military forces, especially command and control capabilities.⁴²¹ This nuclear strategy de-emphasized, but retained, Soviet industrial targets. The new countervailing strategy called for:

[S]equential selection of attacks from among a full range of military targets, industrial targets providing immediate military support, and political control targets, while retaining a survivable and enduring capability that is sufficient to attack a broader set of urban and industrial targets.⁴²²

Presidential Directive 59 distinguished “industrial facilities which provide immediate support to military operations” from a separate category of “general industrial capacity.”⁴²³ Furthermore, the directive was to “limit collateral damage to urban areas, general industry and population targets outside these categories, consistent with effectively covering the objective target”⁴²⁴ General industry appeared to receive a more protected status as a civilian object, departing from its treatment since the Kennedy-Johnson years as indistinguishable from military supporting industry.

The Department of Defense provided an example list of targets to the Senate Armed Services Committee in March 1980. The list is informative:

War-supporting industry

Ammunition factories.

Tank and armored personnel carrier factories.

Petroleum refineries.

Railway yards and repair facilities.

Industry contributing to economic recovery

Coal.

Basic steel.

Basic aluminum.

Cement.

Electric power.

⁴²¹ SAGAN, MOVING TARGETS, *supra* note 394, at 49-52.

⁴²² PD-59, *supra* note 419 at 2; Freedman characterizes the Carter administration’s nuclear strategy as a refinement of the strategy initially developed by Schelsinger. FREEDMAN, *supra* note 134, at 375.

⁴²³ PD-59, *supra* note 419, at 3.

⁴²⁴ *Id.* at 3-4.

Conventional military forces

Kasernes [Barracks].
Supply depots.
Marshaling points.
Conventional air fields.
Ammunition storage facilities.
Tank and vehicle storage yards.

Nuclear forces

ICBMs/IRBMs, [intercontinental ballistic missiles and intermediate-range ballistic missiles, together with their launch facilities and launch command centers].
Nuclear weapon storage sites.
Long range aviation bases (nuclear capable aircraft).
SSBN [nuclear ballistic missile submarine] bases.

Command and control

Command posts.
Key communications facilities.⁴²⁵

Arguments could easily be made for the samples of “Industry contributing to economic recovery” to be reclassified as “War-supporting industry.” The connections, however, would be more indirect. For example, military-industrial plants would need heat and power from coal and electricity. Military equipment was made from steel, structures from concrete. During the Second World War, steel plants were a priority military-industrial target. The distinction in the category examples does not appear to have been “war-supporting” versus “economic recovery” industry, but the industries’ direct or indirect relation to military end products.

PD-59 specifically refrained from population targeting. While it permitted the continued targeting of all industrial facilities, it distinguished military supporting industries from general industries. Examples of economic recovery objectives, cited as targetable, also appeared to be critical to direct military support. Despite this “progress” in humanitarian and law-of-war targeting categories, all 200 of the largest Soviet cities and

⁴²⁵ Senate Armed Services Committee, *Department of Defense Authorization for Appropriations for Fiscal Year 1981*, BABEL 2721(1980), <https://babel.hathitrust.org/cgi/pt?id=umn.31951p00475313z;view=1up;seq=63>

80% of cities with populations over twenty-five thousand contained targets for potential nuclear strikes in 1980.⁴²⁶

VIII. The End of the Cold War: The Reagan and Bush 41 Years

Nuclear weapon employment law and strategy did not change significantly during the Reagan and Bush administrations, although arms control breakthroughs allowed significant reductions in nuclear arsenals. The end of the Cold War allowed the United States to eliminate certain targets altogether.

Ronald Reagan fully understood the law-of-war issue with nuclear weapons in moral terms. He stated, “By the time the 1980s rolled around, we were placing our entire faith in a weapon whose *fundamental target was the civilian population*.”⁴²⁷ Despite concerns, the Reagan administration affirmed President Carter’s PD-59 targeting policy in 1981 with National Security Decision Directive 13, with one significant change.⁴²⁸ Deterrence remained fundamental, but if deterrence failed then the policy was for the United States and its allies to prevail in a nuclear war.⁴²⁹ Other Carter-era nuclear employment guidance was maintained. For example, the guidance to “limit collateral damage consistent with effective accomplishment of the attack objective” remained.⁴³⁰ Targeting also stayed focused on strategic nuclear systems, conventional forces, military-political centers and communications, as well as the 200 largest Soviet urban-industrial centers.⁴³¹ The military under the Reagan administration also improved planning for small nuclear options to increase the chances of the Soviets perceiving them to be limited.⁴³²

⁴²⁶ Ball, *Toward a Critique of Strategic Nuclear Targeting*, *supra* note 245, at 27.

⁴²⁷ RONALD REAGAN, AN AMERICAN LIFE 549 (1990).

⁴²⁸ *Id.* at 17.

⁴²⁹ National Security Decision Directive 13, *Nuclear Weapons Employment Policy*, REAGAN LIBRARY 1, <https://reaganlibrary.archives.gov/archives/reference/Scanned%20SDDs/NSDD13.pdf> [hereinafter NSDD-13].

⁴³⁰ *Id.* at 2.

⁴³¹ Publicly available sources indicate that PD-59 and NSDD-13 used the same basic targeting categories. *See, e.g.*, Rosenberg, *Nuclear War Planning*, *supra* note 243, at 187; Bunn, *supra* note 291, at 59; Ball, *The Development of the SIOP, 1960–1983*, *supra* note 319, at 79–82.

⁴³² Elbridge Colby, *The United States and Discriminate Nuclear Options in the Cold War*, in ON LIMITED NUCLEAR WAR IN THE 21ST CENTURY, 64–65 (Jeffrey Larsen & Kerry Kartchner, eds., 2014). Although Schlesinger called for the development of limited strike

President Reagan did not overhaul the nuclear target list, but changed the United States approach to potential conflicts to convince the Soviets that the United States intended to prevail in conflict should one arise.⁴³³ First, the Reagan administration focused on deploying new cruise and ballistic missiles, introducing new classes of missiles into the European theater, resuscitating the B-1 bomber cancelled by the previous administration, developing the B-2 stealth bomber, and pursuing strategic defense.⁴³⁴ While Reagan wanted to eventually rid the world of nuclear weapons, his intermediate goal was to create sufficient defenses so as to change Assured Destruction to Assured Survival.⁴³⁵ Moreover, Reagan thought he would only be able to achieve his goals by negotiating with the Soviets from a position of military strength.⁴³⁶ Reagan and his successor, President George H.W. Bush, pursued a robust arms control agenda which resulted in a series of arms treaties with the Soviets. At the close of Reagan's first summit meeting with Soviet leader Mikhail Gorbachev, they issued a mutual statement announcing that they had "agreed that a nuclear war cannot be won and must never be fought."⁴³⁷

Planning for war contingencies continued against the backdrop of arms control. President Bush's Secretary of Defense Richard "Dick" Cheney explained that arms control was made possible by rationalizing nuclear targeting.⁴³⁸ Cheney ended "encrusted bureaucratic thinking" which planned on striking cities like Kiev with "literally dozens of warheads."⁴³⁹ These plans were based on guaranteeing target destruction and hedging against failures of different weapon types and delivery

options during his tenure as Secretary of Defense, the Office of the Secretary of Defense under Secretary Casper Weinberger determined that the military's previous plans would not be perceived as limited. *Id.*

⁴³³ After leaving office, Reagan wrote about "the people at the Pentagon" who thought a nuclear war might be winnable: "I thought they were crazy. Worse, it appeared there were also Soviet generals who thought in terms of winning a nuclear war." REAGAN, *supra* note 432, at 586.

⁴³⁴ Colby, *supra* note 432, at 63.

⁴³⁵ REAGAN, *supra* note 427, at 550.

⁴³⁶ *Id.* at 548-49.

⁴³⁷ *Joint Soviet-United States Statement on the Summit Meeting in Geneva*, REAGAN LIBRARY (Nov. 21, 1985), <https://reaganlibrary.archives.gov/archives/speeches/1985/112185a.htm>

⁴³⁸ DICK CHENEY, *IN MY TIME* 233 (2011).

⁴³⁹ *Id.* Cheney attributed the phrase "encrusted bureaucratic thinking" to then Chairman of the Joint Chiefs Colin Powell. *Id.*

systems.⁴⁴⁰ The “encrusted bureaucratic thinking” may have been a significant factor hindering law-of-war concerns from entering into nuclear targeting considerations during the Cold War. The October 1989 nuclear war plan revision, SIOP-6F, emphasized targeting Soviet leadership and means of political and military control.⁴⁴¹

The Cold War ended with the peaceful fall of the Berlin Wall in November 1989, and the collapse of the Soviet Union on Christmas Day 1991. The United States removed nuclear targets in Eastern Europe and former Soviet states from war plans.⁴⁴² With the specter of total nuclear Armageddon seemingly gone, concerns over rogue states and terrorism rose.

IX. New Rules: The 1977 Additional Protocols

While the *lex specialis* for nuclear weapons did not necessarily change during the last two decades of the Cold War, law-of-war rules for conventional weapons certainly did receive a long awaited update in the form of the 1977 Additional Protocols to the Geneva Conventions.⁴⁴³ Although signed by the United States during the Carter administration, the full analysis and impact of the protocols took roughly a decade and the United States ultimately rejected Additional Protocol I (AP I). Meanwhile, the United States recognized that some of the provisions of the Additional Protocols are articulations of pre-existing customary international law—applicable to conventional and nuclear weapons. Thus, the law applicable to nuclear weapon employment must be viewed in light of this unique context.

⁴⁴⁰ Theodore Postal, *Targeting*, in *MANAGING NUCLEAR OPERATIONS* 379–80 (Ashton Carter et al., eds., 1987).

⁴⁴¹ FREEDMAN, *supra* note 134, at 431–32.

⁴⁴² *Id.* at 432.

⁴⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Jun. 8 1977 [hereinafter AP I], reprinted in SCHINDLER & TOMAN, *supra* note 53, at 711-74; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of victims of Non-International Armed Conflicts, Jun. 8, 1977 [hereinafter AP II], reprinted in SCHINDLER & TOMAN, *supra* note 53, at 775-818.

A. Background

The Additional Protocols, which were negotiated during multiple formal and informal sessions of a 1974–1977 diplomatic conference.⁴⁴⁴ The First Additional Protocol addressed law-of-war issues in international armed conflicts. The ICRC began the discussion by presenting draft protocols with the understanding that they were not intended to broach problems relating to atomic, bacteriological or chemical warfare.⁴⁴⁵ The United States, United Kingdom and Soviet Union endorsed the ICRC position.⁴⁴⁶ The United States, along with other nations, signed the protocols while providing statements of understanding that the rules did not affect, regulate or prohibit the use of nuclear weapons.⁴⁴⁷

The inapplicability of AP I to nuclear weapons is not in the language of the treaty and thereby caused concern with the United States⁴⁴⁸ In 1985, a Joint Chiefs of Staff memo explained that “the rules against indiscriminate methods of warfare and excessive collateral damage . . . might severely limit the utility of [nuclear] weapons.”⁴⁴⁹ The memo also recognized that legal experts were disputing the applicability of the treaty to nuclear weapons.⁴⁵⁰ The military was concerned with making a reservation to the treaty over the nuclear issue:

The problem with taking a treaty reservation on AP I’s inapplicability to nuclear weapons is that such an act would constitute a formal admission that, in the absence of the reservation, the Protocol does apply to nuclear and chemical weapons. This could create problems if the United States needed to launch such weapons from the soil of allies who had not taken a similar reservation.⁴⁵¹

⁴⁴⁴ BOTHE ET AL., *supra* note 225, at ix. The high level expert discussions leading to AP I may have influenced nuclear targeting changes in the 1970s.

⁴⁴⁵ *Id.* at 218.

⁴⁴⁶ *Id.* at 219.

⁴⁴⁷ *Id.* at 219–20; 2015 DoD LAW OF WAR MANUAL ¶6.18.3.

⁴⁴⁸ Appendix to John W. Vessey, Jr., Chairman, Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, May 3, 1985, at 90.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 91.

⁴⁵¹ *Id.* at 90.

The memo ultimately recommended that if the United States ratified the treaty, it should expressly condition its ratification on acceptance of an understanding excluding the use of nuclear and chemical weapons from regulation by the Protocol “to make it clear that the rules related to use of weapons in the Protocol do not have *any effect on* the use of nuclear or chemical weapons.”⁴⁵²

The ratification language was never needed. In a letter to the Senate, President Reagan unequivocally rejected the treaty, stating, “Protocol I is fundamentally and irreconcilably flawed.”⁴⁵³ One of the major factors for the United States’ rejection of AP I was its radical abolition of the doctrine of belligerent reprisal against enemy civilian populations.⁴⁵⁴ The doctrine allowed such attacks in response to the enemy’s law-of-war violations with the intent to deter the enemy from future violations.⁴⁵⁵ The concern was that without the sanctions permitted under this doctrine, an adversary could attack U.S. cities and the United States would be legally prohibited from responding in kind.⁴⁵⁶

B. The Articulation of Law-of-War Principles

Even after rejecting AP I, the United States considered portions of it as reflecting customary international law.⁴⁵⁷ The question became which provisions reflect customary international law, and which of those, if any, would be applicable to the use of nuclear weapons?

Prior to AP I, the U.S. military’s understanding of the law of war was presented primarily in the 1956 Army Field Manual, *The Law of Land Warfare*, which was updated in 1976. It articulated three law-of-war

⁴⁵² *Id.* at 91.

⁴⁵³ Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, January 29, 1987. For a detailed critique of AP I’s faults, see Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT’L L. & POL’Y 467–68 (1987); Parks, *Air War and the Law of War*, *supra* note 56.

⁴⁵⁴ Sofaer, *supra* note 453, at 469.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ See Matheson, *supra* note 404, at 427; 1977 Protocols Additional to the Geneva Conventions: Memorandum for Mr. John H. McNeill, Assistant Gen. Counsel, Office of the Secretary of Defense, Customary International Law Implication (May 9, 1986) *reprinted in* The Judge Advocate General’s Legal Center & School, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 234 (2012).

principles: humanity, chivalry, and military necessity.⁴⁵⁸ Since signing AP I, the United States acknowledged proportionality and distinction as principles of the law of war.⁴⁵⁹ The 2015 *DoD Law of War Manual* explains proportionality and distinction are founded upon the three earlier principles.⁴⁶⁰

In 1987 Michael Matheson, Deputy Legal Advisor to the U.S. State Department, outlined the U.S. position on aspects of AP I to an American Red Cross Conference on International Humanitarian Law. During those remarks he endorsed the application of the principle of proportionality:

We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them, and that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage.⁴⁶¹

The U.S. military had long followed a similar requirement, found under the heading “unnecessary killing and devastation” within the Army’s Field Manual.⁴⁶² In other words, the requirement to conduct

⁴⁵⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (C1, 1976) ¶ 3 [hereinafter 1976 FM 27-10]. U.S. DEP’T OF AIR FORCE, AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, November 19, 1976 [hereinafter AFP 110-31] (listing the same three principles). AFP 110-31 ¶ 1-3.

⁴⁵⁹ LAW OF WAR MANUAL, *supra* note 19, ¶ 2.6 (recasting “chivalry” as “honor”).

⁴⁶⁰ *Id.*, ¶ 2.1. Sean Watts, *The DOD Law of War Manual’s Return to Principles*, JUST SECURITY (June 30, 2015, 9:12 AM), <https://www.justsecurity.org/24270/dod-law-war-manuals-return-principles/>.

⁴⁶¹ Matheson, *supra* note 404, at 426. AP I, art. 51(5)b contains the language of proportionality provision prohibiting attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” AP I, art. 51(2) (containing the prohibition against attacks with the primary purpose of spreading terror).

⁴⁶² 1976 FM 27-10, *supra* note 458, ¶ 41 (“[L]oss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.”).

proportional attacks is not a new rule. The challenge with proportionality, however, is its subjective and imprecise nature.⁴⁶³

The principle of distinction, also known as discrimination, was also codified in AP I, requiring that all parties to a conflict “shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁴⁶⁴ The principle, which is that military violence be directed at military targets, is directly related to the principle of military necessity.⁴⁶⁵ It is also related to the principle of humanity, which prohibits actions not required by military necessity.⁴⁶⁶ AP I’s construction of the discrimination principle in Article 48 also codified the duty of a defender to keep civilian populations and objects distinct from military ones.⁴⁶⁷ The principle of discrimination, however, is not new. Its origins have been traced back to the Hague Conventions and the 1965 ICRC pronouncement endorsed by the United Nations General Assembly.⁴⁶⁸

⁴⁶³ LAW OF WAR MANUAL, *supra* note 19, at ¶ 2.4.1.2; Rogier Bartels, *Dealing With the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, 46 ISR. L. REV. 271, 275-76 (2013). In 1982, Major General J.P. Wolfe, Judge Advocate General for the Canadian Defense Forces, and W. Hays Parks, Chief, International Law Branch, International Affairs Division, in the Office of The Judge Advocate General of the Army, debated the standard for violations of proportionality; they eventually agreed that “proportionality was gauged by ‘casualties so excessive . . . as to be tantamount to the intentional attack of the civilian population, or to the total disregard for the civilian population.’” *More “Rolling Thunder” (Editor’s Note)*, XXIII AIR U. REV. 6, 82, 84 (1982), <https://babel.hathitrust.org/cgi/pt?id=uiug.30112105112301;view=1up;seq=84>.

⁴⁶⁴ AP I, art. 48; Parks, *Air War and the Law of War*, *supra* note 56, at 113 (“Article 48 states the fundamental principle of discrimination, a principle with which there should be no disagreement.”). While Article 48’s general restatement of the principle of discrimination is in keeping with the U.S. view of customary international law, subsequent articles in AP I are more problematic. Parks, *Air War and the Law of War*, *supra* note 56, at 113.

⁴⁶⁵ Parks, *Air War and the Law of War*, *supra* note 56 at 14. The principle of military necessity “justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” 1976 FM 27-10, *supra* note 464, ¶ 3; *see also* LAW OF WAR MANUAL, *supra* note 19, at ¶ 2.2.

⁴⁶⁶ LAW OF WAR MANUAL, *supra* note 19, ¶ 2.3.1.1.

⁴⁶⁷ BOTHE ET AL., *supra* note 225, 323–24.

⁴⁶⁸ *Id.* at 321-23; LAW OF WAR MANUAL, *supra* note 19, ¶ 2.5 n.80.

C. Targeting Provisions

Arising from the principle of discrimination, AP I articulates targeting guidance with the first definition of “military objective” articulated in a treaty since the Hague Conventions.⁴⁶⁹ Article 52(2) contains key language:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

This establishes a two-part test for attacks.⁴⁷⁰ First, the entity to be attacked must make an effective contribution to military action. Second, attacking the entity must offer a definite military advantage under existing circumstances. Both parts of the test must exist for an attack to be legitimate.

This definition of military objective can be found almost verbatim in the 1976 update to the 1956 Army Field Manual.⁴⁷¹ It is repeated word-

⁴⁶⁹ Parks, *Air War and the Law of War*, *supra* note 56, at 33 n.124.

⁴⁷⁰ LAW OF WAR MANUAL, *supra* note 19, ¶5.6.5.

⁴⁷¹ The 1976 update to the 1956 Field Manual reads:

Military objectives—*i.e.*, combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage—are permissible objects of attack (including bombardment). Military objectives include, for example, factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations. Pursuant to the provisions of Article 25, HR [Universal Declaration of Human Rights], however, cities, towns, villages, dwellings, or buildings which may be classified as military objectives, but which are undefended . . . , are not permissible objects of attack.

for-word in the 1976 Air Force Pamphlet on international law and the law of war.⁴⁷² Thus, AP I Article 52(2) did not appear to be controversial in 1977.

The standard did create some concern within the U.S. Department of Defense. In a 1982 preliminary assessment, the Joint Chiefs of Staff raised concerns with possible interpretations requiring attack effects to be strictly confined to military objectives, rather than relying on the traditional proportionality standards.⁴⁷³ The report expressed problems the standard would potentially create with strategic bombardment:

Strategy aimed at destruction of the enemy's political infrastructure or economic or industrial establishment might result in targeting objects that make only a remote contribution to military action but significantly curtail the enemy's will to continue hostilities. To the extent that this article prohibits strategic bombing, it could severely impede US war efforts.⁴⁷⁴

The 1985 Joint Chiefs of Staff final assessment; however, determined that the definition of military objective within Article 52(2) included "political and economic activities" and ultimately characterized the standard as "militarily acceptable."⁴⁷⁵ A year later, U.S. military service lawyers wrote that AP I Article 52(2) reflected customary international law.⁴⁷⁶ While this rule prohibits attacks on civilian objects, it does not

1976 FM 27-10, *supra* note 458, ¶ 40.c.

⁴⁷² AFP 110-31, *supra* note 458, ¶ 5-3b(1).

⁴⁷³ Joint Chiefs of Staff, *Review of the 1977 Protocols to the 1949 Geneva Conventions*, JCS 2497/24-4, DEP'T OF DEF. 32 (Sept. 13, 1982) http://www.dod.mil/pubs/foi/Reading_Room/Special_Collections/13-M-3010.pdf.

⁴⁷⁴ *Id.* at 33.

⁴⁷⁵ Appendix to John W. Vessey, Jr., Chairman, Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, May 3, 1985, at 51-52.

⁴⁷⁶ Memorandum for Mr. John H. McNeill, *supra* note 457. Note that one service attorney, Mr. W. Hays Parks, Chief of the Army's International Law Team, International Affairs Division, later challenged the status of the AP I Article 52(2) as customary international law. W. Hays Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, in INTERNATIONAL LAW FACING NEW CHALLENGES 91-92 (2007) (Parks was assigned to the U.S. Department of Defense General Counsel's office at the time of the 2007 article). In a 1990 article, Parks questioned how to apply the AP I Article 52(2) standard when considering potential targets that would have significant psychological effects, but not significantly contribute to military action. Parks, *Air War and the Law of War*, *supra* note 56, at 141-42 n.421. Examples he discussed included the Second World War's Doolittle

address collateral damage resulting from attacks on military objectives.⁴⁷⁷ As discussed below, AP I Article 52(2) continues to be important as it establishes a universal targeting standard and frames the legal debate over economic targets.⁴⁷⁸

Raid and the 1986 Operation ELDORADO CANYON. The 1942 Doolittle Raid targeted military objectives in Tokyo and four other Japanese cities: Yokohama, Nagoya, Osaka, and Kobe. CARROLL GLINES, *THE DOOLITTLE RAID: AMERICA'S FIRST DARING STRIKE AGAINST JAPAN* 52, 55 (1988). Pilots were instructed to aim only at military targets like military installations, war industries, ship building facilities, power plants, and oil refineries while being directed not to strike residential areas, hospitals, schools, temples, the Imperial Palace, or similar locations. *Id.* at 55; *THE ARMY AIR FORCES IN WORLD WAR II, VOLUME I, PLANS AND EARLY OPERATIONS JANUARY 1939 TO AUGUST 1942* 442 (Wesley Craven & James Cate eds., 1983). Similarly, Operation ELDORADO CANYON targeted military objectives within Libya, specifically Qadhafi's terrorist-training infrastructure and a fighter aircraft base. Judy G. Endicott, *Raid on Libya: Operation ELDORADO CANYON*, in *SHORT OF WAR: MAJOR USAF CONTINGENCY OPERATIONS 1947-1997* 149 (A. Timothy Warnock, ed., 2000). The Libyan targets were of a military nature and were thereby lawful targets under AP I Article 52(2). If the primary purpose of a strike, however, was to spread "terror" among civilians, then AP I Article 51(2) would prohibit the attack.

Other military attorneys have also been critical of AP I for creating new limits inconsistent with customary law. See Jeanne Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 *AIR FORCE L. REV.* 143 (2001) (arguing that attacks on civilian morale and property would be lawful so long as attacks are not directed at civilian lives and otherwise comply with military necessity); Charles Dunlap, *The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era*, 28 *STRATEGIC REV.* 9 (2000); Charles Dunlap, *Targeting Hearts and Minds: National Will and Other Legitimate Military Objectives of Modern War*, in *INTERNATIONAL LAW FACING NEW CHALLENGES* 120 (2007) (arguing that "civilian morale is considered simply a constituent element of the adversary's national will that . . . war seeks to destroy[,] while caveat[ing] that civilians may not be attacked directly."); *c.f.* Parks, *Air War and the Law of War*, *supra* 56, at 113 (explaining that he is troubled by the expanding definition of military objectives to the extent advocated by Dunlap); A. P. V. ROGERS, *LAW ON THE BATTLEFIELD* 118 (3d ed. 2012) (criticizing Dunlap's redefinition of "military objective" as not necessarily reducing civilian casualties and not working in conflicts against poor countries). The Meyer and Dunlap interpretations seem to be in keeping with Spaight's writings, where non-military industry and civilian buildings would be eligible for attack when civilian casualties are unlikely. See *supra* Section II.D.

⁴⁷⁷ BOTHE ET AL., *supra* note 225, at 363.

⁴⁷⁸ In 1987, the U.S. State Department Legal Adviser explained, "[T]he United States has no great concern over the new definition of 'military objective' set forth in article 52(2) of Protocol I." Matheson, *supra* note 404, at 426. In 2016, the U.S. State Department Legal Adviser confirmed that the United States applies the AP I, art. 52(2) standard to the conduct of hostilities during non-international armed conflicts as a matter of customary international law. Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 *INT'L L. STUD.* 235, 242 (2016).

D. Increased Role for Legal Advisers in the Targeting Process

Another perhaps overlooked ramification of AP I on targeting has been a requirement for military commanders to have legal advisors available when necessary to consult on law-of-war issues.⁴⁷⁹ At the time this requirement was drafted, the United States believed it was in substantial compliance.⁴⁸⁰ In the decade after AP I was signed, the United States significantly improved its legal support to targeting and operations.

Prior to the Protocol, military judge advocates in the United States focused primarily on military justice matters, claims, and legal assistance.⁴⁸¹ During the Vietnam War, for example, there were no judge advocates systematically advising commanders in Vietnam on potential targets or rules of engagement at the base level, within the tactical air control center, or at the unified command level.⁴⁸² Legal advice from judge advocates appeared to be provided nearly exclusively by legal advisors to the Chairman of the Joint Chiefs of Staff.⁴⁸³ One exception to this highly centralized advice was an exchange officer at the Thailand embassy who was an Air Force judge advocate.⁴⁸⁴ He advised airmen operating out of Thailand, including regular reviews of target lists to ensure targets were lawful, compliant with the law of war, and were in keeping with the sensitivities of the Thailand government.⁴⁸⁵

The Army and Air Force appeared to realize the need for increased involvement by judge advocates in operations around the same time. The 1983 Operation URGENT FURY in Grenada led the U.S. Army to

⁴⁷⁹ AP I, art. 82.

⁴⁸⁰ Matthew Winter, "Finding the Law"—*The Values, Identity, and Function of the International Law Advisor*, 128 MIL. L. REV. 6 (1990).

⁴⁸¹ Michael Denny, *The Impact of Article 82 of Protocol I to The 1949 Geneva Conventions on the Organization and Operation of a Division SJA Office*, ARMY LAW., Apr. 1980, at 15; Charles Dunlap, *The Revolution in Military Legal Affairs: Air Force Professionals in 21st Century Conflicts*, 51 AIR FORCE L. REV. 293, 296 (2001).

⁴⁸² FREDERIC BORCH, JUDGE ADVOCATES IN COMBAT viii (2001); Terrie Gent, *The Role of Judge Advocates in a Joint Air Operations Center, A Counterpoint of Doctrine, Strategy and Law*, AIRPOWER J. (1999) <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj99/spr99/gent.html>.

⁴⁸³ W. Hays Parks, *The Law of War Advisor*, 31 JAG J. 1, 12 (1980).

⁴⁸⁴ Gent, *supra* note 482.

⁴⁸⁵ *Id.*

formally create an operational law discipline.⁴⁸⁶ In 1988, the Joint Chiefs of Staff officially required combatant commanders to have legal advisors available to provide advice on the law of war, rules of engagement, and related matters during planning and execution of joint and combined exercises and operations.⁴⁸⁷ Thus, military judge advocates were able to support Operation JUST CAUSE in Panama at all levels of command and across services.⁴⁸⁸ Their involvement in operations increased during DESERT STORM.⁴⁸⁹ When U.S. Strategic Command was established as the combatant command successor to Strategic Air Command, its first staff judge advocate reported that his attorneys “had a seat at the battle staff, and otherwise prepared for the possibility of strategic conflict.”⁴⁹⁰

X. Nuclear Weapons and the Law of War: The Clinton Years

The Clinton administration publically articulated the policy and law applicable to nuclear weapons in considerable detail. This was due, in part, to the end of the Cold War and to litigation brought before the United Nations International Court of Justice. The administration also built upon non-proliferation agreements with restrictions on nuclear targeting.

A. Historical and U.S. Policy Developments: Nuclear Posture Review and Threats

Writing in 1991, Professor Howard Levie commented, “It is probably necessary to conclude that if and when an armed conflict approaches the nuclear stage, law will play a very small role in determining the actions of the belligerents.”⁴⁹¹ The decade of 1990s proved to be a dynamic time for the law of war and the debate over the role of nuclear weapons. President William J. Clinton entered office after the Cold War and conducted a

⁴⁸⁶ BORCH, *supra* note 482, at x; David Graham, *Operational Law—A Concept Comes of Age*, ARMY LAW., July 1987, at 9.

⁴⁸⁷ Gent, *supra* note 482.

⁴⁸⁸ *Id.*

⁴⁸⁹ Dunlap, *The Revolution in Military Legal Affairs: Air Force Professionals in 21st Century Conflicts*, *supra* note 481, at 296.

⁴⁹⁰ William Moorman, *Flying “The Glass”*, 26 THE REPORTER, 118 (1999).

⁴⁹¹ Howard S. Levie, *Nuclear, Chemical, and Biological Weapons*, 64 U.S. NAVAL WAR COLLEGE INT’L L. STUD. 334 (1991).

Nuclear Posture Review, which was completed in 1994.⁴⁹² The results modified force structures, but did not make significant changes to weapon employment guidance.⁴⁹³ The focus of deterrence shifted to include the growing threat from the proliferation of Weapons of Mass Destruction (WMD).⁴⁹⁴ President Clinton's policy, issued in 1997 as Presidential Decision Directive 60, removed Reagan-era references to prevailing in a nuclear conflict, but retained the right to respond to aggression with nuclear weapons.⁴⁹⁵ Meanwhile, the U.S. Congress, through a National Defense Authorization Act, prohibited the Department of Energy from conducting research and development into nuclear weapons with a yield under five kilotons.⁴⁹⁶

B. Legal Developments: Nuclear Weapons and the International Court of Justice

The attention to nuclear weapons law in the nineties was not generated by Presidential policy or an international crisis, but by the international community acting through the United Nations. The United Nations General Assembly had passed nonbinding resolutions condemning nuclear weapons for decades.⁴⁹⁷ In December 1994, however, the General Assembly approved a resolution asking the United Nation's International Court of Justice (ICJ) for an advisory opinion on the following question:

⁴⁹² Paul Bernstein, *Post-Cold War US Nuclear Strategy*, in ON LIMITED NUCLEAR WAR IN THE 21ST CENTURY 83 (Jeffrey Larsen & Kerry Kartchner, eds., 2014).

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 84.

⁴⁹⁵ *Id.* at 85.

⁴⁹⁶ Pub. L.No. 103-160, § 3136 (1993). This legislation effectively ended development of very low yield nuclear weapons, as defined as those with a yield under five kilotons. The bomb used at Hiroshima was 15 kilotons. Jonathan Medalia, *Nuclear Weapon Initiatives: Low-Yield R&D, Advanced Concepts, Earth Penetrators, Test Readiness*, CRS Report for Congress, RL32130, Oct. 28, 2003, at 6.

⁴⁹⁷ Charles Dunlap, *Taming Shiva: Applying International Law to Nuclear Operations*, 42 AIR FORCE L. REV. 157, 159-60 (1997); see also *Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons*, G.A. Res. 1653 (XVI) (Nov. 24, 1961); *Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons*, G.A. Res. 2936 (XXVII) (Nov. 29, 1973); G.A. Res. 33/71-B (Dec. 14, 1978); G.A. Res. 35/152-D (Dec. 12, 1980); G.A. Res. 36/92-I (Dec. 9, 1981); *Convention on the Prohibition of the Use of Nuclear Weapons*, G.A. Res. 46/37-D (Dec. 9, 1991); G.A. Res. 47/53C (Dec. 9, 1992).

“Is the threat or use of nuclear weapons in any circumstances permitted under international law?”⁴⁹⁸

The ICJ issued a non-binding advisory decision in 1996.⁴⁹⁹ By an eleven-to-three decision, the ICJ determined the answer to the General Assembly’s question: “There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such”⁵⁰⁰ The ICJ unanimously determined that any threat or use of force involving nuclear weapons “should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of the international humanitarian law” and treaty requirements.⁵⁰¹ By a seven-to-seven vote, the court made its most controversial statement, explaining:

[T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake[.]⁵⁰²

⁴⁹⁸ Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, G.A. Res. 49/75K (Dec. 15, 1994).

⁴⁹⁹ For a detailed critique of the opinion, see Robert F. Turner, *Nuclear Weapons and the World Court: The ICJ’s Advisory Opinion and Its Significance for U.S. Strategic Doctrine*, 72 U.S. NAVAL WAR COLLEGE INT’L L. STUD. 309 (1998); Michael Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, LI:2 NAVAL WAR COLLEGE REV. 91 (1998).

⁵⁰⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 105(2)B (July 8) [hereinafter 1996 ICJ Advisory Opinion].

⁵⁰¹ *Id.* ¶ 105(2)D.

⁵⁰² *Id.* ¶ 105(2)E. The rules of the ICJ allowed the court’s President to cast a tie-breaking vote. ICJ STAT. art. 55(2). The ICJ President, Mohommed Bedjaoui of Algeria, separately wrote that nuclear weapons were the “ultimate evil.” 1996 ICJ Advisory Opinion, *supra* note 5, Declaration of President Bedjaoui, ¶ 20.

The court failed to provide any meaningful guidance as to what would amount to an “extreme circumstance of national defense.” This decision by the ICJ, where a weapon might be considered lawful under limited circumstances of national survival, is inconsistent with *jus in bello*, which prescribes rules independent of the political righteousness of a belligerent’s *causes belli*.⁵⁰³ In another sense, the ICJ decision appears consistent with AP I article 52(2) analysis for strikes: attack assessments are always based on the circumstances ruling at the time.

Perhaps more informative than the ICJ’s non-binding decision were the actions taken and statements provided by the governments of the nuclear weapon states during the litigation. For example, in April 1995, the international community determined to permanently extend the 1968 Nuclear NPT. President Clinton made a statement of U.S. policy:

The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.⁵⁰⁴

France, Russia, and the U.K. made similar policy declarations.⁵⁰⁵

⁵⁰³ YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 173 (5th ed. 2011).

⁵⁰⁴ Written Statement of the Government of the United States of America before the International Court of Justice, June 20, 1995 (Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons) 16 [hereinafter U.S. Statement to ICJ].

⁵⁰⁵ *Id.* The United States and other nuclear weapon states also took action to further build the nuclear NPT regime. In April 1996, the United States, the United Kingdom, China, and France signed Protocols I and II to the African Nuclear-Weapon-Free Zone Treaty, known as the Treaty of Pelindaba Treaty. Protocols I and II to the Pelindaba Treaty, Apr. 11, 1996, United Nations U.N. Office for Disarmament Affairs Treaty Database, <http://disarmament.un.org/treaties/t/pelindaba>. Russia signed the Protocols in November 1996. *Id.* The text of the Pelindaba Treaty is available as part of the same U.N. data-base and is available at <http://disarmament.un.org/treaties/t/pelindaba/text>. The treaty, which is open to African states, prohibits research, development, manufacture, stockpiling, acquisition, testing, possession, control, or stationing of nuclear explosive devices by state parties. Protocol I signatories agreed not use or threaten to use a nuclear explosive device against any of the African state parties to the treaty. Protocol I to the Pelindaba Treaty, art.

On June 20, 1995, the U.S. State Department filed an official position regarding the pending ICJ nuclear weapons case. The statement, signed by Mr. Matheson, contains important guidance for nuclear weapon targeting law. The United States agreed that principles of the law of war applied to the use of nuclear weapons.⁵⁰⁶ As to AP I, the United States explained that its “new rules” did not apply to non-ratifying states or to the use of nuclear weapons.⁵⁰⁷ The United States reaffirmed that it would be unlawful to use nuclear weapons on civilian populations, subject to the right of reprisal.⁵⁰⁸ This rule, however, would not be violated when attacking military objectives that might cause collateral civilian injury or damage.⁵⁰⁹ As to proportionality, the United States explained that nuclear weapons could be used proportionally, but this would depend on the nature of the enemy threat, the importance of destroying the objective, the nature and size of the nuclear blast and the magnitude of risk to civilians.⁵¹⁰ Similarly, nuclear weapons could be used discriminately based on tailored effects (i.e., size of yield, blast height, offset targeting, etc.) and precision guidance systems.⁵¹¹ The significance of the official U.S. legal pleading to the ICJ is greater than being a simple argument in a non-binding court; it established an official written U.S. policy statement on nuclear weapon targeting to account for law-of-war concerns.

Ultimately, the ICJ decision had little practical impact on U.S. nuclear weapon employment policy. Ten years after the opinion, the U.S. State Department’s deputy legal adviser explained “much of the Court’s discussion was generally reflective of the state of international law”⁵¹²

1. Under Protocol II, the signatories agreed not to test, assist or encourage the testing of nuclear explosive devices within treaty’s zone. Protocol II to the Pelindaba Treaty.

⁵⁰⁶ U.S. Statement to ICJ, *supra* note 504, at 21.

⁵⁰⁷ *Id.* at 25. The United States has not comprehensively detailed precisely which provisions of AP I represent “New Rules.” *See supra* Part XIII. Relevant to targeting law, the abolition of the doctrine of belligerent reprisal against enemy civilian populations, cultural objects and places of worship, objects indispensable to the survival of the civilian population, the natural environment, and works and installations containing dangerous forces all represented “new rules.” *Id.* at 31; Matheson, *supra* note 404, at 426. Similarly, the environmental protections established in AP I art. 33(1), arts. 55, 56 were “new rules.” U.S. Statement to ICJ, *supra* note 504, at 30; Matheson, *supra* note 404, at 424, 427.

⁵⁰⁸ 1995 U.S. Statement to ICJ, *supra* note 504, at 26.

⁵⁰⁹ *Id.* at 22.

⁵¹⁰ *Id.* at 23.

⁵¹¹ *Id.*

⁵¹² Deputy Legal Adviser Bettauer’s address before the Lawyer’s Committee on Nuclear Policy re U.S. compliance with nuclear policy (October 10, 2006), *reprinted in* Digest of United States Practice in International Law 2006, <https://www.state.gov/s/l/2006/>

Moreover, the United States did not believe the ICJ's nonbinding response "necessitated any changes in the nuclear posture and policy of the United States."⁵¹³

C. Developments in U.S. Military Doctrine and Policy Guidance

The U.S. military also promulgated unclassified guidance during the Clinton administration. In December 1995, the U.S. Department of Defense published a remarkable document: Joint Publication (JP) 3-12, *Doctrine for Joint Nuclear Operations*.⁵¹⁴ JP 3-12 emphasized the deterrent role of nuclear weapons, repeating a warning from the National Military Strategy that the United States would "dominate" conflicts should WMD be used by an adversary against U.S. forces, which in the context of nuclear doctrine is a stern warning indeed.⁵¹⁵ The JP 3-12 told the military to consider countervalue and counterforce targeting.⁵¹⁶ Countervalue targets were defined as the adversary's "military and military related activities, such industries, resources, and/or institutions *that contribute to the enemy's ability to wage war*."⁵¹⁷ The guidance pointed out, weapons required to implement countervalue targeting "need not be as numerous or accurate as those required to implement a counterforce targeting strategy, because *countervalue targets generally tend to be softer and unprotected* in relation to counterforce targets."⁵¹⁸ Counterforce targets were defined as WMD-related forces and facilities requiring larger and more accurate weapons because the targets tended to

98879.htm.

⁵¹³ *Id.*

⁵¹⁴ JOINT CHIEFS OF STAFF, JOINT PUB. 3-12, DOCTRINE FOR JOINT NUCLEAR OPERATIONS (15 Dec. 1995) [hereinafter JP 3-12].

⁵¹⁵ *Id.* at I-1.

⁵¹⁶ *Id.* at vi.

⁵¹⁷ *Id.* at II-5. Herman Kahn, a physicist-turned-nuclear strategist, popularized the term "countervalue" in the targeting context. HERMAN KAHN, ON THERMONUCLEAR WAR 179 (2d ed., 1961). He defined a countervalue attack as one where the attacker tries "to destroy those things which the defender prizes most highly regardless of whether such destruction helps the attacker to achieve an immediate or essential military objective." HERMAN KAHN, THINKING ABOUT THE UNTHINKABLE 63 (1962). He believed countervalue targets were primarily people and property, but acknowledged that some states might assign a higher value to military power. *Id.* Kahn wrote that countervalue targets were irrational and would merely waste weapons. *Id.* at 64-67. The JP 3-12's definition of countervalue targets differed significantly from Kahn's by requiring the target to be a valid military objective.

⁵¹⁸ JP 3-12, *supra* note 514 at II-5 (emphasis in original).

harder and better protected.⁵¹⁹ The JP 3-12 also instructed targeting to limit collateral damage.⁵²⁰ This publication even contained an annex listing treaties that established obligations for nuclear operations.⁵²¹

JP 3-12 was supplemented by another unclassified document: JP 3-12.1, *Doctrine for Joint Theater Nuclear Operations*.⁵²² The document had early sections on “The Law of Armed Conflict,” emphasizing the legality of nuclear weapons. The JP 3-12.1 also made clear, “any weapon used must be considered a military necessity, and measures must be taken to avoid collateral damage and unnecessary suffering. Since nuclear weapons have greater destructive potential, in many instances they may be inappropriate.”⁵²³ For nuclear strike targeting, JP 3-12.1 specified enemy combat forces and facilities, while factoring in the need for environmental awareness and to avoid collateral damage.⁵²⁴ The JP 3-12.1 had a separate section addressing the use of nuclear weapons to produce a political decision by an adversary or otherwise influence its operations.⁵²⁵ By separating these goals from the law of war section, JP 3-12.1 validated the concept that targets must be independently lawful prior to prioritizing them for political or psychological effects. The record is unclear as to whether JP 3-12 and JP 3-12.1 were published as unclassified documents in order to emphasize the legality of nuclear operations, or whether they were intended to increase deterrence, or both. Together, they went further in articulating DoD’s understanding of the applicability of the law of war

⁵¹⁹ *Id.*

⁵²⁰ *Id.* at II-6.

⁵²¹ *Id.* at Annex A.

⁵²² JOINT CHIEFS OF STAFF, JOINT PUB. 3-12.1, DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS (9 Feb 1996) [hereinafter JP 3-12.1].

⁵²³ *Id.* at v-vi; *see also id.* at I-1:

[T]o comply with the law, a particular use of any weapon must satisfy the long-standing targeting rules of military necessity, proportionality, and avoidance of collateral damage and unnecessary suffering. *Nuclear weapons are unique in this analysis only in their greater destructive potential* (although they also differ from conventional weapons in that they produce radiation and electromagnetic effects and, potentially, radioactive fallout).

Id.

⁵²⁴ *Id.* at 3-12.1.

⁵²⁵ Dunlap, *Taming Shiva: Applying International Law to Nuclear Operations*, *supra* note 497, at 164.

to nuclear operations than was previously available to the public.⁵²⁶ DoD's articulation of these legal restraints was consistent with the absence of an existential communist threat to national survival.

XI. Operation ALLIED FORCE and the Economic Targeting Debate

Targeting an adversary's industrial and economic areas was a long-standing strategy of the United States and Soviets during the Cold War. Based on the experience of total war and conflict escalation, these targets were viewed as legitimate. Operation ALLIED FORCE, a seventy-eight-day U.S. and NATO air campaign, served to ignite a debate over the legitimacy of targeting economic objects as military objectives.⁵²⁷

A. Overview of the Operation

The goal of ALLIED FORCE in Kosovo was to bring an end to atrocities by Serbian forces under the control of Slobodan Milosevic.⁵²⁸ Destroying Serbian forces proved to be difficult because the Serbian military remained hidden from view and only traveled under limited circumstances.⁵²⁹ The NATO air attacks, therefore, focused on selected infrastructure targets, such as bridges and electric-power systems, to degrade the ability of the Serbian military to command and control its forces or to resupply and reconstitute them.⁵³⁰ Air strikes were reportedly designed to weaken support for Milosevic by destroying objects serving both a military and civilian purpose like bridges, communications and electrical power facilities.⁵³¹ Moreover, reports surfaced that NATO was

⁵²⁶ Both publications were withdrawn in 2005, because these were determined to be policy documents, not doctrine. Subsequent replacement policy publications are highly classified.

⁵²⁷ U.S. DEPT. OF DEFENSE REPORT TO CONGRESS, KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT (31 Jan. 2000), <http://www.dod.gov/pubs/kaar02072000.pdf>.

⁵²⁸ *Id.* at Secretary Cohen's Message, 1.

⁵²⁹ *Id.* at 10, 61.

⁵³⁰ *Id.* at 10–11.

⁵³¹ AMNESTY INTERNATIONAL, FEDERAL REPUBLIC OF YUGOSLAVIA (FRY) /NATO: "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE 1 (June 5, 2000), <https://www.amnesty.org/en/documents/EUR70/018/2000/en/>; HUMAN RIGHTS WATCH, THE CRISIS IN KOSOVO (Feb. 2010), <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm>; Daniel Lake, *The Limits of Coercive Airpower*, 34 INT'L SECURITY 107 (2009); Julian Tolbert, *Crony Attack*:

striking factories owned by supporters of Milosevic and other objects for purely coercive purposes, i.e., to make Serbians reconsider their support for Milosevic.⁵³² These target descriptions subsequently generated significant legal controversy.

B. Resulting Legal Debates

In a 2002 collection of articles entitled “Legal and Ethical Lessons of NATO’s Kosovo Campaign,” Law Professor Yoram Dinstein explained that the United States was stretching AP I Article 52(2)’s definition of military objective beyond the plain meaning of its words to justify striking economic objects that did not constitute military objectives.⁵³³ Dinstein pointed out that valid targets were those that made “an effective

Strategic Attack’s Silver Bullet?, 31-33 (Nov. 2006) (unpublished thesis, U.S. Air Force School of Advanced Air and Space Studies), <http://www.dtic.mil/dtic/tr/fulltext/u2/a462291.pdf>.

⁵³² Arkin, *Smart Bombs, Dumb Targeting?*, BULL. OF ATOMIC SCIENT. 46-53 (2000); Lake, *supra* note 540, at 107; Human Rights Watch reported that unnamed U.S. military sources admitting destroying certain bridges for psychological or symbolic value, rather their value to the Serbian military. Human Rights Watch, *supra* note 531. The accuracy of these reports, however, are questionable. Judith Miller, who was with the DoD General Counsel’s Office during the conflict, wrote, “In each case a direct military link was required, or only those portions of the facility having military utility, or conducting military work, were targeted.” Judith Miller, *Commentary*, 78 U.S. NAVAL WAR COLLEGE INT’L L. STUD. 110 (2002).

⁵³³ Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus In Bello*, 78 U.S. NAVAL WAR COLLEGE INT’L L. STUD. 139, 145 (2002) (Dinstein, like all authors published in this series, was speaking for himself, not on behalf of the U.S. Naval War College). Dinstein points out that the AP 52(2) definition of military objective is contained verbatim in Protocols II and III, Annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [hereinafter 1980 Conventional Weapons Convention] and the 1999 Second Protocol to the Hague Cultural Property Convention. *Id.* at 141. While the United States is a party to the 1980 Conventional Weapons Convention, the definitions of military objective in the protocols are limited to those protocols. Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices (Protocol II), 1994 U.S.T. LEXIS 225 (May 24, 1999); Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1981 U.S.T. LEXIS 311 (May 14, 1981). The United States is not a party to the 1999 Second Protocol to the Hague Cultural Property Convention. *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999*, U.N. EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO) CONVENTIONS DATABASE (Mar. 26, 1999), <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha>.

contribution to military action.”⁵³⁴ He found the United States was acting based on questionable guidance, citing the 1997 *U.S. Commander’s Handbook on the Law of Naval Operations*, which substituted “military action” with “war-fighting or war-sustaining capability.”⁵³⁵ While “handbooks” are not official U.S. policy, they reflect the military services’ understanding of rules and are used by military members for guidance when conducting operations. The authority cited by the Handbook’s annotated supplement was the destruction of cotton during the U.S. Civil

⁵³⁴ Dinstein, *Legitimate Military Objectives Under the Current Jus In Bello*, *supra* note 533, at 145 (quoting AP I, art. 52(2)).

⁵³⁵ *Id.* The guidance stated:

Proper economic targets for naval attack include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability may also be attacked.

U.S. NAVAL WAR COLLEGE ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.1.1 (A.R. Thomas & James Duncan, eds., 1999). The same guidance was found in the 1989 version of the handbook. U.S. DEP’T OF NAVY, NAVAL WARFARE PUB. 9 (REV. A)/FLEET MARINE FORCE MANUAL 1-10, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 8-1.1 (5 Oct. 1989). The 2007 COMMANDER’S HANDBOOK states:

Proper objects of attack also include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic objects of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability may also be attacked.

U.S. DEP’T OF NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 8.2.5 (July 2007) [hereinafter NWP 1-14M].

Even before Operation ALLIED FORCE, Rear Admiral (ret.) Horace B. Robertson, former Judge Advocate General of the Navy, cautioned that the U.S. NWP 1-14M had a broader definition of military objectives than that found in AP I, and emphasized that the U.S. Navy’s approach was rejected by the drafters of the SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA. Horace Robertson, *The Principle of the Military Objective in the Law of Armed Conflict*, 8 U.S. AIR FORCE ACAD. J. LEGAL STUD. 35-70 (1997). The *San Remo Manual* authors feared that the U.S. language could “too easily be interpreted to justify unleashing the type of indiscriminate attacks that annihilated entire cities during [the Second World War].” *Id.* (quoting Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT’L L. 192, 199 (1995)).

War to deprive the Confederacy of revenue.⁵³⁶ Dinstein concluded, “The connection between military action and exports, required to finance the war effort, is ‘too remote.’”⁵³⁷ To Dinstein, the U.S. Navy’s interpretation of the AP I standard was not textual.

On the other hand, an Air Force Judge Advocate, Captain Burrus Carnahan, presented a different perspective decades earlier—while AP I was in draft form. Carnahan emphasized that the definition of a military objective was broad, consisting of the contribution it made to an enemy, the attacker’s advantage in destroying it, and the circumstances existing at the time.⁵³⁸ Confederate cotton was the ultimate source of almost all of the Confederate weapons and military supplies. “Thus, it made an effective contribution to military action, and its destruction offered a definite military advantage to the Union ‘in the circumstances ruling at the time.’”⁵³⁹ Carnahan also pointed out that a post-Civil War Anglo-American arbitration tribunal concluded that the destruction of British-owned cotton was lawful.⁵⁴⁰ Carnahan, however, conceded that this well-established nineteenth century legal precedent appears to have faded after the adoption of the Hague Regulations.⁵⁴¹ After analyzing those rules, he concluded that the Hague Regulations did not change the law:

It is still permissible to destroy property of military value, with such prior warning of bombardment as is practical under the circumstances. Noncombatant persons and property may lawfully be incidentally harmed during the course of the bombing if the harm is proportional to the military advantage.⁵⁴²

⁵³⁶ Dinstein, *Legitimate Military Objectives Under the Current Jus In Bello*, *supra* note 533, at 145 (citing *The Law of Targeting*, 73 U.S. NAVAL WAR COLLEGE INT’L L. STUD. 403 n.11 (A.R. Thomas & J.C. Duncan eds., 1999)).

⁵³⁷ *Id.* at 146. See also YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 95–96 (2d. ed. 2010).

⁵³⁸ Burrus Carnahan, *Protecting Civilians Under the Draft Geneva Protocol: A Preliminary Inquiry*, 18 AIR FORCE L. REV. 32, 47 (1976).

⁵³⁹ *Id.* at 47–48.

⁵⁴⁰ *Id.* at 48; Burrus Carnahan, *The Law of Air Bombardment in Its Historical Context*, 17 AIR FORCE L. REV. 39, 42 (1975).

⁵⁴¹ Carnahan, *The Law of Air Bombardment in Its Historical Context*, *supra* note 540, at 42.

⁵⁴² *Id.* (citing 1956 FM 27-10, *supra* note 291, ¶40 (defining “defended places”) and ¶43c (explaining warning requirements). Paragraph 40 of was updated in 1976 to add the prohibition on attacking civilian populations. 1976 FM 27-10, *supra* note 458.

Carnahan's position was repeated in the highly influential analysis of AP I by international experts Michael Bothe, Karl Partsch, and Waldemar Solf.⁵⁴³ It was also restated in a 1980 U.S. *Air Force Commander's Handbook on the Law of Armed Conflict*,⁵⁴⁴ as well as the aforementioned *Naval Commander's Handbooks*.⁵⁴⁵

Over time, Dinstein's argument has been influential in Western academic circles. Professor Michael Schmitt of the Naval War College analyzed a hypothetical adversary oil-export facility as a potential target based on the revenue it generated for the adversary state. He concluded, "attacking oil facilities dedicated solely to export production in order to deprive the military of funding stretches the definition [of AP I Article 52(2)] beyond its intended reach."⁵⁴⁶ Other international experts agreed.⁵⁴⁷

⁵⁴³ BOTHE ET AL., *supra* note 225, at 366 n. 15. Michael Bothe was Professor of Public Law at the Johann Wolfgang Goethe University in Frankfurt, Germany, and former Chair, International Humanitarian Fact-finding Commission; Karl Josef Partsch was Professor at the Universities of Kiel, Mainz and Bonn, Federal Republic of Germany and a member of the International Committee for the Elimination of Racial Discrimination at United Nations Headquarters; Waldemar Solf was Chief International Affairs Division, Office of the Judge Advocate General of the US Army, and Professor of Law at the Washington College of Law, American University, Washington, D.C.

⁵⁴⁴ U.S. DEP'T OF AIR FORCE, AIR FORCE PAMPHLET 110-34, COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT ¶ 2-3a (25 July 1980).

⁵⁴⁵ See U.S. DEP'T OF NAVY, NAVAL WARFARE PUB. 9 (REV. A)/FLEET MARINE FORCE MANUAL 1-10, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 535; U.S. NAVAL WAR COLLEGE ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 544; NWP 1-14M, *supra* note 535.

⁵⁴⁶ Michael Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 281 (Susan Breau & Agnieszka Jachec-Neale, eds., 2006). See also Beth Van Schaack, *Targeting Tankers Under the Law of War (Part I)*, JUST SECURITY (Dec. 2, 2015, 12:50 PM), <https://www.justsecurity.org/28064/targeting-tankers-law-war-part-1/> (characterizing oil as a military objective only when it has a designated military use). Dinstein analyzed oil infrastructure not related to military production and concluded that despite the civilian nature, every oil installation, except for neighborhood filling stations, can be deemed as part of the military industry and represent legitimate targets. Dinstein, *Legitimate Military Objectives Under the Current Jus In Bello*, *supra* note 533, at 155. Oil presumably has this quality because it can always be repurposed for military use.

⁵⁴⁷ WILLIAM BOOTHBY, THE LAW OF TARGETING 106 (2012); Kenneth Watkin, *Targeting "Islamic State" Oil Facilities*, 90 U.S. NAVAL WAR COLLEGE INT'L L. STUD. 499, 504 (2014) citing Program on Humanitarian Policy and Conflict Research, HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE Rule 24, Commentary ¶ 2 (2013); ROGERS, *supra* note 476, at 109-10. See also TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 130-31 (Michael Schmitt, ed.,

Oxford University's Janina Dill pointed out that the "war-sustaining" logic would authorize direct strikes on general business activities, the civilian political system, and general morale.⁵⁴⁸ As a practical matter, defining such broad "war-sustaining" entities as military objectives means that it would be nearly impossible for belligerents to comply with their obligation to separate civilian objects from military, which is the defender's duty under the law-of-war principle of distinction.⁵⁴⁹ Similarly, Ken Watkin, a former Judge Advocate General for the Canadian military, expressed concern over the scope of potential damage: "whether the potential for the broad range of targets that can be attacked as contributing to the 'military action' outside the war sustaining debate has been sufficiently restricted so as to avoid the broad based destruction that can result from the conduct of a total war."⁵⁵⁰

Despite the criticism, U.S. authorities reiterated the Navy's expansive interpretation of "military action." Hays Parks, writing from the U.S. Department of Defense Office of the General Counsel in 2007, reaffirmed the position that belligerents may legitimately attack their adversary's ability to sustain a conflict without limitation to "war-fighting" capabilities; that the U.S. Civil War practice of targeting Confederate cotton would still be legitimate; and that oil can be targeted because of its commercial value apart from its direct military contributions.⁵⁵¹ Similarly, New York University Law Professor Ryan Goodman agreed with Parks and the U.S. position, explaining how AP I states have used militaries to attack and deprive enemies of revenue.⁵⁵² The Military Commission Act of 2009 used the AP I Article 52(2) definition of military objective, while substituting "military action" with the words "war-fighting or war-sustaining capability."⁵⁵³ In 2016, U.S. State Department and Department

2013).

⁵⁴⁸ Janina Dill, *The 21st-Century Belligerent's Trilemma*, 26 EUROPEAN J. INT'L L. 1, 95 (2015).

⁵⁴⁹ LAW OF WAR MANUAL, *supra* note 19, ¶ 2.5.3; AP I, art. 58. The United States agrees in principle with AP I, art. 58. Matheson, *supra* note 404, at 427.

⁵⁵⁰ Kenneth Watkin, *Targeting in Air Warfare*, 44 ISR. Y.B. HUM. RIGHTS 1, 39 (2014).

⁵⁵¹ Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, *supra* note 476, at 100–01.

⁵⁵² Ryan Goodman, *Targeting 'War-Sustaining' Objects in Non-International Armed Conflict*, 110 AM. J. INT'L L. (forthcoming 2017) <http://ssrn.com/abstract=2783736>. At the time of writing, Professor Goodman was Special Counsel to the General Counsel of the Department of Defense, but wrote in his personal capacity.

⁵⁵³ Military Commission Act of 2009, Pub. L. No. 111-84, § 950p(a)(1), 123 Stat. 2190 (codified at 10 U.S.C. 47A (2006)) *cited in* Watkin, *supra* note 547, at 503.

of Defense legal advisers concurred in the lawfulness of attacks on objects making an effective contribution to the enemy's war-fighting or war-sustaining capabilities.⁵⁵⁴ The *2015 DoD Law of War Manual* further supports the Navy's position on the legitimacy of destroying war sustaining property, using the U.S. Civil War cotton destruction as a legitimate means of depriving an adversary of funding.⁵⁵⁵ The manual also lists "economic objects associated with military operations" as military objectives.⁵⁵⁶ The manual's examples, electrical power and oil, however, are less informative because they serve or have the strong potential to serve direct military purposes: modern air defenses use the power grid and military vehicles use oil.

Although the United States finds war-sustaining objects to be legitimate objects for attack, the DoD General Counsel Jennifer O'Connor recently explained that they could not be categorially targeted based on their nature alone.⁵⁵⁷ Every potential target requires an evaluation to determine whether it qualifies as a military objective.⁵⁵⁸ The object must have a connection to its military action, where "each additional link in a causal chain between an object and its contribution to military action will generally make the military advantage to be gained from its destruction less certain, and more remote, and therefore less likely to qualify as

⁵⁵⁴ Egan, *supra* note 478, at 242. Jennifer O'Connor, *Applying the Law of Targeting to the Modern Battlefield*, speech at New York University, Nov. 28, 2016, <https://www.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>.

⁵⁵⁵ LAW OF WAR MANUAL, *supra* note 19, ¶ 5.17.2.3.

⁵⁵⁶ *Id.* ¶¶ 5.6.6.2 n.174 & 5.6.8. The manual also cites a 1999 DoD General Counsel Opinion as an authority on cyber issues. Although not restated in the 2015 manual, the 1999 opinion explains that purely economic objects would not likely be lawful targets in a short conflict, but may be in long ones: "In a long and protracted conflict, damage to the enemy's economy and research and development capabilities may well undermine its war effort, but in a short and limited conflict it may be hard to articulate any expected military advantage from attacking economic targets." U.S. DEP'T OF DEF., OFFICE OF GENERAL COUNSEL, AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS 8 (May 1999), <http://www.au.af.mil/au/awc/awcgate/dod-io-legal/dod-io-legal.pdf>.

⁵⁵⁷ O'Connor, *supra* note 554, at 9. O'Connor's remarks were endorsed by a report signed by President Obama. THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, Dec. 2016, https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf [hereinafter Legal Policy Report].

⁵⁵⁸ O'Connor, *supra* note 554, at 9.

‘definite.’”⁵⁵⁹ Adversary control, as opposed to civilian control, over an entity is another significant consideration.⁵⁶⁰ The requirement for these strong connections rules out striking objects merely because they contribute to an enemy’s general tax base. Requiring a causal connection also helps ensure that appropriate facts are gathered in advance of strikes to ensure commanders can account for their decisions.⁵⁶¹ It provides a basis for the proportionality analysis, which requires an understanding of concrete and direct military advantages. The nature of the proportionality analysis itself, however, remains vague. Goodman suggests that the proportionality analysis go beyond weighing considerations of death and injury to civilians or incidental damage to civilian objects against concrete and direct military advantages; the analysis should “include the percentage of funds distributed to nonmilitary purposes (such as running civilian hospitals, schools, etc.)”⁵⁶² Furthermore, some commentators interpreted O’Connor’s remarks as requiring the war- sustaining object to be unique or irreplaceable before it could be considered to provide a definite military advantage.⁵⁶³

Russia may have inadvertently weighed in on this debate. Russian news recently broadcast designs for a “drone” submarine capable of launching nuclear weapons.⁵⁶⁴ The effects of the submarine were listed as defeating “important economic objects of an enemy in coastal zones, [and] bringing guaranteed and unacceptable losses on the country’s territory by forming a wide area of radioactive contamination incompatible with

⁵⁵⁹ *Id.* The requirement for a causal connection appears to follow the recommendations of Professor Goodman. Goodman, *supra* note 552, at 17. It does not, however, fully incorporate his idea for a limiting principle where “the economic product constitutes an indispensable and principal source for directly maintaining military action.” Goodman, *supra* note 552, at 18.

⁵⁶⁰ O’Connor, *supra* note 554, at 10.

⁵⁶¹ Kenneth Watkin, *Reflections on Targeting: Looking in the Mirror*, JUST SECURITY (June 16, 2016, 12:59 PM), <https://www.justsecurity.org/31513/reflections-targeting-mirror/>; Watkin, *Targeting “Islamic State” Oil Facilities*, *supra* note 547, at 512.

⁵⁶² Goodman, *supra* note 552, at 18 (citing General Counsel, Department of Defense, letter of Sept. 22, 1972, reprinted in 67 AM. J. INT’L L. 123-24 (1973)).

⁵⁶³ Oona Hathaway, Marty Lederman & Michael Schmitt, *Two Lingering Concerns About the Forthcoming Law of War Manual Amendments*, JUST SECURITY (Nov. 30, 2016, 8:28 AM), <https://www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments/>. O’Connor remarked that Islamic State oil has been targeted, in part, because it creates cash used for military purposes and it provided a revenue source not easily substituted. O’Connor, *supra* note 554.

⁵⁶⁴ Andrew Kramer, *Russia Says Leak of Secret Nuclear Weapon Design Was an Accident*, INT’L N.Y. TIMES (Nov. 12, 2015), <http://nyti.ms/1OGxrDf>.

conducting military, economic or any other activities there for a long period of time.”⁵⁶⁵ Russia’s apparent willingness to broadly target economic objects serves as a reminder that interpretations of the law of war will ultimately be decided by national *opinio juris* and its state practice component. It should also serve as a warning about overreliance on technical legal rules for protection. Although the law of war seeks to maximize humanitarian protection, its credibility requires recognition of battlefield realities and necessities.⁵⁶⁶ Such recognition is as important in the strategic environment as it is in the technical environment.

XII. The Rome Statute of the International Criminal Court

In 1998, a United Nations conference finalized the treaty known as the Rome Statute of the International Criminal Court (ICC), referred to as the “Rome Statute.”⁵⁶⁷ It is relevant to the law relating to nuclear weapons inasmuch as it purports to have universal jurisdiction and establishes a standards for war crimes and proportionality.

The Rome Statute established the first permanent international court with jurisdiction to prosecute individuals for “the most serious crimes of concern to the international community.”⁵⁶⁸ The ICC asserts jurisdiction over citizens of states that are not parties to the Rome Statute, which the U.S. views as unchecked power and a threat to state sovereignty.⁵⁶⁹ The U.S. is not a party to the Rome Statute.⁵⁷⁰

⁵⁶⁵ *Id.*

⁵⁶⁶ Geoffrey Corn, et al., *Belligerent Targeting and the Invalidity of the Least Harmful Means Rule*, 89 INT’L L. STUD. 536, 542 (2013).

⁵⁶⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

⁵⁶⁸ *Id.* preamble.

⁵⁶⁹ *Id.* arts. 12-13.

⁵⁷⁰ The United States initially supported the underlying concept for the ICC, participated in the drafting conference, but ultimately voted against the treaty language. EMILY BARBOUR & MATTHEW WEED, CONG. RESEARCH SERV. R41116, THE INTERNATIONAL CRIMINAL COURT (ICC): JURISDICTION, EXTRADITION, AND U.S. POLICY, 2 (2010). President Clinton signed the treaty on December 31, 2000, but simultaneously recommended that it not be submitted for ratification due to concerns over jurisdictional flaws. William J. Clinton, 37 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1 (Jan. 8, 2001) <https://www.gpo.gov/fdsys/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf>. The United States subsequently notified the U.N. that it did not intend to become

The Rome Statute is highly relevant to international law and through later-adopted elements of crimes, established specific criteria for war crimes. It contains provisions and omissions applicable to the potential use of nuclear weapons. The drafting committee considered provisions to criminalize the use of nuclear weapons, but these measures were ultimately rejected.⁵⁷¹ Instead, the weapons provisions were in keeping with prior treaty obligations and international law. The provisions criminalize the use of poison or poisoned weapons;⁵⁷² “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;”⁵⁷³ expanding bullets,⁵⁷⁴ and:

[W]eapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment⁵⁷⁵

a party to the Rome Statute and therefore had no legal obligations from President Clinton’s signature. Letter from John Bolton, Under Secretary of State for Arms Control and International Security, to U.N. Secretary General Kofi Annan, May 6, 2002, *reprinted in* DIGEST OF UNITED STATES PRACTICE OF INTERNATIONAL LAW 2002 148-156. The United States also took several measures to prevent the ICC from exercising jurisdiction over its citizens, to include passing of the American Servicemembers’ Protection Act of 2002, 22 U.S.C. §§ 7421-7433; concluding bilateral immunity agreements; and obtaining a U.N. Security Council resolutions deferring potential prosecution of U.S. personnel during peacekeeping operations in Bosnia and Herzegovina through 2004. BARBOUR & WEED, *supra* 570, at 3-4.

⁵⁷¹ Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L. L. 2, 7-8 (1999). Various drafts of nuclear weapon prohibitions can be found in 3 UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT OFFICIAL RECORDS, ROME, 15 JUNE –17 JULY 1998, 18, 206, 242, 243, 250.

⁵⁷² Rome Statute, *supra* note 567, art. 8(2)(b) (xvii). *C.f.* Hague II and Hague IV, art. 23(a), *supra* note 54, at 235.

⁵⁷³ Rome Statute, *supra* note 567, art. 8(2)(b)(xviii). *C.f.* 1899 Hague Declaration on Asphyxiating Gases, July 29, 1899, *reprinted in* SCHINDLER & TOMAN, *supra* note 53, at 95, and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 26 U.S.T. 571, June 17, 1925.

⁵⁷⁴ Rome Statute, *supra* note 567, art. 8(2)(b)(xix). *C.f.* 1899 Hague Declaration Concerning Expanding Bullets, July 29, 1899 *reprinted in* SCHINDLER & TOMAN, *supra* note 53, at 99.

⁵⁷⁵ Rome Statute, *supra* note 567, art. 8(2)(b)(xx). *C.f.* API I, *supra* note 449, art. 35(2).

No annex to the treaty exists. Thus, the use of nuclear weapons would only become unlawful *per se* once they became the “subject of a comprehensive prohibition.”

Although the Rome Statute did not outlaw nuclear weapon use *per se*, it reinforces the overall law-of-war requirements to limit attacks to proportionate strikes against legitimate military objectives. Intentional attacks against civilian populations were specifically criminalized.⁵⁷⁶ The language from article 25 of the 1907 Hague Regulation was also brought into the Rome Statute’s framework, with a prohibition against “[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.”⁵⁷⁷ Perhaps most relevant to the potential use of nuclear weapons, the Rome Statute made intentionally disproportionate attacks war crimes:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated[.]⁵⁷⁸

This provision expands the proportionality analysis beyond weighing the anticipated advantage from an attack against possible civilian casualties and damage to their property—environmental damage is factored into the equation.⁵⁷⁹ While proportionality remains fundamentally subjective, the Statute’s standard requires both intent and “clearly excessive” damage. Nuclear weapons will cause significant damage by their nature. The Rome Statute’s disproportionate attack

⁵⁷⁶ Rome Statute, *supra* note 567, art. 8(2)(b)(i).

⁵⁷⁷ *Id.* art. 8(2)(b)(v).

⁵⁷⁸ *Id.* art. 8(2)(b)(iv).

⁵⁷⁹ The United States has not recognized as customary international law the environmental damage provisions previously found in AP I art. 35(3) or art. 55. Matheson, *supra* note 404, at 424; John Bellinger, III and William J. Haynes II, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INT’L REV. OF THE RED CROSS 443, 455-56 (June 2007). Mr. Matheson, however, conceded that “the means and methods of warfare that have such a severe effect on the natural environment so as to endanger the civilian population may be inconsistent with the other general principles, such as the rule of proportionality.” Matheson, *supra* note 404, at 436.

offense should give decision makers incentive to carefully select nuclear targets and tailored weapon effects to maximum degree necessary to achieve the military objective.

Another critical concern with the Rome Statute is a complete omission of the doctrine of belligerent reprisals. The Statute lists ground for excluding criminal responsibility such as mental disease or defect, intoxication, duress, and reasonable self-defense.⁵⁸⁰ Reprisals are not on this list, but historically have been omitted from treaty discussions due to their contentious nature.⁵⁸¹ When AP I prohibited reprisals, the United States considered it to be one of that treaty's major flaws and not reflective of customary international law.⁵⁸² Other nations, like the United Kingdom, France, Germany, Italy, and Egypt, became parties to AP I while reserving the right to take reprisals.⁵⁸³ The Rome Statute's omission of discussion relating to reprisals does not eliminate this doctrine, which is relied upon by States to compel adversaries to cease violating the law of war.⁵⁸⁴

XIII. Nuclear Transformation: The Bush 43 Years

Nuclear weapon targeting law did not significantly change during the administration of President George W. Bush. This period was marked by a new strategy, deemphasizing nuclear capabilities, and a failed attempt to modernize nuclear weapons.

⁵⁸⁰ Rome Statute, *supra* note 576, art. 31.

⁵⁸¹ See *supra* Section II.B.

⁵⁸² Burrus Carnahan, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL'Y 419, 506-07 (1987). Even if AP I's prohibitions against reprisals were generally accepted as customary international law, those prohibitions would not apply to nuclear weapons. 1995 U.S. Statement to ICJ, *supra* note 513, at 25.

⁵⁸³ Michael Newton, *Reconsidering Reprisals*, 20 DUKE J. COMP. & INT'L L. 361, 378-79 (2010).

⁵⁸⁴ *Id.* at 379-80 (2010).

A. U.S. Policy Developments: The New Triad

Like Clinton, President Bush began his administration with a Nuclear Posture Review. Based on this review, Russia was no longer considered a primary threat, while remaining known and unknown potential threats needed to be addressed through a “capabilities based approach.”⁵⁸⁵ First, the administration established a “New Triad.” The term “triad” previously referred to nuclear strike capabilities: submarines, bombers, and land-based missiles. Secretary of Defense Donald Rumsfeld announced the composition of the “New Triad” in the publicly released Foreword to the 2002 Nuclear Posture Review Report. It was composed of: (1) “Offensive strike systems (both nuclear and non-nuclear);” (2) “Defenses (both active and passive);” and (3) “A revitalized defense infrastructure[.]”⁵⁸⁶ The new system would need improved command, control, intelligence and planning to work.⁵⁸⁷ Basically, U.S. strategic defense would have a nuclear component, but nuclear weapons would not be its sole emphasis.

B. U.S. Nuclear Modernization Controversy

Because of WMD proliferation, Rumsfeld also argued that different nuclear weapons were needed: instead of large warheads with moderately accurate delivery vehicles, the United States needed weapons with lower yields, greater accuracy, and the ability to penetrate hardened and deeply buried structures.⁵⁸⁸ New nuclear weapons could also have tailored effects, such as the ability to neutralize chemical and biological agents.⁵⁸⁹ These new nuclear weapons were viewed as more likely to deter rogue state adversaries.⁵⁹⁰ Since deterrence required the ability to destroy an adversary’s high value assets, those adversaries needed to know the U.S. had the capability and will to do so when necessary.⁵⁹¹ Secretary Rumsfeld pointed out that seventy countries were pursuing underground activities.⁵⁹² He told Congress,

⁵⁸⁵ Donald Rumsfeld, Foreword to the Nuclear Posture Review Report, http://imioonline.de/download/Nuclear_Posture_Review.pdf; Bernstein, *supra* note 498, at 87.

⁵⁸⁶ Rumsfeld, *supra* note 585, at 1.

⁵⁸⁷ *Id.*

⁵⁸⁸ Bernstein, *supra* note 492, at 87.

⁵⁸⁹ Robert Monroe, *New Threats, Old Weapons*, WASH. POST, Nov. 16, 2004, at A25.

⁵⁹⁰ *Id.*; Bernstein, *supra* note 492, at 87.

⁵⁹¹ Monroe, *supra* note 589, at A25.

⁵⁹² Testimony of Donald Rumsfeld, Secretary of Defense, U.S. Senate Subcommittee of

At the present time, we don't have a capability of dealing with that. We can't go in there and get at things in solid rock underground.

The proposal—the only thing we have is very large, very dirty, big nuclear weapons. So the choice is not do we have—do we want to have nothing and only a large dirty nuclear weapon or would we rather have something in between?⁵⁹³

The proposed “nuclear transformation” of the weapons proved to be controversial based on practical and policy arguments. One of the principle arguments against the proposed weapons was found in the physics problems with nuclear bunker busters. The *Washington Post* reported:

[N]o nuclear weapon could go deep enough without destroying itself or creating enormous fallout. As Sidney Drell, the nuclear physicist. . . . wrote, 50 feet is about as deep as a bomb or missile warhead could dig itself. To be effective, it would take more than 100 kilotons to reach a target 1,000 feet down. That size weapon would create a much larger crater than Ground Zero at the World Trade Center and create a large amount of dangerous radioactive debris.⁵⁹⁴

Although this criticism applied to existing technology, Rumsfeld pointed out that the theoretical nuclear “bunker buster” needed to be studied.⁵⁹⁵ Critics also focused on the fact that employment of new nuclear weapons would still have the potential to cause considerable casualties.⁵⁹⁶

the Committee on Appropriations, Wed. 27, 2005, at 41 <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg39104153/pdf/CHRG-109shrg39104153.pdf> ;

⁵⁹³ *Id.* at 41.

⁵⁹⁴ Walter Pincus, *Future of the U.S. Nuclear Arsenal Debated; Arms Control Experts Worry Pentagon's Restructuring Plan Means More Weapons*, WASH. POST, May 4, 2003, at A06.

⁵⁹⁵ Testimony of Donald Rumsfeld, *supra* note 592 at 41.

⁵⁹⁶ Ann Scott Tyson, *'Bunker Buster' Casualty Risk Cited*, WASH. POST, Apr. 28, 2005, at A07.

Rumsfeld countered that casualties would be reduced when compared to existing weapons.⁵⁹⁷

Other criticism of the proposed new generation of weapons focused on policy concerns. Some emphasized the lack of threats to the United States, accusing the Bush administration of trying to indefinitely preserve the “nuclear security establishment’s . . . nuclear weapon design capability at the national laboratories.”⁵⁹⁸ Other critics feared that the smaller, lower-yield weapons would be more likely to be used.⁵⁹⁹ They also argued that development of nuclear “bunker busters” would require resumption of nuclear testing, which was suspended in 1992.⁶⁰⁰ Furthermore, some argued that it was hypocritical for the U.S. to develop a new generation of nuclear weapons while discouraging other countries from developing their own.⁶⁰¹

Congress ultimately opposed developing the new weapons.⁶⁰² Senator Edward “Ted” Kennedy stated that the new nuclear weapons would raise doubt about the U.S. commitment to refrain from using nuclear weapons against non-nuclear nations.⁶⁰³ He also agreed with arguments finding the proposed nuclear bunker buster to be more usable, and went so far as to declare, “If we build it, we will use it[.]”⁶⁰⁴ Senator Richard “Dick” Durbin explained that the new weapon development program would likely lead to a resumption of the Cold War arms race.⁶⁰⁵ Senator Dianne Feinstein expressed concerns over these initiatives expanding nuclear proliferation, rather than controlling it.⁶⁰⁶ Representative David Hobson

⁵⁹⁷ Testimony of Donald Rumsfeld, *supra* note 592, at 69.

⁵⁹⁸ Bruce Blair, *We Keep Building Nukes For All the Wrong Reasons*, WASH. POST, May 25, 2003, at B01.

⁵⁹⁹ Andrew Krepinevich, *The Real Problems with Our Nuclear Posture*, N.Y. TIMES, Mar. 14, 2002, at A31.

⁶⁰⁰ James Dao, *Study Raises Fears About Weapons*, N.Y. TIMES, Nov. 17, 2002, at A22. Research and development of nuclear weapons under five kilotons had been prohibited in the 1994 National Defense Authorization Act. P.L. 103-160 § 3136. That restriction was repealed by the 2004 National Defense Authorization Act and replaced with a prohibition on testing, acquiring, or deploying low-yield nuclear weapons. P.L. 108-136 § 3116.

⁶⁰¹ *Id.*

⁶⁰² Bernstein, *supra* note 492, at 88.

⁶⁰³ Pincus, *supra* note 594, at A06.

⁶⁰⁴ Helen Dewar, *GOP Blocks Democrats’ Effort to Halt Nuclear Arms Studies*, WASH. POST, May 21, 2003, at A04.

⁶⁰⁵ *Id.*

⁶⁰⁶ Carl Hulse, *House Retreats From Bush’s Nuclear Plan*, N.Y. TIMES, July 15, 2003, at A18.

also found the new weapons proposal to be provocative.⁶⁰⁷ The Bush administration's efforts to transform the nuclear stockpile did not advance.

Due to the proliferation of threats, however, the planning for nuclear conflict was forced to evolve. The military's single integrated operational plan for nuclear war was no longer viable in the new global environment and was transformed into a family of plans where employment options could vary as needed.⁶⁰⁸

XIV. The Prague Agenda: The Obama Years

The Obama administration articulated that the principles of the law of war applicable to nuclear weapons, emphasizing the role of law in their potential employment, while simultaneously stressing both arms control and deterrence. The administration continued to pursue modernization to make weapons more compliant with legal requirements.

A. U.S. Policy Developments

Early in his Presidency, Barack Obama made a speech in Prague, Czech Republic, where he outlined priorities to strengthen nonproliferation and advocate for further arms control negotiations as steps toward a world ultimately free of nuclear weapons.⁶⁰⁹ The Obama administration's approach to promoting that agenda was outlined in a 2010 Nuclear Posture Review Report. The review called for stable relations with existing nuclear powers, emphasizing "Russia and the United States are no longer adversaries, and prospects for military confrontation have declined dramatically."⁶¹⁰ It acknowledged that nuclear weapons existed for deterring aggression, but declared they would have a reduced role in deterring non-nuclear attacks. The review refrained from an absolute "no-first use" declaration in favor of stressing use only under "extreme circumstances to defend the vital interests of the United States or its allies

⁶⁰⁷ Matthew Wald, *Nuclear Weapons Money Is Cut From Spending Bill*, N.Y. TIMES, Nov. 23, 2004, at A22.

⁶⁰⁸ Bernstein, *supra* note 492, at 88.

⁶⁰⁹ *Id.* at 89.

⁶¹⁰ U.S. Dep't of Defense, Nuclear Posture Review Report, April 2010 at iv.

and partners.”⁶¹¹ Furthermore, the review stated that the United States would “not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations.”⁶¹² Finally, the review rejected new nuclear warheads and new capabilities for existing weapons.⁶¹³

In response to a Congressional mandate, the Obama Administration released a public Nuclear Employment Strategy document in 2013. The strategy, signed by Defense Secretary Chuck Hagel, repeated the themes of the 2010 Nuclear Posture Review: Russia was no longer an adversary; deterrence was the fundamental role of U.S. nuclear weapons; those weapons would only be used in extreme circumstances to defend vital interests; and nuclear weapons would not be used against non-nuclear NPT states complying with their obligations.⁶¹⁴ With regard to targeting, the emphasis was on maintaining counterforce capabilities. The announced policy disfavored reliance on a “countervalue” or “minimum deterrence” strategy.⁶¹⁵ It did not define these terms, nor did it state that eliminating reliance on counter-value targeting reflected any legal limitations. The direction within the document required all war plans to be consistent with the fundamental principles of the law of war and “apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.”⁶¹⁶

In 2015, the Obama administration oversaw testing of a smaller, more accurate, modernized version of an existing nuclear bomb.⁶¹⁷ According to reports, the administration believed this modernization would allow for a smaller overall U.S. nuclear arsenal.⁶¹⁸ The administration also

⁶¹¹ *Id.* at viii-ix.

⁶¹² *Id.* at viii.

⁶¹³ *Id.* at xiv.

⁶¹⁴ U.S. DEP’T OF DEF., REPORT ON NUCLEAR EMPLOYMENT STRATEGY OF THE UNITED STATES SPECIFIED IN SECTION 491 OF 10 U.S.C. at 3-4 (19 June 2013).

⁶¹⁵ *Id.* at 4-5.

⁶¹⁶ *Id.*

⁶¹⁷ William J. Broad & David E. Sanger, *As U.S. Modernizes Nuclear Weapons, ‘Smaller’ Leaves Some Uneasy*, N.Y. TIMES, Jan. 11, 2016, at A1. The new bomb has a “dial-a-yield” capability whereby the blast can be lowered to 2% of the Hiroshima bomb. *Id.* Variable yield nuclear warheads allowing tailored efforts have existed in the U.S. arsenal since at least 1962. James Gibson, *History of the Army’s Nuclear Capable Rocket Program*, FIELD ARTILLERY, Aug. 1987 at 23.

⁶¹⁸ Broad & Sanger, *supra* note 617, at A1.

recognized concerns that smaller more accurate weapons would be more tempting to use, but believed the increased “usability” made them a more credible threat and would increase the deterrent value of the weapons.⁶¹⁹ James Miller, the Under Secretary of Defense for Policy who helped develop the modernization plan, explained that the modernized weapon addressed proportionality concerns with nuclear weapons by reducing the risks for civilians living near military targets: “Minimizing civilian casualties if deterrence fails is both a more credible and a more ethical approach.”⁶²⁰ Such modernization efforts would also be in keeping with the administration’s nuclear posture review’s restriction against new nuclear warheads or new military capabilities so long as existing military technology is used to sustain capabilities.

In its final months in office, the Obama Administration issued policy guidance to “underscore its commitment to reducing civilian casualties[.]”⁶²¹ Through an executive order, the President required DoD to take feasible precautions, conduct risk assessments, and develop intelligence systems in the interest of protecting civilians.⁶²² These policy requirements reflected existing law and policy. The order, however, also directed that the United States acknowledge “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[.]”⁶²³ In the context of a major war, such payments could be significant, although they are subject to rules under annual Congressional funding acts and DoD regulations.⁶²⁴

⁶¹⁹ *Id.*

⁶²⁰ *Id.* Meanwhile, Russia’s nuclear weapon modernization included development of the Sarmat intercontinental ballistic missile, nicknamed “Satan 2.” Sebastian Shukla & Laura Smith-Spark, *Russia Unveils ‘Satan 2’ Missile, Could Wipe Out France or Texas, Report Says*, CNN (Oct. 27, 2016, 9:43 AM) <http://www.cnn.com/2016/10/26/europe/russia-nuclear-missile-satan-2/>. The Russian weapon is capable of wiping out parts of the earth the size of Texas or France. *Id.*

⁶²¹ Legal Policy Report, *supra* note 557, at 26.

⁶²² Exec. Order No. 13,732, Sec. 2, July 1, 2016 *reprinted in* 81 Fed. Reg. 44,485 (July 7, 2016).

⁶²³ *Id.*

⁶²⁴ The annual National Defense Authorization Act (NDAA) authorizes and governs *ex gratia* “condolence” payments. *See e.g.* Pub. L. No.109-163, § 1202 (2006); Pub. L. No. 110-181 § 1205 (2008); Pub. L. No. 111-84 § 1222 (2009); Pub. L. No. 111-383 § 1212 (2011); Pub. L. No. 112-81 § 1201 (2011). *See also* U.S. DEP’T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 12, ch. 27, para. 270103, (Aug. 2008).

B. United States Military Targeting Guidance

As pointed out earlier, the distinctions between military and civilian objects are not always clear. This problem is acknowledged in Joint Publication (JP) 3-60, *Joint Targeting*, which contains the current U.S. military doctrine addressing targeting across the spectrum of possible actions, including conventional, cyberspace, information operations and nuclear targeting.⁶²⁵ The publication fully adopts the AP I Article 52(2) targeting language.⁶²⁶ In the explanation, JP 3-60 maintains definitional flexibility to permit the targeting of objects that sustain an adversary's war effort:

Purpose or use. Purpose means the future intended or possible use, while use refers to its present function. The potential dual use of a civilian object, such as a civilian airport, also may make it a military objective because of its future intended or potential military use. The connection of some objects to an enemy's war-fighting, war-supporting, or war-sustaining effort may be direct, indirect, or even discrete. A decision as to classification of an object as a military objective and allocation of resources for its attack is dependent upon its value to an enemy states [sic.] war-supporting or war-sustaining effort (including its ability to be converted to a more direct connection), and is not solely reliant on its overt or present connection or use.⁶²⁷

The guidance appears to preclude targeting unimportant objects with its repeated emphasis on the need for a “definite military advantage,”

⁶²⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING C-7 (31 Jan. 2013) [hereinafter JP 3-60].

⁶²⁶ *Id.* at A-2:

Lawful Military Attacks. Military attacks will be directed only at military objectives. In the law of war, military objective is a treaty term: “those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose partial destruction, capture, or neutralization, under the circumstances ruling at the time, offers a definite military advantage.

⁶²⁷ *Id.* at A-3. “Discrete,” meaning “separate” or “distinct,” should not be confused for its homonym “discreet,” meaning “inconspicuous” or “subtle.”

which must be “concrete and perceptible military advantage, rather than one that is merely hypothetical or speculative.”⁶²⁸ This definition incorporates the legal principle of military necessity by requiring attacks to be limited to entities contributing to the ability to wage war. Direct attacks on populations or objects exclusively to undermine enemy morale or civilian support for the war efforts are no longer considered to be lawful, as such attacks do not provide a definite military advantage.⁶²⁹ As Hays Parks wrote, “‘Morale’ is neither an object nor a person. It may be affected by attack of military objectives. But morale may not in and of itself be a military objective, and civilian objects may not be attacked to affect civilian morale.”⁶³⁰ Likewise, the enemy’s national will, the ultimate Clausewitzian objective of war, may be aimed at through attacks on lawful military objectives.⁶³¹

Under JP 3-60, proportionality must also factor into any strike on military objectives.⁶³² Scholars have pointed out examples of nuclear weapon use where collateral damage would clearly not be excessive:

[T]here seems to be no reason to fault the use of nuclear weapons in a ‘strike upon troops and armor in an isolated desert region with a low-yield air-burst in conditions of no wind’. Another apparently acceptable setting would be that of detonating ‘clean’ nuclear weapons against an enemy fleet in the middle of the ocean . . . In neither of these two exceptional situations should the employment of nuclear weapons give rise to . . . any expectation of ‘excessive’ collateral damage to civilians or civilian objects.⁶³³

⁶²⁸ *Id.* at A-2, A-3.

⁶²⁹ LAW OF WAR MANUAL, *supra* note 19, ¶ 5.6.7.3.

⁶³⁰ Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, *supra* note 476, at 116 (quoting comments from Professor Knut Ipsen).

⁶³¹ *Id.* at 99.

⁶³² JP 3-60, *supra* note 625, at III-1.

⁶³³ DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, *supra* note 537, at 86, (quoting Schmitt, *supra* note 499, at 108). *See also* Justin Anderson, *Applying Jus In Bello to the Nuclear Deterrent*, ARMS CONTROL WONK (March 14, 2016), <http://www.armscontrolwonk.com/archive/1201208/applying-jus-in-bello-to-the-nuclear-deterrent/> (describing a scenario where it would be legitimate for a U.S. nuclear strike to prevent a catastrophic, mass-casualty attack against the United States or an ally).

Under the conditions that characterize operational realities, law-of-war proportionality assessments are far more difficult.

Although subjective, modern proportionality requirements limit attack options, including potential attacks on military forces as well as war-sustaining, economic targets. Proportionality must account for legitimate civilian needs, like electrical power, in addition to incidental destruction and casualties.⁶³⁴ Ultimately, the proportionality determination weighs collateral damage against military advantage, noting that “a very significant military advantage would be necessary to justify the collateral death or injury to thousands of civilians.”⁶³⁵ The assessment of the military advantage, however, is not limited to the tactical gains of the individual attack, but is linked to the full context of the war strategy.⁶³⁶ This is consistent with the views of other nations who signed AP I with the understanding that the “military advantage of an attack” refers to the attack as a whole and not isolated or particular parts of the attack.⁶³⁷

Similar to the Rome Statute’s obligations, JP 3-60 contained a doctrinal requirement to include environmental damage in the proportionality analysis. American commanders now have the affirmative “obligation to avoid unnecessary damage to the environment to the extent that it is practical to do so consistent with mission accomplishment.”⁶³⁸ They are cautioned to take “due regard” for the “protection and preservation of the natural environment” when weighing the dictates of military requirements against the possible methods and means of attack.⁶³⁹ The publication’s doctrinal obligations are consistent with the U.S. State Department’s position on accounting for environmental damage.⁶⁴⁰

Applying proportionality requirements to nuclear weapons becomes very abstract, if not subjective. The examples of Hiroshima and Nagasaki are unhelpful in clarifying the modern legal analysis. First, the popular moral proportionality analysis of these strikes often compares the numbers actually killed against those who would have died if an invasion was necessary.⁶⁴¹ Second, many seem to treat the military advantage of these

⁶³⁴ JP 3-60, *supra* note 625, at A-5.

⁶³⁵ LAW OF WAR MANUAL, *supra* note 19, ¶ 5.12.3.

⁶³⁶ JP 3-60, *supra* note 625, at A-4.

⁶³⁷ LAW OF WAR MANUAL, *supra* note 19, ¶ 5.6.7.3 n. 182.

⁶³⁸ JP 3-60, *supra* note 625, at A-7.

⁶³⁹ *Id.*

⁶⁴⁰ Matheson, *supra* note 404, at 436; Bellinger & Haynes, *supra* note 579, at 455-59

⁶⁴¹ FREEDMAN, *supra* note 134, at 189.

strikes as Japan's surrender, rather than the destruction of specific military objectives. The primary historical error of these views is that they use the benefit of hindsight, with full knowledge of the atomic blast effects, numbers killed, and the political situation in Japan as well as the number of civilians at risk of starvation prior the end of the war. The primary legal flaw in these views is that the modern proportionality analysis was not required or conducted prior to the attacks. The modern approach would have required decision makers to weigh the expected collateral damage against the destruction of Hiroshima's regional military headquarters and Nagasaki's military industrial works as part of the overall Allied military strategy.

XV. Trends

United States nuclear targeting policy and the country's understanding of the law of war have evolved considerably. Certain trends are now evident.

The law-of-war requirement to limit attacks to military objectives remains an intact principle for nuclear war. The city-attack strategy during the early Cold War was not an abandonment of this requirement, but a result of limitations in intelligence and capabilities. Those cities still contained significant economic and industrial facilities representing legitimate targets. In the modern era, listing cities *per se* as the potential targets of attack would no longer be considered lawful, unless they were targeted pursuant to application of the doctrine of belligerent reprisal. Similarly, the concept of "bonus damage" is anathema to the modern sense of humanity, especially if such damage was intentionally engineered into a nuclear strike.

The doctrine of reprisal, which is an exception to the law-of-war rules for target selection, always lurks in the background of nuclear weapon policy. It gives the most coherent justification for Cold War strategies like targeting enemy cities, massive retaliation, and assured destruction.⁶⁴² It remains a viable legal rationale for countering unlawful attacks against U.S. vital interests. The limitations to the traditional legal doctrine, however, are that reprisals require unlawful prior conduct by the adversary and proportional responses. Fully rationalizing Cold War era Massive Retaliation or Assured Destruction requires assuming a total war construct

⁶⁴² SCHWARZENBERGER, *supra* note 329, at 40-41.

where the adversary's intent to strike U.S. and allied cities is presumed at the outset and proportionality concerns are contextualized by the condensed timeframe and overwhelming destructive potentials involved in a nuclear exchange. Even if a nuclear exchange is limited, theoretically permitting the operation of the classic belligerent reprisal doctrine, concerns for massive loss of life remain.⁶⁴³ Ambiguities in the law may give states flexibility in characterizing limited attacks as "illegal" and thereby allow justification for reprisal strikes. This leads to history's caution that reprisals tend to escalate conflicts rather than bring parties back into conformity with the law. That said, even though the United States strives to comply with the law at all times, its adversaries do not. The law of war is not a suicide pact.⁶⁴⁴ Thus the mandate for deterrence keeps the doctrine of belligerent reprisal alive despite protests.

Furthermore, the law-of-war principle of distinction plays an increasing role of importance. The requirement was captured in AP I articles 48 and 51(4). These rules prohibit indiscriminate attacks on civilian populations. While the "new rules" contained in AP I do not apply to nuclear war, the principle of distinction is not a new rule. Moreover, the American public and international community at large has ever-increasing expectations of precision attacks by U.S. munitions. This increasing demand for precision and discrimination creates concerns on multiple levels. On the one hand, highly accurate, low yield nuclear weapons would be more likely to mitigate legal concerns, but some fear that such improvement would make the weapons more likely to be used. On the other hand, nuclear weapon employment would still break a "nuclear taboo" and risk producing significant collateral damage. How public expectations of precision damage match with the destructive effects of nuclear weapons will remain a significant legal and policy conundrum as long as nuclear weapons exist.

Despite the increasing role of the law of war for all military operations, the actual role of the law of war relating to nuclear weapons remains at an extraordinary level of abstraction.⁶⁴⁵ For example, consider a strike against a WMD target near a dam, the breach of which would flood a major

⁶⁴³ KALSHOVEN, *supra* note 25, at 376.

⁶⁴⁴ Parks, *Air War and the Law of War*, *supra* note 56, at 54.

⁶⁴⁵ The *Law of War Manual* advises, "[A] very significant military advantage would be necessary to justify the collateral death or injury to thousands of civilians." LAW OF WAR MANUAL *supra* note 19, ¶ 5.12.3.

city. The U.S. rejects the AP I article 56 requirement to refrain from striking dams, dykes or nuclear power plants with conventional weapons when effects would have severe consequence on the civilian population.⁶⁴⁶ Instead, the U.S. favors a more general proportionality analysis on any such attack with a conventional weapon.⁶⁴⁷ Under the U.S. approach, removing the threat posed by the WMD would be weighed against the probability and degree of civilian casualties, damage and hardship as well as environmental damage. If nuclear weapons would be used to strike the WMD objective, the abstraction in applying a proportionality test increases by orders of magnitude.

The abstractions in applying the law of war to potential nuclear weapon use is not a result of negligence or oversight but can only be a deliberate course of action by States.⁶⁴⁸ The international community, to include the nuclear weapon States, has been able to negotiate *jus in bello* rules after the advent of atomic weapons such as the 1949 Geneva Conventions and the 1977 Additional Protocols. The United States and former Soviet Union were able to negotiate arms control treaties. Yet the nuclear weapon States have not demonstrated any will to negotiate specific rules for employing nuclear weapons.⁶⁴⁹ Perhaps the best explanation is that policymakers do not trust the credibility of legal restrictions to protect against nuclear-armed opponents and, simultaneously, the lack of regulation complements nuclear deterrence by confronting enemies with uncertainty.

⁶⁴⁶ Matheson, *supra* note 404, at 427.

⁶⁴⁷ *Id.* at 434.

⁶⁴⁸ For example, the United States has intentionally practiced “calculated ambiguity” to deter adversaries armed with chemical and biological weapons. William Perry, et al., *U.S. Nuclear Weapons Policy, Independent Task Force Report no. 62*, COUN. ON FOR. RELAT.’S 16-17 (2009), <http://www.cfr.org/proliferation/us-nuclear-weapons-policy/p19>

226. The North Atlantic Treat Alliance also leverages ambiguity in its nuclear posture to underscore the irrationality of a major war in the Euro-Atlantic region. *Id.* at 15.

⁶⁴⁹ The United Nations Committee on Disarmament and International Security, also known as the First Committee, is striving for nuclear disarmament. Thalif Deen, *U.N. Plans New Working Group Aimed at Nuclear Disarmament*, INTER PRESS SERVICE NEWS AGENCY (Oct. 28, 2015), <http://www.ipsnews.net/2015/10/u-n-plans-new-working-groups-aimed-at-nuclear-disarmament/>. The United States seeks to achieve a world without nuclear weapons by pursuing a full-spectrum, pragmatic approach by steadily reducing the role and number of nuclear weapons in a way that advances strategic stability and thereby fostering conditions and opportunities for further progress. Rose, *supra* note 355. According to John Burroughs, Executive Director of the New York-based Lawyers Committee on Nuclear Policy, the United States is willing to support a U.N. working group that would explore all effective measures for nuclear disarmament, but not negotiate legal measures. Deen, *supra*.

XVI. Conclusion

Nuclear targeting strategy and its legal support were primarily built on Second World War strategic bombing practices, which arose from earlier theories and legal understandings. Pre-war legal concerns over strategic bombardment and targeting were not resolved by the conflict. Indeed, the legal legacy of the Second World War permitted vague definitions of military objectives and tolerance for civilian collateral damage, justified by a spirit of retaliation. Inasmuch as the United States military resisted targeting “morale” as an objective during the war, it adopted the rationale when developing war plans during the Truman administration to stop potential totalitarian aggression. Collateral damage was embraced as a “bonus.” Eisenhower’s emphasis on Massive Retaliation imperfectly invoked the belligerent reprisal doctrine for deterrence. While U.S. strategy expanded targets to more military force entities, it also included targets under a “population” category—a significant departure from law of war norms. The legal concern over population targeting was addressed during the Kennedy and Johnson administrations, but only by returning the emphasis to broad World War Two concepts of targeting enemy industry and economic infrastructure, with Assured Destruction leaving little room for law-of-war concerns over distinction and proportionality. The Nixon and Ford administrations began tasking the military to seek selective options so as to control escalation in the hope of avoiding Armageddon, but did so with even greater emphasis on targets representing the Soviet’s ability to recover economically. The United States finally settled on a countervailing strategy to close out the Cold War, retaining, but deemphasizing, economic targets based on value to the enemy rather than on legal concerns. The demands of deterring an adversary without scruples relegated the law to the periphery. As much as the United States’ targeting concepts appeared to break with law-of-war norms, exacting legal standards did not get firmly articulated until AP I was finalized. Although the United States rejected the treaty and held that its new rules did not apply to nuclear weapons, AP I articulated customary law standards for targeting, especially for distinction and proportionality. The United States acknowledged the applicability of these standards during the ICJ’s *Nuclear Weapons* proceedings and brought its nuclear targeting strategies into compliance with its understanding of legal obligations.

The Obama administration’s summary of international law applicable to nuclear weapon targeting was succinct and in keeping with the trajectory of history after the fall of Soviet communism. President Obama

articulated a standard that the Trump Administration inherits. The mandate not to strike civilian objects, but military ones only, however, was not new; it was also made by President Truman when issuing employment guidance for atomic bombs. Civilian objects can easily be converted to military objectives based on direct, indirect, or even discrete future intended or potential military use. Understanding the history of major conflicts makes it abundantly clear that industrial, infrastructure, and economic objects were high-priority targets in the past. If defining how and when these objects become military targets is problematic, then a better standard is required. Since defenders are obligated to keep their military objects distinct from civilian ones, the U.S. and international community may wish to clarify these ambiguities.

Clarity, however, may not serve a constructive purpose. Adversaries may attempt to leverage new restrictions to their advantage. Rules for humanitarian safeguards are regularly ignored by ruthless dictators. They do not demonstrate care for their civilian populations in the Western sense. For example, while the United States located its ICBMs to the rural center portion of the country during the Cold War, the Soviet Union spread their arsenal over their territory, including the heavily populated areas west of the Ural Mountains.⁶⁵⁰ Today's rogue actors may not care if civilian populations suffer or starve; they may value civilian objects only as shields from attack, rather than as having inherent humanitarian value. If new legal restrictions were in place, would rogue actors adhere to them? If not, how would the West respond? These are especially challenging questions the United States would face if the doctrine of belligerent reprisal were eliminated. Realistic assessments of potential adversary behavior and deception should always temper approaches to new rules.

The questions and ambiguities about targeting touch on the overall deterrence mission of the nuclear force. If potential adversaries believe the U.S. will not strike certain objects, then that perception will affect their decisions about courses of action and likely consequences. Possessing capabilities matching legal requirements will add credibility to deterrence. At the same time, ambiguity in the law of war can serve to improve deterrence by keeping adversaries uncertain as to the exact nature of potential responses to aggression.

⁶⁵⁰ Ball, *Toward a Critique of Strategic Nuclear Targeting*, *supra* note 245, at 21.

**REDEFINING THE NARRATIVE: WHY CHANGES TO
MILITARY RULE OF EVIDENCE 513 REQUIRE
COURTS TO TREAT THE PSYCHOTHERAPIST-PATIENT
PRIVILEGE AS NEARLY ABSOLUTE**

MAJOR ANGEL M. OVERGAARD*

I. Introduction

In the 2015 National Defense Authorization Act (NDAA), Congress directed the President to significantly expand the protection offered to psychotherapist-patient communications in Military Rule of Evidence (MRE) 513.¹ The President implemented Congress's recommendation in Executive Order (EO) 13696, effective June 2015.² Since its inception, MRE 513 has provided the following privilege:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in

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¹ See Carl Levin & Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014); *infra* app. D (containing full text of § 537).

² See Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819–20 (June 22, 2015) (amending Military Rule of Evidence (MRE) 513); see *infra* app. E (containing relevant portion of the 2015 executive order (EO)).

a case arising under the Uniform Code of Military Justice [(UCMJ)], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.³

The pre-June 2015 privilege contained eight enumerated exceptions, including a “constitutionally required” exception which allowed courts to breach the privilege “when admission or disclosure of a communication is constitutionally required.”⁴ When one of the parties disputed a potential breach of the privilege, upon request, the military judge conducted a hearing.⁵ If, after the hearing, the military judge determined that the court must review the evidence before ruling on production or admissibility, the military judge conducted an *in camera* review.⁶

Before June 2015, military judges frequently relied on the constitutional exception to review otherwise privileged mental health treatment records of victims in sexual assault cases—even when defense counsel could not articulate a reasonable basis for asserting that the records or communications could contain any constitutionally-expected information.⁷ Commonly, military judges reviewed the records *in camera*

³ JOINT SERV. COMM. ON MILITARY JUSTICE, PART III—MILITARY RULES OF EVIDENCE UPDATED AS OF JUNE 2016, MIL. R. EVID. 513 (2016), <http://jsc.defense.gov/Portals/99/Documents/MREsUpdatedJune2016.pdf?ver=2016-07-05-111944-123> [hereinafter JSC, UPDATED MREs]; *see infra* app. F (showing current version of MRE 513); *see also* Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,116 (Oct. 12, 1999) (promulgating MRE 513); *infra* app. B (containing relevant portion of the 1999 EO).

⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513(d)(8) (2014) [hereinafter MCM]; *see* app. C (containing 2013 MRE 513); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513(d)(8) (2012) [hereinafter 2012 MCM] (containing 2012 MRE 513); Exec. Order No. 13,140, 64 Fed. Reg. at 55,117 (containing 1999 MRE 513).

⁵ *See* MCM, *supra* note 4, MIL. R. EVID. 513(e).

⁶ *Id.* MIL. R. EVID. 513(e)(4).

⁷ *See Judicial Proceedings Panel on Military Sexual Assault*, Department Of Defense Transcript of Public Meeting, at 264 (Oct. 10, 2014) (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders) (“In the military, the constitutionally required exception to [MRE 513] has been utilized by judges to justify automatic in camera review of all mental health records, often leading to the disclosure of large chunks of a victim’s therapy records.”); *Embattled: Retaliation against Sexual Assault Survivors in the US Military*, HUMAN RIGHTS WATCH, May 18, 2015, https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military#_ftn95 (“Attorneys told us that military judges commonly review private mental health records in chambers looking for relevant evidence, which some described as a ‘fishing expedition.’” (citation omitted)).

on the basis that the records *could* contain impeachment material.⁸ Based on their review, military judges released to the parties—at times liberally—otherwise privileged communications or records that the judge determined relevant under typical discovery rules.⁹ Treating MRE 513 as a rule of relevance rather than limiting a release to information that was allegedly constitutionally required, or that supported the defense’s alleged theory, was particularly troublesome in sexual assault cases. In these cases, deeply personal treatment communications were handed over to the very individual that allegedly victimized the witness.

Because the pre-2015 MRE 513 was vague¹⁰ and military courts were accustomed to open discovery, it was understandable that when MRE 513 could allow it, judges chose the more cautious route of reviewing and disclosing an alleged victims’ mental health records. Regardless of the judge’s reason for requiring the victim witness to disclose otherwise privileged communications and records, producing this information could be traumatic for alleged sexual assault victims and did not account for the purpose of the privilege or the victims’ rights.¹¹ The result of the privilege’s misapplication was re-victimization of sexual assault victims.

⁸ See *United States v. Burgh*, No. 38207, 2014 CCA LEXIS 824, at *19-21 (A.F. Ct. Crim. App. Apr. 16, 2014), *review denied*, 2014 CAAF LEXIS 1031, at *1 (C.A.A.F. Oct. 28, 2014) (finding trial judge properly reviewed victim’s mental health records based on defense assertion that they could contain *Brady* or *Giglio* material and that the court properly released portions of the records even though they contained no reference to the possible *Brady* or *Giglio* material asserted); *United States v. Hohenstein*, No. 37965, 2014 CCA LEXIS 179, at *17 (A.F. Ct. Crim. App. July 1, 2013), *aff’d in part, rev’d in part, dismissed in part*, 2014 CAAF LEXIS 910 (C.A.A.F. Sept. 5, 2014) (finding trial court conducted *in camera* review based on defense assertion that victim made statements to therapists that could be used for impeachment as constitutionally required under MRE 513).

⁹ See *United States v. Palmer*, No. 38184, 2013 CCA LEXIS 1116, at *13 (A.F. Ct. Crim. App. Nov. 25, 2013), *review denied*, 2014 CAAF LEXIS 947, at *1 (C.A.A.F. June 30, 2014) (noting, without more explanation, that the court granted defense’s motion to compel production of the victim’s mental health records and the defense received a copy of the records); *United States v. Mora*, No. 201200335, 2013 CCA LEXIS 265, at *3-4 (N-M Ct. Crim. App. Mar. 28, 2013) (noting, without more explanation, that the court granted defense’s motion to compel production of the victim’s mental health records); *see also supra* notes 7-8.

¹⁰ See MCM, *supra* note 4, MIL. R. EVID. 513.

¹¹ See Carolyn Peddy Courville, *Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution*, 35 Hous. L. Rev. 187 (1998) (discussing victims’ privacy rights); Major David L. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, 123 Mil. L. Rev. 31, 42, 56-59 (1989) (discussing the development of a constitutional right of privacy and its application to the psychotherapist-patient relationship).

It further discouraged victims from continuing to cooperate in prosecutions.¹² Arguably, such a result is a miscarriage of justice. The application of the privilege, therefore, had to change.

The President, Congress, and the Department of Defense (DoD) have become more attuned to victims' rights.¹³ The President has noted that sexual assault threatens our national security,¹⁴ and the DoD Annual Report on Sexual Assault in the Military cited the revisions to the psychotherapist-patient privilege in its way forward in fiscal year 2015 "to incorporate best practices and reforms that improve its ability to address this crime."¹⁵ The military has also recognized the value of servicemembers seeking mental health treatment and endeavored to abolish stigmas associated with such treatment.¹⁶ Responding to a clear

¹² See *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Services*, 113th Cong. 89 (2013) [hereinafter *Sexual Assault Hearing*] (statement of Major General Gary S. Patton, U.S. Army, Director, Sexual Assault Prevention and Response Office) ("[V]ictims won't come forward unless we can demonstrate we will treat them the dignity and respect everyone deserves. . . . We gain their trust by creating a climate where a victim's report is taken seriously, their privacy is protected, and they are provided the resources and attention to manage their care and treatment."); Brief of U.S. Air Force Special Victims' Counsel Division as Amicus Curiae Supporting Petitioner at 16 n.10, *DB v. Lippert*, No. 20150769, 2016 WL 381436 (A. Ct. Crim. App. Feb. 1, 2016) ("Successful prosecution of [sexual offenses] frequently depends on victim cooperation. Prosecutors may reasonably conclude that if victims know disclosure of their confidential psychotherapy records without observance of legal protections is a significant risk, they will be less willing to step forward." (citing *People v. Superior Court*, 182 P.3d 600, 612 n.13 (Cal. 2008))).

¹³ See, e.g., 10 U.S.C. § 806b (2014) (declaring, among other things, that crime victims have "[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim."); 10 U.S.C. § 1044e (2014) (establishing Special Victims' Counsel (SVC) program).

¹⁴ Bryant Jordan, *Obama: Sexual Assault Threatens National Security*, MILITARY.COM (May 17, 2013), <http://www.military.com/daily-news/2013/05/17/obama-sexual-assault-threatens-national-security.html>; Tom Vanden Brook & David M. Jackson, *Obama says Sexual Assault Crisis Hurts National Security*, USA TODAY (May 16, 2013, 6:41 pm) <http://www.usatoday.com/story/news/politics/2013/05/16/obama-hagel-military-sexual-assaults/2165763/>.

¹⁵ U.S. DEP'T OF DEFENSE, SEXUAL ASSAULT PREVENTION AND RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2014, at 52 [hereinafter DOD SAPR REPORT].

¹⁶ JOIE D. ACOSTA, ET AL., RAND CORP., MENTAL HEALTH STIGMA IN THE MILITARY 67-75 (2014). After over a decade of recurring deployments, the military has come to value and depend on psychotherapy in a time where suicide rates of servicemembers are still a real and preventable problem. See *The Incidence of Suicides of United States Servicemembers and Initiative Within the Department of Defense to Prevent Military Suicides: Hearing Before the Subcomm. on Personnel of the Comm. on Armed Services*, 111th Cong. 8-12 (2009) (statement of General Peter Chiarelli, Vice Chief of Staff, U.S. Army).

need to prevent unnecessary re-victimization by baselessly breaching the privilege, the President updated MRE 513 to ensure victim witnesses receive their protections intended by Congress. These protections arguably amount to providing victim witnesses a level of due process. Now, MRE 513 more clearly reflects the privilege's main purposes as it pertains to alleged victims—encouraging them to report the crime and seek effective treatment for their trauma.

The primary changes implemented by the 2015 EO are the following: (1) expanding the definition of psychotherapist; (2) deleting the “constitutionally required” exception in MRE 513(d)(8); (3) enhancing procedural protections during the required motions hearing prior to the court ordering production or admission of records or communications; (4) inserting the following specific requirements that a judge must find by a preponderance of the evidence before conducting an *in camera* review of evidence:

- (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
- (B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
- (C) that the information sought is not merely cumulative of other information available; and
- (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources[;]¹⁷ and
- (5) requiring any production or disclosure to only include information that meets the determined exception and purpose for which they are sought.¹⁸

The President, Congress, and the DoD are moving the military toward the unqualified federal privilege articulated in *Jaffee v. Redmond*.¹⁹ At the same time, because the military justice system requires more specificity and efficiency than the civilian justice system,²⁰ Congress, the President,

¹⁷ Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,820 (June 22, 2015); JSC, UPDATED MREs, *supra* note 3, MIL. R. EVID. 513(e)(3)(A)-(D).

¹⁸ Exec. Order No. 13,696, 80 Fed. Reg. at 35,819-20; JSC, UPDATED MREs, *supra* note 3, MIL. R. EVID. 513(e)(4).

¹⁹ See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

²⁰ See 2012 MCM, *supra* note 4, MIL. R. EVID. 501 analysis, at A22-38-39.

and the DoD articulated the required exceptions for military necessity and safety to ensure all parties' rights are appropriately balanced.²¹ After meeting the above-articulated factors by a preponderance of the evidence, the current MRE 513 exceptions allow piercing the privilege in the following circumstances:

- (1) when the patient is dead;
- (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
- (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
- (4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
- (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
- (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; [and]
- (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice.²²

The changes to MRE 513 show that the President and Congress have determined that a patient's right to privacy in their mental health records prevails over an accused having access to all potentially relevant information in a case. By deliberately deleting the constitutional exception

²¹ See *id.* MIL. R. EVID. 513(d) analysis, at A22-38-39.

²² JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(1)-(7).

in MRE 513(d)(8) and enumerating the required analysis for courts to review and disclose records that fall under the seven remaining exceptions, the President and Congress have revealed their judgment that the exceptions reflect the full extent of the constitutional requirements. Now, the psychotherapist-patient privilege can only be pierced under limited, defined exceptions, similar to the absolute and nearly absolute clergy, spousal, and attorney-client privileges.²³ The rule no longer allows a fishing expedition through privileged information.

Instead of acknowledging that MRE 513 is now nearly absolute, practitioners have attempted to create their own exceptions, rather than look to the enumerated exceptions or other non-privileged sources.²⁴ In one recent case, defense counsel alleged that deleting the constitutionally required exception to MRE 513 had no impact on the application of the privilege.²⁵ The defense made no attempt to conform to the new MRE 513²⁶ and asserted the same baseless arguments to pierce the privilege that were successful under the pre-2015 MRE 513.²⁷ Practitioners have also published articles that seemingly take for granted MRE 513's revisions and the narrowing of the constitutionally required exception.²⁸ This view,

²³ *Id.*; see discussion *infra* Part IV.A.

²⁴ See *infra* note 28.

²⁵ *DB v. Lippert*, No. 20150769, 2016 WL 381436, at *6 (A. Ct. Crim. App. Feb. 1, 2015) (“The defense motion first argued that the recent amendment to Mil. R. Evid. 513(d)(8) (removing the ‘constitutionally required’ exception to the privilege) was without effect.”).

²⁶ See *id.* (“[T]he [defense] motion [for mental health records] also argued that the procedural requirements under Mil. R. Evid. 513 are invalid when the defense is seeking constitutionally required material.”).

²⁷ See *id.* (“The [defense] motion [for mental health records] did not identify, other than broad generalizations of possible impeachment evidence, what information they believed the records contained Nor did the motion identify with any specificity what constitutional issues were at play.”).

²⁸ See Major Michael Zimmerman, *Rudderless: 15 Years and Still Little Direction on the Boundaries of Military Rule of Evidence 513*, 223 MIL. L. REV. 312, 341-42 (2015) (advocating that trial judges pierce the MRE 513 privilege and conduct an *in camera* review when “the moving party can make the reasonable-likelihood showing” that “the requested intrusion is relevant and material, . . . the balancing test is satisfied, and . . . piercing the privilege is necessary”); Major Cormac M. Smith, *Applying the New Military Rule of Evidence 513: How Adopting Wisconsin’s Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice*, ARMY LAW., at 14-15, Nov. 2015 (recommending that if military judges determine that there is a “reasonable likelihood” that privileged mental health records contain three categories of evidence that patients must either choose to waive their privilege and allow the court to conduct an *in camera* review or have their testimony suppressed).

however, is not surprising given the military's strong resistance to treating the psychotherapist-patient privilege as a real privilege.²⁹

By making a blanket assertion that the Constitution must prevail, arguments against interpreting MRE 513 as a nearly absolute privilege reach the wrong conclusion regarding what is actually constitutionally required. These arguments fail to account for the fact that the President has spelled out how the rule should be interpreted, which is supported by Congress and the exceptional societal interest recognized by the Supreme Court in *Jaffee*.³⁰ Courts cannot engage in a balancing test of constitutional rights because the Supreme Court, Congress, and the President have already performed that test, and the importance of the privilege has prevailed over the unlikely possibility of discovering probative information in all but a few enumerated exceptions.³¹ By updating MRE 513, the President and Congress agreed that MRE 513 protects all interests involved, including the constitutional rights of the accused, victims' due process and privacy rights, and society's interest in protecting psychotherapist-patient communications while still discovering the truth. Military courts, therefore, have a clearly defined privilege in MRE 513 and cannot continue interpreting MRE 513 as having undefined exceptions.

To assist in understanding how to interpret and apply MRE 513, Part I of this article explains the recent updates to MRE 513. To show that the current version of MRE 513 is a nearly absolute privilege, Part II examines the purpose and history of the federal and military psychotherapist-patient privileges, the continuing trend of expanding the military psychotherapist-patient privilege, and the motivations for expanding the privilege. Through legislative history and Supreme Court and military case law, Part III discusses the constitutional interests involved in a nearly absolute psychotherapist-patient privilege and argues that the President—at the directive of Congress—appropriately balanced all interests in promulgating the current version of MRE 513. Part IV reviews other military privileges and concludes that the psychotherapist-patient privilege should be treated like other absolute and nearly absolute privileges, in particular the clergy privilege. Part V discusses how to correctly interpret and implement the *in camera* review procedure spelled out in MRE 513. Part VI concludes with a review of why the

²⁹ See discussion *infra* Part II.B.

³⁰ See *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996).

³¹ See *id.* at 10-11, 17-18.

psychotherapist-patient privilege must be interpreted as nearly absolute despite the potential limitation on acquiring all probative evidence.

II. Background

Although the Supreme Court has been reluctant to recognize testimonial privileges, it has recognized that public interest in protecting certain sensitive information is more important than the need to have access to all possible information.³² For example, the psychotherapist-patient privilege, the spousal privilege, the attorney-client privilege, and the communications to clergy privilege are based on the need for trust and confidence in the exclusive nature of the relationship.³³ The psychotherapist-patient privilege is the most recently recognized of the aforementioned privileges by the military,³⁴ but it is no less essential.

By examining the legislative history and development of the psychotherapist-patient privilege in both the federal and military justice systems, this section demonstrates how highly the President, Congress, and Supreme Court value the psychotherapist-patient privilege. The discussion below follows the federal psychotherapist-patient privilege from its early recognition by the Supreme Court, through Congress's discussions of codifying federal privileges and subsequent delegation to the Supreme Court to define privileges, to the psychotherapist-patient privilege's ultimate recognition by the Supreme Court.³⁵ This section also discusses how the military and civilian justice systems differ, the military's resistance to recognize the psychotherapist-patient privilege until after the President promulgated MRE 513, and the changes to MRE 513 since its implementation.³⁶ Finally, this section concludes with an examination of the motivations behind the changes to the psychotherapist-patient privilege, specifically the important impact of recognition of victim's rights by society, Congress, and the President.³⁷

³² See *id.* at 9; *Trammel v. United States*, 445 U.S. 40, 50-51 (1980); *United States v. Nixon*, 418 U.S. 683, 710 (1974).

³³ See *Jaffee*, 518 U.S. at 10. *But see* 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45 ("In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces.").

³⁴ President Carter promulgated the military rules of evidence in 1980 and recognized the spousal privilege, the attorney-client privilege, and the communications to clergy privilege. Exec. Order. No. 12,198, 45 Fed. Reg. 16,932 (1980).

³⁵ See *infra* Part II.A.

³⁶ See *infra* Part II.B.

³⁷ See *infra* Part II.C.

A. Federal Psychotherapist-Patient Privilege

The federal psychotherapist-patient privilege began as a compromise between the Supreme Court and Congress and evolved into the nearly absolute privilege recognized today. The Supreme Court has long recognized nine non-constitutional privileges: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer.³⁸ In 1972, all the aforementioned privileges were submitted by the Supreme Court to Congress for inclusion in the Federal Rules of Evidence (FRE).³⁹ In its submission, the Supreme Court included only three exceptions to the psychotherapist-patient privilege⁴⁰ and noted that many state-created psychotherapist-patient privileges contained so many exceptions that they left “little if any basis for the privilege.”⁴¹ The House could not agree on how to best articulate the privilege rules and therefore eliminated all of the Court’s specific rules in favor of one general rule.⁴² Congress thus charged the courts to define privileges “on a case-by-cases basis” through “the application of the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.”⁴³

1. *Supreme Court Recognition of Psychotherapist-Patient Privilege*

In 1996, the Supreme Court responded to its Congressionally-mandated mission and recognized the federal psychotherapist-patient

³⁸ See FED. R. EVID. 501 advisory committee’s note to 1974 enactment; see also Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAWYER, Sept. 2003, at 2-6 (discussing in detail the development of the federal and military psychotherapist-patient privilege).

³⁹ See FED. R. EVID. 501 advisory committee’s note to 1974 enactment.

⁴⁰ Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 241 (1972) (including exceptions to the federal psychotherapist-patient privilege for proceedings for hospitalizations for mental illness, examinations ordered by a judge, and mental and emotional conditions that are elements of the claim or defense).

⁴¹ *Id.* at 241-42 advisory committee’s note to Rule 504; see app. A (containing proposed FRE 504).

⁴² S. REP. NO. 93-1277 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7053 (noting that “it was clear that no agreement was likely to be possible as to the content of specific privilege rules”); see also FED. R. EVID. 501 advisory committee’s note to 1974 enactment (“Many of these rules contained controversial modifications or restrictions upon common law privileges.”).

⁴³ FED. R. EVID. 501 advisory committee’s note to 1974 enactment.

privilege for the first time in *Jaffee v. Redmond*.⁴⁴ In *Jaffee*, the administrator of the estate of a man whom a police officer shot and killed sued the officer and the town alleging excessive force.⁴⁵ At trial, the testimony of witnesses conflicted with the police officer's version of events.⁴⁶ During discovery, the estate sought the statements the officer made to a licensed social worker in the course of psychotherapy, as well as the notes taken during their sessions.⁴⁷ The Court determined that the statements and records were protected from compelled disclosure, observing the "mental health of our citizenry . . . is a public good of transcendent importance."⁴⁸

In so deciding, the Court noted the privilege is similar to the attorney-client and marital privileges in that it is "rooted in the imperative need for confidence and trust."⁴⁹ The Court determined that the privilege is vital because it facilitates treatment for individuals with mental or emotional problems.⁵⁰ If rejected, confidential communications between psychotherapists and patients "would surely be chilled," especially when future litigation is contemplated.⁵¹ On the other hand, the Court noted that "the likely evidentiary benefit that would result from the denial of the privilege is modest."⁵² Furthermore, the Court noted that if the psychotherapist-patient privilege did not exist, individuals would not speak to their therapists when litigation could follow, and then the evidence would never be created.⁵³

2. Supreme Court Scope of Psychotherapist-Patient Privilege

The psychotherapist-patient privilege equally applies in criminal and civil cases. In *Swidler & Berlin v. United States*, the Supreme Court noted that "there is no case authority for the proposition that the [attorney-client] privilege applies differently in criminal and civil cases."⁵⁴ Additionally,

⁴⁴ See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 5.

⁴⁷ *Id.*

⁴⁸ *Id.* at 15-18.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 11.

⁵¹ *Id.* at 11-12.

⁵² *Id.* at 11.

⁵³ *Id.* at 12 ("This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.")

⁵⁴ *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998).

the *Jaffee* Court seemed to acknowledge the psychotherapist-patient privilege's application to criminal cases.⁵⁵ The Court cited the criminal case of *Trammel v. United States* in finding that "both reason and experience" indicated that "a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence.'" ⁵⁶ The *Jaffee* Court again cited *Trammel* and noted, "Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" ⁵⁷

Justice Scalia's dissent in *Jaffee* also acknowledged the privilege's application to criminal cases.⁵⁸ Scalia expressed his disapproval of the majority's determination by contrasting excluding evidence under the privilege with excluding evidence under *Miranda v. Arizona*.⁵⁹ He lamented that when excluding "reliable and probative evidence" under *Miranda*, "the victim of the injustice is always the impersonal State or the faceless 'public at large.' For the rule proposed here, the victim is more likely to be some individual who is prevented from proving a valid claim—or (worse still) prevented from establishing a valid defense."⁶⁰ Although *Jaffee* is a civil case, it illustrates the proper application of the psychotherapist-patient privilege in criminal cases.

B. Military Psychotherapist-Patient Privilege

The military justice system functions somewhat differently than civilian justice systems, to include the authority and application of privilege.⁶¹ The Constitution gives Congress the authority to enact laws

⁵⁵ See *Jaffee*, 518 U.S. at 9-10.

⁵⁶ *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

⁵⁷ *Id.* at 9 (quoting *Trammel*, 445 U.S. at 50).

⁵⁸ See *id.* at 19 (Scalia, J., dissenting).

⁵⁹ *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

⁶⁰ *Id.* at 19-20. Scalia's dissent reveals his interpretation that the majority intended the psychotherapist-patient privilege be nearly absolute. *Id.*

⁶¹ See *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) ("Although there are many similarities between civilian criminal proceedings and our own, and although we frequently look to civilian statutes for guidance, the military and civilian justice systems are separate as a matter of law."); see also 1 DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 3-16 (9th ed.) (Matthew Bender & Co., Inc. 2015) (2003) (explaining the military criminal justice system).

regulating “land and naval [f]orces.”⁶² Via Article 36(a) of the UCMJ, Congress delegated authority to the President to issue rules governing military “[p]retrial, trial, and post-trial procedures,” which include MREs.⁶³ The Supreme Court has upheld the constitutionality of this delegation.⁶⁴ The MREs, therefore, have been issued through executive orders. However, at least recently, Congress has instructed the President and the Secretary of Defense through legislation to make changes to the MREs, and the President has complied through executive order.⁶⁵ The MREs, therefore, have strong statutory authority.⁶⁶

Unlike Congress’s general adoption of privilege in the FREs via Rule 501, the MREs are very specific. According to the Joint Services Committee (JSC), a general rule would be “impracticable within the armed forces. . . . [T]he military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geoliental and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law.”⁶⁷ The President and Congress, therefore, deliberately preempted the military from having to determine privilege application on a case-by-case basis.⁶⁸

Despite this requirement for specificity, the military “recognizes privileges ‘generally recognized in the trial of criminal cases in the United

⁶² U.S. CONST. art. 1, § 8, cl. 14.

⁶³ See 10 U.S.C. § 836(a) (2006) (“Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . .”).

⁶⁴ *Loving v. United States*, 517 U.S. 748, 772 (1996) (“The President’s duties as Commander in Chief, however, require him to take responsible and continuing action to superintend military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution . . .”).

⁶⁵ See, e.g., Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

⁶⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty.”).

⁶⁷ 2012 MCM, *supra* note 4, MIL. R. EVID. 501 analysis, at A22-38.

⁶⁸ See *id.*

States district courts pursuant to Rule 501 of the Federal Rules of Evidence.”⁶⁹ However, a caveat exists to the military’s ability to recognize common law privilege: “the application of such principles in trials by court-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.”⁷⁰ Military courts have consistently eschewed federal court precedent and used this caveat to resist recognizing any new privileges or to interpret privileges differently than a literal reading of the MRE.⁷¹

1. Military Recognition of Psychotherapist-Patient Privilege

Consequently, after *Jaffee*, the military continued to reject the psychotherapist-patient privilege citing MRE 501(d), where President Carter specifically barred a doctor-patient privilege.⁷² The Court determined that the definition of “physician” necessarily included psychiatrists and psychotherapists; therefore, the President had precluded the psychotherapist-patient privilege.⁷³ This view prevailed until 1999, when President Clinton exercised his delegated authority by establishing and implementing MRE 513.⁷⁴

Soon after President Clinton promulgated MRE 513, the U.S. Court of Appeals for the Armed Forces (CAAF) discussed *Jaffee* and the newly adopted MRE 513 in *United States v. Rodriguez*.⁷⁵ The CAAF interpreted *Jaffee* as articulating an absolute federal psychotherapist-patient privilege and acknowledged that the Supreme Court rejected the balancing test

⁶⁹ *Id.* MIL. R. EVID. 501 analysis, at A22-38-39 (citation omitted).

⁷⁰ *Id.* MIL. R. EVID. 501 analysis, at A22-39 (citation omitted).

⁷¹ *See, e.g.,* *United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000) (refusing to recognize psychotherapist-patient privilege); *United States v. Custis*, 65 M.J. 366, 368 (C.A.A.F. 2007) (refusing to recognize a crime-fraud exception to the spousal privilege); *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) (refusing to broaden spousal privilege exception to include the definition of child to include a “de facto child” or “a child who is under the care or custody of one of the spouses”).

⁷² Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980) (“Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.”).

⁷³ *See* *United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000) (citations omitted) (“A psychotherapist-patient privilege would be contrary to and inconsistent with Mil.R.Evid. 501(d).”).

⁷⁴ *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,120 (Oct. 12, 1999) (“Military Rule of Evidence 513 shall only apply to communications made after 1 November 1999.”).

⁷⁵ *See Rodriguez*, 54 M.J. at 156.

applied by the lower court.⁷⁶ The CAAF also noted that when promulgating MRE 513, the President did not rely on MRE 501(a)(4) to incorporate district court common law or “literally incorporate *Jaffee*.”⁷⁷ Instead, MRE 513 took “a more limited approach,” and the President set forth “in detail” the military privilege and its various exceptions.⁷⁸ Notably, MRE 513 included the possible exception cited in *Jaffee* among its eight enumerated exceptions.⁷⁹

Practitioners used the last of the enumerated exceptions, “when admission or disclosure of a communication is constitutionally required,”⁸⁰ to eviscerate the privilege.⁸¹ Military courts gutted the privilege despite the JSC’s observation that MRE 513 is necessary “based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege.”⁸² The JSC further noted that the exceptions to the privilege ensure “commanders . . . have access to all information that is necessary for the safety and security of military personnel, operations, installations, and equipment.”⁸³ The analysis of MRE 513 does not highlight a concern for the constitutional rights of the accused.⁸⁴ Instead, the JSC indicates that the primary concern of the rule

⁷⁶ See *id.* at 159. The Court of Appeals for the Armed Forces (CAAF) also cites the possible exception noted in *Jaffee*. See *id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)).

⁷⁷ *Rodriguez*, 54 M.J. at 160; see also 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45 (“Rule 513 was based in part on proposed Fed. R. Evid. 504 (not adopted) and state rules of evidence.”).

⁷⁸ *Rodriguez*, 54 M.J. at 160.

⁷⁹ Compare Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,117 (Oct. 12, 1999) (listing the 1999 MRE 513 exceptions, including (d)(4) and (d)(6)) with *Jaffee*, 518 U.S. at 18 n.19 (“[W]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”). The exceptions are also included in the current version of MRE 513. See JSC, UPDATED MREs, *supra* note 3, MIL. R. EVID. 513 (d)(4) and (d)(6).

⁸⁰ Exec. Order No. 13,140, 64 Fed. Reg. at 55,117.

⁸¹ See *supra* notes 7-9 and accompanying text.

⁸² 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

⁸³ *Id.* (“The exceptions to the rule have been developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security.”). Health and welfare reasons allow commanders to view Soldiers’ psychotherapist information separate and apart from the courts-martial process. *Id.* (“There is no intent to apply Rule 513 in any proceeding other than those authorized under the [Uniform Code of Military Justice (UCMJ)].”).

⁸⁴ Compare 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45 with 2012 MCM, *supra* note 4, MIL. R. EVID. 507(c) analysis, at A22-44.

is treatment, and the reason for the limitations on the privilege is military readiness.⁸⁵

2. *Development of Military Psychotherapist-Patient Privilege*

Reinforcing the importance of protecting mental health consultations from disclosure at courts-martial, Presidents have continuously expanded patient protections under the military psychotherapist-patient privilege. President Obama narrowed the exceptions of the 1999 MRE 513 in 2012 by removing the spousal abuse exception to the privilege.⁸⁶ In 2013, the JSC altered the language in MRE 513(e)(3) from “military judge[s] shall”⁸⁷ to “military judge[s] may examine the evidence or a proffer thereof *in camera*.”⁸⁸ The purpose of the change was to give judges more discretion, but the change did not have any apparent impact on the application of the vague *in camera* procedure.⁸⁹ Fortunately, the 2015 NDAA and EO 13696 defined the *in camera* prerequisites and procedure and significantly expanded the overall scope of the privilege.⁹⁰ Importantly, in addition to removing the constitutionally required exception, the 2015 MRE 513 requires specific findings by a preponderance of evidence to overcome the privilege.⁹¹ These changes reveal executive and legislative intent to protect victim-witness rights and treat information protected by MRE 513 as truly privileged.

Congress further recognized victims’ rights by amending Article 6(b) of the UCMJ in the 2015 NDAA.⁹² The provision enumerated that a crime victim may petition the Court of Criminal Appeals for a writ of mandamus

⁸⁵ See 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

⁸⁶ “Executive Order 13593 removed communications about spouse abuse as an exception to the privilege by deleting the words ‘spouse abuse’ and ‘the person of the other spouse or’ from Rule 513(d)(2)” *Id.* MIL. R. EVID. 513 analysis to 2012 amendment, at A22-45-46.

⁸⁷ *Id.* MIL. R. EVID. 513(e)(3) (emphasis added).

⁸⁸ MCM, *supra* note 4, MIL. R. EVID. 513(e)(3) (emphasis added).

⁸⁹ See *id.* MIL. R. EVID. 513 analysis to 2013 amendment, at A22-51 (“[T]he committee changed the language to further expand the military judge’s authority and discretion to conduct *in camera* reviews.”).

⁹⁰ Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014) [hereinafter 2015 NDAA]; Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

⁹¹ 2015 NDAA § 537.

⁹² 2015 NDAA § 535. The section is entitled “Enforcement of Crime Victims’ Rights Related to Protections Afforded by Certain Military Rules.” *Id.*

to require the court-martial to comply with MRE 412 and 513 if the victim “believes that a court-martial ruling violates the victim’s rights” under those rules.⁹³ Congress, through these changes, is emphasizing a crime victims’ due process rights.

C. Impetus for Change

The Manual for Courts-Martial (MCM) revisions reflect internal and external pressure in the military justice system to recognize victims’ rights. Internally, *LRM v. Kastenberg*⁹⁴ revealed why MRE 513 needed to evolve through the perceived inability by the trial court and the Air Force Court of Criminal Appeals (AFCCA) to provide victims sufficient rights.⁹⁵ Externally, the media and Congress subjected the military justice system to intense scrutiny and criticism.⁹⁶ In addition to highlighting the significance of crime victims’ rights, arguably the MCM revisions also were a response to the reluctance of military judges to recognize the psychotherapist-patient privilege as a real privilege. All these issues motivated changing MRE 513.

1. *LRM v. Kastenberg*

The JSC cited *Kastenberg* as an impetus for changing MRE 513.⁹⁷ In *Kastenberg*, an Article 120, UCMJ case, Airman First Class (A1C) LRM’s special victims’ counsel (SVC) filed a formal notice of appearance advising the court that he would be “asserting A1C LRM’s enumerated rights as a victim of crime under federal law and Mil. R. Evid. 412, 513, and 514.”⁹⁸ To enable adequate representation of his client, the SVC requested the trial judge “direct the parties to provide him with copies of

⁹³ *Id.* For an example, see *DB v. Lippert*, No. 20150769, 2016 WL 381436, at *6 (A. Ct. Crim. App. Feb. 1, 2015).

⁹⁴ *LRM v. Kastenberg*, No. 2013-05, 2013 WL 1874790 (A.F. Ct. Crim. App. Apr. 2, 2013), *rev’d*, 72 M.J. 364 (C.A.A.F. 2013).

⁹⁵ *See id.* at *1 (A.F. Ct. Crim. App. Apr. 2, 2013).

⁹⁶ *See infra* note 110.

⁹⁷ *See* Manual for Courts-Martial; Publication of Supplementary Materials, 80 FED. REG. 39,077, 39,088 (2015) (amending the MCM 2015 analysis of MRE 513(e)(2) to include reference to *Kastenberg* and the 2015 NDAA).

⁹⁸ *Kastenberg*, 2013 WL 1874790, at *1. MRE 412 precludes admission of irrelevant evidence of past sexual behavior of alleged victims in sexual offense case. JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 412. MRE 514 creates a victim advocate-victim privilege. JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 514.

motions filed under those Military Rules of Evidence.”⁹⁹ The SVC argued LRM was entitled to the motions “so she can understand the arguments being made regarding her privacy interests and thereby receive a ‘meaningful opportunity’ to respond and be heard.”¹⁰⁰ The SVC also requested authorization to argue issues arising under MREs 412, 513, and 514 at the motions hearings, should it be necessary.¹⁰¹ The military judge denied the SVC’s requests, finding the alleged victim had no standing.¹⁰² The appellate SVC for LRM filed a Petition for a Writ of Mandamus and Petition for Stay of Proceedings at the AFCCA.¹⁰³ The AFCCA determined that it did not have jurisdiction to rule on a sexual assault victim’s complaint about a military judge’s ruling in an ongoing court-martial proceeding.¹⁰⁴

The Air Force Judge Advocate General certified three issues for review by the CAAF.¹⁰⁵ The CAAF determined that the lower court erred by denying the victim the opportunity to be heard through counsel, thereby denying her due process under the MREs, the Crime Victims’ Rights Act, and the Constitution.¹⁰⁶ The CAAF also determined that the appellate court erred by determining it lacked jurisdiction to hear the victim’s Petition for a Writ of Mandamus.¹⁰⁷ The CAAF further found that LRM had standing¹⁰⁸ and remanded the case to the trial judge “for action not inconsistent with [the CAAF’s] opinion.”¹⁰⁹ The MCM’s revisions, therefore, also reflect the CAAF’s increased understanding of sexual assault victims and the emphasis on protecting victims’ rights in criminal prosecutions.

⁹⁹ *Kastenberg*, 2013 WL 1874790, at *1 (“When a military judge is detailed to a case, SVC will enter an appearance, notifying the judge of their representation of a witness in the case and requesting that the judge direct that the SVC be provided with information copies of motions filed where the victim has an interest (e.g., Mil. R. Evid. 412, 513, and 514 motions).” (quoting SVC Rule 4.5)).

¹⁰⁰ *Id.* at *2 (citation omitted).

¹⁰¹ *Id.*

¹⁰² *Id.* at *3. Specifically, the trial judge found that “LRM had no standing (1) to move the court, through her SVC or otherwise, for copies of any documents related to Mil. R. Evid. 412 and 513; (2) to be heard ‘through counsel of her choosing’ in any hearing before the court-martial; or (3) to seek any exclusionary remedy.” *Id.* (citation omitted).

¹⁰³ *Id.* The SVC named the trial judge, Lieutenant Colonel Kastenberg, as the respondent. *Id.*

¹⁰⁴ *Id.* at *4-7.

¹⁰⁵ See *LRM v. Kastenberg*, 72 M.J. 364, 366 (C.A.A.F. 2013).

¹⁰⁶ *Id.* at 369-71.

¹⁰⁷ *Id.* at 367-68.

¹⁰⁸ *Id.* at 368-69.

¹⁰⁹ *Id.* at 372.

2. Victims' Rights

The changes to MRE 513 likely reflect a response to Congressional pressure to recognize victims' rights, as well as increased scrutiny from the media. The DoD, in particular, has been vocally criticized in the media and by Congress for its alleged mistreatment of sexual assault victims by the military.¹¹⁰ In an attempt to encourage victims to come forward with rape or abuse allegations, the President and Congress made victims' rights a priority.¹¹¹ According to Department of Justice and DoD statistics, sexual assault is an extremely underreported crime.¹¹² Victim-focused legislation highlighted and reinforced the need to redefine the narrative for victims wanting to pursue justice and prevent future crime.

The President, Congress, and the DoD made numerous changes to the MCM, creating and enhancing programs to better assist victims through the entire legal and treatment process.¹¹³ The changes attempt to minimize

¹¹⁰ See, e.g., *Sexual Assault Hearing*, *supra* note 12, at 2-4 (statement of Sen. Kirsten E. Gillibrand, Chairman, Subcomm. on Personnel); Leo Shane III, *Military Sexual Assault Reform Plan Fails Again*, MILITARY TIMES (June 18, 2015), <http://www.militarytimes.com/story/military/crime/2015/06/16/ndaa-gillibrand-sex-assault/28814451/>; Jacqueline Klimas, *Gillibrand Again Pushes for Reforming Military Justice System*, WASH. TIMES (Dec. 2, 2014), <http://www.washingtontimes.com/news/2014/dec/2/kirsten-gillibrand-again-pushes-reforming-military/>.

¹¹¹ See, e.g., Crime Victim's Rights Act, 18 U.S.C. § 3771 (2004); *Sexual Assault Hearing*, *supra* note 12.

¹¹² MICHAEL PLANTY ET. AL, U.S. DEP'T OF JUSTICE, NCJ 240655, SPECIAL REPORT: FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 6-7 (Mar. 2013), www.bjs.gov/content/pub/pdf/fvsv9410.pdf (finding from 2005-2010, sixty-four percent of rapes and sexual assaults victimizing females were not reported to the police); LYNN LANGTON ET. AL, U.S. DEP'T OF JUSTICE, NCJ 238536, SPECIAL REPORT: VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 4 (Aug. 2012), www.bjs.gov/content/pub/pdf/vnvp0610.pdf (finding from 2006-2010, sixty-five percent of rapes and sexual assaults were not reported to the police); DOD SAPR REPORT, *supra* note 15, at 6 n.8 (noting that sexual assault is an underreported crime). RAND estimated that approximately seventy-six percent of servicemembers did not report unwanted sexual contact in fiscal year 2014. DOD SAPR REPORT, *supra* note 15, app. A, at 12 (containing provisional statistical data on sexual assault).

¹¹³ See, e.g., Carl Levin & Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 543, 128 Stat. 3292, 3373 (2014) (requiring the Secretary of Defense (SECDEF) to submit a plan for limited use of certain information on sexual assaults in restricted reports by military criminal investigate organizations); *id.* § 533 (requiring SVCs for victims of sex-related offenses); *id.* § 534 (requiring SECDEF to establish a process to ensure victims of certain sexual offenses are consulted concerning jurisdiction of the victim's case and that they have notice of any proceeding so they can participate); *id.* § 535 (expanding crime victims' rights under 10

the re-victimization of witnesses in sexual assault and domestic abuses cases as they endure the military justice process.¹¹⁴ The military's goal is to eliminate sexual assault; to assist in achieving that goal, victims must have enough trust in the system to come forward.¹¹⁵ By most standards, with the addition of special victim prosecutors and special victim counsel, the military is moving in the right direction. From fiscal year 2012 to fiscal year 2014, the estimated number of sexual assaults in the military decreased and the number of reports increased.¹¹⁶ As protections for victims have increased, so have the number of sexual abuse prosecutions in the military.¹¹⁷

The victim-based impetus for change to MRE 513 is apparent not only through the 2015 NDAA, the subsequent EO, and *Kastenber*, but also through statements of DoD officials.¹¹⁸ Military justice practitioners, therefore, must include victims' rights in the calculus when trying to correctly apply MRE 513. To assist in understanding the psychotherapist-

U.S.C. § 806b); *id.* § 537 (expanding privilege under MRE 513); *id.* § 538 (modifying DOD policy on retention of evidence in a sexual assault case to permit return of personal property upon completion of related proceedings); *id.* § 541 (adding the role of a Chief Prosecutor in each of the Services to review Convening Authority's non-referral decision in certain sexual assault cases); *see also Sexual Assault Hearing, supra* note 12 (discussing the numerous changes to the military justice system since 2005).

¹¹⁴ *See Sexual Assault Hearing, supra* note 12, at 61 (statement of Lieutenant General (LTG) Dana K. Chipman, The Judge Advocate General (TJAG), U.S. Army); *see also* Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 150 (2005) ("[T]he criminal process, rather than the offender, often inflicts a large portion of the trauma the victim experiences."); Tera Jckowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah*, 2001 UTAH L. REV. 695 (2001) (discussing the re-victimization of rape victims during criminal prosecutions and the evolution of victims' rights).

¹¹⁵ *See Sexual Assault Hearing, supra* note 12, at 52 (statement of LTG Dana K. Chipman, TJAG, U.S. Army); DOD SAPR REPORT, *supra* note 15, at 41.

¹¹⁶ DOD SAPR REPORT, *supra* note 15, at 41 ("While the estimated prevalence of [sexual assault] is down from FY 2012 to FY 2014, the overall reporting of sexual assault in the same period increased substantially.").

¹¹⁷ *Sexual Assault Hearing, supra* note 12, at 60 (statement of LTG Dana K. Chipman, TJAG, U.S. Army) ("Since the inception of the SVP program in 2009, the number of courts-martial for sexual assault and domestic violence has steadily increased.").

¹¹⁸ *See, e.g., Judicial Proceedings Panel on Military Sexual Assault*, Department Of Defense Transcript of Public Meeting (Oct. 10, 2014) (testimony of Mr. William Barto, Army Highly Qualified Expert, Attorney Advisor, and Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development), http://jpp.whs.mil/public/docs/05-Transcripts/20141010_Transcript_Final.pdf; *Sexual Assault Hearing, supra* note 12, at 61-65 (statement of Hon. Robert S. Taylor, Acting General Counsel of the Department of Defense).

patient privilege, this article will next discuss relevant military and civilian case law to explain why MRE 513 should be interpreted as a nearly absolute privilege and the significance of such an interpretation.

III. How the Constitutional Exception Applies to Privilege

Current case law does not provide definitive guidance on piercing a privilege on constitutional grounds, including government searches that involve privileged evidence when a party merely alleges its existence. In general, an accused must have access to evidence that is “relevant, material, and favorable to the defense.”¹¹⁹ There is, however, “no general right to discovery . . . in a criminal case.”¹²⁰ Privilege is an exception asserted to prevent inspecting and disclosing evidence that might otherwise be discoverable.¹²¹ To implicate a constitutional right, an accused must show that by failing to produce certain evidence, the government denied the accused the opportunity to present his or her case.¹²²

Although the Supreme Court and military courts have held that the Constitution will prevail over contrary legislation,¹²³ dismissively asserting that the Constitution *always* prevails over evidentiary rules is meaningless without a deeper exploration of the limits of all constitutional safeguards when compared to privileges. Both civilian and military courts recognize that privileges are constitutional, even when the privilege obscures relevant information.¹²⁴ To allay the concerns of individuals like Justice Scalia, who believe that a nearly absolute psychotherapist-patient privilege will lead to “occasional injustice,”¹²⁵ the following section argues that MRE 513 is constitutional when interpreted as written.

¹¹⁹ *United States v. Williams*, 37 M.J. 352, 359 (C.A.A.F. 1993); *see also* *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984))).

¹²⁰ *United States v. Lucas*, 5 M.J. 167, 170 (C.M.A. 1978) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

¹²¹ *See Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996).

¹²² *See Lucas*, 5 M.J. at 170.

¹²³ *See United States v. Gaddis*, 70 M.J. 248, 253 (C.A.A.F. 2011) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.” (citing *Dickerson v. United States*, 530 U.S. 428, 437 (2000))).

¹²⁴ *See Jaffee*, 518 U.S. at 9-10; *Trammel v. United States*, 445 U.S. 40, 50-51 (1980); *United States v. Nixon*, 418 U.S. 683, 709-710 (1974).

¹²⁵ *Jaffee*, 518 U.S. at 18 (Scalia, J. dissenting).

Part III.A discusses limitations that the executive and legislative branches have placed on an accused's ability to discover and use evidence in both civilian and military court systems. It also explores the judiciary's reasoning for upholding those restrictions and argues that the psychotherapist-patient privilege is a justifiable restriction on discovery and use of potentially relevant information. Part III.B addresses how the Supreme Court (like the President) has balanced accused, victim, and societal interests and recognized the importance of the psychotherapist-patient privilege as an exception to the discovery and production of relevant evidence. To determine when privilege can prevail over Fifth and Sixth Amendment challenges, Part III.C examines Supreme Court decisions involving privilege and discusses the difference between a qualified and absolute privilege. Based on the drafter's intent, the specificity of the privilege, and the societal import in protecting the privileged information, the section concludes that the psychotherapist-patient privilege is nearly absolute and, as written, can prevail over due process, confrontation, and compulsory process arguments. Part III.D emphasizes that privilege rules are distinct from military discovery rules. To conclude, Section III.E discusses the President's authority and his national security and military readiness objectives in the military justice system. Since the President deliberately changed MRE 513, revealing his intent that it be nearly absolute, the Supreme Court and the CAAF should defer to him (particularly in light of Congressional support).

A. Evidentiary Rules Do Not Necessarily Yield to Defendant's Alleged Rights

Importantly, the Supreme Court has acknowledged that limitations may be placed on potential constitutional rights.¹²⁶ Other legitimate interests may prevail over information the accused can discover¹²⁷ and use¹²⁸ at trial. The Supreme Court has accepted the loss of potential

¹²⁶ See cases cited *infra* notes 127-28.

¹²⁷ See *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [government's] files."); *cf. Nixon*, 418 U.S. at 701 ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial.");

¹²⁸ See, e.g., *United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) ("Of course, the right to present relevant testimony is not without limitation."); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("Of course, the right to confront and to cross-examine is not absolute and may, in

evidence in numerous ways, including: “the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.”¹²⁹ The Court has also determined that particular types of information are not useful.¹³⁰ Although the *Jaffee* Court relied on the need for complete privacy and trust as justification for the psychotherapist-patient privilege,¹³¹ the Court could have determined that any information produced in psychotherapy sessions was not the type of information that makes for reliable testimony.¹³²

In *United States v. Scheffer*, for example, the accused wanted to admit the opinion of the polygraph examiner that there was no deception indicated when the accused denied committing the charged offense.¹³³ Military Rule of Evidence 707 (a per se rule against the admission of polygraph evidence in court-martial proceedings) prevented the accused from admitting the evidence, as the President determined the evidence was unreliable.¹³⁴ The Court found that the exculpatory polygraph merely would have been used to bolster testimony of the accused.¹³⁵ Therefore, MRE 707 did not “implicate any significant interest of the accused.”¹³⁶ In determining the constitutionality of a complete ban on polygraph evidence, the Court found:

The approach taken by the President in adopting Rule 707 . . . is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. . . .

appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.”).

¹²⁹ *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998); *see also Jaffee*, 518 U.S. at 12 (“Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being.”).

¹³⁰ *Scheffer*, 523 U.S. at 309 (“Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules.”).

¹³¹ *See Jaffee*, 518 U.S. at 10.

¹³² This is particularly true given the nature of psychotherapy where the victim and therapist are likely exploring “doubts, insecurity, and self blame” as part of treatment, not because the victim was actually lying. Schimpf, *supra* note 114, at 186 (citing Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 264 (1995)).

¹³³ *Scheffer*, 523 U.S. at 306.

¹³⁴ *See id.* at 306-307.

¹³⁵ *Id.* at 317.

¹³⁶ *Id.* at 316-17. *But see* *Chambers v. Mississippi*, 410 U.S. 284 (1973) (finding a due process violation where a state’s rules of evidence arbitrarily limited cross-examination, impeachment, and excluded relevant exculpatory evidence).

Individual jurisdictions . . . may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a per se rule excluding all polygraph evidence.¹³⁷

The Supreme Court thus determined that MRE 707 did not violate the Fifth or Sixth Amendment rights of the accused.¹³⁸

Similarly, the nearly absolute privilege contained in MRE 513 does not violate the Fifth or Sixth Amendment rights of the accused. First, the accused's interests in MRE 513 evidence are unlikely to be particularly weighty.¹³⁹ An accused can pursue evidence using the procedure enumerated in the rule; however, if the accused has a valid basis for the request, the information likely exists in an unprivileged format, so breaching the privilege would not be necessary. Second, the purpose of the mental health information is therapy, so any privileged information will likely have little to no relevance in a criminal proceeding. This advances the legitimate interest, enumerated in *Scheffer*, of barring unreliable evidence.¹⁴⁰

Third, like the prohibition against polygraph evidence in *Scheffer*, the clearly enumerated exceptions in MRE 513 prevent military courts from reaching inconsistent conclusions that can occur when individual courts are left to create their own exceptions.¹⁴¹ Also, the clarity of MRE 513 avoids delays and mini-trials that result from: (1) determining whether the government must attempt to obtain the privileged information; (2) actually trying to obtain the information; (3) litigating whether the judge should conduct an *in camera* review; (4) litigating whether information should be disclosed to defense; (5) litigating whether the information can be used at trial; and (6) waiting for any writs that may be filed based on the court's

¹³⁷ *Scheffer*, 523 U.S. at 312; *see also* United States v. Rodriguez, 54 M.J. 156, 158 (C.A.A.F. 2000) ("The President may promulgate rules of evidence for the military, which 'do not abridge an accused's right to present a defense . . . [W]e have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.'" (quoting *Scheffer*, 523 U.S. at 308)).

¹³⁸ *Scheffer*, 523 U.S. at 317.

¹³⁹ *See id.* at 316-17.

¹⁴⁰ *See id.* at 312.

¹⁴¹ *See, e.g.*, cases cited *supra* notes 8-9; *infra* note 155.

determinations during the process.¹⁴² The privilege in MRE 513 is also a rational and proportional means of advancing the public interest in protecting mental health information.¹⁴³

Finally, the Supreme Court recognized the importance of protecting the psychotherapist-patient privilege by finding a federal privilege; this decision necessarily implies the privilege is non-arbitrary under the standard set out in *Scheffer*.¹⁴⁴ Furthermore, unlike MRE 707, MRE 513 is not a complete ban on a specific type of evidence; it is a tailored privilege with enumerated exceptions.¹⁴⁵ The Supreme Court, the President, and Congress have found that excluding potential evidence is acceptable when interests are properly balanced; therefore, the near-absolute privilege provided in MRE 513 should similarly withstand constitutional scrutiny.

B. Accused, Victim, and Societal Interests Have Been Balanced

In establishing federal privileges, as empowered by Congress, the Supreme Court ensures that the privilege “serve[s] public ends.”¹⁴⁶ Similar to the President’s determination in establishing MRE 513, the Supreme Court weighed the interests involved in the federal psychotherapist-patient privilege and determined that exceptional circumstances warrant protecting the privileged information.¹⁴⁷ Because of the Court’s fear that the exceptions could swallow the privilege, the Supreme Court established an absolute (though relatively undefined) federal psychotherapist-patient privilege in *Jaffee*.¹⁴⁸ The Court did note at least one possible exception to the absolute privilege (to prevent harm

¹⁴² In the portions of his opinion that were not supported by the majority, Justice Thomas also cited “[p]reserving the court members’ core function of making credibility determinations in criminal trials” and avoiding collateral litigation as legitimate interests in creating rules of evidence that limit an accused’s ability to present a defense. *Scheffer*, 523 U.S. at 313-14.

¹⁴³ *See id.* at 312.

¹⁴⁴ *See id.*

¹⁴⁵ Compare MCM, *supra* note 4, MIL. R. EVID. 707 (prohibiting admission of any reference to a polygraph examination) with JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d) (enumerating seven exceptions to the psychotherapist-patient privilege).

¹⁴⁶ *See Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.* at 15; *see supra* Part II.A.

to the patient or others),¹⁴⁹ but emphasized a patient's need for assurances of their privacy.¹⁵⁰ According to the Court, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."¹⁵¹ The Supreme Court, therefore, specifically prohibited lower courts from conducting balancing tests between evidentiary needs and privacy interests.¹⁵²

Although the psychotherapist-patient privilege articulated in *Jaffee* is broad and seemingly absolute, privileges must be narrowly construed because they exclude relevant evidence.¹⁵³ Pursuant to this narrow construction, some circuit courts have recognized exceptions to the psychotherapist-patient privilege.¹⁵⁴ State and federal court interpretation of the privilege, however, is varied and inconsistent and, thus, not particularly useful.¹⁵⁵ Also, the President has clearly articulated MRE 513 (including its exceptions), and military courts have refused to recognize

¹⁴⁹ *Jaffee*, 518 U.S. at 18 n.19 ("Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.").

¹⁵⁰ *Id.* at 17-18.

¹⁵¹ *Id.* at 18 (citing *Upjohn*, 449 U.S. at 393 (1981)). The Court also noted that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* at 17.

¹⁵² *Id.* The Court similarly notes "the rejected use of a balancing test in defining the contours of the privilege" with regard to the attorney-client privilege, noting that "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application." *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998); *see also United States v. Custis*, 65 M.J. 366, 368 (C.A.A.F. 2007) (noting that the trial court erroneously conducted a balancing test in determining whether to release privileged marital communications).

¹⁵³ *Trammel v. United States*, 445 U.S. 40, 50-51 (1980).

¹⁵⁴ *See Diane M. Allen, Psychotherapist-patient Privilege Under Federal Common Law*, 72 A.L.R. FED. 395 (2015) (discussing the development of the federal psychotherapist-patient privilege and federal cases addressing the scope of the privilege).

¹⁵⁵ *See Smith, supra* note 28, at 13, n.114 (describing the variety of state law precedent in treatment of state psychotherapist privileges); Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV. 1, 17-23 (2007) (examining numerous state and federal approaches to whether the privilege or accused rights prevail); Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1466-69 (2005) (comparing state case law on whether a criminal defendant has the right to compel production of exculpatory information protected by an absolute privilege); Flippin, *supra* note 38, at 10 (reviewing federal case law's inconsistent treatment of psychotherapy privilege).

additional privileges or exceptions to privileges unless the President promulgates or amends a rule.¹⁵⁶

Although a zealous advocate may have difficulty comprehending not having access to potentially useful information, the Supreme Court's privilege determinations make sense given the unlikelihood of locating any material information that a party could not otherwise discover from a non-privileged source.¹⁵⁷ Beyond the Court's determination of the superior public interest involved, since privileges often preclude the search for potentially relevant information rather than access to known information, the privilege concept is easier to understand.

Furthermore, if a party were able to articulate a strong enough basis to search privileged communications, he or she likely has another source for the information, thus rendering piercing the privilege cumulative and unnecessary. Also, the seven remaining exceptions account for any evidence that may be constitutionally required. In the unlikely event that a victim witness recanted to his or her therapist and is going to commit perjury, there is a crime-fraud exception to MRE 513. Finally, if the victim witness has an emotional issue or a propensity to lie or exaggerate the truth, coworkers, family, and friends will be able to testify regarding the victim's character for truthfulness.

C. Privilege Can Prevail over Fifth and Sixth Amendment Challenges

In determining whether to recognize and how to scope a privilege, Congress told courts to use their "reason and experience."¹⁵⁸ The Supreme Court has recognized limitations to privileges based on the importance of the privacy interests involved in *Davis v. Alaska*,¹⁵⁹ *Pennsylvania v.*

¹⁵⁶ See *infra* Part III.E.3.

¹⁵⁷ See *Jaffee*, 518 U.S. at 11 (stating "the likely evidentiary benefit that would result from the denial of the privilege is modest").

¹⁵⁸ FED. R. EVID. 501 advisory committee's note to 1974 enactment; Diane Marie Amann and Edward J. Imwinkelried, *The Supreme Court's Decision to Recognize a Psychotherapist Privilege in Jaffee v. Redmond*, 116 S. Ct. 1923 (1996): *The Meaning of "Experience" and the Role of "Reason" Under the Federal Rule of Evidence 501*, 65 U. CIN. L. REV. 1019, 1042 (1997).

¹⁵⁹ See *Davis v. Alaska*, 415 U.S. 308, 320 (1974) (finding that, under the specific circumstances of the case, the defendant's right to confrontation overcame the state's policy interest in maintaining the confidentiality of a key witness's juvenile records).

Ritchie,¹⁶⁰ and *United States v. Nixon*.¹⁶¹ *Davis* and *Ritchie* involved state privilege statutes, not federal privileges recognized pursuant to FRE 501 authority.¹⁶² *Nixon* involved the unique circumstance of a President asserting a generalized executive privilege.¹⁶³ All cases are pre-*Jaffee*, and none provide definitive guidance on how the Fifth and Sixth (and Fourteenth) Amendment rights of the accused are balanced against a nearly absolute military privilege based on an important societal benefit recognized by the Supreme Court. These cases, however, are instructive on when the Court will pierce a privilege and when a privilege will prevail over a constitutional challenge.

1. *The Supreme Court May Pierce a Qualified Privilege*

The Supreme Court has been willing to pierce what it determines are qualified state privileges. When evaluating state privileges, the Supreme Court has looked to the drafter's language and legislative intent to determine the extent of the state's interest in preserving privacy interests.¹⁶⁴ In *Pennsylvania v. Ritchie*, the Supreme Court reviewed the state's privilege prohibiting the release of a victim's Children and Youth Services (CYS) file, a state agency "charged with investigating cases of suspected mistreatment and neglect."¹⁶⁵ The defendant subpoenaed "the [CYS] file related to the immediate [child abuse] charges," as well as records and a possible medical report from a previous CYS investigation resulting from "a separate [abuse] report by an unidentified source."¹⁶⁶ When CYS asserted its privilege over the records and refused to comply with the subpoena, *Ritchie* requested the trial court sanction CYS, arguing that "the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence."¹⁶⁷

¹⁶⁰ See *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (finding the defendant was entitled to have the state investigative file, which was covered by a qualified state privilege, reviewed by the trial court for material information).

¹⁶¹ See *United States v. Nixon*, 418 U.S. 683, 713 (1974) (finding that the Fifth and Sixth Amendment require a President's "generalized assertion of privilege . . . yield to the demonstrated, specific need for evidence in a pending criminal trial").

¹⁶² See *Davis*, 415 U.S. at 320; *Ritchie*, 480 U.S. at 57-58.

¹⁶³ See *Nixon*, 418 U.S. at 713.

¹⁶⁴ See *Ritchie*, 480 U.S. at 57-58.

¹⁶⁵ See *id.* at 42-43.

¹⁶⁶ *Id.* at 43-44.

¹⁶⁷ *Id.* at 44.

The CYS privilege included an exception that allowed disclosure to a “court of competent jurisdiction pursuant to a court order.”¹⁶⁸ The Court found that the state’s CYS privilege statute was qualified because it “contemplated some use of CYS records in judicial proceedings.”¹⁶⁹ Since the privilege was qualified, the Court determined that the state legislators intended the privilege be pierced under the circumstances.¹⁷⁰ The Court remanded the case to the trial court to conduct an *in camera* review and determine if the records contained information that was material to the defense, as alleged by the accused.¹⁷¹

Signifying the importance of the drafter’s intent, the Court (in dicta) differentiated the qualified CYS privilege from the state’s absolute privilege for communications between sexual assault counselors and victims.¹⁷² Arguably, the pre-2015 MRE 513, like the CYS privilege, was qualified. By deliberately removing the constitutional exception, the President signaled and effected his intent that the privilege be absolute aside from the enumerated exceptions.

2. *Due Process Could Prevail Over Qualified or Generalized Privilege*

Although a qualified privilege protects information, certain constitutional rights, such as due process, can prevail over a qualified or generalized privilege. The Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”¹⁷³ In *Nixon*, thus, the Supreme Court determined that due process required that “[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”¹⁷⁴ The Court refused to quash a subpoena requiring then-President Nixon to produce tape recordings and related documents in a criminal prosecution of Nixon officials.¹⁷⁵ The Court determined that the prosecution made “a

¹⁶⁸ *Id.* at 43-44 (citation omitted).

¹⁶⁹ *Id.* at 57 (emphasis omitted).

¹⁷⁰ *See id.* at 57-58.

¹⁷¹ *Id.*

¹⁷² *Id.* at 57 (“This is not a case where a state statute grants [Children and Youth Services] the absolute authority to its files from all eyes. . . . [Compare the] unqualified statutory privilege for communications between sexual assault counselors and victims.”).

¹⁷³ U.S. CONST. amend. V.

¹⁷⁴ *United States v. Nixon*, 418 U.S. 683, 713 (1974).

¹⁷⁵ *Id.*

sufficient preliminary showing that each of the subpoenaed tapes contain[ed] evidence admissible with respect to the offenses charged in the indictment.”¹⁷⁶

Nixon asserted an absolute privilege over the information based on the “need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties” and “the independence of the Executive Branch within its own sphere.”¹⁷⁷ According to the Court, Nixon’s “broad, undifferentiated claim of public interest in the confidentiality of such conversations” could not “sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”¹⁷⁸

The *Nixon* Court required a demonstrated, specific need for evidence before breaching the asserted privilege. Military Rule of Evidence 513 also requires a specific basis before breaching the privilege. Unlike President’s Nixon’s broad assertion of executive privilege based on a generalized assertion of public interest, however, MRE 513 clearly defines the psychotherapist-patient privilege, its exceptions, and its implementation. The President, Congress, and the Supreme Court have all agreed that the privilege is important based on the strong public interest in a guarantee of privacy to enable a psychotherapist-patient relationship. The decision in *Nixon*, therefore, is only instructive in differentiating its generalized asserted interests with those clearly articulated in MRE 513 and other nearly absolute privileges.

In *Ritchie*, discussed above, the Court also addressed due process. In evaluating the defense’s request to review state-privileged CYS records, the Court looked to the public interest in protecting the information.¹⁷⁹ In analyzing the public interest, the Court looked to the drafter’s intent in the relevant state statute.¹⁸⁰ Since the state legislature enumerated an exception to the privilege for use in judicial proceedings and there was no “apparent state policy to the contrary,” the court relied on the exception to pierce the privilege.¹⁸¹ The *Ritchie* Court thus determined that due process required an *in camera* review of the state-privileged information when a

¹⁷⁶ *Id.* at 700.

¹⁷⁷ *Id.* at 705-06.

¹⁷⁸ *Id.* at 706.

¹⁷⁹ *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987).

¹⁸⁰ *Id.* at 57-58.

¹⁸¹ *Id.* at 58.

party's request is based on an exception in the state statute.¹⁸² Though the Court explicitly expressed "no opinion" on whether due process would have prevailed over the state privilege if it were absolute,¹⁸³ the fact that the Court classified and discussed the different privileges is instructive.

The enumerated court order exception to the CYS privilege is even broader than the previous constitutionally required exception of MRE 513. As discussed above, by deleting the constitutionally required exception, the President indicated the importance of consistency among courts and the importance of the public interest. The rule is now nearly absolute because it is all encompassing but still contains seven enumerated exceptions that balance the interests involved, including the constitutional rights of the accused. For example, if an accused has a specific factual basis that evidence of child sexual abuse by another exists only in psychotherapy records, the defendant could look to one of the enumerated exceptions to overcome the privilege.¹⁸⁴ According to MRE 513(d)(2), there is no privilege "when the communication is evidence of child abuse or of neglect."¹⁸⁵ Also, MRE 513(d)(3)¹⁸⁶ and (d)(6)¹⁸⁷ require disclosure of child abuse.¹⁸⁸ Additionally, if the alleged victim witness is going to testify falsely, there is no privilege "if the communication clearly contemplated the future commission of a fraud or crime."¹⁸⁹

In addition to MRE 513 being nearly absolute and the *Ritchie* privilege being qualified, the public interest in protecting mental health records and communications is stronger than protecting state investigative files. Requiring a higher standard to breach MRE 513, therefore, makes sense. Moreover, although there was no evidence that the prosecution viewed the files, they were state files in the state's possession.¹⁹⁰ The Court does not

¹⁸² *Id.*

¹⁸³ *Id.* at 57 n.14.

¹⁸⁴ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3).

¹⁸⁵ *Id.* MIL. R. EVID. 513(d)(2).

¹⁸⁶ There is no privilege "when federal law, state law, or service regulation imposes a duty to report information contained in a communication." *Id.* MIL. R. EVID. 513(d)(3).

¹⁸⁷ There is no privilege "when necessary to ensure the safety and security of . . . military dependents." *Id.* MIL. R. EVID. 513(d)(6).

¹⁸⁸ Mental health professionals may also have state ethical obligations that require them to disclose child exploitation.

¹⁸⁹ JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(5).

¹⁹⁰ *Pennsylvania v. Ritchie*, 480 U.S. 39, 44 n.4 (1987). The Court of Military Appeals, citing Supreme Court precedent, determined that besides the need to disclose exculpatory evidence, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. *United States v. Lucas*, 5 M.J. 167, 170 (C.M.A. 1978)

emphasize these factors, so whether or to what extent they affected the analysis is unknown. Since mental health records are located with civilian as well as military providers, the potentially disparate application of due process on a testimonial privilege is worth considering.¹⁹¹

3. Sixth Amendment Right to Cross-Examination Could Prevail Over a Non-Weighty State Privilege

Like the Fifth Amendment, the Sixth Amendment could also prevail over a state privilege. The Confrontation Clause provides the accused the right to face the person testifying against him or her and the right to cross-examine witnesses.¹⁹² Restricting an attorney's ability to conduct cross-examination violates the Confrontation Clause "when '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'"¹⁹³ *Davis v. Alaska* is an example of the Supreme Court weighing privacy interests against confrontation rights.¹⁹⁴

In *Davis*, the Court examined an Alaska statute created to preserve the State's privacy interest in juvenile adjudications of delinquency.¹⁹⁵ A key witness in a robbery case was on probation from a juvenile court for burglary.¹⁹⁶ On cross-examination, the defense attorney asked the witness if he had ever been similarly questioned by law enforcement, and he denied it.¹⁹⁷ Despite the "questionably truthful" nature of the response, the trial judge stopped the defense counsel from continuing the line of

(quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). *Brady* is not a discovery right, so if the government has not obtained the evidence, the defense has not been denied equal access. *Id.* at 170-71 ("The fair trial considerations enunciated in *Brady* . . . were motivated by concern on the part of the Supreme Court with the suppression by the Government of evidence favorable to the defense, rather than a right to discovery for an accused in a criminal case." (italics added) (citations omitted)).

¹⁹¹ Interestingly, if the privilege were qualified, it could potentially matter if therapy occurred at a military versus a civilian facility. This seemingly would produce the unintended consequence of requiring sexual assault victims to seek psychological treatment at non-military facilities.

¹⁹² U.S. CONST. amend. VI.

¹⁹³ *United States v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013) (alteration in original) (citation omitted).

¹⁹⁴ See *Davis v. Alaska*, 415 U.S. 308 (1974).

¹⁹⁵ *Id.* at 309.

¹⁹⁶ *Id.* at 310-11.

¹⁹⁷ *Id.* at 313.

questioning and asking the witness about being on probation for a juvenile offense.¹⁹⁸

The State argued that releasing a juvenile's record of delinquency would "cause impairment of rehabilitative goals of the juvenile correctional procedures."¹⁹⁹ The Supreme Court, however, determined that the accused's Sixth Amendment confrontation right in this case was paramount to the state's interest in protecting a witness from embarrassment.²⁰⁰ The defense, therefore, should have been able to cross-examine the witness for bias "because of [his] vulnerable status as a probationer."²⁰¹

In *Davis*, the accused's right to confrontation prevailed over the state privilege. *Davis* and the state juvenile record privilege, however, are distinct from *Jaffee*, the federal psychotherapist-patient privilege, and MRE 513. The privacy interest in juvenile records, unlike the psychotherapist-patient privilege, is not particularly significant, nor is it a federally recognized privilege. *Davis* also only involved the trial right of cross-examination with information known by both parties and not discovery rights.²⁰² The interests in *Davis*, therefore, are quite different from those of a person talking to a counselor before or after a traumatic event to help them heal.

4. Sixth Amendment Confrontation Rights May Not Apply in Pretrial Discovery

The Confrontation Clause might not apply to privileged information unless the prosecution were to introduce counseling records at trial or put the therapist on the stand. According to four justices in *Ritchie*, the confrontation right articulated in *Davis* did not create "a constitutionally

¹⁹⁸ *Id.* at 313-14.

¹⁹⁹ *Id.* at 319 ("This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.").

²⁰⁰ *Id.*

²⁰¹ *Id.* at 318-19. The concurrence "emphasize[d] that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." *Id.* at 321 (Stewart, J., concurring).

²⁰² *Id.* at 311.

compelled rule of pretrial discovery.”²⁰³ In remanding the opinion to the trial court, the Supreme Court noted that “the Confrontation Clause only guarantees ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.’”²⁰⁴ This is consistent with both Supreme Court and military precedent.²⁰⁵ The Court, however, has not provided clear guidance as to when and to what extent the Confrontation Clause applies in the context of privileges. Nonetheless, as discussed, any information necessary for a fair trial that an accused could glean from a victim’s mental health records could be acquired from a different source or through one of the enumerated exceptions.²⁰⁶

5. Sixth Amendment Right to Compulsory Process Is Potentially Implicated By Privilege

The Sixth Amendment right to compulsory process is potentially implicated by privileges.²⁰⁷ Again, this right does not include the power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.²⁰⁸ In *Ritchie*, the Court determined that Sixth Amendment compulsory process “provides no greater protections” in areas controlling a defendant’s right to require the government to produce exculpatory evidence than protections afforded by

²⁰³ *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (plurality opinion) (“The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.”).

²⁰⁴ *Id.* at 54 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

²⁰⁵ *See, e.g., id.* at 54 n.10 (listing cases); *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (noting that the Sixth Amendment confrontation right is not without limits).

²⁰⁶ It is also noteworthy that there is no constitutional right of confrontation during presentencing. *DB v. Lippert*, *DB v. Lippert*, No. 20150769, 2016 WL 381436, at *7 (A. Ct. Crim. App. Feb. 1, 2015) (noting that “it is only logical to conclude that the Sixth Amendment right of confrontation does not apply to the presentencing portion of a non-capital court-martial” (quoting *United States v. McDonald*, 55 M.J. 173, 177 (C.A.A.F. 2001)); *see also id.* (“While the rules of evidence provide for cross-examination of sentencing witnesses, *see* Mil. R. Evid. 611(b) and 1101(a), these are regulatory confrontation rights rather than a constitutional right of confrontation that could form the basis for piercing a privileged communication.”) (emphasis in original)).

²⁰⁷ U.S. CONST. amend. VI.

²⁰⁸ *See Ritchie*, 480 U.S. at 59 (acknowledging strong public interest in protecting psychotherapist records but indicating state legislative intent determines whether or not the privilege yields in criminal prosecutions if the information is material).

due process.²⁰⁹ The Court, therefore, did not address the issue,²¹⁰ but it did note that they “never squarely held that the Compulsory Process Clause guarantees the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence.”²¹¹ At the same time, the *Ritchie* Court noted that *Nixon* suggested that compulsory process “may require the production of evidence.”²¹²

As discussed above, *Nixon* was a unique case decided on Fifth and Sixth Amendment grounds.²¹³ The *Nixon* Court stated that “[t]o ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed by either the prosecution or by the defense.”²¹⁴ However, the *Nixon* Court then distinguished *Nixon*’s claimed privilege from those “designed to protect weighty and legitimate competing interests,” such as the attorney-client and priest-penitent privileges.²¹⁵ So, while *Nixon* may have implicated compulsory process, it only did so when a broad, general executive privilege was weighed against “a sufficient preliminary showing [of] . . . evidence admissible with respect to the offense charged in the indictment.”²¹⁶ The privilege in *Nixon* is thus different than the weighty and legitimate interests involved in well-defined psychotherapist-patient privilege.

Even if the accused requested compulsory process, in most if not all cases, he or she would not be able to meet the burden to establish the

²⁰⁹ *Id.* at 56 (emphasis omitted). The Court did note, however, that they “never squarely held that the Compulsory Process Clause guarantees the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence.” *Id.* (emphasis omitted). At the same time, the Court notes that *United States v. Nixon* suggests that compulsory process may require the production of evidence. *Id.*

²¹⁰ The Court also chose not to address testimonial privileges in *Washington v. Texas*, an otherwise significant compulsory process case. 388 U.S. 14, 23 n.21 (1967) (“Nothing in this opinion should be construed as disapproving testimonial privileges, . . . which are based on entirely different considerations from those underlying the common-law disqualifications for interest.”).

²¹¹ *Ritchie*, 480 U.S. at 56 (emphasis omitted).

²¹² *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 709, 711 (1974)).

²¹³ See *supra* note 161 and accompanying text.

²¹⁴ *Nixon*, 418 U.S. at 709.

²¹⁵ *Id.* The Court noted that President Nixon “does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.” *Id.* at 710.

²¹⁶ *Id.* at 700; see also *id.* at 712-13.

materiality of witnesses or evidence.²¹⁷ As discussed above, neither the government nor the defense typically has access to privileged information, so neither could articulate its significance. If the accused had sufficient information to meet the standard required to compel discovery, the information would likely be cumulative. Finally, an accused has access to evidence through the enumerated exceptions if he or she meets the MRE 513 requirements.

6. *Implications of Military Due Process*

Servicemembers' due process rights differ from those of civilians.²¹⁸ The Supreme Court has noted that "in determining what process is due [to defendants in military proceedings], courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.'"²¹⁹ Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."²²⁰ The standard, therefore, when the Court examines a due process challenge to an aspect of the military justice system is "whether the factors militating in favor of [the servicemember's alleged due process right] are so extraordinarily weighty as to overcome the balance struck by Congress."²²¹ The Supreme Court has already determined that the societal interests involved in protecting the psychotherapist-patient relationship are significant. Courts, therefore, should defer to the President and Congress and accord military defendants the rights articulated in MRE 513.

²¹⁷ See, e.g., *United States v. Lucas*, 5 M.J. 167, 171-72 (C.M.A. 1978) (finding no violation of Sixth Amendment right to compulsory process where defense did not articulate why requested witnesses were material).

²¹⁸ See *Weiss v. United States*, 510 U.S. 163 (1994).

²¹⁹ *Id.* at 177 (quoting *Middendorf v. Henry*, 425 U.S. 25 (1976)).

²²⁰ *Id.* (quoting *Chappell v. Wallace*, 462 U.S. 296 (1983)).

²²¹ *Id.* at 177-78 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). This deferential treatment also applies to the President's promulgation of military rules of evidence. See *Loving v. United States*, 517 U.S. 748, 772 (1996).

D. Military Discovery

Military rules of discovery should not be confused with the rules governing privilege.²²² Military Rule of Evidence 701 clearly spells out that privileges overcome an absolute right to discovery.²²³ The discussion following RCM 701(a)(2) directs the reader to “specific rules concerning certain mental examinations of the accused or third party patients” and cites RCM 513.²²⁴ The reciprocal discovery portion of RCM 701 similarly specifies that “the defense, on request of trial counsel, shall (except as provided in . . . Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations.”²²⁵ Also, RCM 701(f) reiterates that “[n]othing in this rule shall be construed to require the disclosure of information protected . . . by the Military Rules of Evidence.”²²⁶ The analysis following RCM 701 states, “[t]he rule is intended to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure (see e.g., Mil. R. Evid. 301; Section V).”²²⁷ Privileged information is excluded from standard discovery, and MRE 513 articulates the requirements that practitioners must follow.²²⁸

E. Presidential Intent

As discussed, the President has the authority to promulgate rules of evidence in the military criminal justice system.²²⁹ The goal of military privileges is to give practitioners clear guidance, as well as to contemplate military readiness and national security.²³⁰ The President, therefore, has

²²² See *DB v. Lippert*, No. 20150769, 2016 WL 381436, at *11 (A. Ct. Crim. App. Feb. 1, 2015) (“It is axiomatic that if a privileged communication is disclosed whenever it would be subject to the rules governing discovery then there is no privilege at all.”).

²²³ See 2012 MCM, *supra* note 4, R.C.M. 701(a)(2) discussion.

²²⁴ *Id.*

²²⁵ *Id.* R.C.M. 701(b)(4). The rule was amended in 2002 “to take into consideration the protections afforded by the new psychotherapist-patient privilege under Mil. R. Evid. 513.” *Id.* R.C.M. 701 analysis to 2002 amendment, at A21-34-35.

²²⁶ *Id.* R.C.M. 701(f). “This subsection is based on privileges and protections in other rules (see, e.g., Mil. R. Evid. 301 and Section V).” *Id.* R.C.M. 701 analysis to 1986 amendment, at A21-35.

²²⁷ *Id.* R.C.M. 701 analysis to introduction, at A21-33.

²²⁸ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513.

²²⁹ See *supra* note 63.

²³⁰ See 2012 MCM, *supra* note 4, 501 analysis, at A22-38; *id.* at MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

established military privileges with different goals in mind than civilian federal analogues. Because of this, courts should defer to the President (and Congress) and interpret MRE 513 as written.

1. The Supreme Court Defers to the President and Congress in Military Matters

The Supreme Court gives the President and Congress great deference when addressing matters pertaining to the military.²³¹ According to the Court, “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military [W]e have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated.”²³² The Supreme Court recognized that the separation of powers did not preclude Congress from delegating the constitutional authority to make rules governing the military to the President.²³³ It is apropos that the Commander-in-Chief makes rules for his military.²³⁴ As discussed in Part II.B., because of Congress’s involvement in changing MRE 513, the President should receive even more deference in his role as rule maker.²³⁵

2. The CAAF Defers to the President in Interpreting MREs

The CAAF recognized the need to narrowly construe privileges, stating “the authority to add exceptions to the codified privileges within the military justice system lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government.”²³⁶

²³¹ See *Loving v. United States*, 517 U.S. 748, 777-78 (1996) (Thomas, J., concurring) (“This heightened deference extends not only to congressional action but also to executive action by the President, who by virtue of his constitutional role as Commander in Chief . . . possesses shared authority over military discipline.”).

²³² *Weiss v. United States*, 510 U.S. 163, 177 (1994) (alteration in original) (quoting *Solorio v. United States*, 483 U.S. 435, 447-48 (1987)).

²³³ *Loving*, 517 U.S. at 772 (“The President’s duties as Commander in Chief, however, require him to take responsible and continuing action to superintend military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution . . .”).

²³⁴ See U.S. CONST. art. II, § 2, cl. 1.

²³⁵ See discussion *supra* Part II.B.

²³⁶ *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007); see *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003) (finding whether an exception should apply

This finding accounts for the fact that the President articulates, in detail, military rules to simplify the process for our system.²³⁷ As discussed in Part II.B., the CAAF has thus refused to read exceptions into privileges, noting that adding an exception to a codified privilege is “inconsistent with” the rule which already reflects the policy judgments of the President.²³⁸ The CAAF followed similar reasoning in *Rodriguez* when determining the court could not create a privilege.²³⁹

3. MRE 513 Plainly Expresses Presidential and Congressional Intent

Courts use principles of statutory construction in understanding and applying the military rules of evidence.²⁴⁰ According to the CAAF, “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”²⁴¹ Congress and the President plainly articulated the psychotherapist-patient privilege and its enumerated exceptions.²⁴² Clearly, recognizing a nearly absolute psychotherapist-patient privilege is not absurd, as the Supreme Court did so in *Jaffee*.²⁴³ The JSC analysis of MRE 513 cites “the social benefit of confidential counseling recognized by *Jaffee*” as the reason for adopting the rule.²⁴⁴

The military privilege is even narrower than the federal privilege. In articulating the exceptions, the President accounted for the possible exception the Supreme Court articulated in *Jaffee*—if someone was going to harm him or herself or others—which also ensures the safety of military

to a privilege in a courts-martial “is a legal policy question best addressed by the political and policy-making elements of the government.”)

²³⁷ See 2012 MCM, *supra* note 4, MIL. R. EVID. 501 analysis, at A22-38 (“Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.”).

²³⁸ *Custis*, 65 M.J. at 370; see discussion *supra* Part II.B.

²³⁹ See *supra* Part II.B.1.

²⁴⁰ *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009); *Custis*, 65 M.J. at 370.

²⁴¹ *Custis*, 65 M.J. at 370 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and internal quotations omitted)).

²⁴² See Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

²⁴³ See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

²⁴⁴ 2012 MCM, *supra* note 4, MIL. R. EVID 513 analysis to 1999 amendment, at A22-45.

personnel.²⁴⁵ The exception is covered by MREs 513(d)(4)²⁴⁶ and (d)(6).²⁴⁷ Even so, the loss of potentially probative evidence may occur when applying a privilege. The rule and its exceptions, however, account for military necessity and all interests involved, including the accused's right to a fair trial.²⁴⁸

4. MRE 513 Addresses the President's Significant Public Policy Concerns

The CAAF has pointed to public policy concerns when interpreting exceptions to other privileges.²⁴⁹ Significant public policy concerns, such as encouraging reporting by and treatment of sexual assault victims, require a psychotherapist-patient privilege. As discussed above, the President, Congress, and the DOD are focused on eliminating sexual assault from the military.²⁵⁰

The psychotherapist-patient privilege may be even more important in the military than in the civilian world to reinforce command support for the previously stigmatized act of seeking mental health counseling.²⁵¹ Also, it may be even more difficult for servicemember victims when they are assaulted by a fellow servicemember than for those in civilian society, as members of the military often have little separation between their work, personal, and social lives.²⁵² Having well-adjusted servicemembers that feel comfortable and confident enough in the sanctity of their relationship with their mental health professional is beneficial for servicemembers and,

²⁴⁵ See *supra* note 79.

²⁴⁶ There is no privilege "when . . . a patient's mental or emotional condition makes the patient a danger to any person, including the patient." JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(4).

²⁴⁷ MRE 513(d)(6) says that there is no privilege "when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission." *Id.* MIL. R. EVID. 513(d)(6).

²⁴⁸ 2012 MCM, *supra* note 4, MIL. R. EVID 513(d) analysis to 1999 amendment, at A22-45 ("These exception are intended to emphasize that military commanders are to have access to all information that is necessary for the safety and security of military personnel, operations, installations, and equipment.").

²⁴⁹ For example, in interpreting an exception to the spousal privilege, the CAAF pointed to the "explicit public policy concerns prompting the military's adoption of [the privilege exception]." *United States v. McCollum*, 58 M.J. 323, 344 (C.A.A.F. 2003) (Crawford, C.J., concurring in the result).

²⁵⁰ See *supra* Part II.C.2.

²⁵¹ See *supra* note 16 and accompanying text.

²⁵² See Schimpf, *supra* note 114, at 179-80.

thus, national security. Finally, MRE 513 also increases the efficiency of the military justice process by not having multiple mini-trials that delay justice and ensuring the fact finder only reviews relevant, probative, and not unduly prejudicial evidence during a criminal trial.

5. Eliminating the “Constitutionally Required” Language Reveals Presidential Intent

The June 2015 changes to MRE 513 ensure that courts understand that privilege is stronger than locating, acquiring, and producing potential evidence in all but limited and specifically enumerated instances.²⁵³ The significance of our executive and legislative branches agreeing on this issue should not be ignored.²⁵⁴ Arguably, the previous MRE 513 was a qualified privilege, and the deliberate deletion of the constitutionally required language indicated a significant change in the implementation of the rule. According to the CAAF, “[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”²⁵⁵

Removing the constitutionally required language, particularly when viewed alongside other Congressional and Presidential actions, reveals their determination that the psychotherapist-patient privilege should be nearly absolute. The deletion of the exception coincided with the President’s declared mission to improve the military’s response to sexual assault, which included discussions regarding the potential abuse of MRE 513(d)(8).²⁵⁶ The constitutionally required exception that was included in the previous MRE 513, unlike the other enumerated exceptions, did not account for military necessity, societal interests, and fair treatment of victims. Instead, the exception seemed to try to balance the hesitance of the military to recognize a psychotherapist-patient privilege against the Supreme Court’s recognition of the privilege.

²⁵³ See Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

²⁵⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

²⁵⁵ *United States v. Matthews*, 68 M.J. 29, 37 (C.A.A.F. 2009) (quoting *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 397 (1995)).

²⁵⁶ See *supra* note 7 and accompanying text.

Similar to the federal psychotherapist-patient privilege established in *Jaffee*, Congress and the President have determined that the military benefits when the psychotherapist-patient privilege prevails over giving defense access to all possibly relevant information. Military practitioners now need to abide by that determination. As discussed, privileges exist to protect information, some of which would be otherwise discoverable. Since attorneys have become accustomed to discovering mental health records as if they were any other item with some extra procedural requirements, the transition will be difficult. Judicially created exceptions would likely cause parties to fall back into the practice of not treating MRE 513 as a privilege. The deletion of the constitutionally required exception obliges military practitioners to overcome their reservations in the interest of justice for all parties.

Justice does not prevail when a witness is persecuted until he or she is no longer willing to cooperate because of a defense counsel's interest in marginally-relevant or confusing treatment notes. If the military is serious about eliminating sexual assault, then military courts need to comply with MRE 513 as it is written. The possible worst-case scenario is that the parties never discover exculpatory information or a damaging piece of impeachment evidence. However, this could happen in any case (even when no privilege is involved). The justice system assumes risk when declaring privileges, but society has determined that some risks are worthwhile. That said, it seems extremely unlikely that wrongful convictions could result from properly applying a privilege, particularly where MRE 513 enumerates exceptions, such as the crime-fraud exception, to overcome the privilege.

IV. Comparison of the Psychotherapist-Patient Privilege to Other Military Privileges

The JSC observed that MRE 513 is necessary “based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege.”²⁵⁷ Clearly, the psychotherapist-patient privilege has not been treated similarly to the clergy privilege, which begs the question: Are rules of evidence applied differently in sexual assault cases?²⁵⁸ Are members of the military (and society at large) so mired in the prejudices surrounding sexual assault cases and psychotherapy that

²⁵⁷ 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

²⁵⁸ See Hebert, *supra* note 155.

despite all of the statutory progress relating to both, change cannot occur? Practitioners need to consider why this privilege is treated differently than the federally recognized privileges to which it is most similar (the clergy, spousal, and attorney-client privileges). The below, therefore, compares the psychotherapist-patient privilege to other military privileges to assist in consistent and proper interpretation and application of the privilege.

A. Absolute or Nearly Absolute Privileges

As discussed above, there are no intended exceptions to absolute privileges.²⁵⁹ Nearly absolute privileges are those in which the drafters have clearly defined the enumerated exceptions within the four corners of the rule.²⁶⁰ The below discusses the absolute clergy privilege and the nearly absolute spousal and attorney-client privileges and concludes that psychotherapist-patient privilege is similar to and should be treated like the absolute or nearly absolute privileges.

1. *Communications to Clergy Privilege*

The President recognized the absolute nature of the communications to clergy privilege in drafting the rule; the privilege includes no exceptions.²⁶¹ Military courts have also recognized the absoluteness of the privilege through case law.²⁶² The CAAF has determined the privilege applies despite the fact that breaching the privilege could prevent ongoing and future crimes.²⁶³ The CAAF noted that “[a]lthough the clergy

²⁵⁹ See *supra* Part III.C.1.

²⁶⁰ See *supra* Part III.C.1.

²⁶¹ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 503. The Army also has a regulation that further defines the privilege for clergy. See U.S. DEP’T OF ARMY, REG. 165-1, Army Chaplain Corps Activities, para. 16-2 (23 June 2015).

²⁶² See *United States v. Moreno*, 20 M.J. 623 (A.C.M.R. 1985) (establishing a three-part test to apply MRE 503 and reversing accused’s conviction based on violation of privilege).

²⁶³ *United States v. Shelton*, 64 M.J. 32 (C.A.A.F. 2006) (finding privilege applied to accused’s confession, to not only reverend, but to his wife in reverend’s presence and at reverend’s encouragement, that he was molesting his four-year-old stepdaughter); *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002) (finding accused’s confession to CID involuntary after chaplain violated privilege and revealed to CID that accused was molesting his stepdaughter); *United States v. Isham*, 48 M.J. 608 (N-M Ct. Crim. App. 1998) (dismissing with prejudice accused’s conviction based on privileged communications to chaplain revealing his specific plans to kill his fellow Marines and himself).

privilege, like all privileges must be strictly construed, it is legal error when the privilege is misconstrued.”²⁶⁴

Military case law seems to acknowledge the absolute nature of this privilege even when the parties know that privilege is preventing the admission of potentially exculpatory evidence.²⁶⁵ Although there is no case law directly on point, *United States v. Jasper* indicates that if the victim’s guardian had not waived the privilege covering the victim’s communications with the clergyman, exculpatory information would not have been admissible.²⁶⁶

In *Jasper*, the seventeen-year-old victim witness told her pastor that she had made up some (but not all) of her allegations of sexual abuse against the accused to get attention.²⁶⁷ The pastor requested and received permission to discuss the victim’s communications with the trial counsel, and the trial counsel disclosed the statements to the defense counsel.²⁶⁸ At a motions hearing, the military judge determined that the privilege had not been waived and denied the defense motion to produce the pastor because “any testimony that [he] would have would be inadmissible.”²⁶⁹ The ACCA agreed finding that the victim did not voluntarily consent “to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege.”²⁷⁰

The CAAF noted that the parties agreed that the clergy privilege applied to the victim’s communications and determined that the “sole question before [the Court], then, is whether the privilege was waived under MRE 510(a).”²⁷¹ The CAAF found that the victim waived the privilege,²⁷² but the case implies that without waiver by the privilege holder, the material evidence would have been privileged.²⁷³

²⁶⁴ *Shelton*, 64 M.J. at 37 (footnote omitted).

²⁶⁵ See *United States v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013).

²⁶⁶ *Id.* at 281.

²⁶⁷ *Id.* at 278-79.

²⁶⁸ *Id.* at 279.

²⁶⁹ *Id.* (quoting trial court).

²⁷⁰ *United States v. Jasper*, No. 20100112, 2012 WL 2887224, at *2 (A. Ct. Crim. App. July 13, 2012) (quoting MRE 510(a)), *rev’d* 72 M.J. 276 (C.A.A.F. 2013).

²⁷¹ *Jasper*, 72 M.J. at 280.

²⁷² *Id.*

²⁷³ *Id.* at 281 (“[W]here, as here, a privilege holder voluntarily consents to the disclosure of privileged statements to trial counsel without express limitation, we think it would be

The psychotherapist-patient privilege is similar to the communications to clergy privilege. Both relationships are based on trust and focus on wellbeing, and breaching the privileges would eviscerate the purpose and societal benefits resulting from the relationships. The Supreme Court's reasoning in recognizing the privileges is substantially similar.²⁷⁴ Like the patient of a mental health professional, if a congregant has to worry about the possibility of future disclosure, they may not discuss what is necessary to repent. Also, both clergy and mental health professionals have ethical obligations requiring them (in most circumstances) to maintain the privacy of the patients' communications.²⁷⁵ Furthermore, both clergy and psychotherapists may be servicemembers or military employees, or they may be civilians, so creating a penetrable privilege could unduly complicate discovery. Finally, similar to the psychotherapist-patient privilege, the military was reluctant to recognize the communications to clergy privilege, but eventually realized its importance.²⁷⁶

Importantly, however, the psychotherapist-patient privilege has enumerated exceptions to help ensure exculpatory evidence is disclosed to defense counsel. In *Jasper*, without the waiver, the parties may not have known of the existence of the exculpatory evidence. The psychotherapist-patient privilege, however, contains a crime-fraud exception which arguably allows piercing the privilege under these circumstances to

inappropriate to allow a claim of privilege to prevent Appellant from using those statements at trial. Cf. R.C.M. 701(a)(6); *Brady v. Maryland* . . .”).

²⁷⁴ Compare *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (“Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment) with *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”).

²⁷⁵ “Under the current MRE 513, these civilian victims often have their records turned over contrary to state law protecting their confidentiality.” Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to Judicial Proceedings Panel, MRE 513 Analysis and Proposal For Reform 6 (Oct. 24, 2014) (on file with author); see also *United States v. Harding*, 63 M.J. 65-66 (C.A.A.F. 2006) (finding government's interlocutory appeal of trial judge's decision abating proceedings when social worker refused to comply with warrant of attachment and produce sexual assault victim's counseling records because of privilege was not authorized).

²⁷⁶ See Lieutenant Shane D. Cooper, *Chaplains Caught in the Middle: The Military's "Absolute" Penitent-Clergy Privilege Meets State "Mandatory" Child Abuse Reporting Laws*, 49 NAVAL L. REV. 128, 133-34 (2002).

prevent a potential miscarriage of justice.²⁷⁷ Therefore, the exculpatory evidence discussed above in *Jasper* would likely be revealed even if applying a nearly absolute interpretation to MRE 513.

2. Spousal and Attorney-Client Privileges

The psychotherapist-patient privilege is also similar to the spousal and attorney-client privileges (though to a lesser degree than the clergy privilege). According to the Supreme Court, the spousal privilege protects the important public interest of “marital harmony.”²⁷⁸ The spousal privilege, like the psychotherapist-patient privilege, has a number of exceptions and no constitutional exception.²⁷⁹ As discussed, the CAAF has strictly interpreted the enumerated exceptions.²⁸⁰ The CAAF would not recognize a crime-fraud exception to the privilege,²⁸¹ nor would the CAAF expand the definition of “child.”²⁸² In response, the President broadened the exceptions to the spousal privileges based on his policy determination that protecting child victims was more important than the spousal privilege in some instances.²⁸³ Unlike the psychotherapist-patient privilege, where the exceptions are narrowed and the privilege broadened to protect victims, the exceptions to the spousal privilege are broad and the privilege is narrow to protect victims.

The attorney-client privilege is the oldest privilege²⁸⁴ and “rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”²⁸⁵ The attorney-client privilege, like the psychotherapist-patient privilege, has specifically enumerated exceptions and no

²⁷⁷ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(5).

²⁷⁸ *Trammel v. United States*, 445 U.S. 40, 53 (1980).

²⁷⁹ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 504(c).

²⁸⁰ See *United States v. Custis*, 65 M.J. 366, 368 (C.A.A.F. 2007); *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003).

²⁸¹ *Custis*, 65 M.J. at 368.

²⁸² *McCollum*, 58 M.J. at 340.

²⁸³ See 2012 MCM, *supra* note 4, MIL. R. EVID. 504 analysis of 2012 amendment, at A22-41 (creating an exception to the privilege via executive Order 13,593 “when both parties have been substantial participants in illegal activity”); *id.* MIL. R. EVID. 504 analysis of 2007 amendment, at A22-41 (modifying exception to include “a ‘de facto’ child or a child who is under the physical custody of one of the spouses but lacks a formal legal parent-child relationship with at least one of the spouses”).

²⁸⁴ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

²⁸⁵ *Trammel v. United States*, 445 U.S. 40, 51 (1980).

constitutional exception.²⁸⁶ In both cases, clients are seeking professional assistance to deal with an issue that they cannot solve themselves. Like the psychotherapist-patient privilege, the professional relationship of the attorney and client would likely not exist and the communications not made without the privilege.²⁸⁷

3. Practitioners Should Treat the Psychotherapist-Patient, Clergy, Spousal, and Attorney-Client Privileges Similarly

The clergy, spousal, attorney-client, and psychotherapist-patient privileges are all absolute or nearly absolute. Given the similar goals in the relationships of the parties in the privileges, it is nonsensical that the psychotherapist-patient privilege is frequently breached and the others are not—particularly since the MRE 513 specifically conveys the limited circumstances under which trial judges can breach the privilege.²⁸⁸ This phenomena is particularly odd given the military’s emphasis on changing the previously negative associations surrounding seeing a mental health professional.²⁸⁹ Nonetheless, despite the numerous undeniable similarities, the privileges are treated differently, producing the likely unintended consequence of directing victims to a clergy member or spouse for counseling instead of a psychotherapist.

B. Qualified Privileges

As discussed above, qualified privileges are those in which the drafters create a broad exception for discovering and using the otherwise privileged information in court.²⁹⁰ The below differentiates the psychotherapist-patient privilege from the qualified identity of informant and victim advocate-victim privileges.

²⁸⁶ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 502(d).

²⁸⁷ See *supra* Part II.A.

²⁸⁸ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513; see also *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) (declining to allow trial courts to conduct balancing test to determine admissibility of psychotherapy evidence by evaluating “the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure”).

²⁸⁹ See *supra* note 16 and accompanying text.

²⁹⁰ See *supra* Part III.C.1.

1. *Identity of Informant Privilege*

The relationship between an informant and the individual to whom the informant provides information is not on par with the relationships discussed in Part IV.A. Also, unlike the psychotherapist-patient privilege, there are obvious constitutional concerns with the identity of informant privilege that cannot be specifically addressed in enumerated exceptions. The identity of informant privilege thus has several necessary open-ended exceptions that are left to the courts to determine.²⁹¹ These exceptions account for the numerous Fifth and Sixth Amendment concerns inherent in not knowing the identity of a potential accuser, such as information that “is necessary to the accused’s defense on the issue of guilt or innocence”²⁹² and information necessary to decide a motion to suppress evidence.²⁹³ The President, therefore, specifically left military courts broad discretion to pierce the privilege.²⁹⁴

2. *Victim Advocate-Victim Privilege*

Similar to the informant privilege and the pre-2015 version of MRE 513, the privilege between a victim advocate and victim allows for an exception “where the accused could show harm of constitutional magnitude if such communication was not disclosed.”²⁹⁵ The victim

²⁹¹ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 507(d).

²⁹² *Id.* MIL. R. EVID. 507(d)(2). In its analysis of the rule, the Joint Services Committee specifically notes that the exception “recognizes that in certain circumstances the accused may have a due process right under the Fifth Amendment, as well as a similar right under the [UCMJ], to call the informant as a witness.” 2012 MCM, *supra* note 4, MIL. R. EVID. 507(c)(2) analysis, at A22-44 (“The subdivision intentionally does not specify what circumstances would require calling the informant and leaves resolution of the issue to each individual case.”).

²⁹³ JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 507(d)(3) (“[T]he military judge must, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the United States Constitution as applied to members of the Armed Forces.”); see 2012 MCM, *supra* note 4, MIL. R. EVID. 507(c)(3) analysis, at A22-44 (“In view of the highly unsettled nature of the issue, the Rule does not specify whether or when such disclosure is mandated and leaves the determination to the military judge in light of prevailing law utilized in the trial of criminal cases in the Federal district courts.”).

²⁹⁴ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 507(d). Also, if a military judge determines an exception applies, the privilege allows the command to make the ultimate determination regarding whether to disclose the informant’s identity or withdraw charges so any concern for protecting the safety of the individual is alleviated. *Id.* MIL. R. EVID. 507(e)(3).

²⁹⁵ 2012 MCM, *supra* note 4, MIL. R. EVID. 514(d) analysis to 2012 amendment, at A22-46 (noting “this relatively high standard of release is not intended to invite a fishing

advocate-victim privilege was established to prevent the re-victimization that occurred when defense attorneys called a victim witness's victim advocate as a witness in a criminal prosecution.²⁹⁶ Like MRE 513, MRE 514 may become a nearly absolute privilege in the future. However, the relationship between a victim advocate and a victim is quite different than that of a psychotherapist and a patient. A victim advocate provides a victim of sexual assault or domestic abuse with support and assistance with future planning.²⁹⁷ Because of that close tie to the military justice process, it makes sense that their relationship is less sacrosanct than that of a mental health professional and his or her patient.²⁹⁸

3. *Practitioners Should Treat the Informant and Victim-Advocate Privileges Differently Than the Psychotherapist-Patient Privilege*

Contrast the qualified identity of informant and victim advocate-victim privileges with the nearly absolute psychotherapist-patient privilege. It does make sense to treat the privileges similarly. Significantly, both MRE 507 and MRE 514 explicitly allow courts to breach them for constitutional reasons. As discussed, the President deleted a similar enumerated constitutional exception from MRE 513, indicating his intent to move the privilege into the same category as the clergy, attorney-client, and spousal privileges.

C. MRE 412 is Not a Privilege

Military Rule of Evidence 412 is a rule of relevance to exclude evidence of an alleged victim's other sexual behavior or sexual predisposition.²⁹⁹ It is not a privilege but is worth mentioning because of the danger that practitioners may conflate the analyses. That MRE 513 is

expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless").

²⁹⁶ See *id.* at MIL. R. EVID. 514 analysis to 2012 amendment, at A22-46. According to a 2009 report by the Defense Task Force on Sexual Assault in the Military Services, "victims [also] did not believe they could communicate confidentially with medical and psychological support services provided by DoD." *Id.*

²⁹⁷ See, e.g., U.S. DEP'T OF ARMY REG. 600-20, ARMY COMMAND POLICY ch. 8 (6 Nov. 2014) (explaining the victim advocates will explain reporting options, resources available, and assistance throughout medical, investigative, and judicial process). Unit victim advocates are specifically prohibited from counseling a victim. *Id.* at para. 8-5 (s)(6).

²⁹⁸ But see Schimpf, *supra* note 114.

²⁹⁹ JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 412(a).

often used by defense counsel to invade the privacy of sexual assault victims does not remove MRE 513 from Section V, “Privileges” and place it into Section IV, “Relevancy and its Limits” (where MRE 412 is located).³⁰⁰

Military Rule of Evidence 412 was created to recognize that a sexual assault victim’s past sexual behavior is often not relevant or has “minimal probative value with great potential for distraction.”³⁰¹ The rule contains an exception for “evidence the exclusion of which would violate the constitutional rights of the accused.”³⁰² The JSC’s analysis of MRE 412 is instructive on how the relevancy constitutional exception should be interpreted.³⁰³ According to the JSC, MRE 412 recognizes “the fundamental right of the defense under the Fifth Amendment . . . to present relevant defense evidence by admitting evidence that is ‘constitutionally required to be admitted.’ Further, it is the Committee’s intent that the Rule not be interpreted as a rule of absolute privilege.”³⁰⁴

Clearly, MRE 513 is not the same type of evidentiary rule as MRE 412, as demonstrated by its text and the drafter’s analysis. Instead, as stated above, the JSC notes that the psychotherapist-patient privilege is “similar to the clergy-penitent privilege.”³⁰⁵ Comparison to other military rules of privilege and evidence buttress what is apparent by the President and Congress’s actions—that courts should only breach the psychotherapist-patient privilege for the seven enumerated reasons. Notably, MRE 513 and its analysis lack any statement that the list of exceptions is non-exhaustive.³⁰⁶ Supreme Court and military case law support this nearly absolute interpretation because of the importance of the privacy interest. Trial judges, therefore, should infrequently have to conduct an *in camera* review, but when they do, the requirements are explicitly stated.³⁰⁷

³⁰⁰ See 2012 MCM, *supra* note 4, pt. III, sec. IV, V.

³⁰¹ Although not binding, the analysis of the military rules “presents the intent of the drafting committee.” *Id.* MIL. R. EVID. 412 analysis, at A22-36.

³⁰² JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 412(b)(1)(C); *accord* MCM, *supra* note 4, MIL. R. EVID. 513(d)(8) (enumerating an exception “when admission or disclosure of a communication is constitutionally required”).

³⁰³ 2012 MCM, *supra* note 4, app. 22, sec. I, at A22-1.

³⁰⁴ *Id.* MIL. R. EVID. 412 analysis, at A22-36; *see also* United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).

³⁰⁵ 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

³⁰⁶ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513; 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis, at A22-45-46.

³⁰⁷ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e).

V. *In Camera* Review

Courts are only allowed to breach the privilege if they make a finding by a “preponderance of the evidence” that there is a “reasonable likelihood” that an *in camera* review of the information will reveal non-cumulative evidence that meets an enumerated exception.³⁰⁸ Some practitioners have asserted that the *in camera* review procedure reinforces that a low threshold exists for piercing the privilege.³⁰⁹ However, all potential evidence is subject to an *in camera* review.³¹⁰ Thus, having a particularized *in camera* procedure in the rule indicates additional care and consideration for the protected information beyond the standard procedure.³¹¹

United States v. Klemick, which served as a basis for the *in camera* review procedures codified in MRE 513, supports this idea by laying out specific threshold requirements to review information privileged under MRE 513 rather than simply citing the relevant Rule for Courts-Martial.³¹² Those requirements were incorporated and expanded by the President in the latest revisions to MRE 513.³¹³ Arguably, the requirements set by the President highlight the high standard of care due to the exceedingly sensitive information and the fact that the information is likely going to be unknown to all parties before judicial review.

A. *United States v. Klemick*

As mentioned above, before the current MRE 513, when a party raised the possibility that an exception to a privilege applied, some courts looked to *United States v. Klemick* to determine if they should conduct an *in camera* review.³¹⁴ *Klemick* involved a government request to breach the

³⁰⁸ *Id.* MIL. R. EVID. 513(e)(3).

³⁰⁹ See Smith, *supra* note 28, at 13 (observing that some could interpret the *in camera* review mechanism as making the privilege qualified); Schimpf, *supra* note 114, at 173 (asserting that MRE 513’s *in camera* review provision makes it “a second-tier privilege”).

³¹⁰ See 2012 MCM, *supra* note 4, R.C.M. 703(f)(4)(C); *United States v. Zolin*, 491 U.S. 554, 568-69 (1989); *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997).

³¹¹ Numerous privileges have particularized *in camera* rules. See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 505; *id.* MIL. R. EVID. 506; *id.* MIL. R. EVID. 507; *id.* MIL. R. EVID. 513; *id.* MIL. R. EVID. 514.

³¹² See 2012 MCM, *supra* note 4, R.C.M. 703(f)(4)(C).

³¹³ See *United States v. Klemick*, 65 M.J. 576 (N-M. Ct. Crim. App. 2006).

³¹⁴ See *Klemick*, 65 M.J. at 576. The CAAF cited *Klemick* in *L.R.M. v. Kastenber*, 72 M.J. 364 (C.A.A.F. 2013).

psychotherapist-patient privilege of an accused's spouse using the child abuse exception.³¹⁵ Before requesting the privileged records, the government unsuccessfully attempted to interview the accused's spouse.³¹⁶ The trial judge released the records that fell under the child abuse exception, as well as records that related to the witness's potential bias.³¹⁷

The appellant contended that the judge erred in reviewing and ultimately releasing a portion of his wife's records to the government pursuant to this exception because the government failed to make the required "threshold showing."³¹⁸ Since there was a dispute as to whether the requested records contained admissible information pursuant to the exception, the Court looked to MRE 513(e).³¹⁹ As discussed, MRE 513 was silent as to whether there was any threshold requirement.³²⁰ The Navy-Marine Corps Court of Criminal Appeals (NMCCA), therefore, looked to similar state psychotherapist-patient privilege rules.³²¹ The court established the following three-part standard:

(1) [D]id the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources?³²²

³¹⁵ JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(2) (There is no privilege under this rule "when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse.").

³¹⁶ *Klemick*, 65 M.J. at 579.

³¹⁷ *Id.* at 578-79.

³¹⁸ *Id.* at 579.

³¹⁹ *Id.*

³²⁰ Compare MCM, *supra* note 4, MIL. R. EVID. 513(e) (containing no guidance on when to conduct an MRE 513 *in camera* review beyond when production or admission of material is "in dispute") with JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3) (containing a four-pronged requirement that a proponent must meet by the preponderance of the evidence for an MRE 513 *in camera* review).

³²¹ See *Klemick*, 65 M.J. at 579 ("using a standard similar to that of the Wisconsin Supreme Court in [*Wisconsin v. Green*], 646 N.W.2d 298 (Wis. 2002)").

³²² *Id.* at 580.

The court stated that the standard was “not high, because we know that the moving party will often be unable to determine the specific information contained in a psychotherapist’s records.”³²³ The NMCCA found that the otherwise privileged records “could reasonably be expected” to contain the information alleged pursuant to the child abuse exception, that the information was not cumulative, and that the government could not get the information elsewhere because the spouse would not speak to the government.³²⁴ The trial court then ordered and conducted the *in camera* review.³²⁵

The standard laid out in *Klemick* in 2006 was apparently used in establishing the current MRE 513(e).³²⁶ In the EO, the President used the three factors articulated in *Klemick* and added the standard (which was implicit in *Klemick*) “that the requested information meets one of the enumerated exceptions under subsection (d) of this rule.”³²⁷ The 2015 amendment to the rule also required that “the military judge must find by a preponderance of the evidence that the moving party showed [all four factors].”³²⁸ Arguably, this preponderance of the evidence requirement increases the threshold showing from *Klemick* or at least solidifies a middle ground threshold that accounts for the fact that the neither party will likely have seen the alleged evidence and the important privacy interests at stake. If *Klemick* were decided under the 2015 MRE 513, thus, the government may not have met the “reasonable likelihood” standard “by a preponderance of the evidence.”³²⁹

The NMCCA did not make a finding on whether the apparently unrequested information regarding the victim’s bias should have been disclosed.³³⁰ The current rule requires that the military judge only disclose “the specific records or communications, or portions of such records or communications that meet the requirements for one of the enumerated exceptions to the privilege . . . and are included in the stated purpose for

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 581.

³²⁶ See JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT 117 (Feb. 2015).

³²⁷ Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,820 (June 22, 2015); JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3)(D).

³²⁸ Exec. Order No. 13,696, 80 Fed. Reg. at 35,819; JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3).

³²⁹ Exec. Order No. 13,696, 80 Fed. Reg. at 35,819-20; JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3)(A), (e)(3).

³³⁰ See *Klemick*, 65 M.J. at 789-79.

which the records or communications are sought.”³³¹ When conducting *in camera* reviews, therefore, the military judge must maintain a type of fiction and not disclose potentially relevant evidence that does not fall under an exception and does not meet the stated purpose for the request.

In addition, the NMCCA mentioned that the government requested a deposition of the witness because of her apparent unavailability but does not discuss the outcome of that request.³³² Since the ability to conduct a deposition may have still been available and the ability to cross the witness at trial was still available, the government may not have actually met the standard required for the military judge to review the information *in camera*.³³³ Breaching the privilege should be a rare occurrence and will most likely result from accidental waivers or child exploitation exceptions, and practitioners need to ensure that they are strictly applying the required standard.

B. Military Judges Should Apply the *In Camera* Review Procedure as Written

Litigation regarding the new MRE 513 is inevitable, but the privilege seems to effectively enumerate the standard to review privileged psychotherapist information based on Supreme Court case law, military necessity, and balancing the involved interests. Military justice practitioners, nonetheless, have attempted to define and redefine the types of accused interests that should necessitate *in camera* reviews.³³⁴ The categories, however, are overbroad, redundant to the enumerated exceptions, do not usefully define the interests at stake, and defy executive and legislative intent. Rules of evidence are presumed constitutional,³³⁵

³³¹ JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(4).

³³² *Klemick*, 65 M.J. at 578 n.2.

³³³ See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3)(C)-(D) (requiring “that the information sought is not merely cumulative of other information available” and “that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources”).

³³⁴ See Smith, *supra* note 28, at 14 (enumerating the first three Fishman categories); Fishman, *supra* note 155, at 41 (including the following categories, “Recantation or Other Contradictory Conduct[;] . . . Evidence of Behavioral, Mental, or Emotional Difficulties[;] . . . Complainant’s ability to Perceive, Remember, and Relate Events . . . [and] Other Situations Involving Rape and Child Abuse Complaints.”).

³³⁵ See *DB v. Lippert*, No. 20150769, 2016 WL 381436, at *9 (A. Ct. Crim. App. Feb. 1, 2015) (“The presumption is that a rule of evidence is constitutional unless lack of

and as discussed, a nearly absolute psychotherapist-patient privilege is not inconsistent with the Constitution.

In addition, reading non-enumerated exceptions into MRE 513 is not allowed by either Supreme Court precedent or the MREs. It would require the judges to conduct constitutional interest balancing to pierce the privilege. Enumerated exceptions cover the examples that practitioners give of when they believe the psychotherapist-patient privilege should be pierced. For example, “if the accused demonstrates that a victim is unable to distinguish fantasy from reality,”³³⁶ there must be other evidence available to support the argument. Otherwise, there likely would not be enough evidence to satisfy the standard in MRE 513(e)(3). This evidence could be obtained from, for example, medical records, testimony of individuals who have interacted with the witness, or cross-examination. If necessary, the defense could even use its expert to testify about the victim and the characteristics displayed on the stand during cross in relation to a diagnosis. Finally, if this is truly a concern, in rare cases, perhaps an RCM 706 procedure should be instituted for victims.³³⁷

One article posits that military courts can balance all interests involved in MRE 513 if military judges require a victim to waive his or her privilege upon a determination that a defendant’s constitutional rights indicate an *in camera* review is necessary.³³⁸ While this puts some power in the hands of the victim,³³⁹ the procedure is not enumerated under MRE 513.³⁴⁰ The current iteration of the privilege does not require a victim to waive his or her privilege before the judge can conduct an *in camera* review. This may actually put a victim in a worse position, because once the privilege is waived, the judge is not obliged to follow the procedures outlined in MRE 513(e). Also, suppressing victim-witness testimony or abating proceedings does little to enhance victim rights and is counter to society’s interest in justice. Reducing sexual assault prosecutions runs counter to

constitutionality is clearly and unmistakably shown.” (quoting *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000)).

³³⁶ Smith, *supra* note 28, at 13.

³³⁷ See 2012 MCM, *supra* note 4, R.C.M. 706.

³³⁸ Smith, *supra* note 28, at 14-15.

³³⁹ See *id.*

³⁴⁰ Cf. JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 507(e)(3) (enumerating procedure if the government does not want to reveal the identity of an informant after a military judge determines it is required).

leadership's goal of eliminating sexual assault.³⁴¹ To implement the proposal, the President would have to issue a new executive order.

VI. Conclusion

Over the years, the Supreme Court has rejected numerous other privileges³⁴² but determined that not only is the psychotherapist-patient privilege necessary, it is nearly absolute.³⁴³ Similarly, the MREs only recognize a limited number of privileges.³⁴⁴ The Supreme Court does not prohibit a nearly absolute interpretation of the privilege; to the contrary, case law supports an absolute psychotherapist-patient privilege.³⁴⁵ Relevant Supreme Court case law also supports deference to a privilege's drafter³⁴⁶ and great deference to the President in matters involving the military.³⁴⁷ Both the President and Congress support the current version of MRE 513,³⁴⁸ as do national policy goals.³⁴⁹ The exceptions have been spelled out to account for not only military readiness and national security, but also the rights of the accused, the witness, and society.

Given the necessary deference to Congress and the President,³⁵⁰ military courts must interpret MRE 513 as nearly absolute. An MRE is presumed valid "unless lack of constitutionality is clearly and unmistakably shown."³⁵¹ Furthermore, the results of a nearly absolute interpretation are not arbitrary or absurd, and the interests protected by the

³⁴¹ See DOD SAPR REPORT, *supra* note 15.

³⁴² *Jaffee v. Redmond*, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (listing some rejected privileges as privileges prohibiting disclosure of "academic peer review materials" and "legislative acts by member of state legislature" (citations and internal quotation marks omitted)).

³⁴³ *Jaffee*, 518 U.S. at 13.

³⁴⁴ See 2012 MCM, *supra* note 4, sec. V; see also *id.* MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45 (rejecting a physician-patient privilege).

³⁴⁵ See *Jaffee*, 518 U.S. at 13.

³⁴⁶ See *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Davis v. Alaska*, 415 U.S. 308, 320 (1974).

³⁴⁷ See *Loving v. United States*, 517 U.S. 748, 772 (1996).

³⁴⁸ See Carl Levin & Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

³⁴⁹ See, e.g., DOD SAPR REPORT, *supra* note 15.

³⁵⁰ See *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007).

³⁵¹ *DB v. Lippert*, No. 20150769, 2016 WL 381436 (A. Ct. Crim. App. Feb. 1, 2015) (quoting *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000)).

privilege are weighty.³⁵² The privilege balances multiple interests and ensures the introduction of reliable evidence while avoiding excessive litigation on collateral matters. A clearly defined privilege will increase the reliability and efficiency of the military justice system.

There is no reason to treat the psychotherapist-patient privilege differently than similar privileges.³⁵³ The drafter's analysis and the recent changes in the rule indicate that the psychotherapist-patient privilege should be treated like the clergy privilege and the other nearly absolute privileges and only pierced under the thoughtfully defined exceptions enumerated in the privilege. Nonetheless, military justice practitioners seem to forget that as a privilege, MRE 513 purposefully precludes access to potentially relevant evidence based on an exceptional societal interest.³⁵⁴ Perhaps the mistreatment of the psychotherapist-patient privilege is purposeful, perhaps it is due to inherent biases against sexual assault victims and psychotherapy, or perhaps it is due to the military's previously used relevancy analysis for psychotherapy evidence. Regardless, the need to rely on the psychotherapist-patient privilege is particularly important in a time when the military is trying to eliminate sexual assault by, among other things, encouraging victims to report the crime.

³⁵² See *United States v. Scheffer*, 523 U.S. 303, 309 (1998); *Custis*, 65 M.J. at 370.

³⁵³ See discussion *supra* Part IV.

³⁵⁴ See *United States v. Trammel*, 445 U.S. 40, 50 (1980) ("Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (one set of internal quotation marks omitted))).

Appendix A. Proposed FRE 504¹**Rule 504. PSYCHOTHERAPIST–PATIENT PRIVILEGE****(a) Definitions.**

(1) A “patient” is a person who consults or is examined or interviewed by a psychotherapist.

(2) A “psychotherapist” is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

¹ Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 240-41 (July 1, 1973).

(1) *Proceedings for hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of judge.* If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) *Condition an element of claim or defense.* There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Appendix B. Exec. Order 13140 (1999 MRE 513)³⁵⁶

Rule 513. Psychotherapist-patient privilege

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

³⁵⁶ Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,116-18 (Oct. 12, 1999) (promulgating MRE 513).

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf.

The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.”

Appendix C. 2013 MRE 513³⁵⁷

Rule 513. Psychotherapist-patient privilege

(a) *General Rule.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any State, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

³⁵⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (Supp. 2014).

- (d) *Exceptions.* There is no privilege under this rule:
- (1) when the patient is dead;
 - (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
 - (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
 - (4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
 - (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
 - (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
 - (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or
 - (8) when admission or disclosure of a communication is constitutionally required.
- (e) *Procedure to Determine Admissibility of Patient Records or Communications.*
- (1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:
 - (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and
 - (B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).
 - (2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a

hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings may not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

Appendix D. 2015 NDAA § 537³⁵⁸

SEC. 537. MODIFICATION OF RULE 513 OF THE MILITARY RULES OF EVIDENCE, RELATING TO THE PRIVILEGE AGAINST DISCLOSURE OF COMMUNICATIONS BETWEEN PSYCHOTHERAPISTS AND PATIENTS.

Not later than 180 days after the date of the enactment of this Act, Rule 513 of the Military Rules of Evidence shall be modified as follows:

- (1) To include communications with other licensed mental health professionals within the communications covered by the privilege.
- (2) To strike the current exception to the privilege contained in subparagraph (d)(8) of Rule 513.
- (3) To require a party seeking production or admission of records or communications protected by the privilege—
 - (A) to show a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
 - (B) to demonstrate by a preponderance of the evidence that the requested information meets one of the enumerated exceptions to the privilege;
 - (C) to show that the information sought is not merely cumulative of other information available; and
 - (D) to show that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.
- (4) To authorize the military judge to conduct a review in camera of records or communications only when—
 - (A) the moving party has met its burden as established pursuant to paragraph (3); and
 - (B) an examination of the information is necessary to rule on the production or admissibility of protected records or communications.
- (5) To require that any production or disclosure permitted by the military judge be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the

³⁵⁸ Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014).

privilege and are included in the stated purpose for which the such records or communications are sought.

Appendix E. Exec. Order 13696 (2015 MRE 513)³⁵⁹

(c) Mil. R. Evid. 513(b)(2) is amended to read as follows:

"(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials."

(d) Mil. R. Evid. 513(d)(8) is deleted.

(e) Mil. R. Evid. 513(e)(2) is amended to read as follows:

"(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before, a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members."

(f) Mil. R. Evid. 513(e)(3) is amended to read as follows:

"(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources."

³⁵⁹ Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

(g) A new Mil. R. Evid. 513(e)(4) is inserted immediately after Mil. R. Evid. 513(e)(3) and reads as follows:

"(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this Rule."

(h) Mil. R. Evid. 513(e)(4) is renumbered as Mil. R. Evid. 513(e)(5).

(i) Mil. R. Evid. 513(e)(5) is renumbered as Mil. R. Evid. 513(e)(6).

Appendix F. Current MRE 513³⁶⁰

Rule 513. Psychotherapist—patient privilege

(a) *General Rule.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant,

³⁶⁰ JOINT SERV. COMM. ON MILITARY JUSTICE, PART III—MILITARY RULES OF EVIDENCE UPDATED AS OF JUNE 2016, MIL. R. EVID. 513 (2016), <http://jsc.defense.gov/Portals/99/Documents/MREsUpdatedJune2016.pdf?ver=2016-07-05-111944-123>.

guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(e) *Procedure to Determine Admissibility of Patient Records or Communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call

witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial comprised of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

GENDER ADVISORS IN NATO: SHOULD THE U.S. MILITARY FOLLOW SUIT?

LIEUTENANT COLONEL KEIRSTEN H. KENNEDY*

I. Introduction

Members of the U.S. military serving in multinational assignments or working in the North Atlantic Treaty Organization (NATO) cannot help but compare their own military structure and practices to those of other nations. In some instances, the United States serves as the model for other nations' militaries—an example is the noncommissioned officer (NCO) system, in which the U.S. NCO usually carries more responsibility than his European counterpart.¹ In other instances, the U.S. military might come across unique positions on a staff and wonder if those might be a good fit in the United States. One such position is the Gender Advisor (GENAD) created in NATO in the late 2000s.² This article outlines the history and rationale for a GENAD in NATO, explains the function and responsibilities of a NATO GENAD, presents examples of gender perspective integration in military missions, and examines why such a position could be of benefit in the U.S. military.

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¹ Michael L. Lewis, *Europe's NCOs*, NCO JOURNAL (Aug. 2012), <http://www.eur.army.mil/pdf/NCO1.pdf>. See also *General Breedlove Visits Norway*, SHAPE (Feb. 6, 2016), <https://shape.nato.int/2016/general-breedlove-visits-norway>.

² BI-STRATEGIC COMMAND, DIR. 40-1 (2 Sept. 2009) [hereinafter Bi-SC 40-1] (Bi-SC 40-1, dated September 2, 2009, has been superseded by Bi-SC 40-1 Rev 1, dated Aug. 8, 2012). See also *Role and Experience of International Organisations in Implementation of UNSCR 1325 in Afghanistan*, NATO.INT (Nov. 11, 2010), http://www.nato.int/cps/en/natohq/opinions_68078.htm?selectedLocale=en.

II. History of the Gender Advisor Staff Position

A. 2000-2008: United Nations Security Council Resolution 1325 (2000)

In 2000, the United Nations (UN) passed UN Security Council Resolution (UNSCR) 1325, titled Women and Peace and Security.³ In it, the UN recognized two distinct areas of concern: a woman's role in conflict and a woman's role in the peace process.⁴ Representative Ms. Netumbo Nandi-Ndaitwah introduced the resolution when it was Namibia's turn to chair the UN Security Council. It was unanimously passed after two days of discussion and was supported by international women's organizations.⁵ There are four pillars to the resolution: participation, protection, prevention, and relief and recovery. The resolution stresses the importance of ensuring protection of women's rights, as well as the full involvement of women in promoting peace and security.⁶

³ S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/pdf/N0072018.pdf?OpenElement>.

⁴ *What is UN Security Council Resolution 1325 and Why Is It So Critical Today?*, UNITED STATES INSTITUTE FOR PEACE, http://www.usip.org/gender_peacebuilding/about_UNSCR_1325#What_is_U.N._Security_Council_Resolution_1325 UNSCR 1325 (last visited July 27, 2016) (“[United Nations Security Council Resolution (UNSCR)] 1325 is a landmark international legal framework that addresses not only the inordinate impact of war on women, but also the pivotal role women should and do play in conflict management, conflict resolution and sustainable peace.”). See also Kathleen Kuehnast et al., *WOMEN AND WAR: POWER AND PROTECTION IN THE 21ST CENTURY* (2011).

⁵ Michelle Landsberg, *Resolution 1325—Use It or Lose It*, MS. MAGAZINE (Summer 2003), <http://www.msmagazine.com/june03/landsberg.asp>.

⁶ Cynthia Cockburn, *Snagged on the Contradiction: NATO, UNSC Resolution 1325, and Feminist Responses*, CYNTHIA COCKBURN BLOG, <http://www.cynthiacockburn.org/BlogNATO1325.pdf>.

The preamble acknowledges both the specific effect of armed conflict on women and women's role in preventing and resolving conflict, setting these in the context of the Security Council's responsibility for the maintenance of international peace and security. It has eighteen brief points covering, broadly speaking, three main themes [of protection, participation, and gender perspective].

Id. The resolution further recommends specialized training for peacekeepers and notes the need to track data on the impact of armed conflict on women and girls. S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

The resolution contains eighteen action sentences, wherein the UN “urges,” “encourages,” “further urges,” “requests,” “emphasizes,” etc.⁷ Interestingly, the resolution appears to have two purposes: first, to include women in the peace process; and second, to protect women from an “inordinate impact on women” in war.⁸ The first four of the resolution’s eighteen action paragraphs deal with—to greatly paraphrase—employing more women at senior levels of member states’ governments and other decision-making entities. The Security Council “[urges] Member States to ensure increased representation of women at all decision-making levels in national, regional, and international institutions and mechanisms for the prevention, management, and resolution of conflict”⁹ Additionally, the Secretary-General should “appoint more women as special representatives and envoys”¹⁰ Paragraphs five through eight propose gender perspective training on the “protection, rights, and special needs of women” affected by conflict.¹¹ From the ninth paragraph onward, it is clear that the women the resolution is referring to are women within the region of conflict; specifically, women who should be protected from the effects of that conflict. This is important to note and understand because UNSCR 1325 attempts to address two areas involving women: essentially, women’s advancement in the workplace (paragraphs 1-4) as well as protection of women in war-torn countries (paragraphs nine and onward). As a result of this dual aim, nations and organizations have struggled to fully implement UNSCR 1325 (both to employ more women and to protect women from conflict).

Nevertheless, setting aside—for the moment—the issue of employing more women at senior levels, one positive thing UNSCR 1325 established (or validated) was a link between “women’s experiences of conflict [and] the international peace and security agenda.”¹² It “recogni[zed] the disproportionate impact of armed conflict on women, [acknowledging] the

⁷ S.C. Res. 1325, U.N. Doc. S/RES/1325, UNITED NATIONS, paras. 1-18 (Oct. 31, 2000), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/pdf/N0072018.pdf?OpenElement>.

⁸ *What is UN Security Council Resolution 1325 and Why Is It So Critical Today?*, UNITED STATES INSTITUTE FOR PEACE, http://www.usip.org/gender_peacebuilding/about_UNSCR_1325#What_is_U.N._Security_Council_Resolution_1325 UNSCR 1325 (last visited July 27, 2016).

⁹ S.C. Res. 1325, U.N. Doc. S/RES/1325 para. 1 (Oct. 31, 2000), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/pdf/N0072018.pdf?OpenElement>.

¹⁰ *Id.* para. 3.

¹¹ *Id.* para. 6.

¹² *Global Study on UNSC Resolution 1325*, UN WOMEN, <http://wps.unwomen.org/en> (last visited July 27, 2016).

fact that women continued to be excluded from participating in the peace process”¹³ In conflict, women and children are truly at a disproportionate disadvantage when it comes to sexual violence and violations of human rights.¹⁴ Not only that, but women are not participating in (or worse, being excluded from) discussions and meetings at the conclusion of a conflict: when it is time to restabilize and—hopefully—usher in peace in the region.

Once the UN passed UNSCR 1325, individual nations began to take note of the issues the resolution raised and developed plans to address those very same issues along national lines.

B. 2008-2012: NATO Action Plan and Bi-Strategic Command Directive 40-1

The way NATO and participating nations implement UNSCR 1325 is with National Action Plans (NAPs), which usually set forth some type of framework relating to gender issues. The North Atlantic Treaty

¹³ ALLIED COMMAND OPERATIONS (ACO), DIR., SH/SAG/GEN/15-310385, “ACO Gender Functional Planning Guide,” July 24, 2015, encl. 1, para. 2 (NATO Unclassified, Releasable to SWE) (on file with author). For an analysis and history of the disproportionate impact on women of gender-based violence in conflict, see Rashida Manjoo & Calleigh McRaith, *Gender Based Violence and Justice in Conflict and Post-Conflict Areas*, 44 CORNELL INT’L L. J. 11, 14 (2011).

Throughout history, we have seen that violence against women is an integral aspect of militarization and war. . . . Rape and other forms of sexual violence are used as instruments of violence and terror—as torture, punishment, intimidation, coercion, humiliation, and degradation. Nonetheless, it is only recently that the international human rights community has begun to recognize rape as violence rather than as an assault on honour or a crime against morality.

Id. (internal citation omitted). See also Lisa Denney & Pilar Domingo, *A Problem-Focused Approach to Violence Against Women: A Political-Economy of Justice and Security Programming*, POLITICS & GOVERNANCE (Mar. 2013), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8325.pdf>.

¹⁴ Tadzie Madzima-Boshi, *The Effects of Conflict Are Felt Hardest by Women and Children* (May 10, 2013), <https://www.insightonconflict.org/blog/2013/05/effects-conflict-women-children/>. See Manjoo & McRaith, *supra* note 13, at 16-17 (listing some effects of gender-based violence in conflict as sexually transmitted diseases, injury to reproductive organs, unwanted pregnancy or miscarriage, social stigma/difficulty in societal reintegration (especially post-rape), and psychological consequences, such as depression, anxiety, shock, sexual dysfunction, suicide, and behavior disorders).

Organization adopted the UN resolution in 2007,¹⁵ publishing Bi-Strategic Command Directive (Bi-SC)¹⁶ 40-1 (issued in 2009), which “detail[ed] how [the Allied Command Operations (ACO)] and [the Allied Command Transformation (ACT)] [would] implement UNSCR 1325 and its related resolutions.”¹⁷ Further, NATO revised Military Committee (MC) 249/1 (issued in 1976), resulting in MC 249/2 published in 2009 to support the implementation of UNSCR 1325 and then updating the document as MC 249/3 in 2014.¹⁸ “In 2010, [NATO] adopted the first result-oriented

¹⁵ Robert Egnell et al., *Implementing a Gender Perspective in Military Organisations and Operations: The Swedish Armed Forces Model, Report/Department of Peace and Conflict Research*, at 11 (2012), <http://jamda.ub.gu.se/bitstream/1/733/1/egnell.pdf>.

In 2007, [North Atlantic Treaty Organization (NATO)] adopted a Euro-Atlantic Partnership Council (EAPC) policy, tasking member states to develop practical proposals for the implementation of UNSCR 1325. In September 2009, NATO approved the “Bi-Strategic Command Directive 40-1 Integrating UNSCR 1325 and Gender Perspectives in the NATO Command Structures Including Measures for Protection During Armed Conflict” (which was revised in 2012). The directive is applicable to all international military headquarters or any other organisations operating within NATO chains of command.

Id.

¹⁶ OFFICE OF THE LEGAL ADVISOR, ALLIED COMMAND TRANSFORMATION, STAFF ELEMENT EUROPE, NATO LEGAL DESKBOOK 25 (2d. 2010) [hereinafter NATO Legal Deskbook] (copy on file with author) (defining “Bi-SC Directive” as a “strategic command directive signed by both strategic commanders (SACEUR and SACT)”).

¹⁷ *Integrating UNSCR 1325 and Gender Perspective into the NATO Command Structure*, ODSACEUR/20130701 (July 1, 2013), https://lawfas.hq.nato.int/RC/References/UNSCR_1325_NATOGenderPerspective.pdf (NATO Unclassified memo from Deputy SACEUR to Commander, Joint Force Command Brunssum, standardizing how NATO Command Structure and NATO Force Structure should integrate UNSCR 1325 to certify units as NATO Response Forces (NRFs)) (login and password required). Organized in three main categories, NATO consists of a civilian structure, a military structure, and agencies (also sometimes called organizations). North Atlantic Treaty Organization, <http://www.nato.int/cps/en/natohq/structure.htm> (last visited Aug. 3, 2016) (select “Organization,” then “Structure” tabs). Within the NATO military structure, there are three further sub-entities: the military committee; Allied Command Operations (ACO); and Allied Command Transformation (ACT). Headquartered in Mons, Belgium, ACO is sometimes used synonymously with Supreme Headquarters Allied Powers Europe, or SHAPE. *Homepage*, SUPREME HEADQUARTERS ALLIED POWERS EUROPE, <http://www.shape.nato.int/> (last visited Aug. 3, 2016). The ACT is headquartered in Norfolk, Virginia. *Homepage*, NATO ALLIED COMMAND TRANSFORMATION, <http://www.act.nato.int/> (last visited Aug. 3, 2016).

¹⁸ NORTH ATLANTIC MILITARY COMM., MC 0249/3 (MILITARY DECISION), THE NATO COMMITTEE ON GENDER PERSPECTIVE (NCGP) (Feb. 3, 2014) (NATO Unclassified), http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2014_01/20160615_1401-tor-ncgp.pdf. Substantively similar to military committee (MC) 249/2 (2009), MC 249/3

NATO Action Plan for the implementation of [NATO's] Policy on Women, Peace, and Security, which is revised every two years."¹⁹ The policy and action plan were both updated in 2014 to read:²⁰

The NATO Action Plan on Women, Peace and Security sets the course for this with two overarching objectives. Firstly, it aims to reduce barriers to the active and meaningful participation of women in the security institutions and operations of NATO, Allies, and Partners. Comparative data shows that progress in including more women in our institutions has been modest, and mixed. Secondly, that Action Plan strives to integrate a gender perspective into the day-to-day security business.²¹

As of July 2016, fifty-eight nations have published various types of NAPs to promote women, peace, and security.²² The United States is no different: "On December 19, 2011, President Barack Obama signed

(2014) mainly updated Annex B; instead of the "NATO Office on Gender Perspective (NOGP)," the annex now refers to the "IMS [International Military Staff] Office of the Gender Advisor." *Id.*

¹⁹ ALLIED COMMAND TRANSFORMATION GENDER ADVISOR PORTAL, *Who We Are* (June 9, 2016), <http://www.act.nato.int/gender> (outlining six tracks to NATO's action plan: (1) mainstreaming in policies, programs, and documentation; (2) cooperation with international organizations and civil society; (3) education and training (ACT); (4) operations; (5) public diplomacy; and (6) national initiatives).

²⁰ Marriet Schuurman, *NATO and the Women, Peace, and Security Agenda: Time to Bring It Home*, 14 CONNECTIONS: QUARTERLY J, 3 (2015), http://www.nato.int/cps/en/natohq/opinions_124032.htm?selectedLocale=en. Ms. Schuurman, NATO's Special Representative for Women, Peace, and Security, summarizes the history of NATO's implementation of UNSCR 1325 as follows:

A revised Policy and a new Action Plan were adopted in 2014 by NATO, Allies, EAPC partners and six global partners. In total, fifty-five nations signed off on the new NATO Action Plan on Women, Peace and Security. In 2009, NATO's two Strategic Commands—Allied Command Operations and Allied Command Transformation—issued a Directive (Bi-SC Directive 40-1) on integrating UNSCR 1325 and the gender perspective into the NATO command structure. The Directive was updated in 2012.

Id.

²¹ Schuurman, *supra* note 20.

²² *List of National Action Plans for the Implementation of UNSCR 1325*, IKNOW POLITICS, <http://iknowpolitics.org/en/knowledge-library/website-database/list-national-action-plans-implementation-unscr-1325> (last visited July 27, 2016).

Executive Order 13595, instituting the U.S. ‘National Action Plan on Women, Peace, and Security.’”²³

Notably, the implementation tool NATO chose in 2009—with a Bi-SC directive—is mere “guidance on how gender perspectives can be integrated into the planning and conduct of NATO-led operations as a tool to increase operational effectiveness.”²⁴ Although technically a directive, which—in the common sense of the word—would normally direct certain actions, events, etc., the language in the directive did not mandate or order anyone to do anything; it simply “aim[ed] to ensure implementation of [UNSCR] 1325.”²⁵ It became clear that stronger language was called for in the directive to ensure the fledgling program promoting women, peace, and security would survive in NATO.

The former gender advisor for the Supreme Allied Commander Europe (SACEUR), Ms. Charlotte Isaksson²⁶ of Sweden, explained in 2015 that NATO implemented UNSCR 1325 for two reasons: because “[i]nternational armed conflict has a disproportionate impact on women in terms of gender-based violence . . .” and because “[w]omen are also active agents in the prevention and resolution of conflicts. Adequately recognizing the role and influence of native women in conflict zones can yield benefits for conflict resolution and intelligence gathering.”²⁷

²³ ROBERT EGNELL ET AL., GENDER, MILITARY EFFECTIVENESS, AND ORGANIZATIONAL CHANGE: THE SWEDISH MODEL (2014) (“Then-Secretary of State Hillary Clinton announced this initiative at Georgetown University, describing it as a ‘comprehensive effort across the U.S. government to advance women’s participation for making and keeping peace.’”).

²⁴ BI-STRATEGIC COMMAND, DIR. 40-1, INTEGRATING UNSCR 1325 AND GENDER PERSPECTIVE INTO THE NATO COMMAND STRUCTURE (Revision 1) (8 Aug. 2012) [hereinafter Bi-SC 40-1, Rev 1].

²⁵ Bi-SC 40-1 Rev 1, *supra* note 24, para. 1-1.

²⁶ Ms. Charlotte Isaksson was the Supreme Allied Commander Europe’s (SACEUR’s) Gender Advisor from 2011-2016 (accepting the position as Senior Gender Advisor at the European Union External Action Service on September 2, 2016). *SHAPE Says Farewell to ACO Gender Advisor Ms. Charlotte Isaksson This Week*, FACEBOOK.COM (Sept. 2, 2016), <https://socialfeed.info/shape-says-farewell-to-aco-gender-advisor-ms-charlotte-isaksson-this-week-3744586> (Supreme Headquarters Allied Powers Europe *Facebook* page). From 2001 to 2011, Ms. Isaksson was the Senior Gender Advisor at the Swedish Armed Forces Headquarters. *Charlotte Isaksson*, LINKEDIN, <https://be.linkedin.com/in/charlotte-isaksson-992bb215> (last visited Jan. 6, 2017).

²⁷ Sam Marrero, *SACEUR Gender Advisor: Protecting Women Essential to NATO/UN Peacekeeping Success*, NAT’L DEF. UNIV. (June 10, 2015), <http://www.ndu.edu/News/ArticleView/tabid/6469/Article/601432/saceur-gender-advisor-protecting-women-essential-to-natoun-peacekeeping-success.aspx>. *But see* “We

Thus, NATO established gender awareness training, which takes place prior to military deployment, as well as the position of a gender advisor within each NATO command structure in 2009 (reporting to the ACO Gender Advisor).²⁸ In 2010, NATO published its strategic concept, reinforcing its position that gender perspective integration—with a GENAD on the commander’s personal staff—is mandatory for all units in the NATO military force structure.²⁹ Clearly, this stronger language (mandating certain actions) began to clarify NATO’s growing commitment to gender perspective integration among the NATO Force Structure.³⁰

C. 2012-the Present: Bi-Strategic Command Directive 40-1, Revision 1

In 2012, NATO reissued Bi-SC 40-1 (calling it Bi-SC 40-1, Revision 1), noting,

[A]dditional [UNSCRs] and policies have been passed” since 2009, namely UNSCRs 1888 (2009),³¹ 1889 (2009),³² and 1960 (2010).³³ The directive envisioned the

Can Die, Too—*Recruitment and Use of Child Soldiers in South Sudan*, HUMAN RIGHTS WATCH REPORT 13 (Dec. 2015), https://www.hrw.org/sites/default/files/report_pdf/south_sudan1215_4.pdf (stating that a vast majority of recruited child soldiers in a conflict are boys).

²⁸ Bi-SC 40-1, *supra* note 2; *see also* Dr. Stefanie Babst, Remarks at the Conference on Women, Peace, and Security—the Afghan View, *Role and Experience of International Organisations in Implementation of UNSCR 1325 in Afghanistan* (June 11, 2010), http://www.nato.int/cps/en/natohq/opinions_68078.htm?selectedLocale=en (Dr. Stefanie Babst was the Acting NATO Assistant Secretary in November 2010.).

²⁹ NORTH ATLANTIC COUNCIL INTERNATIONAL STAFF, *The Alliance’s Strategic Concept*, Document PO (2010)0169 (Nov. 19, 2010), <http://www.ft.dk/samling/20101/almdel/upn/bilag/24/920917.pdf>.

³⁰ Robert Egnell et al., *supra* note 15. (“The Bi-Strategic Command Directive 40-1 was updated in 2012 with an increasing amount of measures to be undertaken by member and partner states.”).

³¹ S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/534/46/pdf/N0953446.pdf?OpenElement>.

³² S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/542/55/pdf/N0954255.pdf?OpenElement>.

³³ S.C. Res. 1960, U.N. Doc. S/RES/1960 (Dec. 16, 2010), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/698/34/pdf/N1069834.pdf?OpenElement>. Since then, UNSCR 2242 (2015), has reaffirmed the international community’s commitment to women, peace, and security. S.C. Res. 2242, U.N. Doc. S/Res/2242 (Oct. 13, 2015), <https://documents-ddsny.un.org/doc/UNDOC/GEN/N15/311/09/pdf/N1531109.pdf?Open>

creation of a gender advisor who participates in “operational planning and preparation, integrating UNSCR 1325 and gender perspectives at all levels of planning [which is] imperative when developing strategies to address the full spectrum of crisis management scenarios in which NATO is involved.”³⁴

The NATO headquarters assigned on a rotating basis as the NATO Rapid Deployment Force (NRF) would be (and are currently) evaluated for NRF certification on their “inclusion of gender perspectives in operational planning and assessments”³⁵

Consisting of three chapters (introduction, education and training, and implementation), the 2012 directive outlines aims, rationales, definitions, policies, training requirements, operational planning and tactical considerations, as well as standards of behavior and reporting. The most interesting and useful part of the Bi-SC 40-1, Revision (Rev) 1 is the annex portion; in its five annexes are the following topics: (A) Gender Advisor and Gender Field Advisor: Roles and Responsibilities; (B) NATO Standards of Behaviour; (C) ACT Education and Training Programme Framework; (D) Reporting of Gender Perspective in Operations; and (E) References. These are useful in understanding the function and responsibilities of the NATO gender advisor program within a NATO Force Structure.

III. Function and Responsibilities of the NATO Gender Advisors, Gender Field Advisors, and Gender Focal Points

The position of GENAD came about in 2009 because “NATO commanders and their staffs are not yet trained and skilled in planning and execution of operations with an integrated gender perspective.”³⁶ The

Element. See also *Global Study on UNSC Resolution 1325*, UNWOMEN.ORG, <http://wps.unwomen.org/en> (last visited Aug. 3, 2016).

³⁴ Bi-SC 40-1, *supra* note 2, title page.

³⁵ *Integrating UNSCR 1325 and Gender Perspective into the NATO Command Structure*, ODSACEUR/20130701 (July 1, 2013), https://lawfas.hq.nato.int/RC/References/UNSCR_1325_NATOGenderPerspective.pdf (NATO Unclassified) (login and password required).

³⁶ Bi-SC 40-1 Rev 1, *supra* note 24, ann. A, para. 1. Notably, NATO seems to be moving away from the initial trend of appointing a majority of female GENADs, Gender Field Advisors (GFAs), and Gender Focal Points (GFPs). E-mail from Lieutenant Colonel John

NATO GENAD is a designated special staff officer who—much like the Legal Advisor (LEGAD),³⁷ Political Advisor (POLAD), and Civil Advisor (CIVAD)—personally advises the unit commander on gender matters. The GENAD—not to be confused with the Gender Field Advisor (GFA) and the Gender Focal Point (GFP)³⁸—helps the commander and military unit integrate “gender perspective . . . [in] the planning, execution, and evaluation phases of NATO-led operations.”³⁹

What is gender perspective? “Within scholarly research on international law, there is a range of definitions for the term ‘gender.’ The common element in each articulation of the term is the distinction drawn between differences based on sex (biology) and differences based on social assumptions about masculine and feminine behaviors (social constructs).”⁴⁰ For example, in a certain society, going to the well to get water for the household might be viewed as a more feminine task; whereas working in an office outside the home could be considered a more masculine role. Examining these roles is a large part of the GENAD’s function. “Gender perspective looks at the impact of gender on people’s opportunities, social roles, and interactions.”⁴¹ The first point to make in this explanation is that the term “gender” is not interchangeable with “sex.”

Sex refers to the permanent and immutable biological characteristics common to individuals in all societies and cultures, while “gender defines traits forged throughout the history of social relations.”⁴² Gender, although it originates in objective biological divergences, goes far beyond the physiological and biological specifics of the two sexes in terms of the roles each is expected to play. Gender differences are social constructs,

Moore, NATO Legal Advisor and Trainer, Joint Warfare Center, to author (Sept. 6, 2016, 06:36 EST) (on file with author) [hereinafter Moore E-mail].

³⁷ Colonel Brian H. Brady, *The NATO Legal Advisor: A Primer*, ARMY LAW., Oct. 2013, at 4, 4.

³⁸ Bi-SC 40-1 Rev 1, *supra* note 24. For a discussion on the GENAD, GFA, and GFP roles and duties, *see infra*, Sec. III.A.-C.

³⁹ *Id.* (“All of these phases [i.e., the planning, execution, and evaluation phases of NATO-led operations] must be based on initial and regular analysis of social groups with a gender perspective.”).

⁴⁰ Helen Durham & Katie O’Byrne, *The Dialogue of Difference: Gender Perspectives on International Humanitarian Law*, 92 INT’L REV. RED CROSS 877 (Mar. 2010), <https://www.icrc.org/eng/assets/files/other/irrc-877-durham-obyrne.pdf>.

⁴¹ *Chapter II. The Gender Perspective*, FAO CORPORATE DOCUMENT REPOSITORY, <http://www.fao.org/docrep/003/x2919e/x2919e04.htm> (last visited Aug. 3, 2016).

⁴² *Id.*

inculcated on the basis of a specific society's particular perceptions of the physical differences and the assumed tastes, tendencies, and capabilities of men and women. Gender differences, unlike the generally immutable characteristics of sex, are universally conceded in historical and comparative social analyses to be variants that are transformed over time and from one culture to the next, as societies change and evolve.⁴³

It is important at this point to ensure the understanding of the connection between UNSCR 1325 and the creation of the GENAD position in NATO; without such an explanation, the reader might leap to the conclusion that GENADs occupy themselves with esoteric questions of how women and men behave in society and roles they fulfill in a specific community. However, in peacetime operations, GENADs also concentrate on female representation in NATO nations' militaries, rights of women in the NATO workplace, and a whole host of other women-related issues not necessarily specific to NATO nations' militaries.

This contributes to the confusion of what the GENAD's primary function is: advocating for women's rights? Or assessing gender roles in a given society and applying those assessments to mission analysis? Because NATO has almost no control over troop-contributing nations' gender makeup of the troops they decide to contribute, it is difficult for NATO as an organization—whose military might is made up of other nations' militaries—to influence female representation at the highest levels of its military portion of the organization.⁴⁴ Thus, although the policies and encouragement remain in place,⁴⁵ it is natural that the focal point of NATO's gender advisor program involves gender perspective integration in military operations. But the take-away here is that both aims are part of the gender advisor's responsibilities. To examine those responsibilities more fully, it is helpful at this point to understand the roles

⁴³ *Id.*

⁴⁴ Marriet Schuurman, *supra* note 20 (“To increase the share of female troops deployed in missions and operations, NATO depends on the Nations contributing troops.”).

⁴⁵ At NATO Headquarters, NATO can and does espouse programs to increase women's responsibilities and authority within its organization. Celebrating Female Leadership at NATO, NORTH ATLANTIC TREATY ORGANIZATION (Mar. 12, 2013), http://www.nato.int/cps/en/natohq/news_99120.htm?selectedLocale=en. See also Tara Nordick, *Gender Enablers within NATO*, NATO LEGAL GAZETTE 31, 50 (Aug. 2013), <http://www.ismllw.org/NATO%20LEGAL%20GAZETTE/Legal%20GazetteIssueNo%2031.pdf> (referring to NATO's Diversity Action Plan (2012-2014) and the International Staff's Civilian Personnel Regulations (CPRs), which contain a statement on diversity of staff recruitment at Chapter I, Article 1.3).

of each of NATO's three types of gender officers: GENAD, GFA, and GFP.

A. Role of the GENAD

The GENAD reports directly to the commander at the strategic or operational level.⁴⁶ That commander is “responsible for the overall integration of gender perspective into planning, execution, and evaluation” of the unit’s missions.⁴⁷ The Bi-SC directive explains that a NATO unit must have Standard Operating Procedures (SOPs) to describe the GENAD’s and GFA’s roles, but goes on to note several in a nonexhaustive list of roles for either/both positions, depending on how the unit employs GENADs and GFAs:

- a. Reports directly the commander to ensure gender perspective is integrated in all aspects of planning
- b. Liaises with “all elements of the staff”
- c. Supports operational objectives and activities
- d. Assesses security risks of men and women
- e. Supports staff members in integrating gender perspective in their varying functions
- f. Conducts/disseminates gender analyses
- g. Cooperates and shares information with the international community actors
- h. Supports and enables local law, directives, and commitments related to UNSCR 1325
- i. Supports the commander, J1, and LEGAD with inquiries or investigations (regarding breaches of NATO Standards of Behaviour; allegations of violence, rape, or sexual abuse)

⁴⁶ Notably, the GENAD position exists in NATO units’ peacetime establishment (PE) and crisis establishment (CE) lists of positions. However, NATO is only obligated to fill the CE GENAD position; in other words, a NATO unit may never employ a GENAD until it is deployed/on a NATO mission, thus activating (and filling) NATO’s CE positions. W. Bruce Weinrod & Charles L. Barry, *NATO Command Structure—Considerations for the Future*, CTR. FOR TECH. AND NAT’L SEC. POL’Y, NAT’L DEF. UNIV. at 15 (Sept. 2010), <http://ctnsp.dodlive.mil/files/2013/08/DTP-075.pdf> (noting that PE positions remain unfilled during peacetime, but CE positions are then filled during NATO missions).

⁴⁷ *Soldier’s Card*, THE SWEDISH ARMED FORCES NORDIC CENTRE FOR GENDER IN MILITARY OPERATIONS (Feb. 2015), <http://www.forsvarsmakten.se/siteassets/english/swedint/engelska/swedint/nordic-centre-for-gender-in-military-operations/soldiers-card-feb-2015.pdf>.

- j. Supports a gender balanced force and ensures in particular that women are part of the regular force structure
- k. Gives special attention to organizations/groups defending women's and children's human rights.⁴⁸

Beyond simply appointing a GENAD and issuing a SOP, a NATO unit must also educate those officers involved in advising on gender integration. To that end, Bi-SC 40-1, Rev 1 outlines mandatory and optional training for gender advisors, field advisors, and focal point personnel.⁴⁹ In 2015, Supreme Headquarters Allied Powers Europe (SHAPE) issued the ACO Gender Functional Planning Guide,⁵⁰ which gives “guidance to GENADs, GFPs, and NATO planning staff It provides gender perspectives to be addressed/considered during each stage of the planning process at the strategic and operational levels.”⁵¹ It is a useful step-by-step guide for planners at all levels—tactical, operational, and strategic.

Beyond the GENAD in the command group, there are also slots for GFAs and GFPs within the unit. The GENAD and GFA have doctrinally similar duties, except the GENAD also “monitors, coordinate[s], and support[s] the Gender Field Advisors.”⁵²

B. Role of the GFA

A step below the GENAD in the gender advisor hierarchy, the GFA is pivotal at the operational level and usually is most helpful during a unit's deployment or other type of specific operation. “Gender Field Advisors (GFAs) are tasked to conduct gender analysis in the area of Operations and to ensure that the commanders' intent and execution of tasks will be in-line with the UN resolutions and NATO Bi-SC Directive 40-1 (Rev 1).”⁵³ The unit's SOP that lists GENAD duties also applies to the GFA. A level below, the “Gender Focal Points (GFP) are appointed within the units on a tactical level and are allocated to dedicate 10-15 percent of their time to

⁴⁸ Bi-SC 40-1 Rev 1, *supra* note 24, ann. A, para. 5.

⁴⁹ *Id.*

⁵⁰ ALLIED COMMAND OPERATIONS (ACO), DIR., SH/SAG/GEN/15-310385, “ACO Gender Functional Planning Guide,” July 24, 2015 (NATO Unclassified, Releasable to SWE).

⁵¹ *Id.*

⁵² *Soldier's Card*, *supra* note 47.

⁵³ *Id.*

the task of integrating gender perspective within the ordinary task of the unit.”⁵⁴

C. Role of the GFP

Normally, each section or division within a NATO unit has a designated GFP, which “is a dual-hatted position that supports the commander in implementing directives and procedures with gender perspective.”⁵⁵ They work closely with the GENAD, but report to their regular, functional chains of command, not to the GENAD. The main role of the GFP is to “ensure gender perspective is fully integrated into the daily tasks of [an] operation [at the tactical level].”⁵⁶ The GFP, who comes from every section (G1, G2, G3, etc.), receives training,⁵⁷ attends conferences, and works with fellow GFPs in the various staff sections to ensure gender perspective is considered at all levels of planning and executing operations.⁵⁸

IV. A GENAD in the U.S. Military?

Although the U.S. military does not employ GENADs,⁵⁹ it does focus on gender issues at the national level and, as mentioned above, has

⁵⁴ *Id.*

⁵⁵ Bi-SC 40-1 Rev 1, *supra* note 24, ann. A, para. 7.

⁵⁶ *Id.* (“These activities could include, but are not limited to: patrolling, enabling the provision of humanitarian aid, search procedures, assisting national security forces, assessing the different security risks of men and women in monitoring and evaluation activities, and providing gender training for NATO personnel.”).

⁵⁷ *See id.* ann. C (listing mandatory and recommended training for GENADs and GFAs); *id.* para. 2-7 (mandating training for all gender positions and listing minimum training requirements for compliance).

⁵⁸ Of note, critics of NATO’s gender perspective integration cite to NATO nations’ inconsistent, ad hoc integration of the principles of UNSCR 1325, explaining the impossibility for NATO as an organization to integrate UNSCR 1325 when NATO’s participating members have not made strides in doing so. Chantal de Jonge Oudraat et al., *Gender Mainstreaming: Indicators for the Implementation of UNSCR 1325 and Its Related Resolutions* (Feb. 2014), <http://wiisglobal.org/wp-content/uploads/2014/02/1325-Scorecard2.pdf> (“In 2015, 17 out of 28 NATO member states and 14 out of 41 NATO partner states had developed [national action plans] implementing the principles of UNSCR 1325.”).

⁵⁹ Thus far, only the Swedish military employs fulltime gender advisors within its military staff. ROBERT EGNELL, ET AL., *supra* note 23 (noting the Swedish military “approach[ed] the implementation of a gender perspective in the organization as an issue of operational

implemented a NAP on Women, Peace, and Security.⁶⁰ Although these policies do affect the military, the Department of Defense (DoD) does not have a dedicated program concentrating on integrating gender perspective in the military branches.⁶¹ Instead of GENADs, the U.S. military relies on a robust Equal Opportunity (EO) program,⁶² based on Title VII of the U.S. Code,⁶³ to deal with gender issues within the organization. However, the EO program does not completely fulfill what a GENAD brings to the table in NATO military operations; it concentrates (in part) on addressing gender discrimination within the military rather than integrating gender perspective in operations, as the NATO GENAD program does. Thus, there is a void in the U.S. military in that regard.⁶⁴

A logical question is how a GENAD within the U.S. military structure would be helpful. The answer is—in the same way it is helpful to the units within the NATO military structure—it would provide a focus on gender perspective in all stages of operations. And yet, although arguably helpful,

effectiveness—as opposed to one ‘merely’ of gender equality, women’s rights, or human resources”).

⁶⁰ See generally *supra* note 58. The U.S. National Action Plan (NAP) on Women, Peace, and Security contains a statement of national policy: “The goal of the [U.S. NAP] on Women, Peace, and Security remains as simple as it is profound: to empower half the world’s population as equal partners in preventing conflict and building peace in countries threatened and affected by war, violence, and insecurity.” The next sentence emphasizes the importance of that lofty aim: “Achieving this goal is critical to our national and global security.” *The United States National Action Plan on Women, Peace, and Security 2* (June 2016), <https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/women-national-action-plan.pdf>.

⁶¹ The U.S. NAP cites several examples of initiatives in addressing conflict-related sexual violence (CRSV): one such example is the U.S. government-funded security assistance program Global Peace Operations Initiative (GPOI), which works with international military forces and police and “emphasizes the prevention and remediation of sexual and gender based violence The [DoD] also works to advance gender integration in partner nation militaries through the National Guard State Partnership Program (SPP)” (citing the Colorado National Guard’s engagements with women from the Jordanian Armed Forces on female-specific work topics).

⁶² U.S. DEP’T OF DEF., DIR. 1020.02E, DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY IN THE DOD (8 June 2015), <http://www.dtic.mil/whs/directives/corres/pdf/102002E.pdf>. It is important to note that the GENAD is not at all akin to an Equal Opportunity (EO) representative, nor is the GENAD involved in any sexual harassment complaints, training, etc. Moore E-mail, *supra* note 36.

⁶³ Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq. (1964), <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

⁶⁴ Notably, the role of political advisor (POLAD) also does not exist in the U.S. military; yet, U.S. commanders, their staff, and especially legal advisors (usually) satisfactorily incorporate that need to consider political issues when planning and executing missions. See Colonel Brady, *supra* note 37, at 4.

is a GENAD truly necessary as an advisor in a U.S. commander's special staff? Examining some examples in which a GENAD proved useful might provide the answer to this question.

The Nordic Center for Gender in Military Operations,⁶⁵ part of the Swedish military, issued a pamphlet in 2015, citing numerous examples of when a GENAD proved quite useful in operations.⁶⁶ Some examples include the following:

(a) Afghanistan, ISAF (2013): An all-male unit's area of patrol responsibility included a female-only bazaar; the GFA identified the problem and advised the unit to either include women on its patrol (who could enter the bazaar area) or to change the patrol route (so male soldiers would not have to enter the bazaar).⁶⁷

(b) Kosovo, KFOR (2012): Roadblocks affected men, women, and children differently: unemployed men worked at the roadblocks, so they had an incentive to keep the roadblocks even as they established alternate supply routes; women could not obtain supplies to run their households due to the roadblocks; children could not attend school due to the roadblocks. Understanding how the roadblocks affected these members of the community (depending on their gender) helped the military commander run an effective roadblock program, lessening impacts on the [various communities] in the process.⁶⁸

(c) Darfur (Sudan), African Union United Nations Mission in Darfur (UNAMID) (2009-2012): Some local

⁶⁵ NORDIC CENTRE FOR GENDER IN MILITARY OPERATIONS, <http://www.forsvarsmakten.se/en/swedint/nordic-centre-for-gender-in-military-operations/> (last visited July 27, 2016). See also EGNELL ET AL., *supra* note 23, at 31 ("Its origin can be traced to 10 May 2010, when Norway, Finland, and Sweden decided within the framework of the Nordic Defence Cooperation (NORDEFECO) to establish a Centre for Gender in Military Operations, which came into being on 1 January 2012.").

⁶⁶ *Whose Security? Practical Examples of Gender Perspectives in Military Operations 2015*, NORDIC CENTRE FOR GENDER IN MILITARY OPERATIONS, <http://www.forsvarsmakten.se/siteassets/english/swedint/engelska/swedint/nordic-centre-for-gender-in-military-operations/whose-security-2015-low-resolution.pdf> (last visited July 27, 2016).

⁶⁷ *Id.* at 14-15.

⁶⁸ *Id.* at 16-17.

women were part of groups called Hakamas, who sang traditional songs in their communities. “In peacetime, their singing would maintain social order in the community. In wartime, they sang to encourage their sons and husbands to fight at the front.”⁶⁹ Although a GENAD was not present in the mission, women made up 32 percent of the Demobilization, Disarmament, and Reintegration (DDR) section working in that area. These women realized that “Darfuri women took part in the peace process to a large extent”⁷⁰ and used that information to work with Darfuri women to fulfill UNAMID’s “mandate [of supporting] the implementation of the peace agreement and protection of civilians.”⁷¹

These examples show how considering plans, missions, and operations through a gender-focused lens—viewing them from adult male, female, and possibly even male/female child perspectives—can truly enhance the effectiveness of military actions. Including a GENAD on a U.S. military staff would improve perspective and intelligence within stability operations that, like it or not, the military repeatedly undertakes. The obvious counterargument to that conclusion is that U.S. military members already think, plan, and act with a gender perspective in mind, as approximately 15.7% are women. This claim is worth exploring, and it begins with the percentage of females in the U.S. military.

Just as in the above Darfur example—in which a GENAD did not provide a gender perspective, but women did—can the U.S. military not simply rely on its gender diversity and agile thinking without adding the position of GENAD to a commander’s staff? Women, previously barred from serving in combat roles until Secretary Panetta partially lifted the ban in 2013,⁷² can now—as of December 2015—serve in all positions in the U.S. military.⁷³

⁶⁹ *Id.* at 27-28.

⁷⁰ *Id.* at 27 (“The Hakamas sometimes travelled with the armed forces to the battlefield and their singing would spur the fighters.”).

⁷¹ *Id.*

⁷² *Pentagon Makes Women in Combat Rule Change Official*, USATODAY.COM (Jan. 23, 2013), <http://www.usatoday.com/story/news/nation/2013/01/24/women-combat-change-panetta/1861995/>.

⁷³ P.J. Tobia, *Defense Secretary Carter Opens All Combat Jobs to Women*, PBS.ORG (Dec. 3, 2015), <http://www.pbs.org/newshour/rundown/watch-live-defense-secretary-carter-to-lift-ban-on-women-in-combat-jobs/>.

Currently, women account for 15.7% of active-duty personnel in the U.S. military. The Marines have the lowest percentage of women, at 7.6%. Twenty of 336 Marine jobs are currently closed to women. The Air Force and Navy have the highest percentage of women serving: 17.8% for the Navy, and 18.7% for the Air Force.⁷⁴

According to the Defense Manpower Data Center (DMDC), which “maintain[s] the central repository of [DoD] Human Resource Information,”⁷⁵ the percentage of total female active duty personnel in the U.S. Army, Air Force, Navy, and Marines is 15.7% as of May 2016 (updated monthly).⁷⁶ The DMDC breaks this information down by rank and service, giving actual numbers and then the corresponding percentage to indicate female representation in the services. Women do appear to be well represented across the ranks in the U.S. military, but the real question is whether or not these female servicemembers are in the position to provide gender perspective in their jobs. First, it is impossible to know if these women are inclined to think along gender perspective lines. Second, even if they did, will they be heard, for example, during a planning meeting—if these women voice concerns about how a planned action will affect women in a given community their unit is operating in? Those issues are left to chance without a trained GENAD or GFP to monitor consistent consideration of gender in mission planning.

The Swedish Army introduced the role of gender advisor in 2007,⁷⁷ and the program has grown in scope since then. Sweden plans to assign

⁷⁴ David Johnson & Bronson Stamp, *See Women's Progress in the U.S. Military*, TIME.COM (Sept. 8, 2015), <http://labs.time.com/story/women-in-military/>.

⁷⁵ DEFENSE MANPOWER DATA CENTER, <https://www.dmdc.osd.mil/appj/dwp/index.jsp> (last visited July 27, 2016).

⁷⁶ *Id.* (in homepage search textbox, type “women” to obtain monthly tally of active duty military personnel by service and rank/grade).

⁷⁷ ROBERT EGNELL, ET AL., *supra* note 23, at 22.

The aim of the Gender Field Advisor Course project was to train a group of GFAs who would be able to participate in international operations and missions and advise their commanders on how to integrate UNSCR 1325 and a gender perspective. Other organisations such as the UN, Red Cross, UNHCR and [Organization for Security and Cooperation in Europe] had previously also established GFA functions and were used for benchmarking. In 2007, 20 persons from the partner organizations participated in the pilot course.

Id.

GENADs and GFPs at every brigade by 2016.⁷⁸ Since 2012, training for GENAD and GFP positions occurs mainly through the Nordic Centre for Gender in Military Operations.⁷⁹ The Swedish government and interested scholars have studied gender integration extensively in the Swedish military formations since that time. One scholar who studied the effectiveness of Swedish implementation of UNSCR 1325 recommends other nations' militaries follow suit; he utilizes an extremely clever argument: he zeroes in on a commander's hesitancy to take actions that detract from achieving the mission, and argues instead that gender perspective integration ultimately improves operational effectiveness.

Professor Robert Egnell, a Professor of Leadership at the Swedish Defence University, and Georgetown Institute for Women, Peace, and Security senior fellow, has authored and coauthored several books and articles detailing the success of the Swedish military in implementing gender perspective; his main point is usually along these lines: militaries are usually unsympathetic to a rights-based argument that the integration of women and gender perspectives in military organizations is the right thing to do.⁸⁰ Military commanders—although possibly in favor of improving gender rights in their formations—simply do not view it as a focal point in any of their assigned missions, according to Professor Egnell.

In March 2016, Professor Egnell argued in a *Prism* article that militaries can improve operational effectiveness by implementing UNSCR 1325 and their NAPs; he emphasized the importance of the military institution's buy-in before attempting any wide-sweeping changes.⁸¹ The two questions Professor Egnell addressed are, firstly, why gender

⁷⁸ *Sweden Appoints Special Military Gender Advisors*, THELOCAL.COM (Feb. 20, 2015), <http://www.thelocal.se/20150220/swedish-army-appoints-gender-advisors>. "As currently structured, the organization includes two brigade headquarters and eight maneuver battalions: five mechanized, one motorized infantry, one light infantry and one amphibious." Scott R. Gourley, *Swedish Army Restructures, Reduces*, ARMY MAG. (Feb. 2015), http://www.editiondigital.net/article/Swedish_Army_Restructures,_Reduces/1904968/242037/article.html.

⁷⁹ NORDIC CENTRE FOR GENDER IN MILITARY OPERATIONS, <http://www.forsvarsmakten.se/en/swedint/nordic-centre-for-gender-in-military-operations/> (last visited July 27, 2016).

⁸⁰ Robert Egnell, *Gender Perspectives and Military Effectiveness: Implementing UNSCR 1325 and the National Action Plan on Women, Peace and Security*, 6 PRISM 1, at 73, 82 (Mar. 1, 2016), <http://cco.ndu.edu/Publications/PRISM/PRISM-volume-6-no1/Article/685108/gender-perspectives-and-military-effectiveness-implementing-unscr-1325-and-the/>.

⁸¹ *Id.* at 74-75.

perspectives should be implemented and, secondly, how to do it.⁸² Keeping that mission-focused commander in mind, Egnell explains, “A better approach is to emphasize that the implementation process serves to strengthen the military in its constant pursuit of maximal effectiveness at its core tasks”⁸³ Egnell recognizes that “[t]he *raison d’être* of military organizations is not to improve women’s rights, but to defend the nation from military threats.” One way to do this more effectively, according to Egnell, is to mainstream gender perspectives in the military.

Although the United States has not seriously explored adding a GENAD to its special staff of advisors for commanders, the military has embarked on several initiatives that highlight the importance of gender perspective in operations. For example, in 2009, U.S. Marines were the first U.S. service to employ female engagement teams (FETs), followed by the U.S. Army in 2013.⁸⁴ Similarly, in 2014, Norway created its “Hunter Troop,” consisting of female infantry soldiers, with the hope of “open[ing] up critical interactions and information channels with indigenous female populations in future conflicts”⁸⁵

V. Proposal for a U.S. GENAD

With NATO’s and Sweden’s gender advisor programs in mind, the DoD should launch a pilot program appointing trained⁸⁶ GENADs at the division and corps levels of, perhaps, the 82d Airborne Division and XVIII Airborne Corps, Fort Bragg, North Carolina, chosen merely for illustrative purposes for this article. Those GENADs would be part of a commander’s special staff, much like the Staff Judge Advocate or Inspector General—and should have the commensurate rank. In a high operational tempo unit, the GENAD might serve to focus operational planning to incorporate a gender perspective—a concept that can only add to the welcome diversity

⁸² *Id.* at 74.

⁸³ *Id.* at 82.

⁸⁴ Sergeant Ida Irby, “FET” to fight: Female Engagement Team makes history, ARMY.MIL (Apr. 18, 2013), https://www.army.mil/article/101111/_FET_to_fight__Female_Engagement_Team_makes_history.

⁸⁵ David Leffler, *Hunter Troop Is the World’s First All-Female Special Operations Unit*, TASKANDPURPOSE.COM (Sept. 14, 2016), <http://taskandpurpose.com/hunter-troop-worlds-first-female-special-operations-unit/>.

⁸⁶ The Swedish Armed Forces Institute, or SWEDINT, provides a two-week gender advisor course three times per year. GENAD, SWEDISH ARMED FORCES, <http://www.forsvarsmakten.se/en/swedint/courses-at-swedint-and-how-to-apply/gfa/> (last visited Aug. 3, 2016) (explaining the aim, target audience, and application instructions for the course).

in thought when undertaking mission planning. Bifurcating the two aims of the NATO gender advisor—(1) encouraging growth in women in leadership roles and (2) integrating a gender perspective in operations—makes sense for the U.S. military. Concentrating on the latter aim—gender in operations—fills a void, whereas efforts to support gender diversity within the U.S. military ranks already exist through EO programs.

After evaluating a GENAD's value added to division and corps staff (in terms of planning and executing operations), the DoD might follow Sweden's example in training and assigning GFPs at the brigade level to fully integrate gender perspective at the lowest tactical level. Officially emplacing a staff officer to concentrate solely on gender perspective in mission execution will achieve an important goal: meeting the objectives of the U.S. NAP on Women, Peace, and Security.⁸⁷

VI. Conclusion

At a time of U.S. military streamlining, adding a seemingly periphery position like the GENAD to a commander's staff might not initially make sense to the casual observer. The U.S. military's reputation is that they are the finest fighting force in the world; a reputation earned through its agile and adaptive servicemembers.⁸⁸ However, when the U.S. military is being asked to do more with fewer resources in a complex, unpredictable conflict or security operation, adding an emphasis on gender perspectives to mission planning and execution might just be part of the solution.

⁸⁷ Anne A. Witkowsky, *Integrating Gender Perspectives within the Department of Defense*, 6 PRISM, 1, 34 (Mar. 2016), <https://www.inclusivesecurity.org/wp-content/uploads/2016/03/Prism-Vol-6-No-1-Final.pdf> (featuring several articles on gender integration in the military).

⁸⁸ Global Firepower Survey, *Countries Ranked by Military Strength (2016)*, GLOBALFIREPOWER.COM (Apr. 1, 2016), <http://www.globalfirepower.com/countries-listing.asp>.

**WHY “GREEN DREAMS” SHOULD NOT COME
TRUE: KEEPING BOARDS OF CONTRACT
APPEALS OFF THE SCALES OF JUSTICE**

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*What’s in a name that which we call a rose?
By any other name would smell as sweet.¹*

I. Introduction

In contracts, precise terms matter. Fraud, by any other name, does not change its form. Whether raised as an affirmative claim, defense, or to argue that a contract never existed, the underlying issue is still fraud.

Tied to fraud are “green dream” claims for money. Cases like *Green Dream*² call for a change in how claims involving fraud are resolved. A

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¹ WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, Act II, Scene ii (1600). This quotation symbolizes the central struggle and tragedy of Shakespeare’s love story between Romeo and Juliet. It is often referenced to mean that names or labels do not change the nature of what something really is. Juliet professes her love of Romeo regardless of his family name. Ironically, however, Shakespeare reveals that names do matter and can lead to struggle and tragedy. In contracts, the lesson is that fraud should be taken for what it is, even when it is labeled as something else or cloaked as an affirmative defense. Any claims or disputes involving fraud should be resolved by a court of law.

² *Green Dream Grp.*, ASBCA Nos. 57413, 57414, 57565, 13-1 BCA ¶ 35,272.

board of contract appeals (BCA) should not have jurisdiction of any claims involving fraud. Instead, a contractor's right to forum selection should be restricted to the U.S. Court of Federal Claims (COFC).

On its face, the Contract Disputes Act (CDA) of 1978 prohibits BCAs from having jurisdiction over claims or disputes involving fraud.³ Such matters fall within the sole authority of the Department of Justice (DoJ).⁴ In practice, however, BCAs have adjudicated cases based on how the term "fraud" is raised. If, for example, the government raises fraud as an affirmative defense, a BCA will retain jurisdiction over the contractual issues, but will not make findings of fraud unless a contractor engaged in fraud to procure the contract.⁵

Green Dream exemplifies the need for bright-line rules that take all forms of fraud out of a BCA's jurisdiction. Despite asserting claims involving alleged fraud, *Green Dream* successfully appealed its case, receiving over \$925,000.⁶ The termination contracting officers (TCOs) had denied its claims believing that the costs were false.⁷ At the Armed

³ 41 U.S.C. § 7103(a)(5), (c)(1) (2016).

⁴ *Id.* § 7103(c); *see infra* Part II.B. for a discussion of the legislative history of the Contract Disputes Act (CDA) excluding fraud from a board's jurisdiction.

⁵ *See infra* Parts III.A, D. for further discussion on a board's jurisdiction over claims involving fraud in void *ab initio* cases compared to cases pending criminal or civil actions.

⁶ *Green Dream*, 13-1 BCA ¶ 35,272, at 173,143. In *Green Dream*, the issue of fraud was not investigated by the U.S. Army Criminal Investigation Command (CID) and the Department of Justice (DoJ) did not take criminal or civil action on this case. *See id.*, at 173,141. Similarly, based on the opinions of the U.S. Court of Federal Claims (COFC) and the Court of Appeals for the Federal Circuit, the issue of fraud was not investigated by CID in *Daewoo*. *Daewoo Eng'g & Constr. Co. v. United States*, 73 Fed. Cl. 547 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009). Yet, in *Daewoo*, the DoJ pursued a civil action in the form of filing counterclaims at the COFC. *Id.* It is clear from the COFC's opinion that the DoJ was able to prove fraud through the discovery process, and the testimony of witnesses at trial. *Id.* 569–570, 572–576, 582, 584. In the same manner, the DoJ could have arguably proven that at least one of *Green Dream*'s claims was fraudulent despite the lack of a criminal investigation. This would have affected *Green Dream*'s ability to recover on any of its claims under the same contract. 28 U.S.C. § 2514. Presumably, the DoJ did not pursue a cause of action in *Green Dream* based on the lack of an investigation, the relatively low dollar amount of *Green Dream*'s claims, and the cost of litigation. *See infra* note 123 and accompanying sources. This article attempts to remedy the issue of forum selection and DoJ's involvement by requiring all claims in which probable cause exists for fraud to be filed at the COFC for the DoJ to defend and/or file counterclaims. *See infra* Part V.

⁷ *Id.* at 173,139, 173,141. For one of the claims, despite believing the "sum requested for rental equipment is a false claim actionable under [U.S.] Law," the termination contracting officer (TCO) issued a final decision allowing \$69,452.32 of the \$224,400 total amount the appellant claimed. *Id.* at 173,138–39.

Services Board of Contract Appeals (ASBCA), the government argued that Green Dream falsified documents to support its claims and fabricated costs.⁸ The ASBCA, however, restricted it from proving that the claims were false.⁹ The ASBCA asserted it lacked jurisdiction over (1) a misrepresentation of fact or fraud by the contractor under the CDA; and (2) a government claim (that would arise from a finding of fraud) under both the CDA and the False Claims Act (FCA).¹⁰ With the government's hands tied jurisdictionally as to the issue of fraud, Green Dream realized its "green dream." Yet, in other cases, the ASBCA has asserted jurisdiction and even made its own findings of fraud.¹¹

This article addresses when fraud is really fraud at the ASBCA and ultimately argues that all claims involving fraud should be resolved in a court of law. Following Part I of the introduction, Part II provides background on the CDA and forum selection. It highlights the laws and legislative history that exclude fraud from a BCA's jurisdiction. Part III focuses on ASBCA decisions, criticizing how it justifies jurisdiction contrary to legislative intent. Part IV argues the importance of keeping fraud outside of a BCA's jurisdiction. It compares and contrasts the ASBCA's decision in *Green Dream* to the COFC's decision in *Daewoo*,¹² underscoring the disparate and unfair outcomes. Finally, Part V suggests reforms to ensure all forms of fraud are resolved in a court of law. This entails restricting the choice of forum to the COFC if there is probable cause for fraud. It suggests ways to implement this change by requiring a coordinated legal review for fraud, engaging the DoJ in significant contract or claim decisions, and enjoining contractors from seeking claims tainted by fraud.

⁸ *Id.* at 173,141.

⁹ *Id.* at 173,142.

¹⁰ *Id.* at 173,141–43.

¹¹ See *infra* Part III.A. for a discussion of void *ab initio* cases where the board made its own findings of fraud.

¹² *Daewoo Eng'g & Constr. Co. v. United States*, 73 Fed. Cl. 547 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009). In *Daewoo*, the United States Army Corps of Engineers solicited bids to construct a fifty-three-mile road around the island of Babeldaob in the Republic of Palau. *Id.* at 1334. The government awarded the contract to Daewoo, the lowest bidder. Daewoo initially proposed building the road for \$73 million. *Id.* Daewoo sought equitable adjustment of the contract price alleging defective specifications, superior knowledge, and impossibility of performance. *Id.* These allegations were related to the humid, rainy weather, and moist soil in Palau, which required increased amounts of soil compaction for Daewoo to be compliant with the contract specifications that, in turn, caused delays and Daewoo's alleged damages. *Id.* In total, Daewoo claimed \$63,978,648.95 in damages. *Id.*

II. Background

Before analyzing ASBCA decisions, this section gives a brief overview of the ASBCA's jurisdictional limits with regard to fraud. It reviews the CDA, a contractor's right to appeal a claim to the ASBCA or the COFC, and the legislation that excludes fraud from a BCA's jurisdiction. It provides context to better understand how the ASBCA is, in practice, retaining jurisdiction of fraud contrary to legislative intent.

A. The Contract Disputes Act and Forum Selection

The CDA governs disputes arising from federal government contracts.¹³ Under the CDA, all claims, except those involving fraud, must first be submitted to the contracting officer (CO) for a decision.¹⁴ A contractor then has two avenues to appeal a CO's final decision (COFD) or failure to issue a decision. The contractor can appeal either to the appropriate BCA within ninety days or to the COFC within one year.¹⁵ A contractor has the right to elect either forum, but once chosen, that decision is binding.¹⁶

In selecting a forum, contractors weigh various factors. A BCA offers a quasi-judicial forum that is generally less formal, less expensive, and more expedient than the COFC.¹⁷ Board judges tend to have more

¹³ 41 U.S.C. §§ 7101–09 (2016).

¹⁴ *Id.* § 7103(a)(1), (a)(4)(B), (a)(5). Under the Federal Acquisition Regulation (FAR), the contracting officer (CO) must prepare a written decision that includes a description of the claim or dispute, a reference to pertinent contract terms, a statement of factual areas of agreement and disagreement, the CO's decision with supporting rationale, and the contractor's appeal rights. FAR 33.211 (2016). Submission of a claim to the CO for a final decision is a jurisdictional prerequisite to appealing a claim. 41 U.S.C. § 7103(a).

¹⁵ *Id.* § 7104(a)–(b). Under the Tucker Act, however, the Court of Federal Claims (COFC) has concurrent jurisdiction with the district courts for contractual monetary claims against the United States that are less than \$10,000. 28 U.S.C. § 1346(a)(2). Although administrative remedies should normally first be exhausted, Congress intended to give contractors a “right to a day in court—a fully judicialized totally independent forum which historically has been the forum within which contract rights and duties have been adjudicated,” allowing contractors to “bypass administrative disputes forums and seek review of adverse contracting officer decisions directly in the Court of Claims.” S. Rep. No. 118, 95th Cong., 2d Sess. 29 (1978).

¹⁶ *Nat'l Neighbors, Inc. v. United States*, 839 F.2d 1539, 1542 (Fed. Cir. 1988); *Holly Corp.*, ASBCA No. 24975, 80-2 BCA ¶ 14,675.

¹⁷ *See* 41 U.S.C. § 7105(f)–(g); *compare* Rules of the Armed Services Board of Contract Appeals (July 21, 2014), <http://www.asbca.mil/Rules/forms/Final%20Rule%20>

experience in contracts given their appointment requires at least five years of experience in public contracts law and they only hear contract claims.¹⁸ In contrast, the COFC is a “legislative court” under Article I of the U.S. Constitution that hears a variety of claims, but gives contractors more due process rights.¹⁹ Its procedural rules are predominately based on the Federal Rules of Civil Procedure and it is bound by the Federal Rules of Evidence.²⁰ Contractors also consider any relevant precedent established in each forum. In the area of fraud, the jurisdictional limits of each forum affects not only precedent, but the risk of loss.

Unlike the BCAs, the COFC has jurisdiction to hear government counterclaims, which can subject the contractor to heavy penalties.²¹ By asserting jurisdiction over contractual issues yet limiting the affirmative defense of fraud, the BCAs further incentivize contractors to forum shop. As discussed later, this leads to disparate and unfair outcomes.²²

B. Exclusion of Fraud from a BCA’s Jurisdiction

Under the CDA, two provisions exclude fraud from a BCA’s jurisdiction. First, the CDA expressly provides that jurisdiction “does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.”²³ Second, the CDA does not authorize

Formatting%20pgl.pdf, (hereinafter ASBCA Rules), with Rules of the United States Court of Federal Claims (Aug. 3, 2015), http://www.usfc.uscourts.gov/sites/default/files/150803-Final-Version-of-Rules_0.pdf [hereinafter RCFC].

¹⁸ 41 U.S.C. § 7105(a)(2), (b)(2), (e); compare *Administrative Judge Biographies*, ARMED SERVICES BOARD OF CONTRACT APPEALS, <http://www.asbca.mil/Bios/biographies.html> (last visited Nov. 11, 2016), with *Judges—Biographies*, U.S.COURT OF FEDERAL CLAIMS, <http://www.usfc.uscourts.gov/judicial-officers> (last visited Nov. 11, 2016).

¹⁹ 28 U.S.C. § 165; see *supra* note 15 and accompanying sources. By executing a government contract, a contractor waives its right to a jury trial or an Article III district court. Gregory Timber Res., AGBCA No. 84-319-1, 87-3 BCA ¶ 20,086, at 101,685 (concluding that “[D]ispute resolution under a Government contract need not be vested in any court, let alone an Article III court.”). “[A]s a matter of grace,” however, Congress allowed contractors to sue the sovereign at the COFC. *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1565 (Fed. Cir. 1990).

²⁰ See RCFC, *supra* note 17, at 1, 52, 55, 71.

²¹ See *infra* Part IV.A. for a discussion of forfeitures and penalties available at the COFC via counterclaims.

²² See *infra* Part IV.B. for a comparison of an appeal filed at the COFC versus the Armed Services Board of Contract Appeals (ASBCA).

²³ 41 U.S.C. § 7103(a)(5).

an “agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.”²⁴

The legislative history of the CDA clearly shows Congress’s intent to exclude fraud from a board’s jurisdiction.²⁵ During the 1978 congressional hearings, several agencies, to include the DOJ, asserted fraud should not be part of the dispute resolution process.²⁶ In response, Congress made changes intending to exclude fraud from an agency’s jurisdiction.²⁷ The Senate report stated the CDA excludes “issues of fraud against the United States from the authority of contracting agencies to consider or resolve”²⁸ It further states, the DOJ is solely responsible for enforcing its rights related to any claim involving fraud, which would be “instituted by the United States in a court of competent jurisdiction.”²⁹

Courts have interpreted the aforementioned provisions of the CDA to apply to a wide range of claims involving fraud, and not only causes of action for fraud.³⁰ The BCAs, however, have limited the CDA’s exclusion to an “affirmative claim” of fraud, or a criminal or civil cause of action for fraud.³¹

III. Decisions Related to Fraud at the ASBCA

Despite Congress’s intent to exclude all matters of fraud under the CDA, the ASBCA has frequently asserted that the existence of fraud alone does not deprive it of jurisdiction.³² This section reviews and criticizes

²⁴ *Id.* § 7103(c)(1).

²⁵ *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 543–45 (Fed. Cir. 1988) (citing *Contract Disputes Act of 1978: J. Hearings Before the Subcomm. on Fed. Spending Practices & Open Gov’t of the Comm. on Gov’t Affairs, and the Subcomm. on Citizens & S’holders Rights & Remedies of the Comm. on the Judiciary*, 95th Cong., 210–13 (1978)).

²⁶ *Id.* at 543–44.

²⁷ *Id.* at 543–45.

²⁸ *Id.* at 544 (citing S. REP. NO. 1118, at 20 (1978), reprinted in 1978 U.S.C.C.A.N. 5254).

²⁹ *Id.*

³⁰ *E.g.*, *United States v. Unified Indus., Inc.*, 929 F. Supp. 947, 950 (E.D. Va. 1996) (concluding that Congress intended to except from the CDA not only causes of action for fraud but also “non-fraud claims,” to include breach of contract and unjust enrichment claims that factually involve allegations of fraud); *United States v. Rockwell Int’l Corp.*, 795 F. Supp. 1131, 1135 (N.D. Ga. 1992) (interpreting the CDA to deprive agencies authority over claims “involving fraud” and not just over “causes of action for fraud”).

³¹ See *infra* Part III. for an overview of ASBCA decisions related to fraud.

³² *E.g.*, *SIA Constr., Inc.*, ASBCA No. 57693, 14-1 BCA ¶ 35,762, at 174,986 (stating “the existence of fraud alone is insufficient to deprive the Board of jurisdiction”); *Public*

how the ASBCA has been adjudicating fraud.

A. When Fraud Is “Not Really” Fraud—Void *Ab Initio* Cases

The ASBCA has frequently retained jurisdiction to determine whether a contract is void *ab initio* (from its inception).³³ Under this principle, procuring a contract by fraud nullifies its very existence and thus precludes any claim arising from it.³⁴ To determine that a party engaged in fraud, the ASBCA relies not only on pleas and convictions from a court of competent jurisdiction (CCJ),³⁵ but makes its own findings of fraud.³⁶ In making its findings, the ASBCA has applied an unclear standard of proof based on un rebutted evidence, as the below four cases demonstrate.

In *C & D Construction, Inc.*, the ASBCA found that the appellant *intentionally* misrepresented its status as a small business by failing to disclose its affiliation and joint venture with other entities.³⁷ It further found that had it made this disclosure, the CO would have considered the appellant to be non-responsible for lacking business integrity.³⁸ The ASBCA made its findings based on “unrebutted documentation,” the demeanor of the company president, Ms. Carolyn Sur, and negative inferences drawn from her refusal to answer numerous questions.³⁹ Of

Warehousing Co. K.S.C., ASBCA No. 58078, 13-1 BCA ¶ 35,460, at 173,897 (asserting jurisdiction over any adjustments entitled for “performance based distribution fees” despite pending criminal and civil actions in district court); Nexus Constr. Co., Inc., ASBCA No. 51004, 98-1 BCA ¶ 29,375 (asserting jurisdiction over any entitlement under the termination for convenience clause despite allegedly submitting a fraudulent claim for costs).

³³ See *infra* notes 34, 37, 42, 45, 47 and accompanying sources.

³⁴ E.g., Supreme Foodservice GmbH, ASBCA Nos. 57884, 58666, 58958, 58959, 58982, 59038, 59164, 59165, 59391, 59392, 59393, 59418, 59419, 59420, 59481, 59615, 59618, 59619, 59636, 59653, 59675, 59676, 59681, 59682, 59683, 59811, 59830, 59863, 59867, 59872, 59879, 60017, 60024, 60250, 60309, 60365, 2016 ASBCA LEXIS 201, at *64–71 (Mar. 17, 2016); Int’l Oil Trading Co., ASBCA Nos. 57491, 57492, 57493, 13-1 BCA ¶ 35,393.

³⁵ E.g., Atlas Int’l Trading Corp., ASBCA No. 59091, 15-1 BCA ¶ 35,830; see *infra* Part III.B. for a discussion of the ASBCA’s reliance on findings of fraud from a court of competent jurisdiction.

³⁶ See *infra* notes 37, 42, 45, 47 and accompanying sources.

³⁷ *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256, at 116,683.

³⁸ *Id.*

³⁹ *Id.* The “unrebutted documentation” included the guilty plea of Mr. Derwin Au, the appellant’s brother and executive vice president of Au’s Plumbing. *Id.* Mr. Au pleaded guilty to making false statements to the Small Business Administration to obtain contracts subject to the small business set-aside for Au’s Plumbing. *Id.* at 116,679. Mr. Au’s

note, Ms. Sur was never convicted of fraud, and, had she disclosed all her affiliations in the bid, could have still qualified as a small business.⁴⁰ The ASBCA, however, found that her misrepresentation constituted a “material and substantial inducement” to enter into the contract, and that a “but-for” test need not be satisfied.⁴¹

In *Orc, Inc.*, the ASBCA found that the appellant *purposefully* made false representations of the technical qualifications of research personnel in its proposal.⁴² In particular, it found that a key employee did not have a Ph.D. degree in physics as certified by the appellant and that this misrepresentation was intended to obtain a more favorable evaluation.⁴³ The ASBCA did not describe the standard of proof that it used, but the evidence of the false Ph.D. degree was verified by the university and un rebutted.⁴⁴

In *Servicios y Obras Isetan*, the ASBCA found “enough evidence” to conclude that the appellant materially misrepresented its business relationship with another company, Heliopol, to secure its award of the contract.⁴⁵ The evidence included a private contract between the appellant and Heliopol, which Heliopol asserted it never signed or entered into.⁴⁶

More recently, in *Vertex Construction*, the ASBCA found that the appellant materially misrepresented a master electrician certification that was “proved to be fraudulent” with no “realistic intention” of employing a master electrician as required by the solicitation.⁴⁷ The ASBCA decision was based on “uncontested evidence,” to include incriminating findings and admissions from a report completed by the U.S. Army Criminal Investigation Command (CID).⁴⁸

In each of the above cases, the ASBCA cites to the definition of common law fraud or case law for the proposition that a “[g]overnment

conviction did not directly involve C & D. The board found, however, that Au’s Plumbing exercised control over and was an affiliate of C & D. *Id.* at 116,683.

⁴⁰ *Id.*

⁴¹ *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 167 (AM. LAW INST. 1981)).

⁴² *Orc, Inc.*, ASBCA No. 49693, 97-1 BCA ¶ 28,750, at 143,488.

⁴³ *Id.* at 143,491.

⁴⁴ *See id.* at 143,490.

⁴⁵ *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13-1 BCA ¶ 35,279, at 173,162.

⁴⁶ *Id.* at 173,159.

⁴⁷ *Vertex Constr. & Eng’g*, ASBCA No. 58988, 14-1 BCA ¶ 35,804, at 175,110.

⁴⁸ *Id.* at 175,107.

contract tainted by fraud or wrongdoing is void *ab initio*.⁴⁹ But it avoids making a specific finding of fraud despite the government alleging fraud as an affirmative defense.⁵⁰ Of significance, is *how* the ASBCA expands its authority to find that the appellant had the scienter to commit a material misrepresentation, albeit not calling it “fraud.”⁵¹ It does this by relying on cases that were based on either a conviction or a finding of fraud by a CCJ, namely, the COFC.⁵² It justifies this approach based on the logic that the contract would be void *ab initio* despite drawing this conclusion only after it makes its findings of fraud.

By concluding that a contract is void *ab initio* without a finding of fraud by a CCJ, the ASBCA ultimately made its own findings of fraud in the above cases, contrary to the jurisdictional limits intended under the CDA.⁵³ Of note, to support its authority to void a contract absent a criminal conviction, the ASBCA relies on two U.S. Supreme Court decisions, *United States v. Acme Process*⁵⁴ and *United States v. Mississippi Valley*.⁵⁵ These decisions, however, reversed the judgment of the COFC, holding that a contract tainted by kickbacks or an illegal

⁴⁹ *Id.* at 175,108 (quoting *Godley v. United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993); *Servicios y Obras Isetan S.L.*, 13-1 BCA ¶ 35,279, at 173,162; *Orc, Inc.*, 97-1 BCA ¶ 28,750, at 143,491; *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256, at 116,683.

⁵⁰ *C & D Constr., Inc.*, 90-3 BCA ¶ 23,256, at 116,678; *Orc, Inc.*, 97-1 BCA ¶ 28,750, at 143,487; *Servicios y Obras Isetan S.L.*, 13-1 BCA ¶ 35,279, at 173,157; *Vertex Constr. & Eng'g*, 14-1 BCA ¶ 35,804, at 175,105.

⁵¹ *C & D Constr., Inc.*, 90-3 BCA ¶ 23,256, at 116,683; *Orc, Inc.*, 97-1 BCA ¶ 28,750, at 143,488; *Vertex Constr. & Eng'g*, 14-1 BCA ¶ 35,804, at 175,110. In *Servicios y Obras Isetan S.L.*, however, the board avoids explicitly finding that the appellant had the scienter to commit a material misrepresentation by simply relying on elements of proof that render a contract voidable to conclude the contract was void *ab initio*. *Servicios y Obras Isetan S.L.*, 13-1 BCA ¶ 35,279, at 173,161–62. Yet, the government properly alleged the appellant knowingly submitted fictitious documents to procure the contract as would be required to support its fraud in the inducement defense. *See id.*

⁵² The preceding cases relied on *J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988) and/or *Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993). In *J.E.T.S.*, the Federal Circuit affirmed the judgment of the ASBCA denying appellant’s claim for equitable adjustment. *J.E.T.S.*, 838 F.2d at 1201. Its decision was based on the criminal conviction of the vice president of its corporate parent, Mr. Thomas Gibbs. Mr. Gibbs had falsely certified J.E.T.S.’s small business status under the contract at issue, as he did for four other contracts for which he was convicted. *Id.* In *Godley*, the Federal Circuit vacated the COFC’s judgment in favor of the appellant. *Godley*, 5 F.3d at 1476. It remanded the case to the COFC to make specific findings as to whether the contract was void *ab initio* due to fraud rather than simply voidable. *Id.*

⁵³ *See supra* Part II.B. for a discussion of the jurisdictional limits of the board.

⁵⁴ *United States v. Acme Process Equip. Co.*, 385 U.S. 138 (1966).

⁵⁵ *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961).

conflict of interest is voidable despite the lack of a criminal conviction.⁵⁶ Unlike the COFC, the ASBCA is not a CCJ.⁵⁷ To date, the appellate courts have not recognized the ASBCA's authority to make its own findings of fraud.⁵⁸

B. When Fraud Is Fraud—Criminal Conviction or Civil Liability

If a CCJ finds that a contractor committed fraud, the ASBCA will use these findings to deny or dismiss a contractor's claim in its entirety.⁵⁹ Although the ASBCA has often emphasized that issues other than fraud could affect the contract rights of parties,⁶⁰ its decisions consistently show that there is rarely any contractual right that could defeat a criminal conviction or civil fraud violation adjudicated by a CCJ.⁶¹ Accordingly, the ASBCA has consistently denied claims *in toto* regardless of whether the fraud was committed in the procurement,⁶² performance, and/or submission of a claim.⁶³

Thus, with a finding of fraud by a CCJ, various arguments raised by contractors have failed. This includes unjust enrichment for work

⁵⁶ *Acme Process*, 385 U.S. at 148 (reversing the COFC's judgment with directions to sustain the government's right to cancel the contract despite the appellant's acquittal under the Anti-Kickback Act based on violating the public policy against contracts tainted by kickbacks); *Mississippi Valley*, 364 U.S. at 563 (reversing the COFC's judgment for the contractor and concluding that protection of the public from corruption can be fully accorded only if contracts tainted by a conflict of interest may be disaffirmed by the government).

⁵⁷ Charter, ASBCA (May 14, 2007), 48 C.F.R. Ch. 2, Appx. A, Part 1 (2016).

⁵⁸ *See Laguna Constr. Co. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016).

⁵⁹ *See infra* notes 62–65 and accompanying sources.

⁶⁰ *See supra* note 32 and accompanying sources.

⁶¹ *See infra* notes 62–65 and accompanying sources.

⁶² *E.g.*, Atlas Int'l Trading Corp., ASBCA No. 59091, 15-1 BCA ¶ 35,830 (denying the appeal based on convictions for bribery used to secure a contract of an unsolicited proposal for a zip kit); Dongbuk R & U Eng'g Co., ASBCA No. 58300, 13-1 BCA ¶ 35,389 (denying the appeal based on a conviction in a Korean court for forging technician licenses to procure a contract for maintenance services).

⁶³ *E.g.*, Laguna Constr. Co., ASBCA No. 58324, 14-1 BCA ¶ 35,748 (denying the appeal based on convictions of senior officials for soliciting and receiving kickbacks during the performance of a cost-reimbursable contract), *aff'd*, 828 F.3d 1364 (Fed. Cir. 2016); Techno Eng'g & Constr., Ltd., ASBCA No. 47471, 94-3 BCA ¶ 27,109 (denying recovery for equitable adjustments based on a conviction for submitting false certified payroll forms); Nat'l Roofing & Painting Corp., ASBCA Nos. 36551, 37714, 90-2 BCA ¶ 22,936 (holding the contract void because the contract was tainted with fraud from its inception and during performance via bribes and false work orders).

adequately performed⁶⁴ and equitable adjustments for improper contract changes performed under protest.⁶⁵ It even includes circumstances where the government extended the performance period despite being aware of the fraud and suspending the contractor from future contracts.⁶⁶ Moreover, if the fraud occurred during the performance or submission of a claim, the degree to which it or various claims under the same contract were inflated by fraud does not matter.⁶⁷

Common to all of these decisions is the overriding public interest in preserving the integrity of the procurement process and deterring fraud.⁶⁸ As a result, the law enforces harsh consequences for even a minimal level of fraud.⁶⁹ The boards and courts have established that “any degree of fraud is material as a matter of law”⁷⁰ and that a “‘balancing test’ between the fraudulent act and the work free of fraud is contrary to precedent.”⁷¹

Under this lofty public policy objective, the framework of the CDA that preserves a contractor’s forum selection rights is off balance. For cases involving criminal convictions or civil liability, parallel actions at

⁶⁴ Schuepferling GmbH, ASBCA No. 45564, 98-1 BCA ¶ 29,659. In *Schuepferling*, the appellant was convicted in a German court for bribery. *Id.* at 146,952. Prior to the conviction, the government suspended the appellant from *future* contracts based on an investigation that corroborated fraudulent conduct. *Id.* at 146,949–50. Instead of terminating the *current* contract at issue, however, the government modified it to extend the performance period. *Id.* at 146,950. Despite adequate performance, the ASBCA held the contract was void *ab initio* because the contract was tainted by bribery in the inducement. *Id.*

⁶⁵ *J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988). In *J.E.T.S.*, the ASBCA found that the government improperly exercised its option to extend the contract and originally sustained the appeal for equitable adjustments in the contract price. *Id.* at 1197. It reversed its decision, however, after the corporate parent was convicted for falsely certifying its small business status. *Id.*; *see supra* note 52 for further details of the case.

⁶⁶ *Schuepferling*, 98-1 BCA ¶ 29,659, at 146,949–50.

⁶⁷ *E.g.*, *Laguna Constr. Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748, at 174,950 (determining that the government need not prove that the kickbacks, for which appellant’s principle officers were convicted, were paid under every task order or voucher because any degree of fraud is material as a matter of law), *aff’d*, 828 F.3d 1364 (Fed. Cir. 2016); *AAA Eng’g & Drafting Co.*, ASBCA Nos. 48729, 48575, 47940, 01-1 BCA ¶ 31,256, at 154,367 (concluding that the falsification of thirteen work orders, as determined by a district court, permeated the entirety of the claims under the contract despite constituting a fraction of the 8080 total work orders and not quantifying the extent to which the false work orders inflated the claims).

⁶⁸ *See supra* notes 62–65 and accompanying sources.

⁶⁹ *E.g.*, *Laguna*, 14-1 BCA ¶ 35,748.

⁷⁰ *Id.* at 174,950 (quoting *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1335 (Fed. Cir. 2004)).

⁷¹ *Id.* (quoting *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1278 (Fed. Cir. 1985)).

the BCA unfairly allow contractors to continue to seek monetary gain without being subject to a counterclaim. It also inefficiently intertwines and unnecessarily prolongs the legal battle. It is a waste of time and resources for the ASBCA to assert jurisdiction only to dismiss or deny claims *in toto* without the potential consequence of a counterclaim.

C. When Fraud Is on Hold—Pending DoJ Action

If there are parallel criminal or civil actions against the contractor, the ASBCA may stay or dismiss an appeal.⁷² The mere existence of a pending criminal or civil case is insufficient to stay or dismiss an appeal.⁷³ Also, it is improper to argue that an appeal is premature by continuously delaying a COFD pending the outcome of a criminal or civil action.⁷⁴ The government has the burden of showing a “clear case of hardship or inequity in being required to go forward.”⁷⁵ This requires the U.S. Attorney to establish that the prejudice to the government outweighs the prejudice to the appellant, which is generally more difficult to establish in civil than criminal parallel proceedings.⁷⁶

In parallel civil actions, the ASBCA’s differing position and the judicial inefficiency for claims involving fraud are especially pronounced. On the one hand, the ASBCA recognizes that it does not have jurisdiction over claims or disputes that the DoJ is authorized to “administer, settle, or determine,” such as those under the FCA.⁷⁷ Yet, even when the DoJ has filed a civil action for violations under the FCA, the ASBCA will not

⁷² See *infra* notes 73, 80 and accompanying sources.

⁷³ E.g., *Suh’Dutsing Techn., LLC*, ASBCA No. 58760, 15-1 BCA ¶ 36,058 (highlighting that a DoJ investigation, rather than an active litigation, overlapping only one common issue, did not justify staying or dismissing the appeal); *Public Warehousing Co. K.S.C.*, ASBCA No. 58078, 13-1 BCA ¶ 35,460 (denying motion to dismiss despite pending criminal and civil action in district court), *amended by*, 14-1 BCA ¶ 35,574; *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 (denying motion to suspend pending the outcome of a False Claims Act (FCA) civil fraud suit).

⁷⁴ *Public Warehousing*, 13-1 BCA ¶ 35,460, at 173,896.

⁷⁵ *TRW*, 99-2 BCA ¶ 30,407, at 150,332.

⁷⁶ *Public Warehousing*, 14-1 BCA ¶ 35,574, at 174,338, 174,340.

⁷⁷ E.g., *Green Dream Grp.*, ASBCA Nos. 57413, 57414, 57565, 13-1 BCA ¶ 35,272, at 173,143 (stating that the CDA does not extend to a “claim or dispute for penalties, or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine”) (citing 41 U.S.C. § 7103(a)(5)); *Envtl. Sys., Inc.*, ASBCA No. 53283, 03-1 BCA ¶ 32,167 (concluding that it does not have jurisdiction over an affirmative defense that closely tracks the language of the FCA despite the government not demanding any penalties set forth in the Act).

dismiss the case based on jurisdictional grounds.⁷⁸ This conflicting position is noteworthy because, had the contractor filed its appeal at the COFC, the government could potentially avoid litigating two civil actions by simply filing a counterclaim. At the BCAs, however, this strategic and cost-saving avenue is unavailable.⁷⁹

A comparison of two ASBCA decisions pertaining to Kellogg Brown & Root Services, Inc. (KBR) accentuates the complexity of fraud cases and the judicial inefficiency of the ASBCA. In two separate appeals filed two years apart, the ASBCA took opposing positions on whether to grant a stay/dismissal despite involving the same appellant, the same contract, and the same two of three ASBCA judges who decided each case.⁸⁰

In the first case, the ASBCA denied the government's motion to stay the appeal pending the outcome of a civil fraud action under the FCA.⁸¹ The government argued that the parallel proceedings would be a waste of time and resources because the cases involved the same issues, facts, and witnesses.⁸² The ASBCA denied the motion, reasoning that the FCA suit was "much wider in scope."⁸³ It found that requesting a stay for an indefinite period until the resolution of the civil suit was unreasonable.⁸⁴ It took judicial notice that the district court took 35.6 months to resolve a case, and that this delay would likely harm the appellant.⁸⁵

⁷⁸ *E.g.*, Palm Springs Gen. Trading, ASBCA No. 56290, 10-1 B.C.A. ¶ 34,406, at 169, 866-67 (disregarding the government's assertion that because the DoJ exercised its authority in filing a civil fraud action in district court, the board lacks jurisdiction under the CDA).

⁷⁹ *See* Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 543-45 (Fed. Cir. 1988); Supreme Foodservice GmbH, ASBCA Nos. 57884, 58666, 58958, 58959, 58982, 59038, 59164, 59165, 59391, 59392, 59393, 59418, 59419, 59420, 59481, 59615, 59618, 59619, 59636, 59653, 59675, 59676, 59681, 59682, 59683, 59811, 59830, 59863, 59867, 59872, 59879, 60017, 60024, 60250, 60309, 60365, 2016 ASBCA LEXIS 201, at *64-68 (Mar. 17, 2016).

⁸⁰ *Compare* Kellogg Brown & Root Servs., Inc., ASBCA Nos. 56358, 57151, 11-1 BCA ¶ 34,614, *with* Kellogg Brown & Root Servs., Inc., ASBCA Nos. 57530, 58161, 13-1 BCA ¶ 35,243.

⁸¹ *Kellogg Brown*, 11-1 BCA ¶ 34,614, at 170,602.

⁸² *Id.*

⁸³ *Id.* at 170,603.

⁸⁴ *Id.* at 170,604-05.

⁸⁵ *Id.* It took the ASBCA forty-three months to decide this appeal, which remains pending a decision on remand that was reversed by the Federal Circuit. *See* Kellogg Brown & Root Servs., Inc., ASBCA Nos. 56358, 57151, 57327, 58559, 14-1 BCA ¶ 35,639, *aff'd in part, rev'd in part, vacated in part, and remanded* by McHugh v. Kellogg Brown & Root Servs., Inc., No. 2015-1053, 2015 WL 5332383 (Fed. Cir. Sept. 15, 2015).

In contrast, the ASBCA dismissed KBR's second appeal.⁸⁶ It reasoned that because the issues before the board were narrower than those before the district court, "any Board findings on less than a complete record may have the effect of compromising the government's efforts in the FCA action."⁸⁷ The ASBCA conceded that "where [the] evidentiary line would be drawn at a trial at the Board is not altogether clear, and this would likely result in unnecessary confusion."⁸⁸ It determined that the appellant would not be harmed because the agency would likely be prohibited from paying the claim pending the resolution of the FCA action.⁸⁹ It concluded that the "most expeditious and inexpensive road to final resolution of this dispute goes through the federal district court."⁹⁰

The above contrasting conclusions and justifications reveal the complexity of fraud issues that even the ASBCA, arguably, acknowledges it is not suited to resolve. It further calls for bright-line rules that completely exclude fraud from the jurisdiction of BCAs.

D. When There Is No Department of Justice Action

If the DoJ has not or is not pursuing a case against an appellant, the ASBCA will retain jurisdiction to determine the validity of a claim.⁹¹ If the alleged fraud occurs during the performance or presentation of a claim, however, the ASBCA will assert that, under the CDA, it lacks jurisdiction

⁸⁶ Kellogg Brown & Root Servs., Inc., ASBCA Nos. 57530, 58161, 13-1 BCA ¶ 35,243. The dismissal of the appeal was without prejudice subject to reinstatement within three years from the date of its decision. *Id.* at 173,021. The appeal was eventually reinstated due to the ongoing FCA civil action. Kellogg Brown & Root Servs., Inc., ASBCA Nos. 57530, 58161, 16-1 BCA ¶ 36,449, at 177,637.

⁸⁷ *Kellogg Brown*, 13-1 BCA ¶ 35,243, at 173,021.

⁸⁸ *Id.* at 173,020–21.

⁸⁹ *Id.* at 173,021.

⁹⁰ *Id.*

⁹¹ ERKA Constr. Co., ASBCA No. 57618, 12-2 BCA ¶ 35,129 (denying motion for summary judgment, stating that an affirmative defense of fraud for claims related to allegedly stolen fuel does not require the board to dismiss rather than decide the appeal); Env'tl. Safety Consultants, Inc., ASBCA No. 53485, 02-2 BCA ¶ 31,904 (denying motion to strike allegations of fraud as relevant to appellant's claim for quantum recovery, yet asserting it does not have jurisdiction over criminal or civil fraud); Nexus Constr. Co., Inc., ASBCA No. 51004, 98-1 BCA ¶ 29,375 (denying motion to stay and asserting jurisdiction over alleged fraudulent termination claim); Toombs & Co., Inc., ASBCA Nos. 35085, 35086, 89-3 BCA ¶ 21,993, at 110,598 (denying motion to dismiss based on alleged fraud, stating that the board need not determine whether incorrect statements made in claims were "made knowingly with intent to deceive").

to make findings of fraud to support an affirmative defense.⁹² It will not consider any documents, witnesses, or evidence for the purpose of determining fraud.⁹³ This is in stark contrast to the void *ab initio* cases previously discussed.⁹⁴

Under such circumstances, a contractor has every incentive to file its appeal at the ASBCA instead of the COFC. This could avoid issues of fraud from affecting the outcome of its appeal as it did in *Green Dream*. In this case, the appellant submitted three claims (two for rental equipment and one for security services) related to road construction projects in Iraq.⁹⁵ For one claim, the TCO had records and reports from interviews of trainers and students who confirmed that certain claimed rental equipment was never on site or used.⁹⁶ The existing equipment was only available for two days instead of the four-month period *Green Dream* claimed.⁹⁷ And, no construction or repairs were ever completed.⁹⁸ *Green Dream* also never obtained the CO's approval for the equipment, as required under the contract.⁹⁹ Similarly, for the second claim, based on the documents reviewed by the TCO, no equipment was ever rented, used, or approved for use, and the claimed costs were unsubstantiated.¹⁰⁰

The third claim for security services also appeared fraudulent. *Green Dream* submitted a subcontract signed by "Sheik Jamal" to support its claim that it paid for six months of security services.¹⁰¹ But Sheik Jamal's identity could not be verified.¹⁰² Instead, "Sheikh J'afar Hussein Danam Al-Masudi" asserted he provided the security services but was never paid.¹⁰³ The TCOs denied all three claims as false and actionable under

⁹² Range Tech. Corp., ASBCA No. 51943, 03-2 BCA ¶ 32,290 (concluding lack of jurisdiction to decide an affirmative defense based on violating the FCA); Env'tl. Sys., Inc., ASBCA No. 53283, 03-1 BCA ¶ 32,167 (concluding lack of jurisdiction over an affirmative defense that closely tracks the language of the FCA); Anlagen-und Sanierungstechnik GmbH, ASBCA No. 37878, 91-3 BCA ¶ 24,128 (denying certain claims for failure of proof rather than for fraud).

⁹³ E.g., *Green Dream Grp.*, ASBCA Nos. 57413, 57414, 57565, 13-1 BCA ¶ 35,272.

⁹⁴ See *supra* Part III.A. for a discussion on void *ab initio* cases.

⁹⁵ *Green Dream*, 13-1 BCA ¶ 35,272, at 173,137-41.

⁹⁶ *Id.* at 173,138-39.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 173,140.

¹⁰¹ *Id.* at 173,141.

¹⁰² *Id.* at 173,140-41.

¹⁰³ *Id.* at 173,140.

law.¹⁰⁴

Despite indicia of fraud, the ASBCA asserted it lacked jurisdiction to determine if the appellant submitted false documents to support its claims.¹⁰⁵ Ultimately, the ASBCA sustained the two claims for rental equipment totaling over \$925,000.¹⁰⁶ It denied the third claim for \$12,374, by simply concluding that Green Dream did not pay for the security services.¹⁰⁷

IV. Keeping BCAs off the Scales of Justice

A. Rebalancing the Scales of Justice with Counterclaims

The outcome in *Green Dream* and similar cases might have been starkly different had the contractor been required to file its appeal at the COFC. Unlike the BCAs, the COFC has jurisdiction to determine government counterclaims of fraud.¹⁰⁸ When the government raises fraud as an affirmative defense, the COFC is not precluded under the CDA in making its own findings of fraud.¹⁰⁹ In addition, the COFC can assess forfeitures, penalties, or damages under a variety of civil fraud statutes that is unavailable to a BCA.¹¹⁰ Typically, at the COFC, the government

¹⁰⁴ *Id.* at 173,139–41. To be precise, the TCOs originally responded to Green Dream’s settlement proposals in connection with the termination for convenience of two task orders under a multiple award task order contract. *Id.* at 173,137–39. Green Dream’s first claim stemmed from the TCO’s final decision that allowed \$69,452.32 of the \$224,400 total amount the appellant claimed. *Id.* at 173,138–39. With regard to Green Dream’s second and third claims, the TCO eventually denied these claims in their entirety. *Id.* at 173,140. Prior to the TCO’s final decision, however, a different TCO had prepared a draft response indicating partial payment would be authorized. *Id.* When fraud was suspected, the TCOs should have referred the case to law enforcement. Arguably, based on the suspected fraud, the TCOs did not have authority to determine which part of Green Dream’s claims were allowable. See 41 U.S.C. § 7103(a)(4)(B), (a)(5), (c)(1) (2016).

¹⁰⁵ *Id.* at 173,142.

¹⁰⁶ *Id.* at 173,143.

¹⁰⁷ *Id.* at 173,142.

¹⁰⁸ *E.g.*, *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 542–45 (Fed. Cir. 1988).

¹⁰⁹ *E.g.*, *Daewoo Eng’g & Constr. Co. v. United States*, 557 F.3d 1332 (Fed. Cir. 2009); Ralph C. Nash & John Cibinic, *Fraudulent Claims: A Phalanx of Government Remedies*, 14-4 NASH & CIBINIC REP. ¶ 21 (2000).

¹¹⁰ Nash & Cibinic, *supra* note 109, ¶ 21. Granted, a denial of a claim at a BCA based on an affirmative defense of fraud, in effect, constitutes forfeiture. *E.g.*, *Laguna Constr. Co., ASBCA No. 58324, 14-1 BCA ¶ 35,748, at 174,948, aff’d*, 828 F.3d 1364 (Fed. Cir. 2016). The government, however, cannot seek statutory or regulatory remedies as an affirmative

pursues claims under the Forfeiture of Fraudulent Claims Act (FFCA), the CDA, and the FCA.¹¹¹ A brief description of each statute follows.

The FFCA allows the government to seek forfeiture of *all* claims under a fraudulent contract.¹¹² The fraud must be tied to the submission of a claim, to include submitting false proof to support a claim or falsely establishing a claim despite not fulfilling a contract specification; simply establishing that fraud occurred in the performance of a contract is insufficient.¹¹³ The government must prove, by clear and convincing evidence, that the contractor knowingly submitted a false claim with the intent to defraud it; reliance on the claim or injury from it is not required.¹¹⁴ If any part of a claim under a contract is fraudulent then *all* claims under the contract are forfeited.¹¹⁵

Under the anti-fraud provision of the CDA, a contractor may be imposed a penalty equal to the unsupported part of a fraudulent claim plus costs in reviewing the claim.¹¹⁶ The government must prove fraud, or a

fraudulent claim without filing a separate cause of action in a court of competent jurisdiction. 41 U.S.C. § 7103(a)(5) (2016).

¹¹¹ Matthew Solomson, *When the Government's Best Defense is a Good Offense: Litigating Fraud and Other Counterclaims Before the U.S. Court of Federal Claims*, 11-12 BRIEFING PAPERS 9 (2011).

¹¹² 28 U.S.C. § 2514.

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof. In such cases the *United States Court of Federal Claims shall specifically find such fraud or attempt* and render judgment of forfeiture.

Id. (emphasis added).

¹¹³ Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1366 n.18 (Fed. Cir. 2013) (rejecting a broad application of the statute without ties to the “proof, statement, establishment, or allowance” of a claim).

¹¹⁴ Long Island Sav. Bank, FSB v. United States, 467 F.3d 917 (Fed. Cir. 2007), *withdrawn and vacated*, 503 F.3d 1234 (Fed. Cir. 2007) (changing the basis for reversing the COFC’s decision from violating the Forfeiture of Fraudulent Claims Act (FFCA) to holding that the contract was void *ab initio*).

¹¹⁵ Daewoo Eng’g & Constr. Co. v. United States, 557 F.3d 1332, 1341 (Fed. Cir. 2009); UMC Elecs. Co. v. United States, 43 Fed. Cl. 776, 790–91 (1999), *aff’d*, 249 F.3d 1337 (Fed. Cir. 2001).

¹¹⁶ 41 U.S.C. § 7103(c)(2).

If a contractor is unable to support any part of the contractor’s claim and it is determined that the inability is attributable to a

misrepresentation of a substantive fact with intent to deceive or mislead, by a preponderance of the evidence.¹¹⁷

The FCA imposes treble damages and a civil penalty¹¹⁸ on “any person” who, among other offenses, “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”¹¹⁹ Liability, including damages, requires proof by a preponderance of the evidence.¹²⁰

None of the above remedies are available to BCAs even if a BCA denies a contractor’s appeal based on a criminal conviction for fraud.¹²¹ Instead, an agency would have to pursue a separate cause of action, coordinating it with the DoJ.¹²² The DoJ, however, often declines to pursue “small-dollar” cases because of litigation costs.¹²³

misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government’s costs attributable to reviewing the unsupported part of the claim.

Id. Congress intended this remedy to supplement the FCA and FFCA so that “the larger the fraud attempted, the greater is the liability to the Government.” S. REPT. NO. 95-1118, at 7–8 (1978).

¹¹⁷ 41 U.S.C. § 7101(9); 48 C.F.R. § 33.201 (2016); *Daewoo*, 557 F.3d at 1335.

¹¹⁸ 31 U.S.C. § 3729(a)(1). The civil penalty is \$5,000 to \$10,000 per violation, but when adjusted for inflation is \$5,500 to \$11,000 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890. 28 C.F.R. § 85.3(a)(9).

¹¹⁹ 31 U.S.C. § 3729(a)(1)(A)–(B). “Knowingly” is defined as “actual knowledge,” “deliberate ignorance,” or “reckless disregard” of the truth or falsity; specific intent to defraud is not required. *Id.* § 3729(b)(1).

¹²⁰ *E.g.*, *Veridyne Corp. v. United States*, 758 F.3d 1371, 1378 (Fed. Cir. 2014).

¹²¹ *See supra* notes 62–65 and accompanying sources.

¹²² *See supra* notes 73, 78–80 and accompanying sources.

¹²³ For these cases, Congress created the Program Fraud Civil Remedies Act (PFCRA). *See* H.R. REP. NO. 99-1012, at 258 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 3903. This act is similar to the FCA, but involves an administrative process to recover civil remedies for claims or group of claims that do not exceed \$150,000. 31 U.S.C. § 3803(c)(1). Few agencies, however, have used the PFCRA primarily because of its administrative hurdles, low claim threshold, and the fact that recovered funds go to the U.S. Treasury instead of to the agency. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-275R, PROGRAM FRAUD CIVIL REMEDIES ACT: OBSERVATIONS ON IMPLEMENTATION 2 (2012) [hereinafter GAO-12-275R]; *see also* Trevor B. A. Nelson, *A Restitution Alternative for Department of Defense Agencies to Combat Program Fraud Civil Remedies Act-Level Cases under FAR 9.4*, 44 PUB. CONT. L.J. 469 (2015). From fiscal years 2006–2010, only 141 cases were referred to the DoJ for approval. GAO-12-275R, at 2.

B. Uneven Scales—*Green Dream Versus Daewoo*

In contrast to *Green Dream*, in *Daewoo*,¹²⁴ the appellant filed its appeal at the COFC instead of at the BCA. Daewoo's claim for equitable adjustment sought \$63,978,648.95 for alleged weather and soil conditions that affected its ability to construct a fifty-three-mile road.¹²⁵ The government asserted that the contractor's claim was fraudulent and filed counterclaims seeking forfeitures and penalties under the FFCA, the CDA's anti-fraud provision, and the FCA.¹²⁶

Under the FFCA, the COFC found, by clear and convincing evidence, that Daewoo knowingly presented a false claim with the intent of being paid for it.¹²⁷ As mandated by statute, the COFC specifically found that Daewoo committed fraud.¹²⁸ It determined that \$50,629,855.88 of its \$63,978,648.95 certified claim was falsely presented as a "negotiating ploy."¹²⁹ It therefore forfeited Daewoo's *entire* claim.¹³⁰ Under this statute, Daewoo could not obtain \$13,168,793.07 of its claim that appeared to be supported by the record and not found to be fraudulent.¹³¹

Furthermore, the COFC adjudged a penalty of \$50,629,855.88 under the CDA finding, by a preponderance of the evidence, that at least that portion was unsupported and in bad faith.¹³² It also entered costs for the government for reviewing the claim.¹³³

Lastly, under the FCA, the COFC assessed a \$10,000 penalty, as authorized per claim.¹³⁴ It found, by a preponderance of the evidence, that Daewoo presented at least one false claim for payment and knowingly used false records or statements to support it.¹³⁵ It did not impose damages for which it could not determine the government had suffered.¹³⁶

¹²⁴ *Daewoo Eng'g & Constr. Co. v. United States*, 73 Fed. Cl. 547 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009).

¹²⁵ *Id.* See *supra* note 12 and accompanying notes.

¹²⁶ *Id.*

¹²⁷ *Id.* at 584.

¹²⁸ *Id.* (citing 28 U.S.C. § 2514).

¹²⁹ *Id.* at 570, 584–85, 595–97.

¹³⁰ *Id.* at 584.

¹³¹ *Id.* at 584, 596.

¹³² *Id.* at 584–85, 597.

¹³³ *Id.* at 585.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

In total, the United States was awarded \$50,639,855.88 plus interest on its counterclaims and costs for reviewing the claim.¹³⁷ The government won its case primarily by cross-examining the plaintiff's witnesses; it did not have to call new witnesses or hire new experts.¹³⁸

The outcome in *Daewoo* highlights how forum selection can have disparate and unfair results. Had Daewoo elected to file its appeal at the ASBCA, the government would not have been able to cross-examine witnesses or attack evidence in the same manner.¹³⁹ The ASBCA would assert, as it did in *Green Dream*, that it lacks jurisdiction to determine if a document is fraudulent or to make other findings of fraud.¹⁴⁰ Without a finding by a CCJ that Daewoo engaged in fraud, the ASBCA would have likely sustained the \$13 million portion of its claim that was supported by the record and denied the rest as simply unsupported.

Moreover, the ASBCA would not have jurisdiction to consider counterclaims.¹⁴¹ Granted, the agency could pursue a separate cause of action in coordination with the DoJ. But even then, this would unnecessarily bifurcate the proceedings, wasting time and resources.

Conversely, if *Green Dream* had been required to file its appeal at the COFC, the result could have been more favorable to the government. With the ability to make findings of fraud with established standards of proof, and the ability to file counterclaims, the government's approach and strategy would have been significantly different. Arguably, out of the three claims that *Green Dream* filed, there was clear and convincing evidence that at least one of them was fraudulent. The ASBCA denied the claim for security services given that the subcontractor stated he had never

¹³⁷ *Id.* at 597.

¹³⁸ *Id.* at 582.

¹³⁹ This is due to the jurisdictional limits that prohibit factual determinations of the underlying fraud and counterclaims at the ASBCA. *See supra* Parts II–III for a discussion of the jurisdictional limits of the ASBCA. As demonstrated in *Daewoo*, however, at the COFC, the government was able to establish not only that it was not liable for Daewoo's claim but that Daewoo's claims were fraudulent and thereby pursue its counterclaims for forfeiture and penalties. *Daewoo*, 73 Fed. Cl. 547 at 582. Of significance, the COFC emphasized that the government accomplished this primarily through cross-examination of Daewoo's witnesses. *Id.* This effectively absolved the DoJ from having to pursue a separate civil cause of action. *See id.*

¹⁴⁰ *Green Dream Grp.*, ASBCA Nos. 57413, 57414, 57565, 13-1 BCA ¶ 35,272, at 173,143.

¹⁴¹ 41 U.S.C. § 7103(a)(5) (2016). *See supra* Part II.B. for a discussion of the exclusion of fraud from a board's jurisdiction.

been paid.¹⁴² Yet, to support its claim, Green Dream submitted a contract signed by a different and unverifiable person as proof of its incurred costs.¹⁴³ If the COFC determined the claim to be fraudulent, then under the FFCA, *all* the claims under the contract would be forfeited, precluding over \$925,000 that the ASBCA had sustained.¹⁴⁴ It would likely have assessed a penalty of \$12,374 plus costs and interest for the unsupported amount of the security claim under the CDA, and a penalty of \$10,000 under the FCA.¹⁴⁵

The stark difference in outcomes is especially highlighted in the above types of cases where the alleged fraud was committed during the performance and/or submission of a claim, and there is no prior determination of fraud by a CCJ. It is inapposite for the ASBCA to assert jurisdiction over cases involving fraud, yet bar jurisdiction to make findings of fraud that support an affirmative defense. Its contrary approach in void *ab initio* cases on the rationale that those contracts never legally existed further highlights the lopsided outcomes that shifts on technicalities. Moreover, the dichotomy in remedies that are unavailable at the ASBCA supports the very reason Congress never intended it to address fraud.

C. Countervailing Issues—Tipping Point for Contractors?

From a contractor's perspective, it is apparent that it does not want matters of fraud to be addressed at all in contract disputes.¹⁴⁶ Critics argue that counterclaims at the COFC fall outside the scope of the CDA and infringe on a contractor's due process rights, to include the right to a jury trial.¹⁴⁷ Suing the government versus being sued by the government involves separate legal issues and procedural rights that should not be comingled.¹⁴⁸ In this vein, restricting forum selection to the COFC could be the tipping point that discourages future business with the government.

¹⁴² *Green Dream*, 13-1 BCA ¶ 35,272, at 173,142.

¹⁴³ *Id.* at 173,140, 173,142.

¹⁴⁴ *Id.* at 173,143. The board sustained \$266,587 and \$658,627 for the two separate rental equipment claims with interest pursuant to the CDA from August 13, 2009, and July 9, 2009, for the respective claims. *Id.*

¹⁴⁵ *See id.* at 173,142.

¹⁴⁶ *E.g.*, Int'l Oil Trading Co., ASBCA Nos. 57491, 57492, 57493, 13-1 BCA ¶ 35,393.

¹⁴⁷ Elizabeth W. Fleming & Rebecca Clawson, *Fraud Counterclaims in the Court of Federal Claims: Not So Fast, My Friend*, 46-WTR PROCUREMENT LAW. 3, 3 (2011).

¹⁴⁸ *Id.* at 4-5.

Yet, it may also encourage good faith and fair dealings that reduce civil litigation involving fraud.

As addressed throughout this article, the countervailing issues of upholding the public policy against fraud and preventing disparate or unfair outcomes call for reforms. Perhaps amending the CDA to expand a BCA's jurisdiction could be a compromise. Admittedly, BCA judges have similar judicial authority to issue subpoenas, require discovery, and conduct trial hearings, as do COFC judges.¹⁴⁹ Further, BCA judges generally have more expertise in contract law.¹⁵⁰ In addition, BCAs have already adjudicated claims involving fraud, so expanding its authority appears logical.¹⁵¹

Nonetheless, the right balance overall requires restricting a BCA's authority. First, the very nature of fraud allegations complicates issues. Due to its quasi-judicial function, BCAs have already been criticized for not being as expedient as Congress envisioned.¹⁵² Broadening the BCA's jurisdiction even more would only further protract its proceedings. This goes against the very purpose of the BCA, which is to provide an informal, inexpensive, and expedient forum.¹⁵³ As Congress intended, BCAs should hear routine contract appeals while more complex issues like fraud should go before the COFC.¹⁵⁴

Second, BCAs are not structured to provide due process rights as it is at the COFC. If BCAs were authorized to hear government counterclaims that could impose harsher penalties, more formal procedures of a court would be warranted. And, simply allowing BCAs to make findings of fraud without the ability to hear counterclaims unnecessarily hampers the DoJ's coordination of remedies to counter fraud.

Lastly, limiting forum selection to only fraud-related matters balances the interests of contractors and the government more fairly. The heightened requirements and risk of liability will promote the public policy against fraud. It would deter contractors from appealing claims

¹⁴⁹ See ASBCA Rules, *supra* note 17 (focusing on ASBCA Rules 8, 10 and 22) and accompanying sources.

¹⁵⁰ See *supra* note 18 and accompanying sources.

¹⁵¹ See *supra* Part III. for an overview of board decisions involving fraud.

¹⁵² Ralph C. Nash, *Boards of Contract Appeals: Are They Meeting the Need?*, 26-11 NASH & CIBINIC REP. ¶ 63 (2012).

¹⁵³ 41 U.S.C. § 7105(g) (2016).

¹⁵⁴ See S. REP. NO. 95-1118, at 29 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.

tainted with fraud, and may even encourage alternate dispute resolutions. At the same time, contractors continue to have the flexibility to resolve disputes at a BCA for all other matters.

V. Reforms¹⁵⁵

Contractors who engage in fraud should be held accountable in a consistent, fair, and efficient manner. To accomplish this, all claims and disputes involving fraud should be resolved in a court of law. This section suggests several reforms to help implement this process.

A. Certified Coordinated Legal Review

The CO plays a critical role in identifying and reporting fraud. The Federal Acquisition Regulation (FAR) should, at minimum, require the CO to certify in the COFD that she or he has conducted a review for fraud in consultation with the local procurement fraud advisor (PFA).¹⁵⁶ Without this requirement, the CO can easily overlook issues of fraud, fail to refer the matter for investigation, or even decide to make partial payments on a claim as occurred in *Green Dream*.¹⁵⁷ If the PFA believes there is a reasonable basis to suspect fraud, the CO should notify the contractor that his right to forum selection may be restricted. The CO should also be required to deny the claim. The denial would be based on the CO's inability to approve the claim and not based on any conclusion that the contractor actually engaged in fraud.¹⁵⁸

¹⁵⁵ The ideas in this section were drawn, in part, from discussions with Raymond Saunders, Chief Trial Attorney, USALSA, KFLD; Frank March, Trial Attorney, USALSA, KFLD; and Trevor B. A. Nelson, Attorney, Advisor, USALSA, Procurement Fraud Division (PFD). The intent of this section is to provide a broad overview of suggested reforms. A detailed analysis of specific changes to statutes and regulations are beyond the scope of this article.

¹⁵⁶ Interview, Trevor B. A. Nelson, Attorney Advisor, USALSA, PFD, in Fort Belvoir, Va. (Jan. 24, 2017). Currently, certification with regard to a claim is only required by a contractor if a claim is over \$100,000. 41 U.S.C. § 7103(b)(1); FAR 32.207 (2016).

¹⁵⁷ See *supra* notes 6, 104 and accompanying sources.

¹⁵⁸ See generally 41 U.S.C. § 7103(a)(5), (c)(1), (e); *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1280–81 (Fed. Cir. 1985); *SIA Constr., Inc.*, ASBCA No. 57693, 14-1 BCA ¶ 35,762, at 174,986–87. This avoids potential litigation as to whether the CO or agency is inappropriately settling, compromising, paying, or otherwise adjusting any claim involving fraud.

To restrict forum selection, however, the PFA must confer with the DoJ for its endorsement.¹⁵⁹ The DoJ must affirmatively determine that there is probable cause that a contractor is unable to support any part of a claim and that its inability is attributable to a misrepresentation of fact or to fraud by the contractor.¹⁶⁰ The FAR should require that the DoJ's affirmative determination that there is a probable cause basis for fraud presumptively restricts forum selection to the COFC.

B. Engaging the DoJ

Absent exigent circumstances, when the DoJ determines that there is probable cause to suspect fraud, a CO should be required to coordinate significant decisions affecting a contract or claim with the PFA, who in turn, should be required to consult with the DoJ. A CO's decision to deny a claim, terminate a contract, modify contract terms, or suspend payments prior to a judicial determination of fraud is bound to have lengthy legal ramifications. Care must be taken as the CO's decision not only impacts contractual disputes but various criminal or civil forfeitures, penalties, and damages that may be available.¹⁶¹ As such, when fraud is suspected the CO, local PFA, and the DoJ should be required to work as a tiered team, with the CO and PFA on one level, the PFA and CID on another level, and the PFA and DoJ on the next level. This tiered approach can foster better communication and oversight over the CO's decisions.

If there is direct evidence of fraud, this tiered approach can assist the CO in determining whether termination of the contract is appropriate. It would also prevent the CO from rashly terminating a contract for the convenience of the government rather than terminating for default (T4D).¹⁶² If there is insufficient evidence, but the investigation is ongoing, the CO should consider a non-fraud related basis to T4D (i.e., false progress payment requests).¹⁶³ This would not disrupt any subsequent action pursued by the DoJ because case law supports that evidence of fraud

¹⁵⁹ Interview, Raymond Saunders, Chief Trial Attorney, USALSA, KFLD, in Fort Belvoir, Va. (Dec. 7, 2016).

¹⁶⁰ See 41 U.S.C. §7103(c)(2).

¹⁶¹ See *supra* Part IV.A. for a discussion of potential remedies.

¹⁶² Unlike a termination for default, a termination for convenience entitles a contractor to reasonable profits and reasonable costs of termination. FAR 49.202, 49.206, 49.402-2.

¹⁶³ The submission of false progress payments may constitute a material breach of contract justifying a default determination, which is distinct from finding that as a matter of law fraud was committed. *Envtl. Sys., Inc.*, ASBCA No. 53283, 03-1 BCA ¶ 32,167.

discovered after termination of a contract can also support a default termination, even if the fraud was then unknown.¹⁶⁴

The CO should include an assessment of the claim in the COFD, which would be coordinated through the PFA with the DoJ. The CDA and FAR should clarify that assessing or denying a claim does not constitute settling or adjusting any claim involving fraud in violation of the CDA.¹⁶⁵ The assessment would simply serve to calculate any unsupported amount of a contractor's claim or the amount of any government claim, which could be useful in any future litigation or settlement.

C. Restrict Forum Selection to the COFC

The CDA should be revised to clearly restrict forum selection to the COFC based on probable cause for fraud. The CDA should explicitly state that a BCA does not have jurisdiction over fraud in any form to include affirmative defenses. Ideally, through the coordinated efforts of the CO, CID, PFA, and DoJ described above, probable cause for fraud can be established before a contractor appeals a claim. If not, there should still be a mechanism to restrict forum selection. If, for example, the government believes there is probable cause as discovery unfolds after an appeal has already been filed at a BCA, the DoJ should be able to file a petition at the COFC to transfer the appeal. Any proceedings before the BCA should be stayed pending the COFC's decision on forum restriction.

A contractor can challenge the forum restriction through a preliminary hearing at the COFC. The parties should be bound by the COFC's decision. If the COFC determines that forum restriction was improper, the contractor can elect to have the COFC transfer its appeal to the ASBCA.

To account for restricting the right to forum selection that contractor's would normally have, certain remedies should be available if the contractor substantially prevails on its appeal. Similar to payments authorized under the Equal Access Justice Act,¹⁶⁶ a small business contractor can be entitled to certain costs of litigation.¹⁶⁷ The contractor

¹⁶⁴ Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985).

¹⁶⁵ See generally 41 U.S.C. § 7103(a)(5), (c)(1).

¹⁶⁶ 28 U.S.C. § 2412(d)(1).

¹⁶⁷ Interview, Frank March, Trial Attorney, USALSA, KFLD, in Fort Belvoir, Va. (Jan. 20, 2017).

would have to substantially prevail on a claim in which probable cause existed for fraud, and the government's position must not have been substantially justified. The recoverable costs, for example, could include attorney's fees specifically for time defending unsuccessful counterclaims for fraud, which the government would not have been able to pursue at the ASBCA.

These changes would help clarify and finally terminate the on-going litigation as to whether a BCA has jurisdiction over claims involving fraud. More importantly, it would greatly reduce the likelihood of disparate outcomes in cases like *Green Dream* and *Daewoo*. It would more consistently uphold the public policy against fraud in a manner that would not depend on forum selection, the value of a claim, or the cost of litigation. After all, with forum restriction at the COFC, even relatively small claims could lead to large penalties and treble damages. It would also avoid having three separate proceedings at the criminal, civil, and BCA level at substantially the same time. The COFC could resolve civil and contractual disputes for claims and counterclaims in one forum.

D. Enjoin Contractors from Seeking Claims Tainted by Fraud

To the extent a CCJ finds that a contractor engaged in fraud, it should also identify the affected contracts and enjoin contractors from seeking fraudulent claims. In concert with the DoJ, the court should identify the contracts tainted by fraud with as much specificity as possible. As part of the punishment or remedy, the court should have the authority to enjoin contractors from seeking any claims associated with a tainted contract. This would require withdrawal of any outstanding claims on appeal. The CDA should be revised to facilitate this process, creating a rebuttable presumption to challenge the injunction.

The above action by a criminal or civil district court would better enforce the doctrines of *res judicata*¹⁶⁸ and *collateral estoppel*.¹⁶⁹ It is also

¹⁶⁸ A second suit will be barred under the doctrine of *res judicata* or "claim preclusion" if (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first. *AAA Eng'g & Drafting, Inc.*, ASBCA Nos. 48729, 48575, 47940, 01-1 BCA ¶ 31,256, at 154,366 (citing, *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000)).

¹⁶⁹ The doctrine of *collateral estoppel* or "issue preclusion" requires proof that (1) the identical issue was previously adjudicated; (2) the issue was "actually litigated" in the prior

in keeping with established case law that supports denying *all* claims tied to a contract tainted by fraud even when only one claim is proven fraudulent.¹⁷⁰ With the above remedies in mind, contractors like Laguna Construction Company, Inc., would be enjoined from seeking any claim tainted by fraud.

In *Laguna*, the principle officers of the company were found guilty of soliciting and accepting kickbacks during its performance of a contract in which Laguna received sixteen cost-reimbursable task orders.¹⁷¹ Laguna had claimed approximately three million dollars for tax expenses under various task orders of the contract some of which included inflated costs to compensate for the kickbacks.¹⁷² The ASBCA denied its claim despite the government not proving that the kickbacks were paid under *all* the claimed task orders.¹⁷³ Merely showing that the principle officers committed the criminal acts under the same contract within the scope of their employment was sufficient.¹⁷⁴ The recommended reforms would allow a criminal or civil district court to make findings and enjoin contractors like Laguna from seeking a claim through the contract dispute resolution process. This would save considerable time and resources in cases like *Laguna* and even more so in less complex cases that rely on a CCJ's findings to determine that a contract is void *ab initio*.

VI. Conclusion

Fraud is fraud, and referring to it by any other name or context does not change its insidiousness. All forms of fraud, whether committed during the procurement, performance, or submission of a claim, or whether raised as an affirmative defense does not transform its existence. By asserting jurisdiction over contractual issues while barring factual determinations of the underlying fraud in cases like *Green Dream*, the ASBCA is tipping the “scales of justice.” Even when it finds fraud in void

case; (3) the determination of that issue was necessary to the earlier judgment; and (4) the party being precluded was fully represented in the prior action. *Id.* at 154,367 (citing *Thomas v. GSA*, 794 F.2d 661, 664 (Fed. Cir. 1986)).

¹⁷⁰ *E.g.*, *Veridyne Corp. v. United States*, 758 F.3d 1371, 1378 (Fed. Cir. 2014). *See supra* Part III.B. for a discussion of how a finding of fraud by a court of competent jurisdiction impacts contractual disputes.

¹⁷¹ *Laguna Constr. Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748, at 174,948, *aff'd*, 828 F.3d 1364 (Fed. Cir. 2016).

¹⁷² *Id.*

¹⁷³ *Id.* at 174,950.

¹⁷⁴ *Id.*

ab initio cases or acknowledges a finding of fraud from a CCJ, the ASBCA lacks jurisdiction over government counterclaims to provide adequate civil relief. The DoJ, on the other hand, is passively allowing the “scales” to be tipped by not pursuing “small-dollar” cases because of litigation costs. This has led to disparate and unfair outcomes.

As Congress intended, a BCA should not have jurisdiction over any claims involving fraud. All contract disputes or claims involving fraud should be restricted to the COFC. Limiting the right to forum selection to only fraud-related matters would balance the interests of contractors and the government more fairly. It would lead to more consistent and fair outcomes, preserve judicial economy overall, and uphold the high public policy objective against fraud. It would more effectively stop “green dreams” tainted with fraud from coming true.

CONDUCTING UNCONVENTIONAL WARFARE IN COMPLIANCE WITH THE LAW OF ARMED CONFLICT

MAJOR JIM SLEESMAN*

[Unconventional Warfare] operations involve many unique and often unsettled legal matters, including authority to conduct operations, funding, legal status of personnel, and a host of other issues. The legal parameters of [Unconventional Warfare] are rarely clear and depend on the specifics of a particular mission, campaign, or conflict. [Special Forces] should know the potential that individual and small-unit [Unconventional Warfare] operations have to affect matters on the international level.¹

I. Introduction

The Islamic State of Iraq and Syria (ISIS) is one of the cruelest and most feared terrorist organizations in the world.² Throughout 2014 and early 2015, its forces raced across Syria and Iraq proclaiming itself as the vanguard of a new Islamic caliphate, claiming Raqqa as its capital; exploiting the security vacuum, it later seized Mosul in northern Iraq.³ Its

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¹ U.S. DEP'T OF ARMY, TRAINING CIRCULAR 18-01, SPECIAL FORCES UNCONVENTIONAL WARFARE para. 3-84 (Jan. 2011) [hereinafter T.C. 18-01].

² Rukmini Callimachi, *The Horror Before the Beheadings*, N.Y. TIMES, Oct. 25, 2014, at A1.

³ Ian Fisher, *In Rise of ISIS, No Single Missed Key but Many Strands of Blame*, N.Y. TIMES, Nov. 19, 2015, at A1; see also Nancy A. Youssef, *The Time Has Arrived, U.S. Warns ISIS Capital: Get out Now*, Daily Beast (May 20, 2016 4:12 PM), <http://www.thedailybeast.com/articles/2016/05/20/u-s-warns-isis-capital-get-out-now.html>.

treatment of enemies was brutal. Men were decapitated and burned alive.⁴ Women were sold into sexual slavery.⁵ In October of 2014, its forces were massed outside the Syrian town of Kobane.⁶ The situation in Kobane seemed hopeless, but its citizens were prepared to resist.⁷ The border behind Kobane was closed, with Turkish troops seemingly content to watch Kobane fall.⁸ However, members of a Kurdish militia group, the People's Protection Committees (known as the YPG) were committed to defending the city.⁹ Over the next few weeks the YPG, with extensive U.S. air support,¹⁰ fought a block-by-block battle for Kobane.¹¹ While experts had expected the city to fall,¹² by January of 2015 the YPG had prevailed with U.S. support.¹³ After the battle of Kobane, the YPG continued to succeed, pushing ISIS out of significant portions of northern Syria.¹⁴

While the story of the YPG's defense of Kobane is inspiring, its legality, and the legality of U.S. support, is a more complex question. Despite its successes against ISIS, the Democratic Union Party (PYD), which controls the YPG, is not the recognized government of Syria,¹⁵ and the United States' actions in Syria are not taken with the consent of the Syrian government.¹⁶

⁴ Callimachi, *supra* note 2, at A1; Rod Nordland & Ranya Kadri, *Jordanian Pilot's Death, Shown in ISIS Video, Spurs Jordan to Execute Prisoners*, N.Y. TIMES, Feb. 3, 2015, at A1.

⁵ Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES, Aug. 13, 2015, at A1.

⁶ Dexter Filkins, *When Bombs Aren't Enough*, NEW YORKER (Oct. 9, 2014), <http://www.newyorker.com/news/daily-comment/turkey-kurds-battle-isis-kobani>.

⁷ *Id.*

⁸ *Id.*

⁹ Mark Landler et al., *Turkish Inaction on ISIS Advance Dismays the U.S.*, N.Y. TIMES (Oct. 7, 2014), <http://nyti.ms/1EogjL7>.

¹⁰ Eric Schmitt & Karim Faheem et al., *U.S. Steps Up Strikes on Embattled Syrian Town, Aided by Data From Kurds*, N.Y. TIMES, Oct. 15, 2014, at A13.

¹¹ Anne Barnard, *Reinforcements Enter Besieged Syrian Town via Turkey, Raising Hopes*, N.Y. TIMES (Oct. 29, 2014), <http://nyti.ms/1tPKqrS>.

¹² Filkins, *supra* note 6.

¹³ Anne Barnard & Karam Shoumali, *Kurd Militia Says ISIS Is Expelled From Kobani*, N.Y. TIMES, Jan. 26, 2015, at A8.

¹⁴ John Davison, *U.S.-Backed Syrian Fighters Say Advance Against Islamic State in Raqqa Province*, N.Y. TIMES, 4 Jan., 2016, <http://nyti.ms/22HamFp>.

¹⁵ HUMAN RIGHTS WATCH, UNDER KURDISH RULE: ABUSES IN PYD-RUN ENCLAVES OF SYRIA 52 (2014) (noting that the Democratic Union Party (PYD) is a non-state entity in de facto control of portions of northern Syria).

¹⁶ Stephen Preston, DoD General Counsel, Speech at the Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015).

United States support to the YPG is only one part of the United States' activities in Syria. Overall, the United States has two goals: The first is ISIS' defeat.¹⁷ Second, the United States believes that there must be a "political transition" from the Assad regime.¹⁸ To achieve both goals, the United States appears to have embarked upon two related campaigns: First, the United States has trained, equipped, and supported the YPG in an effort to defeat the Islamic State on the ground in Syria.¹⁹ Second, according to publicly available reports, the United States has participated in the training and arming of anti-Assad rebel groups,²⁰ likely in an effort to prevent the Assad regime from controlling all of Syria, and to coerce the Assad regime into negotiations.²¹ According to media reports it is the Central Intelligence Agency, not the Department of Defense that is involved in this second, anti-Assad campaign.²² Notably, both campaigns are occurring inside Syria without the support of the Syrian government.²³

Support to resistance movements like the YPG and the anti-Assad rebels is called "unconventional warfare".²⁴ Unconventional warfare has a long history dating back to the resistance movements supported by the United States' Office of Strategic Services (OSS) and the British government's Special Operations Executive (SOE) during World War II.²⁵

¹⁷ Barack Obama, President of the United States, Statement by the President on ISIL (Sept. 10, 2014).

¹⁸ John Kerry, United States Secretary of State, Remarks at the Press Availability at the International Syria Support Group in Munich, Germany (Feb. 12, 2016).

¹⁹ Davison, *supra* note 14; Barbara Starr, *Special Ops Forces in Syria Doing More Than Raids, Ash Carter Says*, CNN (Jan. 20, 2016), <http://www.cnn.com/2016/01/20/politics/ashton-carter-syria-special-operations-forces/>; *U.S. Ground Troops Set for Syria Deployment*, DEUTSCHE WELLE (Oct. 30, 2015), <http://dw.com/p/1GxU8>; Rukmini Callimachi, *Inside Syria: Kurds Roll Back ISIS, but Alliances Are Strained*, N.Y. TIMES, Aug. 10, 2015, at A1.

²⁰ Michael R. Gordon, *Kerry Says U.S. Backs Mideast Efforts to Arm Syrian Rebels*, N.Y. TIMES, Mar. 5, 2013, at A7; Anne Barnard, *Knowing the Risks, Some Syrian Rebels Seek a Lift From Turks' Incursion*, N.Y. TIMES, Aug. 29, 2016, at A4; Mark Landler & Mark Mazzetti, *U.S. Presses for Truce in Syria, With Its Larger Policy on Pause*, N.Y. TIMES, Sept. 4, 2016, at A1.

²¹ See Anne Barnard & Karam Shoumali, *U.S. Weaponry Is Turning Syria Into Proxy War With Russia*, N.Y. TIMES, Oct. 13, 2015, at A1.

²² *Id.*

²³ Kia Makarechi, *Are U.S. Strikes on Syria Legal Under International Law?*, VANITY FAIR (Sept. 23, 2014), <http://www.vanityfair.com/news/politics/2014/09/us-strikes-syria-international-law>; *Syria: US Begins Air Strikes on Islamic State Targets*, BBC NEWS (Sept. 23, 2014), <http://www.bbc.com/news/world-middle-east-29321136>.

²⁴ JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS, at GL-12 (16 July 2014).

²⁵ M.R.D. FOOT, *SOE IN FRANCE* (rev. ed. 2004). In fact, the People's Protection Committees (known as the YPG) and the Democratic Union Party (PYD) originated as

Despite this long history, unconventional warfare campaigns require careful legal analysis because resistance movements are not recognized by the state in which they operate and generally violate the domestic law of the host nation.

While the legality of U.S. airstrikes has been discussed,²⁶ the two unconventional warfare campaigns have not. This underscores the lack of systematic, scholarly legal evaluation of unconventional warfare. Legal analysis is especially urgent given the recent battlefield successes of the YPG, which already controls significant Syrian territory and is poised to make significant battlefield gains in Raqqa province.²⁷

This article will demonstrate that while unconventional warfare remains viable under modern international law, the law creates both legal risks and opportunities, both of which must be understood in order to wage an effective campaign. The article will highlight those risks and opportunities as they apply to the unconventional warfare campaigns the United States is currently conducting in Syria.

The article begins, in sections II and III, by describing the Syrian conflict and outlining the basics of unconventional warfare. The article then turns to the two main bodies of international law governing unconventional warfare: the rules governing the use of force in international relations, known as *jus ad bellum*,²⁸ and the rules governing the parties' conduct within armed conflict, known as *jus in bello*.²⁹

Jus ad bellum rules regulate an unconventional warfare campaign's initiation, governing whether it may take place and, if it does, whether it creates a particular kind of armed conflict.³⁰ In section IV, this article will analyze both campaigns' compliance with *jus ad bellum* rules and will conclude that both campaigns are currently supported by international law

clandestine resistance movements similar to those supported by the United States' Office of Strategic Services (OSS) and the British government's Special Operations Executive (SOE). See INTERNATIONAL CRISIS GROUP, FLIGHT OF ICARUS? THE PYD'S PRECARIOUS RISE IN SYRIA 12 (2014).

²⁶ Preston, *supra* note 16.

²⁷ Davison, *supra* note 14; Eric Schmitt, *U.S.-Backed Militia Opens Drive on ISIS Capital in Syria*, N.Y. TIMES, Nov. 7, 2016, at A8.

²⁸ INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 8 (2015).

²⁹ *Id.* at 8.

³⁰ *Id.*

and that neither has created an international armed conflict between the United States and the Assad regime.

In section V, the article will turn to *jus in bello* rules, which challenge the viability of unconventional warfare more generally, testing whether support may be provided to non-state partner forces under modern international law.³¹ Unconventional warfare campaigns will again pass the test, though the article will identify risks, recommend necessary safeguards, and discuss available remedies should violations occur.

This article aims to comprehensively review the legality of unconventional warfare campaigns under modern international law. While helpful new literature exists,³² much of it is not comprehensive, and the comprehensive sources that do exist are aging.³³ With this in mind, the article's analysis of unconventional warfare will incorporate the newly released Department of Defense (DoD) Law of War Manual.³⁴

II. Unconventional Warfare: The Basics

Before discussing the law of unconventional warfare, this article must first define it. The DoD defines unconventional warfare as “activities that are conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied

³¹ *See id.*

³² Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT'L SEC. J. 349 (2014); Kevin Jon Heller, *Disguising a Military Object as a Civilian Object: Prohibited Perfidy or Permissible Ruse of War?*, 91 INT'L L. STUD. 517 (2015); Gregory Raymond Bart, *Special Operations Forces and Responsibility for Surrogates' War Crimes*, 5 HARV. NAT'L SEC. J. 513 (2014); Todd C. Huntley & Andrew D. Levitz, *Controlling the Use of Power in the Shadows: Challenges in the Application of Jus in Bello to Clandestine and Unconventional Warfare Activities*, 5 HARV. NAT'L SEC. J. 461 (2014).

³³ Major R.L. Braun, *Guerrilla Warfare Under International Law*, 1952 JAG J. 3; Joseph B. Kelly, *Assassination in War Time*, 30 MIL. L. REV. 101 (1965); Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 1975 MIL. L. REV. 487, 502 (1975); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989; Arthur John Armstrong, *Mercenaries and Freedom Fighters: The Legal Regime of the Combatant Under Protocol Additional To The Geneva Convention Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts (Protocol I)*, 30 JAG J. 125 (1978).

³⁴ U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL (June 2015, updated May 2016) [hereinafter DOD LAW OF WAR MANUAL].

area.”³⁵ The following section will begin by focusing on the groups involved in unconventional warfare, and will then discuss the phases of an unconventional warfare campaign.

A. The Groups Involved

Unconventional warfare is conducted by a resistance movement and, when the United States is involved, United States Special Operations Forces (SOF), who generally serve as advisors. The resistance movement consists of three components: The underground, the auxiliary, and the guerrilla force.³⁶

The underground is a clandestine, cellular organization that is the first part of the resistance movement to form.³⁷ The underground usually includes the resistance movement’s overall leadership and a shadow government.³⁸ The underground will also include extensive networks for intelligence collection, counterintelligence, propaganda, weapons manufacture, and sabotage.³⁹ Because the underground protects itself by operating in cells separated by intermediaries and by operating out of uniform, it can carry out activities in enemy-controlled cities or territories.⁴⁰

The auxiliary is not a true group—it consists of any individual who clandestinely supports the underground or the guerrilla force.⁴¹ Members of the auxiliary are generally isolated from the broader resistance movement by intermediaries, and auxiliary members may know very little about the overall structure of the organization.⁴² However, auxiliary members carry out many important tasks, such as recruiting new members, managing safe houses, acquiring and distributing supplies, collecting intelligence, moving personnel, and communicating.⁴³ Finally, the resistance movement includes the guerrilla force, which consists of armed

³⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS, at GL-12 (16 July 2014).

³⁶ T.C. 18-01, *supra* note 1, para. 2-32.

³⁷ *Id.* para. 2-32 to 2-33.

³⁸ *Id.* para. 2-42, 2-44.

³⁹ *Id.* para. 2-33.

⁴⁰ *Id.* para. 2-33, 2-34.

⁴¹ *Id.* para. 2-36.

⁴² *Id.* para. 2-36, 2-37.

⁴³ *Id.* para. 2-36.

members who overtly engage the enemy in combat.⁴⁴ Guerrillas avoid decisive engagements and attack only where they have relative superiority, allowing them to maintain an advantage over better trained and equipped government forces.⁴⁵

B. The Phases of Unconventional Warfare

The United States conducts unconventional warfare in seven phases: preparation, initial contact, infiltration, organization, buildup, employment, and transition.⁴⁶ The first six phases reflect escalating SOF involvement in the resistance movement.⁴⁷ These phases begin with initial planning, expand to clandestine efforts to contact and strengthen the resistance, and culminate with full-scale operations.⁴⁸ During these phases, U.S. SOF advisors will perform a broad spectrum of activities with the resistance movement, in many cases exercising a great deal of control over their operations.⁴⁹ During each phase U.S. advisors will assess, vet, and organize the resistance movement.

How the resistance movement is employed will vary widely depending upon the goals of the resistance movement and the campaign plan created with U.S. SOF advisors.⁵⁰ The resistance movement may seize territory, clear the way for invading conventional forces, or even begin a military campaign to overthrow the government.⁵¹ However, it is important to remember that not all resistance movements seek to overthrow a government. They may simply be trying to coerce, disrupt, or destroy a non-state occupying power.⁵²

The final phase is transition, which occurs after the resistance movement achieves its objectives. During transition, the resistance movement begins to demobilize or shift its focus to supporting the new

⁴⁴ *Id.* para. 2-38.

⁴⁵ *Id.* para. 2-38.

⁴⁶ *Id.* para. 1-44; *see also* Huntley & Levitz, *supra* note 32, at 469-76 (providing an overview of U.S. unconventional warfare doctrine).

⁴⁷ T.C. 18-01, *supra* note 1, para. 3-6–3-38.

⁴⁸ *Id.*

⁴⁹ *Id.* para. 3-15, 3-18–3-21, 3-29–3-31, 3-35–3-36.

⁵⁰ *Id.* para. 3-30 to 3-38.

⁵¹ *Id.* para. 3-30.

⁵² JOINT PUB. 3-05, SPECIAL OPERATIONS, *supra* note 24, at GL-12.

government.⁵³ The original SOF teams may remain in place or may be replaced by conventional forces or civil affairs elements.⁵⁴

Because many phases of unconventional warfare are clandestinely conducted in enemy-controlled territory, they will violate (or appear to violate) some body of law. This could be the law of the host nation government or the rules enforced by a non-state occupying power. An unconventional warfare campaign's legal advisor must be able to navigate this complex legal environment to successfully apply binding legal rules.

III. Background of the Syrian Conflict

To determine whether the United States' two unconventional warfare campaigns are legal, it is important to understand the history of the conflict. The Syrian conflict began in March of 2011 when the Syrian government opened fire on protesters demonstrating against the arrest of teenagers.⁵⁵ Widespread riots followed. By 2012, the situation escalated into civil war.⁵⁶ Rebels formed paramilitary brigades, and the death toll rose to approximately 90,000 by June 2013.⁵⁷ In the chaos, militant Islamist groups such as the Nusra Front and the Islamic State (ISIS), formerly known as al-Qaeda in Iraq (AQI), found room to survive and expand.⁵⁸ The Islamic State became the most prominent and successful, expanding throughout northern and eastern Syria and into Iraq, overrunning Ramadi, Tikrit, and Mosul.⁵⁹ As more territory fell to ISIS, the United States, along with a coalition of other nations, began to intervene in both Syria and Iraq in an effort to stop the brutality and protect

⁵³ T.C. 18-01, *supra* note 1, para. 3-39–3-40.

⁵⁴ *Id.* para. 3-41.

⁵⁵ Lucy Rodgers et al., *Syria: The Story of the Conflict*, B.B.C. NEWS (Oct. 9 2015), <http://www.bbc.com/news/world-middle-east-26116868>; *Middle East Unrest: Three Killed at Protest in Syria*, B.B.C. NEWS (Mar. 18 2011), <http://www.bbc.com/news/world-middle-east-12791738>.

⁵⁶ Rodgers et al., *supra* note 55; *Syrian President Bashar al-Assad: Facing Down Rebellion*, B.B.C. NEWS (Oct. 21 2015), <http://www.bbc.com/news/10338256>.

⁵⁷ Rodgers et al., *supra* note 55.

⁵⁸ Ian Fisher, *In Rise of ISIS, No Single Missed Key but Many Strands of Blame*, N.Y. TIMES, Nov. 19, 2015, at A1.

⁵⁹ Sergio Peçanha & Derek Watkins, *ISIS' Territory Shrank in Syria and Iraq This Year*, N.Y. TIMES (Dec. 22, 2015), <http://nyti.ms/1TbIxp7>.

the nascent Iraqi government.⁶⁰ While the Iraq conflict is noteworthy in its own right,⁶¹ the focus of this article is the U.S. intervention in Syria.⁶²

While U.S. intervention in Syria has been dynamic and complex, the United States appears to be conducting two unconventional warfare campaigns in Syria. First, the United States has provided support to armed groups fighting ISIS in Syria.⁶³ Originally, this included an effort to train and equip non-Kurdish rebels to fight ISIS, but that effort largely ended, shifting instead to a mission to train “spotters.”⁶⁴ This first campaign now appears to exclusively consist of support to the Kurdish PYD and its military wing, the YPG, alongside limited allied groups.⁶⁵ Support appears to consist of United States SOF advisors⁶⁶ and extensive coalition air support.⁶⁷

The United States is also reportedly conducting a second unconventional warfare campaign against the Syrian government, in

⁶⁰ Fisher, *supra* note 58, at A1.

⁶¹ Tim Arango & Falih Hassan, *Mosul Is Breached by Iraqi Forces, Heralding a New, Complex Phase*, N.Y. TIMES, Nov. 2, 2016, at A8.

⁶² In addition to its activities in Syria, the United States has conducted anti-ISIS operations in Iraq with the consent of the Iraqi government. Preston, *supra* note 16. Because most U.S. assistance to Iraq could not properly be considered unconventional warfare, and because it is undertaken with Iraq’s consent, this paper will not cover it in any depth, focusing instead on U.S. activities in Syria.

⁶³ Peter Baker et al., *Obama Sends Special Operations Forces to Help Fight ISIS in Syria*, N.Y. TIMES, Oct. 30, 2015, at A1; Liz Sly, *A Mini World War Rages in the Fields Of Aleppo*, WASH. POST (Feb. 14, 2016), <http://wpo.st/CvGD1>; Peter Baker & Eric Schmitt, *Discordant Verdicts on U.S. Forces in Syria: Too Much, or Too Little*, N.Y. TIMES, Oct. 31, 2015, at A6.

⁶⁴ Michael D. Shear et al., *Obama Administration Ends Effort to Train Syrians to Combat ISIS*, N.Y. TIMES, Oct. 10, 2015, at A1; Mark Hensch, *Rebooted Pentagon Program Trained Fewer Than 100 Syrians*, HILL: BRIEFING ROOM (June 27, 2016), <http://thehill.com/blogs/blog-briefing-room/news/285106-pentagon-has-trained-fewer-than-100-syrians> (citing Missy Ryan, *Revamped U.S. Training Program, With New Goals, Has Trained Fewer Than 100 Syrians So Far*, WASH. POST (June 27, 2016), <http://wpo.st/0mSw1>).

⁶⁵ Ben Hubbard, *New U.S.-Backed Alliance to Counter ISIS in Syria Falters*, N.Y. TIMES, Nov. 2, 2015, at A1; HUMAN RIGHTS WATCH, *supra* note 15, at 1–5; Tim Arango, *Kurds Fear the U.S. Will Again Betray Them, in Syria*, N.Y. TIMES, Sept. 1, 2016, at A4.

⁶⁶ Peter Baker et al., *supra* note 63, at A1; Michael R. Gordon & Eric Schmitt, *Obama’s Stark Options on ISIS: Arm Syrian Kurds or Let Trump Decide*, N.Y. TIMES, Jan. 17, 2017, <https://nyti.ms/2jAt6rp>.

⁶⁷ Steven Erlanger & Stephen Castle, *British Jets Hit ISIS After Parliament Authorizes Airstrikes*, N.Y. TIMES, Dec. 2, 2015, at A16; Tim Lister & Clarissa Ward, *Meet the Men Fighting ISIS with Hunting Rifles and Homemade Mortars*, CNN.COM (Oct. 28, 2015), <http://www.cnn.com/2015/10/27/middleeast/inside-syria-front-line-against-isis/>.

addition to its unconventional warfare campaign against ISIS.⁶⁸ Unlike the rebels fighting ISIS, these rebels fight the Syrian government itself.⁶⁹ The United States' support reportedly includes anti-tank missiles⁷⁰ and small arms.⁷¹ The support—especially the anti-tank missiles—appears to have been crucial for rebel advances against the Syrian government.⁷²

While the United States has not explained all of its activities in Syria, U.S. officials have made comments about the overall legal framework for its operations. The United States considers itself to be in a non-international armed conflict⁷³ (NIAC) with ISIS,⁷⁴ but despite its aid to anti-Syrian-regime rebel forces, there is no evidence that the United States considers itself to be in an international armed conflict⁷⁵ (IAC) with the Syrian government.⁷⁶

IV. *Jus ad Bellum* and Unconventional Warfare

International law regulates when states may interfere in another state's territory.⁷⁷ This body of law is called *jus ad bellum*.⁷⁸ Not only do *jus ad bellum* rules regulate when states may conduct activities, they also define

⁶⁸ Gordon, *supra* note 20, at A7.

⁶⁹ Barnard & Shoumali, *supra* note 21, at A1; Barnard, *supra* note 20, at A4;

⁷⁰ *Id.*

⁷¹ Mark Mazzetti et al., *U.S. Is Said to Plan to Send Weapons to Syrian Rebels*, N.Y. TIMES, June 13, 2013, at A1.

⁷² Barnard & Shoumali, *supra* note 21, at A1.

⁷³ “Non-international armed conflicts are those armed conflicts that are not between States.” U.S. DEP’T OF DEF., DOD LAW OF WAR MANUAL para. 17.1 (June 2015, updated May 2016) [hereinafter DOD LAW OF WAR MANUAL].

⁷⁴ See Preston, *supra* note 16 (noting that the conflict with ISIS is being carried out pursuant (in part) to the 2001 Authorization for the Use of Military Force, and that the United States believes IS to be an associated force with Al-Qaeda). See also Hamdan v. Rumsfeld, 548 U.S. 557, 630–31 (2006) (holding that the conflict with Al-Qaeda authorized by the 2001 Authorization for the Use of Military Force is a NIAC governed by Common Article 3).

⁷⁵ An international armed conflict is a conflict between states. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 26–28 (2nd ed. 2010).

⁷⁶ See Brian J. Egan, State Department Legal Adviser, Speech at the Annual Meeting of the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016).

⁷⁷ U.N. Charter art. 2(4); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 83–88 (4th ed. 2005).

⁷⁸ YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 3–4 (2d ed. 2010).

when certain conflicts begin to exist as a matter of law.⁷⁹ This affects unconventional warfare in two ways. First, states must comply with the rules before embarking on a particular unconventional warfare campaign. Second, once a campaign is underway states seek to avoid unintentionally creating a new type of conflict that may include new and undesired parties.

To understand these concepts, the next section will begin with a general discussion of the *jus ad bellum* rules governing unconventional warfare activities. The section will show that unconventional warfare activities may be carried out in the absence of armed conflict, in non-international armed conflict, and in international armed conflict, and that a carefully-designed campaign may be conducted without necessarily triggering a particular type of conflict. The section will then analyze both of the U.S. campaigns in Syria to discuss whether each complies with *jus ad bellum* rules, and whether they appropriately manage the risk of triggering an unwanted type of conflict.

A. Proper Justification

To determine whether an unconventional warfare campaign is lawful under *jus ad bellum* rules, it is essential to know whether it will amount to a “use of force” and, if so, whether force will be directed against a state or against a non-state armed group.

1. *Justification for Activities That Do Not Amount to a “Use of Force”*

Certain unconventional warfare activities may be conducted without triggering an armed conflict. For example, a state may assist “insurgent forces in hopes of toppling an unfriendly government” without providing “support that would trigger an armed conflict as a matter of law.”⁸⁰ Commentators have suggested calling such activities “unconventional statecraft” to emphasize that they are traditional unconventional warfare activities that take place outside armed conflict.⁸¹ When seeking to conduct “unconventional statecraft” and avoid armed conflict, policymakers must consider two legal principles: the principle of non-

⁷⁹ *See id.* at 26–29.

⁸⁰ Schmitt & Wall, *supra* note 32, at 352.

⁸¹ *Id.*

intervention and the prohibition on the “threat or use of force” in international relations.⁸²

The principle of non-intervention “involves the right of every sovereign State to conduct its affairs without outside interference.”⁸³ In particular, intervention is prohibited when it uses coercive methods with regard to “matters in which each State is permitted, by the principle of State sovereignty, to decide freely.”⁸⁴ Commentators differ on whether the principle of non-intervention is distinct from Article 2(4) of the U.N. Charter, which prohibits the threat or use of force.⁸⁵ While language in the judgments of the International Court of Justice suggests that the principle may have some independent significance,⁸⁶ in practice the principle merges with Article 2(4)’s prohibition on the “threat or use of force.”⁸⁷ In fact, some manuals discuss the principle of non-intervention as an “integral aspect” of Article 2(4).⁸⁸ To the extent that the principle of non-intervention is distinct from Article 2(4), available remedies are likely political rather than legal.

This leaves a single rule for unconventional warfare planners seeking to operate below the armed conflict threshold: their activities must not amount to the threat or use of force.⁸⁹ But applying this standard can be difficult. Begin with Article 15 of the U.N. Charter, which recognizes that

⁸² *Id.* at 353–58.

⁸³ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 202 (June 27).

⁸⁴ *Id.* ¶ 205; Schmitt & Wall, *supra* note 32, at 354 (“The key to the prohibition is the requirement of coercion[.]”).

⁸⁵ Schmitt & Wall, *supra* note 32, at 355; U.N. Charter art. 2(4).

⁸⁶ Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 247.

⁸⁷ Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 188; YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 81, 87 (3d ed. 2002) (“In the *Nicaragua* proceedings, both parties were in agreement that ‘the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.’”); Schmitt & Wall, *supra* note 32, at 355. Context matters when discussing the *Nicaragua* case, because in *Nicaragua* the Court was jurisdictionally prohibited from deciding the case under the U.N. Charter or other multilateral treaties. Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 43–46. The Court’s logic is focused on its ability to decide the case based on customary international law.

⁸⁸ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 1–2 (2015).

⁸⁹ Both the U.N. Charter and customary international law prohibit the “threat or use of force” in international relations. U.N. Charter art. 2(4); DINSTEIN, *supra* note 93, at 85–95.

a state may respond to an “armed attack.”⁹⁰ In *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice (ICJ) discussed the type of activity that would constitute an “armed attack” in international law.⁹¹ While the Court’s decision is not universally seen as binding,⁹² in a widely referenced and persuasive portion of its opinion,⁹³ the Court held that an armed attack would consist of “the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”⁹⁴ The Court also held that an armed attack includes “assistance to rebels in the form of the provision of weapons or logistical or other support.”⁹⁵

The United States, referencing the same U.N. Resolution as did the Nicaragua Court, has recognized that states have a duty to “refrain from supporting non-State armed groups in hostilities against other States,” and “take all reasonable steps to ensure that their territory is not used by non-State armed groups for purposes of armed activities—including planning, threatening, perpetrating, or providing material support for armed attacks—against other States and their interests.”⁹⁶

This leaves unconventional warfare planners with some general guidelines. Intelligence collection activities that do not result in

⁹⁰ U.N. Charter art. 51.

⁹¹ *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. Rep. 14, ¶ 195.

⁹² State Department, *Text of U.S. Statement on Withdrawal from Case Before World Court*, N.Y. TIMES (Jan. 19, 1985), <http://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html>.

⁹³ U.S. DEP’T OF DEF., *DoD LAW OF WAR MANUAL*, para. 1.11.5.2 (June 2015) [hereinafter *DoD LAW OF WAR MANUAL*]; YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE 201–04* (4th ed. 2005).

⁹⁴ *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. Rep. 14, ¶ 195.

⁹⁵ *Id.* Support to non-State armed groups implicates the doctrine of state responsibility, discussed below. See *infra* note 130 and accompanying text.

⁹⁶ *DoD LAW OF WAR MANUAL*, *supra* note 34, para. 17.18.1 (citing *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, annex to U.N. GENERAL ASSEMBLY RESOLUTION 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (1970)). The *Nicaragua* court referenced the same resolution in its discussion. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. Rep. 14, ¶ 191 (citing *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, annex to U.N. GENERAL ASSEMBLY RESOLUTION 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (1970)).

destruction of property will not amount to an armed attack,⁹⁷ nor will humanitarian assistance, leadership training, or other “nonlethal” aid.⁹⁸ Also, the ICJ has indicated that “mere supply of funds” is not a threat or use of force.⁹⁹ However, certain activities are generally considered an “armed attack.”¹⁰⁰ In particular, political assassination would be considered an armed attack,¹⁰¹ as would providing targeting intelligence to an armed group, providing lethal training, and providing direct logistical support to military activities.¹⁰²

If the unconventional warfare campaign does not amount to an armed attack, planners will have a final question: is there a gap between activities that amount to the threat or use of force but do not rise to the level of an armed attack? In its famous *Nicaragua* opinion, the ICJ indicated that there was a gap between a “use of force” that would violate Article 2(4) of the U.N. Charter, and an “armed attack” that would allow a state to respond in self-defense.¹⁰³ Such a gap would be extremely important for an unconventional warfare campaign, because there would be a higher threshold of possible activity before a state need fear an armed response. When responding to a mere use of force, the *Nicaragua* Court noted, states would be limited merely to “countermeasures” that could not be taken collectively.¹⁰⁴

However, the United States has consistently rejected the notion that there is a gap between the use of force and an armed attack that would justify self-defense.¹⁰⁵ For planners of unconventional warfare campaigns, this means that any activities amounting to a use of force or amounting to

⁹⁷ See Simon Chesterman, *The Spy Who Came in From the Cold War*, 27 MICH. J. INT’L L. 1071, 1073, 1077–93 (2006) (describing the limit as espionage that causes property damage or involves territorial incursion with aircraft). *But see* Craig Forcese, *Spies Without Borders: International Law and Intelligence Collection*, 5 J. NAT’L SECURITY L. & POL’Y 179, 198–205 (2011) (noting that commentators are divided on the legality of extraterritorial spying).

⁹⁸ Schmitt & Wall, *supra* note 32, at 361–63.

⁹⁹ Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 228.

¹⁰⁰ U.N. Charter art. 51.

¹⁰¹ W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 69–71 (1992).

¹⁰² Schmitt & Wall, *supra* note 32, at 362–63.

¹⁰³ Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶¶ 230, 247–49.

¹⁰⁴ REISMAN & BAKER, *supra* note 101, at 97–98.

¹⁰⁵ *Text of U.S. Statement on Withdrawal from Case Before World Court*, *supra* note 92; DOD LAW OF WAR MANUAL, *supra* note 34, para. 1.11.5.2.

an armed attack must be justified in self-defense or as part of a Chapter VII enforcement action.¹⁰⁶

2. *Unconventional Warfare as a Non-International Armed Conflict*

Even unconventional warfare campaigns that involve the use of force will not always trigger an international armed conflict. This is true because unconventional warfare need not be carried out against a state actor.¹⁰⁷ A terrorist or other non-state armed group may control large portions of a state's territory.¹⁰⁸ In such a situation, force may be used against the non-state group, even without host nation consent, if the group threatens another state and the host nation is unable or unwilling to prevent the use of its territory by the group.¹⁰⁹

When this occurs, the victim state (the state acting in self-defense against a threat from another state's territory) is not in an IAC with the territorial state (the state in which the non-state group operates).¹¹⁰ While the victim state is in an armed conflict, the armed conflict is a NIAC with

¹⁰⁶ U.N. Charter art. 39-44. See *infra* Section IV.A.3 for further discussion of *Jus ad Bellum* justifications for the use of force and armed attack.

¹⁰⁷ T.C. 18-01, *supra* note 1, para. 2-32, 2-40; JOINT PUB. 3-05, SPECIAL OPERATIONS, *supra* note 24, at GL-12 (noting that unconventional warfare may be carried out against a "government or occupying power").

¹⁰⁸ Eric Schmitt, *U.S. Commandos Kill Midlevel ISIS Leader in Syria*, N.Y. TIMES (Jan. 10, 2017), <https://nyti.ms/2k8Jaxj>.

¹⁰⁹ Ashley S. Deeks, "Unwilling or Unable": *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499-503 (2012). See also Preston, *supra* note 16.

¹¹⁰ Deeks, *supra* note 109, at 494-95.

In the interstate context, a victim state considering whether force is necessary generally will be contemplating the use of force on the territory of the state that originally attacked it. In contrast, an attack by a nonstate actor almost always is launched from the territory of a state with which the victim state is not in conflict.

Id.; DINSTEIN, *supra* note 87, at 15-17. Because of their clarity, the terms "victim state" and "territorial state" will be used throughout. Both terms were coined by Professor Deeks, *supra* note 109.

the armed group,¹¹¹ not the territorial state.¹¹² In fact, interference by the territorial state could itself constitute an armed attack.¹¹³ However, the victim state certainly risks conflict with the territorial state, and if such conflict does occur, it would be characterized as an IAC.¹¹⁴

In order to rely on the “unable or unwilling” principle, several things must be true. First, there must be an imminent or actual armed attack from the non-state armed group that entitles the victim state to act in self-defense.¹¹⁵ This calls for a straightforward application of the law of self-defense.¹¹⁶ Second, the victim state must assess whether the territorial state has the capability to stop the actual or imminent armed attack.¹¹⁷ If the territorial state has the capability, the victim state must also assess whether the territorial state is willing to act against the armed group.¹¹⁸ If the territorial state is unable or unwilling to stop the armed attack, the victim state may use force.¹¹⁹

3. *Justification for Activities That Amount to a “Use of Force”*

Despite these alternatives, unconventional warfare campaigns will frequently involve the use of force against another state. Because states are generally prohibited from using force against other states,¹²⁰

¹¹¹ While some commentators reject the concept of a non-international armed conflict between a state and a non-state armed group, the U.S. government position is that a non-international armed conflict would exist. DOD LAW OF WAR MANUAL, *supra* note 34, at 1.11.5.4; Preston, *supra* note 16.

¹¹² Deeks, *supra* note 109, at 494–95; Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 79 INT’L L. STUD. 1, 40 (2003).

¹¹³ Schmitt, *supra* note 106, at 40; DINSTEIN, *supra* note 93, at 268 (“For instance, if Utopia conducts a legitimate operation of extra-territorial law enforcement against terrorists or armed bands ensconced within the territory of Arcadia, this is an act of self-defence in which Arcadia has to acquiesce . . . there is no self-defence against self-defence”). Because the territorial state is not (due to lack of ability or lack of will) addressing the threat emanating from within its borders, it lacks the legal right to interfere when victim states act in self-defense. *Id.*

¹¹⁴ Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

¹¹⁵ Deeks, *supra* note 109, at 487–88.

¹¹⁶ See *infra* Section IV.A.3 for further discussion of *Jus ad Bellum* self-defense principles.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ U.N. Charter art. 2(4); DINSTEIN, *supra* note 87, at 78–91 (discussing the Kellogg-Briand pact, article 2(4) of the U.N. Charter, and the prohibition on the use of force in customary international law).

unconventional warfare that involves the use of force must have a specific legal basis in international law. There are two generally recognized bases for the use of force. First, use of force may be authorized by the U.N. Security Council under Chapter VII of the U.N. Charter.¹²¹ Second, use of force may be authorized in individual or collective self-defense pursuant to Article 51 of the Charter.¹²²

The U.N. Security Council, acting pursuant to Chapter VII, may authorize the use of force.¹²³ Because one of the primary purposes of unconventional warfare is to prepare the environment for or to support a conventional military campaign,¹²⁴ there are many situations where unconventional warfare could be conducted in a Chapter VII enforcement action. Such situations provide the clearest example of proper *jus ad bellum* authority.

In situations where the Security Council does not act pursuant to Chapter VII, a state may still conduct unconventional warfare in individual or collective self-defense. A state has the right to act in self-defense when it is the victim of an armed attack,¹²⁵ or when an imminent threat of armed attack exists.¹²⁶ The state's use of force must be necessary, proportional, and immediate.¹²⁷ The key is that these are the same rules that govern a state's use of conventional military force.

B. Unintended Legal Escalation

While standard *jus ad bellum* rules govern unconventional warfare campaigns, when embarking upon an unconventional warfare campaign

¹²¹ U.N. Charter art. 39-44; STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 212-15 (5th ed. 2011).

¹²² U.N. Charter art. 51; DYCUS ET AL., *supra* note 121, at 215.

¹²³ U.N. Charter art. 39-50.

¹²⁴ FOOT, *supra* note 25; JOINT PUB. 3-05, SPECIAL OPERATIONS, *supra* note 24, at II-4; T.C. 18-01, *supra* note 1, para. 1-34.

¹²⁵ U.N. Charter art. 51; Deeks, *supra* note 109, at 491-92.

¹²⁶ Deeks, *supra* note 109, at 491-92.

¹²⁷ *Id.* at 493-924; Sangjae Lee, *Inherent Right of Self-Defense Through the Lens of the 2010 Chenoan Attack*, 216 MIL. L. REV. 212, 212-13 (2013) (citing DINSTEIN, *supra* note 93, at 208). The law of self-defense has been analyzed and debated at length elsewhere, and a full analysis is beyond the scope of the article's discussion. See DYCUS ET AL., *supra* note 121, at 210-33; Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259 (2012); and DINSTEIN, *supra* note 93. See also John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

states often consider the law in a slightly different way. As discussed above, a state will—and must—consider whether it has a legal justification for the type of activity it wishes to conduct. But because unconventional warfare is often limited warfare, states will also consider the law in a second way: They will work to avoid unintentionally escalating the legal status of the conflict. In other words, a state may have a legal basis to act, but may not wish to fundamentally alter the conflict's legal status, generally by transforming it into an IAC.

In these situations, a state's primary concern will be twofold: First, to avoid turning a NIAC against a non-state armed group into an IAC against the territorial state. Second, to conduct limited unconventional warfare activities against a state without triggering armed conflict at all. Because the United States operates in Syria without the Syrian government's consent, the United States' unconventional warfare campaigns in Syria raise precisely these concerns.

1. Preventing NIAC from becoming IAC: United States Support to the YPG

Without proper controls, the United States unconventional warfare campaign against ISIS risks becoming an IAC with the Syrian government. To manage this risk, campaign planners must ensure that their use of force is solely directed against the armed group (ISIS), not against the territorial state (Syria). Recall the general rule that where the territorial state is unable or unwilling to act, and the victim state intervenes, the territorial state and the victim state are not in an armed conflict.¹²⁸ However, the victim state must not use force against the territorial state without a separate, sufficient justification.¹²⁹

The key concern for the U.S. government in Syria is that if the partner force—the YPG—should attack the Syrian government, the United States could be responsible under the doctrine of state responsibility.¹³⁰ Under this doctrine, where a partner force acts “on behalf [of] the State, having been charged by some competent organ of [the State] to carry out a specific

¹²⁸ Deeks, *supra* note 109, at 494–95; Schmitt, *supra* note 112, at 40.

¹²⁹ U.N. Charter art. 2(4).

¹³⁰ Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41, 93–94 (2004).

operation,” the sending state is responsible under international law.¹³¹ Also, the sending state will become responsible where they ratify the partner force’s actions by taking advantage of them or approving them.¹³²

In its support to the YPG and in its earlier program to support other anti-ISIS rebel groups, the United States has taken many precautions to avoid conflict with the Syrian government itself. In particular, the United States has avoided airstrikes that target regime forces.¹³³ The United States has also refused to overtly train and equip militant groups that fight the Syrian government as well as ISIS.¹³⁴ Where militant groups are trained, controls have been adopted (at significant cost)¹³⁵ to ensure that the groups do not target Syrian government forces.¹³⁶ While these controls do not appear to include a pledge not to attack the Syrian government,¹³⁷ the United States has indicated that it will monitor funded groups and reduce or eliminate support if they attack the Syrian government.¹³⁸

Controls have been adequate in the past. There have been no reports that the United States has directed the YPG or another anti-ISIS group to attack the Syrian regime. In fact, the United States has warned rebel forces that they will incur significant costs should they conduct attacks.¹³⁹ Congress has also required DoD to account for “any misuse or loss of provided training and equipment,” and describe “how such misuse or loss is being mitigated.”¹⁴⁰ However, as the situation develops, additional safeguards may be necessary. For example, while the PYD currently maintains an uneasy ceasefire with the regime, battlefield gains may tempt the PYD to seize additional, non-ISIS-controlled territory in an effort to

¹³¹ Chase, *supra* note 130, at 100 (quoting Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 58 (May 24)).

¹³² Chase, *supra* note 130, at 100–01 (quoting Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. Rep. 3, ¶ 74).

¹³³ Baker & Schmitt, *supra* note 63, at A6.

¹³⁴ Shear et al., *supra* note 64, at A1; Anne Barnard & Eric Schmitt, *Rivals of ISIS Attack U.S.-Backed Syrian Rebel Group*, N.Y. TIMES, Aug. 1, 2015, at A1.

¹³⁵ Roy Gutman, *How the US ‘train and equip’ program in Syria collapsed*, STARS & STRIPES (Dec. 23, 2015), <http://www.stripes.com/news/middle-east/how-the-us-train-and-equip-program-in-syria-collapsed-1.385552>.

¹³⁶ Karam Shoumali et al., *Abductions Hurt U.S. Bid to Train Anti-ISIS Rebels in Syria*, N.Y. TIMES, July 30, 2015, at A1.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(d)(5).

enlarge its de facto state.¹⁴¹ The PYD may also be tempted to seize territory controlled by other states in the region, such as Turkey. In fact, the PYD has clashed with Turkish forces operating within Syria.¹⁴²

Should controls fail and the PYD attack regime forces or the forces of another state, the United States could likely avoid legal responsibility by refusing to support any PYD elements involved in the attack or incursion. So long as the United States did not direct the attack, legally it would need only avoid ratifying or taking advantage of the attack.¹⁴³ Further partnership with other PYD elements directed solely at defeating ISIS would not likely be considered “taking advantage of the attack,” and would not put the United States government in breach of its international obligations.¹⁴⁴

2. Remaining Below the Armed Conflict Threshold: United States Support to Anti-Assad Rebels

The United States’ support to anti-Assad rebels also risks triggering IAC with the Syrian government. While it is possible to conduct unconventional warfare activities without triggering IAC, such campaigns are generally limited to intelligence collection activities that do not result in destruction of property, humanitarian assistance, leadership training, and “nonlethal” aid.¹⁴⁵ Where this is accomplished, IAC will not occur.

In its support to the anti-Assad rebels, the United States appears to be taking precautions to remain below the armed conflict threshold. In particular, the actual arms appear to be provided by various countries in the region, with the United States’ role limited to facilitation of flights and vetting of recipients.¹⁴⁶ However, there are reports that many of the anti-

¹⁴¹ See INTERNATIONAL CRISIS GROUP, *supra* note 25, at 4–22 (describing the PYD’s struggle to establish Rojava, a Kurdish-controlled region in Syria).

¹⁴² Tim Arango et al., *Turkey’s Military Plunges Into Syria, Enabling Rebels to Capture ISIS Stronghold*, N.Y. TIMES, Aug. 24, 2016, <https://nyti.ms/2jMajZG>.

¹⁴³ Chase, *supra* note 130, at 100–01 (quoting Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 74 (May 24)).

¹⁴⁴ See *id.*

¹⁴⁵ See *supra* Section IV.A.

¹⁴⁶ C.J. Chivers & Eric Schmitt, *Arms Airlift to Syria Rebels Expands, With Aid From C.I.A.*, N.Y. TIMES, Mar. 24, 2015, at A1; Gordon, *supra* note 20, at A7.

Syrian-government militias have received training from the United States.¹⁴⁷

Again the question is whether these precautions are sufficient to remain below the threshold of armed conflict. Recall that an armed attack will not occur based only on intelligence collection activities that do not result in destruction of property,¹⁴⁸ humanitarian assistance, leadership training, or nonlethal aid.¹⁴⁹ However, provision of targeting intelligence, lethal training, and direct logistical support to military activities is considered an armed attack.¹⁵⁰

While no definitive conclusion can be reached (given the program's secrecy), the United States' program has likely been successfully crafted to remain just below the threshold of armed conflict. However, there are identifiable risk factors. The first risk factor is the training curriculum. While there is little clarity concerning what constitutes impermissible "lethal training,"¹⁵¹ training tailored to operations in Syria or specific Syrian targets would potentially cross the threshold. The second risk factor is the logistical plan. The United States' cooperation in exfiltration of rebels from Syria for training, or infiltration back into Syria after training, would also likely cross the threshold. Finally, the countries providing the weapons likely have crossed the threshold into an armed conflict with the Syrian government, and close cooperation on the overall program could simply make the United States a co-belligerent.¹⁵²

V. *Jus in Bello* and Unconventional Warfare

Establishing that modern international law does not prevent a state from embarking on an unconventional warfare campaign is only the beginning of the analysis, as *jus ad bellum* rules are only the first of two

¹⁴⁷ Anne Barnard, *Syrian Rebels Say Russia Is Targeting Them Rather Than ISIS*, N.Y. TIMES, Oct. 1, 2015, at A14.

¹⁴⁸ See Simon Chesterman, *The Spy Who Came in From the Cold War*, 27 MICH. J. INT'L L. 1071, 1073, 1077–93 (2006) (describing the limit as espionage that causes property damage or involves territorial incursion with aircraft). But see Craig Forcece, *Spies Without Borders: International Law and Intelligence Collection*, 5 J. NAT'L SECURITY L. & POL'Y 179, 198–205 (2011) (noting that commentators are divided on the legality of extraterritorial spying).

¹⁴⁹ Schmitt & Wall, *supra* note 32, at 361–63.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² DINSTEIN, *supra* note 93, at 201–04.

bodies of law regulating unconventional warfare. This section will consider the second body of law, *jus in bello*, concluding that such a campaign can be conducted under modern rules.

The *jus in bello* rules of modern international law pose two challenges to an unconventional warfare campaign: First, they pose a direct challenge to some of the unique ways in which a resistance movement is employed, making it difficult to select proper targets, hold and try detainees, gather supplies, and recruit personnel. Second, because *jus in bello* rules are designed to promote reliance on conventional military forces, they challenge an unconventional warfare commander's ability to fight in various statuses (such as out of uniform or in a non-standard uniform). Despite these difficulties, unconventional warfare campaigns can be conducted lawfully. The commander can successfully employ the force and effectively manage the force's legal status.

A. Employment of the Force

Employing resistance forces raises many legal issues, from the unique targets they are called upon to attack, their lack of a recognized government, their relative lack of supplies, to their lack of regularly organized armed forces. While this makes an unconventional campaign legally complex, a resistance movement may successfully and lawfully employ the auxiliary, the underground, and the guerrillas.

1. *Selecting Lawful Targets*

Unconventional warfare is governed by the same targeting rules that govern conventional warfare. However, unconventional warfare forces have historically been used to attack unique sets of targets, all of which pose unique legal difficulties.¹⁵³

The first challenge is the duty to positively identify partner force targets. Because unconventional warfare advisors work through or with a partner force,¹⁵⁴ they are often further removed from the fight, and may be forced to rely on others for information. This often makes it more difficult

¹⁵³ E.g. JOHN KENNETH KNAUS, ORPHANS OF THE COLD WAR 222-33 (1999) (describing a mission to destroy "trucks carrying borax from the local mines").

¹⁵⁴ JOINT PUB. 3-05, SPECIAL OPERATIONS, *supra* note 24, at GL-12.

for a commander to determine whether a potential target is subject to attack under the laws of war. While unconventional warfare makes a commander's task more difficult, the standard remains the same: Commanders must "make a good faith assessment of the information that is available to them at that time."¹⁵⁵ This can include information presented by the partner force.¹⁵⁶ While the law does not require the commander to delay a decision to gather more information,¹⁵⁷ the commander must fairly weigh the reliability of the information received in light of the overall credibility of the partner force.¹⁵⁸ The commander cannot rely in bad faith on information known to be unreliable. Commanders should also be aware that, while it is not the U.S. view, there is some support for the idea that a commander could be held liable where they are reckless (even if they act in good faith).¹⁵⁹

In Syria, the United States reportedly relies on YPG-supplied data when selecting targets for air attack.¹⁶⁰ The YPG units use radios to report ISIS locations to a YPG controller, who uses chat programs and satellite imagery to report Global Positioning System (GPS) grid coordinates to U.S. forces.¹⁶¹ This system presents both a tactical issue of how the attacking aircrew will identify the correct target (called correlation in Close Air Support terminology)¹⁶² and a more strategic issue of ensuring the YPG is directing attacks only at ISIS. While civilian casualty numbers are disputed and difficult to verify,¹⁶³ there have not been reports of systematic failures in YPG-derived information at the tactical level. Integration of multiple sources of intelligence¹⁶⁴ can address both problems, but commanders must remain alert for both correlation failures and the risk that the YPG will shift its targets away from ISIS.

¹⁵⁵ DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.4.

¹⁵⁶ *Id.* para. 5.4.1–5.4.2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* para. 5.4.2 (citing United States v. List, et al. ((The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1295–96).

¹⁵⁹ Brian Finucane, *Partners and Legal Pitfalls*, 92 INT'L L. STUD. 407, 413-14 (2015).

¹⁶⁰ Callimachi, *supra* note 19, at A1.

¹⁶¹ *Id.*

¹⁶² JOINT CHIEFS OF STAFF, JOINT PUB. 3-09.3, CLOSE AIR SUPPORT, at III-47–III-50 (25 Nov. 2014).

¹⁶³ Bryan Schatz, *The Pentagon Says It Has Killed 20,000 ISIS Fighters—and Just 6 Civilians*, MOTHER JONES (Dec. 23, 2015), <http://www.motherjones.com/politics/2015/12/united-states-isis-bombing-civilian-deaths>.

¹⁶⁴ JOINT CHIEFS OF STAFF, JOINT PUB. 2-0, JOINT INTELLIGENCE (22 Oct. 2013).

In addition to these precautions, commanders should mitigate the risk that a “recklessness” standard might be used to judge their actions under a future legal regime.¹⁶⁵ If applied, the recklessness standard would make a commander liable if they continued to provide assistance to a force knowing that force systematically failed to comply with LOAC and that LOAC violations were likely in the future.¹⁶⁶ Even under this standard, compliance is possible even in an aggressive unconventional warfare campaign. Recall that the standard prohibits assistance where partner force failures are unaddressed and future violations are likely. Commanders can fix the problem by ensuring that the campaign is responsive to LOAC violations—that they are reported, investigated (which can be done in at least some fashion even in a resource-constrained environment), and corrected. This type of campaign should avoid violating the law even under a more-restrictive recklessness standard.¹⁶⁷

While a commander’s duty to properly identify a target is a classic *jus in bello* decision, unconventional warfare adds a *jus ad bellum* component. As discussed above, states have a duty to refrain from charging a partner force to carry out a specific operation against a state that is not a party to the armed conflict.¹⁶⁸ This creates a critical legal risk for the advisor, who may erroneously direct (or be manipulated by the partner force into directing) the partner force to attack a non-party state’s forces. While the advisor would not be criminally liable (applying the *jus in bello* standard discussed above), the attack risks creating an enduring international armed conflict.

Initially, the victim of the partner force’s attack would have a right to respond in self-defense.¹⁶⁹ The United States’ position is that the right to respond in self-defense does not depend on the specific intent of the attacker,¹⁷⁰ meaning that the victim state’s unit would be legally entitled to fight to repel the erroneous attack. However, by immediately ceasing an attack when the error is discovered, and credibly communicating that

¹⁶⁵ See *supra* Section V.A.1 for a discussion of the recklessness standard.

¹⁶⁶ Finucane, *supra* note 159 at 422-24.

¹⁶⁷ See *id.* at 425-30 (discussing risk mitigation measures in greater detail).

¹⁶⁸ Chase, *supra* note 130, at 100 (quoting Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 58 (May 24)).

¹⁶⁹ See *supra* Section IV.A.3 for the rules regarding self-defense.

¹⁷⁰ William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 302-03 (2004).

the attack was in error, advisors would limit or eliminate the victim unit's justification for continued actions in self-defense.¹⁷¹

While the United States would likely be liable in international law for the attack,¹⁷² a prompt apology and immediate cessation of the attack would terminate a victim state's justification for further acts of self-defense and end any legal justification for further conflict.¹⁷³ The most important way to mitigate this risk is to maintain some form of communication with the territorial state.

While sabotage raises unique legal issues, it is a classic unconventional warfare activity and is often a primary goal of an unconventional warfare campaign.¹⁷⁴ It is generally conducted by members of the underground or auxiliary operating out of uniform.¹⁷⁵ While it is permissible to employ saboteurs,¹⁷⁶ there are several limits on sabotage. First, because they operate out of uniform, saboteurs will not receive combatant immunity and may be tried by the territorial state.¹⁷⁷ Second, because both the saboteur and the weapons used are concealed, sabotage raises special perfidy concerns,¹⁷⁸ especially with regard to booby-traps and other concealed explosive devices.¹⁷⁹ Also, concealed explosive devices are regulated by treaty. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices of May 3, 1996 (Protocol II to the 1980 CCW Convention), which the United States has ratified,¹⁸⁰ prohibits disguising booby traps or explosive devices as, among other things, children's toys or "internationally recognized protective emblems, signs or signals."¹⁸¹ Also, such devices may not be emplaced in a "city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear

¹⁷¹ DINSTEIN, *supra* note 93, at 224 (noting that to be lawful, an act of self-defense must be necessary).

¹⁷² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 901 (AM. LAW. INST. 1986); DINSTEIN, *supra* note 93, at 208–10.

¹⁷³ DINSTEIN, *supra* note 93, at 224.

¹⁷⁴ FOOT, *supra* note 25, at 380–91.

¹⁷⁵ See T.C. 18-01, *supra* note 1, para. 2-33–2-37.

¹⁷⁶ DoD LAW OF WAR MANUAL, *supra* note 34, para. 4.17.

¹⁷⁷ *Id.* para. 4.17.3.

¹⁷⁸ Heller, *supra* note 32.

¹⁷⁹ *Id.* (citing Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, May 3, 1996, 2048 U.N.T.S. 93 [hereinafter Protocol II to the 1980 CCW Convention]).

¹⁸⁰ DoD LAW OF WAR MANUAL, *supra* note 34, para. 6.12.

¹⁸¹ Protocol II to the 1980 CCW Convention, *supra* note 179, art. 7.

to be imminent.”¹⁸² The only exceptions are when the devices are “placed on or in the close vicinity of a military objective” or when “measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.”¹⁸³

Commanders can readily comply with Protocol II’s requirements. Many sabotage activities will be exempt because despite being conducted clandestinely they target traditional military objectives (such as bases and other military facilities). These operations fall squarely within Protocol II’s exception for devices placed near military objectives. Other attacks may not be so straightforward. Booby traps used to attack enemy key leaders away from the front lines, for example, would not fall within Protocol II’s exception.¹⁸⁴ In these situations the attacking force can still comply with Protocol II so long as they take steps (such as command detonation and overwatch) to protect civilians.

However, saboteurs must still consider the risk of perfidy. This risk will exist any time sabotage is conducted by resistance forces operating out of uniform, and will be thoroughly discussed in Section B.

While sabotage raises legal issues as a method of warfare, resistance forces are also challenged by types of targets they are asked to attack. Historically, resistance forces have focused on hard-to-access, high payoff targets such as dams and power stations.¹⁸⁵ These targets may be attacked, but pose special proportionality concerns and are subject to two disputed rules of international law.

Dams, power stations, and similar targets containing dangerous forces are given special protection, but the two rules that do so are disputed and do not reflect customary international law. The first disputed rule is Article 56 of Additional Protocol I¹⁸⁶ Article 56 protects “[w]orks or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations” from attack where the attack could cause

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Heller, *supra* note 32, at 517–18 (discussing an operation that was allegedly carried out by the Central Intelligence Agency and Israel to kill Imad Mughniyah, a key Hezbollah leader).

¹⁸⁵ KNUT HAUKEID, *SKIS AGAINST THE ATOM* (1989).

¹⁸⁶ DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.13.

“severe losses among the civilian population.”¹⁸⁷ Article 56 provides very limited exceptions, such as when the “work” provides “regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.”¹⁸⁸ The second disputed rule is Article 35 of Additional Protocol I, which prevents means or methods of warfare which “are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”¹⁸⁹ However, the United States and other nations have consistently objected to these rules, at least in IAC,¹⁹⁰ and it is unlikely that either rule would be considered customary international law given state practice.¹⁹¹

Even without a categorical rule, works containing dangerous forces are heavily protected by the general rule of proportionality¹⁹² and require extensive precautions in the attack.¹⁹³ Because of the potentially large collateral effects, commanders should expect that decisions to attack such targets will rightfully be subjected to heavy scrutiny.

2. *Detainee Operations and Trials: Prisoners taken by the Partner Force*

While modern international law imposes strict guidelines for the care of detainees, it is possible for a resistance movement such as the YPG to take—and even try—prisoners without violating international law. However, the standards will be different depending on whether the unconventional warfare campaign occurs in a NIAC or in IAC. After identifying the general rules, this section will consider the YPG’s trial of ISIS detainees during the NIAC in Syria.

¹⁸⁷ Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 56, 8 June 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

¹⁸⁸ *Id.* art. 56.

¹⁸⁹ *Id.* art. 35.

¹⁹⁰ *Id.* art. 35; DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.13.1 (noting the objections of the United States, the United Kingdom, and France to Article 56); DOD LAW OF WAR MANUAL, *supra* note 34, para. 6.10.3.1 (noting the objections of the United States and France to Article 35(3)); *see also* Michael N. Schmitt, *Humanitarian Law and the Environment*, 28 DENV. J. INT’L L. & POL’Y 265 (2000). *But see* DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.7.1 (noting that the United States has not objected to AP II art. 15 in NIAC).

¹⁹¹ Schmitt, *supra* note 190.

¹⁹² DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.12.

¹⁹³ *Id.* para. 5.13.

Before trying a detainee, the resistance movement must determine whether the detainee merits treatment as a prisoner of war under the Third Geneva Convention. In international armed conflict, detainees captured by the resistance movement will be entitled to prisoner of war status so long as the detainees meet the requirements of Article 4(A)(2) of the Third Geneva Convention.¹⁹⁴

While prisoners of war may not be tried for warlike acts, it is lawful for the resistance movement to try prisoners of war for war crimes.¹⁹⁵ It is also lawful to try unprivileged belligerents.¹⁹⁶ However, such trials are subject to strict rules. In particular, they are governed by Articles 82 through 108 of the Third Geneva Convention, and by Article 75 of Additional Protocol I.¹⁹⁷ These articles pose several key obstacles to trials by a resistance movement.

The first obstacle is that Article 75 of Additional Protocol I requires that all trials be performed by a “regularly constituted court.”¹⁹⁸ This would be a significant obstacle for a resistance movement, especially early in the conflict. However, it would be possible for the resistance movement to set up new courts, yet have them be “regularly constituted” for purposes of the Convention. In determining whether a court is “regularly constituted,” judges look not to whether the court is new, but whether it is established pursuant to generally applicable rules and procedures.¹⁹⁹ In the United States, this means that any differing rules must be justified by “some practical need [that explains] deviations from court-martial practice.”²⁰⁰ The resistance movement could show that new courts are “regularly constituted” by establishing common rules and using the same

¹⁹⁴ While the resistance movement could claim that it is not a party to the 1949 Geneva convention, in an IAC, Article 75 of Additional Protocol I embodies the rules of customary international law. DoD LAW OF WAR MANUAL, *supra* note 34, para. 8.1.4.2; *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006). In addition, a resistance movement’s acknowledgement that it belongs to a party to the conflict is a prerequisite for the resistance movement’s own forces meriting prisoner of war protections, and such an acknowledgement will bind the resistance movement to the requirements of the Third Geneva Convention. Geneva Convention III, art. 4.

¹⁹⁵ Yoram Dinstein, *Unlawful Combatancy*, 79 INT’L L. STUD. 151, 156–59 (2003).

¹⁹⁶ *Id.* at 153–55.

¹⁹⁷ Geneva Convention III, arts. 82–108.

¹⁹⁸ Additional Protocol I, art. 75.

¹⁹⁹ *Hamdan*, 548 U.S. 557 at 631–33; *Khadr v. Obama*, 724 F. Supp. 2d 61, 66–68 (D.D.C. 2010).

²⁰⁰ *Hamdan*, 548 U.S. at 632–33.

courts to try members of its own force.²⁰¹ So long as the courts' rules are generally applicable and follow the procedural requirements of Articles 82 through 108 of the Third Geneva Convention and Article 75 of Additional Protocol I, even new courts could be considered "regularly constituted."²⁰²

Another obstacle of Article 75 is that it requires the application of international or national law in force at the time of the offense.²⁰³ Because a resistance movement is unlikely to have implemented a legal code within its territory (if it controls territory at all), trials would be limited to offenses against the territorial state's legal code or international law.²⁰⁴ However, given that most states have a legal code that punishes rape, murder, and other similar crimes, and because the courts could try prisoners of war or other detainees for war crimes, resistance movement courts could likely try the most urgent cases at a minimum.

Trials must meet a similar standard to be acceptable in a NIAC. Additional Protocol II Article 6, which applies in NIAC, imposes similar requirements that all trials be before regularly constituted courts applying international or national law in force at the time of the offense.²⁰⁵

The PYD²⁰⁶ controls territory in Syria and has established courts and a legal system based on reformed Syrian law.²⁰⁷ While this system will, in principle, allow trials that comply with Additional Protocol II Article 6,²⁰⁸ in practice the system is has problems, including uneven publishing of new laws, questionable Syrian laws that remain on the books, and allegations of politicization and lack of independence.²⁰⁹ While these are serious issues, it appears that the PYD/YPG courts are, in fact, regularly constituted. Regularly constituted courts need not be perfect, they need

²⁰¹ With some exceptions, trials of prisoners of war must occur in a military court. Geneva Convention III, art. 84.

²⁰² Geneva Convention III, arts. 82–108; Additional Protocol I art. 75. *See also* The Trial of Sergeant-Major Shigeru Ohashi and Six Others, V U.N. L. REP. 25, 30–31 (Australian Military Court, Rabaul, Mar. 20–Mar. 23, 1948).

²⁰³ Additional Protocol I art. 75.

²⁰⁴ *Id.* *See also* DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.19.

²⁰⁵ Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, art. 6, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

²⁰⁶ The YPG is the military wing of the PYD. HUMAN RIGHTS WATCH, *supra* note 15, at 1.

²⁰⁷ *Id.* at 22.

²⁰⁸ Additional Protocol II, *supra* note 205, art. 6.

²⁰⁹ HUMAN RIGHTS WATCH, *supra* note 15, at 22–25.

only provide minimum procedural protections and be properly set up under the law.²¹⁰ The defects of PYD/YPG courts, while significant, are not of this kind, and the courts likely comply with Additional Protocol II Article 6. To clarify matters, U.S. commanders assisting YPG forces should insist that YPG courts publicly clarify which criminal law they intend to apply when trying ISIS detainees. Commanders should also act promptly to investigate any allegations that YPG courts lack independence or are unduly focused on YPG or PYD political opponents. To account for the limited number of U.S. personnel, such efforts should first focus on any courts trying detainees from partner force operations. This will minimize the risk that U.S. forces might participate in the execution of unlawful sentences.²¹¹

3. Supplying the Force: Requisitioning Supplies from the Civilian Population

Historically, many resistance movements have been poorly supplied.²¹² This means that many resistance movements (and their advisors) obtain support by capturing enemy property. In IAC, the general rule is that “[a]ll property located in enemy territory is regarded as enemy property regardless of its ownership.”²¹³ Enemy real property may be utilized or destroyed so long as the use is justified by “imperative military necessity,” which is a lower standard than that required to make the property a lawful target for purposes of attack.²¹⁴

However, movable property is treated differently. In general, enemy public, movable property may be taken, but private movable property may only be taken if it is “susceptible to direct military use.”²¹⁵ Private property not susceptible to direct military use may only be taken if the taking would be lawful during an occupation.²¹⁶ Occupation law permits private movable property to be “requisitioned,” which is the forcible

²¹⁰ *Hamdan*, 548 U.S. 557 at 631–35.

²¹¹ See *infra* notes 240–53 and accompanying text for a discussion of liability for partner force abuses.

²¹² John Lee Anderson, *Guerrillas: Journeys in the Insurgent World* 87 (2d ed. 2004).

²¹³ DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.1.

²¹⁴ *Id.* para. 5.17.2.1; U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 56–59 (18 Jul. 1956) [hereinafter FM 27-10 (1956)].

²¹⁵ DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.3; FM 27-10 (1956), *supra* note 214, para. 59.

²¹⁶ DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.3.1; FM 27-10 (1956), *supra* note 214, para. 59.

taking of property for the support of the armed force.²¹⁷ However, this is limited to property needed to support the force, and no property may be taken for private gain.²¹⁸ Also, the needs of the civilian population must be considered when food and medical supplies are requisitioned.²¹⁹ Finally, requisition requires the payment of fair compensation.²²⁰ This means that military supplies such as ammunition may be taken, but that other supplies, such as food and medical items, must be paid for and the needs of civilians must be considered when the items are requisitioned.

While the legal issues of supply may seem pedestrian, this area of the law has resulted in some of the most serious criticisms of the YPG. The YPG has been accused of illegal destruction and seizure of property, including demolition of villages, forced displacement from villages, and politically motivated displacement of people and destruction of homes.²²¹ The YPG has responded by claiming that civilians were moved based on military necessity, including protection from mines, protection from fighting, and the need to isolate the population from ISIS supporters.²²²

While the facts are hotly disputed, the YPG's actions are permissible so long as destruction or seizure is justified by "imperative military necessity."²²³ Advisors must pay close attention to supply issues and seizure of property, ensuring that any takings are justified by a compelling and legitimate military purpose. While it would not be practical for a small number of advisors to monitor every member of the partner force for petty theft, advisors can focus on large-scale clearing operations. These should receive close intelligence analysis. Advisors can also ensure that partner force commanders are aware of the rules for gathering supplies, and the need to pay compensation.

²¹⁷ DoD LAW OF WAR MANUAL, *supra* note 34, para. 11.18.7; FM 27-10 (1956), *supra* note 214, para. 412.

²¹⁸ DoD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.3.2, 5.17.4; FM 27-10 (1956), *supra* note 214, para. 398.

²¹⁹ DoD LAW OF WAR MANUAL, *supra* note 34, para. 11.14.2.

²²⁰ *Id.*; FM 27-10 (1956), *supra* note 214, para. 412.

²²¹ "We Had Nowhere Else to Go": *Forced Displacement and Demolitions in Northern Syria*, AMNESTY INTERNATIONAL (Oct. 2015), <http://www.aina.org/reports/aiwhnetg.pdf>.

²²² AMNESTY INTERNATIONAL, *supra* note 221, at 28–29.

²²³ DoD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.2.1.

4. War Crimes Committed by the Partner Force

A key concern for unconventional warfare SOF advisors will be liability for war crimes committed by the partner force. There are two ways in which advisors could be held liable; command responsibility or actual participation.²²⁴ Command responsibility means that a commander will be held criminally liable if they fail “to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war.”²²⁵ Command responsibility generally has three elements: “(1) a superior/subordinate relationship; (2) knowledge, actual or constructive, by the superior of the crimes committed by the subordinate; and (3) failure by the superior to halt, prevent, or punish the subordinate.”²²⁶ In unconventional warfare, the most important question will be whether the advisors have “effective control” over the partner force.²²⁷ Effective control does not require a formal command relationship, which will almost certainly not exist for SOF advisors.²²⁸ What it does require is functional similarity to command, such as the ability to discipline subordinates and the ability to issue orders.²²⁹ While SOF advisors will generally not have this authority,²³⁰ they must be aware that if they exercise command authority, they must use it to prevent war crimes. They must also be aware that they will be judged on whether they “should have known” of abuses, not whether they actually knew of abuses.²³¹

Regardless of whether command responsibility exists, SOF advisors will be liable if they actually participate in war crimes. Unlike command authority, which allows prosecution based on a “should have known” standard,²³² actual participation requires that the advisor know of the crimes and act with some form of intent to further the crime.²³³ In general,

²²⁴ Bart, *supra* note 32, at 515–16, 521, 524–27; DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.4 to 18.23.6.

²²⁵ DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.3.1. See Application of Yamashita, 327 U.S. 1, 13–15 (1946).

²²⁶ Bart, *supra* note 32, at 517.

²²⁷ *Id.* at 517–22. But see Finucane, *supra* note 159, at 416 (discussing the lower—but less accepted—“overall control” standard). Note that the “overall control” standard is relevant to state responsibility, not individual criminal liability. *Id.*

²²⁸ Bart, *supra* note 32, at 519–20.

²²⁹ *Id.* at 522–23.

²³⁰ *Id.* at 524.

²³¹ DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.3; Bart, *supra* note 32, at 525.

²³² DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.3; Bart *supra* note 32, at 525.

²³³ DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.4–18.23.6.

this means that the advisor would have to be an aider and abettor to the actual crime, or be a co-conspirator in the criminal conspiracy.²³⁴ Aiding and abetting would require the advisor to “aid or encourage” the person who committed the war crime, and to “consciously share in the actual perpetrator’s criminal intent.”²³⁵ Conspiracy would require an agreement to commit a war crime.²³⁶ So long as SOF advisors follow DoD policy requiring them to report and prevent war crimes,²³⁷ they will avoid criminal liability. All such efforts should be documented by the advisors.

5. Suitability of the Partner Force: Past Law of War Violations

Advisors must evaluate the history of the partner force. While the United States has many legal and policy rules governing assistance to forces with a history of law of war or human rights violations,²³⁸ this section will deal primarily with international law on the subject.

States have an affirmative duty to search for and try those who have committed grave breaches of the Geneva conventions,²³⁹ as well as to suppress all breaches of the Geneva conventions, regardless of whether they are grave breaches.²⁴⁰ This obligation applies both to grave breaches of the Geneva conventions in IAC and to grave breaches of Common Article 3 in NIAC.²⁴¹

However, SOF advisors should be able to readily comply with these obligations. Under U.S. doctrine, SOF advisors will be gathering information on the resistance movement during the second phase of unconventional warfare, initial contact.²⁴² Also, advisors will be continuously evaluating the personnel for security and reliability

²³⁴ Bart, *supra* note 32, at 525–26.

²³⁵ U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGE’S BENCHBOOK para. 7-1-1 (10 Sept. 2014). *But see* Finucane, *supra* note 169, at 420–24 (arguing that advisors could be liable if they act with the knowledge that their actions will assist the crime, even absent a desire that the crime occur).

²³⁶ *Military Judge’s Benchbook*, *supra* note 235, para. 3-5-1.

²³⁷ U.S. DEP’T OF DEF., DIR. 2311.01E, DoD LAW OF WAR PROGRAM (9 May 2006).

²³⁸ 22 U.S.C. § 2378d; Michael J. O’Connor, *Bangladesh Rapid Action Battalion: Satisfying the Requirements of the Leahy Amendment with a Rule of Law Approach*, 215 MIL. L. REV. 182 (2013).

²³⁹ DoD LAW OF WAR MANUAL, *supra* note 34, para. 18.9.3.

²⁴⁰ *Id.* para 18.9.3.3.

²⁴¹ *Id.* para 18.9.3.2.

²⁴² T.C. 18-01, *supra* note 1, para. 3-9–3-10.

reasons.²⁴³ So long as this aggressive information gathering is paired with a duty to report past breaches of the Geneva conventions, and so long as those reports are acted upon by the U.S. government as a whole, SOF advisors will be complying with their portion of the United States' obligations under the convention.

B. Legal Status of the Force

So far, modern international law has posed no obstacle to unconventional warfare campaigns. Section IV established that the rules governing when force may be used—*jus ad bellum*—allow unconventional warfare activities to be conducted in IAC, NIAC, and even in the absence of armed conflict. After showing when campaigns could be initiated, the article turned to the *jus in bello* rules—those governing conduct during the conflict itself—and found that the modern rules governing employment of the force (targeting, supply, etc.) posed no obstacle to an unconventional warfare campaign. This section now turns to the final subset of *jus in bello*, the rules governing a force's status, to determine whether modern laws governing uniforms and combatant immunity would prevent waging an effective unconventional warfare campaign.

Much of the law of armed conflict (LOAC) is related to a force's status—how a force dresses and acts on the battlefield can determine its treatment under the law, and can even determine what activities the force may lawfully conduct.²⁴⁴ Because unconventional warfare relies on stealth,²⁴⁵ modern rules on a force's legal status pose the second major challenge for an unconventional warfare campaign. This section will again show that unconventional warfare survives scrutiny, and that an effective campaign may be conducted under modern rules governing a force's legal status.

When conducting an unconventional warfare campaign, a commander considers the legal status of the force in two ways: First, what does a force have to do to receive lawful combatant status? This is important because when a force is recognized as lawful combatants, their authority is at its maximum—they receive full prisoner of war protections and may operate

²⁴³ See *id.* para. 3-6 to 3-41.

²⁴⁴ DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.1

²⁴⁵ T.C. 18-01, *supra* note 1, para. 2-21 to 2-26.

to the maximum extent permitted by the LOAC rules discussed above.²⁴⁶ Second, the commander also considers when the force may operate without lawful combatant status. It is not a violation of international law for resistance movements to operate as unprivileged belligerents.²⁴⁷ Caution must be employed, however, because in addition to losing combatant immunity, a force so operating will incur more restrictions on what it can and cannot do—restrictions ranging from the prohibitions on perfidy and treachery to the LOAC's prohibition of assassination.

1. Privileged Belligerency: When is a Force Legally Protected?

The question of combatant immunity is one where modern international law—even as interpreted by the United States—provides an advantage to an unconventional warfare campaign. In fact, modern international law provides many situations where members of the resistance movement will be able to maintain combatant immunity. Even without combatant immunity, captured members of the resistance force are entitled to many substantive legal protections. This is important even when the enemy state does not follow the law, because an astute commander can impose significant diplomatic and information operations costs for every violation.

In international armed conflict, the LOAC provides substantial protections for members of a resistance movement. Certain portions of the force will qualify for combatant immunity, and even those who do not qualify for combatant immunity are entitled to significant protection. In particular, unprivileged members of a resistance movement may not be executed or punished without a fair trial, and torture or mistreatment of unprivileged belligerents is a war crime.²⁴⁸

Historically, this was not always the case. Prior to 1949, it was unclear whether members of a resistance movement were entitled to international legal protections or combatant immunity, especially when operating in occupied territory.²⁴⁹ Under the Hague Convention of 1907, irregular

²⁴⁶ See *supra* Section V.A.

²⁴⁷ See *infra* Section V.B.2.

²⁴⁸ Trial of Gerhard Friedrich Ernst Flesch, SS Obe. Sturmbannführer, Oberregierungsrat, VI U.N. L. REP. 111, 115-17 (Frostatting Lagmannsrett, Nov.–Dec., 1946, Supreme Court of Norway, Feb., 1948).

²⁴⁹ Braun, *supra* note 33, at 5.

forces could attain the status of “belligerents” if they met four (now classic) requirements:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.²⁵⁰

Scholars also included an “implied requirement” that the hostilities be conducted “on behalf of a government of some kind.”²⁵¹ Once belligerent status was obtained, a member of an irregular force obtained the rights of a combatant, including prisoner of war status under the 1929 Geneva Convention.²⁵²

Despite the language of the treaties, before World War II it was unclear whether irregulars operating in occupied territory could obtain belligerent status or receive substantive legal protections.²⁵³ The 1940 edition of the United States law of war manual, for example, stated that those taking up arms against the occupying military force in occupied territory were “war rebels” committing the offense of “war treason.”²⁵⁴ However, the language of the manual was far from clear, and did not explicitly address whether such “war rebels” could be treated as belligerents if they complied with the Hague Convention requirements.

After World War II, war crimes tribunals were forced to squarely address this question. In many cases, Nazi or Japanese soldiers had executed members of resistance forces either without trial or after

²⁵⁰ Annex to the Hague Convention of 1907, Regulations Respecting The Laws And Customs Of War On Land art 1, Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

²⁵¹ Braun, *supra* note 33, at 5.

²⁵² *Id.*

²⁵³ *Id.* at 3–5.

²⁵⁴ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 349 (1 Oct. 1940). *See also id.* para. 205–14.

summary trials.²⁵⁵ In their defense, the Axis officials argued that they were merely trying and executing unprivileged belligerents for acts of “war treason.”²⁵⁶ While the language of pre-war manuals may have been ambiguous, Allied war crimes tribunals reached several clear holdings. First, they held that irregular forces who met the requirements of the 1907 Hague Convention were entitled to combatant immunity and should have been treated as prisoners of war, even when they operated in occupied territory.²⁵⁷ Second, while Allied war crimes tribunals acknowledged that unprivileged belligerents could be tried and executed,²⁵⁸ their holdings recognized that even an unprivileged belligerent was entitled to a fair trial, and the tribunals proved quite willing to examine the details of the trial to determine whether it was fair.²⁵⁹

For example, in 1946 Sergeants Major Shigeru Ohashi and Yoshifumi Komoda were accused of murdering several resistance members on New Britain (now part of Papua New Guinea).²⁶⁰ In their defense, the two Sergeants Major claimed that they had executed the resistance members after a trial.²⁶¹ While the evidence showed that there had been a trial, it lasted only about fifty minutes, no defense counsel or spokesperson was appointed, and the resistance members were executed about an hour after the verdict.²⁶² This trial was held to be inadequate, and the Sergeants Major were convicted.²⁶³ Notably, the court members were instructed to look beyond the trial rules provided under Japanese military law, and the

²⁵⁵ The Trial of Sergeant-Major Shigeru Ohashi and Six Others, V U.N. L. REP. 25, 28, 30 (Australian Military Court, Rabaul, Mar. 20–Mar. 23, 1948); The Trial of Captain Eitaro Shinohara and Two Others, V U.N. L. REP. 32, 34 (Australian Military Court, Rabaul, Mar. 30–Apr. 1, 1946); The Trial of Karl Buck and Ten Others, V U.N. L. REP. 39, 43–44 (British Military Court, Wuppertal, Germany, May 6–May 10, 1946).

²⁵⁶ Trial of Captain Eikichi Kato, V U.N. L. REP. 37 (Australian Military Court, Rabaul, May 7, 1946).

²⁵⁷ The Trial of Sergeant-Major Shigeru Ohashi and Six Others, V U.N. L. REP. 25, 28, 30 (Australian Military Court, Rabaul, Mar. 20–Mar. 23, 1948).

²⁵⁸ *Id.* at 27–28.

²⁵⁹ The Trial of Captain Eitaro Shinohara and Two Others, V U.N. L. REP. 32, 34 (Australian Military Court, Rabaul, Mar. 30–Apr. 1, 1946). *See also* The Trial of Karl Buck and Ten Others, V U.N. L. REP. 39, 43–44 (British Military Court, Wuppertal, Germany, May 6–May 10, 1946); The Trial of Karl Adam Golkel and Thirteen Others, V U.N. L. REP. 45, 51–53 (British Military Court, Wuppertal, Germany, May 15–May 21, 1946); and The Trial of Werner Rohde and Eight Others, V U.N. L. REP. 54, 57–58 (British Military Court, Wuppertal, Germany, May 29–June 1, 1946).

²⁶⁰ The Trial of Sergeant-Major Shigeru Ohashi and Six Others, *supra* note 290.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 30–31.

members were instructed that certain minimum standards must be met before the proceeding counted as a trial.²⁶⁴

Lastly, the tribunals punished torture and other mistreatment of unprivileged belligerents as a war crime.²⁶⁵ The end result was a legal regime that, even before the 1949 Conventions, held that belligerents (even irregulars) could be entitled to prisoner of war protections, that even unprivileged belligerents could not be executed or punished without a fair trial, and that torture or mistreatment of unprivileged belligerents was a war crime.

The 1949 Geneva Conventions significantly improved the situation of members of resistance movements in IAC. In contrast to the ambiguous requirements of World War II, the Geneva Conventions expressly stated that members of irregular forces would be treated as prisoners of war even if they operated in occupied territory.²⁶⁶ Article 4 granted prisoner of war status to the following:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.²⁶⁷

²⁶⁴ *Id.*; see also Trial of Captain Eikichi Kato, *supra* note 289.

²⁶⁵ Trial of Gerhard Friedrich Ernst Flesch, SS Obe. Sturmbannführer, Oberregierungsrat, VI U.N. L. REP. 111, 115–17 (Frostatting Lagmannsrett, Nov.–Dec., 1946, Supreme Court of Norway, Feb., 1948).

²⁶⁶ Braun, *supra* note 33, at 6–9.

²⁶⁷ Geneva Convention III, art. 4.

This language was adopted over the objections of some nations, who would have inserted a requirement that irregular forces operating in occupied territory must control territory of their own and be able to send and receive communications.²⁶⁸

In addition to granting prisoner of war status to organized guerrillas in occupied territory, the 1949 conventions also expanded protections for unprivileged guerrillas not entitled to combatant immunity.²⁶⁹ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GCIV) applied to even those unprivileged belligerents operating within occupied territory, and intended to protect them from the worst abuses seen during World War II.²⁷⁰ Even unprivileged guerrillas became entitled to significant procedural and substantive protections.²⁷¹ The 1949 conventions settled the question of whether resistance forces in occupied territory could obtain combatant immunity, and even today they lay out the key rules for obtaining privileged belligerent status: the adoption of at least a non-standard uniform and the requirement that the resistance group belong to a party to the conflict.

In a classic article, W. Hays Parks discussed the non-standard uniform, defining it as “a hat, a scarf, or an armband—any device recognizable in daylight with unenhanced vision at a reasonable distance.”²⁷² The DoD law of war manual clarifies this description by stating that “the sign suffices if it enables the person to be distinguished from the civilian population,”²⁷³ and providing the examples of a “helmet or headdress that makes the silhouette of the individual readily distinguishable from that of a civilian . . . , a partial uniform (such as a uniform jacket or trousers), load bearing vest, armband, or other device”²⁷⁴ In addition to the device, arms must be carried openly.²⁷⁵ This does not mean that concealed weapons are categorically forbidden, but some weapons must be visible.²⁷⁶ Therefore, as long as the other Article 4 requirements are met, advisors and members of the resistance movement may conduct combat operations

²⁶⁸ Braun, *supra* note 33, at 7.

²⁶⁹ *Id.* at 7–8.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 7–9.

²⁷² W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 517 (2003).

²⁷³ DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.4.1.

²⁷⁴ *Id.* para. 4.6.4.1.

²⁷⁵ *Id.* para. 4.6.5.

²⁷⁶ *Id.*; Dinstein, *supra* note 195, at 162.

in a non-standard uniform without risking committing perfidy or risking loss of combatant immunity.²⁷⁷

However, there is less clarity on how long the non-standard uniform must be worn, despite the importance of this question for guerrilla forces and their advisors. In general, the “fixed distinctive emblem must be worn throughout every military operation against the enemy in which the combatant takes part (throughout means from start to finish, namely, from the beginning of deployment to the end of disengagement), and the emblem must not be deliberately removed at any time in the course of the operation.”²⁷⁸ However, “combatants are not bound to wear the distinctive emblem when discharging duties not linked to military operations (such as training or administration).”²⁷⁹ The key is that the force must wear the emblem and carry weapons openly come what may, and may not adopt a tactic of hiding weapons and signs upon the approach of the enemy.²⁸⁰

While many states supported relaxing these requirements in Additional Protocol I,²⁸¹ the United States’ position is more restrictive, and compliance with the United States’ view will necessarily comply with Additional Protocol I.²⁸² Finally, under the United States’ view, customary international law requires the armed group as a whole to fulfill the Article 4 criteria, meaning that commanders cannot gain protection by complying for merely one specific operation.²⁸³

In addition to wearing some form of uniform, members of the resistance group must belong to a party to the conflict.²⁸⁴ Because state authority may be granted orally, members of a resistance movement sponsored by a state’s unconventional warfare campaign could easily belong to a party to the conflict.²⁸⁵ This allows them to obtain combatant

²⁷⁷ DoD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.

²⁷⁸ Dinstein, *supra* note 195, at 161.

²⁷⁹ *Id.*

²⁸⁰ DoD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.4–4.6.5.

²⁸¹ Additional Protocol I; Memorandum from Joint Chiefs of Staff to Secretary of Defense, subject: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949 (3 May 1985) at 31–40.

²⁸² DoD LAW OF WAR MANUAL, *supra* note 34, para. 19.20; Memorandum from Joint Chiefs of Staff to Secretary of Defense, *supra* note 281, at 31–40.

²⁸³ DoD LAW OF WAR MANUAL, *supra* note 34, para. 4.2.1.1.

²⁸⁴ Geneva Convention III, art. 4; DoD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.2; Dinstein, *supra* note 195, at 160. *See also* Huntley & Levitz, *supra* note 32, at 483–87.

²⁸⁵ DoD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.2.

immunity and distinguishes them from private persons who engage in hostilities.²⁸⁶

The landscape shifts when unconventional warfare is conducted in a NIAC. Recall that unconventional warfare will generally be a NIAC when conducted inside a territorial state against a non-state armed group.²⁸⁷ In such a situation, while the non-state armed group will generally lack legal authority to take action against the resistance movement,²⁸⁸ the territorial state is in a different situation. The following section will consider the status of the force with respect to the territorial state.

Advisors, as members of a state's armed forces, will generally receive a form of immunity similar to—but broader than—combatant immunity. Combatant immunity is limited to IAC, and is only granted to forces meeting the Article 4 requirements of the Third Geneva Convention.²⁸⁹ However, at least since the *Caroline* case, international law has recognized that a state may not prosecute agents of a foreign state who lawfully participate in a NIAC.²⁹⁰ Because no law imposes a duty to wear a uniform

²⁸⁶ *Id.* para. 4.18.3.

²⁸⁷ See *supra* sec. IV.A.2 for further discussion.

²⁸⁸ DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.17.2.

²⁸⁹ Geneva Convention III, art. 4; OPERATIONAL LAW HANDBOOK, *supra* note 88, at 182.

²⁹⁰ DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.4.1.1 (citing Daniel Webster, *Letter to Mr. Fox*, Apr. 24, 1841, reprinted in THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 124 (1848)). The relevant text of the letter reads as follows:

The government of the United States entertains no doubt that, after this avowal of the transaction, as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law, for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs, by public means, cannot desire the punishment of individuals, when the act complained of is declared to have been an act of the government itself.

People v. McLeod, 1 HILL 377 (N.Y. Sup. Ct. 1841); JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 113–17 (2012). While *ex parte Quirin* purports to impose a uniform requirement during armed conflicts, it is the *Caroline* case, not *ex parte Quirin*, that would apply. *Ex parte Quirin*, 317 U.S. 1, 12–16 (1942). In *Quirin*, the German saboteurs were carrying out their hostile activities against the territorial state, not against a non-state armed group that the territorial state itself had a duty to suppress. *Ex parte Quirin*, 317 U.S. 1, 12–16 (1942). The facts of the *Caroline* case are exactly on point,

in a NIAC, *Caroline* immunity is likely to be broader than the combatant immunity provided in a NIAC. This is supported by the principle that the territorial state has an obligation to prevent the use of its territory by the non-state armed group,²⁹¹ and the principle that the territorial state generally lacks the ability to interfere with another state's exercise of the right of self-defense.²⁹² Because advisors are not taking military action against the territorial state, and because the territorial state itself has an obligation to act against the non-state armed group, the territorial state is unlikely to be able to insist that advisors adopt certain distinctive insignia.²⁹³

This rationale would directly apply to the “expeditionary targeting force” that the United States has sent to assist the YPG in Syria.²⁹⁴ Notably, they are in precisely the same situation as the British colonial militia involved in the *Caroline* incident, who crossed the border and entered the United States to engage a non-state armed group threatening British colonial authorities in Canada.²⁹⁵ Like the militia in the *Caroline* incident, the targeting force members are exercising public authority on behalf of the government of the United States, not operating in their personal capacity.²⁹⁶ Therefore, they have immunity for their official acts under international law.

Arguably, this same rationale would apply to other members of the resistance movement, including guerrillas, the auxiliary, and the underground, so long as they confine their activities to those directed against the non-state armed group. However, there is no precedent for such a radical expansion of *Caroline* immunity, and it is more likely that members of the resistance movement (as opposed to advisors) would be considered simply unprivileged belligerents subject to territorial state jurisdiction. In such a case, they would be entitled to the protections of Common Article III to the Geneva Conventions, as well as Additional

and in *Caroline* the only question was whether the fighters acted pursuant to state authority, not whether they were in uniform. *People v. McLeod*, 1 HILL 377 (N.Y. Sup. Ct. 1841).

²⁹¹ DINSTEIN, *supra* note 87, at 214.

²⁹² *See Deeks, supra* note 109, at 494–95; Schmitt, *supra* note 112, at 40.

²⁹³ Ian Henderson, *Civilian Intelligence Agencies and the Use of Armed Drones*, in 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 144 (M.N. Schmitt et al. eds., 2010).

²⁹⁴ Missy Ryan, *In Intensified Islamic State Effort, U.S. to Send Elite Targeting Force to Iraq*, WASH. POST (Dec. 1, 2015), <http://wpo.st/IEPF1>.

²⁹⁵ DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.4.1.1 (citing Webster, *supra* note 290); Letter from Henry S. Fox (Jan. 8, 1838), in DOCUMENTS OF AMERICAN HISTORY 289–91 (6th ed., 1958).

²⁹⁶ *See id.*

Protocol II.²⁹⁷ In effect, this would leave them with protections similar to those of an unprivileged belligerent during international armed conflict. However, Article 6 of Additional Protocol II suggests that unprivileged members of resistance movements should generally be given “the broadest possible amnesty” after the conflict.²⁹⁸ While this is not mandatory, it may provide significant diplomatic and public opinion support for imprisoned members of the resistance movement.

2. Unprivileged Belligerency: When Does Status Limit What a Force Can Do?

There will be times, especially during the early phases of unconventional warfare, when operational risk prevents the force from complying with the requirements for combatant immunity. There are also portions of the force, such as the underground and auxiliary, that conduct clandestine activities and are unlikely ever to meet the conditions for privileged belligerency. It is not an affirmative violation of international law for the force to operate out of uniform.²⁹⁹ However, when operating in civilian clothes, the force will not receive prisoner of war status or combatant immunity, and the force incurs additional restrictions on how it may operate. These restrictions go beyond the general LOAC rules discussed above, and are uniquely tied to the force’s status. They include the prohibition on perfidy and the law of armed conflict prohibition of assassination.

The first restriction is the prohibition on perfidy. While international law does not prevent guerrillas from fighting out of uniform,³⁰⁰ it does

²⁹⁷ Geneva Convention III, art. 3; Additional Protocol II, art. 2.

²⁹⁸ Additional Protocol II, art. 6.

²⁹⁹ Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE (Yôrām Dinštein & Mala Tabory eds., 1989); Dinstein, *supra* note 195, at 154–55; Jelena Pejic, *The European Court of Human Rights’ Al-Jedda judgment: the oversight of international humanitarian law*, 93 INT’L REV. RED CROSS 837, 846 (2011).

³⁰⁰ Baxter, *supra* note 33, at 502; Kenneth Anderson, *Readings: Civilian Intelligence Agencies and the Use of Armed Drones by Ian Henderson*, LAWFARE (June 27, 2014 3:00 PM), <https://www.lawfareblog.com/readings-civilian-intelligence-agencies-and-use-armed-drones-ian-henderson>; Henderson, *supra* note 293, at 144. Despite pre-release controversy, the DoD’s Law of War Manual has affirmed that this remains the state of the law. Hays Parks & Edwin Williamson, *Where is the Law of War Manual?*, WEEKLY STANDARD (July 22, 2013), <http://www.weeklystandard.com/>

prohibit killing or wounding by feigning a civilian, non-combatant status, or by feigning another protected status.³⁰¹ The test here is whether there is an intent to deceive the target and whether the deception “is the proximate cause of the killing . . . [or] wounding.”³⁰² However, it is not perfidy to feign civilian status to commit sabotage or espionage.³⁰³

This means that a force will be more limited when enemy personnel must be directly engaged. Because sabotage is permissible even when feigning civilian status, a commander could order a member of the auxiliary or underground to clandestinely destroy enemy property without committing perfidy.³⁰⁴ But when enemy personnel must be directly engaged, the guerrilla force is more limited. While it may infiltrate or exfiltrate from the target in civilian clothes and with concealed weapons, the force should adopt a distinctive sign and carry weapons openly during the attack itself.³⁰⁵ While observance of these rules will not afford the force privileged status, they likely fulfill the force’s duty under international law.

The second restriction is the LOAC prohibition on assassination.³⁰⁶ However, the LOAC prohibition must be distinguished from several similar rules. First, there is a general prohibition of assassination in peacetime, where it is recognized that “[i]n peacetime, the citizens of a nation—whether private individuals or public figures—are entitled to immunity from intentional acts of violence by citizens, agents, or military forces of another nation.”³⁰⁷ Second, there is the United States executive

where-is-the-law-of-war-manual/article/739267; DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.17.4–4.17.5.

³⁰¹ Additional Protocol I, art. 37. While Article 37 prohibits capturing the enemy by feigning protected status, the United States does not believe that this reflects customary international law. DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.22.2.1.

³⁰² Parks, *supra* note 272, at 519, 541–42. *But see* Huntley & Levitz, *supra* note 32, at 495–97 (arguing that the direct participation in hostilities standard “sheds light on which [surrogate] activities would require those conducting them to distinguish themselves from the civilian population . . .”). The DoD *Law of War Manual* states that sabotage is permissible out of uniform, lending strong support to W. Hays Parks’ test. DOD LAW OF WAR MANUAL, *supra* note 34, paras. 4.17.3, 4.17.4, 5.22.2.

³⁰³ DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.22.2.

³⁰⁴ *Id.* para. 4.17.5.

³⁰⁵ *See supra* notes 339–41 and accompanying test for the prohibition on feigning civilian status where it is the proximate cause of killing or wounding.

³⁰⁶ Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 628–32 (1992).

³⁰⁷ Parks, *supra* note 33, at 4.

order's prohibition on assassination.³⁰⁸ While important, the executive order is a matter of United States policy that falls outside the scope of this article.³⁰⁹

The LOAC rule on assassination has been said to prohibit the selective killing of the enemy by persons not in uniform.³¹⁰ Defined this way, the prohibition on assassination would be a significant limitation on resistance movement personnel operating out of uniform. However, the true scope of the rule is much narrower. It contains “two elements: the targeting of an individual, and the use of treacherous means.”³¹¹ The first element requires aiming the attack at a particular, selected individual, and is relatively straightforward.³¹² The second element, the use of “treacherous means,” is much more difficult. At a minimum, the element includes perfidious conduct.³¹³ This means that where the attackers feign protected status in the manner described above to attack a selected individual, the attack violates both the prohibition on assassination and the rule against perfidy.³¹⁴ However, treacherous conduct can be broader than perfidy, and includes offering a bounty for the killing of a particular person³¹⁵ or declaring that an offer of surrender will not be accepted.³¹⁶

This leaves a relatively straightforward rule for unconventional warfare. Perfidy—the feigning of a protected status where the deception proximately causes death or injury—violates both the rule against perfidy and the rule against assassination, while offering a bounty or declaring that a person will receive no quarter violates the rule against assassination.

C. Managing Legal Status in Syria: The People's Protection Units (YPG)

The YPG is an example of a successful resistance movement operating against a non-state armed group that controls territory.³¹⁷ While the YPG

³⁰⁸ Exec. Order No. 12,333, 40 Fed. Reg. 59941, 59952 (1981).

³⁰⁹ See Parks, *supra* note 33, at 4.

³¹⁰ Kelly, *supra* note 33, at 103, 106.

³¹¹ Schmitt, *supra* note 306, at 632.

³¹² Schmitt, *supra* note 306, at 632; Kelly, *supra* note 33, at 102–103.

³¹³ Schmitt, *supra* note 306, at 634–35.

³¹⁴ *Id.*

³¹⁵ *Id.* at 635.

³¹⁶ Parks, *supra* note 33, at 5.

³¹⁷ See generally Ben Hubbard, *On the Road in Syria, Struggle All Around*, N.Y. TIMES, Nov. 12, 2015, at A1; Yaroslav Trofimov, *Russian Intervention Emboldens Syrian Kurds*,

does not have combatant immunity, it has been able to manage its legal status effectively while generally complying with LOAC. However, this area of the law offers a critical opportunity—one that has not yet been taken—to secure better treatment for captured YPG fighters and force adversaries to bear the costs when they violate international law.

1. The YPG: Privileged Belligerents?

The YPG is one of the most effective fighting forces in Syria,³¹⁸ but determining whether its members are privileged belligerents requires analysis under Article 4 of the Third Geneva Convention. Open-source media frequently depicts YPG fighters carrying arms openly and wearing full military-style uniforms.³¹⁹ Reports depict a fairly rigid command structure that makes efforts to conduct its operations in compliance with the law of war.³²⁰ Also, the YPG has an argument that it belongs to a party to the conflict given the significant support it receives from the United States.³²¹ However, the YPG would only become privileged belligerents if the Syrian conflict were to become an IAC, which would trigger the full protections of the 1949 Geneva convention.³²² In the absence of an IAC, YPG fighters remain unprivileged belligerents.³²³

2. The YPG: The Fair Trial Requirement

However, as discussed above, even unprivileged members of a resistance movement are entitled to significant protections under the LOAC. Most important is the requirement that any trial comply with the minimum standards of Common Article 3 and Additional Protocol II. This means that members of the territorial state government could be found criminally liable for carrying out punishment on captured YPG members

WALL ST. J. (Jan. 14, 2016), <http://www.wsj.com/articles/russian-intervention-emboldens-syrian-kurds-1452773070>.

³¹⁸ Gordon & Schmitt, *supra* note 66.

³¹⁹ *Id.*

³²⁰ Letter from General Command of the People's Protection Units to *Human Rights Watch* (22 July, 2015), https://www.hrw.org/sites/default/files/supporting_resources/letter_from_ypg_to_human_rights_watch150722.pdf.

³²¹ Davison, *supra* note 14.

³²² Geneva Convention III, art. 4.

³²³ Agence France-Presse, *Dutch man suspected of killing Isis fighter could face murder charge*, GUARDIAN (Jan. 15, 2016), <http://www.theguardian.com/world/2016/jan/15/dutch-man-suspect-killing-isis-fighter-arrest>.

if trials were not conducted by regularly constituted courts applying international or domestic law in effect at the time of the offense,³²⁴ or if the trials were not substantively fair.³²⁵ In addition, should YPG members be tried by the territorial state, there is significant support for the position that they should be given broad amnesty after the conflict has ended.³²⁶

3. *The YPG: Undue Interference by the Territorial State*

Even in the absence of formal combatant immunity, there is a strong argument that Syrian government interference with the YPG could breach its duty to prevent attacks from its territory. Recall the broader context of U.S. support to the YPG: The United States is acting in self-defense and collective self-defense of Iraq pursuant to Article 51 of the U.N. Charter.³²⁷ It is doing so because the Syrian government is unable or unwilling to prevent ISIS attacks from its territory.³²⁸ While the Syrian government is not obligated to afford the YPG combatant immunity, systematic arrests and trials of YPG members for acts directed against ISIS (as opposed to the Syrian government) likely breaches Syria's duty to prevent ISIS from using its territory to conduct attacks. This is especially true if the Syrian government is not taking similar action against ISIS.

VI. Conclusion

From the liberation of Europe³²⁹ to Kobane's stand against ISIS,³³⁰ partisan fighters have a noble history of struggle against tyranny and

³²⁴ Additional Protocol II, art. 6.

³²⁵ Trial of Captain Eikichi Kato, V U.N. L. REP. 37 (Australian Military Court, Rabaul, May 7, 1946).

³²⁶ Additional Protocol II, art. 6.

³²⁷ Preston, *supra* note 16.

³²⁸ *Id.*

³²⁹ FOOT, *supra* note 25 (describing United States and British support to the French resistance during World War II); PATRICK K. O'DONNELL, THE BRENNER ASSIGNMENT (2008) (describing Office of Strategic Services support to anti-fascist Italian partisans during World War II); HAUKELID, *supra* note 185 (describing Norwegian partisan attacks against the Nazi nuclear program); THOMAS GALLAGHER, ASSAULT IN NORWAY (Lyons Press ed. 2002) (describing Norwegian partisan attacks against the Nazi nuclear program); OFFICE OF STRATEGIC SERVICES, THE SECRET WAR REPORT OF THE OSS (Anthony Cave Brown ed., 1976) (describing United States support to resistance movements during World War II).

³³⁰ Barnard & Shoumali, *supra* note 13, at A8.

oppression.³³¹ While international law has developed since the famous unconventional warfare campaigns of World War II, unconventional warfare can be carried out under the modern LOAC. This article has identified the legal rules governing unconventional warfare and applied them to the two unconventional warfare campaigns the United States is currently conducting in Syria, finding that both comply with the modern LOAC.

Applying international law's *jus ad bellum* rules to these unconventional warfare campaigns revealed several key insights. First, it is possible for unconventional warfare campaigns to avoid triggering armed conflict, though this will necessarily limit their scope. Second, unconventional warfare may be conducted in a NIAC without triggering IAC with the territorial state. Should mistakes occur due to confusion on the battlefield or manipulation by the partner force, it is possible to remedy the situation and avoid giving the territorial state legal justification for continued IAC.

Examination of *jus in bello* rules revealed a wide scope of permissible activities for United States-supported resistance movements and their SOF advisors. However, risks are present. While a partner force has expansive authority to attack targets, conduct detainee operations and trials, carry out sabotage operations, and requisition supplies, U.S. advisors must carefully monitor partner force conduct to prevent violations and report them if they occur. Finally, this article asserted that many resistance movements will be able to achieve lawful combatant status in IAC, and that even unprivileged members of the movement retain significant protections under the law of war. In particular, resistance fighters could operate out of uniform without affirmatively violating the law of war so long as they avoid perfidy and assassination.

Overall, unconventional warfare can be conducted under the modern law of war. While portions of the force may be subject to prosecution by a hostile power, a properly designed unconventional warfare campaign will comply with international law and the LOAC. This leaves the unconventional warfare campaigns pioneered by the partisans and resistance fighters of World War II as a viable option for forces struggling in conflicts against oppression today. Recognizing the lawfulness of

³³¹ ANNE APPLEBAUM, *IRON CURTAIN: THE CRUSHING OF EASTERN EUROPE 1944–1956* at 90–109 (2012) (describing anti-Nazi and anti-Soviet Polish partisans at the close of World War II).

unconventional warfare allows the United States to support properly organized and properly led partisans as they fight their own battles, liberate their own country, and establish their own government with the goal of a just and lasting peace.

BAD PAPER: REFORMING THE ARMY REPRIMAND PROCESS

CAPTAIN MARK E. BOJAN*

*You are hereby reprimanded. Your conduct falls below the standard I expect from a Soldier in this division. I question your ability to lead and your potential for future military service.*¹

I. Introduction

American servicemembers are held to a higher standard of conduct than civilians.² When misconduct occurs, commanders have a broad range

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¹ This is a hypothetical scenario. Any resemblance to actual persons or events is entirely coincidental.

² See Kori Schake, *Yes, The Military Has Higher Standards*, BLOOMBERG VIEW (Nov. 15, 2012), <http://www.bloomberglaw.com/articles/2012-11-16/why-military-is-held-to-higher-personal-standards> (observing that the “men and women who fight the nation’s wars accept intrusions into their activities most of us would balk at”). The Uniform Code of Military Justice (UCMJ) criminalizes many acts that are not otherwise criminal for civilians. See, e.g., UCMJ art. 134 (2012) (making adultery a criminal offense); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 62c(2) (2012) [hereinafter MCM] (providing that in order to “constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting”). These strictures are unique to the military. “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” *Id.* pt. I, ¶ 3.

of disciplinary options.³ One such option is an administrative reprimand.⁴ Reprimands are in widespread, routine use in the Army.⁵ When a general officer either issues a reprimand or directs that one issued by a subordinate be filed permanently in a soldier's Official Military Personnel File⁶ (OMPF), the document is commonly referred to as a General Officer Memorandum of Reprimand, or GOMOR.⁷

³ Compare MCM, *supra* note 2, app. 12 (listing maximum possible punishments for offenses under the UCMJ, up to and including death), and UCMJ art. 15, *supra* note 2 (describing commanders' limited non-judicial punishment authority), with Rule for Courts-Martial 306(c)(2) (MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(c)(2) (June 2015 update)) (authorizing commanders to dispose of offenses under the UCMJ by administrative action characterized as "corrective" or "withholding of privileges").

⁴ See U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4 (19 Dec. 1986) [hereinafter AR 600-37] (describing the administrative reprimand process).

⁵ *Id.*

⁶ The Official Military Personnel File (OMPF) is a subset of a soldier's Army Military Human Resource Record (AMHRR). See U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCE RECORDS MANAGEMENT para. 1-6 (7 Apr. 2014) (hereinafter AR 600-8-104) (noting that "[T]he naming convention AMHRR is an umbrella term encompassing human resource (HR) records for [s]oldiers, retirees, veterans, and deceased personnel. The AMHRR includes, but is not limited to, the official military personnel file (OMPF), finance related documents, and non-service related documents deemed necessary to store by the Army."). Although it encompasses a wide range of matters, the OMPF subset is limited to "permanent documentation within the AMHRR that documents facts related to a [s]oldier during the course of his or her entire Army career, from time of accession into the Army until final separation, discharge, or retirement." AR 600-8-104, ¶ 1-6b. "The purpose of the OMPF is to preserve permanent documents pertaining to enlistment, appointment, duty stations, assignments, training, qualifications, performance, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, and any other personnel actions." *Id.* ¶ 1-6b(1). "The OMPF remains in Army control for [sixty-two] years from a [s]oldier's final separation date. At the end of [sixty-two] years, the OMPF is transferred to the control of the [National Archives and Records Administration] as a public record." *Id.* ¶ 1-6b(2). The Military Personnel Record Jacket (MPRJ), on the other hand, refers to the now-defunct DA Form 201, which was literally a paper jacket or file folder that units in the field used to maintain records. AR 600-8-104 defines the MPRJ as the "individual military personnel records maintained in a DA Form 201 (Military Personnel Records Jacket) (Inactive) normally kept by brigade or battalion S1, UA, or MPD serving the [s]oldier's unit. The Military Personnel Records Jacket / DA Form 201 have been eliminated." *Id.* § 2, Terms. However, the term MPRJ is still commonly used in the Army when referring to any soldier's personnel file maintained by a unit in the field.

⁷ For purposes of this discussion, the terms reprimand, memorandum of reprimand (MOR), and general officer memorandum of reprimand (GOMOR) are used interchangeably, except with respect to GOMOR filing approval authorities. See AR 600-37, *supra* note 4, ¶ 3-4b (requiring the order of a general officer (to include one frocked to the rank of brigadier general) senior to the recipient or the direction of an officer having general court-martial jurisdiction over the individual in order for a reprimand to be filed permanently in a soldier's OMPF).

Arguably, GOMORs have been over-used to the point of abuse. They have become *de facto* punishment not subject to the extensive due process protections of the Uniform Code of Military Justice (UCMJ). This article proposes reforming the reprimand process in Army Regulation (AR) 600-37, Unfavorable Information.⁸ The revised regulation should require written legal review not only of reprimands, but of all unfavorable information intended for filing in the OMPF. The reviewing judge advocate should affirm that adverse information intended for filing is supported by a preponderance of evidence. Inclusion of unproven criminal offenses in administrative reprimands should be prohibited. Policy guidance should emphasize that OMPF filing is a significant, potentially career-ending action, and that alternative options should be carefully considered. The revised regulation should also stress the use of the unfavorable information referral process in AR 600-37.⁹

Electronic record-keeping, new evaluation systems, and aggressive record review protocols for promotion boards have obviated the GOMOR's secondary function of preserving records of soldier misconduct. Written reprimands once served as an efficient, one-page summaries of misconduct in paper-only personnel records.¹⁰ However, it is no longer overly burdensome to scan and transmit entire administrative investigations to a soldier's OMPF. Technology has rendered this summary function obsolete. As a result, the GOMOR has become—at best—an unnecessarily punitive cover letter.

Contrary to popular belief, GOMORs are not the only way to transfer unfavorable information into a soldier's OMPF. Since 1955, the Army has had procedures in place that allow OMPF filing of almost any

⁸ *Id.* ¶ 3-4.

⁹ See AR 600-37, *supra* note 4, ¶ 3-6; see also *infra* section III.A.2 for discussion.

¹⁰ Paper-only personnel records were standard through the end of the twentieth century. The Army did not maintain centralized electronic personnel records until the relatively recent introduction of the Interactive Personnel Electronic Records Management System (iPERMS). See AR 600-8-104, ¶ 3-5a.

OMPF records pertaining to a [s]oldier currently serving, discharged, retired, or deceased while in service on or after 1 October 2002 are maintained in iPERMS. Official information and documents stored in the OMPF or other previously authorized files prior to 1 October 2002 are maintained at the NPRC in St. Louis, Missouri and are in paper or microfiche format.

Id. See *infra* section C2 for further discussion.

unfavorable information, so long as it is first referred to the soldier for comment.¹¹ Consistent use of existing referral procedures will ensure that soldiers will be called to answer for misconduct before boards of inquiry, particularly when combined with candid evaluations, without continued overreliance on GOMORs.

General Officer Memorandum of Reprimand recipients receive certain limited procedural due process protections, specifically notice and an opportunity to respond, before an OMPF filing determination is made.¹² However, in their present form and in the context of modern Army practice, these protections have become hollow. Despite soldiers' acknowledged liberty interests in their military careers, the GOMOR has evolved over the last thirty years to become—and is widely acknowledged as—a virtually unchecked Army career-killer.¹³ Such broad recognition speaks to the adequacy of the GOMOR's associated due process. For these reasons, an update to AR 600-37 is long overdue.

II. Background

A. Punitive Administrative Actions

The U.S. Department of Defense (DoD) continues to focus on enforcing standards of conduct in the military, including the prevention of sex-based offenses.¹⁴ The National Defense Authorization Act (NDAA) for Fiscal Year 2014 contained several measures intended to deter such

¹¹ AR 600-37, *supra* note 4, ¶ 3-6.

¹² *Id.* ¶ 3-4b.

¹³ See *infra* note 37, 98 for further discussion.

¹⁴ In early 2004, prompted by reports of sexual assault against servicemembers deployed in Iraq and Kuwait, former Secretary of Defense Donald H. Rumsfeld directed a review of the Department of Defense (DoD) process for treatment and care of military sexual assault victims. Memorandum from Secretary of Defense to Under Secretary of Defense (Personnel and Readiness), subject: Department of Defense Care for Victims of Sexual Assaults (5 Feb. 2004). See generally *Mission and History*, U.S. DOD SEXUAL ASSLT' T PREV'N AND RESPONSE OFF., <http://www.sapr.mil/index.php/about/mission-and-history> (discussing the establishment of the DoD's Sexual Assault Prevention and Response (SAPR Office)). The DoD SAPR reflects the DoD's policy goal of establishing a "culture free of sexual assault, through an environment of prevention, education and training, response capability . . . , victim support, reporting procedures, and appropriate accountability that enhances the safety and well being [*sic*] of all persons." U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM para. 4b (23 Jan. 2012) (C2, 20 Jan. 2015).

offenses.¹⁵ In section 1745 of NDAA 2014, Congress introduced a new term to the military disciplinary lexicon, “punitive administrative action” (PAA):

If a complaint of a sex-related offense is made against a member of the Armed Forces and the member is convicted by court-martial or receives non-judicial punishment or *punitive administrative action* for such sex-related offense, a notation to that effect shall be placed in the personnel service record of the member, regardless of the member’s grade.¹⁶

Unfortunately, Congress neglected to define the term.

In addition to being left undefined, the term PAA is also internally inconsistent. Disciplinary actions may be either punitive (related to punishment for criminal offenses) or administrative (non-punitive, albeit potentially adverse).¹⁷ What exactly is a PAA and why is the appearance of the term so important?

Former Secretary of the Army John M. McHugh answered the first question in Army Directive 2014-29, the implementing directive for section 1745 of NDAA 2014.¹⁸ Secretary McHugh defined PAAs expansively as “any adverse administrative action initiated as a result of

¹⁵ See generally National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701–1747, 127 Stat. 672, 950-983 (2013) (NDAA 2014) (implementing multiple reforms of the UCMJ and administrative provisions related to sexual harassment and assault). Congress has clearly stated that deterring sexual assault and harassment in the military should be a legislative priority. See, e.g., *Sexual Assault in the Military: Prevention: Hearing Before the Subcom. on Military Personnel of the H. Armed Services Comm.*, 111th Cong. (2009) (statement of Rep. Susan A. Davis, Chairwoman, H. Subcom. on Military Personnel) (“Just as we have a responsibility to ensure that victims of sexual assault receive all the support that can be provided following an attack, we also have an obligation to do all we can to prevent such attacks from ever taking place.”).

¹⁶ National Defense Authorization Act for Fiscal Year 2014, § 1745(a)(1) (emphasis added).

¹⁷ The DoD has not defined the word “punitive.” JOINT CHIEFS OF STAFF, PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (15 Nov. 2015). However, the word is commonly understood to mean “[r]elating to punishment; having the character of punishment or penalty; [or] inflicting punishment or a penalty.” *Punitive*, Black’s Law Dictionary (10th ed. 2014).

¹⁸ U.S. DEP’T OF ARMY, DIR. 2014-29, INCLUSION AND COMMAND REVIEW OF INFORMATION ON SEX-RELATED OFFENSES IN THE ARMY MILITARY HUMAN RESOURCE RECORD 4a (9 Dec. 2014) [hereinafter ARMY DIR. 2014-29].

the sex-related offenses identified [herein, which] includes, but is not limited to, memorandum or [*sic*] reprimand, admonishment or censure from all levels of command.”¹⁹

The significance of PAAs lies not in how they entered the military lexicon,²⁰ but in how the service Secretaries interpreted the term.

¹⁹ *Id.* Despite the qualifier “included, but is not limited to,” the intent of this provision on any fair reading is plainly to classify reprimands as PAAs. *Id.* The Air Force defines a PAA as a “Letter of Reprimand” without further qualification. U.S. DEP’T OF AIR FORCE, INSTR. 36-2406, OFFICER AND ENLISTED EVALUATION SYSTEMS para. 1.1 (2 Jan. 2013) (C2, 24 Aug. 2015); *see also* U.S. DEP’T OF AIR FORCE, INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM ch. 4 (26 Nov. 2014) (describing the Air Force administrative reprimand process); *but see* Navy Administrative Message, 189/14, 202029Z Aug. 14, Chief, Naval Operations, subject: Inclusion and Command Review of Information on Sex-Related Offenses in Personnel Service Records para. 7 [hereinafter NAVADMIN Message 189/14] (limiting PAAs to “punishments imposed by court-martial or [non-judicial punishment] (e.g., punitive letters of reprimand)”).

²⁰ A detailed examination of the legislative history of NDAA 2014 is beyond the scope of this article. However, legislative records suggest that the introduction of the term PAA in § 1745 was an unintended byproduct of House and Senate staff negotiators’ hurried reconciliation of their respective proposed NDAA 2014 bills, and not a deliberate expression of specific legislative intent. The proposed bills were House Resolution 1960 (H.R. 1960) and Senate Bill 1197 (S. 1197). H.R. 1960, 113th Cong. § 547 (2013); S. 1197, 113th Cong. § 534 (2013). *See also* STAFF OF H. COMM. ON THE ARMED SERVICES, 113TH CONG., LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY H.R. 3304, PUBLIC LAW 113-66 715-16 (Comm. Print Dec. 2013), <https://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/pdf/CPRT113HPRT86280.pdf> [hereinafter JOINT EXPLANATORY STATEMENT] (describing the development of NDAA 2014). The final text of NDAA 2014 and the material in the Joint Explanatory Statement were the product of an agreement between the Chairmen and the Ranking Members of the House and Senate Armed Services Committees. JOINT EXPLANATORY STATEMENT, at III (note by Mr. Zach Steacy, Dir., Legis. Operations, H. Comm. on the Armed Services). The Senate was unable to complete the regular processing of S. 1197 in time to ensure “the enactment of an annual defense bill by the end of the calendar year,” and so “was unable to initiate a formal conference with the House” on the bill. *Id.* Instead, the Chairmen and Ranking Members of the respective Committees directed their staffs to finalize a compromise bill with only three days left before the House recessed for the holidays. 159 Cong. Rec. S8548 (daily ed. Dec. 9, 2013) (statement of Sen. Levin). The PAA language first appeared in House Resolution 441 (H.R. 441), which contained the resulting agreed joint text. JOINT EXPLANATORY STATEMENT, at III; H.R. 441, 113th Cong. § 1745(a)(1) (2013). The Joint Explanatory Statement indicates that the proposed Senate provision requiring “administrative action” for sex-related offenses to be noted in offenders’ service records was adopted in the joint text with a clarifying amendment. *Id.* at 716. That clarifying amendment must have added the word “punitive,” as the joint text was not subsequently amended prior to final adoption. *Id.* However, since no formal conference committee was convened on H.R. 441, direct support for this conclusion is lacking. In any event, whether the term was intentionally introduced is secondary. Because the term is now law, practitioners must understand and accommodate the focus on reprimands in Army

Secretarial-level classification of administrative reprimands as punitive actions raises serious concerns.²¹ How much punitive character may an administrative action acquire before it is no longer merely administrative but *de facto* punishment? If such an action rises to the level of punishment, is administrative due process still sufficient to protect soldiers' rights?

Importantly, the designation of administrative reprimands as punitive conflicts directly with a contrary statement in the Manual for Courts-Martial (MCM). The MCM describes administrative reprimands as "corrective measures that promote efficiency and good order and discipline."²² According to the MCM, reprimands and other administrative corrective measures "are not punishment."²³

Given this statement, the fact that the Secretaries of the Army and the Air Force clearly believed that administrative reprimands in their respective services were sufficiently punitive to justify placing them under the rubric of PAAs is troubling.²⁴ Indeed, the Secretaries' guidance raises

Directive 2014-29. ARMY DIR. 2014-29, *supra* note 18, ¶ 4a. "If you like laws and sausages, you should never watch either one being made." (Attributed to German statesman Otto von Bismarck (1815–1898)). *But see* Robert Pear, *If Only Laws Were Like Sausages*, N.Y. TIMES (Dec. 4, 2010), <http://www.nytimes.com/2010/12/05/weekinreview/05pear.html> (observing that "[v]on Bismarck's] quotation is offensive to sausage makers; their process is better controlled and more predictable.").

²¹ The Secretaries of the Army and the Air Force—the only services that use administrative reprimands—both defined PAAs to include reprimands. *See supra* notes 16-18 and accompanying sources. Punitive administrative actions are not limited to sex-related offenses. Neither section 1745 of NDAA 2014 nor Army Directive 2014-29 contains any such limitation. To the contrary, section 1745 simply lists PAAs as one possible disposition of a sex-related offense, along with courts-martial and non-judicial punishment. *See supra* note 14 and accompanying sources. The same possible dispositions apply to all offenses. Although Army Directive 2014-29 does not expressly amend AR 600-37, it both lists the regulation as a reference and directs the Army Deputy Chief of Staff, G-1, to "incorporate the provisions of this directive into the next version of [AR 600-37] as soon as practicable." ARMY DIR. 2014-29, *supra* note 18, ¶ 9, and encl., ¶ k.

²² MCM *supra* note 2, part V, ¶ 1g.

²³ *Id.*; *see also id.* R.C.M. 306(c)(2) (describing administrative reprimands as "corrective" as opposed to punitive).

²⁴ Recall that, despite the introduction of PAAs to the mix, the regulatory distinction between punitive reprimands (those imposed as punishment following judicial or non-judicial disciplinary proceedings) and administrative reprimands under AR 600-37 persists. *See supra* note 4 distinguishing the underlying authorities for punitive and administrative reprimands). The fact that section 1745 of NDAA 2014 was passed—thereby legitimizing the concept of punitive administrative actions contrary to those authorities and the prior stance of the MCM—is, of course, the larger issue. To be sure, administrative reprimands are "subject to regulations of the Secretary concerned." MCM, *supra* note 2, R.C.M. 306(c)(2). However, in this case there appears to be a need to reconcile the Secretaries'

significant, disturbing questions about the role and impact of reprimands in today's military disciplinary process, which the remainder of this article will address.

Among the questions raised is: what level of due process that should be associated with such actions? Generally, the more severe the possible consequences of punishment, the greater the degree of due process that is typically afforded to the individual subject to that punishment.²⁵ Therefore, we must also ask: just how punitive is an administrative reprimand in the context of modern Army practice?²⁶ Does an administrative reprimand have sufficient punitive character and impact to obviate its due process protections? With these questions in mind, we turn next to military due process generally, examine the due process protections available to soldiers in adverse administrative actions, and consider the Army's reprimand process.

B. Due Process

The Fifth and Fourteenth Amendments to the United States Constitution prohibit deprivations of life, liberty, or property without due process of law.²⁷ Due process protections may generally be considered either substantive or procedural.²⁸ Substantive due process protects against "government power arbitrarily and oppressively exercised," whereas procedural due process protects against "arbitrary takings."²⁹

Constitutional due process protections plainly extend to members of the military.³⁰ However, courts give "particular deference to the determination[s] of Congress, made under its authority to regulate the land

designations of administrative reprimands as punitive with both the imperative of section 1745 and the existing strictures of the MCM.

²⁵ Compare MCM part V (describing the limited protections afforded in nonjudicial punishment proceedings) with MCM part II (laying out the extensive body of procedural rules with respect to courts-martial).

²⁶ Air Force Instruction 36-3406 notwithstanding, the primary focus of this article is on Army practice.

²⁷ U.S. CONST. amends. V, XIV.

²⁸ *City of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

²⁹ *Id.*

³⁰ See *Weiss v. United States*, 510 U.S. 163, 176–77 (1994) (observing that Congress is "subject to the requirements of the Due Process Clause when legislating in the area of military affairs").

and naval forces[.]”³¹ The Supreme Court has acknowledged that the specific “tests and limitations [of due process] may differ because of the military context.”³² “The difference arises from the fact that the Constitution contemplates that Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.’”³³ Accordingly, the due process available to military members in adverse administrative actions is built into the regulations governing those actions.³⁴

Courts have observed with respect to Army regulations that the “requirements of procedural due process apply only to the deprivation of interests encompassed by the due process protection of liberty and property.”³⁵ Absent such an interest, procedural due process is not offended so long as the Army adheres to its own regulations.³⁶ Significantly, courts have held that although service members do not have a property interest in military service or employment, they do have a liberty interest in being able to pursue such continued service or employment where military action to terminate that employment might stigmatize them.³⁷

³¹ U.S. CONST., art. I, § 8. *Weiss*, 510 U.S. at 177 (quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (noting that judicial deference is “at its apogee” in this area); *see also Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (observing that “perhaps in no other area has the Court accorded Congress greater deference” than with respect to “Congress’ authority over national defense and military affairs”).

³² *Weiss*, 510 U.S. at 177 (quoting *Goldberg*, 453 U.S. at 67).

³³ *Id.* (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)).

³⁴ *See MCM*, *supra* note 3, R.C.M. 306(c)(2) (noting that commanders’ options for administrative disposition of misconduct—including reprimands—are “subject to regulations of the Secretary concerned”); *accord Weiss*, 510 U.S. at 177 (recognizing Congress’ plenary control over military regulations). For an extended discussion of the nature of due process and its application to military administrative actions, see former Deputy Judge Advocate General of the Navy Rear Admiral Robert D. Powers, Jr.’s excellent article on the subject. Robert D. Powers, Jr., *Administrative Due Process in Military Proceedings*, 20 WASH. & LEE L. REV. 1, 4–10 (1963).

³⁵ *Rich v. Sec’y of the Army*, 735 F.2d 1220, 1226 (10th Cir. 1984).

³⁶ *See Rich*, 735 F.2d at 1226 (finding that because plaintiff had no property right to continued military service, the Army regulation allowing plaintiff to be honorably discharged for fraudulent enlistment without a hearing did not violate his right to procedural due process).

³⁷ *See Golding v. United States*, 48 Fed. Cl. 697, 726 (2001) (quoting *Canonica v. United States*, 41 Fed. Cl. 516, 524 (1998)).

Persons are entitled to due process before they can be deprived of property or liberty. Courts have held that an enlisted member of the

Accordingly, we next examine the Army's reprimand process. Although the protections built into the process are limited, the history of the regulation governing reprimands clearly indicates that the Army has considered those protections to be adequate for more than fifty years.

C. Evolution of Army Reprimands

The Army reprimand process is relatively straightforward. Army Regulation 600-37, Unfavorable Information, describes the procedure for imposing administrative reprimands.³⁸ However, the reprimand procedure did not always exist in its current form. It is the result of decades of regulatory development, which informs the due process discussion.

1. Army Regulation 640-98 (1955)

Army Regulation 640-98, descriptively titled *Filing of Adverse Matter in Individual Records and Review of Intelligence Files Consulted Prior to Taking Personnel Action* (AR 640-98), is a 1955 precursor to AR 600-37.³⁹ Part of the purpose of AR 640-98 was to preclude certain matters

armed forces does not have a property interest in his employment because he may be discharged 'as prescribed by the Secretary' of his service. However, courts have held that an enlisted member of the armed forces has a liberty interest in his employment. . . . This liberty interest prevents the military from discharging a service member without due process—but only in cases where a 'stigma' would attach to the discharge.

Id. at 727. These principles apply equally to officers. See also *Gonzalez v. United States*, 44 Fed. Cl. 764, 766 (1999) (concluding that a summary Department of the Army Active Duty Board (DAADB) separation violated the subject officer's constitutional liberty interest where it imposed a stigmatizing general discharge without an adversary hearing); see generally John A. Wickham, *The Total Force Concept, Involuntary Administrative Separation, and Constitutional Due Process: Are Reservists On Active Duty Still Second Class Citizens?*, Oct. 2000, ARMY LAW., at 23–24 (discussing the interplay between a soldier's liberty interest in continued military employment and Army separation procedures).

³⁸ U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4 (19 Dec. 1986).

³⁹ U.S. DEP'T OF ARMY, REG. 640-98, FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS AND REVIEW OF INTELLIGENCE FILES CONSULTED PRIOR TO TAKING PERSONNEL ACTION (14 Nov. 1955) (TAGO 2749B-Nov. 360481-55) [hereinafter AR 640-98] (*superseded by* U.S. DEP'T OF ARMY, REG. 640-98, FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS AND REVIEW OF INTELLIGENCE FILES CONSULTED PRIOR TO TAKING PERSONNEL ACTION (19 July

from being “filed in an individual’s record maintained in the field or by The Adjutant General.”⁴⁰ Those matters included “[u]nsupported or unacted upon adverse matter[s], other than counterintelligence information, which will prejudice the individual’s reputation or future in the military service,” and “[a]llegations which have been successfully rebutted and/or have not resulted in elimination or disciplinary action.”⁴¹

Paragraph four of AR 640-98 will have a familiar ring to today’s practitioners:

No adverse matter . . . will be made a part of an individual’s record without his knowledge and an opportunity being afforded him either to make a written statement in reply to the adverse information, communication, or report, or to decline, in writing, to make such a statement.⁴²

Under the 1955 scheme, soldiers were generally entitled to the procedural due process protections of both notice and an opportunity to respond to any adverse information proposed to be filed in their records.⁴³ Critically, however, reprimands were excluded from those protections.

The following and references thereto normally will not be referred to the individual concerned for comment prior to filing, and are therefore excluded from consideration under these regulations: . . .

d. Administrative reprimands and admonishments of a nonpunitive nature (will not be forward for inclusion in

1965)) (*infra* App. A). Due to its age, this regulation is not maintained in electronic format on any available military or civilian database. The copy attached as App. A was located in the archives of The Judge Advocate General’s Legal Center and School, Charlottesville, Virginia. U.S. ARMY LEGAL SERV. AGENCY LIBR., Bound Compilation of Regulations, AR 638-25, AR 670-328 (untitled) (1983). Special thanks to Mr. Fred L. Borch III, Regimental Historian and Archivist, for his assistance in obtaining this regulation.

⁴⁰ AR 640-98, *supra* note 39, ¶ 1a. Field-maintained records and those maintained by The Adjutant General’s Office (TAGO) were approximately the equivalent of the MPRJ and AMHRR/OMPF in modern Army practice. *See supra* note 6 and accompanying sources (distinguishing the MPRJ and AMHRR/OMPF).

⁴¹ AR 640-98, *supra* note 39, ¶ 1a(1)-(2).

⁴² *Id.* ¶ 4.

⁴³ *Id.* ¶ 1a.

TAGO 201 file. See DA Form 201a Field 201 file divider).⁴⁴

Recall that AR 640-98 applied to adverse matters filed in any record, whether field-maintained or permanently maintained by The Adjutant General's Office (TAGO) (the TAGO 201 file).⁴⁵ Therefore, not only did the regulation bar commanders from submitting reprimands for permanent filing, soldiers had no regulatory right to respond to reprimands prior to their filing at the field or local level.⁴⁶

2. Army Regulation 600-37 (1972)

In 1972, however, the Army's regulatory landscape changed drastically with respect to reprimands.⁴⁷ AR 600-37 underwent a major rewrite that incorporated AR 640-98 and updated the "policies and procedures for the resolution of unfavorable information."⁴⁸ Initially, AR 600-37-1972 carried forward the stated purpose of AR 640-98, to "insure that unsupported or unresolved unfavorable information, which may prejudice the individual's reputation or future in the military service, is not

⁴⁴ *Id.* ¶ 5d; see *supra* note 6 and accompanying sources (discussing the elimination of the historical "201" file and the MPRJ).

⁴⁵ *Id.* ¶ 4.

⁴⁶ Research reveals no regulatory mechanism then in place providing soldiers a right to respond to administrative reprimands prior to local filing. However, whether the exclusion of reprimands from the matters allowed to be retained permanently in The Adjutant General's Office (TAGO) 201 file was entirely due to concerns that such matters would "prejudice the individual's reputation or future in the military service" is unclear. *Id.* ¶ 1a. Many of the other excluded matters plainly resulted from processes that carried their own due process protections: records of court-martial (¶ 5c); actions of boards of officers, "provided that it is clearly indicated in such board proceedings that the individual concerned has been given [an] opportunity to testify in his own behalf" (¶ 5e); completed criminal, IG, or other investigative reports that "resulted in elimination or disciplinary action" (¶ 5f); prisoner-related matters (¶ 5h); FBI reports (¶ 5i); efficiency reports (¶ 5j); and, "[o]ther adverse matter of which the individual concerned had prior knowledge and an adequate opportunity to refute" (¶ 5k).

⁴⁷ A.R. 640-98 was updated in 1965, but contained no major changes for the purpose of this discussion. U.S. DEP'T OF ARMY, REG. 640-98, FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS AND REVIEW OF INTELLIGENCE FILES CONSULTED PRIOR TO TAKING PERSONNEL ACTION (19 July 1965).

⁴⁸ U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION 1 (16 Oct. 1972), *superseded by* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION 1 (18 May 1977) [hereinafter AR 600-37-1972]. This unofficial naming convention is used throughout this article solely to distinguish and track changes among the multiple versions of AR 600-37 since its 1972 inception through to its current form.

filed in an individual's official personnel files.”⁴⁹ However, the new regulation expanded on this statement by listing certain additional objectives:

- a. Apply fair and just standards to all military personnel.
- b. Protect the rights of individual members of the Army, and, at the same time, protect the right of the Army to consider all available information when selecting individuals for
- c. Provide safeguards from adverse personnel action based on unsubstantiated allegations or mistaken identity.
- d. Provide a means of correcting injustices if they occur.
- e. Insure that individuals of questionable moral character are not continued in the service or elevated to positions of leadership and responsibility.⁵⁰

Clearly, these objectives express an intent to protect both the rights of the individual soldier and—equally importantly from an institutional perspective—the Army's ability to preserve records of incidents of misconduct or poor judgment.⁵¹ Bear in mind that in 1972, computers were not in widespread use and electronic personnel records did not exist. Commanders and promotion boards had no way to preserve adverse information except via a centralized paper record system.⁵²

Certain definitions in the regulation further illustrate the intent of the new system. Unfavorable information was defined as “any credible derogatory information that may reflect unfavorably on an individual's character, integrity, trust worthiness, and reliability.”⁵³ Interestingly, positions of “leadership, trust and responsibility” were considered to be limited to those held by an officer, warrant officer, or non-commissioned

⁴⁹ *Id.* ¶ 1-1b; AR 640-98, *supra* note 39, ¶ 1a(1).

⁵⁰ AR 600-37-1972, *supra* note 48, ¶ 1-3a-e.

⁵¹ *Id.*

⁵² *See supra* note 10 and accompanying sources (discussing the implementation of iPERMS and the preservation of records of misconduct). The need to preserve such records is a recurring theme throughout this article.

⁵³ AR 600-37-1972, *supra* note 48, ¶ 1-4a.

officer in the grade of E-7 or above.⁵⁴ Favorable personnel actions included any “personnel management or career management decision that enhance[d] the individual’s status or position. Included [we]re promotions, Regular Army appointments, selection for schooling, entry or continuation on active duty, awards, decorations, commendations, and sometimes reassignment, retirement, separation, or release from active duty.”⁵⁵

The new regulation’s policy statement with respect to decisions on favorable personnel actions is also instructive. It required decision-makers to review personnel files, consider both favorable and unfavorable information, and apply their own knowledge and best judgment.⁵⁶ It also provided a clear balancing test: “Performance and potential will be weighed against available unfavorable information.”⁵⁷

The right to notice and an opportunity to respond in writing prior to the filing of unfavorable information was imported into AR 600-37-1972 directly from AR 640-98.⁵⁸ However, significant additional due process protections were added:

Individuals will be informed when unfavorable information in their files causes an unfavorable personnel

⁵⁴ *Id.* ¶ 1-4b. This view is inconsistent with modern Army leadership doctrine, which recognizes that leadership and responsibility may be exclusive of position or rank. *See* U.S. DEP’T OF ARMY, DOCTRINE REFERENCE PUB. 6-22, C1, ARMY LEADERSHIP at v (10 Sept. 2012) (“Everyone in the Army is part of a team and functions in the role of leader and subordinate. . . . All Soldiers and Army Civilians must serve as leaders and followers. . . . Leaders are not always designated by position, rank, or authority.”)

⁵⁵ *Id.* ¶ 1-4c. The granting of a security clearance was also considered to be a favorable personnel action, although it was addressed under separate regulations. *Id.*

⁵⁶ *Id.* ¶ 2-1a.

Personnel decisions which may result in the selection of individuals to positions of public trust and responsibility or vesting such individuals with authority over others should be based upon a thorough review of the records of such individuals—including appraisal of both favorable and unfavorable information which may be available. The Army selects individuals for promotion or appointment to such positions on a competitive basis and only the best qualified should be promoted or appointed.

Id. ¶ 2-1d.

⁵⁷ *Id.* ¶ 2-1a.

⁵⁸ *Id.* ¶ 2-1b; AR 640-98, *supra* note 39, ¶ 4.

action or decision. They will be informed of the basis of such adverse personnel actions and the policies and procedures governing such actions. They have the right to appeal decisions which they believe were based on erroneous information, lack of equal opportunity, prejudice, bias, or other related injustice, or when substantive new evidence is discovered.⁵⁹

Army Regulation 600-37-1972 also highlighted information that should be “identified early,” including “[i]ndications of substandard leadership ability, promotion potential, morals, [or] integrity.”⁶⁰ To that end, the new regulation carried forward, from AR 640-98, the list of matters that could be filed without further referral to the individual.⁶¹

AR 600-37-1972 then introduced the framework for the modern Army reprimand process. Paragraph 2-4 provided:

2-4. Reprimands, admonitions, and censures.

a. Nonpunitive (as outlined in para 128c, UCMJ). Administrative reprimands, admonitions, and censures, etc., of a nonpunitive nature imposed by a commander or supervisor, will be filed in the Military Personnel Records Jacket (MPRJ). Only such items that have been signed by General Officers and specifically designated by him for inclusion in Official Military Personnel Files (OMPF) maintained by The Adjutant General will be forwarded. A written administrative reprimand, admonition, or censure, etc., which is designated for inclusion in an individual's official military personnel file will:

(1) Contain a statement indicating that it has been imposed merely as an administrative measure and not as punishment under Article 15, UCMJ.

(2) Be referred to the individual concerned for comment in accordance with paragraph 2-6. Statements furnished

⁵⁹ AR 600-37-1972, *supra* note 48, ¶ 2-1c.

⁶⁰ *Id.* ¶ 2-2. “Other unfavorable character traits of a permanent nature should be similarly recorded.” *Id.*

⁶¹ *Id.* ¶ 2-3.

by the individual will be reviewed by the official imposing the administrative reprimand, admonition, or censure and will be attached to the basic written comment prior to filing it in the official personnel files.

(3) Be forwarded for inclusion in official military personnel files or the career branch files only after due consideration of the circumstances and alternative nonpunitive measures. It is emphasized that it is not intended that minor behavior infractions or honest mistakes chargeable to sincere but misguided efforts be permanently recorded in the individual's official military personnel file.

b. Non-judicial. Reprimands and admonitions of a non-judicial nature are governed by the provisions of AR 27-10.⁶²

The first significant change under this portion of AR 600-37-1972 is perhaps not readily apparent. Under AR 640-98, administrative reprimands were excluded only from being forwarded for filing in a soldier's permanent TAGO 201 file.⁶³ The regulation made no mention of MPRJ filing, thereby impliedly granting the imposing authority discretion whether to retain reprimands locally. Army Regulation 600-37-1972, on the other hand, eliminated any such implied discretion and expressly required that, at a minimum, reprimands not submitted for TAGO 201 filing would be filed in MPRJs.⁶⁴

The other major change was the specific application of the referral procedure to reprimands.⁶⁵ Previously, nothing in AR 640-98 required reprimands to be referred to the recipient for comment; reprimands simply could not be forwarded for TAGO 201 filing.⁶⁶ Under AR 600-37-1972,

⁶² *Id.* ¶ 2-4. Note that the new regulation continues to distinguish between non-punitive, administrative reprimands and those issued as punishment. *Id.*; AR 640-98, *supra* note 39, ¶ 5d.

⁶³ AR 640-98, *supra* note 39, ¶ 5d.

⁶⁴ *See* AR 600-37-1972, *supra* note 48, ¶ 2-4 (directing that administrative reprimands "will" be filed in the MPRJ).

⁶⁵ *Id.* ¶ 2-6. The referral requirement was not limited to reprimands, but was required for any unfavorable information for which a specific exception was not provided in ¶ 2-3.

⁶⁶ AR 640-98, *supra* note 39, ¶ 5d.

however, soldiers would now be entitled to an opportunity to either submit a written response to a reprimand or decline in writing to do so.⁶⁷

3. *Army Regulation 600-37 (1977)*

The next step in the evolution of AR 600-37 was a 1977 update.⁶⁸ The update first incorporated the requirements of the Privacy Act of 1974: “Unfavorable information filed in official personnel files must meet privacy act standards of accuracy, relevancy, timeliness, and completeness.”⁶⁹

Next, the update expanded both filing authority and discretion concerning whether to direct MPRJ (local) filing of reprimands to any “commander, supervisor, officer exercising general court-martial jurisdiction over the individual concerned, or general officer senior to the individual concerned,” subject to the referral requirement.⁷⁰ Along those lines, any letter filed locally was required to state the length of time it would remain in the MPRJ, and could only be removed before the end of that period by an officer exercising general court-martial jurisdiction over the individual (not necessarily the same person who directed the original filing).⁷¹

Importantly, the 1977 update introduced a process for mandatory general officer review of reprimands issued by those lacking the authority to direct OMPF filing.⁷² Filing authority was expanded from the 1972

⁶⁷ AR 600-37-1972, *supra* note 48, ¶ 2-6.

⁶⁸ U.S. DEP’T. OF ARMY, REG. 600-37, Unfavorable Information (18 May 1977), *superseded by* U.S. DEP’T. OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986), [hereinafter AR 600-37-1977]. *See also supra* note 46 and accompanying sources (discussing the use of this naming convention).

⁶⁹ *Id.* ¶ 2-1b; Privacy Act of 1974, 5 U.S.C. § 552a(e)(5) (2015).

⁷⁰ *Compare* AR 600-37-1977, *supra* note 68, ¶ 2-4a (stating that appropriate authorities “may” direct the filing of such letters in the MPRJ), *with* AR 600-37-1972, *supra* note 48, ¶ 2-4 (directing that administrative reprimands “will” be filed in the MPRJ).

⁷¹ AR 600-37-1977, *supra* note 68, ¶ 2-4a.

⁷² *See id.* ¶ 2-4b.

Any letter in the nature of an administrative reprimand, admonition, or censure, not imposed by an officer authorized to direct filing in the OMPF . . . will be reviewed by a general officer in the chain of command for the purpose of determining whether the letter should be filed in the individual’s OMPF.

version's language, which read: "signed by a General Officer and specifically designated by him for inclusion" in the OMPF, to new language stating that filing was permitted "upon the specific direction of any general officer senior to the individual concerned or by an officer exercising general court-martial jurisdiction over the individual concerned."⁷³

Any filing directives issued would now need to be stated in the reprimand itself or an attachment.⁷⁴ No substantive changes were made to the required contents of the reprimand. However, the update did contain procedural guidance for circumstances when the recipient or the imposing authority left the chain of command prior to the completion of the reprimand process.⁷⁵

4. Army Regulation 600-37 (1986)

The final revision of AR 600-37, which solidified the familiar modern Army reprimand process, was completed in 1986.⁷⁶ The 1986 revision retained the classification of reprimands as unfavorable information subject to the requirements of referral and an opportunity for rebuttal.⁷⁷

Significantly, the 1986 revision removed the mandatory general officer review of reprimands issued by subordinates.⁷⁸ However, MPRJ filing authority for enlisted personnel was then restricted to the "recipient's immediate [or a higher] commander . . . school commandants, any general officer . . . or an officer exercising general court-martial jurisdiction over the recipient."⁷⁹ Enlisted soldiers' immediate supervisors could impose reprimands, but could only direct MPRJ filing if serving in one of these capacities.⁸⁰

Id.

⁷³ AR 600-37-1972, *supra* note 48, ¶¶ 2-4a, 2-4c.

⁷⁴ AR 600-37-1977, *supra* note 68, ¶ 2-4c.

⁷⁵ *Id.* ¶ 2-4d.

⁷⁶ U.S. DEP'T. OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986) [hereinafter AR 600-37-1986]. See *supra* note 48 (discussing the use of this naming convention).

⁷⁷ AR 600-37-1986, *supra* note 76, ¶¶ 3-4a, 3-6.

⁷⁸ *Id.* ¶ 3-4a ("If filing is intended for the MPRJ, the letter need not be referred to a higher authority for review.").

⁷⁹ *Id.* ¶ 3-4a(1).

⁸⁰ *Id.* Although authorized, it would be highly unusual in current Army practice for a supervisor who lacked MPRJ (local) filing authority to issue a reprimand.

Under the modern scheme, MPRJ filing authority for commissioned and warrant officers is restricted to the first commander in the recipient's chain of command who is senior to the recipient, or any higher commander.⁸¹ Members of the recipient's rating chain also have MPRJ filing authority, as do any general officer senior to the recipient, and any officer who exercises general court-martial jurisdiction over the recipient.⁸² No matter the rank of the recipient, a reprimand may only be filed in a soldier's MPRJ for a maximum of three years, or until the soldier transfers to another general court-martial jurisdiction.⁸³

Comparatively, OMPF filing authority is tightly restricted. Regardless of the issuing authority, a reprimand may be filed in a soldier's OMPF only by order of a general officer or an officer having general court-martial jurisdiction over the recipient.⁸⁴ "Letters filed in the OMPF will be filed in the performance portion (P-fiche)."⁸⁵

Before a reprimand may be filed in a soldier's OMPF, as with any unfavorable information not specifically exempt, it must first be "referred to the recipient concerned for comment according to paragraph 3-6."⁸⁶ Referral is the key component of the reprimand process. It provides the recipient's sole opportunity to rebut or mitigate facts alleged in the

⁸¹ *Id.* ¶ 3-4a(2)(a).

⁸² *Id.* ¶ 3-4a(2)(b), (c).

⁸³ *Id.* ¶ 3-4(a)(3). Reprimands filed in the MPRJ must also state the length of time they will be retained therein. *Id.* Any designation of a period shorter than the maximum authorized is atypical in current practice.

⁸⁴ *Id.* ¶ 3-4b. This is the reason that the practice of favoring GOMORs over lower-level reprimands evolved. The recipient of a GOMOR is directly exposed to the threat of OMPF filing. Subordinate issuing authorities may only file in the recipient's MPRJ, and must take the extra step of asking a higher authority to make an OMPF filing determination if desired. *See infra* note 93 and accompanying sources for further discussion.

⁸⁵ *Id.*; *see* U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCE RECORDS MANAGEMENT ¶ 3-8, tbl. 3-1 (7 Apr. 2014) (discussing the types of folders authorized for inclusion in the OMPF, including the performance folder). "The performance folder contains performance related information to include evaluations, commendatory documents, specific disciplinary information, and training/education documents. The primary purpose of this folder is to provide necessary information to officials and selection boards tasked with assessing [s]oldiers for promotion, special programs, or tours of duty." *Id.* tbl. 3-1. The terms performance portion and P-fiche are outdated and are no longer used in AR 600-8-104.

⁸⁶ AR 600-37-1986, *supra* note 76, ¶ 3-4b(1). "The referral will include reference to the intended [MPRJ or OMPF] filing of the letter." *Id.* Although often overlooked, this reference is important to the soldier. Knowing in advance whether the imposing authority intends MPRJ versus OMPF filing may inform the soldier's decision whether to submit a statement or rebuttal materials.

reprimand.⁸⁷ The referral must include any documents or other materials that serve as the factual basis for the reprimand.⁸⁸ The OMPF filing authority must review and consider any rebuttal statement and supporting evidence before making a final filing determination.⁸⁹

For the first time, the 1986 revision also distinguished between the factual matters upon which a reprimand is based and the allied documents.⁹⁰ Although not defined, AR 600-37-1986 references “statements, previous reprimands, admonitions, or censure” and requires that such documents also be referred for comment if the filing authority intends to file them in the recipient’s OMPF along with a reprimand.⁹¹

In addition, any reprimand intended for OMPF filing must state that it “has been imposed as an administrative measure and not as a punishment under UCMJ, Article 15.”⁹² It must also be “signed by (or sent under the cover or signature of)” the filing authority.⁹³

⁸⁷ *Id.* ¶ 3-6b(1).

⁸⁸ *Id.* ¶ 3-6b(1)(a). Importantly, such documents must be included only if the recipient “was not previously provided an opportunity to respond to information reflected in that documentation.” *Id.*; see also U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS ¶¶ 1-9c (2 Oct. 2006) [hereinafter AR 15-6] (requiring that reports of administrative investigations be similarly referred for rebuttal prior to any adverse administrative action being taken on such reports). Significantly, AR 15-6 excepts investigations from referral prior to adverse action if the “action contemplated is prescribed in regulations or other directives that provide procedural safeguards, such as notice to the individual and opportunity to respond.” *Id.* ¶ 1-9d. However, AR 600-37-1986 requires referral of reprimands for comment independent of whether the recipient had an opportunity to rebut the underlying factual matters. See AR 600-37-1986, *supra* note 76, ¶ 3-4b(1)(a) (stating that “referral will also include” such matters).

⁸⁹ AR 600-37-1986, *supra* note 76, ¶ 3-4b(1)(b). If OMPF filing is directed, the underlying evidentiary matters may be attached and filed concurrently. *Id.*

⁹⁰ *Id.* ¶ 3-4b(1)(c).

⁹¹ *Id.* Filing authorities should exercise caution when including prior reprimands as allied documents in OMPF filings. If a prior reprimand was filed in a soldier’s OMPF, there is no need to file it a second time. If it was previously filed in the soldier’s MPRJ, then the soldier is entitled to the full referral of that reprimand and its supporting documentation and an opportunity for rebuttal before it is filed in the soldier’s OMPF. “Care must be exercised to ensure additional unfavorable information is not included in the transmittal documentation unless it has been properly referred for comment.” *Id.*

⁹² *Id.* ¶ 3-4b(2).

⁹³ *Id.* ¶ 3-4b(3). Reprimands imposed by individuals who lack OMPF filing authority may reach soldiers’ OMPFs by referral for comment under the cover or signature of an officer with such authority. A typical scenario would involve a subordinate commander forwarding a reprimand to a superior general officer commander (or general court-martial convening authority (GCMCA)) and requesting referral to the recipient and an OMPF

Finally, consistent with prior versions, AR 600-37-1986 cautions that reprimands should be filed in a soldier's OMPF "only after considering the circumstances and alternative nonpunitive measures."⁹⁴ OMPF filing should be reserved for serious misconduct. "Minor behavior infractions or honest mistakes chargeable to sincere but misguided efforts" may be appropriate for MPRJ filing but "will not normally be recorded in a soldier's OMPF."⁹⁵

III. Argument

A. The Dilemma

As the Army's administrative reprimand process evolved, soldiers' procedural due process protections solidified. Soldiers have the right to notification and an opportunity to respond.⁹⁶ They may also submit rebuttal statements and evidence, which the imposing authority is required to consider before making a filing determination.⁹⁷ Evidently, the Army believes those protections to be adequate, since AR 600-37-1986 has not been updated since its publication thirty years ago.

The static nature of the regulation underscores the central dilemma of today's reprimands. Over the past thirty years, the nonpunitive intent of the reprimand process has all but disappeared from actual Army practice. In fact, there is a widely-held belief—by judge advocates who advise commanders, by soldiers generally, and by civilians—that an OMPF-filed reprimand is a "career-killer."⁹⁸ When an ostensibly non-punitive process

filing determination. Should the superior commander, or GCMCA, elect not to file the reprimand in the soldier's OMPF but instead retain it in the MPRJ, the reprimand will be returned to the author, who will advise the soldier of the filing determination. *Id.* ¶ 3-4c.

⁹⁴ *Id.* ¶ 3-4b(4).

⁹⁵ *Id.*

⁹⁶ AR 600-37-1986, *supra* note 76, ¶ 3-4.

⁹⁷ *Id.*

⁹⁸ See, e.g., Lee S. Stockdale, *Reprimands: The Army's Dirty Little Secret*, AVVO.COM (Aug. 24, 2011), <http://www.avvo.com/legal-guides/ugc/reprimands-the-armys-dirty-little-secret> ("A . . . GOMOR . . . is the kiss of death in a [s]oldier's . . . OMPF A GOMOR is called, and is often meant to be, a 'Career Killer.'"); Lieutenant Colonel Victor M. Hansen, *Walking on Unfamiliar Ground: A Primer for Defense Counsel Representing Clients in an Inspector General Investigation*, ARMY LAW., Mar. 2005, at 16 ("A GOMOR in a senior officer's OMPF can have a devastating effect on his career. The most obvious impact is a certain end to the officer's upward progression in the Army."); Michelle Tan, *Army Rangers' Wild Partying Contributed To Commander's Reprimand, Report Says*, ARMY TIMES (Jan. 15, 2016), <http://www.armytimes.com/story/military/careers/>

army/officer/2016/01/14/army-rangers-wild-partying-contributed-commanders-reprimand-report-says/78755074/ (noting that the former commander of the 75th Ranger Regiment had received a GOMOR, which could “often be a career killer”); Jeff Schogol, *Miley Cyrus Song Crashes Air Force Pilots’ Careers*, AIR FORCE TIMES (Oct. 19, 2015), <http://www.airforcetimes.com/story/military/2015/10/19/texting-can-kill-your-career/73954112/>. Tan reported:

Three instructor pilots at Laughlin Air Force Base, Texas, are facing the end of their Air Force careers after investigators searched their personal cellphones and found mentions of the word “Molly”—a slang term for the illegal drug ecstasy. Importantly, the pilots were punished because the Air Force deemed their texts to be unprofessional. The Air Force Office of Special Investigations found no evidence that they had used drugs. The pilots also passed drug tests. The pilots, who have not been identified publicly, claimed they were referencing club and rap songs that have popularized the word “Molly,” such as in Miley Cyrus’ ‘We Can’t Stop,’ but their commander . . . issued the three pilots letters of reprimand and stripped them of their wings[.]

Id.; Larry McShane, *Fort Hood Shooting: Nine Army Officers Get Reprimand For Missing Warning Signs Raised By Nidal Hasan*, N.Y. DAILY NEWS (Mar. 11, 2011), <http://www.nydailynews.com/news/national/fort-hood-shooting-army-officers-reprimand-missing-warning-signs-raised-nidal-hasan-article-1.121299>. McShane reported:

[N]ine officers—all ranked lieutenant or above—were sanctioned with either oral reprimands or possible career-ending written letters of censure, said Army Secretary John McHugh. The secretary said the officers failed to meet the “high standards” expected of Army officers when they supervised Hasan at the Walter Reed Army Medical Center in Washington. The harsh sanctions “send a clear message to everyone that the Army will not tolerate such negligence and passivity in reaction to clear signs that a soldier is radicalizing to Islamist extremists,” said Sen. Joe Lieberman (I-Conn.).

Id.; Dan Lamothe, *2 Officers Reprimanded Over Ganjgal Mistakes*, MARINE CORPS TIMES (Feb. 21, 2011), <http://archive.marinecorpstimes.com/article/20110221/NEWS/102210315/2-officers-reprimanded-over-Ganjgal-mistakes> (commenting that “documents indicating two of the three [Army] officers cited last year in a joint Army-Marine Corps investigation were deemed primarily responsible for the [Ganjgal] mission’s failures and given reprimands, likely career killers”); Nathan Pfau, *DUI Consequences Far-reaching*, ARMY.MIL (Dec. 6, 2012), http://www.army.mil/article/92499/DUI_consequences_far_reaching/ (quoting Captain Megan Mueller, Special Assistant United States Attorney, Office of the Staff Judge Advocate, Fort Rucker, Alabama, stating that “when a person gets some sort of reprimand on their permanent record, [it is] a career killer”). Even *Wikipedia* acknowledges this reality: “In military contexts, a formal letter of reprimand can be career ending, even without prescribed punishments, because it makes it difficult to secure advancements in rank or to enjoy the respect of one’s peers.” *Letter of Reprimand*, WIKIPEDIA (13 Aug. 2014, 7:44 PM), https://en.wikipedia.org/wiki/Letter_of_reprimand.

is so widely believed to have punitive effect, how can it be anything else? When do institutional practice and perception overcome stated regulatory intent?

1. Standards

Process and fairness are not necessarily the same. In his 2011 civilian practitioner's note, *Reprimands: The Army's Dirty Little Secret*, retired Army Reserve judge advocate Colonel (COL) Lee Stockdale calls the Army reprimand process "broken and abused."⁹⁹ According to COL (Ret.) Stockdale, the core of the "dirty secret" is that GOMORs are the "Army's way of punishing [s]oldiers when the evidence [is not] there."¹⁰⁰

Significantly, he first notes that AR 600-37-1986 contains no standard of proof or evaluation with respect to the factual information underlying a GOMOR.¹⁰¹ Colonel (Ret.) Stockdale points out that AR 600-37-1986 "requires only an 'objective decision by competent authority.'"¹⁰²

This is incorrect. "Objective decision by competent authority" is not a standard by which a filing authority either assesses the sufficiency of underlying evidence or determines whether to file a document in the soldier's OMPF. Rather, it is a legal presumption that attaches to OMPF filings when they are appealed to the Department of the Army Suitability Evaluation Board (DASEB), the regulatory appellate authority for removal of unfavorable information from official Army personnel files.¹⁰³ "Once an official document has been properly filed in the OMPF, it is

⁹⁹ Stockdale, *supra* note 98. Colonel (COL) Retired (Ret.) Stockdale served on active duty in Active Guard and Reserve (AGR) status until 2008. His previous assignments include Command Judge Advocate, U.S. Army Human Resources Command.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ AR 600-37-1986, *supra* note 76, ¶ 7-2a; *see generally id.* ch. 6, 7 (discussing the organization, procedures, and appellate authority of the Department of the Army Suitability Evaluation Board (DASEB)). Soldiers may seek collateral relief from unfair command decisions via petitions under UCMJ Art. 138, complaints to their servicing Inspector General, complaints to their Representative in Congress, or other means. *See, e.g.*, UCMJ, art. 138 (2012) (authorizing soldiers to petition commanders for redress of grievances). However, only the DASEB may direct the alteration or removal of unfavorable information in a soldier's OMPF. AR 600-37-1986, *supra* note 76, ¶ 7-2d.

presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority.”¹⁰⁴

In fact, there is no express standard of evaluation for making filing determinations in AR 600-37-1986. Since the 1972 inception of AR 600-37, the only standard of evaluation provided in the regulation has applied not to the assessment of unfavorable information, but to favorable personnel decisions.

Favorable personnel decisions will be based on review of official personnel files and the knowledge and best judgments of the commander, board, or other decision making authority. Both favorable and unfavorable information regarding the individual will be considered. *Performance and potential will be weighed against available unfavorable information.*¹⁰⁵

Army Regulation 600-37-1977 eliminated even this vague balancing test:

Favorable personnel decisions will be based on review of official personnel files and the knowledge and best judgments of the commander, board, or other responsible authority. Both favorable and unfavorable information regarding the individual will be considered. *Performance and potential will be assessed based on a review of all pertinent records.*¹⁰⁶

In 1986, the word “favorable” was removed and this provision morphed to cover the broad category of actions now known as “personnel management decisions”:

Personnel management decisions will be based on the following: (1) Review of official personnel file[,] (2) The knowledge and best judgment of the commander, board, or other responsible authority. (Both favorable and

¹⁰⁴ AR 600-37-1986, *supra* note 76, ¶ 7-2a. The word “objective” in paragraph 7-2a is ambiguous in that it might be construed to imply some standard of decision-making that the regulation does not actually provide. Stockdale, *supra* note 98. It would be more precise to replace the word “objective” with “unbiased.”

¹⁰⁵ AR 600-37-1972, *supra* note 48, ¶ 2-1a (emphasis added).

¹⁰⁶ AR 600-37-1977, *supra* note 68, ¶ 2-1a (emphasis added).

unfavorable information regarding the soldier concerned will be considered.)¹⁰⁷

The filing of a GOMOR in a soldier's OMPF is a personnel management decision within the meaning of this provision, which not coincidentally heads the chapter titled, "Unfavorable Information in Official Personnel Files."¹⁰⁸ This conclusion seems further supported by the fact that AR 600-37-1986 establishes the DASEB, which is the appellate authority for GOMORs, as a "continuing board under the Director of Military Personnel Management (DMPM), [Office of the Deputy Chief of Staff for Personnel] (ODCSPER)."¹⁰⁹ If so, then the only standard applicable to the OMPF filing of GOMORs or any other unfavorable information is the "knowledge and best judgment" of the filing authority.¹¹⁰

Given the existence of the DASEB and the GOMOR appeal process, COL (Ret.) Stockdale's statement that a "[g]eneral [o]fficer can determine, unilaterally and without external review, that [a] reprimand be filed in a [s]oldier's permanent records" is somewhat misleading.¹¹¹ True, there is no immediate, desk-side external review of filing determinations, but the same could be said of any decision left to a commander's discretion. That the Army relies on such discretion is unsurprising; it is the Army's default position for decision-making and the engine that powers the UCMJ.¹¹² Too many decisions to list are left to commanders' discretion.¹¹³ Unfortunately, not all commanders exercise their judgment the same way, which may result in disparate treatment of soldiers even within the same command.

More importantly, when we consider discretion as applied to the disciplinary process, a commander's decisions are subject to the whole range of due process protections of the U.S. Constitution and the UCMJ. On the other hand, when a commander exercises that same discretion with respect to a GOMOR and the decision whether to file it permanently in a

¹⁰⁷ AR 600-37-1986, *supra* note 76, ¶ 3-1a.

¹⁰⁸ *Id.* ¶ 3-1. The term "personnel management decision" is not separately defined in AR 600-37-1986.

¹⁰⁹ *Id.* ¶ 2-2a.

¹¹⁰ *Id.* ¶ 3-1.

¹¹¹ Stockdale, *supra* note 98.

¹¹² See MCM, *supra* note 3, R.C.M. 306(a) (noting that "[e]ach commander has discretion to dispose of offenses by members of that command").

¹¹³ *E.g.* UCMJ art. 60 (2012) (discussing action by the convening authority after conviction

soldier's OMPF, the soldier's only protection is to be as persuasive as possible in presenting his written rebuttal statement.¹¹⁴

Some might say: "But the [s]oldier still has the right to submit a rebuttal and can make his case there."¹¹⁵ That is little comfort where responses to GOMORs have become formulaic, one-page, "fall-on-my-sword" memos.¹¹⁶ Even if a soldier provides the expected response, local filings are simply unlikely absent something in the soldier's military record that weighs heavily in his favor, such as a combat deployment or a significant personal decoration. Practically speaking, given the common knowledge of the impact of GOMORs at promotion and other boards, filing a GOMOR in a Soldier's OMPF has the same effect as a general officer saying, "Your career is over."

The GOMOR appellate process is an inadequate failsafe.¹¹⁷ Importantly, appeals are limited to Soldiers in the grade of E-6 and above, with any other appeal considered only as an exception to policy.¹¹⁸ The

¹¹⁴ AR 600-37-1986, ¶ 3-4.

¹¹⁵ *Id.* ¶ 3-4b.

¹¹⁶ Official (and unofficial) guidance on preparing rebuttals is readily available. *See, e.g.*, LEGAL ASSISTANCE OFFICE, OFFICE OF THE STAFF JUDGE ADVOCATE, XVIII AIRBORNE CORPS AND FORT BRAGG, INFORMATION PAPER—LETTERS OF REPRIMAND AND GENERAL OFFICER MEMORANDUMS OF REPRIMAND (Aug. 2012), <http://www.bragg.army.mil/directorates/osja/Legal%20Assistance%20Documents/Information%20Papers/LORs%20AND%20GOMORs.pdf>; LEGAL ASSISTANCE OFFICE, OFFICE OF THE STAFF JUDGE ADVOCATE, 2D INFANTRY DIV., GOMOR, <http://www.2id.korea.army.mil/soldiers/pdf/lgl-svc/Memorandum-of-Reprimand-GOMOR.pdf>; *Rebuttals to Letters of Reprimand*, UCMJ-DEFENDER.COM, <http://www.ucmj-defender.com/practice-areas/rebuttals-to-letters-of-reprimand/> (last visited Sept. 15, 2016). Rebuttals to Air Force Letters of Reprimand (LORs) follow a similar formula. *LOR Rebuttal*, AIRFORCE WRITER, <http://www.airforce-writer.com/LOR-rebuttal.htm> (last visited May 20, 2016). The common, unspoken thread in all GOMOR rebuttal guidance is that rebuttals should not exceed a single page whenever possible. This assertion is based on the author's recent professional experiences as the Chief, Military Justice for the 200th Military Police Command from September 12, 2011 to July 17, 2015, and as a Legal Assistance Attorney, 101st Airborne Division and Fort Campbell, Kentucky, from June 25, 2010 to June 24, 2011.

¹¹⁷ *See supra* note 103 and accompanying sources; *see* AR 600-37-1986, *supra* note 76, chs. 6, 7 (discussing the organization and scope of authority of the DASEB).

¹¹⁸ AR 600-37-1986, *supra* note 76, ¶ 7-2a.

standards for appeal are also exceedingly high.¹¹⁹ Potential remedies beyond appeal to DASEB are even more rarified.¹²⁰

Army Regulation 600-37-1986 may provide commanders additional guidance with respect to filing determinations. For example, part of the stated purpose of the regulation is to “[e]nsure that the best interests of both the Army and the soldiers are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files.”¹²¹

This vague statement is problematic. First, this is necessarily an expression of best interest as viewed from the commanders’ perspective. A soldier would hardly concede that it is ever in his own best interests for a GOMOR to be filed in his OMPF. Further, to say that commanders should make filing determinations in the best interests of the Army is redundant. That is the standard for all commanders’ decision-making; it

¹¹⁹ *Id.* (noting that the “burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF”); *id.* ¶ 7-2b (requiring “substantial evidence” that the “intended purpose [of a reprimand] has been served and that [its] transfer [from the performance portion to the restricted portion of the soldier’s OMPF] would be in the best interest of the Army”).

¹²⁰ See *Appealing Unfavorable Information in Military Records*, PENTAGON.MIL, <http://arba.army.pentagon.mil/Unfavorable.cfm> (last visited Sept. 15, 2016).

If, after exhausting your appeal to the DASEB, you still feel that there is an error or injustice in the information in your military file, you can apply to the Army Board for Correction of Military Records on a [Department of Defense] (DD) Form 149 for removal of unfavorable information from your file or transfer from the performance section to the restricted section.

Id. “The Army Board for Correction of Military Records (ABCMR) is the highest level of administrative review within the Department of the Army with the mission to correct errors in or remove injustices from Army military records.” *The Army Board for Correction of Military Records*, PENTAGON.MIL, <http://arba.army.pentagon.mil/abcmr-overview.cfm> (last visited Sept. 15, 2016). Soldiers may appeal decisions of the ABCMR to the federal courts at their own expense as an appeal of a final agency action under the Administrative Procedure Act (APA). The Administrative Procedure Act, 5 U.S.C. §§ 701–708 (2015) Judicial review under the APA is limited to compelling “agency action unlawfully withheld or unreasonably delayed,” or overturning action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” unconstitutional, or in violation of an applicable statute or agency procedural requirement. 5 U.S.C. § 706. “Due account shall be taken of the rule of prejudicial error.” *Id.*

¹²¹ AR 600-37-1986, *supra* note 76, ¶ 1-1a

is difficult to conceive a situation in which a commander would say, “I will do X, even if the Army suffers as a result.”

Along with the best interests of the Army, the statement of objectives in AR 600-37-1986 is relevant.¹²² The objectives of AR 600-37-1986 are:

- a. Apply fair and just standards to all soldiers.
- b. Protect the rights of individual soldiers and, at the same time, permit the Army to consider all available[,] relevant information when choosing soldiers for positions of leadership, trust, and responsibility.
- c. Prevent adverse personnel action based on unsubstantiated derogatory information or mistaken identity.
- d. Provide a means of correcting injustices if they occur.
- e. Ensure that soldiers of poor moral character are not continued in the Service or advanced to positions of leadership, trust, and responsibility.¹²³

The statement of objectives contains several concepts that bear further discussion. With respect to fair standards and unsubstantiated information, COL (Ret.) Stockdale observes that the “Army requires no standard of proof for a reprimand to be filed, permanently, in a [s]oldier’s official military records.”¹²⁴ However, there is a critical distinction here. We have established that a commander’s standard of evaluation in making a filing determination is the exercise of the commander’s best judgment, informed by the best needs of the Army and the soldier.¹²⁵ What standard of proof or evidentiary standard applies to the factual matter *underlying* a reprimand is a completely separate question.¹²⁶

In fact, AR 600-37-1986 contains an evidentiary standard for underlying factual matters, although it is only partially articulated. Part of

¹²² *Id.* ¶ 1-4; *see also* AR 600-37-1977, *supra* note 68, ¶ 1-3, and AR 600-37-1972, *supra* note 48, ¶ 1-3.

¹²³ AR 600-37-1986, *supra* note 76, ¶ 1-4.

¹²⁴ Stockdale, *supra* note 98.

¹²⁵ AR 600-37-1986, ¶ 3-1; *see generally supra* notes 102–10 and accompanying text.

¹²⁶ Colonel (Ret.) Stockdale’s reference to an “objective decision by competent authority” only clouds the issue. Stockdale, *supra* note 98.

the regulation's stated purpose is to "[e]nsure that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files."¹²⁷ We may infer, then, that any unfavorable information that is ultimately filed should be substantiated, relevant, timely, and complete. Plainly, this is the case, since AR 600-37-1986 imports the familiar Privacy Act of 1974 standard: "Unfavorable information filed in official personnel files must meet Privacy Act standards of accuracy, relevance, timeliness, and completeness."¹²⁸

Relevance seems intuitively necessary and understandable, as do timeliness and completeness.¹²⁹ However, what it means precisely for unfavorable information to be "substantiated" is not readily apparent from the regulation. Accuracy under the Privacy Act and substantiation are not necessarily the same. Substantiation is not defined in AR 600-37-1986, at least not in the sense of the clear criminal standard of beyond a reasonable doubt or the administrative preponderance of the evidence standard.¹³⁰ We are left to conclude that the requirement for substantiation of unfavorable information must incorporate by reference whatever

¹²⁷ AR 600-37-1986, *supra* note 76, ¶ 1-1a(2).

¹²⁸ *Id.* ¶ 3-2b; *see* The Privacy Act of 1974, 5 U.S.C. § 552a(d)(2)(B)(i) (2015) (requiring each agency that maintains a system of records to permit any individual to request amendment of any record pertaining to that individual and to promptly either correct "any portion thereof which the individual believes is not accurate, relevant, timely, or complete" or explain the agency's reasons for refusing the request for amendment). The Privacy Act standard was first adopted in AR 600-37-1977. *See* AR 600-37-1977, *supra* note 68, ¶ 2-1b ("Unfavorable information filed in official personnel files must meet privacy act standards of accuracy, relevancy, timeliness, and completeness.").

¹²⁹ AR 600-37-1986, *supra* note 76, ¶ 3-4b(1)(a) (allowing referral to the recipient of only the "applicable portions of investigations, reports, and other documents" underlying a reprimand, "providing the recipient was not previously provided an opportunity to respond to information reflected in that documentation"). This may generate friction, as soldiers may argue that the imposing authority is attempting to "hide the ball." The better practice is to provide the recipient with complete supporting documents that have been appropriately redacted for personal information of third parties. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM para. 2-6 (5 July 1985) (noting that "personal data such as [social security number] and home address of a third party in the data subject's record normally do not pertain to the data subject and therefore may be withheld").

¹³⁰ *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 918(c) (2015) (requiring proof beyond a reasonable doubt to support a finding of guilty at a court-martial); *see* AR 15-6, *supra* note 88 (requiring findings of administrative investigations and boards of inquiry to be "supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion." This is commonly referred to as the "preponderance of the evidence" standard.

evidentiary standard applied to the underlying factual information at the time it was acquired.¹³¹

This is simple enough where the facts at issue are acquired in an administrative investigation. Such facts must be established by a preponderance of the evidence in order to be approved by the appointing authority, and so may be deemed substantiated for purposes of AR 600-37-1986.¹³² Unfortunately, this model tends to collapse when applied to evidence acquired in the course of a criminal investigation. If evidence is used in a prosecution (whether military or civilian) that results in a finding of guilt, it has been tested against the reasonable doubt standard with all of the due process protections of the criminal justice system. It would be difficult to argue that such evidence is not substantiated for purposes of a reprimand.¹³³

However, an evidentiary problem arises when criminal evidence is gathered but not used to prosecute, or there is a prosecution but the soldier is acquitted. As it stands, subject to the substantiation requirement, 600-37-1986 does not restrict the source of information upon which reprimands may be predicated. It therefore allows for the imposition of administrative reprimands based on evidence used in a criminal prosecution in which a soldier has been acquitted.¹³⁴

Acquittal raises a unique issue. Army Regulation 600-37-1986 allows imposing authorities to use information acquired in criminal investigations—which would not independently satisfy and has not been tested against the beyond a reasonable doubt standard—as the basis for

¹³¹ Anonymous tips illustrate this point. “Anonymous communications will not be filed in a soldier’s MPRJ . . . [or] OMPF . . . unless, after investigation or inquiry, they are found to be true, relevant, and fully proven or supported.” AR 600-37-1986, *supra* note 76, ¶ 3-5. The applicable evidentiary standard must necessarily be that of the investigation or inquiry. For administrative investigations, this is the preponderance standard. AR 15-6, *supra* note 88, ¶ 3-10b.

¹³² AR 15-6, *supra* note 88, ¶ 3-10b.

¹³³ Whether an administrative reprimand is necessary in the event of a criminal conviction is a larger issue. Evidence of criminal convictions is expressly excepted from the referral requirement, and OMPF filing is authorized without additional notification to the soldier. *See* AR 600-37-1986, *supra* note 76, ¶ 3-3a, d (authorizing OMPF filing without further referral of “[r]ecords of courts-martial, court-martial orders, and records of nonjudicial punishment under the Uniform Code of Military Justice” and “[r]ecords of civilian convictions (to include the record of arrest), or extracts thereof, authenticated by civilian authorities”). Under such circumstances, a reprimand not only smacks of piling on, it is plainly unnecessary in order to document misconduct.

¹³⁴ Such prosecution may be civilian or military.

potentially career-ending reprimands.¹³⁵ Indeed, in the absence of an available evidentiary standard to import, it seems the only applicable standard in that situation is the imposing authority's best judgment.¹³⁶ This may be a difficult pill for a soldier to swallow, considering that the prosecution has failed to establish guilt beyond a reasonable doubt in a formal judicial proceeding.¹³⁷ That is not to say that it is impossible to substantiate such evidence; sworn statements, certified records, and authenticated laboratory reports, for example, may all fairly be deemed "substantiated."

Significantly, however, the Army uniformly prohibits the administrative separation of soldiers based on "conduct that has been the subject of judicial proceedings that resulted in an acquittal."¹³⁸ The

¹³⁵ Stockdale, *supra* note 98. It is disingenuous to claim that such evidence must have at least been supported by a finding of probable cause. Even if probable cause was found in a particular case, probable cause does not rise to the level of a preponderance of the evidence and so does not represent a degree of reliability equivalent to that provided by evidence assessed in an administrative investigation. Instead, it is the lesser "reasonable belief" standard. Compare AR 15-6, *supra* note 88, ¶ 3-10b (describing the administrative preponderance standard) with MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(f)(2) (2015) (discussing the probable cause standard in the context of search authorizations). See also *United States v. \$242,484.00*, 351 F.3d 499, 504 (11th Cir. 2003) (observing that the "probable-cause standard demands less evidence than the preponderance-of-the-evidence standard").

¹³⁶ AR 600-37-1986, *supra* note 76, ¶ 2-2a.

¹³⁷ See, e.g., MCM, *supra* note 3, R.C.M. 917(d) (authorizing a finding of not guilty only "in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses").

¹³⁸ U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES ¶ 4-4a (12 Apr. 2006) (RAR 13 Sept. 2011).

An [Active Army] officer [or an officer of the Army National Guard of the United States or the U.S. Army Reserve serving on active duty or on active duty for training for a period in excess of 90 days] will not be considered for involuntary separation because of conduct that has been the subject of judicial proceedings that resulted in an acquittal.

Id. See also U.S. DEP'T OF ARMY, REG. 135-175, OFFICER TRANSFERS AND DISCHARGES ¶ 2-5a (28 Feb. 1987) (RAR 4 Aug. 2011).

No [Troop Program Unit] (TPU) officer [of the Army National Guard of the United States or the U.S. Army Reserve] will be considered for involuntary separation . . . because of conduct that has been the subject of judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect.

consequences of administrative separation are severe, and may include loss of benefits, reduction in grade, and a characterization of discharge of other than honorable (OTH) upon discharge or separation.¹³⁹ However, those consequences are balanced against significant due process protections. Chief among those protections is that evidence used in administrative separations must meet the preponderance of the evidence standard.¹⁴⁰

Thus, the Army prohibits evidence of conduct that results in an acquittal in its more severe administrative separation proceedings, with all of their attendant due process protections. How, then, could the use of such evidence to support reprimands, which have much more limited due

Id.; U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 1-17b(1) (6 June 2006) (RAR 6 Sept. 2011) (“No Soldier will be considered for administrative separation because of conduct that . . . [h]as been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof.”). *Cf.* U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 2-3a(1) (18 Mar. 2014) [hereinafter AR 135-178]. The regulation prohibits administrative separation of TPU Reserve Component enlisted soldiers based on:

Conduct that has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof, unless: (a) “such action is based on a judicial determination not going to the guilt or innocence of the respondent;” or (b) “[w]hen the judicial proceeding was conducted in a State or foreign court and the separation is approved by HQDA, ARNGUS, NGR–ARP/OCAR, DAAR (para[.] 1–12, of this regulation);” or (c) “[w]hen acquittal from the judicial proceedings was based on a finding of not guilty only by reason of lack of mental responsibility. A [s]oldier in this category normally shall be separated under Secretarial plenary authority (chap[.] 14, of this regulation) unless separation for disability is appropriate.

Id.

¹³⁹ An extensive discussion of the administrative separation process is beyond the scope of this article. *See supra* note 138 and accompanying sources (identifying the four primary Army administrative separation regulations).

¹⁴⁰ *See* AR 600-8-24, *supra* note 138, ¶ 4-6a (requiring the Government “to establish, by preponderance of the evidence, that the officer has failed to maintain the standards desired for their grade and branch or that the officer’s Secret-level security clearance has been permanently denied or revoked by appropriate authorities”); AR 135-175, *supra* note 138, ¶ 2-20a(1) (requiring the Government “to establish by a preponderance of evidence that officers have failed to maintain established standards for grade and branch or that their conduct has been prejudicial to National security”); AR 635-200, *supra* note 138, ¶ 2-12a(1) (requiring boards of inquiry to determine “whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence”); AR 135-178, *supra* note 138, ¶ 3-18h(2) (applying the same as to TPU Reserve Component enlisted soldiers).

process protections and lack a clear evidentiary standard, possibly be justified?¹⁴¹

The greater question is not whether a reprimand may be imposed based on such evidence, but whether it is fair to the soldier to do so. “Ironically, these reprimands state the crime, and the article from the Uniform Code of Military Justice, but the soldier is afforded virtually none of the safeguards of the Uniform Code of Military Justice (UCMJ) they ostensibly violated.”¹⁴² This is a persuasive argument, particularly where, as we shall see, a GOMOR is not necessary in order to file information (even information as detrimental as this) in a soldier’s OMPF.

2. Mechanisms

Another of the stated objectives of AR 600-37-1986 is to “[p]rotect the rights of individual soldiers and, at the same time, permit the Army to consider all available relevant information when choosing soldiers for positions of leadership, trust, and responsibility.”¹⁴³ How is relevant information contained in the OMPF made available to Army leaders in order to guide these choices? In modern Army practice, that is the purpose of the Interactive Personnel Electronic Records Management System (iPERMS).¹⁴⁴ Before computerized recordkeeping, the Army’s only centralized record system was maintained entirely on paper.¹⁴⁵ At that time—which includes the first sixteen of the thirty years since the inception of AR 600-37-1986, as iPERMS did not go into general operation until October 1, 2002—the filing of a GOMOR in a soldier’s OMPF served the incidental secondary purpose of preserving records of soldier misconduct.

However, it is critically important to understand that, although the issuance and filing of GOMORs have become matters of routine Army practice, GOMORs themselves have never actually been necessary in order to preserve such records or to allow permanent filings. On the

¹⁴¹ Unfortunately, nothing restricts a Department of the Army promotion board from examining a GOMOR filed in a soldier’s OMPF based on conduct that could not serve as the predicate for administrative separation.

¹⁴² Stockdale, *supra* note 98.

¹⁴³ AR 600-37-1986, *supra* note 76, ¶ 1-4b.

¹⁴⁴ See *supra* note 10 and accompanying sources (discussing the implementation of iPERMS).

¹⁴⁵ *Id.*

contrary, every applicable regulation since 1955 has authorized permanent filing of *any* unfavorable information *so long as* it is first referred to the soldier and the soldier is provided an opportunity to comment.¹⁴⁶ In a telephonic interview, Mr. Jan Serene, Senior Legal Advisor to the Army Review Boards Agency (ARBA), observed that although OMPF filing authority for unfavorable information certainly does exist as described, it is rarely used.¹⁴⁷ According to Mr. Serene, despite this express authority and for no discernable reason, GOMORs have become the default mechanism for transmittal of unfavorable information for OMPF filing.¹⁴⁸

Army regulation 600-37-1986 goes a step further and exempts certain unfavorable information from the referral process:

- a. Records of courts-martial, court-martial orders, and records of nonjudicial punishment under the Uniform Code of Military Justice (UCMJ), Article 15. (See AR 27–10 and AR 640–10.)
- b. Proceedings of boards of officers, if it is clear that the recipient has been given a chance to present evidence and cross-examine witnesses in his or her own behalf.
- c. Completed investigative reports. These include criminal investigation reports (or authenticated extracts) that have resulted in elimination or disciplinary action against the person concerned. When it is not practical to include the entire report (or an extract), the investigative report will be referenced.
- d. Records of civilian convictions (to include the record of arrest), or extracts thereof, authenticated by civilian authorities. However, records consisting solely of minor traffic convictions are not to be filed in the OMPF.

¹⁴⁶ See AR 640-98, *supra* note 39, ¶¶ 4, 5d (allowing permanent filing of unfavorable information subject to referral requirement, except administrative reprimands themselves); AR 600-37-1972, *supra* note 48, ¶ 2-6 (allowing permanent filing of unfavorable information subject to referral requirement,); AR 600-37-1977, *supra* note 68, ¶ 2-6 (same); AR 600-37-1986, *supra* note 76, ¶ 3-6 (same).

¹⁴⁷ Telephone interview with Mr. Jan Serene, Senior Legal Advisor, Army Review Boards Agency, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) (Nov. 10, 2015).

¹⁴⁸ *Id.*

e. Officer and enlisted evaluation reports. Administrative processing and the appeal of evaluation instruments are governed by AR 623–1, AR 623–105, and AR 623–205. Filing of evaluation instruments is governed by AR 640–10.

f. Other unfavorable information of which the recipient had prior official knowledge (as prescribed by para 3–6) and an adequate chance to refute. The notation “AR 600–37 complied with” will be entered below the filing authority on such unfavorable information.¹⁴⁹

Each category of exempt information shares the common characteristic of being the result of an underlying procedure with its own inherent due process protections. Even the catch-all provision in paragraph 3-3f requires prior notification and an opportunity for rebuttal.¹⁵⁰

Authority to direct OMPF filing of matters other than reprimands is governed by AR 600-8-104, Army Military Human Resource Records Management.¹⁵¹ Significantly, this regulation grants iPERMS access to “Commanders at all levels (includ[ing] brigade and battalion S1s, [unit administrators], Reserve personnel action center[s], and [human resource providers])” as well as “G–1s and G–1 sergeants major” for purposes of “[p]ersonnel management, personnel operation, and administration requiring referral to the OMPF.”¹⁵²

Plainly, numerous personnel within every Army command structure are authorized to upload unfavorable information to iPERMS after referral. Uploads are still subject to the requirements of AR 600-37-1986,

¹⁴⁹ AR 600-37-1986, *supra* note 76, ¶¶ 3-3a-f. “Internal staff actions and working papers within and among personnel management offices and personnel decision makers at HQDA” are also exempted from referral. *Id.* ¶ 3-3g. Although commanders have no direct control over such documents, whether they might include mention of an OMPF-filed GOMOR is an open question.

¹⁵⁰ *Id.* ¶ 3-3f.

¹⁵¹ See U.S. DEP’T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCE RECORDS MANAGEMENT tbl. 2-1 (7 Apr. 2014) (identifying both personnel authorized to access iPerms and authorized purposes for access).

¹⁵² *Id.* Access for the personnel identified includes the performance folder without evaluations, as well as the service, deployment/mobilization, and administrative folders for all “units within unit identification code [UIC] Structure.” *Id.* This is broad access, but does not include, for example, the evaluation or health/dental folders. *Id.*

however, and should be limited to “indications of substandard leadership ability, promotion potential, morals, and integrity” or “[o]ther unfavorable character traits of a permanent nature.”¹⁵³ Such filings are expressly intended to be available to “personnel managers and selection board members for use in making such personnel decisions as described in paragraph 3–1b,” which include “selecting soldiers for positions of public trust and responsibility, or vesting such persons with authority over others.”¹⁵⁴

Given how readily unfavorable information upon which GOMORs are based may be filed in a soldier’s OMPF, the role of the GOMOR itself becomes even less clear. Further, despite its title, AR 600-37-1986 is not the sole mechanism for the preservation and transmittal of unfavorable information to Army decision-making authorities. Evaluations are an ideal medium for preserving unfavorable information. The Army recently moved to a consolidated online personnel performance evaluation application, the Evaluation Entry System (EES), making this forum even more accessible.¹⁵⁵

Adverse comments on an evaluation report fulfill the same function as the directed filing of a reprimand. They preserve a record of soldier misconduct for later review by promotion and selection authorities.¹⁵⁶ Indeed, Army regulations specifically require that misconduct be recorded in evaluations.¹⁵⁷ Like reprimands, evaluations also preserve the rating chain’s opinions about the effect of misconduct on the soldier’s potential

¹⁵³ AR 600-37-1986, *supra* note 76, ¶ 3-2c.

¹⁵⁴ *Id.* ¶¶ 3-1b, 3-2c.

¹⁵⁵ U.S. ARMY HUMAN RESOURCES COMMAND EVALUATION ENTRY SYSTEM, <https://evaluations.hrc.army.mil/> (last visited May 18, 2016) [hereinafter EES]; *see* U.S. DEP’T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-33b(1) (4 Nov. 2015, eff. 1 Jan 2016) [hereinafter AR 623-3] (directing use of the EES for the processing of all evaluation reports).

¹⁵⁶ *See* AR 623-3, *supra* note 155, ¶ 1-14b (“Evaluation reports will serve as the primary source of information for officer and NCO personnel management decisions and will serve as a guide for the Soldier’s performance and development, enhance the accomplishment of the organization’s mission, and provide additional information to the rating chain.”); *see also* U.S. DEP’T OF ARMY, PAM. 623-3, ARMY EVALUATION SYSTEM para 2-2a (10 Nov. 2015) [hereinafter DA PAM 623-3] (“The DA Form 67-10 series allows rating officials to provide HQDA with performance and potential assessments of each rated officer for HQDA selection board processes. It also provides valuable information for use by successive members of the rating chain, [and] emphasizes and reinforces professionalism.”).

¹⁵⁷ *See* AR 623-3, *supra* note 155, ¶ 3-2f (directing that “evaluations will cover failures as well as achievements”).

for future service, with more immediate impact and without the artificial imprimatur of a general officer's signature.

Honesty in evaluations is a recurring theme throughout Army Regulation 623-3, which governs the Evaluation Reporting System.¹⁵⁸ Removal of GOMORs from the equation—particularly in the case of sex-based offenses, where adverse comments on evaluations are now mandatory—would serve as an additional forcing function for candor in the evaluation process.¹⁵⁹ This would have the significant benefit of counteracting over-inflated ratings generally.¹⁶⁰

¹⁵⁸ See, e.g., *id.* ¶ 2-12f (directing the rater to “[p]rovide an honest assessment of the rated [s]oldier’s performance and potential”); AR 623-3, *supra* note 155, ¶ 3-2f.

Rating officials will prepare evaluation reports that are forthright, accurate, and as complete as possible within the space limitations of the form. This responsibility is vital to the long-range success of the Army’s mission. With due regard for the rated [s]oldier’s current rank or grade, experience, and military schooling, evaluations will cover failures as well as achievements. Evaluations normally will not be based on a few isolated minor incidents. Rating officials have a responsibility to balance their obligations to the rated Soldier with their obligations to the Army. Rating officials will make honest and fair evaluations of [s]oldiers under their supervision. On the one hand, this evaluation will give full credit to the rated [s]oldier for their achievements and potential. On the other hand, rating officials are obligated to the Army to be honest and discriminating in their evaluations so Army leaders, [Headquarters, Department of the Army] selection boards, and career managers can make intelligent decisions.

Id.

¹⁵⁹ See AR 623-3, *supra* note 155, ¶¶ 2-12j, k (requiring raters to “[a]ssess the rated [s]oldier’s performance in fostering a climate of dignity and respect and adhering to the requirements of the Sexual Harassment/Assault Response and Prevention (SHARP) Program” and “[d]ocument any substantiated finding, in an Army or DOD investigation or inquiry” that a rated soldier either committed, failed to report, failed to respond to, or retaliated against any person “making a complaint or report of sexual harassment or sexual assault.”); see also U.S. DEP’T OF ARMY, DIR. 2013-20, ASSESSING OFFICERS AND NONCOMMISSIONED OFFICERS ON FOSTERING CLIMATES OF DIGNITY AND RESPECT AND ON ADHERING TO THE SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION PROGRAM (27 Sept. 2013) (directing changes to the Army Evaluation System).

¹⁶⁰ See, e.g., Jim Tice, *View the Army’s Tough*, *New NCOER*, ARMY TIMES (Oct. 9, 2014), <http://www.armytimes.com/story/military/careers/army/2014/10/09/view-the-armys-tough-new-ncoer/16985971/> (observing that when “everyone is supposedly doing a fantastic job, [it is] difficult for selection boards to determine who the true standouts are for promotion”).

Another recent Army mechanism for the preservation and transmittal of unfavorable information is the Adverse Information Pilot Program (AIPP) database. Then-Secretary of the Army John M. McHugh established the AIPP to conform Army practice to existing law with respect to promotion selection boards for grades above colonel (O-6).¹⁶¹ The purpose of the AIPP is to identify “‘credible information of an adverse nature’ documented in command-directed investigations or inquiries related to field grade officers, centrally maintain summaries of this adverse information and provide access to these adverse summaries prior to convening brigadier general and major general promotion selection boards (PSBs).”¹⁶² Qualifying adverse information will be added to the AIPP database for all field-grade officers, major (O-4) through colonel (O-6), not only for those officers eligible for general officer (GO) PSBs.¹⁶³

Importantly, Department of Defense Instruction (DoDI) 1320.04 defines adverse information to include:

[A]ny substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. *To be credible, the information must be resolved and supported by a preponderance of the evidence.* To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual.”¹⁶⁴

The DoD’s adoption of the preponderance of the evidence standard as the foundation for evidentiary credibility in the AIPP highlights the thirty-year absence of such a standard from the GOMOR process.

Commanders are directed to work with their servicing staff judge advocates (SJAs) to identify credible adverse information documented in

¹⁶¹ Memorandum from Sec’y of Army to Principal Officials of Headquarters, Dep’t of Army et al., subject: Pilot Program for Providing Adverse Information to Brigadier General and Major General Promotion Selection Boards (21 July 2015) [hereinafter AIPP Memorandum].

¹⁶² *Id.* ¶ 2.

¹⁶³ *Id.* Encl., ¶ 4c.

¹⁶⁴ U.S. DEP’T OF DEF., INSTR. 1320.04, MILITARY OFFICER ACTIONS REQUIRING PRESIDENTIAL, SECRETARY OF DEFENSE, OR UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS APPROVAL OR SENATE CONFIRMATION encl. 4, para. 1.a (3 Jan. 2014) [hereinafter DoDI 1320.04] (emphasis added).

command investigations and inquiries.¹⁶⁵ This requires confirmation of the credibility of the underlying adverse information.¹⁶⁶ Unlike GOMORs, substantiation of credibility is much cleaner in the AIPP, given DoD's adoption of the preponderance of the evidence standard.¹⁶⁷

Equally importantly, entry of adverse information into the AIPP triggers an additional legal review of the command's summary of the documented adverse information.

If an officer is identified as having adverse information in this new application, the Office of the Judge Advocate General (OTJAG) and the Office of the General Counsel (OGC) will provide a legal review of the summary submitted by the command. GOMO [the General Officer Management Office] will then refer the summary to the officer. The summary of adverse information and the officer's response, if any, will then be provided to the BG and MG PSBs.¹⁶⁸

This high-level, independent legal review stands in stark contrast to the absence of a legal review requirement for GOMORs in AR 600-37-1986.¹⁶⁹ The AIPP provides significantly greater due process protection to soldiers than the single referral for comment authorized for GOMORs, for which no legal review is required.

¹⁶⁵ AIPP Memorandum, *supra* note 161, Encl., ¶ 3.

¹⁶⁶ See 10 U.S.C. § 615(a)(3) (2006) (requiring "any credible information of an adverse nature, including any substantiated adverse finding or conclusion from an officially documented investigation or inquiry" to be provided to the selection board).

¹⁶⁷ DOD INSTRUCTION 1320.04, *supra* note 164.

¹⁶⁸ AIPP Memorandum, *supra* note 161, Encl., ¶ 3.

¹⁶⁹ AR 600-37-1986, *supra* note 76, ¶ 3-4; AIPP Memorandum, *supra* note 161, Encl., ¶ 3. The scope of the required legal review is not entirely clear from the pilot program's description. Commanders must "ensure that 'credible adverse information' documented in an official investigation or inquiry is properly recorded." *Id.* ¶ 4c. The Office of the General Counsel (OGC) has the lead in conducting the legal reviews, with assistance from the Office of The Judge Advocate General (OTJAG) as required. *Id.* ¶¶ 4d, g. Guidance from OTJAG's Administrative Law Division indicates that the legal review will determine whether the "adverse summary accurately reflects the findings of the investigation and meets the definition of adverse information." ADMINISTRATIVE LAW DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. ARMY, INFORMATION PAPER: ADVERSE INFORMATION PILOT PROGRAM, para. 4d (6 Aug. 2015) [hereinafter AIPP Information Paper]. Department of Defense Instruction 1320.04 defines adverse information. DoDI 1320.04, *supra* note 164.

The Adverse Information Summary is based on the responsible commander's input into the AIPP database and is then generated by the same database. The resulting summary must be referred to the subject officer for review and an opportunity for rebuttal.¹⁷⁰ The summary is identical to a GOMOR in the sense that it consolidates adverse information into a brief "deliverable." Army practitioners will observe that the system-generated summary not only *looks* like a GOMOR, it even contains some of the same structural elements, including substantiated findings, a synopsis of misconduct, and the imposing commander's comments.¹⁷¹ This evinces that GOMORs have become redundant for field-grade officers following the implementation of the AIPP.

Although still in its formative stages, the ultimate expansion of the AIPP to encompass PSBs (as opposed to merely recording adverse information) for all field-grade officers—or even for junior officers and senior noncommissioned officers—would be unsurprising. Even if it is not expanded, the AIPP will still document adverse information that arises in the field-grade ranks with the express purpose of making that information available to general officer PSBs. This makes GOMORs based on such information redundant for field-grade officers, particularly in light of the AIPP's clear evidentiary standard and heightened procedural due process protections.

B. The Way Ahead

1. Criticisms

Colonel (Ret.) Stockdale suggests multiple fixes for the problem of runaway GOMORs, some of which are clearly appropriate and defensible.¹⁷² However, by no means does this article endorse wholesale adoption of all of COL (Ret.) Stockdale's recommendations. To the contrary, he includes at least two suggestions that are clearly unworkable, one of which is radically divergent from settled principles of military justice.

¹⁷⁰ A sample AIPP Database Summary is attached as app. B. Colonel Karen Carlisle, Adverse Information, at slide 12 (WWCLE 2015) (unpublished PowerPoint presentation) (on file with author).

¹⁷¹ See *infra* app. B.

¹⁷² Stockdale, *supra* note 98.

First, he recommends that if a soldier receives a reprimand intended for OMPF filing, an alternative offer of nonjudicial punishment under UCMJ Article 15 should be required of the command.¹⁷³ His stated goal is for the recipient to “turn down” the nonjudicial punishment and force a court-martial in order to access due process in a confrontational forum.¹⁷⁴ However, this conflates acceptance of nonjudicial punishment with the collateral abandonment of the opportunity to challenge the evidence. To the contrary, soldiers who accept nonjudicial punishment are fully entitled to “[p]resent matters in defense, extenuation, and mitigation orally, or in writing, or both,” and to have favorable (or even adverse) witnesses present if their statements would be relevant and they are reasonably available.¹⁷⁵

In any case, it would be paradoxical to require the government to prove beyond a reasonable doubt facts upon which it does not intend to predicate criminal liability. It would also elevate proof of fact far above the preponderance standard, which applies in even the most contentious administrative separation actions before boards of inquiry with opposing counsel present. Most importantly, this proposal would impermissibly invade commanders’ discretion with respect to the disposition of offenses under the UCMJ.¹⁷⁶

Next, COL (Ret.) Stockdale recommends that all reprimands “directed for [OMPF] filing” should be reviewed by The Judge Advocate General (TJAG) and, when “questionable, inappropriate, or legally insufficient reprimands come to TJAG’s attention, TJAG should personally contact [the imposing] General Officer.”¹⁷⁷ Although no statistics are available to determine the number of GOMORs directed for OMPF filing annually, the GOMOR process is so ubiquitous that actual filings must conservatively number in the hundreds, if not more. Automatic legal review at TJAG’s level of every GOMOR directed for OMPF filing throughout the Army

¹⁷³ *Id.*

¹⁷⁴ *Id.* Demanding trial by court-martial is colloquially known as turning down an Article 15, and is a soldier’s right; however, if the soldier is subsequently found guilty, he will not only have a conviction on his record, but also face a wide range of potential punitive actions, including elimination from the service.

¹⁷⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶¶ 4c(1)(E), (F) (2012) [hereinafter MCM].

¹⁷⁶ Stockdale, *supra* note 98; MCM, *supra* note 175, R.C.M. 306.

¹⁷⁷ Stockdale, *supra* note 98.

would be a practical impossibility.¹⁷⁸ In any event, because significant misconduct will often result in a GOMOR under the current Army mindset, the OGC-level legal review required by the AIPP should lay to rest most concerns about legal insufficiency, at least with respect to field-grade officers.¹⁷⁹

Finally, COL (Ret.) Stockdale suggests that the “entire ‘reprimand mill’ needs revamping”:

Typically, an investigating officer is appointed to look into alleged misconduct. After a few weeks or months, he produces a report with “findings and recommendations.” The vast majority of these investigating officers have never conducted an investigation in their lives. Rarely do they have any investigative training whatsoever. They are first instructed to meet with the servicing Staff Judge Advocate (SJA) (or, actually, a junior Judge Advocate in the SJA office). The JA instructs them how to take “sworn statements”; “what evidence to look for”; “who to interview”; etc. Note: the SJA works for the commander, who appointed this investigating officer. The commander, his SJA, and now the investigating officer are all on the same prosecutorial team. Is this fair to the [s]oldier? No. Add to that, the investigating officer is typically in the commander’s chain of command and is going to receive his [e]valuation [r]eport either from that commander directly, or from the commander’s chain of command. Everyone wants to please the commander and get a good [e]valuation and get promoted. Often, the investigating officer simply looks for, and finds, whatever evidence will justify his having been appointed to look into the matter in the first place. Ask yourself, under these dynamics, what are the chances for a fair and impartial

¹⁷⁸ However, this article does support amending AR 600-37-1986 to require legal review of proposed GOMORs and their supporting evidence at the local SJA level before they are imposed. *See infra* sect. B2 for further discussion.

¹⁷⁹ *See supra* note 169 and accompanying sources. The existing GOMOR appellate process via DASEB remains in place. *See supra* note 101 and accompanying sources. That process, in tandem with the proposed mandatory local legal review, should sufficiently address concerns about questionable or inappropriate reprimands. *See infra* app. C (describing the proposed legal review process).

investigation? The answer should be clear: slim to none.¹⁸⁰

It is unreasonable to suggest that commanders do not take their duty to appoint investigating officers (IOs) seriously.¹⁸¹ It is also unreasonable to imply universal collusion among IOs, SJAs, and their staffs to ensure that commanders receive only pleasing reports of investigation, thereby ensuring good evaluations all around. To the contrary, judge advocates take their roles as honest brokers—who maintain the integrity of the investigative process—as seriously as commanders do.¹⁸²

Ensuring the competence and independence of IOs and eliminating conflicts of interest are laudable goals.¹⁸³ However, a supportive command climate, scrupulous IO selection, and proactive legal support from the servicing SJA's office will do more to meet those goals than arbitrarily designating IOs from outside the appointing authority's chain of command.¹⁸⁴ Nor would it be possible to appoint officers detailed as Inspectors General (IGs) to serve as IOs.¹⁸⁵ IGs are exempt by regulation from additional duty appointment as IOs.¹⁸⁶

2. Proposal

A general overhaul of AR 600-37-1986, which has not been updated in thirty years, is essential.¹⁸⁷ However, as we have seen, COL (Ret.) Stockdale's approach is unpalatable, if not unworkable. This section

¹⁸⁰ Stockdale, *supra* note 98.

¹⁸¹ See AR 15-6, *supra* note 88, ¶ 2-1c (directing that investigating officers (IOs) "shall be those persons who, in the opinion of the appointing authority, are best qualified for the duty by reason of their education, training, experience, length of service and temperament").

¹⁸² *Id.* ¶ 2-3b (discussing the legal review process for administrative investigations).

¹⁸³ Stockdale, *supra* note 98.

¹⁸⁴ *Id.* It may be proper in certain cases for an IO to be appointed from outside the chain of command, but only if such a step is required in the best judgment of the appointing authority based on the facts and circumstances at hand. See AR 15-6, *supra* note 88 (describing the requirements for appointment of an IO).

¹⁸⁵ Stockdale, *supra* note 98.

¹⁸⁶ See U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 2-7a(2) (29 Nov. 2010) (RAR 3 July 2012) (prohibiting appointment of IG personnel as IOs under "AR 15-6, or any other regulation providing for the appointment of investigating officers or members of administrative separation boards"). Inspector General personnel "must not perform duties that might interfere with their status as fair, impartial fact-finders and confidants within the command." *Id.* ¶ 2-7a.

¹⁸⁷ See *infra* app. C for a proposed update to AR 600-37-1986.

proposes a more balanced and accessible solution, which involves a fundamental shift away from reprimands as part of routine Army practice.

Given the well-known and severe consequences of permanent filing, the Army should require that *all* unfavorable information intended for OMPF filing at any level be supported by a preponderance of the evidence, even if a reprimand is not attached.¹⁸⁸ The Air Force has already adopted the preponderance standard for its letters of reprimand, but requires only substantiation for any other adverse information.¹⁸⁹ For the Army, merely to do the same would be insufficient. It would not significantly curb the overuse of GOMORs, which is the Army's main challenge.

The Army should require a written legal review, at the local level, of any reprimand or other unfavorable information proposed for OMPF filing. In the legal review, the servicing judge advocate should confirm that the underlying factual matter has been proven by a preponderance of the evidence.¹⁹⁰ There is nothing novel or particularly resource-intensive about this requirement. It is actually much less rigorous than the in-depth legal reviews the Army has required for years for administrative investigations.¹⁹¹

¹⁸⁸ See *infra* app. C. Self-authenticating unfavorable information, such as matters exempt from the referral process in AR 600-37-1986 would be deemed to satisfy the preponderance standard unless the servicing judge advocate finds otherwise. AR 600-37-1986, *supra* note 76, ¶ 3-3.

¹⁸⁹ See U.S. DEP'T OF AIR FORCE, INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM, ¶ 4.1.3 (26 Nov. 2014) (AIR FORCE INSTR. 36-2907) (requiring commanders to apply the preponderance standard to the evidence supporting letters of reprimand (LORs) "when evaluating the evidence and every element of the offenses committed"); *but see* AIR FORCE INSTR. 36-2907, ¶ 2.4.2 (requiring commanders to ensure that airmen's unfavorable information files (UIFs) contain "only substantiated unfavorable information about events that occurred"), and paragraph 4.1.3 (acknowledging that "no specific standard of proof applies to administrative action proceedings").

¹⁹⁰ The legal review should confirm the nature of matters exempt from referral. AR 600-37-1986, *supra* note 76, ¶ 3-3.

¹⁹¹ See AR 15-6, *supra* note 88, ¶ 2-3b. Legal reviews of certain administrative investigations are required to determine:

[W]hether the proceedings comply with legal requirements . . . [w]hat effects any errors would have . . . [w]hether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority . . . [and] [w]hether the recommendations are consistent with the findings.

Id. Judge advocates typically assist in the preparation of GOMORs and advise senior commanders with respect to filing determinations. A written legal review requirement

Absent a conviction, references to crimes or violations of specific articles of the UCMJ should be eliminated from reprimands.¹⁹² GOMORs typically give a brief summary of the soldier's misconduct in the first paragraph, often followed by a statement that the soldier has violated some punitive article of the UCMJ or other criminal statute.¹⁹³ Yet, how can that be the case if the soldier has never received non-judicial punishment or been convicted at a court-martial? Nothing in AR 600-37-1986 authorizes such references, yet they have become part of the GOMOR rubric. This is patently unfair. If a reprimand is to be given at all, the imposing authority should cite to specific conduct but be prohibited from making conclusory statements about unproven criminal violations.

There is little question that the Army reprimand process is overused, if not abused. An updated AR 600-37-1986 should strongly urge imposing authorities to adhere to long-standing guidance to “[forward reprimands] for inclusion in the performance portion of the OMPF only after considering the circumstances and alternative nonpunitive measures.”¹⁹⁴ A permanently filed reprimand should be a last resort, short of administrative separation, and not a reflexive response. Candid comments in evaluations, to include relief for cause, may be sufficient to address many instances of misconduct or excessively poor judgment and will have greater immediate corrective impact.¹⁹⁵

In parallel with this admonition, the updated regulation should emphasize that the regular referral process in AR 600-37-1986, ¶ 3-6 is strongly preferred for “indications of substandard leadership ability, promotion potential, morals, [or] integrity.”¹⁹⁶ Under this process,

would not be excessive, as many SJAs conduct (or require their staffs to conduct) such reviews as a matter of regular office practice.

¹⁹² Stockdale, *supra* note 98. It is interesting to note that the sample AIPP database summary also considers an ostensible—and unproven—UCMJ violation to be a “substantiated finding.” See *infra* app. B (noting that the fictional colonel “did knowingly and willfully commit adultery, in violation of Art. 134, UCMJ”). This is just as inappropriate as referencing an unproven criminal offense in a reprimand, and for the same reasons. Such references should be eliminated from the AIPP.

¹⁹³ *Id.*

¹⁹⁴ AR 600-37-1986, *supra* note 76, ¶ 3-4b(4).

¹⁹⁵ See generally AR 623-3, *supra* note 155, ¶¶ 3-54, 3-55 (discussing relief for cause OERs and NCOERs, respectively).

¹⁹⁶ AR 600-37-1986, *supra* note 76, ¶¶ 3-2c, 3-6. Note that paragraph 3-6b erroneously uses the term “reprimanding official,” which implies that the referral process in this paragraph is limited to reprimands. However, no such limitation exists. Reprimands are plainly governed by the separate referral provisions in paragraph 3-4. *Id.* ¶ 3-4. Any update

soldiers receive the same right to submit a written rebuttal as they would with a reprimand.¹⁹⁷ It bears repeating that no reprimand is required in order for adverse information to reach a soldier's OMPF. Reprimands are, and always have been, unnecessary for that purpose.

That is not to say that GOMORs should be eliminated entirely. Rather, they should be used judiciously in simple, factual scenarios with relatively straightforward evidence. The automatic reprimand requirement for driving under the influence of alcohol (DUI) under the motor vehicle regulation is one such instance.¹⁹⁸ Retaining the use of GOMORs for DUIs is justified: DUIs are contrary to the Army Values, particularly the cornerstone principle of doing what is right, legally and morally.¹⁹⁹ They also demonstrate a significant defect of character, which is a building block of the Army Ethic.²⁰⁰ Equally importantly, knowledge of a soldier's DUI erodes the public's trust in the Army and is harmful to the Army's relationship with civilians.²⁰¹ A relatively severe consequence is appropriate for such a significant lapse in personal judgment. The filing of any such reprimand would be subject to the remaining provisions of AR

to AR 600-37-1986 should correct this error and substitute the phrase "referring official." See *infra* app. C.

¹⁹⁷ *Id.* ¶ 3-2a.

[U]nfavorable information will not be filed in an official personnel file unless the recipient has been given the chance to review the documentation that serves as the basis for the proposed filing and make a written statement, or to decline, in writing, to make such a statement. This statement may include evidence that rebuts, explains, or mitigates the unfavorable information.

Id.

¹⁹⁸ See U.S. DEP'T OF ARMY, REG. 190-5, MOTOR VEHICLE TRAFFIC SUPERVISION para. 2-7 (22 May 2006) [hereinafter AR 190-5] (requiring a written, general officer reprimand of active duty soldiers who are: convicted by civilian court or court-martial or receive non-judicial punishment for driving under the influence (DUI); refuse to take a blood alcohol (BAC) test; drive on post with a BAC in excess of 0.08% or off post with a BAC in violation of state law; or, operate a vehicle while having tested positive for illegal drugs).

¹⁹⁹ ARMY.MIL, *The Army Values*, <http://www.army.mil/values/> (last visited Sept. 21, 2016) (discussing the Army value of integrity).

²⁰⁰ U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 1, THE ARMY PROFESSION para. 2-3 (14 June 2013). The Army Ethic comprises competence, character, and commitment. *Id.* Character is defined as an "Army professional's dedication and adherence to the Army Values and the profession's ethic as consistently and faithfully demonstrated in decisions and actions." *Id.*

²⁰¹ *Id.* ¶ 2-1 ("Trust is the bedrock upon which the United States Army grounds its relationship with the American people.").

600-37-1986, in which case the proposed legal review requirement should apply if OMPF filing is intended.²⁰²

At the opposite end of the complexity spectrum, the Army routinely conducts administrative investigations that involve multiple witnesses and voluminous documents. It is difficult to adequately summarize the facts of a complex investigation in the first paragraph of a one-page reprimand. There is a great risk of oversimplifying the facts, which unfairly forces the Soldier to use part of his precious rebuttal space to tell the whole story.

It might be fairly argued that GOMORs are an intermediate disciplinary measure for situations that do not lend themselves to easy classification. True, they are used for this purpose. Again, this article does not advocate eliminating GOMORs entirely. However, as we have seen, even a GOMOR for poor judgment—let alone one for misconduct—must be supported by credible, substantiated evidence. Such evidence may be referred to a Soldier and filed in the Soldier's OMPF in the absence of a reprimand of any kind. In most circumstances, when combined with the referral of unfavorable information and honest evaluations, the GOMOR becomes merely an unnecessary and destructive cover letter.²⁰³

True, GOMORs are efficient and much less resource-intensive than administrative separation boards. However, fairness and justice should not be our goals, not merely efficiency. When efficiency outpaces due process, we have gone too far. If separation is justified, then instead of issuing a GOMOR, commanders should take action under the appropriate administrative separation regulations. Soldiers should be allowed to make their case for retention in person before the members of a board of inquiry. Boards are the appropriate venue in which to litigate complex facts, not a one-page response to a one-page letter.²⁰⁴

²⁰² AR 190-5, *supra* note 197, ¶ 2-7.

²⁰³ There are certainly exceptional circumstances. *See* Military Personnel Message, 14-365, U.S. Army Human Res. Command, subject: Inclusion and Command Review of Information on Sex-Related Offenses in the Army Military Human Resource Record para. 4 (24 Dec. 2014) (removing discretion with respect to filing determinations and requiring that all reprimands for sex-related offenses be filed in a soldiers' OMPF).

²⁰⁴ It both proves the point that GOMORs are punitive and stands reality on its head to argue that GOMORs are so prejudicial at boards of inquiry that the reprimand and board processes should be considered mutually exclusive. While GOMORs are certainly prejudicial, they are not evidence of underlying misconduct. A GOMOR proves only that a soldier received a GOMOR.

IV. Conclusion

The Army finds itself in a situation where a process intended to be non-punitive has taken on such punitive character that it is universally assumed to end careers. That is not only unacceptable, it is contrary to the stated purpose of reprimands.

Advances in recordkeeping, particularly worldwide access to electronic personnel records, have obviated the need to separately preserve adverse information via GOMORs. The EES, iPerms, the AIPP Database, and other electronic systems have rendered moot the need to preserve records of misconduct by sending hard copies to offsite file maintenance facilities. The GOMOR has largely become an unnecessarily weighty general officer cover letter. Further, formulaic GOMOR rebuttals combined with a difficult-to-access appellate process with extraordinarily burdensome standards make obtaining timely relief unlikely.

Reprimands also have a disproportionate impact on soldiers, when compared to members of the other services.²⁰⁵ The Navy and Marine Corps have no such administrative process.²⁰⁶ The Air Force already requires proof by a preponderance of the evidence to support its reprimands.²⁰⁷

Reform is necessary. Army Regulation 600-37-1986 should be reviewed and updated.²⁰⁸ Significant updates should include: (1) a requirement for legal review by the servicing judge advocate and affirmation that any unfavorable information intended for OMPF filing is supported at minimum by a preponderance of the evidence; (2) a prohibition on the mention of unproven criminal offenses in administrative reprimands; (3) a policy statement that filing authorities must carefully consider all other options before directing OMPF filing, including actions taken at subordinate levels; and, (4) a policy statement that the regular adverse information referral process is strongly preferred as the primary means of transmitting adverse information to a soldiers' OMPF. The intent is to ensure that GOMORs will be used much more sparingly.

²⁰⁵ See Schogol, *supra* note 98 (noting that “[a]t the request of the Air Force Chief of Staff, the Air Force Inspector General has begun an inquiry of the investigative process and the procedures used to administer any adverse personnel actions”).

²⁰⁶ See *supra* note 19 and accompanying sources.

²⁰⁷ See *supra* note 189 and accompanying sources.

²⁰⁸ See *infra* app. C for a proposed update to AR 600-37-1986.

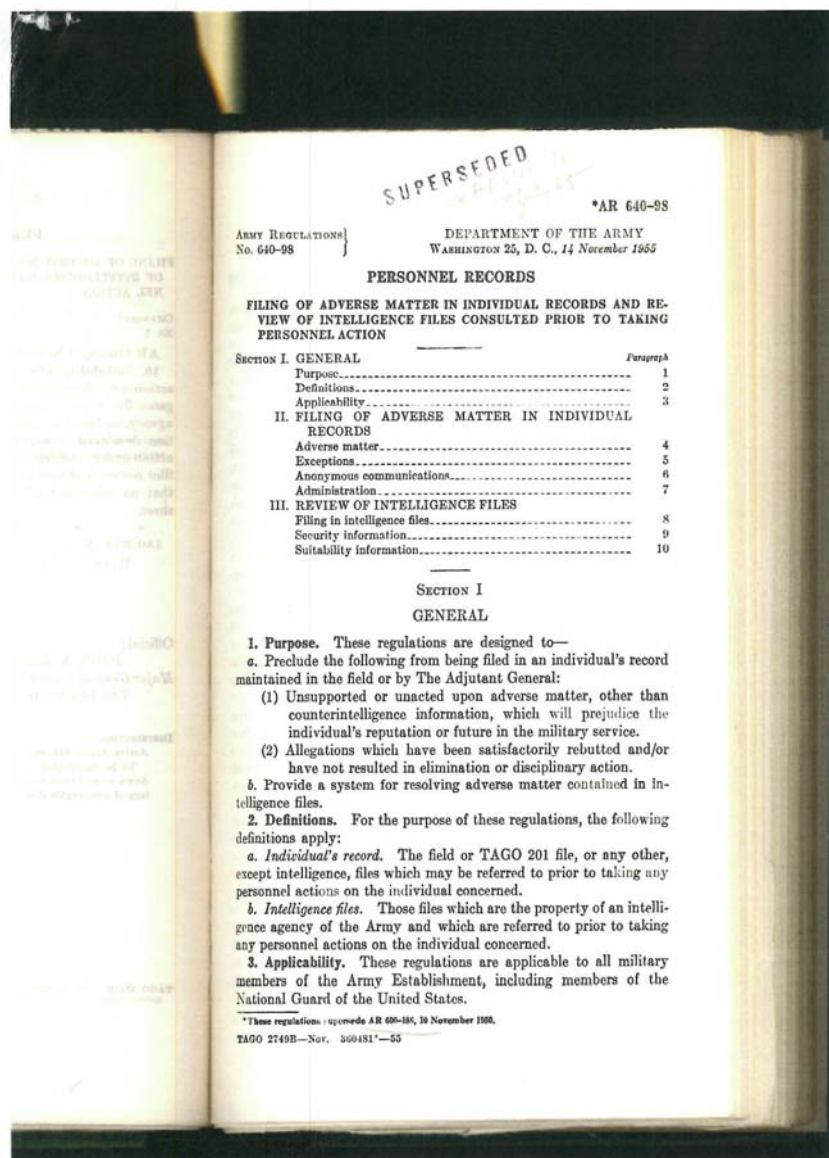
Commanders like GOMORs; GOMORs are comfortable and familiar. Unfortunately, many commanders have come to view GOMORs as a necessary end-state in cases of poor judgment or misconduct. They have become a reflexive, one-size-fits-all solution. Section 1745 of NDAA 2014 and the service secretaries' categorization of administrative reprimands as punitive actions may be fairly viewed as acknowledgements of institutional inertia. The Army has simply gone so far in this direction over the last thirty years that regulatory intent has fallen by the wayside. In the same sense that the prejudicial effect of evidence may outweigh its probative value under Military Rule of Evidence 403, so has the punitive effect of a reprimand come to outweigh its positive disciplinary value.²⁰⁹

Ironically, the more bureaucratic and layered with ostensible protections for soldiers the reprimand process became since its 1972 inception, the more punitive character it acquired in its execution. However, when it comes to good order and discipline, sometimes less is more. Consistent use of unfavorable information referral procedures already in place will ensure that soldiers who commit misconduct will be called to answer for it before show-cause and separation boards, particularly when combined with honest evaluations. Yes, those boards, can be resource-intensive, but those resources are a worthwhile tradeoff to protect soldiers from being forced to gamble their careers on the bare-bones minimum due process allowed in one-page, formulaic GOMOR rebuttals. The Army owes its soldiers no less.

²⁰⁹ MCM, *supra* note 2, MIL. R. EVID. 403 (2015).

Appendix A: Army Regulation 640-98

U.S. DEP'T OF ARMY, REG. 640-98, Filing of Adverse Matter in Individual Records and Review of Intelligence Files Consulted Prior to Taking Personnel Action (14 Nov. 1955) (TAGO 2749B—Nov. 360481—55).



AR 640-98

2

SECTION II

FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS

4. **Adverse matter.** No adverse matter (except that cited in paragraph 5) will be made a part of an individual's record without his knowledge and an opportunity being afforded him either to make a written statement in reply to the adverse information, communication, or report, or to decline, in writing, to make such a statement. Where it is determined that the individual has satisfactorily rebutted the adverse allegation, and provided the Department of the Army or responsible commander does not consider the charges as sufficiently serious to warrant initiation of elimination or disciplinary action, all correspondence and references relative thereto will be excluded from the individual's record. The interpretation as to what constitutes adverse matter will be liberally interpreted in favor of the individual. In doubtful cases the procedure prescribed in paragraph 7 will be followed.

5. **Exceptions.** The following and references thereto normally will not be referred to the individual concerned for comment prior to filing, and are therefore excluded from consideration under these regulations:

- a. Medical information which would prove injurious to the individual's physical or mental health.
- b. Counterintelligence information (sec. III).
- c. Records of courts-martial and courts-martial orders and records of nonjudicial punishments under Uniform Code of Military Justice, Article 15.
- d. Administrative reprimands and admonishments of a nonpunitive nature (will not be forwarded for inclusion in TAGO 201 file. See DA Form 201a Field 201 file divider).
- e. Actions of boards of officers, provided that it is clearly indicated in such board proceedings that the individual concerned has been given opportunity to testify in his own behalf.
- f. Completed investigative reports, including criminal investigation and IG reports, which have resulted in elimination or disciplinary action against the individual concerned.
- g. Reports submitted under AR 600-31.
- h. Adverse matter concerning general prisoners.
- i. FBI Report (Form 1-4).
- j. Efficiency reports.
- k. Other adverse matter of which the individual concerned had prior official knowledge and an adequate opportunity to refute. A notation "AR 640-98 complied with" will be entered below filing authority on such matter.

TAGO 2749B

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7. **Administration** by paragraph 5, all concerned for one of

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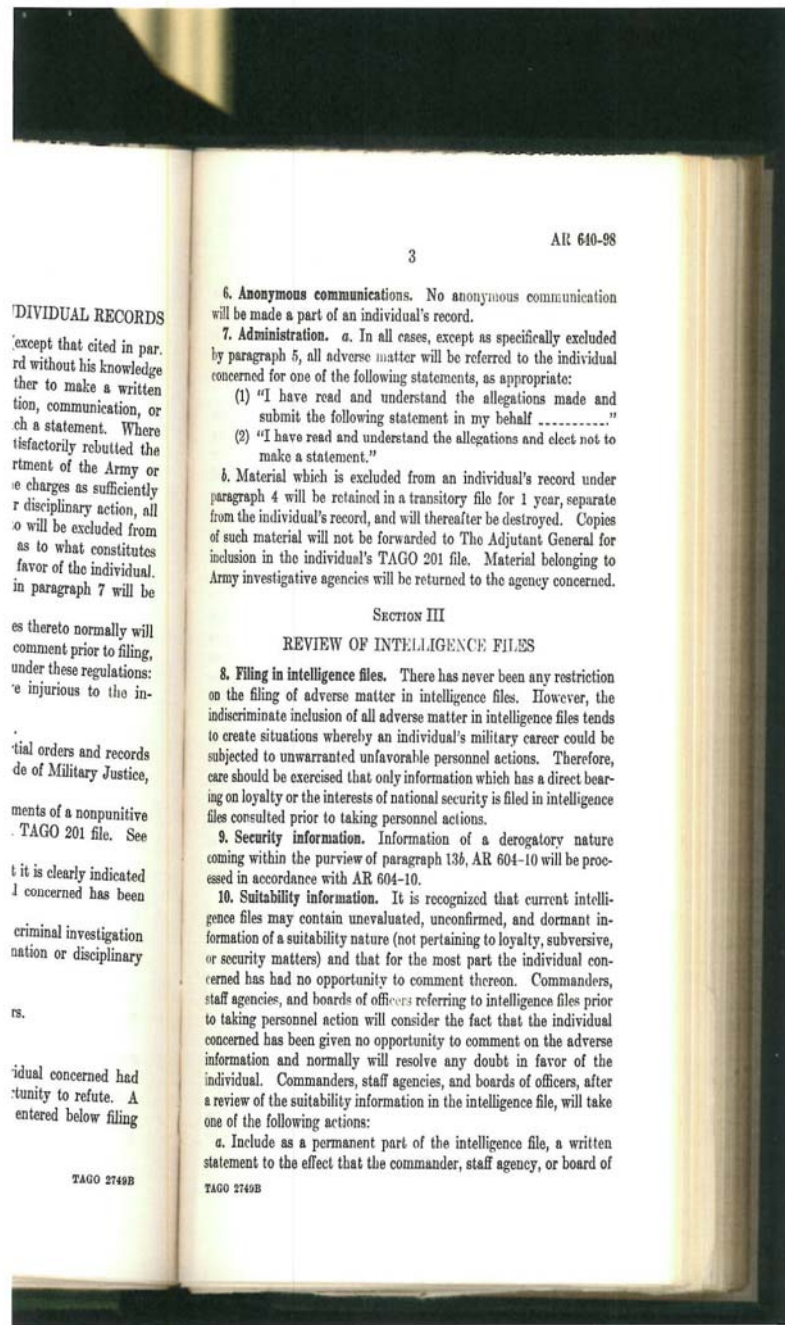
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TAGO 2749B



INDIVIDUAL RECORDS

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TAGO 2749B

6. **Anonymous communications.** No anonymous communication will be made a part of an individual's record.

7. **Administration.** a. In all cases, except as specifically excluded by paragraph 5, all adverse matter will be referred to the individual concerned for one of the following statements, as appropriate:

- (1) "I have read and understand the allegations made and submit the following statement in my behalf"
- (2) "I have read and understand the allegations and elect not to make a statement."

8. Material which is excluded from an individual's record under paragraph 4 will be retained in a transitory file for 1 year, separate from the individual's record, and will thereafter be destroyed. Copies of such material will not be forwarded to The Adjutant General for inclusion in the individual's TAGO 201 file. Material belonging to Army investigative agencies will be returned to the agency concerned.

SECTION III

REVIEW OF INTELLIGENCE FILES

8. **Filing in intelligence files.** There has never been any restriction on the filing of adverse matter in intelligence files. However, the indiscriminate inclusion of all adverse matter in intelligence files tends to create situations whereby an individual's military career could be subjected to unwarranted unfavorable personnel actions. Therefore, care should be exercised that only information which has a direct bearing on loyalty or the interests of national security is filed in intelligence files consulted prior to taking personnel actions.

9. **Security information.** Information of a derogatory nature coming within the purview of paragraph 136, AR 604-10 will be processed in accordance with AR 604-10.

10. **Suitability information.** It is recognized that current intelligence files may contain unevaluated, unconfirmed, and dormant information of a suitability nature (not pertaining to loyalty, subversive, or security matters) and that for the most part the individual concerned has had no opportunity to comment thereon. Commanders, staff agencies, and boards of officers referring to intelligence files prior to taking personnel action will consider the fact that the individual concerned has been given no opportunity to comment on the adverse information and normally will resolve any doubt in favor of the individual. Commanders, staff agencies, and boards of officers, after a review of the suitability information in the intelligence file, will take one of the following actions:

a. Include as a permanent part of the intelligence file, a written statement to the effect that the commander, staff agency, or board of

TAGO 2749B

AR 640-98

4

officers has decided that the suitability information developed to date does not constitute a bar to the personnel action under consideration. The statement will contain the reasons for the decision and since it is based solely on the files reviewed at that particular time, care will be exercised to insure that no subsequent additions thereto are filed under the statement sheet.

b. Take necessary steps to bar the personnel action and initiate (staff agencies and board of officers will request convening authority to initiate) elimination action, disciplinary action, interview under oath, or if necessary, additional investigation, if the commander, staff agency, or board of officers decides that the suitability information does constitute a bar to the personnel action under consideration. Flagging action will be taken only if the provisions of paragraph 3, AR 600-31 apply. Interviews will be conducted under the provisions of paragraph 33, SR 380-320-10. Prior approval will be obtained from the Assistant Chief of Staff, G-2, Department of the Army, unless the provisions of paragraph 43b, SR 380-320-10 apply. During the course of the interview, the line of questioning will be evolved in order to give the individual a full opportunity to rebut the adverse information which can be made available to him under current official disclosure criteria. Care must be exercised to insure that classified information is safeguarded and that confidential sources are protected. The results of the elimination action, disciplinary action, interview under oath, or additional investigation will be reviewed by the commander, staff agency, or board of officers which reconsider the personnel action originally under consideration. Should this review lead to the decision that the suitability information now does not constitute a bar to the personnel action under consideration, a statement similar to that required under a above will be attached to the file considered.

[AG 201.3 (28 Sep 55) G1]

BY ORDER OF THE SECRETARY OF THE ARMY:

MAXWELL D. TAYLOR,
General, United States Army,
Chief of Staff.

OFFICIAL:

JOHN A. KLEIN,
Major General, United States Army,
The Adjutant General.

DISTRIBUTION:

Active Army, NG: A.

To be distributed on a need-to-know basis to all units and headquarters down to and including companies and batteries and to units and headquarters of comparable size.

USAR: None.

TAGO 27490

U. S. GOVERNMENT PRINTING OFFICE: 1968

SUPERSEDE
ARMY REGULATIONS

No. 640-140

PI

Purpose.....
Responsibility.....
Frequency.....
Requirements.....

1. Purpose. These procedures to maintain file and the official Dep officers serving on active regulations do not apply officers who are within active duty.

2. Responsibility.
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TAGO 2667B--Nov. 570481

Appendix B: Sample AIPP Database Summary

SUMMARY OF CREDIBLE ADVERSE
INFORMATION

NAME: COL Alexander Hamilton

CURRENT UNIT: United States Army Forces Command

AUTHORITY: 10 United States Code § 615 (a)(3)

SOURCE: Investigation appointed by the Commanding General, Fort Bragg, and conducted pursuant to Army Regulation 15-6, *Procedures for Investigating Officers and Boards of Officers*, 2 October 2006.

SUBSTANTIATED FINDING: That COL Hamilton did knowingly and willfully commit adultery, in violation of Article 134, UCMJ.

SYNOPSIS: COL Hamilton admitted that he engaged in adultery with another Soldier in April 2009, while he was still married. He was legally separated in September 2010 and divorced in 2011. The relationship stopped in 2014 when the other Soldier ended it because her husband became aware of the relationship. Case was substantiated on 19 March 2014.

ACTION TAKEN: COL Hamilton was issued a general officer memorandum of reprimand, which was filed locally.

COMMANDER COMMENT: COL Hamilton made a terrible error in judgment in 2009. However, I believe he still has potential for service at the highest ranks.

Appendix C: Proposed Update: Army Regulation 600-37

U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION ch. 3 (19 Dec. 1986).

* ~~Lined through~~ text indicates proposed deletions. *Italic, bold text* indicates additions.

Chapter 3**Unfavorable Information in Official Personnel Files****3-1. General**

a. Personnel management decisions will be based on the following:

(1) Review of official personnel files.

(2) The knowledge and best judgment of the commander, board, or other responsible authority. (Both favorable and unfavorable information regarding the soldier concerned will be considered.)

b. Personnel decisions that may result in selecting soldiers for positions of public trust and responsibility, or vesting such persons with authority over others, should be based on a thorough review of their records. This review will include an appraisal of both favorable and unfavorable information available.

3-2. Policies

a. Except as indicated in paragraph 3-3, unfavorable information will not be filed in an official personnel file unless the recipient has been given the chance to review the documentation that serves as the basis for the proposed filing and make a written statement, or to decline, in writing, to make such a statement. This statement may include evidence that rebuts, explains, or mitigates the unfavorable information. (See para 3-6.) The issuing authority should fully affirm and document unfavorable information to be considered for inclusion in official personnel files. *The referral process in paragraph 3-6 is the primary means of transmitting unfavorable information to official personnel files (MPRJ and OMPF). Administrative letters of reprimand, admonition or censure under this chapter (collectively, reprimands) are not required in order to transmit unfavorable information to official personnel files.*

Note. The privileged and confidential nature of information in inspector general IG records requires special attention. Provisions for requesting access and use of IG reports are addressed in AR 20-1.)

b. Unfavorable information filed in official personnel files must meet Privacy Act standards of accuracy, relevance, timeliness, and

completeness. (See AR 340–21.) Access to official personnel files will be granted to the person concerned under AR 340–21.

c. In addition to the Privacy Act standards in paragraph 3-2b, unfavorable information filed in the OMPF must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion (the preponderance of the evidence). (See AR 15–6.)

d. The servicing Judge Advocate (JA) will conduct a written legal review of any unfavorable information intended for OMPF filing under this chapter). cornersThe JA’s review will determine whether such information has been established by a preponderance of the evidence. Legal review is required for information exempt from the referral procedure pursuant to paragraph 3-3 of this regulation. Such information may be deemed to be established by a preponderance of the evidence unless the servicing JA determines otherwise.

e. A copy of the JA’s legal review will be provided to the appropriate filing authority prior to OMPF filing. If the JA determines that any unfavorable information intended for OMPF filing has not been established by a preponderance of the evidence, OMPF filing of such information is not authorized.

e-f. Unfavorable information that should be filed in official personnel files includes indications of substandard leadership ability, promotion potential, morals, and integrity. These must be identified early and shown in those permanent official personnel records that are available to personnel managers and selection board members for use in making such personnel decisions as described in paragraph 3–1*b*. Other unfavorable character traits of a permanent nature should be similarly recorded.

e- g. Unfavorable information that has been directed for filing in the restricted portion of the OMPF may be considered in making determinations under this regulation.

e- h. Refusal to consent to a polygraph examination will not be recorded in official personnel files.

3–3. Filing of information exempt from the referral procedure

The following information may be filed in the performance portion of the OMPF without further referral to the recipient:

a. Records of courts-martial, court-martial orders, and records of nonjudicial punishment under the Uniform Code of Military Justice (UCMJ), Article 15. (See AR 27–10 and AR 640–10.)

b. Proceedings of boards of officers, if it is clear that the recipient has been given a chance to present evidence and cross-examine witnesses in his or her own behalf.

c. Completed investigative reports. These include criminal investigation reports (or authenticated extracts) that have resulted in elimination or disciplinary action against the person concerned. When it is not practical to include the entire report (or an extract), the investigative report will be referenced.

d. Records of civilian convictions (to include the record of arrest), or extracts thereof, authenticated by civilian authorities. However, records consisting solely of minor traffic convictions are not to be filed in the OMPF.

e. Officer and enlisted evaluation reports. Administrative processing and the appeal of evaluation instruments are governed by AR 623-1, AR 623-105, and AR 623-205. Filing of evaluation instruments is governed by AR 640-10.

f. Other unfavorable information of which the recipient had prior official knowledge (as prescribed by para 3-6) and an adequate chance to refute. The notation "AR 600-37 complied with" will be entered below the filing authority on such unfavorable information.

g. Internal staff actions and working papers within and among personnel management offices and personnel decision makers at HQDA. (Applies to the Career management individual file (CMIF) only according to AR 640-10.)

3-4. Filing of nonpunitive administrative letters of reprimand, admonition, or censure in official personnel files

a. Prohibition on mention of unproved criminal conduct. No administrative letter of reprimand, admonition, or censure (collectively, reprimands) may reference any criminal offense or violation of the Uniform Code of Military Justice or other criminal code unless the recipient has received nonjudicial punishment for such a violation or been duly convicted in a court-martial or appropriate court of law. The reprimand requirement in the Army Motor Vehicle Traffic Supervision regulation remains in effect, subject to the remaining procedures and limitations in this chapter. (See AR 190-5.)

a-b. Filing in the military personnel records jacket (MPRJ). Authority to issue and direct the filing of letters of reprimand, admonition, and censure in the MPRJ (after referral to the person concerned according to para 3-6) is outlined in (1) and (2) below. If filing is intended for the MPRJ, the letter need not be referred to a higher authority for review.

(1) Authority to issue and direct the filing of such letters in the MPRJs of enlisted personnel is restricted to the recipient's immediate commander (or a higher commander in his or her chain of command), school commandants, any general officer (to include those frocked to the rank of brigadier general) or an officer exercising general court-martial jurisdiction over the recipient. Immediate supervisors of enlisted personnel also have authority to issue letters of reprimand; but only if serving in one of the capacities listed above may they also direct filing in the MPRJ.

(2) Authority to issue and direct the filing of such letters in the MPRJ of commissioned officers and warrant officers is restricted to—

(a) The recipient's immediate commander or a higher level commander in the chain of command (if such commander is senior in grade or date of rank to the recipient).

(b) The designated rater, intermediate rater, or senior rater under the officer evaluation reporting system (AR 623-105).

(c) Any general officer (to include one frocked to the rank of brigadier general) who is senior to the recipient or an officer who exercises general court-martial jurisdiction over the recipient.

(3) A letter designated for filing in the MPRJ only may be filed for a period not to exceed 3 years or until reassignment of the recipient to another general court-martial jurisdiction, whichever is sooner. Such a letter will state the length of time it is to remain in the MPRJ.

(4) Statements furnished by the recipient following referral under paragraph 3-6 will be attached to the letter for filing in the MPRJ.

b. c. Filing in OMPF. A letter, regardless of the issuing authority, may be filed in the OMPF kept by MILPERCEN, ARPERCEN, or the proper State Adjutant General (for Army National Guard personnel) only upon the order of a general officer (to include one frocked to the rank of brigadier general) senior to the recipient or by direction of an officer having general court-martial jurisdiction over the individual. Letters filed in the OMPF will be filed on the performance portion (P-fiche). The direction for filing in the OMPF will be contained in an endorsement or addendum to the letter. A letter to be included in a soldier's OMPF will—

(1) Be referred to the recipient concerned for comment according to paragraph 3-6. The referral will include reference to the intended filing of the letter.

(a) This referral will also include and list applicable portions of investigations, reports, and other documents that serve, in part or in whole, as the basis for the letter, providing the recipient was not previously provided an opportunity to respond to information reflected in that

documentation. Additionally, documents, the release of which requires approval of officials or agencies other than the official issuing the letter, will not be released to the recipient until such approval is obtained.

(b) Statements and other evidence furnished by the recipient will be reviewed and considered by the officer authorized to direct filing in the OMPF. This will be done before a final determination is made to file the letter.

(c) *The servicing JA shall conduct a written legal review pursuant to paragraph 3-2 of this regulation of all reprimands intended for OMPF filing. Legal review will take place following the exercise or affirmative waiver of the recipient's opportunity for rebuttal under this chapter, and shall include all statements and other evidence furnished by the recipient. A copy of the JA's legal review will be provided to the filing authority prior to the filing determination.* Should filing in the OMPF be directed, the statements and evidence *the recipient provides*, or facsimiles thereof, ~~may~~ *will* be attached as enclosures to the basic letter.

(d) If it is desired to file allied documents with the letter, these documents must also be referred to the recipient for comment. This includes statements, previous reprimands, admonitions, or censure. Allied documents must also be specifically referenced in the letter or referral document. Care must be exercised to ensure additional unfavorable information is not included in the transmittal documentation unless it has been properly referred for comment.

(2) Contain a statement that indicates it has been imposed as an administrative measure and not as a punishment under UCMJ, Article 15.

(3) Be signed by (or sent under the cover or signature of) an officer authorized to direct such filing.

(4) Be forwarded for inclusion in the performance portion of the OMPF only after considering the circumstances and alternative nonpunitive measures, *including measures taken at subordinate levels. An official reprimand is a weighty matter with potential long-term adverse consequences for the recipient's military and even subsequent civilian careers. Imposing authorities are discouraged from directing OMPF filing of reprimands where other administrative processes (including but not limited to relief for cause, adverse evaluation under the EES, a record review under the AIPP, or some combination of processes) adequately capture the conduct at issue for review by promotion or other authorities.*

(5) Minor behavior infractions or honest mistakes chargeable to sincere but misguided efforts will not normally be recorded in a soldier's OMPF. Once placed in the OMPF, however, such correspondence will be

permanently filed unless removed through the appeal process. (See chap 7.)

~~(5)~~ (6) Also be filed in the MPRJ. Such copy will remain in the MPRJ so long as the letter remains filed in the performance fiche of the OMPF.

e-d. Decisions against filing letters in the OMPF. If the general officer (or general court-martial authority) elects not to place the letter in the OMPF, the correspondence will be returned to the person writing the letter. That soldier will advise the recipient of the letter of the decision not to file the letter in the OMPF. The letter may, however, still be directed for filing (by proper authority) in the recipient's MPRJ. (See *a* above.) The specific period of time for which the letter will remain in the MPRJ will be specified.

d-e. Circumstances affecting the imposition or processing of administrative letters of reprimand.

(1) When a soldier leaves the chain of command or supervision after a commander or supervisor has announced the intent to impose a reprimand, but before the reprimand has been imposed, the action may be processed to completion by the losing command.

(2) When the reprimanding official leaves the chain of command or supervision after stating in writing the intent to impose a reprimand, his or her successor may complete appropriate action on the reprimand. In such cases, the successor should be familiar with relevant information about the proposed reprimand.

(3) When a former commander or supervisor discovers misconduct warranting a reprimand, an admonition, or censure, he or she may—

(a) Send pertinent information to the individual's current commander for action.

(b) Personally initiate and process a letter of reprimand, admonition, or censure as if the former command or supervisory relationship continued. In such cases, further review (if needed) will be accomplished in the recipient's current chain of command. Officials should consider the timeliness and relevance of the adverse information before taking administrative action at the later date.

e-f. Reprimands and admonitions imposed as nonjudicial punishment (UCMJ, Article 15). These are governed by AR 27-10, chapter 3.

f-g. Change from enlisted to officer status.

(1) If a status change from enlisted to commissioned or warrant officer was approved *on or after* 16 December 1980—

(a) Letters of reprimand, admonition, or censure received while in an enlisted status which are filed in the performance portion of the OMPF will be moved to the restricted portion of the OMPF.

(b) Letters filed in the MPRJ will be removed.

(2) If a status change from enlisted to commissioned or warrant officer was approved *on or before* 15 December 1980 *and the individual so requests*—

(a) Letters of reprimand, admonition, or censure received while in an enlisted status which are filed in the performance portion of the OMPF will be moved to the restricted portion of the OMPF.

(b) Letters filed in the MPRJ will be removed.

(3) Requests under (2) above will not be a basis for reconsideration by a special selection board.

3-5. Anonymous communications

Anonymous communications will not be filed in a soldier's MPRJ, OMPF, or CMIF unless, after investigation or inquiry, they are found to be true, relevant, and fully proven or supported. If not exempted under paragraph 3-3, the information must be referred to the soldier according to paragraph 3-6 before such information is filed in the MPRJ, OMPF, or CMIF.

3-6. Referral of information

a. Except as provided in paragraph 3-3, unfavorable information will be referred to the recipient for information and acknowledgment of his or her rebuttal opportunity. Acknowledgement and rebuttal comments or documents will be submitted generally in the following form:

(1) "I have read and understand the unfavorable information presented against me and submit the following statement or documents in my behalf:"

(2) "I have read and understand the unfavorable information presented against me and elect not to make a statement."

b. If a recipient refuses to acknowledge the referral of unfavorable information, the ~~reprimanding~~ **referring** official will prepare the following statement: "On (date), (name) has been presented with the unfavorable information and refuses to acknowledge by signature." The letter can then be directed for filing per paragraph 3-4.

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".

GERALD B. O'KEEFE
Administrative Assistant to the
Secretary of the Army
1706601

