



# MILITARY LAW REVIEW

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# *Military Law Review*

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**Volume 225**

**Issue 3**

**2017**

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

Academic Journal No. 27-100-225-3, 2017

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***Military Law Review***

Volume 225

Issue 3

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For Army legal offices, including within the Army National Guard and the U.S. Army Reserve, and other federal agencies, inquiries and address-change requests should be communicated to the *Military Law Review*. Other military services may request distribution through official publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

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 225 MIL. L. REV. page number (2017).

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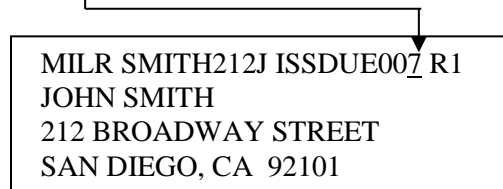
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# MILITARY LAW REVIEW

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Volume 225  
Issue 3

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## AN EMPIRICAL STUDY OF THE POLITICAL PARTY BALANCE REQUIREMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND ITS PREDECESSOR-COURT, THE UNITED STATES COURT OF MILITARY APPEALS, FROM 1951 TO 2016

DAVID A. ANDERSON\*

*For the rational study of the law the black-letter man  
may be the man of the present, but the man of the future  
is the man of statistics . . . .<sup>1</sup>*

### I. Introduction

Currently under the Uniform Code of Military Justice (UCMJ),<sup>2</sup> the United States Court of Appeals for the Armed Forces (CAAF), the

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military's highest appellate court, is comprised of five judges appointed from civilian life by the President of the United States for a term of 15 years and confirmed by the Senate.<sup>3</sup> Created by Congress under its power to regulate the armed forces,<sup>4</sup> the CAAF was established as "a sort of civilian 'Supreme Court' of the military"<sup>5</sup> to hear appeals from court-martial convictions in which either a punitive discharge or confinement for one year or more was adjudged.<sup>6</sup> Although certain court-martial convictions may be appealed to the United States Supreme Court,<sup>7</sup> the CAAF acts in reality as the civilian overseer of the military justice system.<sup>8</sup>

From 1951 to 2016, perhaps the most unique aspect of the CAAF and its predecessor court, the United States Court of Military Appeals (COMA), was its political party balance requirement. Until the end of 2016, according to the CAAF's organizational statute, "[n]ot more than three of the judges of the court may be appointed from the same political

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Sociology and Judicial Studies, University of Nevada, Reno; Emily Wood, Doctoral Student and Research Assistant, Nevada Center for Surveys, Evaluation, and Statistics, Grant Sawyer Center for Justice Studies, University of Nevada, Reno; and Sherri Barker, Program Officer, Judicial Studies Program, University of Nevada, Reno, for their assistance.

<sup>1</sup> Justice Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>2</sup> 10 U.S.C. §§ 801-946 (2012).

<sup>3</sup> 10 U.S.C. § 942(a)-(b) (2012).

<sup>4</sup> U.S. CONST. art. I, § 8, cl. 14 (The Congress shall have power "[t]o make Rules for the Government and Regulation of the land and naval Forces.").

<sup>5</sup> Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

<sup>6</sup> The CAAF has jurisdiction to hear (1) all cases in which a sentence to death has been approved, (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to it; and (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the CAAF has granted review. 10 U.S.C. § 867(a) (2012). The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. 10 U.S.C. § 866(b) (2012). A Court of Criminal Appeals is the first line appellate court for court-martial convictions, and each panel of that court, established by the Judge Advocate General of each service, is composed of not less than 3 appellate military judges. 10 U.S.C. § 866(a) (2012).

<sup>7</sup> See 10 U.S.C. § 867a(a) (2012) ("Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.").

<sup>8</sup> Jonathan Lurie, *Military Justice 50 Years After Nuremberg: Some Reflections on Appearance v. Reality*, 149 MIL. L. REV. 189, 191 (Summer, 1995).

party.”<sup>9</sup> And when the Court was initially conceived as the United States Court of Military Appeals, it consisted of three judges appointed from civilian life by the President for a term of 15 years, and “[n]ot more than two of the judges of such court shall be appointed from the same political party.”<sup>10</sup> Thus, a political party balance requirement, that permitted no more than a bare majority of the Court to be from the same political party, was in the UCMJ from its effective date in 1951 through 2016. On December 23, 2016, in the National Defense Authorization Act for Fiscal Year 2017, at the CAAF’s own request, Congress eliminated the political party requirement.<sup>11</sup> In the CAAF’s recommendation to Congress, the Court argued that after sixty-five years, “the party balance requirement ha[d] outlived its usefulness, imposing an irrelevant limitation on who may be nominated and confirmed to sit on the Court.”<sup>12</sup>

In an effort to determine whether the political party of the appointed judge was irrelevant or if, in fact, it had any impact of a judge’s judicial behavior, I conducted an empirical study of the votes of all the judges who have served on the Court (to include both the CAAF, and its predecessor-court, the COMA) from 1951 to 2016.<sup>13</sup> My purpose was to employ a quantitative analysis in an attempt to confirm or reject the significance of the political balance requirement, as well as various other hypotheses of judicial behavior.

## II. Background

The CAAF is one of only a few federal courts that had a political party balance requirement.<sup>14</sup> In general, Congress has limited the imposition of

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<sup>9</sup> 10 U.S.C. § 942(b)(3) (2012).

<sup>10</sup> *Art. 67(a)(1), Uniform Code of Military Justice*, PUB. L. 506 (81st Cong.), ch. 169 (2d Sess.), 64 STAT. 107, 129 (Act of May 5, 1950, PUB. L. 506, 1950 U.S.C.A.N., Vol. 1 at 130).

<sup>11</sup> §541(c), *National Defense Authorization Act for Fiscal Year 2017*, PUB. L. 114-328 (114th Cong. 2d Sess.), 130 STAT. 2000 (Dec. 23, 2016).

<sup>12</sup> Email from Judge Scott Stucky entitled *Political Party*, to the author (Mar. 22, 2017) (on file with author).

<sup>13</sup> References to the Court will include both the CAAF and COMA.

<sup>14</sup> The United States Court of International Trade, an Article III court, is comprised of nine judges appointed by the President with the advice and consent of the Senate, and “[n]ot more than five of such judges shall be from the same political party.” 28 U.S.C. § 251 (2012). The United States Court of Appeals for Veterans Claims, an Article I court, is comprised of at least three and not more than seven judges, and “[n]ot more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.” 38 U.S.C. § 7253 (2012).

a political party balance requirement to independent administrative agencies, ostensibly in order to ensure non-partisanship.<sup>15</sup> For example, no more than three of the six members appointed by the President to the Federal Election Commission “may be affiliated with the same political party.”<sup>16</sup> With respect to the five member Federal Communications Commission appointed by the President, “[t]he maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.”<sup>17</sup> No more than three of the five commissioners appointed by the President to the Federal Trade Commission “shall be members of the same political party.”<sup>18</sup> No more than three of the five commissioners appointed by the President to the Federal Maritime Commission “may be appointed from the same political party.”<sup>19</sup> No more than three of the five members appointed by the President to the National Transportation Board “may be appointed from the same political party.”<sup>20</sup> No more than three of the five members appointed by the President to the Nuclear Regulatory Commission “shall be members of the same political party.”<sup>21</sup> And as to the five commissioners appointed by the President to the Securities and Exchange Commission, “[n]ot more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.”<sup>22</sup>

The constitutionality of a political party balance requirement for officers of the United States who require nomination by the President and confirmation by the Senate has been disputed.<sup>23</sup> In a Memorandum Opinion for the General Counsels’ Consultative Group, the Office of Legal Counsel of the United States Department of Justice concluded that the political party balance requirement violated the Appointments Clause of

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<sup>15</sup> Matthew A. Samberg, Note, *‘Established by Law’: Saving Statutory Limitations on Presidential Appointments From Unconstitutionality*, 85 N.Y.U. L. REV. 1735, 1750-51 (2010) (noting that independent federal regulatory agencies “play critical roles in promoting the national welfare, and Congress has decided that the important decisions they make require bipartisan input”).

<sup>16</sup> 2 U.S.C. § 437c.(a)(1) (2012).

<sup>17</sup> 47 U.S.C. § 154(b)(5) (2012).

<sup>18</sup> 15 U.S.C. § 41 (2012).

<sup>19</sup> 46 U.S.C. § 301(b)(1) (2012).

<sup>20</sup> 46 U.S.C. § 1111(b) (2012).

<sup>21</sup> 42 U.S.C. § 5841(b)(2) (2012).

<sup>22</sup> 15 U.S.C. § 78d.(a) (2012).

<sup>23</sup> Samberg, *supra* note 15, at 1737.

the United States Constitution.<sup>24</sup> The Appointments Clause provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>25</sup> The Office of Legal Counsel reasoned that such a limitation was “an unconstitutional attempt to share in the appointment authority which is textually committed to the President alone.”

The only congressional check that the Constitution places on the President’s power to appoint “principal officers” is the advice and consent of the Senate. As Justice Kennedy recently wrote for himself and two other members of the Court:

By its terms, the [Appointments] Clause divides the appointment power into two separate spheres: the President’s power to ‘nominate,’ and the Senate’s power to give or withhold its ‘Advice and Consent.’ No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment. *Public Citizen v. Department of Justice*, 491 U.S. 440, 483 (1989)(Kennedy, J., concurring).<sup>26</sup>

Thus, the principal argument against the political party balance requirement is a textual one. “[T]he text of the Constitution gives the legislative branch one method—and one method only—to restrict the President’s appointment power: by providing or withholding the advice and consent of the Senate.”<sup>27</sup> Several commentators and scholars have also argued that the political party balance requirement “violates traditional separation of power principles”: “Limitations on the President’s nomination power, it is argued, should be suspect under the separation of powers set up by the U.S. Constitution as a congressional encroachment on an executive prerogative.”<sup>28</sup>

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<sup>24</sup> *Common Legislative Encroachments on Executive Branch Authority*, 13 OP. O.L.C. 248, 250 (1989) (superseded by *The Constitutional Separation of Powers Between the President and Congress*, 20 OP. O.L.C. 124, 124 n.\* (1996)).

<sup>25</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>26</sup> *Common Legislative Encroachments*, *supra* note 24, at 250.

<sup>27</sup> Samberg, *supra* note 15, at 1752.

<sup>28</sup> Samberg, *supra* note 15, at 1735-36. See Hanah M. Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 754, 747

Limitations on appointments involve Congress statutorily tying the hands of the President in his executive prerogative of choosing officers, a process in which Congress normally has no power. The Senate . . . has only the power to veto, never to choose. Giving the Senate a choosing role—and giving the House any role—is a case of congressional incursion and aggrandizement, and it is thus properly examined as an incursive separation of powers problem.<sup>29</sup>

However, the counter argument in favor of Congressional limitations on appointments by the President, such as a political balance requirement, is a strong one and lies in the Necessary and Proper Clause of the Constitution.<sup>30</sup> That clause provides Congress with the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution [all of its Article I, Section 8] Powers.”<sup>31</sup> Under this clause, Congress is given plenary power to create and structure “a vast and varied federal bureaucracy,”<sup>32</sup> and from this power, Congress may have the inherent power to specify eligibility requirements for officers within that bureaucracy.<sup>33</sup>

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& n.12 (2008); Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1926 (2007); Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women's Bureau at the Department of Labor?*, 37 LOY. U. CHI. L.J. 43, 46 (2005); Adam J. Rappaport, Note, *The Court of International Trade's Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429 (2001); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 534-35 (1998); Richard P. Wulwick & Frank J. Macchiarola, *Congressional Interference with the President's Power to Appoint*, 24 STETSON L. REV. 625, 643-45 (1995).

<sup>29</sup> Samberg, *supra* note 15, at 1754.

<sup>30</sup> U.S. CONST. art. II, § 2, cl. 18.

<sup>31</sup> *Id.*

<sup>32</sup> *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 130 S.Ct. 3138, 3155 (2010) (“No one doubts Congress’s power to create a vast and varied federal bureaucracy.”) and *see id.* at 3165 (Breyer, J. dissenting) (“[T]he Necessary and Proper Clause affords Congress broad authority to ‘create’ governmental ‘offices’ and to structure those offices ‘as it chooses.’”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (*per curiam*)).

<sup>33</sup> Samberg, *supra* note 15, at 1753.

The United States Supreme Court has never specifically addressed the constitutionality of the political party balance restriction on a President's choice of nominees to a federal court or administrative agency.<sup>34</sup> And additionally, no court has addressed what the effect on the court or agency would be if the political party balance were upset by an existing member changing his party affiliation from one party to another.<sup>35</sup> However, in *Myers v. United States*, a case in which the Supreme Court invalidated a Congressional statute requiring the consent of the Senate for the President to remove an executive officer from office,<sup>36</sup> the Court in dictum appeared to approve of the power of Congress to prescribe qualifications for office:

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation. As Mr. Madison said in the First Congress:

“The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. In this point of

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<sup>34</sup> *Id.* at 1737, 1740-42, 1747.

<sup>35</sup> *See id.* at 1756 (“[W]hat if the Commission’s political balance was thrown off because an existing member changed his party affiliation from Republican to Democratic?”). However, the de facto officer doctrine would appear to validate the decision of a court with a defective member. This doctrine “confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of [his] appointment to office is deficient.” *Ryder v. United States*, 515 U.S. 177, 180 (1995).

<sup>36</sup> *Myers v. United States*, 272 U.S. 52 (1926). The *Myers* court invalidated the statute because it held that under Article II of the Constitution, the President had sole power to remove as an incidence of his power to appoint.

view, we shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the legislative and executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the government.” 1 Annals of Congress, 581, 582.

The legislative power here referred to by Mr. Madison is the legislative power of Congress under the Constitution, not legislative power independently of it. Article 2 expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise provided by the Constitution.<sup>37</sup>

Even Justice Brandeis, who in dissent in *Myers* argued that “[t]here is not a word in the Constitution which in terms authorizes Congress to limit the President’s freedom of choice in making nominations for executive offices,” recognized that Congress had continually exercised that power and that Presidents had acquiesced to it:

But a multitude of laws have been enacted which limit the President’s power to make nominations, and which through the restrictions imposed, may prevent the selection of the person deemed by him best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the government. Every President has approved one or more of such acts. Every President has consistently observed them. This is true of those offices to which he makes

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<sup>37</sup> *Myers*, 272 U.S. at 128-29.



appointments without the advice and consent of the Senate as well as of those for which its consent is required.

Thus Congress has, from time to time, restricted the President's selection by the requirement of citizenship. It has limited the power of nomination by providing that the office may be held only by a resident of the United States; of a state; of a particular state; of a particular district; of a particular territory; of the District of Columbia; of a particular foreign country. It has limited the power of nomination further by prescribing specific professional attainments, or occupational experience. It has, in other cases, prescribed the test of examinations. It has imposed the requirement of age; of sex; of races; of property; and of habitual temperance in the use of intoxicating liquors. Congress has imposed like restrictions on the power of nomination by requiring political representation; or that the selection be made on a nonpartisan basis.<sup>38</sup>

If Congress's power to create a federal bureaucracy under the Necessary and Proper Clause is considered in conjunction with its specific power in the Constitution "[t]o make Rules for the Government and Regulation of the land and naval Forces,"<sup>39</sup> then its ability to set a political balance requirement for a Presidential appointment may be secure. As one federal court has concluded:

The Constitution vests in Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces,' U.S. Const. Art. I, § 8, and it is within this power that the Uniform Code of Military Justice . . . resides. Proceedings under this Code are not required to conform with the Due Process Clause of the Fifth Amendment to exactly the same degree as proceedings in civil courts. Nevertheless, though greater latitude

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<sup>38</sup> *Id.* at 265-71 (footnotes omitted).

<sup>39</sup> U.S. CONST. art. II, § 2, cl. 14 and 18.

respecting due process is allowed military tribunals, due process is requisite.<sup>40</sup>

It is within that greater latitude respecting due process that the political balance requirement may find its Constitutional justification. Still, as noted by one commentator, the constitutional question of the validity of statutory restrictions on the appointment of a principal officer no doubt “will depend on whether the Court views them as permissible restrictions or prohibited usurpations.”<sup>41</sup>

### III. Legislative History

Whether the political party balance requirement, which limits eligibility for presidential appointments, is constitutional or not, it was, nonetheless, a statutory requirement for the Court that had been in the UCMJ since its inception and remained in place for sixty-five years. The legislative history behind the establishment of the requirement and the retention of the requirement over the years is a lengthy tale.

At the end of World War II, many complaints surfaced about miscarriages in the application of military justice.<sup>42</sup> As a result, in July, 1948, the Secretary of Defense appointed a special committee chaired by Professor Edmund M. Morgan, Jr., of Harvard Law School, to establish a Uniform Code of Military Justice applicable to all the services in times of war and peace.<sup>43</sup> “The spirit of the new act was to grant an accused more protection when he was being investigated about, charged with, and tried for an offense, and to extend to him the right of review by a body divorced from the military system.”<sup>44</sup> Seven months later, Professor Morgan transmitted a draft Uniform Code of Military Justice to the Secretary of Defense, and the Secretary then transmitted it forthwith to Congress on February 8, 1949.<sup>45</sup> The Morgan draft recommended an appellate review

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<sup>40</sup> *Gallagher v. Quinn*, 363 F.2d 301, 303-04 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966) (internal citations omitted).

<sup>41</sup> Samberg, *supra* note 15, at 1748.

<sup>42</sup> JONATHAN LURIE, *ARMING MILITARY JUSTICE (VOLUME 1 – THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950)* 128-35 (1992).

<sup>43</sup> *Id.* at 154-61.

<sup>44</sup> *United States v. Merritt*, 1 C.M.A. 56, 61, 1 C.M.R. 56, 61 (1951).

<sup>45</sup> LURIE, *supra* note 42, at 193-203.

system of military justice headed by a civilian “Judicial Council.”<sup>46</sup> Paragraph (a) of the proposed Article 67 [Review by the Judicial Council] of the Morgan draft UCMJ, provided:

There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than three members. Each member of the Judicial Council shall be appointed by the President from civilian life and shall be a member of the bar admitted to practice before the Supreme Court of the United States, and each member shall receive compensation and allowances equal to those paid to a judge of a United States Court of Appeals.<sup>47</sup>

Professor Morgan commented that this tribunal was “necessary to insure uniformity of interpretation and administration throughout the armed services” and that it was “consistent with the principle of civilian control of the armed forces that a court of final appeal on the law should be composed of civilians.”<sup>48</sup> No political balance requirement was inserted in this initial bill (H.R. 2498).

The bill was then referred to a subcommittee of the House Armed Services Committee that “conducted hearings 6 days a week for almost 5 weeks, during which time a total of 28 witnesses testified” and “a transcript of 1542 pages” was prepared.<sup>49</sup> On the last day of these hearings, Article 67 was debated and a proposal to add a political party balance requirement was discussed as follows:

Mr. BROOKS [Rep. T. Overton Brooks, D-LA, Chairman of Subcommittee]. Do you have any suggestion, Mr. Elston, on (the proposed Art. 67, UCMJ)?

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<sup>46</sup> *Uniform Code of Military Justice* (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 565-1307 (March 7, 8, 9, 10, 14, 16, 17, 18, 21, 22, 23, 24, 25, 26, 30, 31, April 1, 2, and 4, 1949) at 582.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 604.

<sup>49</sup> 95 CONG. REC. 5719-20 (1949).

Mr. ELSTON [Rep. Charles H. Elston, R-OH]. ... I think there should also be a provision that the members should not all be of the same political party.

Mr. RIVERS [Rep. L. Mendel Rivers, D-SC]. That is right. Like the Commissions. The Federal Communications Commission, and so on.

Mr. ELSTON. Yes.

Mr. BROOKS. You might write in there something about bipartisanship. I don't know whether men should be selected, though, because of their affiliation with a political party. I don't think that ought to be the test, but, rather, the ability to do the job.

Mr. ELSTON. I am sure they could find men of ability in both parties.

Mr. RIVERS. Yes; we have ample precedent for that.

Mr. ELSTON. Yes.

Mr. LARKIN [Mr. Felix E. Larkin, Assistant General Counsel, Office of the Secretary of Defense]. I don't think there is a limitation on the Federal court, but I don't recall. I know it doesn't apply to the Court of Claims, anyhow.

Mr. ELSTON. But it is a requirement with respect to a number of boards, such as the Federal Trade Commission ---

Mr. LARKIN. That is right.

Mr. RIVERS. The Federal Communications Commission.

Mr. ELSTON. The Maritime Commission, the Federal Communications Commission ---

Mr. LARKIN. I know the Federal Trade Commission, specifically, has such a requirement.

Mr. ELSTON. Yes, and I think some of the others.

Mr. HARDY [Rep. Porter Hardy, Jr., D-VA]. I wonder if that is a good idea with respect to judicial people. I wouldn't think that in normal practice it would happen, but I wonder if it is a good thing to require.

Mr. RIVERS. It won't hurt.

Mr. BROOKS. Well, I don't know. What concerns me is, when you say there must be a bipartisan board, whether or not the political qualification should be considered in appointment.

Mr. ANDERSON [Rep. John (Jack) Z. Anderson, R-CA]. Mr. Chairman, is it required by any Federal courts?

Mr. RIVERS. I don't think so.

Mr. BROOKS. No Federal courts.

Mr. RIVERS. I don't think so.

Mr. BROOKS. As a matter of fact, however, it has happened in a great many cases with the Supreme Court. I can recall ---

Mr. RIVERS. Harold Burton.

Mr. BROOKS. I can recall the last justice we had from Louisiana was appointed by a Republican President. He was made the Chief Justice subsequently.

Mr. RIVERS. Couldn't we put something in the commentary or the record to say that it is the sense of this group that the judicial qualification must predominate and where possible a bipartisan selection shall be encouraged?

Mr. BROOKS. Yes.

Mr. RIVERS. Just say in the same manner in which the President takes cognizance of this in his selection of the members of the Supreme Court.

Mr. HARDY. For myself, I will subscribe to that statement in the record here as being the sense of my angle on this committee.

Mr. DEGRAFFENRIED [Rep. Edward deGraffenried, D-AL]. I will, too.

Mr. RIVERS. Don't say "bipartisan" because there may be another strong party in the next election.

Mr. DEGRAFFENRIED. Certainly, the National Military Establishment or any court within it wants to and endeavors continually to stay out of politics. We don't regard it as a political branch of the Government, and I don't think Congress does, either.

Mr. ELSTON. No, and that is the reason for my suggestion.

Mr. DEGRAFFENRIED. Yes.

Mr. ELSTON. Because I don't want it to be political. But appointments are made that are political, and certainly there have been many where, in Federal courts, you get an unbalanced court. Take the Supreme Court of the United States today. I don't want to make any comment on it because everybody knows about it, but there have been times when Republicans appointed Democrats, as was pointed out. President Taft appointed Chief Justice White from Louisiana, wasn't it?

Mr. BROOKS. Yes.

Mr. RIVERS. That is right.

Mr. ELSTON. And they have followed a policy of trying to keep the courts nonpartisan and nonpolitical. But it can be abused. For my part, I feel like we ought to say we want it that way.

Mr. RIVERS. Yes.

Mr. HARDY. Let us do it in the record, Mr. Elston, and not in the law.

Mr. ELSTON. Well, that might be the solution of it, although I don't want to just foreclose myself from probably bringing it up again. I just want it certain that this court which is going to be an exceedingly important court is not filled by political appointments.

Mr. BROOKS. Let me suggest this thought: don't you think when we make it confirmable by the Senate that you are reaching at the same idea that you have in mind?

Mr. ELSON. I don't think that quite reaches it.

Mr. ANDERSON. I suggest, Mr. Chairman, that Mr. Smart be authorized to place in the record the views of this committee as expressed by the gentlemen here, that the court be nonpolitical and bipartisan.

Mr. BROOKS. Well ---

Mr. ANDERSON. That we not put it in the law at the present time---

Mr. BROOKS. The question is nonpartisan instead of bipartisan.

Mr. ANDERSON. Either way, which is the best legal term, and that we let Mr. Elston reserve the right to raise the issue later on if he so desires. That is just a suggestion.<sup>50</sup>

While Representative Elston's recommendation for a political party balance requirement was left unresolved, several of his other recommendations with respect to Article 67 were adopted by the subcommittee. The name "Judicial Council" was changed to the "Court of Military Appeals," and the number of judges on the Court was set at three by striking the words, "not less than."<sup>51</sup> As a result of subcommittee

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<sup>50</sup> *Uniform Code of Military Justice*, *supra* note 46, at 1272-73.

<sup>51</sup> *Id.* at 1277-80.

amendments to H.R. 2498, on April 7, 1949, Representative Brooks, with the unanimous vote of the subcommittee, reintroduced a clean UCMJ bill, H.R. 4080, to the full House Committee on Armed Services.<sup>52</sup> Paragraph (a) of Article 67 [Review by the Court of Military Appeals], UCMJ, had been rewritten as follows:

There is hereby established in the National Military Establishment the Court of Military Appeals which shall consist of three judges who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate. No person shall be eligible for appointment to the Court of Military Appeals who is not a member of the bar of a Federal court or of the highest court of a State. The three judges of the Court of Military Appeals shall hold office during good behavior and shall receive the compensation, allowances, perquisites, and retirement benefits of judges of the United States Court of Appeals.<sup>53</sup>

On April 27, 1949, H.R. 4080 was debated before the full House Committee on Armed Services.<sup>54</sup> During this debate, Representative Elston again introduced his recommendation that the Court of Military Appeals provision include a political party balance requirement:

Mr. ELSTON. . . . I offered another amendment in the [sub]committee which we considered. I understand the chairman has also thought about the matter. That was, with respect to the Court of Military Appeals, that provision be made that no more than two of the members of the court shall be of the same political party.

The CHAIRMAN [Rep. Carl Vinson, D-GA]. I may suggest, Mr. Elston, I am going to offer that amendment for the consideration of the full committee. I think in view of the fact that this is a new military court of civilians, it

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<sup>52</sup> H.R. 4080, 81st Cong., 1st Sess. (April 7, 1949).

<sup>53</sup> *Id.* at 54-55.

<sup>54</sup> Full Committee Hearings on H.R. 3341 and H.R. 4080 (No. 44): House of Representatives, Committee on Armed Services (April 27, 1949).



is nothing but right and proper that it be a nonpartisan court.

Mr. ELSTON. I say, if the chairman offers that, I will be glad to support it. The reason we didn't write it in the subcommittee was I think because we felt we were going to make the court conform as nearly as possible to our United States courts of appeals.

The CHAIRMAN. That is right.

Mr. ELSTON. And there is no provision in the law whereby they shall be bipartisan. However, this is a special court, and I believe that the amendment would be in order. . . .

The CHAIRMAN. Thank you, Mr. Elston.

The CHAIRMAN. May I suggest to my distinguished friend from Texas [speaking to Rep. Paul Kilday, D-TX] the only amendment we ought to put in this:

*Not more than two judges of such court shall be appointed from the same political party.*

I am offering, on page 55, line 4, after "Senate," insert the following new sentence,

*Not more than two judges of such court shall be appointed from the same political party.*

I hope the committee will adopt it because I think it gives strength to it. It makes it nonpartisan and shows the whole tendency of the armed services to be a nonpartisan organization all down the line.

Without objection, the amendment the chairman has offered is agreed to.<sup>55</sup>

Based on this abbreviated dialogue, on April 27, 1949, the House Committee on Armed Services unanimously approved the political party

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<sup>55</sup> *Id.* at 1335-36, 1340, 1350.

balance amendment, and with another unanimous vote sent the UCMJ to the full House of Representatives.<sup>56</sup> Professor Lurie, a history professor at Rutgers University, found that it was, “admittedly, difficult to follow the reasoning behind Elston’s and Vinson’s support for this change.”<sup>57</sup> He wrote the following summary and offered his own negative editorial comments:

The subcommittee had failed to resolve one final issue before its members unanimously reported the revised draft of the UCMJ (now called H.R. 4080) for favorable consideration to the full House Armed Service Committee. Ohio Representative Elston and others on the subcommittee had wanted appointments to the new court to be nonpolitical and nonpartisan. When the full committee met on April 27, Elston stated that originally he had even intended to propose amending article 67 to include a section that “Not more than two judges of such court shall be appointed from the same political party.” The committee chairman, Carl Vinson, now endorsed this amendment. Because “this is a new military court of civilians, it is nothing but right and proper that it be a nonpartisan court.”

There was no provision in existing law that federal courts be bipartisan. But Elston claimed that “this is a special court.” Granting this premise, the question can be asked how it becomes nonpartisan in nature when two of its three [now five] judges can be from the same political party. Moreover, if the committee had truly desired to make the new court nonpartisan, it would have been just as easy to stipulate in article 67 that specific party affiliation should not be the basis for judicial appointment. To put it another way, if this tribunal was to be like other federal appeals courts – except in its scope of jurisdiction – why should it be necessary to provide

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<sup>56</sup> *Id.* at 1340, 1349-50.

<sup>57</sup> LURIE, *supra* note 42 at 229.

such a stipulation here, but not for these other judicial bodies?<sup>58</sup>

On April 28, 1949, Representative Brooks, from the House Committee on Armed Services, submitted Report No. 491 to the whole House of Representatives to accompany H.R. 4080.<sup>59</sup> This report commented on the substantive amendments that had been made to the original bill.<sup>60</sup> With respect to the political party balance requirement, the report asserted that “[t]he committee [wa]s of the opinion that it is desirable to remove every possible criticism from the proposed code and that a limitation on the number of judges who may be appointed from the same political party is not only appropriate but highly desirable.”<sup>61</sup> On May 5, 1949, the bill H.R. 4080 passed in the full House.<sup>62</sup> Article 67(a) now read as follows:

There is hereby established in the National Military Establishment the Court of Military Appeals which shall consist of three judges who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate. Not more than two of the judges of such court shall be appointed from the same political party. No person shall be eligible for appointment to the Court of Military Appeals who is not a member of the bar of a Federal court or of the highest court of a State. The three judges of the Court of Military Appeals shall hold office during good behavior and shall receive the compensation, allowances, perquisites, and retirement benefits of judges of the United States Court of Appeals.<sup>63</sup>

A Senate subcommittee of the Senate Committee on Armed Services conducted hearings on the Senate’s version of the UCMJ bill, S. 857, in conjunction with H.R. 4080.<sup>64</sup> Article 67(a) in the S. 857, mirrored the

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<sup>58</sup> *Id.* at 228-29 (footnote omitted).

<sup>59</sup> H.R. REP. NO. 491 (81st Cong., 1st Sess. 1949).

<sup>60</sup> *Id.* at 9.

<sup>61</sup> *Id.*

<sup>62</sup> 95 CONG. REC. 5744 (1949).

<sup>63</sup> H.R. 4080, 81st Cong. 1st Sess., H.R. REP. NO. 491, Union Calendar No. 190 (April 28, 1949) at 56.

<sup>64</sup> *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services, 81st Cong., 1st Sess. 1-334 (April 27, and May*

provision in the Morgan draft.<sup>65</sup> With respect to Article 67(a), debate in the Senate subcommittee focused on whether the members of the Judicial Council should be appointed for life or a term of years and whether to stagger the terms of the judges, as well as on salary and retirement benefits.<sup>66</sup> No discussion was made as to the need for a political party balance requirement. However, when the subcommittee referred the UCMJ bill to the full Senate Committee on Armed Services on June 10, 1949, it was a revised version of H.R. 4080 that included the political balance requirement and read as follows:

There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the National Military Establishment. The Court of Military Appeals shall consist of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of eight years. Not more than two of the judges of such court shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. Each judge shall receive a salary of \$17,500 a year and shall be eligible for reappointment. The President shall designate from time to time one of the judges to act as Chief Judge. The Court of Military Appeals shall have power to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum. A vacancy in the court shall not impair the right of the remaining judges to exercise all the powers of the court.<sup>67</sup>

The full Senate then considered H.R. 4080, as amended, and on February 3, 1950, the bill passed.<sup>68</sup> In conference between the two houses of Congress, the House and Senate compromised on the term of office,

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4, 9, and 27, 1949). See H.R. 4080 in the Senate of the United States, 81st Cong., 1st Sess. (May 6, 1949).

<sup>65</sup> Compare *id.* at 18 with *Uniform Code of Military Justice*, *supra* note 46, at 582.

<sup>66</sup> *Uniform Code of Military Justice*, *supra* note 64, at 43, 311-15.

<sup>67</sup> H.R. 4080 in the Senate of the United States, S. REP. NO. 486, Calendar No. 481, 81st Cong., 1st Sess. (June 10, 1949), Art. 67(a)(1) at 159.

<sup>68</sup> 96 CONG. REC. 1292-1310; 1353-70; 1412-17; 1430-47 (1950).

salary, and benefits accorded the judges, but no change was made to the political party balance requirement.<sup>69</sup> The UCMJ was approved by Congress on May 5, 1950, signed into law by President Truman on May 6, 1950, and went into effect on May 31, 1951.<sup>70</sup> The political party balance requirement was now law:

There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the Department of Defense. The Court of Military Appeals shall consist of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of such court shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. Each judge shall receive a salary of \$17,500 a year and shall be eligible for reappointment. The President shall designate from time to time one of the judges to act as Chief Judge. The Court of Military Appeals shall have power to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum. A vacancy in the court shall not impair the right of the remaining judges to exercise all the powers of the court.<sup>71</sup>

Several years after the political party balance requirement was written into the UCMJ, the first Chief Justice of the Court, Robert E. Quinn, sought to have legislation passed in both 1956 and 1957 that would have

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<sup>69</sup> See CONF. REP. NO. 1946, Uniform Code of Military Justice Conference Report to accompany H.R. 4080 (April 24, 1950) at 4.

<sup>70</sup> *Uniform Code of Military Justice*, PUB. L. 506 (81st Cong.), ch. 169 (2d Sess.), 64 STAT. 107 (Act of May 5, 1950, Pub. L. 506, 1950 U.S.C.C.A.N., Vol. 1 at 110). The original 140 articles of the UCMJ were codified at 50 U.S.C. (Chap. 22) §§ 551-736 and enacted into positive law at 10 U.S.C. §§ 801-810 in 1956 (Act of August 10, 1956, PUB.L. 1028 (84th Cong.), ch. 1041 (2d Sess.), 70A STAT. 36, 1956 U.S.C.C.A.N., Vol. 1 at 1336, 1379-1431. See LURIE, *supra* note 42, at 255. See also Art. 140, Sec. 5, UCMJ, Act of May 5, 1950, PUB. L. 506, 1950 U.S.C.C.A.N., Vol. 1 at 145 (providing that the UCMJ will become effective on the last day of the twelfth month after approval of the Act).

<sup>71</sup> Art. 67(a)(1), UCMJ, Act of May 5, 1950, PUB. L. 506, 1950 U.S.C.C.A.N., Vol. 1 at 130.

deleted the requirement that no more than two of the judges be from the same political party.<sup>72</sup> Both of these attempts were unsuccessful.<sup>73</sup>

In 1979, the General Counsel for the Department of Defense (DoD) circulated a draft staff paper on possible legislative changes to the Court.<sup>74</sup> After receiving public comment on the draft paper, DoD “formulated an administration proposal (H.R. 6298, 96th Cong., 2d Sess.) and submitted it to Congress on January 24, 1980 (126 Cong. Rec. 636).”<sup>75</sup> One of the provisions of that bill “eliminated the political qualifications test (i.e., no more than two from same political party) and substituted a requirement that appointments be made only on basis of fitness to perform duties of office and age (under 65 years old at time of appointment).”<sup>76</sup> During Congressional hearings on this bill, one of the Court’s judges stated that the Court was “pleased to see the elimination of the political party criteria for selecting further judges.”<sup>77</sup> “Judicial competence,” he continued, “[was] the Court believes, a far better yardstick.”<sup>78</sup> During the Congressional markup of the bill, the proposed elimination of the political party balance requirement was discussed, and Representative Richard White of Texas defended the elimination by noting that “to my knowledge, there are no other judicial appointment provisions that have that type of language in them” and that “the testimony at the time was that they wanted to make it nonpolitical [and] that they felt this [political party provision] was not needed.”<sup>79</sup> Representative Marjorie Holt of Maryland, however, then offered an amendment to reintroduce the political party balance

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<sup>72</sup> JONATHAN LURIE, PURSUING MILITARY JUSTICE (VOLUME 2 – THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980) 125-27, 138-39 (1998).

<sup>73</sup> *Id.*

<sup>74</sup> Draft, *Reform of the Court of Military Appeals*, Office of the General Counsel, Department of Defense, May 7, 1979 (located in the Law Library, United States Court of Appeals for the Armed Forces, 450 E St, NW, Washington, D.C.).

<sup>75</sup> *Report of Department of Defense Study Group on the United States Court of Military Appeals*, Office of the General Counsel Department of Defense, July 25, 1988 at 11 (located in the Law Library, United States Court of Appeals for the Armed Forces, 450 E St, NW, Washington, D.C.).

<sup>76</sup> *Id.*

<sup>77</sup> *Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process*, Hearings on H.R. 6406 and H.R. 6298 before the Military Personnel Subcommittee of the Committee on Armed Services, House of Representatives, 96th Cong., 2d Sess., Feb. 7, Mar. 6, and Sept. 23, 1980 (H.A.S.C. No. 96-55, G.P.O. Washington, DC 1980) at 77, 80 (testimony and written statement of Hon. A. B. Fletcher, Jr., Chief Judge of the U.S. Court of Military Appeals).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 99-100.

requirement, commenting that “I think it has worked well to have some representation of both political parties on the court and I see no reason to change it.”<sup>80</sup> In a voice vote, the amendment to reintroduce the political party balance requirement passed.<sup>81</sup> A clean bill (H.R. 8188) that included this amendment “was passed by the House on October 2, 1980 (126 Cong. Rec. 29011-29013) and referred to the Senate on October 8, 1980, but no further action was taken on this bill.”<sup>82</sup>

The political party balance requirement was next mentioned again in a January 27, 1989, report of a United States Court of Military Appeals Committee chaired by Professor James Taylor, Jr., of Wake Forest University School of Law.<sup>83</sup> That report commented:

Article 67(a)(1) provides that no more than two of the three judges may be from the same political party. That provision was apparently included, at least initially, to prevent the incumbent President in 1950 from appointing all three judges from his political party to the then new Court of Military Appeals. The Committee believes that the language regarding party affiliation is an anachronism and should be removed.<sup>84</sup>

The committee specifically recommended that “Article 67, U.C.M.J. should be amended by removing the ‘same political party’ limitation in the appointment of judges.”<sup>85</sup>

The next reference to the Court’s political party balance requirement came in an article, “Going on Fifty: Evolution and Devolution in Military Justice,” by Mr. Eugene R. Fidell, a frequent commentator on military justice matters. He wrote about the political party requirement in these terms: “Less happily, despite the 1989 recommendation of the court committee headed by Dean James Taylor Jr., the political balance requirement remains on the books, even though many think that such

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 100.

<sup>82</sup> *Report of Department of Defense Study Group, supra* note 75, at 12.

<sup>83</sup> *United States Court of Military Appeals Committee Report*, January 27, 1989 (located in the Law Library, United States Court of Appeals for the Armed Forces, 450 E St, NW, Washington, D.C.).

<sup>84</sup> *Id.* at 12.

<sup>85</sup> *Id.* at 26.

requirements are both inappropriate for a criminal appellate court and so easily manipulated as to be meaningless (aside from bringing the nomination process into disrespect and thereby needlessly detracting from the court's standing in the American judicial pantheon)."<sup>86</sup> In a later law review article, "The Next Judge," Mr. Fidell outlined what he believed should be the qualifications of the next judge to be appointed to the CAAF, and with respect to the political balance requirement, he argued:

The third qualification for appointment to the Court of Appeals springs from the political balance requirement. This indefensible provision, which has been in the UCMJ from the beginning, permits no more than a bare majority of the court to be members of the same political party. It is easily circumvented. For example, a candidate may be (or become) a registered Independent, or may be a merely nominal member of one party but enjoy strong political support from legislators of the other party. This provision should be repealed, but as long as it is on the books it must be complied with.<sup>87</sup>

Finally, in the recent hornbook, *Court-Martial Procedure*, the qualifications for the Court were described in these terms:

It is composed of five civilian members appointed by the President with the advice and consent of the Senate for a term of fifteen years. No military experience or affiliation is required for service on the court. Instead, political affiliation is of statutory concern as not more than two members of the court may be appointed from the same political party.<sup>88</sup>

In a footnote to that passage, it was noted that the first panel of judges on the Court chosen by President Truman in 1951 were all reserve officers,

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<sup>86</sup> Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1218 (1997) (also reprinted in EUGENE R. FIDELL & DWIGHT H. SULLIVAN, EDs., *EVOLVING MILITARY JUSTICE* (2002) at 18).

<sup>87</sup> Eugene R. Fidell, *The Next Judge*, 5 J. NAT'L SECURITY L. & POL'Y 303, 308 (2011).

<sup>88</sup> FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, *COURT-MARTIAL PROCEDURE* (3d ed. 2006), Vol. 2 at § 25-61.00 at 25-33 (footnotes omitted).



with one from each branch of the military service.<sup>89</sup> During the Senate hearings preceding the enactment of the UCMJ, the issue as to whether judges on the Court should be statutorily required to have had some military experience was debated, but rejected, and military experience was never a prerequisite for appointment to the Court.<sup>90</sup> In 1956, President Eisenhower appointed the first judge without prior military experience to the Court when he appointed former Republican Senator Homer Ferguson to the Court.<sup>91</sup> In 1990, Congress specifically amended the qualification statute to prohibit appointment to the Court of military officers who had retired from active duty after 20 years.<sup>92</sup> In 2013, the Congress, however, modified that rule to allow officers who had retired from active duty after 20 years as long as the appointment occurred seven years after the retirement.<sup>93</sup> Despite this tinkering to the civilian/military aspect of the qualifications necessary for appointment to the Court, Congress did not tinker with the political party balance requirement again until 2016. And as noted by Professor Lurie, political considerations have been an integral part of presidential appointments to the Court since 1951:

It is certainly no secret that judicial appointments are not always based on merit. Nor should one be surprised that selections to a court such as USCMA [COMA] are considered less important than appointments to other federal appellate benches. On the other hand, by refusing

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<sup>89</sup> *Id.* at § 25-61.00 at 25-33 n.214.

<sup>90</sup> WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 49 (1973). See also *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, *supra* n.46, at 1275-76; *Full Committee Hearings on H.R. 3341 and H.R. 4080 (No. 44): House of Representatives, Committee on Armed Services*, *supra* note 54 at 1339-40; LURIE, *supra* note 42, at 227.

<sup>91</sup> *Id.*

<sup>92</sup> See *National Defense Authorization Act for Fiscal Year 1991*, PUB. L. NO. 101-501, 104 STAT. 1485 (Nov. 5, 1990) at § 541(f) (providing that “[f]or purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life”). This change did not alter the President’s ability to appoint retired reserve officers to the Court, as long as they had not served on active duty for 20 or more years.

<sup>93</sup> See *National Defense Authorization Act for Fiscal Year 2014*, PUB. L. NO. 113-66, 127 STAT. 672 (Dec. 26, 2013) at § 531(a) (providing that “a person may not be appointed as a judge of the court within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force”). This cooling off period is similar to that used for the appointment of the Secretary of Defense. See 10 U.S.C. § 113 (2012) (“A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force.”).

to equate USCMA judges with other federal appellate judges by granting them life tenure, Congress in effect belittles the importance of the court it created more than forty years ago. Similarly, by keeping the USCMA under the jurisdiction of the Armed Services Committee rather than the Judiciary Committee, Congress further ensures that the tribunal's future rests with a body for whom qualifications of legal ability and jurisprudential distinction are secondary to political connections and expediency. This pattern in appointments became well established during the Truman, Eisenhower, Kennedy and Johnson eras.<sup>94</sup>

In 2016, the CAAF judges forwarded several recommended legislative changes to the General Counsel of the Department of Defense.<sup>95</sup> These included a modification to the term of service of two of the judges, a modification to the daily rate of compensation for its senior judges when performing duties with the Court, an increased authority to administer oaths, a repeal of the dual compensation provision relating to its judges, and a repeal of the political party balance requirement.<sup>96</sup> The Court offered the following rationale with respect to the recommended elimination of the political party provision:

It is somewhat ironic that in attempting to avoid politicizing the court [when the political balance amendment was initially proposed], the amendment inserted politics into the selection process by requiring that the President consider the political affiliation of each potential nominee. Everyone agrees that this court – as all courts – should be nonpartisan. However, after 65 years of operation, there appears little reason to continue

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<sup>94</sup> Jonathan Lurie, *Presidential Preferences and Aspiring Appointees: Selections to the U.S. Court of Military Appeals 1951-1968*, 29 WAKE FOREST L. REV. 521, 555-56 (1994).

<sup>95</sup> Email from Court Executive to the author entitled *Tentative Legislative Package* dated 5 January 2017 (on file with author).

<sup>96</sup> *Id.*

the requirement that political affiliation be a consideration for appointment to the court.<sup>97</sup>

The General Counsel's office reviewed the recommended legislative changes but felt they had been submitted too late in the term to be included in the current year's National Defense Appropriation Act.<sup>98</sup> That office recommended that the Court submit its recommendations directly to Congress.<sup>99</sup> One CAAF judge, Judge Stucky, had previously been the majority counsel to the Senate Armed Services Committee. On behalf of the Court, on April 11, 2016, he forwarded the suggested changes to Congress.<sup>100</sup> With respect to the political balance requirement, the Court noted, as mentioned earlier, that the provision had "outlived its usefulness" and imposed "an irrelevant limitation on who may be nominated and confirmed to sit on the Court."<sup>101</sup> The Court also stated that "[i]t does not appear that any other Federal court includes a party balance requirement."<sup>102</sup> This latter statement was incorrect because, as previously discussed, both the United States Court of International Trade and the United States Court of Appeals for Veterans Claims have this requirement. Nonetheless, without discussion or comment, Congress approved all of the CAAF's recommended legislative changes, and the political balance requirement ended on December 23, 2016.<sup>103</sup>

#### IV. Literature Review

I am unaware of any previous empirical scholarship on the judicial ideology of the CAAF from its inception to the present or on the impact that the political party balance requirement has had on that ideology. In

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<sup>97</sup> Copy of proposed amendment rationale provided by the Chief Judge Erdmann to the author on 2 March 2017 (on file with author).

<sup>98</sup> Emails from Chief Judge Erdmann to the author entitled *CAAF Legislative Package*, *Legislative Sitrep*, and *Legislative Proposals* dated 2 March 2017 (on file with author); email from Dwight Sullivan, DoD GC's office, entitled *A Little Help* dated 15 February 2017 (on file with author).

<sup>99</sup> *Id.*

<sup>100</sup> Emails from Chief Judge Erdmann to the author entitled *CAAF Legislative Package*, *Legislative Sitrep*, and *Legislative Proposals* dated 2 March 2017 (on file with author); email from Judge Stucky to author entitled *Political Party* dated 22 March 2017 (on file with author).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> §541(c), *National Defense Authorization Act for Fiscal Year 2017*, PUB. L. 114-328 (114th Cong. 2d Sess.), 130 STAT. 2000 (Dec. 23, 2016).

fact, two military authors recently commented that “[t]here have been few, if any, statistical reviews or empirical military law articles published in academic journals to date.”<sup>104</sup> As support for this statement, they conducted a Boolean search using the word “empirical” in the Westlaw Legal Research Search Engine and found no military justice articles with that word in the title.<sup>105</sup>

In addition, the CAAF lacks any sort of comprehensive statistical database for its opinions from its inception in 1951 to its current 2016-2017 term. As a consequence, no statistics exist with respect to the individual vote of each judge in each published case, the decisional outcome in each case (for the government or for the appellant), or whether the decision was a reversal or affirmance of the decision below. And as a further consequence, no empirical analysis has been conducted on the judicial behavior of judges on the CAAF. The only resource that I could find that touched on the judicial ideology of the Court was a partial statistical overview of the Court’s recent opinions that has been provided annually for the years 2006 to 2016 by a blog, [www.caaflog.com](http://www.caaflog.com).<sup>106</sup> This overview focused on the voting patterns of the judges (e.g., who are most likely to vote together and who are most likely to vote in favor of the government), but it made no attempt to analyze the judicial ideology of the Court or the impact of the political party balance requirement.

Unlike the complete lack of empirical research and statistical analysis for the CAAF, a plethora of data and empirical research exist with respect to the judicial behavior of the United States Supreme Court and the U.S. Courts of Appeals. In fact, large, publicly available datasets exist for both the United States Supreme Court and the United States Courts of Appeals.<sup>107</sup> The Supreme Court Database was produced by Professor Harold J. Spaeth of Michigan State University under a grant from the National Science Foundation (NSF), and it contains over two hundred

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<sup>104</sup> John A. Sautter & J. Derek Randall, *A Jury of One’s Peers: An Empirical Analysis of the Choice of Members in Contested Military Courts-Martial*, 217 MIL. L. REV. 91, 100 (2013).

<sup>105</sup> *Id.* at 100 n.56.

<sup>106</sup> See CAAFLOG, <http://www.caaflog.com/category/end-o-term-stats> (last visited Nov. 20, 2017).

<sup>107</sup> See <http://supremecourtdatabase.org/> or <http://scdb.wustl.edu/> or <http://artsandsciences.sc.edu/poli/juri/sct.htm> [United States Supreme Court Database]; <http://artsandsciences.sc.edu/poli/juri/appct.htm> [U.S. Courts of Appeals Database]; <http://artsandsciences.sc.edu/poli/juri/attributes.htm> [Judicial Attributes Database of U.S. Courts of Appeals].

pieces of information about each case decided by the Court between the 1946 and 2015 terms, including the court whose decision the Supreme Court reviewed, the parties, the legal provisions in the case, and the votes of the justices.<sup>108</sup> A new legacy, but more limited, database has been added for Supreme Court cases from 1791 to 1945, which includes information about the individual dispute involved and the votes of the individual justices.<sup>109</sup> Two datasets exist for the U.S. Courts of Appeals: a standard voting/decisional database and a judicial attributes database.<sup>110</sup>

The first database, referred to simply as the Courts of Appeals Database, was compiled by Professor Donald Songer of the University of South Carolina, also under a NSF grant, and it contains the votes and decisions in published opinions from each circuit court decided during the period from 1925 to 1996, as well as numerous other variables.<sup>111</sup> That database was updated for the period 1997 to 2002 by Professor Ashlyn Kuersten of Western Michigan University and Professor Susan Haire of the University of Georgia.<sup>112</sup> The second database, referred to as the Judicial Attributes Database, was produced by Professor Gary Zuk, Professor Deborah Barrow, and Professor Gerard Gryski, all of Auburn University, under a separate NSF grant, and it includes personal information about individual judges who served on the courts of appeals during the period from 1801 to 1994, to include race, gender, religion, appointing president, and previous occupational background.<sup>113</sup>

With respect to written empirical studies of the judicial behavior of the federal judiciary, numerous books and law review article exist. In his seminal book from 1959, *Quantitative Analysis of Judicial Behavior*, Professor Glendon Schubert of Michigan State University offered the

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<sup>108</sup> *The Supreme Court Database*, WASH. U. L., <http://supremecourtdatabase.org> (last visited Nov. 20, 2017).

<sup>109</sup> *Id.*

<sup>110</sup> *U.S. Appeals Courts Database*, U. S. C., <http://artsandsciences.sc.edu/poli/juri/appct.htm> (last visited Nov. 20, 2017); *Attributes of U.S. Federal Judges Database*, U. S. C., <http://artsandsciences.sc.edu/poli/juri/attributes.htm> (last visited Nov. 20, 2017).

<sup>111</sup> *U.S. Appeals Courts Database*, U. S. C., <http://artsandsciences.sc.edu/poli/juri/appct.htm> (last visited Nov. 20, 2017).

<sup>112</sup> *Id.*

<sup>113</sup> *U.S. Federal Judges Database*, U. S. C., <http://artsandsciences.sc.edu/poli/juri/attributes.htm> (last visited Nov. 20, 2017).

following observations about the empirical analysis of judicial behavior through counting:

All quantitative analysis begins with counting and with simple arithmetic. In many instances, these everyday numerical operations yield new data and shed new light on hitherto unresolved questions. Judicial behavior, no less than many other realms of human activity, can be illuminated if one pays careful attention to the quantities of cases which are handled in various ways. At the very least, such quantitative analyses can yield important information for policy makers, administrators and scholars interested in the administrative aspects of judicial processes. But they can accomplish a great deal more: we shall endeavor to show how such data can be used to confirm or infirm meaningful hypotheses about the activities of judges.<sup>114</sup>

He then proceeded to count the individual votes of the justices on the United States Supreme Court (members appointed by the President with life tenure) in all the published, non-per curiam opinions from the 1946 term to the 1957 term;<sup>115</sup> he also counted the individual votes of the justices on the Michigan Supreme Court (members who are nominated for election by state party conventions and elected for eight-year terms) in all of that Court's published opinions from its 1955 term through its 1957 term.<sup>116</sup> Using this data, he conducted a majority and dissenting voting bloc analysis of the opinions.<sup>117</sup> In his own words, this bloc analysis "focuse[d] upon the recurring uniformities in the interaction among individuals in a small group, and it permit[ted him] to make inferences about both the effect of the group upon individual justices and the effect of individual justices upon the Court."<sup>118</sup> After conducting this bloc analysis, he found that "there appeared to be no significant partisan dimension to the [voting] blocs on the United States Supreme Court."<sup>119</sup> However, with respect to the Michigan Supreme Court, he found that

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<sup>114</sup> GLENDON A. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* 25 (1959).

<sup>115</sup> *Id.* at 77-129.

<sup>116</sup> *Id.* at 129-142.

<sup>117</sup> *Id.* at 77-142.

<sup>118</sup> *Id.* at 16.

<sup>119</sup> *Id.* at 129.

“partisanship produced changes in the group behavior of the justices.”<sup>120</sup> He concluded his analysis with this thought: “[T]he partisan political affiliations of the justices appear to have been irrelevant to the group behavior of the United States Supreme Court; while bloc analysis suggests its primary importance in the case of the Michigan Supreme Court. There may, after all, be validity in the assumption that life tenure makes for independence of judges.”<sup>121</sup>

In 1993, in their book, *The Supreme Court and the Attitudinal Model*, Professor Spaeth of Michigan State University and Professor Jeffrey Segal of Stony Brook University, conducted a quantitative analysis of the much larger Spaeth Supreme Court Database and concluded that the justices’ behavior was structured largely by their individual preferences toward public policy issues, with liberal justices on the Supreme Court consistently reaching liberal decisions and conservative judges consistently reaching conservative decisions.<sup>122</sup> In their 2002 follow-up book, *The Supreme Court and the Attitudinal Model Revisited*, they confirmed their earlier findings that the decisions of the Supreme Court are best explained by the policy preferences of the justices.<sup>123</sup>

In 2006, in one of the next books to study judges with numbers, *Are Judges Political? An Empirical Analysis of the Federal Judiciary*, Professor Cass Sunstein of the University of Chicago, Professor David Schkade of the University of California-San Diego, and two other authors “attempt[ed] to explore . . . the question whether . . . appellate judges can be said to be ‘political’.”<sup>124</sup> They hypothesized that in ideologically contested cases, “as a statistical regularity, judges appointed by Republican presidents . . . will be more conservative than judges appointed by Democratic presidents,” that “a judge’s ideological tendency is likely to be dampened if [that judge] is sitting with two judges of a different political party,” and that “a judge’s ideological tendency . . . is likely to be amplified if [that judge] is sitting with two judges from the same political party.”<sup>125</sup> After examining a total of 6,408 published three-judge panel

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 142.

<sup>122</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

<sup>123</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

<sup>124</sup> CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN, & ANDRES SAWICKI, *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* vii (2006).

<sup>125</sup> *Id.* at 6-9.

decisions of U.S. Courts of Appeals and the 19,224 associated votes of individual judges, in cases involving 23 areas of the law, and then applying a logistic regression analysis to the results, they concluded that “in numerous areas of the law, all three hypotheses were strongly confirmed.”<sup>126</sup> Thus, based on their quantitative empirical study, it was clear: “Republican appointees and Democratic appointees differ[ed] in their voting patterns, often very significantly.”<sup>127</sup>

A year later, in the next book outlining a quantitative empirical study of the federal judiciary, *Decision Making in the U.S. Courts of Appeals*, Professor Frank Cross of the University of Texas School of Law, examined the role of judicial politics in the decisionmaking of the U.S. Courts of Appeals using the Courts of Appeals Database and the Judicial Attributes Database referenced above and applying logistical regression analysis to the results.<sup>128</sup> He initially noted the irony of examining the role of judicial politics in decisionmaking in the appellate courts: “Beginning with ideology might seem surprising, because judges are expected to follow the law and eschew politics when making decisions.”<sup>129</sup> Nonetheless, he came to a similar conclusion as Professors Spaeth, Sanger, Sunstein, and Schkade: “[Political] ideology has a statistically significant effect on decisions. Judges appointed by more conservative presidents consistently produce more conservative decisions on the bench.”<sup>130</sup> In other words, “Republican appointees were consistently more conservative, on average, than the Democratic appointees,”<sup>131</sup> and he emphasized that using the appointing President of a judge seemed “a reasonable proxy for judicial ideology.”<sup>132</sup> In arriving at his conclusion, Professor Cross also provided certain insights into the limitations of a quantitative analysis. First, he noted that “[u]sing quantitative empirical methods to analyze judicial decisions has some inherent limitations because it is simply impossible to control for all the relevant factors underlying a decision.”<sup>133</sup> And second, he noted that certain relevant factors could not be objectively measured:

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<sup>126</sup> *Id.* at 8-18.

<sup>127</sup> *Id.* at vii.

<sup>128</sup> FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007).

<sup>129</sup> *Id.* at 11.

<sup>130</sup> *Id.* at 7.

<sup>131</sup> *Id.* at 22.

<sup>132</sup> *Id.* at 24.

<sup>133</sup> *Id.* at 6.



For example, the database can characterize outcomes as liberal or conservative but cannot estimate *how* liberal or *how* conservative that decision was. It cannot segregate moderately liberal from extremely liberal results. The coding is also contingent on the facts of the case. For example, a court may reach an outcome classified as liberal only because the alternative position was an extremely conservative one that even conservative judges found unacceptable. This inevitably creates some inaccuracies in the specification of the variables . . . and [t]hese specification errors typically cause an underestimation of a true relationship.<sup>134</sup>

Despite these limitations, however, he contended that “such [quantitative] analyses provide important information and are valuable as rigorous tests of theories that otherwise rely on anecdotal evidence or simple assumptions.”<sup>135</sup> What he discovered by his quantitative analyses, in addition to confirming that political ideology did indeed have an effect on judicial decisionmaking, was that legal threshold requirements, such as jurisdiction and standing, and judicial review standards (such as abuse of discretion) that require a degree of legal deference to the decisions of the lower courts, also had a significant effect on decisionmaking.<sup>136</sup> He also found that the collegiality or interactive effects between the panel members “was at least as powerful as the individual judge’s own preferences” in decisionmaking.<sup>137</sup> With respect to judicial attributes, such as race, gender, religion, and previous life experiences, however, he found relatively little effect on decisionmaking.<sup>138</sup> In this area, he noted only two matters – that female and minority judges appeared more liberal

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<sup>134</sup> *Id.* at 5. He also commented:

An empirical researcher does not need a perfect measure of variables to reach conclusions. Imperfections in measurement tend to obscure results rather than produce spurious positive results. If research with imperfect measurements nevertheless produces a statistically and substantively significant finding, that research probably understates the true result.

*Id.* at 20-21.

<sup>135</sup> *Id.* at 6.

<sup>136</sup> *Id.* at 7-9.

<sup>137</sup> *Id.* at 9.

<sup>138</sup> *Id.* at 7-8.

in criminal cases and that judges of greater net wealth appeared to render more conservative decisions.<sup>139</sup>

In the latest book concerning an empirical quantitative study of federal judges, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, Professor Lee Epstein from Washington University in St. Louis, Professor William M. Landes, and U.S. Circuit Court Judge Richard A. Posner, provided a comprehensive overview of past statistical empirical studies of federal judges and provided their own statistical analysis of the votes of the entire Article III judiciary, to include the United States Supreme Court, the U.S. Courts of Criminal Appeals, and U.S. District Court judges.<sup>140</sup> They first presented what they believed to be a realistic model of judicial behavior and then tested it empirically by analyzing the voting behavior of the judges using regression analysis. Their model conceived of a judge “as a participant in a labor market [who] can be understood as being motivated and constrained, as other workers are, by costs and benefits both pecuniary and nonpecuniary, but mainly the latter: nonpecuniary costs such as effort, criticism, and workplace tensions, nonpecuniary benefits such as leisure, esteem, influence, self-expression, celebrity (that is, being a public figure), and opportunities for appointment to a higher court; and constrained also by professional and institutional rules and expectations and by a ‘production function’ – the tools and methods that the worker used in his job and how he uses them.”<sup>141</sup> In the case of the Supreme Court, they found, consistent with early studies, that “Justices appointed by Republican Presidents vote more conservatively on average than Justices appointed by Democratic ones,” and in the cases of the courts of appeals, they found that “the judges of these courts are less ideological than Supreme Court Justices on average, but not that ideology plays a negligible role in their decisions.”<sup>142</sup> In fact, they found that “ideology influences judicial decisions at all levels of the federal judiciary,” but that the strength of that influence simply “diminishes as one moves down the judicial hierarchy.”<sup>143</sup> Finally, using statistical methodology to test their labor-market model, they found that

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<sup>139</sup> *Id.* at 8.

<sup>140</sup> LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013).

<sup>141</sup> *Id.* at 5.

<sup>142</sup> *Id.* at 8-9.

<sup>143</sup> *Id.* at 385.

many judges, like other workers, prefer leisure, are effort averse, angle for promotion, and seek celebrity status.<sup>144</sup>

In the law review article, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, Professor Daniel R. Pinello of the John Jay College of Criminal Justice, City University of New York, stated that “public-law scholars traditionally have used judges’ political party affiliations as proxies for judicial ideology” and that “conventional wisdom today among students of judicial behavior sees party as a dependable yardstick for ideology: Republican judges are conservatives; Democrats, liberals.”<sup>145</sup> He then asked: “Is there truly an empirically verified connection between judges’ party identification and their behavior on the bench?”<sup>146</sup> To answer this question, the author “identified 140 books, articles, dissertations, and conference papers in the legal and political science literatures between 1959 and 1998 revealing empirical research pertinent to a link between party and modern judicial ideology in the United States.”<sup>147</sup> Synthesizing this group down to eighty-four studies through certain specific inclusion criteria, the author then applied a meta-analysis to these studies.<sup>148</sup> From this analysis, he concluded that (1) “the most cautious conclusion from the meta-analysis about the relationship between judges’ political party affiliation and their ideology is that there is a relationship: Democratic judges indeed are more liberal than Republican ones,” (2) “[p]arty is a stronger attitudinal force in federal courts than in state tribunals,” (3) and “‘scholars’ use of only nonunanimous appellate opinions overestimates party’s effect on the broad range of judicial action.”<sup>149</sup>

In the article, *What is Judicial Ideology, and How Should We Measure It?*, the authors, Professor Joshua B. Fischman of the University of Virginia and Professor David S. Law of Washington University in St. Louis, discussed the difficulties inherent in empirical scholarship on the

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<sup>144</sup> *Id.* at 385-86.

<sup>145</sup> Daniel P. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 220 (1999).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 221.

<sup>148</sup> *Id.* at 221-24. Meta-analysis is defined as “quantitative statistical analysis that is applied to separate but similar experiments or studies of different and usually independent researchers and that involves pooling the data and using the pooled data to test for statistical significance.” *Meta-analysis*, MERRIAM-WEBSTER UNABRIDGED, <http://unabridged.merriam-webster.com/browse/meta-analysis> (last visited Nov. 20, 2017).

<sup>149</sup> Pinello, *supra* note 145, at 240-43.

subject of judicial ideology.<sup>150</sup> They also identified and reviewed the relative merits of three popular ways to measure judicial ideology: “the use of proxy measures, the assessment of judicial ideology based on the actual behavior of the judges in a particular context, and the transplantation of ideology measures developed in one context into other contexts involving partly or wholly different data.”<sup>151</sup> They found that the actual behavior measure may deserve greater attention than the more popular proxy measure.<sup>152</sup> Nonetheless, they ultimately concluded that (1) “no measurement approach is ideal in all respects,” (2) “all three approaches are likely to yield results of overwhelming statistical significance,” (3) the “measurements and estimates that rely upon party of appointment have the added advantage of being easy to interpret,” and (4) “simpler may indeed be better.”<sup>153</sup>

With respect to using party affiliation as an ideological measure, the authors wrote:

A particularly obvious and convenient proxy for a judge’s ideology is that of membership in a political party. The linkage between a judge’s party affiliation and his or her voting behavior has long been established. One of the earliest empirical studies to examine differences among judges by party affiliation dates back to 1959, when

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<sup>150</sup> Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y 133, 136 (2009) (“Empirical scholarship on the subject of judicial ideology is vulnerable to two sets of difficulties, which tend to blend into one another. The first set is theoretical; the second set is methodological. . . . [T]he theoretical problem [is] that scholars use the term ‘judicial ideology’ in the absence of any widespread agreement or clear understanding as to what the term means in the first place. It is difficult for scholars to devise appropriate and broadly acceptable measures of judicial ideology when they and their readers have different concepts—or perhaps no coherent concept at all—of ‘judicial ideology’ in mind. As a result, bona fide intellectual disagreement over the nature of judicial behavior is too easily compounded by outright misunderstanding. . . . [As to the methodological difficulty, there are] three . . . significant and common practical obstacles to the measurement of judicial ideology. First, ideology is not a tangible phenomenon that can be directly observed. Second, judicial behavior is often open to multiple interpretations. Third, judicial ideology may be a multidimensional phenomenon, such that a judge who is liberal in one context may be moderate or conservative in another, or the labels ‘liberal,’ ‘moderate,’ and ‘conservative’ may not seem applicable at all.”).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 137.

<sup>153</sup> *Id.* at 204-05.

Glendon Schubert analyzed decisions in workmen's compensation cases from the Michigan Supreme Court and found that judges who belonged to the Democratic Party were substantially more likely to favor employee claimants in these cases. Two years later, Stuart Nagel published a comprehensive study in which he examined differences in voting behavior among the nation's nearly three hundred state and federal supreme court justices. He found jurists who identified themselves as Democrats to be significantly more liberal than those who identified themselves as Republicans in every issue area he examined, including criminal law, administrative law, civil liberties, tax, family law, business, and personal injury.

The most popular proxy for a judge's ideology, however, has been the party of the official who appointed the judge. The enduring popularity of this measure most likely derives from a combination of two factors. First, the party affiliation of the President or other elected official responsible for appointing a particular judge is easy both to observe and to interpret. Second, the correlation between party of appointing official and judicial ideology has long been observed over a variety of courts, time periods, and issue areas: Democratic appointees are typically more liberal on a variety of issues than Republican appointees.

The appointing-party measure has been especially dominant in studies of the federal courts. As of 1999, one paper had identified forty-one empirical studies that examined differences by party of appointing president on the circuit courts, and twenty-five such studies on the district courts. Although a comprehensive treatment of this literature would be far beyond the scope of this Article, it would suffice to say that party of appointment has been shown consistently to be a statistically significant predictor of votes in most types of cases in the

courts of appeals, but is less consistently correlated with judicial decision-making in the district courts.<sup>154</sup>

Nonetheless, the article also delineates certain difficulties in measuring judicial ideology by political party:

The phenomenon of panel composition effects poses a number of related methodological challenges, among them the problem of observational equivalence. Over a decade ago, Professor Revesz and Professors Cross and Tiller discovered that the voting behavior of federal appeals court judges tends to vary with the partisan composition of the panels on which they happen to sit. On a three-judge panel, a Democratic appointee tends to vote more liberally if paired with at least one other Democratic appointee than if he or she is the lone Democratic appointee, and to vote even more liberally if all three members of the panel are Democratic appointees; likewise, Republican appointees tend to vote more conservatively when they are in the majority than when they find themselves in the minority, and to vote even more conservatively when there is no Democratic appointee present at all. One challenge that empirical scholars must address, therefore, is the fact that panel composition effects can conceal the true extent of a judge's ideological leanings. Because the influence of ideology on a judge's voting behavior may be muted unless he or she is paired with at least one likeminded colleague, a simple analysis of individual judicial voting records that fails to control for panel composition is likely to underestimate the true extent of the judge's ideological preferences.

The other challenge that scholars face, however, is that of explaining why panel composition effects exist at all. The finding that judges tend to vote differently depending upon the partisan composition of the panel is open to a variety of explanations. One is the "whistleblower"

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<sup>154</sup> *Id.* at 167-68.

hypothesis: on this view, the minority judge moderates the behavior of the other judges by threatening to expose “manipulation or disregard of the applicable legal doctrine.” A second explanation is the “dissent hypothesis”: on this view, the judges moderate their positions in order to avoid the costs involved in writing and responding to a dissent. A third explanation is the “deliberation hypothesis”: on this view, the judges on an ideologically divided panel converge in their views as a result of substantive deliberation. All three theories predict that judges on homogenous panels will show stronger ideological voting tendencies than judges on heterogeneous panels. If, however, the only behavior we ever observe is consistent with all three theories, then we have no way of ruling out any of the theories.<sup>155</sup>

In the article, *Judged by the Company You Keep: An Empirical Study of Ideologies of Judges on the United States Court of Appeals*, Professor Corey R. Yung of John Marshall Law School related that three major approaches have been used to measure judicial ideology: case outcome coding, external proxies, such as the political party of the appointing president, and agnostic measures, such as identifying voting blocs in cases to determine which judges are most often aligned.<sup>156</sup> He noted that the most popular method for determining a judge’s ideology has been the political party of the official who appointed the judge.<sup>157</sup> In this regard, researchers have presumed that judges appointed by Democrats are ideologically liberal whereas those appointed by Republicans are ideologically conservative.<sup>158</sup>

In his empirical study of judicial ideology, the author attempted to identify the judicial ideology of federal appellate judges by determining the degree to which these judges “agree and disagree with their liberal and

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<sup>155</sup> *Id.* at 149-50.

<sup>156</sup> Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of Ideologies of Judges on the United States Court of Appeals*, 51 B.C. L. REV. 1113, 1144-53 (2010).

<sup>157</sup> *Id.* at 1148.

<sup>158</sup> Pinello, *supra* note 145, at 220.

conservative colleagues at both the appellate and district court levels.”<sup>159</sup> He relied on a basic assumption about determining ideology: “agreement and disagreement between judges is indicative of shared values,”<sup>160</sup> i.e., “like-minded judges will vote together more often.”<sup>161</sup> His study also incorporated the factor of standard of review, among others.<sup>162</sup> Through his ideology scoring and regression analysis, he concluded that “judges appointed by Republican presidents were more ideological than those appointed by Democratic presidents,” and that “prior government work experience and elite law school attendance were strongly correlated with political liberalism on the bench.”<sup>163</sup>

Finally, in the article, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, the authors, U.S. Circuit Court Judge Harry T. Edwards and Professor Michael A. Livermore of New York University School of Law, discussed what they considered to be the limitations of empirical legal studies of judicial ideology.<sup>164</sup> Their primary criticism was that these empirical studies fail to account for the core determinants of appellate decisionmaking: (1) case records on appeal, (2) applicable law, (3) controlling precedent, and (4) judicial deliberations.<sup>165</sup> According to the authors, “[b]y failing to take account of these core determinants – in part, perhaps, because they cannot be easily or accurately measured – the field of empirical legal studies fails to provide a nuanced understanding of how legal and extralegal factors interact to generate judicial decisions, and likely overemphasizes extralegal factors.”<sup>166</sup>

Nonetheless, from all the books and law review articles on the empirical analysis of judicial behavior, it appears that “[e]mpirical facts are difficult to dispute,” and as a result, in the last two decades, “[t]he

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<sup>159</sup> Yung, *supra* note 156, at 1138 (“By identifying voting blocs, assessments can be made about the ideologies of the judges that form those blocs.”). See also *id.* at 1143 (“This study compares judges to determine which ones are more conservative or liberal relative to their colleagues based upon whom they most often vote with and against.”).

<sup>160</sup> *Id.* at 1191.

<sup>161</sup> *Id.* at 1153.

<sup>162</sup> *Id.* at 1159-60.

<sup>163</sup> *Id.* at 1201.

<sup>164</sup> Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

<sup>165</sup> *Id.* at 1899.

<sup>166</sup> *Id.*



growth of empirical legal studies has been explosive.”<sup>167</sup> As noted by one author, “by definition, empirical means working with observed data or experimental observations. Observations and data are facts. The inferences researchers make based on them might be flawed and not factual, but empirical research essentially involves collecting factual information and using it to draw conclusions.”<sup>168</sup> In other words, “sifting through data can provide insight even if it does not provide definitive answers.”<sup>169</sup>

#### V. The Court and Its Workload

From November 8, 1951, through December 31, 2016, the CAAF issued a total of 7,298 published opinions that were decided by a total of 23 judges. Of those opinions, 2,227 opinions (approximately one-third) had a least one dissenting vote.

For the first forty years of its existence, the Court was a three-judge court. Since 1991, the Court has been a five-judge court. The names of each judge, their terms and total years of active service, their appointing President, their political affiliation, their law school, whether or not they had prior military service, the states from which they were appointed, and whether or not they were a minority are listed below:

Robert E. Quinn – 1951-75 (24 years) – Appointed by President Truman – Democrat – Harvard Law School – Judge on the Rhode Island Superior Court (previously served as Lieutenant Governor and Governor of Rhode Island) – Served as an officer in the U.S. Navy – From Rhode Island – White male

George W. Latimer – 1951-61 (10 years) – Appointed by President Truman – Republican – University of Utah College of Law – Justice on the Utah Supreme Court –

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<sup>167</sup> Mark Klock, *Cooperation and Division: An Empirical Analysis of Voting Similarities and Differences During the Stable Rehnquist Court Era – 1994 to 2005*, 22 CORNELL J.L. & PUB. POL’Y 537, 540-41 (2013).

<sup>168</sup> *Id.* at 542-43.

<sup>169</sup> *Id.* at 554.

Served as an officer in the U.S. Army – From Utah – White male

Paul W. Brosman – 1951-55 (4 years) – Appointed by President Truman – Democrat – University of Illinois College of Law – Dean, Tulane University Law School (and at the time of his appointment, he had been recalled to active duty and was serving in the Office of the Judge Advocate General of the Air Force) – Served as an officer in the U.S. Air Force – From Louisiana – White male

Homer Ferguson – 1956-76 (20 years) – Appointed by President Eisenhower – Republican – University of Michigan Law School – U.S. Senator from Michigan (had lost re-election bid and had been appointed as ambassador to the Philippines and served for a year) – No military service – From Michigan – White male

Paul J. Kilday – 1961-68 (7 years) – Appointed by President Kennedy – Democrat – Georgetown University Law Center – U.S. Congressman from Texas – No military service – From Texas – White male

William H. Darden – 1968-73 (5 years) – Appointed by President Johnson – Democrat – University of Georgia School of Law – Staff member (Chief of Staff), Senate Armed Services Committee – No military service – From Georgia – White male

Robert M. Duncan – 1971-74 (3 years) – Appointed by President Nixon – Republican – Ohio State University College of Law – Justice on the Ohio Supreme Court – Served as a officer in the U.S. Army – From Ohio – African-American male

William H. Cook – 1974-84 (10 years) – Appointed by President Ford – Republican – Washington University School of Law (St. Louis, Missouri) – Staff member (Minority General Counsel), House Armed Services Committee – Served as an officer in the U.S. Army – From Illinois – White male

Albert B. Fletcher, Jr. – 1975-85 (10 years) – Appointed by President Ford – Republican – Washburn University Law School – Trial judge, Kansas – No military service – From Kansas – White male

Matthew J. Perry – 1976-79 (3 years) – Appointed by President Ford – Democrat – South Carolina State College School of Law (segregated), Attorney, private practice in Columbia, South Carolina – No military service – From South Carolina – African-American male

Robinson O. Everett – 1980-92 (12 years) – Appointed by President Carter – Democrat – Harvard Law School – Professor, Duke University School of Law – Served as a judge advocate in the U.S. Air Force – From North Carolina – White male

Walter T. Cox III – 1984-2000 (16 years) – Appointed by President Reagan – Democrat – University of South Carolina School of Law – Trial judge, South Carolina – Served as a judge advocate in the U.S. Army – From South Carolina – White male

Eugene R. Sullivan – 1986-2002 (16 years) – Appointed by President Reagan – Republican – Georgetown University Law Center – General Counsel of the U.S. Air Force – Served as an officer in the U.S. Army – From Missouri – White male

Susan J. Crawford – 1991-2006 (15 years) – Appointed by President George H.W. Bush – Republican – New England School of Law – Inspector-General, U.S. Department of Defense (previously served as General Counsel of the U.S. Army) – No military service – From Pennsylvania – White female

H.F. “Sparky” Gierke – 1991-2006 (15 years) – Appointed by President George H.W. Bush – Republican – University of North Dakota School of Law – Justice, North Dakota Supreme Court – Served as a judge advocate in the U.S. Army – From North Dakota – White male

Robert E. Wiss – 1992-1995 (3 years) – Appointed by President George H.W. Bush – Democrat – Northwestern University School of Law – Attorney in Chicago at the law firm of Foran, Wiss, & Schultz – Retired RADM, JAGC, U.S. Naval Reserve – From Illinois – White male

Andrew S. Effron – 1996-2011 (15 years) – Appointed by President Clinton – Democrat – Harvard Law School – Staff member (Minority General Counsel), Senate Armed Services Committee – Served as a judge advocate in the U.S. Army – From Virginia – White male

James E. Baker – 2000-2015 (15 years) – Appointed by President Clinton – Democrat – Yale Law School – Special Assistant to the President of the United States and Legal Advisor, National Security Council – Served as an officer in the U.S. Marine Corps – From Virginia – White male

Charles E. “Chip” Erdmann – 2002-present (15 years) – Appointed by President George W. Bush – Republican – University of Montana School of Law – Judicial Reform and International Law Consultant in Serbia and Bosnia (previously served as a Justice on the Montana Supreme Court and as the Chief Judge of the Bosnian Election Court) – Retired Colonel, JAGC, Montana Air National Guard (previously served as an enlisted man in the U.S. Marine Corps) – From Montana – White male

Scott W. Stucky – 2006-present (11 years) – Appointed by President George W. Bush – Republican – Harvard Law School – Staff member (Majority General Counsel), Senate Armed Services Committee – Retired Colonel, JAGC, U.S. Air Force Reserve – From Maryland – White male

Margaret A. Ryan – 2006-present (11 years) – Appointed by President George W. Bush – Republican – University of Notre Dame Law School – Attorney in Washington, DC at the law firm of Wiley, Rein, & Fielding – Served as judge advocate in the U.S. Marine Corps – From Virginia – White female

Kevin A. Ohlson – 2013-present (4 years) – Appointed by President Obama – Democrat – University of Virginia School of Law – Chief, Professional Misconduct Review Unit, U.S. Department of Justice (previously served as Chief of Staff and Counselor to the Attorney General of the United States) – Served as a judge advocate in the U.S. Army – From Virginia – White male

John E. Sparks, Jr. – 2016-present (1 year) – Appointed by President Obama – Democrat – University of Connecticut School of Law – Commissioner, U.S. Court of Appeals for the Armed Forces – Served as a judge advocate in the U.S. Marine Corps – From Virginia – African-American male<sup>170</sup>

During its forty year existence as a three-judge court from 1951 to 1991, the Court received an average of 1703 petitions per year, it granted an average of 189 petitions per year, and heard an average of 118 oral arguments per year. During its twenty-five year existence as a five-judge court from 1991 to 2016, the Court received an average of 981 petitions per year, it granted an average of 170 petitions per year, and heard an average of 77 oral arguments per year. Clearly, the Court's workload has diminished in recent years, hearing only 28 oral arguments in the 2016 term, even though the number of its judges has almost doubled.

## VI. Process and Hypotheses

At issue is whether the statutory political party balance requirement for the CAAF had any tangible effect on the judicial decisions of that Court. And the question to answer is whether there was an empirically verified connection between the judges' party identification and their behavior on the bench: Were Democrat judges on the Court more liberal or more conservative than Republican ones or did party affiliation not matter at all? In other words, did political party affiliation relate to judicial policymaking or was party affiliation not important to judicial action at all? And, if party affiliation had no significant effect, then the political

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<sup>170</sup> Judge Sparks did not participate in any of the counted dissenting opinions in this empirical study.

party balance requirement was unnecessary and should have been eliminated.

To examine the connections between judicial ideology and political party at the CAAF, I conducted an actual behavior measure of each Republican and Democrat judge by coding their votes in every published, nonunanimous opinion, either in favor of the government or in favor of the appellant from 1951 to 2016. To do this, I first compiled a database of all of the Court's published opinions in which there was at least one dissent. This database included (1) each case name and citation, (2) the case type, (3) the judges involved, (4) their votes – either for the government or for the appellant, (5) the decision of the lower court, (6) the contested issues, (7) the Court's decision, and (8) the opinion type.

In compiling this database, however, I noticed that certain cases would be problematic to include in any statistical analysis because (1) they simply defied characterization as a true dissent on any issue (e.g., the dissent was merely a disagreement on a matter of dicta; agreeing in result, but for different reasons), (2) there were conflicting votes among the judges for the government or for the appellant on the issues, (3) there was an absence of votes for the government or for the appellant on the issues, (4) the dissents were not on the issues but on the remedy, or (5) an Article III judge was sitting by designation (i.e., the presence of an interloper judge). As a result, I removed 125 cases from the statistical database. The overall statistical database, without the problematic cases, was comprised of 2,102 cases.

In addition, I compiled five separate databases of dissenting opinions involving the following case subtypes: (1) speedy trial-speedy review, (2) challenges to court members, (3) command influence, (4) ineffective assistance of counsel, and (5) jurisdiction. The "Speedy Trial-Speedy Review Database" was comprised of 37 cases. The "Challenges to Court Members Database" was comprised of 40 cases. The "Command Influence Database" was comprised of 44 cases. The "Ineffective Assistance of Counsel Database" was comprised of 54 cases. And the "Jurisdiction Database" was comprised of 135 cases.

The five case subtypes were chosen for study because they involved issues that did not tend to overlap with other issues and the votes cast appeared clearly either in favor of the government or the appellant. Most

of the other issues identified were not as unique and the votes not as definitive.<sup>171</sup>

I then coded votes in the database based on political party, prior military service, attendance at an elite (top ten) law school,<sup>172</sup> and all five of the case subtypes.<sup>173</sup> Once all of the votes were coded, six logistic regression analyses were conducted using a statistical software package for the social sciences (SPSS).

A logistic regression analysis is a statistical estimation that computes the significance of a relationship between a dependent variable and one or more independent variables.<sup>174</sup> In my study, the first regression analysis included political party, prior military service, and attendance at an elite law school as the independent variables and the vote cast as the dependent variable. Independent variables are the factors investigated to see if they are related to the dependent variable.<sup>175</sup> Five additional regression analyses were conducted that investigated the relationship between political affiliation and the vote among each case subtype. Votes favoring

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<sup>171</sup> Other issues identified in the database included general categories of due process/legal procedure, legal sufficiency, admissibility of evidence, substantive offenses and defenses, providence of guilty pleas, instructions, lesser-included offenses, prosecutorial misconduct, rights to counsel and confrontation, Article 31 rights and the right against self-incrimination, multiplicity, unreasonable multiplication of charges, mental responsibility, and pretrial and post-trial processing. With regard to many of the cases, the votes fell with the category of due process/legal procedure with a subtopic of "material prejudice" or "waiver." In such cases, the real issues in the case were avoided with the following rationales: "Even if error, there was no material prejudice"; and "Even if error, there was no objection and the matter was waived."

<sup>172</sup> The top ten list was based on the latest ranking in US News and World Report. See <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?int=a1d108>. Although this type of list did not exist throughout the history of the Court, I used it as a rough measure of what law schools are considered elite.

<sup>173</sup> I coded the variables as follows: Political affiliation: 0 = Republican; 1 = Democrat ; Prior military experience: 0 = No prior military experience; 1 = Prior military experience; Attendance at elite law school: 0 = Did not attend elite law school; 1 = Did attend elite law school. Votes were coded as follows: 0 = Government; 1 = Appellant. And case subtypes were coded as follows: 5 = Speedy trial; 6 = Challenges to court members; 7 = Command influence; 8 = Ineffective assistance of counsel; 9 = Jurisdiction.

<sup>174</sup> Sautter & Randall, *supra* note 104, at 106. Of course, one drawback to this method is that "because case coding relies upon a wholly binary construction of concept," it may lack "significant nuance in particular cases." Yung, *supra* note 156, at 1146-47.

<sup>175</sup> Sautter & Randall, *supra* note 104, at 106.

the appellant were considered liberal; those for the government were considered conservative.<sup>176</sup>

Based on the prior empirical studies conducted on federal appellate courts discussed earlier in the literature review section, I made the following hypotheses with respect to my databases:

1. As a statistical regularity, Republican judges on the Court will be more conservative than Democrat judges.

2. As a statistical regularity, prior military service will have an effect on case outcome being more conservative than liberal.<sup>177</sup>

3. As a statistical regularity, attendance at an elite law school will have an effect on case outcome being more liberal than conservative.

4. As a statistical regularity, Republican judges on the Court will be more conservative on the issue of speedy trial/speedy review than Democrat judges.

5. As a statistical regularity, Republican judges on the Court will be more conservative on the issue of challenges for cause than Democrat judges.

6. As a statistical regularity, Democrat judges on the Court will be more liberal on the issue of command influence than Republican judges.

7. As a statistical regularity, Democrat judges on the Court will be more liberal on the issue of ineffective assistance of counsel than Republican judges.

8. As a statistical regularity, Democrat judges on the Court will be more liberal on the issue of jurisdiction than Republican judges.

Finally, I attempted to measure the ideology of the judges by determining the degree to which the judges agreed and disagreed with their

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<sup>176</sup> This coding is consistent with how criminal cases are coded in The Supreme Court Database Codebook. See [http://scdb.wustl.edu/\\_brickFiles/2013\\_01/SCDB\\_2013\\_01\\_codebook.pdf](http://scdb.wustl.edu/_brickFiles/2013_01/SCDB_2013_01_codebook.pdf).

<sup>177</sup> In a Gallup poll, military veterans of all ages tend to be more Republican than are those of comparable ages who are not veterans. <http://www.gallup.com/poll/118684/military-veterans-ages-tend-republican.aspx> (last visited on Apr. 11, 2017).



Republican or Democrat colleagues. This involved identifying voting blocks (i.e., by examining the number of agreements and disagreements with Republicans and Democrats for each judge) in all of the Court's published, nonunanimous opinions from 1951 to 2016.<sup>178</sup>

## VI. Findings

Based on an analysis of the CAAF dissent database, the following general descriptive statistics were revealed:

(1) Of all the 7,411 votes cast, 46.6% were by Democrat judges and 53.4% were by Republican judges.

(2) Of all the 7,411 votes cast, 47.9% were for the government and 52.0% were for the appellant.

(3) Of all the 7,411 votes cast, 32.0% were by judges with no military experience and 68.04% were by judges with military experience.

(4) Of all the 7,411 votes cast, 52.8% were by judges who did not attend an elite law school and 47.2% were by judges who did attend an elite school.

A logistic regression analysis was conducted to investigate the relationship between political affiliation, elite law school attendance, and prior military experience and voting for the appellant.

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<sup>178</sup> Of course, there are drawbacks to this method. One such drawback is that it cannot make use of unanimous opinions, because "it is impossible to draw any inference about the relative positions of the judges from the voting alignment in a unanimous decision." Another drawback is that "ideology in this context only measures how often particular judges vote with each other, and not how often they support particular types of outcomes." And a third drawback is that this measure is a one-dimensional approach, when judicial "ideology is never perfectly one-dimensional." Fischman & Law, *supra* note 150, at 165-66.

The overall model was significant  $\chi^2(3) = 475.07^{179}$ ;  $p < .001$ .<sup>180</sup> The model explained 8.3% (Nagelkerke  $R^2$ )<sup>181</sup> of the variance in votes.<sup>182</sup>

Prior military experience was significantly associated with vote  $B = -.857$ ;  $Wald Z = 253.498$ ;  $p < .001$ ;  $Exp(B) = .425$ .<sup>183</sup> The odds of voting for the appellant decreased by a factor of .425 for votes cast by judges with prior military experience.<sup>184</sup>

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<sup>179</sup> The chi-square ( $\chi^2$ ) test tests if the overall model is significant. That is, it tests if there is an effect of the independent variables taken together on the dependent variable. In this case, it is significant, which indicates that the independent variables, political affiliation, military experience, and elite law school, when taken together have an effect on the dependent variable. If the chi square test was not significant (as in some of the logistic regressions looking at each case type individually), this means that it is not a good model and the predictor variables (independent variables) are not affecting the dependent variable.

<sup>180</sup> Conventionally, a p value .05 or less is considered significant, from .05 to .1 is considered marginally significant, and anything larger than .1 is not significant.

<sup>181</sup> The Nagelkerke  $R^2$  value provides an indication of how large an effect the independent variables have on the dependent variable. In this case, political affiliation, military experience, and elite law school are only explaining about 8% of the variance in vote. This is relatively low and means that there is a large degree of unexplained variance in vote (i.e., political affiliation, military experience, and elite law school do not explain all of the variation in vote). There are likely other factors such as case facts.

<sup>182</sup> With an extremely large sample size, sometimes differences (e.g., differences between votes cast by those who attended an elite law school and those who did not) will be significant ( $p < .05$ ) even when the difference is really small. This is because as the sample size increases, the power to detect even tiny differences between groups increases. Therefore, just because something is statistically significant ( $p < .05$ ) with a large sample size is not always meaningful or practically relevant. Typically, to tell if a result is “practically meaningful,” effect sizes are examined. This is a little less clear in logistic regression, but one way to do this is the Nagelkerke  $R^2$ , which is a pseudo- $R^2$  measure (a measure designed to evaluate goodness-of-fit logistic models). As already discussed, the  $R^2$  value (about 9%) is quite small.

<sup>183</sup>  $B$  is the regression coefficient. The Wald Z statistic tests the statistical significance (indicated by the associated p value). The  $Exp(B)$  value is the odds ratio (e.g., “The odds of voting for the appellant decrease by a factor of .424 for votes cast by judges with prior military experience.”).

<sup>184</sup> As a hypothetical, suppose two judges are identical with respect to all other variables except that one did not attend an elite school and one did. Because the elite school variable is coded as 0 for did NOT attend elite school and 1 for DID attend elite school, “changing” from did NOT attend to DID attend is a one-unit change in the elite school variable. If the odds ratio value for this variable is 2.15, this means that the odds that the judge who DID attend an elite law school votes for the appellant (liberal) are about 2.15 times the odds that the “equivalent” judge who did NOT attend elite school would vote for the appellant. If the Odds Ratio = 1, then elite school attendance does not affect the odds of outcome (voting for appellant). If the Odds Ratio is  $> 1$ , elite school attendance increases the odds of outcome (voting for appellant). If the Odds Ratio is  $<$

Attending an elite law school was significantly associated with vote  $B = -.767$ ;  $Wald Z = 227.60$ ;  $p < .001$ ;  $Exp(B) = 2.15$ . The odds of voting for the appellant increased by a factor of 2.15 for votes cast by judges who did attend an elite law school.

Political affiliation was marginally significantly associated with vote  $B = -.088$ ;  $Wald Z = 2.95$ ;  $p = .086$ ;  $Exp(B) = .916$ . The odds of voting for the appellant decreased by a factor of .916 for votes cast by Democrat judges.

Five additional logistic regressions were conducted to investigate if among the five case subtypes, political affiliation was related to vote.

The first logistic regression only included votes with the issue of “Speedy Trial-Speedy Review” in the analysis. One-hundred and eighteen votes were cast for cases that had “Speedy Trial-Speedy Review” as the only issue in the case. The overall model was significant  $\chi^2(1) = 4.145$   $p = .042$ . The model explained 4.6% (Nagelkerke  $R^2$ ) of the variance in votes. Among these cases, political affiliation was significantly related to vote  $B = -.758$ ;  $Wald Z = 4.07$ ;  $p = .044$ ;  $Exp(B) = .468$ . The odds of voting for the appellant decreased by a factor of .468 for votes cast by Democrat judges.

The second logistic regression only included votes with the issue of “Challenges to Court Members” in the analysis. One-hundred and sixty-four votes were cast for cases that had “Challenges to Court Members” as the only issue in the case. The overall model was significant  $\chi^2(1) = 11.296$ ;  $p = .001$ . The model explained 8.9% (Nagelkerke  $R^2$ ) of the variance in votes. Among these cases, political affiliation was significantly related to vote  $B = 1.083$ ;  $Wald Z = 10.857$ ;  $p = .001$ ;  $Exp(B) = 2.953$ . The odds of voting for the appellant increased by a factor of 2.953 for votes cast by Democrat judges.

The third logistic regression only included votes with the issue of “Command Influence” in the analysis. One-hundred and fifty-two votes were cast for cases that had “Command Influence” as the only issue in the case. The overall model was not significant  $\chi^2(1) = .429$ ;  $p = .429$ .

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1, then elite school attendance decreases the odds of outcome (voting for appellant). See: <http://stats.idre.ucla.edu/spss/output/logistic-regression>.

The fourth logistic regression only included votes with the issue of “Ineffective Assistance of Counsel” in the analysis. Two-hundred and twenty-six votes were cast for cases that had “Ineffective Assistance of Counsel” as the only issue in the case. The overall model was significant  $\chi^2(1) = 7.314$ ;  $p = .007$ . The model explained 4.3% (Nagelkerke  $R^2$ ) of the variance in votes. Among these cases, political affiliation was significantly related to vote  $B = .752$ ;  $Wald Z = 7.119$ ;  $p = .008$ ;  $Exp(B) = 2.121$ . The odds of voting for the appellant increased by a factor of 2.121 for votes cast by Democrat judges.

The fifth logistic regression only included votes with the issue of “Jurisdiction” in the analysis. Four-hundred and forty-one votes were cast for cases that had “Jurisdiction” as the only issue in the case. The overall model was not significant  $\chi^2(1) = 1.14$ ;  $p = .286$ .

## VII. Conclusions and Discussion

Based on the logistic regression, my first hypothesis (that as a statistical regularity, Republican judges on the Court will be more conservative than Democrat judges) was not supported: Political affiliation was not significantly related to vote.<sup>185</sup>

Based on the logistic regression, my second hypothesis (that as a statistical regularity, prior military service will have an effect on case outcome being more conservative than liberal) was supported: Prior military service was associated with decreased odds of voting for the appellant.

Based on the logistic regression, my third hypothesis (that as a statistical regularity, attendance at an elite law school will have an effect on case outcome being more liberal than conservative) was supported: Attending an elite law school was associated with increased odds of voting for the appellant.

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<sup>185</sup> Interestingly, by running the same logistic regression on just the three-judge cases, the political affiliation would have been significant (i.e., the odds of voting for the appellant would increase for votes cast by Democrat judges); however, by considering just the five-judge cases, the political affiliation would not have been significant. And with all the cases considered together, the result is that political affiliation was not significantly related to vote.

Based on the logistic regression, my fourth hypothesis (that as a statistical regularity, Republican judges on the Court will be more conservative on the issue of speedy trial/speedy review than Democrat judges) was not supported: The odds of voting for the appellant decreased for votes cast by Democrat judges.

Based on the logistic regression, my fifth hypothesis (that as a statistical regularity, Republican judges on the Court will be more conservative on the issue of challenges for cause than Democrat judges) was supported: The odds of voting for the appellant increased for votes cast by Democrat judges.

Based on the logistic regression, my sixth hypothesis (that as a statistical regularity, Democrat judges on the Court will be more liberal on the issue of command influence than Republican judges) was not supported: Political affiliation was not significantly related to votes.

Based on the logistic regression, my seventh hypothesis (that as a statistical regularity, Democrat judges on the Court will be more liberal on the issue of ineffective assistance of counsel than Republican judges) was supported: The odds of voting for the appellant increased for votes cast by Democrat judges.

Finally, based on the logistic regression, my eighth hypothesis (that as a statistical regularity, Democrat judges on the Court will be more liberal on the issue of jurisdiction than Republican judges) was not supported: Political affiliation was not significantly related to votes.

With respect to voting blocks, there were 1518 three-judge cases in which there was a dissenting opinion.<sup>186</sup> In 1066 of these 1518 cases, one Republican judge voted with one Democrat judge. In other words, in 70 percent of the three-judge cases with a dissent, there was clearly an empirical lack of partisanship shown. In addition, there were 557 five-judge cases in which there was at least one dissenting opinion. Of these 557 cases, only 17 cases (3 percent) had votes along a straight party line. In 540 cases (97 percent), at least one Republican judge voted with a Democrat judge. In fact, there were only 127 of the 557 cases (22 percent) where two judges of the same party voted together in dissent. The voting

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<sup>186</sup> Note that 27 three-judge cases in the database in which there was a dissent were not counted because all of the judges on the panel were Republican.

block evidence provides further support for the logistic regression conclusion that political affiliation was not significantly related to votes.

The key conclusion from this study is that there was not an empirically verified connection for the CAAF between the judges' party identification and their behavior on the bench during the period from 1951 to 2016. In other words, during the Court's sixty-five year history, the political affiliation of a judge on the Court was not significantly related to that judge's vote either for the government or for the appellant.<sup>187</sup> As noted earlier, in the latest book concerning an empirical quantitative study of federal judges, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, the authors found that "ideology influences judicial decisions at all levels of the federal judiciary," but that the strength of that influence simply "diminishes as one moves down the judicial hierarchy."<sup>188</sup> Because judges on the CAAF are at a lower level of the federal judiciary and are vetted through the less political Senate Armed Service Committee as opposed to the more political Senate Judiciary Committee, they are undoubtedly less partisan than their contemporaries on the federal circuit courts and the United States Supreme Court. The logistic regression confirms that lack of partisanship.

The results that judges having prior military service are more pro-government in their votes and that judges from elite law schools are more liberal in their votes are confirmed by prior polls and studies.

In the results of case subtypes, I was not surprised that in matters of command influence and jurisdiction, politics played no significant role. These are two areas of the law that are well defined and leave little to dispute. I was mildly surprised that Democrat judges voted more conservatively on matters of speedy trial and speedy review than their Republican counterparts. I would have thought Republican judges would be more time sensitive than Democrat ones. Finally, I was not surprised that Republican judges were more conservative on challenges for cause than the Democrat judges. In my opinion, Republicans tend to see less actual and implied bias in people than the Democrats.

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<sup>187</sup> As noted in footnote 185 above, if just the three-judge cases would have been considered, the political affiliation would have been significant; this result differs for the five-judge cases and with the cases consolidated. Why a three-judge court would be more apt to be influenced by the political party balance requirement than a five-judge court is a matter left for future study.

<sup>188</sup> EPSTEIN, LANDES, & POSNER, *supra* note 140, at 385.

Finally, I note that when one of the original judges of the Court, Judge Quinn, died in 1975, and before the soon-to-be Judge Perry was nominated and confirmed, Senior Judge Ferguson filled in as the third judge on the panel. For approximately eight months then, the Court was comprised of all Republican judges (Judges Cook, Fletcher, and Ferguson). If political affiliation was significant, then the majority of opinions during that time frame would have been unanimous decisions, without any dissents. In the 125 opinions of the Court issued during that period, there were 27 dissents. Obviously, with a 22 percent dissension rate among a fully Republican Court, political party affiliation lacked great significance.

For sixty-five years, the political party balance requirement existed as a key component of the appointment process for judges on the CAAF. The justification for the requirement was to ensure non-partisanship on the Court, and it was introduced by one Congressional Representative who argued that this “exceedingly important court” not be filled “by political appointments.” Despite the fact that many other Congressional Representatives argued against the requirement, noting that at the time no other federal court possessed such a limitation, it became law with the passage on the Uniform Code of Military Justice. Over the next six decades, judges at the CAAF, the General Counsel’s Office at the Department of Defense, and various military commentators argued unsuccessfully to eliminate the requirement. This past year, the judges at the CAAF again asked Congress to eliminate the requirement, suggesting, without any evidence of any kind, that the basis for the party balance restriction had outlived its usefulness and that it imposed an irrelevant limitation on who may be nominated and confirmed to sit on the Court. Without discussion or comment, Congress adopted the CAAF’s suggestion, and the requirement was eliminated. Were the judges of the CAAF and Congress correct in eliminating the requirement? In light of all of the empirical evidence presented in this study, I submit that the political balance requirement for the CAAF was properly eliminated in the National Defense Authorization Act for Fiscal Year 2017.

However, in light of the statistical evidence, I suggest that Congress may wish also to consider removing the political balance requirement from the United States Court of International Trade and the United States Court of Appeals for Veterans Claims, the remaining two federal courts with this requirement. For the CAAF, if Congress wishes to add certain criteria to better balance the Court, it could consider adding prior military service and elite law school restrictions to its appointment criteria: “Not more than three of the judges appointed to the court may have prior military

service and not more than three of the judges appointed to the court may have graduated from an elite law school (a law school ranked in the top ten of the best law schools as determined by the President at the time of the appointment).” From a statistical standpoint, these restrictions would appear to have more significance to balance the Court than the now-defunct political balance requirement.



**LINE OF DUTY INVESTIGATIONS: BATTERED, BROKEN  
AND IN NEED OF REFORM**

MAJOR AARON L. LANCASTER\*

## I. Introduction

Staff Sergeant (SSG) Johnson is a stellar noncommissioned officer (NCO) who excels at work and is an example to junior Soldiers.<sup>1</sup> One Friday night, SSG Johnson and his wife get into an argument over her suspected infidelity. During the argument, SSG Johnson's wife admits to sleeping with a Soldier in SSG Johnson's unit. The fight continues throughout the night and into the next day. Midday Saturday, SSG Johnson goes out to the garage and begins drinking. As the evening progresses, SSG Johnson becomes more intoxicated and furious. Deciding something must be done, SSG Johnson lays out a tarp to prevent a mess, places a chair in the middle of the tarp, and goes into the house and removes a handgun from its lockbox. He then drags his wife out to the garage, sits her in the chair and kills her. Prior to shooting his wife, SSG Johnson sends numerous texts to his friends telling them he is going to kill his wife.

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<sup>1</sup> This example is based on the author's recent professional experience as an Administrative Law Attorney from 2014-2016. Hypothetical information was added for the purpose of this article. Specific names, units, and locations have been changed or withheld to protect the privacy of the military personnel involved, as well as the surviving family members [hereinafter Professional Experience].

With these facts, what commander would not find SSG Johnson's actions to be intentional, calculated, and premeditated? Staff Sergeant Johnson would likely be found mentally competent and court-martialed for his actions. Why then, when the facts are changed slightly to the Soldier deciding to kill himself instead of his wife, does Army Regulation (AR) 600-8-4 presume—and the command immediately try to find—the Soldier mentally unsound and therefore in the line of duty?<sup>2</sup> It makes no sense.

Next, consider Private First Class (PFC) Conrad who, while deployed, is knocked unconscious from an enemy fired mortar round and suffers a traumatic brain injury (TBI).<sup>3</sup> No line of duty investigation (LODI) is conducted because the medical personnel were too busy handling other Soldiers' visual injuries and the commander was unclear on whether the injury was, in fact, an injury per AR 600-8-4. Private First Class Conrad returns from the deployment and, due in part to the TBI, becomes clinically depressed. Attempting to self-medicate, one Tuesday night PFC Conrad drinks so heavily that he develops acute alcohol poisoning and is taken to the hospital. He quickly regains consciousness but is involuntarily held for treatment for forty-eight hours. Once PFC Conrad is released from the hospital, the command allows him to attend an inpatient treatment facility for the next thirty days to combat his substance and alcohol abuse problems. The chief-of-staff, after reading the serious incident report, asks the staff judge advocate (SJA) whether a LODI is required. The SJA looks through the United States Code (U.S.C.) and AR 600-8-4 and is unsure what to tell the chief-of-staff. The SJA's confusion stems from the fact that AR 600-8-4 is silent regarding both the TBI and inpatient care and conflicts with the U.S.C. regarding the alcohol treatment at the hospital. The confusion and lack of clarity is unacceptable.

When Soldiers are injured or die while on active duty, a determination must be made as to whether the injury or death was in the line of duty (ILD) or not in the line of duty (NILD).<sup>4</sup> This ILD or NILD decision affects considerable benefits that the Soldier may be entitled to upon their death or separation from the Army.<sup>5</sup> Because of the substantial economic

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<sup>2</sup> U.S. Dep't of Army, Reg. 600-8-4, Line of Duty Policy, Procedures, and Investigations para. 4-11 (4 Sept. 2008) [hereinafter AR 600-8-4].

<sup>3</sup> Professional Experience, *supra* note 1.

<sup>4</sup> AR 600-8-4, *supra* note 2, at para. 2-1.

<sup>5</sup> See *infra* Part II for a further discussion on benefits.

interests for both the Soldier and the Army, it is crucial that LODIs are conducted in a way that provides transparency, consistency, and credibility. Unfortunately, as currently drafted, AR 600-8-4 is both confusing to use and does not assist the command in producing LODIs that sufficiently address the reasons for conducting a Lodi in the first place. As such, AR 600-8-4 should be substantially revised. It is poorly drafted, often in conflict with the U.S.C. it is designed to implement, and fails to provide proper protections for either injured Soldiers or the Army.

This article begins by analyzing the importance of LODIs and why doing them properly is essential. Next, the deficiencies in AR 600-8-4 preventing fair and consistent investigations are identified. Finally, this article provides proposed solutions and recommended changes to AR 600-8-4.<sup>6</sup> The proposed remedies will provide investigating officers (IOs), approving authorities, and judge advocates (JAs) specific and clear guidance when making or recommending decisions for LODIs, resulting in improved consistency and transparency.

## II. Background on Line of Duty Investigations

Understanding the deficiencies in AR 600-8-4 requires identifying why the military conducts LODIs and what the potential ramifications an ILD or NILD determination can have on a servicemember.<sup>7</sup> When a servicemember dies, is injured, or suffers from an illness, under the U.S.C. a LOD determination is required for three basic purposes.<sup>8</sup> First, a determination must be made for injuries and illnesses suffered by servicemembers in order to ascertain the potential negative effect that lost

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<sup>6</sup> The main part of this paper will address the issues in AR 600-8-4 and the reasons to update the regulation. See *infra* Appendices A-I for the specific proposed updates to AR 600-8-4.

<sup>7</sup> The background section of this paper only provides a general overview of line of duty investigations (LODIs) and primarily focuses on the areas where AR 600-8-4 is currently deficient. See generally AR 600-8-4, *supra* note 2. For a more thorough background on LODIs, see Major Melvin Williams' 2014 primer. Major Melvin L. Williams, *In the Line of Duty? A Primer on Line of Duty Determinations and the Impact on Benefits for Soldiers and Families*, ARMY LAW., Nov. 2014, at 20-32. Throughout the paper the terms servicemember and Soldier will be used. Servicemember will be used to denote sections of statutes and regulations that are applicable to all those in the U.S. Department of Defense (DOD). Soldier will be used for sections of Army regulations that are only applicable to Soldiers. The primary purpose of this differentiation is to highlight which sections are required DOD-wide and which are constructs of the Army.

<sup>8</sup> 10 U.S.C. § 972 (2004); 10 U.S.C. §§ 1201-1207 (2008); 10 U.S.C. § 1074a (2011).

time will have on servicemembers who are found NILD.<sup>9</sup> The second purpose of conducting an LODI is to determine whether servicemembers, or their families, may receive compensation upon the servicemembers' death or discharge from the military due to a physical disability.<sup>10</sup> The third purpose is to determine what, if any, benefits reserve servicemembers may be entitled to when they are injured or die.<sup>11</sup> In many cases, medical expenses are the primary focus for these reserve servicemembers.<sup>12</sup> Currently, AR 600-8-4 fails to provide enough clarity or sufficient guidance in order to properly address these purposes.

### III. Defining Injuries, Investigation Triggers, and Protections for Soldiers

Commanders and their servicing JAs often struggle to answer basic

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<sup>9</sup> 10 U.S.C. § 972 (2004). Enlisted servicemembers, who are unable to perform their duties for more than one day and are found not in the line of duty (NILD), may have the lost time added to the end of their current enlistment period. *Id.* This lost time does not count as credit for the time served towards retirement or pay raises. U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7a, ch. 1 (Apr. 2016). Lost time by officers counts towards length of service for items such as retirement and additional service obligations, but not towards years of service for base pay. *Id.*

<sup>10</sup> 10 U.S.C. §§ 1447-1460B (2007); 38 U.S.C. §§ 1301-1322 (1991); 38 U.S.C. §§ 3500-3566 (1991). The Line of Duty (LOD) determination for a service-ending injury can have a considerably greater financial impact on the servicemember and their family than one involving a servicemember's death. This is because, regardless of the decision made in the LOD, the family of a fallen Soldier will still be entitled to Servicemembers Group Life Insurance (SGLI), the Army Death Gratuity, Social Security, and Special Survivor Indemnification Allowance. National Defense Authorization Act of 2008, Pub. L. No. 110-181, § 644, 122 Stat. 3, 158. Conversely, a servicemember who suffers a service ending injury, found to be NILD, could receive no pension or medical retirement. 10 U.S.C. § 1207 (1956). It should be noted that while eligibility for Department of Veteran Affairs (VA) benefits is done independently of any DOD LOD decision, nothing prohibits the VA from using a DOD LODI when making their findings. 38 U.S.C. § 101 (2008); 38 U.S.C. § 105 (1991).

<sup>11</sup> 10 U.S.C. § 1074a (2011). 10 U.S.C. § 1074a differentiates between servicemembers currently serving on active duty for less than thirty days and those serving for more than thirty days. *Id.* For purposes of this paper, the terms activated status or activated reservist are used to identify National Guard of the United States (NG) and United States Army Reserve (USAR) Soldiers who are performing active duty for a period of thirty days or less or are conducting inactive duty training.

<sup>12</sup> Medical bills are paid by the DOD for injuries sustained by active duty servicemembers regardless of whether the injury was incurred ILD or NILD. 10 U.S.C. § 1074 (2009). Reserve servicemembers' medical expenses will only be paid by the DOD if the injury or illness was incurred ILD and in an activated status. *Id.* As a result, for those on active duty, LODIs are primarily completed to document lost duty time or long-term disability, while, for reservists, the focus is also to provide documentation for any injury or illness which may require treatment after the individual is no longer in an activated status.

LOD questions such as: does a Soldier's injury require a LODI and, if so, what type of LODI is required? The problem arises, not because the situations that commanders and JAs are dealing with are particularly complex, but because AR 600-8-4 is poorly written with inconsistent language regarding how to define an injury and the type of investigation that must be completed.<sup>13</sup> Further complicating the process, AR 600-8-4 fails to provide adequate guidance regarding what statements by the Soldier can be used in the investigation.<sup>14</sup>

#### A. Formal vs. Informal Line of Duty Investigations

Under AR 600-8-4, LODIs can be conducted either as a formal or an informal investigation.<sup>15</sup> The key distinction between the two is the suspicion of whether negligence or misconduct was the proximate cause of the injury or illness.<sup>16</sup> Informal LODIs can only be conducted where *no* misconduct or negligence is indicated.<sup>17</sup> If *any* negligence or misconduct is suspected, a formal LODI is required.<sup>18</sup> This distinction unnecessarily elevates cases involving suspected simple negligence to a formal LODI.<sup>19</sup>

For example, a Soldier drives at night with a broken headlight. He has an accident and is injured. There is no reason to believe that the evidence from the investigation will show the proximate cause of the Soldier's injuries to be anything other than the broken headlight—which the Special Court-Martial Convening Authority (SPCMCA) believes is simple negligence and will result in an ILD determination. Currently, the SPCMCA, suspecting *any* negligence, must start a formal LODI, thereby requiring action by the GCMCA.<sup>20</sup>

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<sup>13</sup> AR 600-8-4, *supra* note 2, para. 2-3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Formal LODIs can be appointed by a Special Court-Martial Convening Authority (SPCMCA) or a General Court-Martial Convening Authority (GCMCA) and approved by the GCMCA. *Id.* para. 1-11 (appointing authority); *Id.* para. 2-5 (approving authority). Informal LODIs are typically appointed and approved by the SPCMCA. *Id.* para. 1-11.

<sup>16</sup> AR 600-8-4, *supra* note 2, para. 2-3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> In order to find a Soldier NILD, the command must show by a preponderance of the evidence that the proximate cause of the Soldier's injury was intentional misconduct or willful negligence. *Id.* app. B-10, R. 1. Simple negligence is not misconduct and will result in an in line of duty (ILD) determination. *Id.* app. B-10, R. 2.

<sup>20</sup> AR 600-8-4, *supra* note 2, para. 2-3.

The solution is simple and has already been implemented by the Navy and the Air Force.<sup>21</sup> Both services only require a formal<sup>22</sup> investigation when “the injury was incurred under circumstances which suggest a finding of ‘misconduct’ might result.”<sup>23</sup> If misconduct is suspected, a formal LODI is required. If misconduct is not suspected, an informal LODI is completed. Updating AR 600-8-4 to reflect this change will allow SPCMCAs to more expeditiously handle the majority of LODIs and only require GCMCA action on cases that could potentially result in a NILD determination. Further, this change will allow the GCMCA more time to properly identify and investigate questionable or problematic cases.

## B. Identifying Injuries

### 1. *Defining What Constitutes an Injury*

While identifying whether a formal or informal LODI is required is important, an often more fundamental question commanders struggle with is, what injuries require a LODI? For example, does a Soldier who pulls a muscle during physical training (PT) and will miss three weeks of PT need a LODI? What about a Soldier who is drunk and falls out of a parked car resulting in a concussion but no lacerations? Finally, what about a Soldier who suffers from substance abuse which requires extended treatment at an inpatient facility? None of these situations are currently answered in AR 600-8-4.<sup>24</sup>

The primary problem is that is that injury is not specifically defined under the U.S.C. or by the DOD. Army Regulation 600-8-4 also fails to

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<sup>21</sup> U.S. DEP’T OF NAVY, JAGINST 5800.7F, MANUEL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) sec. 0222d (26 June 2012) [hereinafter JAGMAN]; U.S. DEP’T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION para. 2.3.4 (8 Oct. 2015) [hereinafter AFMAN].

<sup>22</sup> The Navy uses the term “Command Investigations” instead of “formal.” JAGMAN, *supra* note 21, para. 209.

<sup>23</sup> JAGMAN, *supra* note 21, para. 222d1; AFMAN, *supra* note 21, para. 2.3.4.1. Misconduct, as defined by both the Air Force and Navy, is intentional conduct that is wrongful or improper or willful or gross negligence. JAGMAN, *supra* note 21, para. 0216a; AFMAN *supra* note 21, “Terms.” By combining willful/gross negligence and intentionally incurred injuries under the term misconduct, the Navy and Air Force have simplified when a formal LODI is required.

<sup>24</sup> See generally AR 600-8-4, *supra* note 2.

give a definition of what constitutes an injury.<sup>25</sup> The only guidance that the regulation provides is that a LODI is required for an injury in excess of one “clearly of no lasting significance (for example, superficial laceration or abrasions or mild heat injuries).”<sup>26</sup> No guidance is given to medical personnel or commanders to better understand what is meant by “no lasting significance.”<sup>27</sup> As discussed above, the DOD is required to complete LODIs for three reasons. These are to determine potential lost service in excess of one day, identify potential disability upon exiting military service, and make sure that reserve servicemembers who are no longer activated can continue to receive care for injuries received while on active duty.<sup>28</sup> Unfortunately, AR 600-8-4’s guidance regarding injuries is insufficient to properly answer any of these.<sup>29</sup>

The solution is to create a two-part, black and white test of what constitutes an injury under AR 600-8-4. First, does the injury result in the Soldier being unable to perform military duties for more than twenty-four hours?<sup>30</sup> Second, is it probable or possible that the injury may result in a permanent disability?<sup>31</sup>

To identify whether a Soldier is unable to perform military duties for more than twenty-four hours, the command should determine whether the physical injury substantially prevents the specific Soldier from completing his or her assigned duties.<sup>32</sup> For example, SPC Jones, a file clerk, pulls his hamstring while running and is placed on a running profile for three weeks. Although SPC Jones will be unable to participate in organized PT, the command determines that he is otherwise able to perform his military duties as a file clerk. In this case, no LODI would be required.<sup>33</sup> On the

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<sup>25</sup> *Id.* para. 2-3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 10 U.S.C. § 972 (2004) (lost service); 10 U.S.C. §§ 1201-1207 (2008) (potential disability); 10 U.S.C. § 1074a (2011) (continued reserve care).

<sup>29</sup> AR 600-8-4, *supra* note 2, para. 2-3.

<sup>30</sup> 10 U.S.C. § 972 (2004).

<sup>31</sup> 10 U.S.C. §§ 1201-1207 (2008).

<sup>32</sup> 10 U.S.C. § 972 does not specifically address what is meant by the term “duties.” 10 U.S.C. § 972 (2004). It does couch duties in terms of “his duties” indicating that the intent was to make an individual determination of whether the specific servicemember was able to perform their assigned duties. *Id.*

<sup>33</sup> There is always the possibility that this type of injury could become aggravated in the future, resulting in either missed work or permanent disability. In that case, a LODI would be required for the aggravating incident and the investigation could incorporate the medical documentation from the previous injury.

other hand, if SPC Jones was on a training mission providing security for a dismounted patrol, the command would likely determine that his injury prevents him from completing these tasks and therefore a LODI would be required.

In addition to making a determination regarding assigned duties, AR 600-8-4 should provide clear guidance as to whether specific medical care would, or would not, trigger the twenty-four hour rule.<sup>34</sup> Under AR 600-8-4, there is no guidance as to how the command should treat the time spent in a medical facility.<sup>35</sup>

10 U.S.C. § 972 defines “missed time” using the term “unable.”<sup>36</sup> AR 600-8-4 should implement similar language while providing an explanation as to what unable means. The simplest solution is to identify whether the time spent in the hospital or outpatient facility was deemed medically necessary or whether the treatment or rehabilitation was authorized by the command. If the command authorizes the treatment or rehabilitation, and therefore it is not medically required, then no LODI should be required. This is because, if the command *allows* the treatment, there is a presumption that the Soldier was medically *able* to perform his duties, but the command decided it would be in the Soldier’s best interest to receive treatment. On the other hand, if the treatment was deemed

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<sup>34</sup> 10 U.S.C. § 972 (2004).

<sup>35</sup> See generally AR 600-8-4, *supra* note 2. Ironically, the only place AR 600-8-4 discusses time spent in a treatment facility involves alcohol and substance abuse and is inconsistent with the statutory requirements of 10 U.S.C. § 972. *Id.* para. 4-10. Paragraph 4-10 of AR 600-8-4 states:

That portion of time in the hospital that a doctor determines a soldier to be totally physically incapacitated for more than 24 consecutive hours solely because of alcohol or drug abuse will be “not line of duty—due to own misconduct.” Total physical incapacitation means the soldier is so disabled by the drugs or alcohol that he or she is comatose. The remainder of the period of hospitalization, treatment, or rehabilitation will be administrative absence from duty and does not require an LD determination.

*Id.* The term total physical incapacitation is incongruent with the specific language of 10 U.S.C. § 972. 10 U.S.C. § 972 (2004). Under 10 U.S.C. § 972, a LODI is required when a servicemember “is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor . . . .” *Id.* Therefore AR 600-8-4 should be amended by removing the word “totally” from paragraph 4-11 and its subsequent definition and adding “unable to perform military duties.” AR 600-8-4, *supra* note 2, para. 4-10.

<sup>36</sup> 10 U.S.C. § 972 (2004).



medically necessary, then the Soldier was unable to perform his duties and a LODI would be required.

Taking the case of PFC Conrad, which is discussed previously, the command should conduct a LODI for the forty-eight hours that PFC Conrad was held for medically necessary treatment at the hospital since he was unable to perform his duties during this time. Contrast that with the thirty days that the command allowed PFC Conrad to attend inpatient care. This treatment was at the command's discretion, not medically necessary, and therefore no LODI is required. But what about the TBI that PFC Conrad suffered downrange?

## 2. *Non-Visual Injuries*

Army Regulation 600-8-4 provides no guidance on how to treat non-visual injuries such as concussions or TBIs.<sup>37</sup> Doing so is crucial as studies have found increasing evidence to show that a single TBI “can produce long-term gray and white matter atrophy, precipitate or accelerate age-related neurodegeneration, and increase the risk of developing Alzheimer’s disease, Parkinson’s disease, and motor neuron disease. In addition, repetitive mild TBIs can provoke the development of a tauopathy, chronic traumatic encephalopathy.”<sup>38</sup>

The absence of guidance regarding head injuries is remarkable considering that Army provided direction on the issuance of Purple Heart medals for TBI-related injuries on May 2, 2011.<sup>39</sup> The Army then codified this guidance in AR 600-8-22, paragraph 2-8 identifying the following as a nonexclusive list of conditions warranting a Purple Heart:

- (a) Diagnosis of concussion or mild traumatic brain injury.

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<sup>37</sup> See generally AR 600-8-4, *supra* note 2. Estimates from 2014 indicate that between 15.2% and 22.8% of deployed servicemembers—as many as 320,000 troops—have suffered at least a mild TBI. Ann C. McKee & Meghan E. Robinson, *Military-Related Traumatic Brain Injury and Neurodegeneration*, 10 *Alzheimer’s & Dementia* I3, S242, S243 (2014).

<sup>38</sup> Ann C. McKee & Meghan E. Robinson, *Military-Related Traumatic Brain Injury and Neurodegeneration*, 10 *Alzheimer’s & Dementia* I3, S242, S243 (2014).

<sup>39</sup> Todd Lopez & J.D. Leipold, *Army Clarifies Award of Purple Heart for Concussion*, ARMY NEWS SERV. (May 2, 2011), <https://www.army.mil/article/55850>.

- (b) Any period of loss or a decreased level of consciousness.
- (c) Any loss of memory for events immediately before or after the injury.
- (d) Neurological deficits (weakness, loss of balance, change in vision, praxis (that is, difficulty with coordinating movements), headaches, nausea, difficulty with understanding or expressing words, sensitivity to light, and so forth) that may or may not be transient. Intracranial lesion (positive computerized axial tomography or magnetic resonance imaging scan).<sup>40</sup>

Providing specific guidance in AR 600-8-4, similar to AR 600-8-22, will allow medical professionals and commanders the ability to more precisely identify what type of head traumas may result in long term disability and therefore require a LOD determination. Proper identification of non-visual injuries, while important for all Soldiers, is especially important for those in the reserve component since their medical expenses are only covered for injuries sustained in an activated status.<sup>41</sup>

### *3. Line of Duty Investigations for National Guard and Army Reserve Soldiers*

Currently, injuries for all Soldiers, including those on active duty, in the National Guard of the United States (NG), and United States Army Reserve (USAR), are handled using the same standards and timelines.<sup>42</sup> The result is that the current processing goals for reserve Soldiers is forty days for an informal LODI and seventy-five days for a formal LODI.<sup>43</sup> This can result in an NG or USAR Soldier being forced to pay for their

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<sup>40</sup> U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS para. 2-8I (22 June 2015). The nonexclusive list requires certain other conditions being met, such as receiving the injury while under enemy fire. *Id.* at para. 2-8b.

<sup>41</sup> 10 U.S.C. § 1074a (2011).

<sup>42</sup> AR 600-8-4, *supra* note 2, tbls. 3-1, 3-2. Interestingly, while the processing times are the same for active duty, USAR, and NG Soldiers, formal LODIs for NG Soldiers require an additional review by a "Reviewing Authority." *Id.* tbl. 3-1. The reviewing authority is the adjunct general for the state that the Soldier serves in. *Id.* para. 1-14.

<sup>43</sup> AR 600-8-4, *supra* note 2, tbls. 3-1, 3-2.

medical bills at personal expense prior to receiving a determination on their LODI.<sup>44</sup>

The answer to this potential injustice is simple and already required by DODI 1241.2.<sup>45</sup> For reserve servicemembers, “an appropriate approving authority shall issue an interim LOD determination in sufficient time to ensure that pay and allowances will commence within [thirty] days of the date that the injury, illness, or disease was reported.”<sup>46</sup> The Air Force and Navy have already implemented some form of an interim decision for reservists.<sup>47</sup> The Navy is required to issue an interim LOD determination within seven days of a reservist being injured or suffering an illness.<sup>48</sup> The Air Force, while *allowing* the immediate commander to make an interim decision, specifies that the decision is only valid for fifty-five days.<sup>49</sup> The Army must update AR 600-8-4 to comply with the DODI and prevent NG or USAR Soldiers from being personally liable for medical expenses pending a LODI determination. Requiring these Soldiers to pay for their own medical expenses, because the Army has not implemented the DODI is unacceptable. Unfortunately this is not the only place that the Army fails to protect the rights of Soldiers.

### C. Origin of Injury Warning

Line of duty investigations are unique in that they are one of the only administrative processes in which a subject must be advised of his rights absent any suspicion of criminal misconduct.<sup>50</sup> The protection for LODIs stems from 10 U.S.C. § 1219 which says that “[a] member of an armed

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<sup>44</sup> Meghann Meyers, *After Uproar, Army Agrees to Cover Soldier's Heart Attack Bills*, ARMY TIMES (Nov. 3, 2016), <https://www.armytimes.com/articles/after-uproar-army-agrees-to-cover-soldiers-heart-attack-bills>. Captain Shane Morgan, who suffered a heart attack during an Army Physical Fitness Test (APFT), waited twelve months and was personally liable for \$30,000 dollars in medical bills before the Army agreed to cover his medical costs. *Id.*

<sup>45</sup> U.S. DEP'T OF DEF., INSTR. 1241.2, RESERVE COMPONENT INCAPACITATION SYSTEM MANAGEMENT (30 May 2001) [hereinafter DODI 1241.2].

<sup>46</sup> DODI 1241.2, *supra* note 45, para. 6.4.2.

<sup>47</sup> JAGMAN, *supra* note 21, para. 224a; AFMAN, *supra* note 21, para. 2.3.3.

<sup>48</sup> JAGMAN, *supra* note 21, para. 0224a.

<sup>49</sup> AFMAN, *supra* note 21, para. 2.3.3.

<sup>50</sup> 10 U.S.C. § 1219 (1962). Unless suspected of a criminal offense, Soldiers are not entitled to be warned prior to making an incriminating statement during: a Financial Liability Investigation of Property Loss under AR 735-5, an administrative investigation under AR 15-6, or an investigation into the abeyance of clinical privileges under AR 40-68, chapter 10. *Id.*

force may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he has. Any such statement against his interests, signed by a member, is invalid.”<sup>51</sup> 10 U.S.C. § 1219 only applies to written statements.<sup>52</sup> The Army, along with the Navy and Air Force, has expanded the statutory language to require that a warning be given to a servicemember prior to taking any written or oral statement made by the subject which is then reduced to writing.<sup>53</sup> While all three services have clarified that the protection applies to oral and written statements, none of the three provides guidance as to exactly when the warning must be given or what specific evidence may or may not be used if taken without a warning.<sup>54</sup>

For example, imagine a drunk Soldier who jumps from a second floor window and tears a ligament in his knee when he lands. There are no witnesses. The Soldier does not go to the hospital because he knows he will get in trouble.<sup>55</sup> The next morning at formation, his first line leader notices him limping and asks him how he hurt himself. The Soldier refuses to answer and is sent by the unit to the on-post hospital. While there, the doctor, as he is required to do under AR 600-8-4, asks the Soldier how he hurt himself.<sup>56</sup> Wanting proper medical care, the Soldier is honest with the doctor. The Soldier’s answers are captured in his medical records. The health care provider alerts the unit and fills out a Department of the Army (DA) Form 2173.<sup>57</sup> On the form, the doctor indicates that the Soldier was under the influence of alcohol and recommends that the injury

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<sup>51</sup> *Id.* The statute does not define or clarify what “required” means or give assistance on when statements from servicemembers can be used in a LODI. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> AR 600-8-4, *supra* note 2, para. 3-3b; AFMAN, *supra* note 21, para. A3.2.3.2; JAGMAN, *supra* note 21, para. 0212c. The concept of warning a servicemember prior to taking their statement about the origin, incurrence, or aggravation of a disease or injury is not statutorily required in 10 U.S.C. § 1219, but it appears that each service has implemented the concept of warning the servicemember out of an abundance of caution to ensure statutory compliance with any interpretation. 10 U.S.C. § 1219 (1962); AR 600-8-4, *supra* note 2, para. 3-3b; AFMAN, *supra* note 21, para. A3.2.3.2; JAGMAN, *supra* note 21, para. 0212c.

<sup>54</sup> AR 600-8-4, *supra* note 2, para. 3-3b; AFMAN, *supra* note 21, para. A3.2.3.2; JAGMAN, *supra* note 21, para. 0212c.

<sup>55</sup> Interestingly, Airmen are required to self-report all injuries to their chain of command. AFMAN, *supra* note 21, para. 2.2.1. The Army has no similar requirement. *See generally* AR 600-8-4, *supra* note 2.

<sup>56</sup> AR 600-8-4, *supra* note 2, para. 1-13.

<sup>57</sup> U.S. Dep’t of Army, DA Form 2173, Statement of Medical Examination and Duty Status (Oct. 1972) [hereinafter DA Form 2173]. *See infra* Appendix I for recommended changes to DA Form 2173.

be found NILD.<sup>58</sup> During the LODI, the IO advises the Soldier of his right not to make a statement, which the Soldier invokes. Without any additional evidence of misconduct, the approving authority relies on the medical records alone to find the Soldier NILD.<sup>59</sup>

Was this a proper determination by the approving authority?<sup>60</sup> The decision hinges on whether oral statements made to medical personnel, given without a warning, can be used in making the LOD determination. Army Regulation 600-8-4 does not give any guidance on this, although the prevailing understanding and practice in the field is that this information can be used when making LOD determinations.<sup>61</sup> Although widespread, this practice should not be allowed. Currently, medical personnel, in order to properly fill out DA Form 2173, are required to ask questions to the Soldier to ascertain whether they were committing misconduct at the time of the injury.<sup>62</sup> There is no dispute that these questions would be absolutely improper for the command or the IO to do without warning the Soldier.<sup>63</sup> Why then has the Army deputized its medical personnel and created a culture that circumvents its own restrictions?<sup>64</sup>

There are three solutions to this issue.<sup>65</sup> First, the Army can eliminate the expansion of 10 U.S.C. § 1219 in AR 600-8-4 covering oral statements.<sup>66</sup> This would be problematic for numerous reasons, such as allowing IOs to intentionally take oral statements and then reduce them to writing if they thought that subjects would not be willing to waive their rights. While the Army would be strictly complying with 10 U.S.C. § 1219, it would not be within the spirit of the statute. The second solution

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<sup>58</sup> DA Form 2173, *supra* note 57, block 11.

<sup>59</sup> In an informal survey conducted by the author, thirteen out of thirteen judge advocates from the Army, Navy, Air Force, and Marines interpreted their service regulation as allowing the command to use medical information from this fact pattern when making the line of duty determination [hereinafter Origin of Injury Survey].

<sup>60</sup> For purposes of this paper, the question of compliance with 10 U.S.C. § 1219 will be restricted to statements made to medical personnel. The same concerns could exist with any questioning of Soldiers by any DOD agency including the U.S. Army Criminal Investigation Command (CID) or Military Police Investigations (MPI). 10 U.S.C. § 1219, in describing the servicemembers' rights does not limit it to the LODI process or define who is taking the statement. 10 U.S.C. § 1219 (1962). Therefore, the protection would seem to apply to any member of the DOD asking a servicemember about their injuries. *Id.*

<sup>61</sup> AR 600-8-4, *supra* note 2, para. 3-3; Origin of Injury Survey, *supra* note 59.

<sup>62</sup> AR 600-8-4, *supra* note 2, para. 3-2.

<sup>63</sup> AR 600-8-4, *supra* note 2, para. 3-3.

<sup>64</sup> Origin of Injury Survey, *supra* note 59.

<sup>65</sup> The best solution would be for Congress to update 10 U.S.C. § 1219 to provide the services a better understanding of when the protection applies.

<sup>66</sup> AR 600-8-4, *supra* note 2, para. 3-3.

is to require medical personnel to warn Soldiers about their right not to make a statement. The concern here is that Soldiers may be deprived of proper medical care if they give less or inaccurate information to medical personnel. The third option, which is the simplest and most soldier friendly, is to restrict the information that the command receives from the Soldier's medical record to just the diagnosis of the injury.<sup>67</sup> This would allow medical personnel to best treat Soldiers by letting Soldiers be honest regarding their injuries, eliminating medical personnel from being an active part of the LODI process, and reducing the concerns with violating Soldiers' rights under 10 U.S.C. § 1219 and AR 600-8-4.

#### IV. Handling Suicides and Self Injuries Under Army Regulation 600-8-4

##### A. The Treatment of Suicides Under Army Regulation 600-8-4

Servicemember suicide is both tragic and “continues to be a significant public health issue in the military.”<sup>68</sup> In calendar year 2015 alone, 478 active duty and reserve servicemembers took their own lives.<sup>69</sup> For each of these suicides, the DOD required that a LODI determine whether the death occurred ILD or NILD.<sup>70</sup> Between October 1, 2009, and November 29, 2016, the Army conducted 1,080 suicide LODIs.<sup>71</sup> Of these, ninety-five percent found that the Soldier was mentally unsound.<sup>72</sup> The staggeringly high percentage of suicides that are found mentally unsound raises the question whether AR 600-8-4 gives sufficient clarity to IOs and medical health officers (MHO) during the LODI process.

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<sup>67</sup> This would also be in compliance with the DOD's disclosure of medical information. U.S. DEP'T OF DEF., 6025.18-R, DOD HEALTH INFO PRIVACY REGULATION para. C7.11.1.3. (24 Jan. 2003).

<sup>68</sup> Keita Franklin, *Department of Defense Quarterly Suicide Report - Calendar Year 2016 1st Quarter*, DEFENSE SUICIDE PREVENTION OFFICE (DSPO), <http://www.dspo.mil/Portals/113/Documents/DoD%20Quarterly%20Suicide%20Report%20CY2016%20Q1.pdf> (last visited Jan. 28, 2017).

<sup>69</sup> *Id.*

<sup>70</sup> AR 600-8-4, *supra* note 2, at para. 2-3c(3); AFMAN, *supra* note 21, at para. 1.6.1; JAGMAN, *supra* note 21, at para. 0212b.

<sup>71</sup> E-mail from Major Joseph V. Messina, Chief, Casualty Investigations at U.S. Army Human Resources Command, to Major Aaron L. Lancaster, Student, 65th Judge Advocate Officer Course, The Judge Advocate Gen.'s Sch. (30 Nov. 2016, 11:18 EST) [hereinafter MAJ Messina email to MAJ Lancaster] (on file with author).

<sup>72</sup> *Id.*

As a rule, the Army presumes that all injuries, diseases, or deaths are incurred ILD.<sup>73</sup> This presumption is only overcome when supported by “substantial evidence and by a greater weight of evidence than supports any different conclusion.”<sup>74</sup> This standard is almost identical for suicides.<sup>75</sup> The only substantive difference is that for suicides, the Army created “Rule 10” of AR 600-8-4 which states that the “law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide).”<sup>76</sup>

In addition to this presumption, the Army employs a two-part test to determine the mental soundness of Soldiers who commit suicide. First, the IO must determine if the Soldier committed suicide because of a mental defect, disease, or derangement.<sup>77</sup> Second, the IO, in consultation with an MHO, must then determine if the mental defect, disease, or derangement made the Soldier unable to comprehend the nature of or control his actions.<sup>78</sup>

This process is flawed for three reasons. First, mental soundness is being determined by an IO with no medical training and an MHO who often never spoke with the Soldier.<sup>79</sup> This frequently results in a less than definitive analysis.<sup>80</sup> Second, IOs, MHOs, and commanders only have two options when deciding mental soundness—mentally unsound or mentally sound.<sup>81</sup> This binary determination is required regardless of whether sufficient evidence exists to make any definitive conclusion

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<sup>73</sup> AR 600-8-4, *supra* note 2, at para. 2-6b.

<sup>74</sup> *Id.* at para. 2-6c.

<sup>75</sup> *Id.* at app. B-10, R. 10.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at para. 4-11.

<sup>78</sup> AR 600-8-4, *supra* note 2, at para. 4-11. In order to help make this determination, AR 600-8-4 explains that IOs should inquire into “the [S]oldier’s social background, actions and moods immediately prior to the suicide or suicide attempt, troubles that might have motivated the incident, and examinations or counseling by specially experienced or trained persons.” *Id.* para. 4-11b. In addition, the IO must provide the investigation to a mental health officer for review. *Id.* The mental health officer will render an opinion as to the probable causes of the self-destructive behavior and whether the Soldier was mentally sound. *Id.*

<sup>79</sup> For more information on the problems of having a mental health officer conduct a mental soundness determination when they never met the Soldier, see Major Marcus Misinec’s 2014 article on LODIs. Major Marcus L. Misinec, *Get Back in Line: How Minor Revisions to AR 600-8-4 Would Rejuvenate Suicide Line of Duty Investigations*, 221 MIL. L. REV. 183, 196-200 (Nov. 2014).

<sup>80</sup> *Id.*

<sup>81</sup> AR 600-8-4, *supra* note 2, at para. 4-11, app. B-10 at R. 10.

regarding the Soldier's mental soundness. Third, IOs, MHOs, and commanders have to unnecessarily find Soldiers "mentally unsound" in order to provide the maximum benefits to the Soldier's family.<sup>82</sup> The result is that many mental health reports look something like this:

Mental soundness refers to a Soldier's ability to rationally process consequences, comprehend interactions or practically participate in rendering reasonable judgments. It is probable that this soldier understood the potential consequences of his actions. The Soldier's decision to end his life came at a time of some pending life changes, but not overtly overwhelming distress. There is a possibility that this distress compromised his judgment and temporarily altered his mental soundness. Regardless of his awareness, "Suicide is the deliberate and intentional destruction of one's own life. The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide)." It is therefore my opinion that the Soldier was NOT mentally sound at the time of his suicide.<sup>83</sup>

## B. Proposed Solution

The issues with the treatment of suicides under AR 600-8-4 are not new. Major Marcus Misinec addressed the concern recently in his article and as a solution advocated for the removal of the mental unsoundness presumption in cases where Soldiers are suspected of committing misconduct.<sup>84</sup> However, this recommendation, while addressing some of

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<sup>82</sup> AR 600-8-4, *supra* note 2, at para. 4-11.

<sup>83</sup> Professional Experience, *supra* note 1. Numerous reports from Fort Sill, Oklahoma, and Camp Zama, Japan had nearly identical language to describe the mental soundness of Soldiers who had committed suicide. In no case did the behavioral health report identify the most probable cause of the suicide. *Id.*

<sup>84</sup> See Misinec, *supra* note 79. The key premise of MAJ Misinec's article is that Soldiers, who show no prior mental health issues and who are suspected of committing misconduct, should not be found ILD when they commit suicide to avoid responsibility for their misconduct. *Id.* at 210. Misinec's recommendations is to update AR 600-8-4 to create a split in determining mental soundness for suicides. *Id.* Soldiers who were not suspected of misconduct would continue to be assessed using the current language in AR 600-8-4. *Id.* Soldiers who were suspected of misconduct would lose the mental unsoundness presumption. *Id.* In these cases, a JA, instead of a behavioral health officer, would provide a recommendation on the LODI. *Id.* The opinion would consider whether sufficient



the deficiencies in AR 600-8-4, would leave too many questions unanswered. First, what type of misconduct—adultery, rape, or fraternization—would cause a Soldier to lose the mental soundness presumption? Second, without a presumption of mental soundness, what standard would the command use when a Soldier had both mental health issues and committed misconduct? The solution is far simpler and would allow commanders to provide maximum support to the Soldier's family while simultaneously producing consistent and credible LODIs which have findings based on the facts therein.

First, the presumption of mental unsoundness should be removed for all self-inflicted injuries and suicides, not just those involving criminal misconduct. Army Regulation 600-8-4 already presumes that any injury or death was incurred ILD unless refuted by a preponderance of the evidence.<sup>85</sup> Therefore, Soldiers are considered ILD unless the LODI can *prove* otherwise. For suicides, this means all Soldiers will be found ILD unless a preponderance of the evidence indicates that they were, in fact, mentally sound.<sup>86</sup> Requiring an affirmative finding of mental unsoundness is unnecessary. Second, IOs, MHOs, and commanders should be given the option to make a finding that insufficient information exists to determine mental soundness. The current mentally sound, mentally unsound determination is akin to asking a panel in a court-martial to find the accused either guilty or innocent. The failure to prove the accused's guilt does not mean that they are innocent any more than the inability to prove mental soundness conversely shows mental unsoundness.

Third, for any suspected self-injury or suicide, the IO and MHO should identify any potential causes which may have contributed to the Soldier's injury or death.<sup>87</sup> Finally, the IO and mental health officer should identify whether substantial evidence indicates that any of the potential causes were the proximate cause of the Soldier's decision to commit suicide. If the proximate cause can be identified and is something other than mental defect, disease, or derangement, the Soldier should be found

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evidence existed that the Soldier committed the misconduct and whether the exposure of the evidence was the proximate cause of the suicide. *Id.*

<sup>85</sup> AR 600-8-4, *supra* note 2, at paras. 2-6b and 2-6c.

<sup>86</sup> *Id.* at para. 4-11, app. B-10 at R. 10.

<sup>87</sup> This requirement already exists in paragraph 4-11 of AR 600-8-4. AR 600-8-4, *supra* note 2, at para. 4-11.

NILD due to misconduct.<sup>88</sup> If the proximate cause can be identified and is a mental defect, disease, or derangement, the Soldier should be found ILD due to being mentally unsound. If the proximate cause cannot be identified, the commander should find the Soldier ILD due to an inability to overcome the presumption for all LODIs of ILD.

While these changes may be unpopular, the Army must recognize that in many cases there is insufficient information to determine what motivated a Soldier to take his or her life or the Soldier's mental state at the time that they killed themselves. In these cases, requiring IOs, MHOs, and commanders to unnecessarily find Soldiers mentally unsound, just to provide full benefits to the family, does disservice to the process, the Army, and the Soldier.

On July 31, 2016, Major General (MG) John G. Rossi took his own life just hours before being promoted to lieutenant general.<sup>89</sup> Reports indicate that there were no allegations of adultery, misconduct, or alcohol or drug abuse.<sup>90</sup> The best guess appears to be that he was sleep-deprived and overwhelmed by his upcoming responsibilities.<sup>91</sup>

The report of the investigation is at best perplexing. The IO found that:

Although MG (P) Rossi appeared to be focused on future events during the weeks leading up to his death, his decision to commit suicide was not spontaneous or impulsive. The evidence suggests that this decision developed and was planned during the tumultuous week leading up to his death. Specifically, the location, method, and timing of his suicidal act all suggest that he had considered and planned the act. Additionally, certain of

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<sup>88</sup> The most likely examples would involve Soldiers who commit suicide in order to avoid criminal misconduct.

<sup>89</sup> Tom Vanden Brook, *General is Most Senior Army Officer to Kill Self*, USA TODAY, Oct. 28, 2016, <http://www.usatoday.com/story/news/politics/2016/10/28/army-generals-death-ruled-suicide/92880986/>.

<sup>90</sup> Lieutenant General Patrick J. Donahue II, Army Regulation 15-6/Line of Duty Investigation Findings and Recommendations - Death of Major General (Promotable) John G. Rossi (Sept. 29, 2016), <https://www.foia.army.mil/ReadingRoom/FileDownload.dl?docId=44fd6f76-925c-46ab-af60-7bc813b09c79> (redacted copy) [hereinafter MG Rossi Investigation].

<sup>91</sup> *Id.*

his actions throughout the week leading up to his death suggest that he was contemplating his impending death.<sup>92</sup>

On the other hand, the MHO stated that “[i]n summary, even if MG(P) Rossi had presented for care he would have been assessed as being at low risk for suicide. He had displayed no overt warning signs that might have alerted friends, family, or colleagues.”<sup>93</sup> Regardless, the IO found that:

IAW the provisions of AR 600-8-4, paragraph B-10, I find MG (P) Rossi's death was in line of duty. There is insufficient evidence to overcome the legal presumption that a mentally sound person will not commit suicide. Accordingly, MG (P) Rossi was not mentally sound when he decided to take his own life.<sup>94</sup>

The Army was required to find MG Rossi mentally unsound in order to find him ILD.<sup>95</sup> Not astonishingly, the Army used “Rule 10” to find him mentally unsound.<sup>96</sup> Doing so belittles the memory of MG Rossi and his years of service. Eliminating the presumption of mental unsoundness will not change the outcome, but will bring credibility to the process. His family can be told that a full and complete investigation was done and that insufficient evidence could be found to determine exactly why MG Rossi took his own life. Therefore, he was ILD at the time of his death, not because he was mentally unsound, but because all Soldiers are presumed to be ILD unless sufficient evidence proves otherwise.

## V. Procedural Deficiencies in Army Regulation 600-8-4

### A. Lack of Understanding About the Final Approval Authority

A Soldier dies and the Commanding General (CG) appoints an IO for a LODI. The IO recommends the Soldier be found NILD. The SJA advises the CG that there is sufficient evidence to find the Soldier ILD or NILD. The CG disagrees with the IO and approves the LODI by signing

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<sup>92</sup> *Id.* Although the IO listed these events, he did not address what effect they may have had on his mental soundness at the time of his death. *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> AR 600-8-4, *supra* note 2, at para. 4-11, app. B-10 at R. 10.

<sup>96</sup> MG Rossi Investigation, *supra* note 90.

the DD Form 261 as the “Final Approval.”<sup>97</sup> Case closed—except it is not. Four months later, Human Resources Command (HRC) sends an e-mail to the CG telling him that they reversed his decision and are finding the Soldier NILD.

While uncommon, this scenario occurs roughly fifteen times a year in the Army.<sup>98</sup> The situation is confusing because chapter 3 of AR 600-8-4 gives a detailed description of the LODI process but makes no mention of any role by HRC.<sup>99</sup> The only mention of HRC’s ability to overturn a case is found in AR 600-8-4, paragraph 4-18, which says that [t]he commanding general, USA HRC, acting for the SA [Secretary of the Army], may at any time change a determination made under this regulation. The correct conclusion based on the facts must be shown.”<sup>100</sup> This means that HRC can conduct a de novo review of any case and change the determination. Roughly two-thirds of reversed cases are suicides.<sup>101</sup>

The solution is simple. First, “final approving authority” should be removed from AR 600-8-4 and replaced with “approving authority.”<sup>102</sup> Using the term final is both confusing and misleading to GCMCAs making the determinations and the families of deceased Soldiers. Second, chapter 3 of AR 600-8-4 should be updated to include a paragraph describing HRC’s role in reviewing LODIs. The description should indicate that while approving authorities are delegated the authority from the SA to make determinations on LODIs, HRC reserves the right to review and overturn any LODI determination.

## B. Sexual Assault Line of Duty Processing

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<sup>97</sup> AR 600-8-4, *supra* note 2, at para. 3-11 (final approval authority); U.S. Dep’t of Def., DD Form 261, Report of Investigation Line of Duty and Misconduct Status (Oct. 1995) [hereinafter DD Form 261].

<sup>98</sup> E-mail from Major Joseph V. Messina, Chief, Casualty Investigations at U.S. Army Human Resources Command, to Major Jess R. Rankin, Chief, Administrative and Civil Law, Fort Sill, Oklahoma (9 Mar. 2016, 16:20 EST) (on file with author) [hereinafter MAJ Messina email to MAJ Rankin].

<sup>99</sup> AR 600-8-4, *supra* note 2, at chap. 3.

<sup>100</sup> *Id.* at para. 4-18.

<sup>101</sup> MAJ Messina email to MAJ Rankin, *supra* note 98.

<sup>102</sup> AR 600-8-4, *supra* note 2, at para. 3-11. Further confusing the situation is that informal LODIs appear to require review by the “final approving authority” although nowhere in AR 600-8-4 is it discussed who is the final approving authority for an informal LODI. *Id.* tbl. 3-1. The GCMCA is the final approving authority for formal LODIs. *Id.* at para. 3-11.

An activated reservist is sexually assaulted during a drill weekend. The Soldier contacts his victim advocate (VA), and after discussing the options, files a restricted report.<sup>103</sup> Because a restricted report is filed, no LODI is completed.<sup>104</sup> Monday, the Soldier goes back to his civilian job. The Soldier, as a result of the sexual assault, begins to become depressed and agitated at work. Realizing that he needs mental health services, the Soldier contacts a mental health professional. Without a LODI, the Soldier has to pay for the mental health services at personal expense.<sup>105</sup> The VA calls the JA asking for help. The JA rereads AR 600-8-4 and advises that there is nothing the unit can do unless the victim makes an unrestricted report. The Soldier is forced to choose between the restricted report and receiving medical care.

This situation is both unfortunate and completely preventable. Since March 28, 2013, the DOD has required that the reserve component commanders implement a program to conduct LODIs for restricted reports of sexual assault.<sup>106</sup> The Army has failed to incorporate these changes into AR 600-8-4 preventing those assisting victims from understanding their obligations and the victim's options.<sup>107</sup> Army Regulation 600-8-4 must be updated to incorporate these changes in order to protect the rights of alleged victims of sexual assault.<sup>108</sup>

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<sup>103</sup> Restricted reporting allows a Soldier, who is a sexual assault victim, to confidentially disclose the details of their assault to specifically identified individuals and receive medical treatment and counseling, without triggering an official investigative process. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-4c (6 Nov. 2014).

<sup>104</sup> See generally AR 600-8-4, *supra* note 2. Although AR 600-8-4 does not specifically prohibit a LODI for a restricted report, in practice it does as the commander does not know the identity of the Soldier involved. *Id.*

<sup>105</sup> 10 U.S.C. § 1074a (2011).

<sup>106</sup> U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enc. 4, para. 4 (28 Mar. 2013) [hereinafter SAPR DODI]. The SAPR DODI was updated on July 7, 2015 and the provision is now found in enclosure 5, paragraph 5. U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enc. 5, para. 5 (28 Mar. 2013) (C2, 7 Jul. 2015) [hereinafter Updated SAPR DODI].

<sup>107</sup> See generally AR 600-8-4, *supra* note 2.

<sup>108</sup> The needed updates to AR 600-8-4 can essentially be lifted from the requirements of DODI 6495.02. Under the DODI, reserve commanders will designate an individual or individuals to process LODIs for victims of sexual assault which occurred while the Soldier was activated. Updated SAPR DODI, *supra* note 106, at encl. 5, para. 5d(2). The individual shall possess the maturity and experience to assist in sensitive and protected restricted sexual assault cases and have Sexual Assault, Prevention, and Response (SAPR) training. *Id.* at encl. 5, para. 5d(2)b. The individual's primary job is to help document the medical condition of the victim and substantiate the victim's duty status at the time of the

### C. Department of the Army Form 2173

For a financial liability investigation of property loss, the commander has a DD Form 200.<sup>109</sup> For an AR 15-6 investigation, the commander has a DA Form 1574-1.<sup>110</sup> For a formal LODI, the commander has a DD Form 261.<sup>111</sup> Each of these forms acts as a one to four page consolidated report listing the subject, the incident, the pertinent details, and gives the commander or approving official blocks to check or sign to “Approve” or “Disapprove” the findings of the investigation.<sup>112</sup> Informal LODIs have no such form.<sup>113</sup> The only Army form used for informal LODIs is a DA Form 2173.<sup>114</sup> On the DA Form 2173, the unit commander has two discretionary decisions. First, is a formal LODI required?<sup>115</sup> Second, is the injury considered to have been incurred ILD?<sup>116</sup> The first is binding and will be discussed below.<sup>117</sup> The second is simply a recommendation to the approving authority.

Once the form is forwarded to the approving authority, AR 600-8-4

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incident. *Id.* at encl. 5, para. 5d(3). The key aspect of these LODIs is that the designated individual will make the LOD determination without identifying the victim to the chain of command or identifying the source of the injuries. *Id.* at encl. 5, para. 5d(1). These provisions will allow the victim to continue to access medical care and psychological counseling while maintaining their restricted report.

<sup>109</sup> U.S. Dep’t of Def., DD Form 200, Financial Investigation of Property Loss (Jul. 2009) [hereinafter DD Form 200].

<sup>110</sup> U.S. Dep’t of Army, DA Form 1574-1, Report of Proceedings by Investigating Officer (Apr. 2016) [hereinafter DA Form 1574-1].

<sup>111</sup> DD Form 261, *supra* note 97.

<sup>112</sup> DD Form 200, *supra* note 109; DA Form 1574-1, *supra* note 110; DD Form 261, *supra* note 97. DD Form 261 uses “Approved” and “Disapproved.” DD Form 261, *supra* note 97.

<sup>113</sup> A DD Form 261 can theoretically be used for informal LODIs. The concern is that the form assumes that an IO has been appointed and that a major Army commander will be approving. DD Form 261, *supra* note 97. In addition, using the form for informal LODIs would likely confuse the approving authority as there are three potential places that the commander could sign to approve the LODI. *Id.*

<sup>114</sup> DA form 2173, *supra* note 57. The form consists of two sections. *Id.* Section 1 includes information from the attending physician or hospital patient administrator regarding the injury or death. *Id.* Section 2 is filled out by the unit commander, usually the company level commander, and includes additional information primarily related to the Soldier’s duty status at the time of the injury. *Id.*

<sup>115</sup> DA form 2173, *supra* note 57, at block 31.

<sup>116</sup> DA form 2173, *supra* note 57, at block 32.

<sup>117</sup> AR 600-8-4, *supra* note 2, at para. 3-6a(1).

gives the approving authority two choices—approve the informal LODI or appoint an IO for a formal LODI.<sup>118</sup> The issue is that AR 600-8-4 does not provide guidance on how the approving authority physically annotates either choice and DA Form 2173 does not provide the approving authority a section to mark his choice.<sup>119</sup> The solution is to update DA Form 2173 to include an additional space below “Section II” providing the approving authority blocks to check indicating that the LODI is approved or that the case requires a formal LODI and is being forwarded to the GCMCA.<sup>120</sup>

Adding a space for the approving authority will only solve one of the issues with the DA Form 2173. The second problem is that the form allows junior commanders to force a superior commander to take a specific action.<sup>121</sup> Per AR 600-8-4 the SPCMCA or GCMCA “must” appoint an IO and conduct a formal investigation if the unit commander checks the box on the DA Form 2173 indicating that a formal LODI is required.<sup>122</sup> The superior commander has no discretion. Allowing subordinate commanders to require a specific action by a superior commander is contrary to Army policy. The solution is to update both AR 600-8-4 and DA Form 2173 to make them consistent with Army policy regarding the chain of command.<sup>123</sup> Unit commanders should be restricted to only making a recommendation as to the disposition of the LOD. This will allow superior commanders to exercise their independent judgment to take appropriate action on each case.

## VI. Conclusion

Line of duty investigations must be transparent, consistent, and credible. In the hypothetical case of PFC Conrad, the command should have clear guidance on whether he suffered an injury and if a LODI is required. They should know what level of command the investigation can be adjudicated at and provided a proper form upon which to document

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<sup>118</sup> *Id.* at tbl. 3-1.

<sup>119</sup> *Id.*; DA form 2173, *supra* note 57.

<sup>120</sup> *See infra* Appendix I for proposed update to DA Form 2173.

<sup>121</sup> DA form 2173, *supra* note 57.

<sup>122</sup> AR 600-8-4, *supra* note 2, at para. 3-6a(1). While AR 600-8-4 does not specifically require formal LODI, it does require a “detailed investigation.” *Id.* “Detailed investigation” only appears one other place in AR 600-8-4 and that is in paragraph 2-5 which states that “[a] formal LD investigation is a detailed investigation. . .” *Id.* para. 2-5. Therefore, AR 600-8-4 appears to require a formal LODI in these cases.

<sup>123</sup> *See generally* DA form 2173, *supra* note 57, at para. 2-1.

their decision. In the case of SSG Johnson, the Army needs to stop forcing mental health professionals, IOs, and commanders into finding Soldiers mentally unsound in order to provide support to the Soldier's family. The ability to provide an accurate investigation to the family and the correct adjudication of a LODI are not mutually exclusive.

Even with these changes, the process will still be flawed. The LODI process is driven by Congress. While Congress provided broad guidelines on what is required for LODIs, they gave little guidance on the actual process. The DOD failed to fill this gap and therefore each service implemented its own regulation. The result is contradictory regulations and unfair adjudications.<sup>124</sup> The only solution is for the DOD to consolidate the service regulations and publish a DOD LOD regulation allowing servicemembers to have their injuries or deaths adjudicated in a fair and consistent manner. Unfortunately, this appears unlikely to happen anytime soon. Therefore, in the absence of a consolidated DOD issuance, the Army must amend AR 600-8-4 to place the process more in line with Congressional intent regarding injuries and the LOD process.

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<sup>124</sup> As just one example, under AR 600-8-4, "[d]evelopment of a disease that may be a result of the abuse of alcohol or other drugs is not intentional misconduct within the meaning of 10 U.S.C. [§] 1207." AR 600-8-4, *supra* note 2, at para. 4-10c. So in the Army if you damage your liver from excess drinking it is considered ILD. This is in direct contradiction to Air Force Instruction which says that "[a]dditionally, organic diseases or disabilities that are secondary to alcoholism, such as Laennec's cirrhosis, fatty metamorphosis of the liver and chronic brain syndrome, should be found to be due to misconduct." AFMAN *supra* note 21, at para. A2.1.1.2. In the Air Force you will be found NILD. There is zero logic as to why some servicemembers should receive disability for the same injury that others are not.



**Appendix A. Proposed Revision to Army Regulation 600-8-4, Paragraph 2-3**

## 2-3. Requirements for line of duty investigations

Line of duty investigations are conducted to identify the circumstances surrounding the disease, injury, or death of a soldier and to determine whether the soldier was in line of duty or not in line of duty at the time of the disease, injury, or death. Depending on the circumstances of the case, an LD investigation may or may not be required to make this determination.

*a.* The LD determination is presumed to be "LD YES" without an investigation—

(1) In the case of disease, except as described in paragraphs *b*(1) through (8) below.

(2) In the case of injuries clearly incurred as a result of enemy action or attack by terrorists.

(3) In the case of death due to natural causes or while a passenger in a common commercial carrier or military aircraft.

**(Current sub-paragraphs 2-3b and c.)**

*b.* In all other cases of death or injury, except injuries so slight as to be clearly of no lasting significance (for example, superficial lacerations or abrasions or mild heat injuries), an LD investigation must be conducted.

*c.* Investigations can be conducted informally by the chain of command where no misconduct or negligence is indicated, or formally where an investigating officer is appointed to conduct an investigation into suspected misconduct or negligence. A formal LD investigation must be conducted in the following circumstances:

**(Proposed revision and consolidation of the two sub-paragraphs)**

*b.* In all other cases of death or injury an LD investigation must be conducted. Investigations can be conducted informally (Chapter 3, Section I) where no misconduct is suspected, or formally (Chapter 4, Section II) when misconduct is suspected. A formal LD investigation must be conducted in the following circumstances:

- (1) Injury, disease, death, or medical condition that occurs under strange or doubtful circumstances or is apparently due to misconduct.
- (2) Injury or death involving the abuse of alcohol or other drugs.
- (3) Self-inflicted injuries or possible suicide.
- (4) Injury or death incurred while AWOL.
- (5) Injury or death that occurs while an individual was en route to final acceptance in the Army.
- (6) Death of a USAR or ARNG soldier while participating in authorized training or duty.
- (7) Injury or death of a USAR or ARNG soldier while traveling to or from authorized training or duty.
- (8) When a USAR or ARNG soldier serving on an AD tour of 30 days or less is disabled due to disease.
- (9) In connection with an appeal of an unfavorable determination of abuse of alcohol or other drugs (para 4-10a).
- (10) When requested or directed for other cases.

**Appendix B. Proposed Revision to Army Regulation 600-8-4, Paragraph 4-11**

4-11. Mental responsibility, emotional disorders, suicide, and suicide attempts

*a.* A Soldier may be held responsible for his or her acts and their foreseeable consequences only if the Soldier was able to comprehend the nature of such acts or to control his or her actions. When evidence in the investigation raises the possibility that the Soldier may not have been mentally responsible for their actions, the MTF must identify, evaluate, and document any potential mental and emotional disorders.

*b.* All line of duty investigations of self-destructive behavior, including suicide or attempted suicide, must determine the Soldier's mental responsibility at the time of the incident. The question of mental responsibility can only be resolved by inquiring into and obtaining evidence of the Soldier's social background, actions and moods immediately prior to the suicide or suicide attempt, troubles that might have motivated the incident, and examinations or counseling by specially experienced or trained persons. Personal notes or diaries of a deceased Soldier are valuable evidence.

*c.* In all cases of suicide or suicide attempts, a mental health officer will review the evidence collected to determine the bio-psychosocial factors that contributed to the Soldier's desire to end his or her life. The mental health officer will note any causes of the self-destructive behavior, whether any of these causes appear to be the proximate cause of the Soldier's self-destructive behavior and the Soldier's mental responsibility at the time of the incident. The mental health officer will make a determination whether the Soldier was mentally sound, mentally unsound, or whether insufficient information exists to determine the Soldier's mental soundness. Death or injuries sustained as the result of a suicide or suicide attempt only constitute misconduct if a greater weight of evidence indicates that the Soldier was mentally sound at the time of the incident.

*d.* If the Soldier is found mentally unsound, the mental health officer should determine whether the soldier's mental condition was an EPTS condition aggravated by Service or was due to the soldier's own misconduct. Those conditions occurring during the first six months of AD may be considered as EPTS, depending on history. Personality disorders by their nature are considered as EPTS.

*e.* In cases of suicide or attempted suicide during AWOL, mental soundness at the inception of the absence must also be determined.

*f.* Death, injury, or disease intentionally self-inflicted or an ill effect that results from the attempt (including attempts by taking poison or drugs) when mental soundness existed at the time should be considered misconduct.

**(Current version of Army Regulation 600-8-4, Paragraph 4-11)**

4-11. Mental responsibility, emotional disorders, suicide, and suicide attempts

*a.* The MTF must identify, evaluate, and document mental and emotional disorders. A soldier may not be held responsible for his or her acts and their foreseeable consequences if, as the result of mental defect, disease, or derangement, the soldier was unable to comprehend the nature of such acts or to control his or her actions. Therefore, these disorders are considered "in LD" unless they existed before entering the Service and were not aggravated by military service. Personality disorders by their nature are considered as EPTS.

*b.* Line of duty investigations of suicide or attempted suicide must determine whether the soldier was mentally sound at the time of the incident. The question of sanity can only be resolved by inquiring into and obtaining evidence of the soldier's social background, actions and moods immediately prior to the suicide or suicide attempt, troubles that might have motivated the incident, and examinations or counseling by specially experienced or trained persons. Personal notes or diaries of a deceased soldier are valuable evidence. In all cases of suicide or suicide attempts, a mental health officer will review the evidence collected to determine the bio-psychosocial factors that contributed to the soldier's desire to end his or her life. The mental health officer will render an opinion as to the probable causes of the self-destructive behavior and whether the soldier was mentally sound at the time of the incident.

*c.* If the soldier is found mentally unsound, the mental health officer should determine whether the soldier's mental condition was an EPTS condition aggravated by Service or was due to the soldier's own misconduct. Those conditions occurring during the first six months of AD may be considered as EPTS, depending on history.

*d.* In cases of suicide or attempted suicide during AWOL, mental soundness at the inception of the absence must also be determined.

*e.* An injury or disease intentionally self-inflicted or an ill effect that results from the attempt (including attempts by taking poison or drugs) when mental soundness existed at the time should be considered misconduct.

**Appendix C. Proposed Revision to Army Regulation 600-8-4, Paragraph 4-10**

4-10. Intoxication and drug abuse

*a.* That portion of time in the hospital ~~that a doctor determines a Soldier to be totally physically incapacitated~~ is unable to perform military duties for more than 24 consecutive hours solely because of alcohol or drug abuse will be "not line of duty—due to own misconduct." ~~Total physical incapacitation means the soldier is so disabled by the drugs or alcohol that he or she is comatose. The remainder of the period of hospitalization, treatment, or rehabilitation will be administrative absence from duty and does not require an LD determination. (Hospitalization of less than 24 hours for abuse of alcohol or other drugs does not require an LD determination.) When the person is released from the MTF, the MTF commander or commander designee will inform the soldier and the soldier's unit commander in writing of the LD determination. To preclude unauthorized access to this information, the memorandum will be transmitted in a sealed envelope marked: EXCLUSIVELY FOR the unit commander of the individual concerned and will comply with AR 340-21. The LD determination may be appealed under paragraph 4-17 to the unit commander. In appealed cases, the MTF will prepare DA Form 2173 upon request of the unit commander.~~

*b.* An injury incurred as the "proximate result" of prior and specific voluntary intoxication is incurred as the result of misconduct. For intoxication alone to be the basis for a determination of misconduct with respect to a related injury, there must be a clear showing that the soldier's physical or mental faculties were impaired due to intoxication at the time of the injury, the extent of the impairment, and that the impairment was a proximate cause of the injury.

*c.* Development of a disease that may be a result of the abuse of alcohol or other drugs is not intentional misconduct within the meaning of 10 USC 1207. It would be considered as "in line of duty."

**Appendix D. Proposed Paragraph for Army Regulation 600-8-4  
Regarding Reserve Component Sexual Assault Line of Duty  
Procedures**

**4-XX. Allegations of Sexual Assault by Reserve Component Soldiers**

a. Members of the ARNG or USAR, whether they file a restricted or unrestricted report, shall have access to medical treatment and counseling for injuries and illness incurred from a sexual assault inflicted upon a Service member when performing active service, as defined in Title 10, section 101(d)(3), and inactive duty training.

b. Medical entitlements remain dependent on a LD determination as to whether or not the sexual assault incident occurred in an active service or inactive duty training status. However, regardless of their duty status at the time that the sexual assault incident occurred, or at the time that they are seeking Sexual Harassment/Assault Response & Prevention (SHARP) services, Reserve Component members can elect either the Restricted or Unrestricted Reporting option.

c. Any alleged collateral misconduct by a victim associated with the sexual assault incident will be excluded from consideration as intentional misconduct or gross negligence under the analysis required by Title 10, section 1074a(c) in LD findings for healthcare to ensure sexual assault victims are able to access medical treatment and mental health services.

d. The following LOD procedures shall be followed by Reserve Component commanders.

(1) To safeguard the confidentiality of Restricted Reports, LOD determinations may be made without the victim being identified to DoD law enforcement or command, solely for the purpose of enabling the victim to access medical care and psychological counseling, and without identifying injuries from sexual assault as the cause.

(2) For LOD determinations for sexual assault victims, the USAR and the directors of the Army NG shall designate individuals within their respective organizations to process LODs for victims of sexual assault when performing active service, as defined in Title 10, Section 101(d)(3) and inactive duty training.

(a) Designated individuals shall possess the maturity and experience to

assist in a sensitive situation, will have SHARP training, so they can appropriately interact with sexual assault victims, and if dealing with a Restricted Report, to safeguard confidential communications and preserve a Restricted Report (e.g., SARC and healthcare personnel). These individuals are specifically authorized to receive confidential communications for the purpose of determining LOD status.

(b) The appropriate SARC will brief the designated individuals on Restricted Reporting policies, exceptions to Restricted Reporting, and the limitations of disclosure of confidential communications. The SARC and these individuals, or the healthcare provider may consult with their servicing legal office, in the same manner as other recipients of privileged information for assistance, exercising due care to protect confidential communications in Restricted Reports by disclosing only non-identifying information. Unauthorized disclosure may result in disciplinary action.

(3) For LOD purposes, the victim's SARC may provide documentation that substantiates the victim's duty status as well as the filing of the Restricted Report to the designated official.

(4) If medical or mental healthcare is required beyond initial treatment and follow-up, a licensed medical or mental health provider must recommend a continued treatment plan.

(5) Reserve Component members who are victims of sexual assault may be retained or returned to active duty in accordance with Title 10, Section 12323.

(a) Reserve Component member must be answered with a decision within 30 days from the date of the request.

(b) If the request is denied, the Reserve Component member may appeal to the first general officer in his or her chain of command. A decision must be made on that appeal within 15 days from the date of the appeal.



**Appendix E. Proposed Paragraph for Army Regulation 600-8-4  
Regarding Interim Line of Duty Decisions for Reserve Component  
Members**

**4-XX. Interim Line of Duty Determinations**

Interim Line of Duty determination. In order to meet the requirements of DODI 1241.2, the SPCMCA or GCMCA must issue an “interim” line of duty determination within seven days of being notified that a reservist, not on the active duty list, has an incapacitating injury or illness incurred or aggravated while on active duty, including leave, active duty for training, inactive duty training, or travel to or from such duty. This interim determination is intended to ensure that the reservist's incapacitation pay can be started without delay. If the final line of duty determination is adverse to the member, immediate action must be taken to stop incapacitation benefits. The only exception to the requirement to conduct an interim Line of Duty determination is if there is clear and convincing evidence that the injury, illness, or disease was not incurred or aggravated in a duty status described in DOD Directive 1215.6 and not covered under Title 10, Sections 1074 or 1074a, or was due to the misconduct of the member.

## Appendix F. Proposed Revision to Army Regulation 600-8-4

### 3-3. Evidence collection

*b.* Warning required before requesting statements regarding disease or injury.

(1) A soldier may not be required to make a statement relating to the origin, incurrence, or aggravation of his or her disease or injury. This applies to statements given to any member of the DOD. Any involuntary statement against a soldier's interests, made by the soldier, is invalid and may not be considered in determining LD status (10 USC 1219). Any soldier, prior to being asked to make any statement relating to the origin, incurrence, or aggravation of any disease or injury that the soldier has suffered shall be advised of his or her right that he or she need not make such a statement. A statement voluntarily provided by the soldier after such advice may be considered. The soldier's right not to make a statement is violated if a person, ~~in the course of the investigation~~, obtains the soldier's oral statements and reduces them to writing, unless the above advice was given first.

(2) If information concerning the incident is sought from the soldier, the soldier will be advised that he or she does not have to make any statement that is against his or her interest that relates to the origin, incurrence, or aggravation of any injury or disease he or she suffered. If any information is obtained from the soldier, a statement attesting the above warning was given must be attached to the DA Form 2173. Any written correspondence requesting information from the soldier will also contain the above warning and be attached to the DA Form 2173. If the soldier is also suspected or accused of any offense under the Uniform Code of Military Justice (UCMJ), the soldier should also be advised of his or her rights under UCMJ Art. 31 and right to counsel. A DA Form 3881 (Rights Warning Procedure/Waiver Certificate) should generally be used for such advice.

(3) Nothing in subparagraphs 3-3b(1) and (2) shall be construed to prohibit or restrict medical or emergency services personnel from providing treatment to a Soldier suffering from a disease or injury. Any statement made by the Soldier during their diagnosis or treatment and taken without a warning shall be disclosed to the Soldier's command only if permitted by DOD Regulation 6025.18-R and shall not be used in making any LOD determination.

**Appendix G. Proposed Revision to Army Regulation 600-8-4****Section II  
Terms****Existed prior to service**

Any injury, disease, or illness, to include the underlying causative condition, which was sustained or contracted prior to the present period of AD or authorized training, or had its inception between prior and present periods of AD or training is considered to have existed prior to service. A medical condition may in fact be present or developing for some time prior to the point when it is either diagnosed or manifests symptoms. Consequently, the time at which a medical condition "exists" or is "incurred" is not dependent on the date of diagnosis or when the condition becomes symptomatic. (Examples of some conditions which may be pre-existing are slow-growing cancers, heart disease, diabetes or mental conditions, which can all be present well before they manifest themselves by becoming symptomatic.)

**Gross Negligence**

Same as willful negligence.

**Injury**

Damage or harm caused to the structure or function of the body caused by an outside agent or force. For purposes of this regulation, an injury includes damage or harm that results in a Soldier being unable to perform military duties for more than 24 hours or may result in permanent disability. Injuries may be visual; such as broken bones or lacerations, or may be non-visual such as a concussion or traumatic brain injury. The following is a non-exhaustive list of non-visual injuries that generally require an LD investigation: diagnosis of concussion or mild traumatic brain injury; any period of loss or a decreased level of consciousness; any loss of memory for events immediately before or after an injury; any neurological deficits that may or may not be transient, or evidence of an intracranial lesion.

**Intentional misconduct**

Any wrongful or improper conduct which is intended or deliberate is intentional misconduct. Intent may be expressed by direct evidence of a member's statements or may be implied by direct or indirect evidence of the member's conduct. Misconduct does not necessarily involve committing an offense under the UCMJ or local law.

**Intentional conduct**

An act, by commission or omission, done on purpose.

**Mental responsibility**

The capacity to understand when one's conduct is wrong and to conform one's conduct to the requirement of the law. Soldiers are generally presumed to be mentally responsible for their actions. This presumption usually means it is unnecessary to pursue the issue of mental responsibility unless there is credible evidence to raise the issue of a lack of mental responsibility. Such evidence may consist of the circumstances surrounding the death, illness, injury or disease, previous abnormal or irrational behavior, expert opinion or other evidence directly or indirectly pointing toward lack of mental responsibility. All suicide and bona fide suicide attempts raise the issue of mental responsibility.

**Misconduct**

Intentional conduct that is wrongful or improper. Also, willful negligence or gross negligence.

**Preponderance of evidence**

Evidence that tends to prove one side of a disputed fact by outweighing the evidence to the contrary (that is, more than 50 percent). Preponderance does not necessarily mean a greater number of witnesses or a greater mass of evidence; rather preponderance means a superiority of evidence on one side or the other of a disputed fact. It is a term that refers to the quality, rather than the quantity, of the evidence.

**Presumption**

An inference of the truth of a proposition or fact, reached through a process of reasoning and based on the existence of other facts. Matters that are presumed need no proof to support them, but may be rebutted by evidence to the contrary.

**Proximate cause**

A proximate cause is a cause which, in a natural and continuous sequence, unbroken by a new cause, produces an injury, illness, disease, or death and without which the injury, illness, disease, or death would not have occurred. A proximate cause is a primary moving or predominating cause and is the connecting relationship between the intentional misconduct or willful negligence of the member and the injury, illness, disease, or death that results as a natural, direct and immediate consequence that supports a

“not line of duty—due to own misconduct” determination.

**Service aggravation**

Refers to a medical condition that existed prior to service and which worsened or was aggravated as a result of military service more than it would have been worsened or aggravated in the absence of military service.

**Simple negligence**

The failure to exercise that degree of care which a similarly situated person of ordinary prudence usually takes in the same or similar circumstances, taking into consideration the age, maturity of judgment, experience, education, and training of the soldier. An injury, disease, illness, or death caused solely by simple negligence is in line of duty unless it existed prior to entry into the Service or occurred during a period of AWOL (except when the soldier was mentally unsound at the inception of the unauthorized absence).

**Unable to perform military duties**

The Soldier is unable to perform their specified tasks. This decision is made by the unit commander and is based on whether the physical injury substantially prevents the specific Soldier from completing their assigned duties. Injuries that solely prevent a Soldier from participating in organized physical training will generally not qualify as making them unable to perform military duties. A Soldier is normally unable to perform their military duties while being treated at a medical treatment facility (hospital, clinic, or inpatient facility) for medically required testing, treatment, or observation. A Soldier is considered able to perform their military duties during any such time that the unit commander authorizes treatment which is not medically necessary.

**Willful Negligence**

A conscious and intentional omission of the proper degree of care that a reasonably careful person would exercise under the same or similar circumstances is willful negligence. Willful negligence is a degree of carelessness greater than simple negligence. Willfulness may be expressed by direct evidence of a member’s conduct and will be presumed when the member’s conduct demonstrates a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences of an act or failure to act. Willful negligence does not necessarily involve committing an offense under the UCMJ or local law. Willful negligence is the same as gross negligence.

## Appendix H. Proposed Changes to Appendix B of Army Regulation 600-8-4

### Appendix B

#### Rules Governing Line of Duty and Misconduct Determinations

In every formal investigation, the purpose is to find out whether there is evidence of ~~intentional misconduct or willful negligence~~ that is substantial and of a greater weight than the presumption of "in line of duty." To arrive at such decisions, several basic rules apply to various situations. The specific rules of misconduct are listed below.

##### B-1. Rule 1

Injury, disease, or death directly caused by the individual's ~~misconduct or willful negligence~~ is not in line of duty. ~~It is due to misconduct.~~ This is a general rule and must be considered in every case where there might have been ~~misconduct or willful negligence~~. Generally, two issues must be resolved when a soldier is injured, becomes ill, contracts a disease, or dies—(1) whether the injury, disease, or death was incurred or aggravated in the line of duty; and (2) whether it was due to misconduct. When the nature of the injury, illness, or death raises the question of mental soundness, the investigation must also show by substantial and a greater weight of evidence that the Soldier was mentally sound in order to overcome the presumption of "in line of duty." All suicides and self-inflicted injuries raise the question of mental soundness.

##### B-2. Rule 2

Mere violation of military regulation, orders, or instructions, or of civil or criminal laws, if there is no further sign of misconduct, is generally no more than simple negligence. Simple negligence is not misconduct. Therefore, a violation under this rule alone is generally not enough to determine that the injury, disease, or death resulted from misconduct unless the conduct which caused the violation was the proximate cause of the Soldier's injury, disease, or death. ~~However, the violation is one circumstance to be examined and weighed with the other circumstances.~~

##### B-3. Rule 3

Injury, disease, or death that results in the Soldier suffering a permanent disability or being unable to perform military duties ~~incapacitation~~ because of the abuse of alcohol and other drugs is not in line of duty. It is due to misconduct. This rule applies to the effect of the drug on the soldier's conduct, as well as to the physical effect on the soldier's body.

Any wrongfully drug-induced actions that cause injury, disease, or death are misconduct. That the soldier may have had a pre-existing physical condition that caused increased susceptibility to the effects of the drug does not excuse the misconduct.

**B-4. Rule 4**

Injury, disease, or death that results in the soldier suffering a permanent disability or being unable to perform military duties ~~incapacitation~~ because of the abuse of intoxicating liquor is not in line of duty. It is due to misconduct. The principles in Rule 3 apply here. While merely drinking alcoholic beverages is not misconduct, one who voluntarily becomes intoxicated is held to the same standards of conduct as one who is sober. Intoxication does not excuse misconduct. While normally there are behavior patterns common to persons who are intoxicated, some, if not all, of these characteristics may be caused by other conditions. For example, an apparent drunken stupor might have been caused by a blow to the head. Consequently, when the fact of intoxication is not clearly fixed, care should be taken to determine the actual cause of any irrational behavior.

**B-5. Rule 5**

Injury or death incurred while knowingly resisting a lawful arrest, or while attempting to escape from a guard or other lawful custody, is incurred not in line of duty. It is due to misconduct. One who resists arrest, or who attempts to escape from custody, can reasonably expect that necessary force, even that which may be excessive under the circumstances, will be used to restrain him or her and, is committing misconduct ~~acting with willful negligence~~.

**B-6. Rule 6**

Injury or death incurred while tampering with, attempting to ignite, or otherwise handling an explosive, firearm, or highly flammable liquid in disregard of its dangerous qualities is incurred not in line of duty. It is due to misconduct. Unexploded ammunition, highly flammable liquids, and firearms are inherently dangerous. Their handling and use require a high degree of care. A soldier who knows the nature of such an object or substance and who voluntarily or willfully handles or tampers with these materials without authority or in disregard of their dangerous qualities, is misconduct ~~willfully negligent~~. This rule does not apply when a soldier is required by assigned duties or authorized by appropriate authority to handle the explosive, firearm, or liquid, and reasonable precautions have been taken. The fact that the soldier has been trained or worked with the

use or employment of such objects or substances will have an important bearing on whether reasonable precautions were observed.

**B-7. Rule 7**

Injury or death caused by wrongful aggression or voluntarily taking part in a fight or similar conflict in which one is equally at fault in starting or continuing the conflict, when one could have reasonably withdrawn or fled, is not in line of duty. It is due to misconduct. An injury received or death suffered by a soldier in an affray in which he or she is the aggressor is caused by his or her own misconduct. This rule does not apply when a soldier is the victim of an unprovoked assault and sustains injuries or dies while acting in self-defense. The soldier's provocative actions or language, for which a reasonable person would expect retaliation, is a willful disregard for personal safety, and injuries or death directly resulting from them are due to misconduct. When an adversary uses excessive force or means that could not have been reasonably foreseen in the incident, the resulting injury or death is not considered to have been caused by misconduct. Except for self-defense, a soldier who persists in a fight or similar conflict after an adversary produces a dangerous weapon, and a reasonable person would have withdrawn or fled, is acting in willful disregard for safety and is therefore willfully negligent.

**B-8. Rule 8**

Injury or death caused by a soldier driving a vehicle when in an unfit condition of which the soldier was, or should have been aware, is not in line of duty. It is due to misconduct. A soldier involved in an automobile accident caused by falling asleep while driving is not guilty of misconduct ~~willful negligence~~ solely because of falling asleep. The test is whether a reasonable person, under the same circumstances, would have undertaken the trip without expecting to fall asleep while driving. Unfitness to drive may have been caused by voluntary intoxication or use of drugs.

**B-9. Rule 9**

Injury or death because of erratic or reckless conduct, without regard for personal safety or the safety of others, is not in the line of duty. It is due to misconduct. This rule has its chief application in the operation of a vehicle but may be applied with any deliberate conduct that risks the safety of self or others. "Thrill" or "dare-devil" type activities are also examples of when this rule may be applied.

**B-10. Rule 10**

Suicides and self-inflicted injuries are presumed in the line of duty unless



substantial and a greater weight of evidence shows that the soldier was mentally sound at the time of their injury or death. A soldier who commits suicide or self-injures themselves should only be found mentally sound if substantial and a greater weight of evidence shows that the soldier was able to comprehend the nature of their acts and control their actions. A mental defect, disease, or derangement, raises a strong indication that the soldier was not able to comprehend the nature of their acts or to control their actions. Suicide is the deliberate and intentional destruction of one's own life. The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion. Evidence that merely establishes the possibility of suicide, or merely raises a suspicion that death is due to suicide, is not enough to overcome the in line of duty presumption. However, in some cases, a determination that death was caused by a deliberately self-inflicted wound or injury may be based on circumstances surrounding the finding of a body. These circumstances should be clear and unmistakable, and there should be no evidence to the contrary.

**B-11. Rule 11**

Misconduct or willful negligence of another person is attributed to the soldier if the soldier has control over and is responsible for the other person's conduct, or if the misconduct or neglect shows enough planned action to establish a joint venture. The mere presence of the soldier is not a basis for charging the soldier with the misconduct or willful negligence of another, even though the soldier may have had some influence over the circumstances or encouraged it. If the soldier, however, has substantially participated with others in the venture, then that is misconduct.

**B-12. Rule 12**

The line of duty and misconduct status of a soldier injured or incurring disease or death while taking part in outside activities, such as business ventures, hobbies, contests, or professional or amateur athletic activities, is determined under the same rules as other situations. To determine whether an injury or death is due to willful negligence, the nature of the outside activity should be considered, along with the training and experience of the soldier.

**B-13. Rule 13**

When determining whether a soldier is substantially able to perform military duties, the unit commander must determine whether the physical

injury substantially prevents the specific Soldier from completing his or her assigned duties. For example, a soldier while serving as a file clerk pulls his hamstring. The Soldier will be unable to participate in organized physical training (PT) for three weeks, but will be otherwise able to perform his duties as a file clerk. In this case, no LODI would be required since the Soldier can still substantially perform his assigned tasks. On the other hand, if the Soldier was on a training mission providing security for a dismounted patrol, his injury would likely prevent him from completing these tasks and a LODI would be required.

**B-14. Rule 14**

Medical treatment of more than twenty-four hours may or may not require a LODI. The determination of whether the treatment requires a LODI is whether it is medically necessary or was treatment authorized by the command and therefore not medically necessary. Medically necessary treatment in excess of twenty-four hours requires a LODI. Treatment authorized by the command does not require a LODI regardless of the length. For example, a soldier who overdoses on alcohol and is medically held at the hospital for forty-eight hours requires a LODI. A soldier who makes a suicidal gesture, resulting in no permanent disability and is allowed, on the recommendation of behavioral health, to attend a three week inpatient treatment facility would not require a LODI. The treatment at the inpatient facility was authorized by the command and therefore was not medically necessary.

### Appendix I. Proposed Revision to Department of the Army Form 2173

STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS For use of this form, see AR 600-8-4, the proponent agency is DCS, G-1.			
THRU: (Include ZIP Code)		TO: (Include ZIP Code)	
THRU: (Include ZIP Code)		FROM: (Include ZIP Code)	
1. NAME OF INDIVIDUAL EXAMINED (Last, First, and Middle Initial)		2. SSN	3. GRADE
4. ORGANIZATION AND STATION		5. ACCIDENT INFORMATION	
		a. DATE	b. PLACE (City and State)
6. INVESTIGATION OF <input type="checkbox"/> DEATH <input type="checkbox"/> INJURY <input type="checkbox"/> ILLNESS <input type="checkbox"/> DISEASE			
SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR			
7. INDIVIDUAL WAS <input type="checkbox"/> OUT PATIENT <input type="checkbox"/> ADMITTED <input type="checkbox"/> DEAD ON ARRIVAL		8. NAME OF HOSPITAL OR TREATMENT FACILITY <input type="checkbox"/> CIVILIAN <input type="checkbox"/> MILITARY	
9. HOUR AND DATE ADMITTED		10. HOUR AND DATE EXAMINED	
11. DESCRIPTION OF SYMPTOMS AND DIAGNOSIS (for death cases, explain cause of death)			
12. THE FOLLOWING DISABILITY MAY RESULT <input type="checkbox"/> TEMPORARY <input type="checkbox"/> PERMANENT PARTIAL <input type="checkbox"/> PERMANENT TOTAL		13. TEST FOR <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS	14. RESULT OF TEST(S)
15. DATE	16. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR	17. SIGNATURE	
SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER			
18. DUTY STATION <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ON PASS <input type="checkbox"/> ON LEAVE <input type="checkbox"/> ABSENT WITH AUTHORITY: <input type="checkbox"/> ABSENT WITHOUT AUTHORITY		19. HOUR AND DATE OF ABSENCE a. FROM	
		b. TO	
20. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY (Explain in Item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance) YES NO			
21. INDIVIDUAL WAS ON <input type="checkbox"/> ACTIVE DUTY <input type="checkbox"/> ACTIVE DUTY FOR TRAINING <input type="checkbox"/> INACTIVE DUTY TRAINING		22. HOUR AND DATE TRAINING a. BEGAN	
		b. ENDED	
23. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING		DIRECTLY TO TRAINING	DIRECTLY FROM TRAINING
24. MODE OF TRANSPORTATION	25. HOUR BEGINNING TRAVEL	26. DISTANCE INVOLVED	27. NORMAL TIME FOR TRAVEL
28. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY			
29. DETAILS OF ACCIDENT - REMARKS (If additional space is needed, continue on reverse) (Attach enclosures as necessary)			
30. FORMAL LINE OF DUTY INVESTIGATION RECOMMENDED <input type="checkbox"/> YES <input type="checkbox"/> NO		31. RECOMMEND INJURY BE CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY (Not applicable on deaths) <input type="checkbox"/> YES <input type="checkbox"/> NO	
32. DATE	33. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER	34. SIGNATURE	
SECTION III - TO BE COMPLETED BY THE APPOINTING AUTHORITY			
35. AFTER REVIEWING THE FILE AS THE APPOINTING AUTHORITY, I FIND THE LINE OF DUTY DETERMINATION TO BE <input type="checkbox"/> APPROVED - SOLDIER'S INJURY OR ILLNESS WAS INCURRED IN LINE OF DUTY <input type="checkbox"/> I HAVE APPOINTED AN INVESTIGATING OFFICER TO CONDUCT A FORMAL LINE OF DUTY INVESTIGATION <input type="checkbox"/> I HAVE FORWARDED THE FILE TO THE APPROVING AUTHORITY FOR ACTION			
36. DATE	37. TYPED NAME AND GRADE OF APPOINTING AUTHORITY	38. SIGNATURE	

## Current Version of Department of the Army Form 2173

STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS			
For use of this form, see AR 600-9-4, the proponent agency is DCS, G-1.			
THRU: (Include ZIP Code)	TO: (Include ZIP Code)	FROM: (Include ZIP Code)	
1. NAME OF INDIVIDUAL EXAMINED (Last, First, and Middle Initial)		2. SSN	3. GRADE
4. ORGANIZATION AND STATION		5. ACCIDENT INFORMATION	
		a. DATE	b. PLACE (City and State)
SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR			
6. INDIVIDUAL WAS <input type="checkbox"/> ADMITTED <input type="checkbox"/> DEAD ON ARRIVAL	<input type="checkbox"/> OUT PATIENT	7. NAME OF HOSPITAL OR TREATMENT FACILITY <input type="checkbox"/> CIVILIAN <input type="checkbox"/> MILITARY	
8. HOUR AND DATE ADMITTED		9. HOUR AND DATE EXAMINED	
10. NATURE AND EXTENT OF <input type="checkbox"/> INJURY <input type="checkbox"/> DISEASE <input type="checkbox"/> RESULTING IN DEATH (Explain)			
11. MEDICAL OPINION: a. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (Specify):			
b. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (Attach Psychiatric evaluation if appropriate).			
c. INJURY <input type="checkbox"/> IS <input type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.			
d. INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN LINE OF DUTY. BASIS FOR OPINION:			
12. THE FOLLOWING DISABILITY MAY RESULT <input type="checkbox"/> TEMPORARY <input type="checkbox"/> PERMANENT PARTIAL <input type="checkbox"/> PERMANENT TOTAL		13. BLOOD ALCOHOL TEST MADE <input type="checkbox"/> YES <input type="checkbox"/> NO	14. NO. OF MG ALCOHOL/100 ML BLOOD
15. DETAILS OF ACCIDENT OR HISTORY OF DISEASE (how, where, when)			
16. DATE	17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR		18. SIGNATURE
SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER			
19. DUTY STATION <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ABSENT WITH AUTHORITY: <input type="checkbox"/> ON PASS <input type="checkbox"/> ON LEAVE		20. HOUR AND DATE OF ABSENCE a. FROM <input type="checkbox"/> b. TO <input type="checkbox"/>	
21. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY (Explain in item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance) <input type="checkbox"/> YES <input type="checkbox"/> NO			
22. INDIVIDUAL WAS ON <input type="checkbox"/> ACTIVE DUTY <input type="checkbox"/> ACTIVE DUTY FOR TRAINING <input type="checkbox"/> INACTIVE DUTY TRAINING		23. HOUR AND DATE TRAINING a. BEGAN <input type="checkbox"/> b. ENDED <input type="checkbox"/>	
24. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING <input type="checkbox"/> DIRECTLY TO TRAINING <input type="checkbox"/> DIRECTLY FROM TRAINING			
25. MODE OF TRANSPORTATION	26. HOUR BEGINNING TRAVEL	27. DISTANCE INVOLVED	28. NORMAL TIME FOR TRAVEL
29. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY			
30. DETAILS OF ACCIDENT - REMARKS (If additional space is needed, continue on reverse) (Attach inclosures as necessary)			
31. FORMAL LINE OF DUTY INVESTIGATION REQUIRED <input type="checkbox"/> YES <input type="checkbox"/> NO		32. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY (Not applicable on deaths) <input type="checkbox"/> YES <input type="checkbox"/> NO	
33. DATE	34. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER		35. SIGNATURE

DA FORM 2173, OCT 1972

REPLACES DA FORM 2173, 1 JUN 66, WHICH IS OBSOLETE.

APD PE v2.01E8

**TRADITIONAL COMBATANT COMMANDER ACTIVITIES:  
ACKNOWLEDGING AND ANALYZING COMBATANT  
COMMANDERS' AUTHORITY TO INTERACT WITH  
FOREIGN MILITARIES**

MAJOR ANTHONY V. LENZE\*

*[P]lanning staffs lack a fundamental understanding of security cooperation concepts and programs. This knowledge deficit limits their ability to develop efficient and effective ways to employ military means during steady-state operations in pursuit of theater strategic end states.<sup>1</sup>*

## I. Introduction

Imagine you are an operational law attorney at an Army Service Component Command (ASCC). You attend an operational planning team<sup>2</sup> (OPT) meeting as a member of the Future Operations Cell.<sup>3</sup> You

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<sup>1</sup> TERRY L. BAGGETT, JOINT ADVANCED WARFIGHTING SCHOOL, SECURITY COOPERATION AND PROFESSIONAL MILITARY EDUCATION: DEVELOPING BETTER THEATER CAMPAIGN PLANNERS 3 (2012).

<sup>2</sup> DEPLOYABLE TRAINING DIVISION JOINT STAFF J7, DESIGN AND PLANNING INSIGHTS AND BEST PRACTICES FOCUS PAPER 21 (2013), [http://www.dtic.mil/doctrine/fp/fp\\_design\\_planning.pdf](http://www.dtic.mil/doctrine/fp/fp_design_planning.pdf) (an operational planning team (OPT) utilizes members from various working groups, as well as members from the future operations planning cell).

<sup>3</sup> See *id.* at 28 (spreading plans across three event horizons: current operations, future operations, and future plans). See U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 1-42 (C1, 11 May 2015) (“The future operations cell is responsible for planning operations in the mid-range planning horizon.”).

learn from the OPT that your multi-star commander recently acquired four mobile battlefield command centers from the Defense Logistics Agency.<sup>4</sup> These mobile command centers, known as “JOC-in-a-Box” or JIABs, provide a wide range of cutting edge communication features necessary for providing commanders a real-time understanding of current operations.<sup>5</sup> The JIABs also have the ability to organically generate a secure wireless internet signal that connects to a set of accompanying laptops and cell phones. Most importantly, each JIAB can be stored in a space no larger than the bed of a pick-up truck and assembled in a matter of hours without any technical expertise. The OPT lead informs the group that the commander is set on displaying this new “JOC-in-a-Box” for as many partner militaries from developing countries as possible.<sup>6</sup> He believes our partners will require at least a week’s worth of system familiarization in order to understand its true operational value. As a benefit to our command, demonstrating the features of the JIAB will require U.S. personnel to be familiar enough with the system to operate it in a foreign country. Familiarity in operating this new technology in an austere environment is a command priority.<sup>7</sup>

The OPT understands that the new Section 312 authority<sup>8</sup> enables the

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<sup>4</sup> The Defense Logistics Agency (DLA) is a Department of Defense (DoD) combat support agency that provides the DoD with a full spectrum of logistics, acquisition and technical services. DEFENSE LOGISTICS AGENCY, <http://www.dla.mil/AtaGlance.aspx> (last visited Nov. 28, 2017). The DLA “sources and provides nearly all of the consumable items America’s military forces need to operate – from food, fuel and energy to uniforms, medical supplies and construction material.” *Id.*

<sup>5</sup> The mobile battlefield command centers employ a Joint Operational Center (JOC) for the fictional “JOC-in-a-box” concept. A JOC is “an enduring functional organization, with supporting staff, designed to perform a joint function” within a joint force headquarters. JOINT CHIEFS OF STAFF, JOINT PUB. 3-33, JOINT TASK FORCE HEADQUARTERS II-5(b)(1) (30 July 2012).

<sup>6</sup> Information exchange interactions are common within the Army’s Operating Concept. U.S. DEP’T OF ARMY, PAM. 525-3-1, THE U.S. ARMY OPERATING CONCEPT para. 3-3(a) (31 Oct. 2014) (“Conventional and Special Forces contribute to a global land network of relationships resulting in early warning, indigenous solutions, and informed campaigns. Regional engagement sets favorable conditions for a commitment of forces if diplomacy and deterrence fail.”).

<sup>7</sup> “The Army Service Component Commands (ASCC) exercise mission command under the authority and direction of combatant commanders to whom they are assigned and in accordance with the policies and procedures established by the SECDEF.” U.S. DEP’T OF ARMY, REG. 10-87, ARMY COMMANDS, ARMY SERVICE COMPONENT COMMANDS, AND DIRECT REPORTING UNITS para. 1-1(f)(2) (11 Dec. 17).

<sup>8</sup> National Defense Authorization Act (NDAA) for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2943 (2016) (authorizes the payment of personnel expenses for defense personnel of foreign militaries for security cooperation under Section 312 of Chapter 16, title 10

Secretary of Defense (SECDEF) to pay for friendly foreign military personnel to travel to U.S. installations for theater security cooperation. However, the authority to fund the travel of friendly foreign military personnel is not relevant because the OPT wants to bring the JIABs directly to the foreign military partners. The OPT believes that moving the JIABs to secure locations within the area of responsibility (AOR) is a more efficient and effective way of displaying them. Coincidentally, the command operates four cooperative security locations (CSL)<sup>9</sup> within the AOR that have the capacity for JIAB demonstrations. Each CSL is also located near a major metropolitan area that makes travel convenient and cost-effective for foreign militaries. Demonstrating the incredible utility of a JIAB in an austere location will benefit not only U.S. personnel, but it will also display the JIAB's ability to operate in real-world conditions where low electricity levels, inclement weather, and lack of internet communications all persist.

You learn that the Air Force component command has already approved the shipment of JIABs to the CSLs on a space-available basis.<sup>10</sup> The OPT believes that each demonstration requires at least ten U.S. Army personnel and is best suited for groups of 20-30 foreign military officers at a time. Through the planning process, you come to realize that a JIAB demonstration will convey no training benefit to the foreign military audiences since only U.S. personnel will operate the equipment. As you scramble to jot down notes, you hear one OPT member sneer that two-star commanders can do whatever they want with Operations and Maintenance (O&M) money.<sup>11</sup> Then a second OPT member chimes in that it is all legal

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United States Code). Section 312 consolidates the authorities previously provided under 10 U.S.C. §§ 1050, 1050a, 1051, and 1051a. *Id.*

<sup>9</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP'T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 52 (1 Aug. 2017) [hereinafter JOINT PUB. 1-02] (Defining a cooperative security location as a "facility located outside the United States and US territories with little or no permanent US presence, maintained with periodic service, contractor, or host-nation support."). Cooperative security locations provide contingency access, logistic support, and rotational use by operating forces and are a focal point for security cooperation activities." *Id.*

<sup>10</sup> See generally ANDREW FEICKERT, CONG. RESEARCH SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS (2013). Each geographic combatant command within the DoD contains an Air Force service component command. *Id.*

<sup>11</sup> The DoD normally finances expenses with Operations and Maintenance (O&M) money. See U.S. DEP'T OF DEF. 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 01, para. 010201 (Oct. 2008).

as long as it is not “Big T”<sup>12</sup> stuff. The OPT lead—a seasoned security cooperation planner—poses a pointed question to you: Do our military-to-military contact authorities allow the command to provide week-long JIAB demonstrations to a series of foreign military partners?

Analyzing military-to-military contacts is a difficult task for judge advocates and lawyers across the Department of Defense (DoD).<sup>13</sup> In general, military-to-military contacts are interactions with foreign militaries that promote national security goals and strengthen relationships with foreign partners.<sup>14</sup> The DoD’s geographic combatant commands (COCOMs)<sup>15</sup> use military-to-military contacts in pursuit of their theater campaign plans.<sup>16</sup> Despite the COCOMs’ widespread use of military-to-military contacts, understanding what actually constitutes one of these

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<sup>12</sup> The Army colloquially refers to training foreign security forces as “Big T” training. CONTRACT & FISCAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK 10-7 (2016) [hereinafter FISCAL LAW DESKBOOK].

<sup>13</sup> DEF. INST. OF SEC. COOPERATION STUD., THE MANAGEMENT OF SECURITY COOPERATION GREENBOOK 1-25 (37.0 ed. 2017) [hereinafter GREENBOOK] (“There can be some confusion about the definition of military-to-military contacts programs because there is no single doctrinal definition . . . it is not a clearly defined program.”).

<sup>14</sup> *Id.* at 1-25 (Military-to-military contacts are “designed to encourage a democratic orientation of defense establishments and military forces of other countries.”); *see also* U.S. DEP’T OF DEF., QUADRENNIAL DEFENSE REVIEW 16 (2014) (“The U.S. military forward and rotationally deploys forces – which . . . conduct training, exercises, and other forms of military-to-military [contacts] – to build security globally in support of our national security interests.”). *Cf.* U.S. DEP’T. OF DEF., Implementation of Section 8057, DoD Appropriations Act of 2014 at Tab A (14 Aug. 2014) [hereinafter DOD LEAHY LAW] (defining military-to-military contacts as an individual and collective interface activity where the primary focus is not training foreign security forces).

<sup>15</sup> For the purposes of this paper, the author uses the terms geographic combatant command (COCOM) and combatant commanders interchangeably. Though these terms are not synonymous, they are relatively indistinct when discussing mission intent and authority. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-0, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES (25 Mar. 2013) (“[combatant command] provides full authority for a [combatant commander] to perform those functions of command over assigned forces . . .”).

<sup>16</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-22, ARMY SUPPORT TO SECURITY COOPERATION para. 1-21 (22 Jan. 2013) [hereinafter FM 3-22] (“The Army . . . conduct[s] military engagements with partners, fostering mutual understanding through military-to-military contacts, and helping partners build the capacity to defend themselves.”). Each geographic COCOM publishes a theater campaign plan specific to its area of responsibility. JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING II-5(d)(1) (11 Aug. 2011) [hereinafter JOINT PUB. 5-0] (stating theater campaign plans are a COCOM’s centerpiece for its planning construct and functional strategies).



activities can be vexing.<sup>17</sup>

A number of issues hinder a judge advocate's ability to conceptualize and analyze the proper legal bounds of military-to-military contacts. At the outset, the authority for COCOMs to conduct military-to-military contacts is not readily apparent. Created in 1986,<sup>18</sup> the COCOMs' powers and duties are set forth in 10 U.S.C. §164.<sup>19</sup> These authorities include command and control of all U.S. missions and forces within the respective AOR.<sup>20</sup> But a specific authority for COCOMs to employ forces to interact with foreign militaries is not found in this statute.<sup>21</sup> So in 1994, Congress passed 10 U.S.C. §168 with the intent of authorizing military-to-military contacts. However, this statute went unfunded<sup>22</sup> and still did not provide the COCOMs with specific authorities.<sup>23</sup> This led the Joint Staff to issue specific mission authority to the COCOMs for military-to-military contacts.<sup>24</sup>

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<sup>17</sup> See generally 10 U.S.C. § 168, *repealed* by National Defense Authorization Act of 2017 § 1253, S. 2943 (2016). Section 168 defined military-to-military contacts as “contacts between members of the armed forces and members of foreign armed forces through [traveling contact teams, military liaison teams, exchanges of civilian or military personnel, seminars and conferences]” and other similar activities. *Id.* However, this statute did not provide any details beyond listing examples of military-to-military contacts. *Id.*

<sup>18</sup> Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992, 1012 (1986).

<sup>19</sup> The authority of combatant commanders includes six command functions, including “organizing commands and forces, and employing forces . . . to carry out missions *assigned* to the command.” 10 U.S.C. § 164(c)(1)(C)-(D) (2017) (emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* The authority to employ forces to interact with foreign militaries is not an inherent authority for combatant commanders. *Id.* Instead, combatant commanders require an assigned mission to employ and organize forces against. *Id.*

<sup>22</sup> Congress never appropriated funds for 10 U.S.C. § 168. DoD Appropriations Act of 1995, Pub. L. No. 103-355, 108 Stat. 2599 (1994). Without a specific appropriation, no activities under 10 U.S.C. § 168 could be funded due to its limiting clause. 10 U.S.C. § 168(e)(B) (1994). The House conference report accompanying the Appropriations Act of 1995 directed a reduction of \$46,300,000 in the Military-to-Military Contact Program. H. R. REP. No. 103-747, at 63 (1994). See also Colonel Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV., 11 n.52 (1998).

<sup>23</sup> See 10 U.S.C. § 168(a) (2016) (providing program authority for Section 168 to the Secretary of Defense (SECDEF), not the combatant commanders).

<sup>24</sup> E-mail from William Moxley (Deputy General Counsel, DoD) to Timothy Pendolino (19 July 2012, 03:33:00 EST) [hereinafter Moxley E-mail] (on file with author) (“Thereafter, the Department decided to no longer request funds for [S]ection 168. Instead, the decision was made to fund what is now known as [traditional combatant commander activities][.]”).

Published in 1995, the Joint Staff established Traditional Combatant Commander Activities (TCA) to empower COCOMs to execute military-to-military contacts within their respective AOR.<sup>25</sup> Through a series of three Joint Staff orders, TCA permits COCOMs to interact with foreign militaries and to promote regional and national security goals.<sup>26</sup> These orders establish foreign military interactions as a COCOM responsibility<sup>27</sup> and provide a funding mechanism<sup>28</sup> for military-to-military contacts across the DoD. Despite a recent overhaul to security cooperation authorities,<sup>29</sup> TCA is still the primary and exclusive means for a number of military-to-military contact events<sup>30</sup>—namely, traveling contact teams,<sup>31</sup> information exchanges,<sup>32</sup> and familiarization visits.<sup>33</sup>

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<sup>25</sup> VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING (2 May 1995) [hereinafter TCA ORDER 1] (stating that Traditional Combatant Commander Activities (TCA) funding fulfills a COCOM's long-standing requirement to interact with foreign militaries).

<sup>26</sup> *See id.* *See also* VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING (18 Oct. 1996) [hereinafter TCA ORDER 2]; *see also* VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING (19 Aug. 1996) [hereinafter TCA ORDER 3].

<sup>27</sup> TCA ORDER 1, *supra* note 25, para. 2 (“The [COCOMs] will be responsible for direct oversight and execution of [TCA] within established policy and legal guidelines.”). A combatant commander’s mission authority stems from appropriate orders and other directives. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS xii (11 Aug. 2011) [hereinafter JOINT PUB. 3-0].

<sup>28</sup> *See, e.g.*, HEADQUARTERS, U.S. EUROPEAN COMMAND OFFICE OF STRATEGY IMPLEMENTATION, THEATER SECURITY COOPERATION RESOURCES HANDBOOK 106 (21 Oct. 2016) [hereinafter EUCOM TSC HANDBOOK] (showing an average of five million dollars in TCA funds have been allocated to the U.S. European Command for TCA on an annual basis since 2010).

<sup>29</sup> U.S. DEP’T OF DEF., OFFICE OF THE UNDER SEC. OF DEF., EXECUTION OF FISCAL YEAR 2017 SECURITY COOPERATION ACTIVITIES 1 (3 Feb. 2016) [hereinafter FY17 INTERIM IMPLEMENTATION FOR SC ACTIVITIES] (“The [2017 NDAA] includes a number of changes to existing security cooperation authorities, mandates changes to the oversight and management of security cooperation, and directs improvements to the [DoD] workforce.”).

<sup>30</sup> With the repeal of 10 U.S.C. §168, express authority for traveling contact teams, information exchanges, and familiarization visits exists only within TCA. *Cf.* GREENBOOK, *supra* note 13, at 1-25 (equating 10 U.S.C. §168 as TCA).

<sup>31</sup> A traveling contact team is listed as a military-to-military contact activity within both 10 U.S.C. §168 and TCA. *See* 10 U.S.C. § 168 (2016); *see also* TCA ORDER 2, *supra* note 26.

<sup>32</sup> An information exchange is listed as a military-to-military contact activity only within TCA. *See* TCA ORDER 2, *supra* note 26. Implicitly, an information exchange event occurs in a host nation as TCA authorizes COCOMs to interact with foreign militaries in their respective area of responsibility. *See* TCA Order 1, *supra* note 25, para. 5.

<sup>33</sup> JOINT STAFF MESSAGE, HUMAN RIGHTS VERIFICATION FOR DoD-FUNDED TRAINING WITH FOREIGN PERSONNEL para. 3(c) (21 Dec. 1998); *see also* TCA ORDER 2, *supra* note 26.

Recently, Congress reformed security cooperation authorities in the 2017 National Defense Authorization Act (NDAA).<sup>34</sup> The reforms consolidated a number of authorities and repealed others, including 10 U.S.C §168.<sup>35</sup> As a part of the new reforms, the 2017 NDAA provides new sections specific to funding events listed within TCA such as conferences, personnel exchanges, and the travel of foreign defense personnel.<sup>36</sup> But these reforms did not address all the military-to-military contact activities organic to TCA.<sup>37</sup> As such, the military-to-military contacts that are organic to TCA are unchanged by the 2017 NDAA's reforms.<sup>38</sup> By excluding these events from the new provisions created in the 2017 NDAA, Congress indirectly created a subset of military-to-military contacts that are now "TCA-exclusive."<sup>39</sup>

Congress's decision not to include what are now TCA-exclusive activities within the new reforms is significant because these TCA-exclusive activities are commonly used by COCOMs to interact with foreign forces.<sup>40</sup> In 2015 alone, U.S. Africa Command directed its components to execute over 500 traveling contact team missions and over 100 familiarization visits.<sup>41</sup> By not including these TCA-exclusive activities in the recent security cooperation reforms, Congress essentially magnified TCA's importance to the COCOMs.

Yet, TCA is peculiarly absent from most DoD or service doctrine.<sup>42</sup>

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26. Familiarization visits are activities similar to the individual and collective interface activities contemplated under TCA. *See id.* They are distinct from familiarization *training* events because familiarization visits do not increase the capabilities of a foreign force. *See infra* note 187 (emphasis added) (for a discussion of the origin of familiarization training).

<sup>34</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 § 1253, 130 Stat. 2943 (2016).

<sup>35</sup> *Id.* § 1253.

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* §§ 311-12 (addressing only the payment of personnel exchanges and the payment of foreign defense personnel expenses for travel related to security cooperation). These sections do not address TCA events such as traveling contact teams, information exchanges, or familiarization visits. *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> This paper introduces the term "TCA-exclusive."

<sup>40</sup> *See, e.g.,* HEADQUARTERS, U.S. AFRICA COMMAND, FY-15 MILITARY TO MILITARY TASKING ORDER, Annex A (28 Aug. 2014).

<sup>41</sup> *Id.*

<sup>42</sup> Doctrine does not provide any definitions for military-to-military contacts and doctrine generally does not discuss TCA. *See generally* JOINT PUB. 1-02, *supra* note 9 (providing no definition for TCA); *see generally* U.S. DEP'T OF ARMY, REG. 11-31, ARMY SECURITY COOPERATION POLICY (21 Mar. 13) [hereinafter ARMY REG. 11-31] (providing no references to TCA); *see* U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 4950.4B, JOINT

Moreover, DoD doctrine does not define the events that constitute military-to-military contacts.<sup>43</sup> Even the TCA Orders do not provide definitions; the orders merely provide a non-exhaustive list of authorized activities.<sup>44</sup> With this, a number of misconceptions related to military-to-military contacts persist, ranging from mistaking 10 U.S.C. §168 as a valid authority<sup>45</sup> to associating military-to-military contact events with training foreign forces.<sup>46</sup>

The lack of definitions and common doctrine for TCA-exclusive military-to-military contacts is counter-productive to efficient and effective theater security cooperation. The theater decision makers—combatant commanders—demand clear guidance and counsel in executing their theater campaign plans. Without a true understanding of these TCA-exclusive activities, planning staffs cannot fully appreciate the limits of COCOM authority. Meanwhile, funding interactions with foreign militaries are ripe for Congressional scrutiny.<sup>47</sup> At a time when each dollar spent overseas can wind up under a magnifying glass, the DoD is still struggling to understand its military-to-military contact

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SECURITY COOPERATION EDUCATION AND TRAINING para. 4-46 (3 Jan. 2011) [hereinafter NAVY INSTR. 4950.4B] (mentioning TCA briefly and only with regard to Marine Corps teams). However, a meager discussion of TCA can be found buried in an Army field manual for security cooperation. See FM 3-22, *supra* note 16, at 2-28 (reiterating text found in the TCA Orders and limiting—without explanation—the list of activities that may be funded with TCA to only military liaison teams, exchanges of military and civilian personnel, seminars, and conferences). Other DoD publications may mention TCA but without referencing the orders or providing any context. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-06, FINANCIAL MANAGEMENT SUPPORT TO JOINT OPERATIONS at E-2 (11 January 2016) (parroting back the text of the TCA Orders without any commentary or practical guidance).

<sup>43</sup> See, e.g., FM 3-22, *supra* note 16, at 2-18.

<sup>44</sup> See TCA ORDER 1, *supra* note 25; see TCA ORDER 2, *supra* note 26, see TCA ORDER 3, *supra* note 26.

<sup>45</sup> Often, 10 U.S.C. §168 was mistakenly cited as a valid authority. See BOLKO J. SKORUPSKI AND NINA M. SERAFINO, CONG. RESEARCH SERV., R44602, DO D SECURITY COOPERATION: AN OVERVIEW OF AUTHORITIES AND ISSUES *passim* (2016) [hereinafter CRS-R44602]; see CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, THE OPERATIONAL LAW QUARTERLY at 12 (25 Feb. 2016) (“The authority to conduct a [subject matter expert exchange] is derived from 10 U.S.C. §168, military-to-military contacts and comparable activities.”).

<sup>46</sup> U.S. ARMY COMBINED ARMS CTR, CTR FOR ARMY LESSONS LEARNED BULLETIN at 14 (Mar. 2016) (“Military-to-[m]ilitary funds . . . allow the [ASCC] to send small teams for familiarization training with partner nation armies.”).

<sup>47</sup> See CRS-R44602, *supra* note 45, at 17.

authorities.<sup>48</sup>

The sparse guidance underlying military-to-military contacts does not match their strategic importance. To this end, this paper will argue that the DoD's ability to conduct TCA-exclusive military-to-military contacts still rests in TCA and that commanders charged with planning and executing these events possess the requisite authority to decide their associated limitations. It is the obligation of the actors within the planning process to fully grasp the content and objectives of a military-to-military contact event and, with the help of judge advocates, apply the proper corresponding legal principles.

Part I of this paper will provide a brief overview of security cooperation and then highlight the strategic objectives of post-Cold War military-to-military contacts in an evolving security landscape. Part II of this paper will flesh out the authority to conduct military-to-military contacts and delve into the distinct legal differences between a training event (such as those discussed by the Government Accountability Office (GAO) in the Honorable Bill Alexander Opinion) and a mere interaction with a foreign force. This section will explore the use of O&M money for TCA and shed light on the fact that TCA-exclusive events are within the discretion of the COCOM. Returning to the hypothetical question raised in the introduction, Part III will apply TCA to the series of proposed military-to-military contacts. This paper will conclude by arguing that combatant commanders and their planning staffs hold the requisite authority and are best situated to determine the scope of a military-to-military contact. Further, the DoD should clearly articulate COCOM authority to conduct TCA-exclusive events by updating its guidance for this vital area of security cooperation.

## II. Background

Over the past decade, Congress has increased the DoD's role in

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<sup>48</sup> See DAVID E. THALER ET AL., RAND NAT'L DEF. RESEARCH INST., FROM PATCHWORK TO FRAMEWORK: A REVIEW OF TITLE 10 AUTHORITIES FOR SECURITY COOPERATION 17-18 (2016) [hereinafter PATCHWORK] ("Prior to 2012, SC personnel in the [COCOMs] had used [10 U.S.C. §168] to apply TCA O&M funds to mil-mil events . . . . In mid-2012[] . . . the Office of the General Counsel interpreted the statute as requiring a yearly appropriation that is not delegated to the [COCOMs], but to the SECDEF. The U.S. European Command (EUCOM) and other [COCOMs] stopped using the authority and had to cancel events or quickly revise mil-mil event funding plans in mid-stream. This has led some to ask, 'Is 168 a valid authority?'").

engaging with foreign forces through security cooperation.<sup>49</sup> Today, the DoD conducts security cooperation events in more than 130 countries each year, totaling between 3000 and 4000 events.<sup>50</sup> The aims of security cooperation are vast, from building defense relationships with allies to promoting specific U.S. security interests.<sup>51</sup> Some of the methods used for security cooperation include various types of training, exercises, and military-to-military contacts that are executed in accordance with each combatant command's theater campaign plan.<sup>52</sup> The military-to-military contacts help create international partnerships by fostering mutual understanding and building positive relations toward security.<sup>53</sup>

The COCOMs tailor military-to-military contacts to their respective theater campaign plans.<sup>54</sup> The U.S. Africa Command uses military-to-

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<sup>49</sup> NINA M. SERAFINO, CONG. RESEARCH SERV., R44444, SECURITY ASSISTANCE AND COOPERATION: SHARED RESPONSIBILITY OF THE DEPARTMENTS OF STATE AND DEFENSE 1 (2016) [hereinafter CRS-R44444]. See generally U.S. DEP'T OF ARMY, PAM. 11-31, ARMY SECURITY COOPERATION HANDBOOK para. 2-3 (6 Feb. 2015) [hereinafter DA PAM. 11-31] (“[security cooperation] activities conducted across all phases of military operations . . . promote overall U.S. security interests . . .”); Captain Robert J. Kasper, Jr., *Direct Training and Military-to-Military Contact Programs: The CINC's Peacetime Enablers*, 42 Naval L. Rev. 189, 192 (1995).

<sup>50</sup> *Dep't of Def. and Security Cooperation: Improving Prioritization, Authorities, and Evaluations: Hearing Before the Subcomm. on Emerging Threats of the S. Comm. on Armed Services*, 114th Cong. 1 (2016) (statement of Michael J. McNerney).

<sup>51</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-20, SECURITY COOPERATION at I-1 (23 May 2017) (“[Security Cooperation] strengthens and expands the existing network of US allies and partners, which improves the overall warfighting effectiveness of the joint force and enables more effective multinational operations.”). See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-22, FOREIGN INTERNAL DEFENSE (12 July 2010) [hereinafter JOINT PUB. 3-22]. Security cooperation also includes “develop[ing] allied and friendly military capabilities for self-defense and multinational operations, and provid[ing] U.S. forces with peacetime and contingency access to a host nation.” *Id.*

<sup>52</sup> U.S. DEP'T OF DEF., DIR. 5132.03, DoD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION 3 (29 Dec. 2016) [hereinafter DODD 5132.03] (“Geographic combatant command theater campaign plans . . . serve as the primary vehicle for the development and articulation of integrated DoD security cooperation plans.”). See also DEFENSE SECURITY COOPERATION AGENCY, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL para. C1.3.2.13. (30 Apr. 2012) [hereinafter SAMM] (“The combatant commanders develop campaign plans to conduct [security cooperation] programs and activities[.]”).

<sup>53</sup> General Raymond T. Odierno, CSA Editorial: Prevent, Shape, Win, U.S. Army (Oct. 16, 2011), [https://www.army.mil/article/71030/CSA\\_Editorial\\_Prevent\\_shape\\_win](https://www.army.mil/article/71030/CSA_Editorial_Prevent_shape_win) [hereinafter GEN Odierno Speech] (“We do that by engaging with our partners, fostering mutual understanding through military-to-military contacts, and helping partners build the capacity to defend themselves. This is an investment in the future, and an investment we cannot afford to forego.”).

<sup>54</sup> DODD 5132.03, *supra* note 52; see SAMM, *supra* note 52, at C11.8.6.

military contacts mostly in the form of traveling contact teams of one to two U.S. personnel.<sup>55</sup> The U.S. European Command uses military-to-military contacts to promote interoperability between North Atlantic Treaty Organization allies.<sup>56</sup> The U.S. Pacific Command refers to its military-to-military contacts as subject matter expert exchanges<sup>57</sup> for its Asia Pacific Regional Initiative.<sup>58</sup> The use of military-to-military contacts within security cooperation is not a new concept.<sup>59</sup> Military-to-military contacts have consistently been a part of national security strategies since the end of the Cold War.<sup>60</sup>

#### A. The Strategic Importance of Military-to-Military Contacts

The years following the collapse of the Soviet Union began a momentous transition for the United States and the DoD. On the one hand, old adversaries dissolved away, bringing hope for new relationships and

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<sup>55</sup> HEADQUARTERS, U.S. AFRICA COMMAND, FY-16 MILITARY TO MILITARY TASKING ORDER (29 Sept. 2015); HEADQUARTERS, U.S. AFRICA COMMAND, COMMAND INSTRUCTION 3900.12, MILITARY TO MILITARY CONTACT PROGRAM (1 Aug. 2016) [hereinafter ACI 3900.12].

<sup>56</sup> See SAMM, *supra* note 52, at C11.10.

<sup>57</sup> U.S. DEP'T OF ARMY, REG. app. B-7(d) 34-1, MULTINATIONAL FORCE INTEROPERABILITY (10 Jul. 15) (stating that subject matter expert exchanges (SMEEs) enhance Army-to-Army contacts and mutual understanding with partner militaries). This regulation, does not define military-to-military contacts nor discuss TCA. *Id.* Moreover, its description of SMEEs limits the duration of such an interaction to a single day. *Id.* The regulation does not reconcile the difficulty in building relationships and fostering mutual understanding in only one meeting and infers that multi-day SMEEs evolve into impermissible training events. *See id.*

<sup>58</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 8082, 129 Stat. 2242 (2015). See E-mail from Pamela Harms (Attorney Advisor, U.S. Army Pacific) to Anthony Lenze (13 December 2017, 19:45:00 EST) (on file with author) (stating U.S. Army Pacific's SMEEs for the Asia Pacific Regional Initiative are funded through the Department of the Army, not the COCOM). Ms. Harms' e-mail highlights that not all military-to-military contacts are funded through TCA. Due to the lack of DoD guidance, a service-funded military-to-military contact event is just as troublesome to define as a TCA funded event.

<sup>59</sup> Carol Atkinson, *Constructivist Implications of Material Power: Military Engagement and the Socialization of States, 1972-2000*, 50 *International Studies Quarterly* 509, 509-510 (2006) [hereinafter Atkinson] (discussing the United States' consistent practice of using military-to-military contacts as a national strategy).

<sup>60</sup> *Id.* See generally ROBERT T. COSSABOOM, *THE JOINT CONTACT TEAM PROGRAM, CONTACTS WITH FORMER SOVIET REPUBLICS AND WARSAW PACT NATIONS 1992-1994* (1997) (providing a detailed account of military-to-military contacts early in their development).

free markets.<sup>61</sup> However, new foes emerged around the same time to agitate U.S. national security interests in the Middle East.<sup>62</sup> In response, U.S. military leaders poised themselves for a new approach to the nation's defense strategy.

Starting in 1990, the DoD began regular use of military-to-military contacts as peacetime engagements.<sup>63</sup> Through a series of military-to-military contacts, the DoD engaged the Soviets and Chinese at the defense minister levels.<sup>64</sup> The contacts with the Soviets opened a dialogue to promote understanding between the two nations; with the Chinese, the contacts balanced a series of diplomatic and political ups and downs.<sup>65</sup>

The United States employed the use of military-to-military contacts with other nations too. In its annual report to Congress, the SECDEF noted the strategic importance of the U.S. military-to-military relations in Latin and South America as well as in the Middle East.<sup>66</sup> These contacts and the development of military relationships marked a new method to deter threats and promote regional peace and security. This approach was particularly successful in building relationships that encouraged the

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<sup>61</sup> President George H.W. Bush, Televised Address (Dec. 25, 1991) *in* N.Y. TIMES, Dec. 26, 1991 ("We stand tonight before a new world of hope and possibilities . . . based on commitments and assurances given to us by some of these states, concerning nuclear safety, democracy, and free markets, I am announcing some important steps designed to begin this process.").

<sup>62</sup> *National Security Directive 54*, THE WHITE HOUSE, Responding to Iraqi Aggression in the Gulf (Jan. 15, 1991), <https://nsarchive.gwu.edu/NSAEBB/NSAEBB39/document4.pdf>.

<sup>63</sup> U.S. DEP'T OF DEF., ANNUAL REPORT TO THE CONGRESS 45-46 (1990), [http://history.defense.gov/Portals/70/Documents/annual\\_reports/1990b\\_DoD\\_AR.pdf?ver=2014-06-24-151718-437](http://history.defense.gov/Portals/70/Documents/annual_reports/1990b_DoD_AR.pdf?ver=2014-06-24-151718-437). For example, there were three meetings between the United States and Soviet Union at the defense minister level. Additionally, the Secretary of the Air Force visited the Soviet Union and the Chief of the Soviet General Staff visited the United States. *Id.* The report does not explain how the contacts were funded. *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW sec. III (1997) <http://www.dod.gov/pubs/qdr/>.

[T]he [DoD] has an essential role to play in shaping the international security environment in ways that promote and protect U.S. national interests . . . the [DoD] employs a wide variety of means including: forces permanently, stationed abroad; . . . combined training, or military-to-military interactions; and programs such as defense cooperation, security assistance cooperation.

*Id.*



development of democratic institutions and deterrence of nuclear threats.<sup>67</sup>

#### B. Post-Cold War Opportunities for Military-to-Military Contacts

As sovereign countries materialized from what was once the former Soviet Union, Congress found new opportunities to promote regional and national security. One such program was the Cooperative Threat Reduction (CTR) program.<sup>68</sup> Senators Samuel Nunn and Richard Lugar proposed the CTR program to aid former Soviet Union states with dismantling weapons of mass destruction and their associated infrastructure.<sup>69</sup> Paired with a non-proliferation agenda, Congress set aside 15 million dollars for military-to-military contacts with the newly formed nations previously under the control of the Soviet Union.<sup>70</sup> By 1995, the United States was engaging with Russian and other former Soviet-states in over 100 military-to-military contacts.<sup>71</sup> Increasing in number over time, the contacts helped integrate the Ukraine into western security structures.<sup>72</sup> In 1999, Vice President Gore praised the program as the best example of the Clinton administration's military strategy of "Shape, Prepare, and Respond."<sup>73</sup>

Along these same lines, President Clinton also engaged with China to promote greater military-to-military contacts between the two countries.<sup>74</sup> U.S. military attachés posted to China found that the military-to-military

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<sup>67</sup> Atkinson, *supra* note 59, at 515-16 (discussing the positive effect of military-to-military contacts on Soviet and former Soviets states).

<sup>68</sup> Soviet Nuclear Threat Reduction Act of 1991, Pub. L. No. 102-228, 105 Stat. 1693 (1991). Congress renamed this act in 1993 when it established the Cooperative Threat Reduction Program. Cooperative Threat Reduction Act of 1993, Pub. L. No. 103-160, 107 Stat. 1777 (1993).

<sup>69</sup> AMERICAN SECURITY PROJECT, FACT SHEET: THE NUNN-LUGAR COOPERATIVE THREAT REDUCTION PROGRAM (undated) <https://americansecurityproject.org/ASP%20Reports/Ref%200068%20-%20The%20Nunn-ugar%20Cooperative%20Threat%20Reduction%20Program.pdf>.

<sup>70</sup> DoD Appropriations Act of 1993, Pub. L. No. 102-396 § 9110(b)(5), 106 Stat. 1876 (1992).

<sup>71</sup> BELFER CENTER STUDIES IN INTERNATIONAL SECURITY, DISMANTLING THE COLD WAR 26-27 (John M. Shields & William C. Potter eds., 1997).

<sup>72</sup> Lieutenant Colonel Frank Morgese, U.S.-Ukraine Security Cooperation 1993-2001 A Case Study 6 (2002) (unpublished, U.S. Army War College) (on file with author). The U.S. European Command executed over 300 military-to-military contacts with Ukraine between 1997-2001. *Id.* at 2.

<sup>73</sup> *Id.*

<sup>74</sup> SHIRLEY KAN, CONG. RESEARCH SERV., RL32496, US-CHINA MILITARY CONTACTS: ISSUES FOR CONGRESS 13 (2005).

contacts promoted mutual trust and friendship between the two countries.<sup>75</sup> Chinese showcase units conducted demonstrations for the attachés to display developments in China's military and defense policies.<sup>76</sup> While the U.S.-Chinese relations were mixed throughout the end of the 1990s and early 2000s,<sup>77</sup> the military-to-military relations between the two countries communicated a willingness toward transparency and a greater understanding of each other's nation.<sup>78</sup>

The origins of peacetime engagements show that DoD strategists of the 1990s began to realize the ever-evolving potential in utilizing tailorable, focused military-to-military contacts. Indeed, including these contacts in the DoD's peacetime engagements strategy was vital to strengthening regional security and promoting defense diplomacy. Through the post-Cold War activities of the 1990s, it became clear that the U.S. Army would be the lead executive agency in international activities for the DoD.<sup>79</sup> And in 2001, the DoD scrapped its doctrinal phrase "peacetime engagements" in favor of "security cooperation."<sup>80</sup> But bringing the Army to the forefront of security cooperation was not the only change to U.S. defense strategy. The years following the Cold-War brought a sprawling web of authorities in furtherance of security cooperation, ever increasing the confusion for planning staffs and commands across the DoD.<sup>81</sup>

### C. Evolving Terminology for Peacetime Engagements

Military operations of any scale require precise language to communicate information efficiently.<sup>82</sup> Common sense dictates that terms

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* "Improvements and deteriorations in overall bilateral relations have affected military contacts, which were close in 1997-1998 and 2000, but marred by the 1995-1996 Taiwan Strait crisis, mistaken North Atlantic Treaty Organization (NATO) bombing of the People's Republic of China Embassy in 1999, and the EP-3 aircraft collision incident in 2001." *Id.* at 2.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 11.

<sup>79</sup> THOMAS S. SZAYNA ET. AL., RAND NAT'L DEF. RESEARCH INST., US ARMY SECURITY COOPERATION: TOWARD IMPROVED PLANNING AND MANAGEMENT 20 (2004) [hereinafter RAND SC].

<sup>80</sup> See U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW 11 (2001).

<sup>81</sup> PATCHWORK, *supra* note 48, at 7-18.

<sup>82</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS para. 2-73 (26 Mar. 2010) [hereinafter FM 5-0] ("Staffs prepare clear, concise orders to ensure thorough

and concepts applicable to a joint environment are standard and well-known between the services in order to foster efficient communication. Confusion and general misunderstandings result when military terms are used improperly or when their evolving definitions outpace doctrine. The DoD recognizes the importance of standardizing its terminology by instructing the military departments to identify, delete, modify, and incorporate standard definitions.<sup>83</sup> Nonetheless, the misuse and misunderstanding of key terms within security cooperation is pervasive.<sup>84</sup>

Security cooperation is now a term that encompasses “any program, activity (including an exercise), or interaction of the [DoD] with the security establishment of a foreign country to achieve a [strategic] purpose . . . [.]”<sup>85</sup> The DoD assigns such strategic importance to security cooperation that, with the help of Congress, it created the Defense Security Cooperation Agency (DSCA) to direct and guide the execution of all DoD security cooperation programs.<sup>86</sup> The DSCA helps administer security cooperation, now a multi-billion dollar industry within the annual Defense appropriation.<sup>87</sup> With all the money and strategic brainpower pouring into security cooperation, newcomers to the field may presume fully-vetted, standardized terms and definitions. However, this could not be further

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understanding. They use doctrinally correct operational terms . . . [d]oing this minimizes chances of misunderstanding.”).

<sup>83</sup> U.S. DEP’T OF DEF., INSTR. 5025.12, STANDARDIZATION OF MILITARY AND ASSOCIATED TERMINOLOGY (12 Aug. 2009).

<sup>84</sup> See CRS-R44444, *supra* note 49, at 4 (“The discussion of U.S. assistance to foreign military and other security forces is complicated by the lack of a standard and adequate terminology.”).

<sup>85</sup> 10 U.S.C. § 301(7) (2017). Congress articulates three purposes for security cooperation: “to build and develop allied and friendly security capabilities for self-defense and multinational operations; to provide the armed forces with access to the foreign country during peacetime or a contingency operation; to build relationships that promote specific United States security interests. *Id.*”

<sup>86</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-84, SECURITY ASSISTANCE: DoD’S ONGOING REFORMS ADDRESS SOME CHALLENGES, BUT ADDITIONAL INFORMATION IS NEEDED TO FURTHER ENHANCE PROGRAM MANAGEMENT 4 (2012) (The “[Defense Security Cooperation Agency (DSCA)] oversees program administration for both traditional programs and newer [building partner capacity] programs. [The] DSCA establishes security assistance procedures and systems, provides training, and guides the activities of implementing agencies.”).

<sup>87</sup> See 2016 Appropriations Act §§ 2385-86. The Iraqi Train and Equip Fund, the Counterterrorism Partnership Fund, and the European Reassurance Initiative total over two billion dollars of defense spending. *Id.* Some estimate the DoD has spent an average of \$15 billion annually since 9/11. Joe Gould, *US Security Cooperation Knotted in Bureaucracy*, DEFENSENEWS (Jan. 5, 2016), <http://www.defensenews.com/articles/report-us-security-cooperation-knotted-in-bureaucracy>.

from reality.

Members of the DoD frequently mischaracterize security cooperation or outright disagree with respect to its doctrinal definition.<sup>88</sup> For example, the 2010 National Security Strategy (NSS) used the term security cooperation to include rebuilding damaged infrastructure and establishing conditions necessary to end military operations in Afghanistan.<sup>89</sup> With the exception of combat operations, it would seem that almost any military action could fit under the 2010 NSS's version of security cooperation.<sup>90</sup> Nevertheless, if security cooperation is in fact an evolving term in the DoD, making sense of the authorities under which the military executes security cooperation events is even more troublesome.<sup>91</sup> This is especially true when authorities are based upon a set of specific terms. Hence, with doctrine lagging behind and accompanied by undefined terminology, no authority in the realm of security cooperation is more ambiguous than the authority for military-to-military contacts.<sup>92</sup> With ambiguity surrounding military-to-military contacts, planners and lawyers should defer to commanders to decide the best way to employ these strategic interaction events. The fate of 10 U.S.C. §168 and its ultimate repeal is illustrative of this point.

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<sup>88</sup> Nathan L. Fenell, *Security Cooperation Poorly Defined* (Dec. 12, 2011) (unpublished Master's thesis, University of San Francisco) (on file with author).

<sup>89</sup> *Id.*

<sup>90</sup> *Contra* JOINT PUB. 3-0, *supra* note 27, at V-4(c).

Security cooperation involves all DOD interactions with foreign defense and security establishments to build defense relationships that promote specific US security interests, develop allied and friendly military and security capabilities for internal and external defense for and multinational operations . . . . Ideally, security cooperation activities lessen the causes of a potential crisis *before* a situation deteriorates and requires coercive US military intervention.

*Id.* (emphasis added).

<sup>91</sup> See CRS-R44602, *supra* note 45, at 3 (citing the 2010 Quadrennial Defense Review, "security cooperation efforts, however, remained 'constrained by a complex patchwork of authorities, persistent shortfalls in resources, unwieldy process, and a limited ability to sustain such undertakings beyond a short period.'"); see also *id.* at 4 ("[G]eneral agreement has emerged that the statutory framework has evolved into a cumbersome system.").

<sup>92</sup> PATCHWORK, *supra* note 48, at 18 ("The lack of clarity in congressional intent in authority language has created uncertainty as to how [military-to-military contact] authorities can be legally used."); see also GREENBOOK, *supra* note 13, at 1-25.

## D. The Ill-Fated 10 U.S.C §168

In the early 1990s, the days when peacetime engagements with Russia, the former Soviet States, and China were commonplace, military-to-military contacts comprised a broad range of activities.<sup>93</sup> To some, the term military-to-military contacts meant anything from senior level talks to bilateral joint training.<sup>94</sup> However, in 1994, Congress changed this expansive view of military-to-military contacts by codifying an authority to execute military-to-military contacts.<sup>95</sup>

Building on the momentum gained through the post-Cold War military-to-military contacts, Congress enacted Section 1316 of Pub. L. 103-337 section 168 into law.<sup>96</sup> This statute provided authority for the SECDEF to carry out military-to-military contacts and “comparable activities that are designed to encourage a democratic orientation of defense establishments and military forces of other countries.”<sup>97</sup> Without describing the interactions, it defined military-to-military contacts using key terms such as traveling contact teams, military liaison teams, exchanges of personnel, and other similar activities.<sup>98</sup>

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<sup>93</sup> See CARL H. GROTH & DIANE T., LOGISTICS MGMT INST., LMI-IR317RI, PEACETIME MILITARY ENGAGEMENT: A FRAMEWORK FOR POLICY CRITERIA 3-14 (1993).

<sup>94</sup> *Id.*

<sup>95</sup> 10 U.S.C. § 168 (2016).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

10 U.S.C. §168 defines military-to-military contacts as “contacts between members of the armed forces and members of foreign armed forces” through the following activities: (1) traveling contact teams, including any transportation expense, translation services expense, or administrative expense that is related to such activities; (2) The activities of military liaison teams; (3) Exchanges of civilian or military personnel between the Department of Defense and defense ministries of foreign governments; (4) Exchanges of military personnel between units of the armed forces and units of foreign armed forces; (5) Seminars and conferences held primarily in a theater of operations; (6) Distribution of publications primarily in a theater of operations; (7) Personnel expenses for Department of Defense civilian and military personnel to the extent that those expenses relate to participation in an activity described in paragraph (3), (4), (5), or (6); (8) Reimbursement of military personnel appropriations accounts for the pay and allowances paid to

Since 1995, 10 U.S.C. §168 has been the oft-cited legal authority for military-to-military contacts.<sup>99</sup> The problem, however, is that Congress withdrew its financial pledge for military contacts and Section 168 in the 1995 DoD Appropriations Act.<sup>100</sup> Essentially, what the authorizers gave to the military-to-military contacts program in 10 U.S.C. §168 was denied by the appropriators.<sup>101</sup> But because Section 168 remained on the books as statutory authority,<sup>102</sup> it was assumed to represent the legal authority for conducting military-to-military contacts.<sup>103</sup> Effectively, from 1995-2016, Section 168 was dead letter. The security cooperation reforms of 2017 finally repealed Section 168 and took it off the books.<sup>104</sup>

However, Section 168 is no relic of small import. It represents Congress's attempt to authorize a wide swath of interactions with foreign militaries.<sup>105</sup> Although Section 168 essentially contains a list of undefined terms (e.g., traveling contact team), its codification did acknowledge the importance of military-to-military contacts within the security cooperation enterprise. Had Congress funded Section 168, it is reasonable to assume commanders would have been able to properly employ its authority—chock full of undefined terms—within their respective theater campaign plans.<sup>106</sup> This assumption is reasonable as the Joint Staff's substitute for Section 168 provided similar means to these commanders, which they continue to utilize today.

### III. Traditional Combatant Commander Activities

#### Responding to the lack of funding appropriated against 10 U.S.C.

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reserve component personnel for service while engaged in any activity referred to in another paragraph of this subsection.”

*Id.*

<sup>99</sup> DA PAM. 11-31, *supra* note 49, at table 6-18; GREENBOOK, *supra* note 13, at 41.

<sup>100</sup> See H. R. REP. NO. 103-747, at 63 (1994) (Conf. Rep.) (directing a reduction of \$46,300,000 in the Military-to-Military Contact Program).

<sup>101</sup> *Id.*; see also Moxley E-mail, *supra* note 24.

<sup>102</sup> 10 U.S.C. § 168 (2016). Section 168 was codified in U.S. Code from 1995 to 2017. After 1995, the DoD never requested funds for Section 168 even though it was a statutory authority. Moxley E-mail, *supra* note 24.

<sup>103</sup> DA PAM. 11-31, *supra* note 49; GREENBOOK, *supra* note 13.

<sup>104</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1253, 130 Stat. 2943 (2016).

<sup>105</sup> 10 U.S.C. § 168 (2016).

<sup>106</sup> This assertion presumes that had Congress funded Section 168, the SECDEF, in turn, would have delegated Section 168's authority to the COCOMs. See 10 U.S.C. § 168 (2016) (providing authority to the SECDEF).

§168, the Joint Staff published a series of orders (TCA Orders) between May 1995 and August 1996 to revive and sustain military-to-military contacts.<sup>107</sup> The TCA Orders provide funding, invoke COCOM operational authority,<sup>108</sup> and are in effect across the DoD for military-to-military contacts.<sup>109</sup> The orders permit interactions similar to those identified in 10 U.S.C. §168, but also go further in authorizing staff assistance and assessment visits, ship rider programs, and joint/combined exercise observers.<sup>110</sup>

The TCA program funds military-to-military contacts.<sup>111</sup> This funding is exclusive to COCOMs expressly directs the types of military-to-military contact events.<sup>112</sup> Even as Congress institutes new security cooperation reforms, TCA remains a viable mechanism for promoting regional and national security interests via interactions with foreign militaries.<sup>113</sup> Looking to the text, the TCA Orders provide the COCOMs with the purpose of military-to-military contacts, examples of specific events, and the funds that are to be utilized in exercising COCOM authority.<sup>114</sup>

The TCA Orders give combatant commanders discretion in employing military-to-military contacts. According to the TCA Orders, TCA provides “one of the pillars of [DoD’s] foreign military interaction initiatives.”<sup>115</sup> The Joint Staff published the TCA Orders not to authorize and fund combatant commanders’ efforts to train foreign militaries, but

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<sup>107</sup> TCA ORDER 1, *supra* note 25; TCA ORDER 2, *supra* note 26; TCA ORDER 3, *supra* note 26.

<sup>108</sup> See 10 U.S.C. § 164(c)(1)(D) (providing combatant commanders authority to employ their forces to assigned missions). The TCA Orders affirm the COCOMs’ responsibility to interact with foreign militaries. TCA ORDER 1, *supra* note 25; TCA ORDER 2, *supra* note 26; TCA ORDER 3, *supra* note 26.

<sup>109</sup> Telephone Interview with Lieutenant Colonel Laura M. Calese, Deputy Counsel, Joint Chiefs of Staff (Jan. 13, 2017) (stating the Joint Staff rarely takes measures to rescind previous orders); see also EUCOM TSC HANDBOOK, *supra* note 28, at 106 (showing TCA’s use as a funding source over the last five years).

<sup>110</sup> TCA ORDER 2, *supra* note 26, para. 3.

<sup>111</sup> TCA ORDER 1, *supra* note 25; TCA ORDER 2, *supra* note 26; TCA ORDER 3, *supra* note 26.

<sup>112</sup> See *supra* note 8 (discussing the 2017 NDAA reforms and the events that are still only permitted through TCA).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

instead to *interact* with foreign militaries.<sup>116</sup> Today, TCA is used across the DoD by almost every COCOM.<sup>117</sup> Because each COCOM pursues regional security objectives specific to its AOR,<sup>118</sup> the TCA Orders provide commanders the flexibility in determining how to utilize these interactions.<sup>119</sup> Despite the wide use of TCA funds for interactions with foreign forces, there is no DoD guidance regarding the use of these funds or TCA itself.<sup>120</sup>

The DoD should update its doctrine to reflect TCA. Currently, neither TCA nor the TCA Orders garner even a reference in the Army's Security Cooperation Policy,<sup>121</sup> the Joint Security Cooperation Manual,<sup>122</sup> or the Army's Security Cooperation Handbook.<sup>123</sup> Gaping holes exist where guidance for military-to-military contacts should be. Presumably, the 2017 reforms to security cooperation will likely take priority in doctrinal updates over established programs such as TCA. Meanwhile, the scarce mention of TCA in DoD-wide and service-wide publications compounds what is an already nebulous understanding related to engagements with foreign forces.<sup>124</sup> All the while, TCA remains a current funding source for a number of military-to-military contact events.<sup>125</sup> It also represents the sole source for events exclusive to the TCA orders.<sup>126</sup> Although the TCA Orders represent the current written guidance for TCA-exclusive interactions with foreign forces, the TCA Orders are not free from rebuke.

Similar to 10 U.S.C. §168, the TCA Orders do not provide key

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<sup>116</sup> *Id.* "TCA funding fulfills the [] long-standing requirement to interact with the militaries of nations within their areas of responsibility/area of interest." *Id.*

<sup>117</sup> See ACI 3900.12, *supra* note 55 (references TCA); see also HEADQUARTERS, U.S. CENT. COMMAND, CENT. COMMAND REG. 12-4, TRADITIONAL COMMANDER ACTIVITIES PROGRAM (5 Jan. 2015) [hereinafter CCR 12-4]; see HEADQUARTERS, U.S. EUROPEAN COMMAND OFFICE OF STRATEGY IMPLEMENTATION, THEATER SECURITY COOPERATION RESOURCES HANDBOOK 105-106 (21 Oct. 2016) (describing TCA and providing EUCOM's funding history of TCA).

<sup>118</sup> JOINT PUB. 5-0, *supra* note 16, at II-5(d)(1).

<sup>119</sup> TCA ORDER 3, *supra* note 26, para. 5.

<sup>120</sup> See DA PAM. 11-31, *supra* note 49 (omitting references to TCA).

<sup>121</sup> See ARMY REG. 11-31, *supra* note 42 (omitting references to TCA).

<sup>122</sup> See NAVY INSTR. 4950.B, *supra* note 42 (confusing TCA as title 10 programs for U.S. Marines).

<sup>123</sup> See DA PAM. 11-31, *supra* note 49 (omitting references to TCA).

<sup>124</sup> PATCHWORK, *supra* note 48, at 7-18. See FM 3-22, *supra* note 16, at 2-28.

<sup>125</sup> TCA ORDER 1, *supra* note 25.

<sup>126</sup> TCA ORDER 2, *supra* note 26.



definitions.<sup>127</sup> As discussed above, the DoD should publish guidance that addresses these security cooperation authorities and supports COCOM discretion in executing these events.<sup>128</sup> The lack of definitions impedes clarity for both TCA and Section 168. What is clear, however, is that the TCA Orders instruct the combatant commanders, not the SECDEF as in Section 168.<sup>129</sup> This demonstrates that combatant commanders not only have the authority to conduct TCA-type events, but that they can also determine *how* to conduct such activities. For example, TCA provides a non-exhaustive list of activities that a combatant command can fund.<sup>130</sup> Within this non-exhaustive list is a traveling contact team.<sup>131</sup> Implicitly, the TCA Orders, as published by the Joint Staff to the combatant commanders, convey that what a traveling contact team can be or do is at the discretion of the COCOM.<sup>132</sup> After all, the COCOM is responsible for executing TCA events such as traveling contact teams that pursue theater campaign goals in support of over-arching national security objectives.<sup>133</sup> In addition, neither the TCA Orders nor any other publication across the DoD definitively contemplate how to conduct a traveling contact team. The result is that COCOMs are not all marching in cadence when it comes to traveling contact teams.<sup>134</sup> This is potentially problematic for planners, judge advocates, and commanders who attempt to utilize a traveling contact team for a TCA mission.

Even with the lack of proper guidance, military lawyers can address interaction proposals and properly analyze military-to-military contacts. One way is by understanding the purpose of TCA and the manner in which its events are funded. Analyzing the purpose of the TCA events and the way they are funded permits well-reasoned counsel to planners and commanders. This is true for commands at all echelons with a security cooperation mission.<sup>135</sup> However, in order to properly analyze a TCA event, judge advocates must understand the funding, applicable

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<sup>127</sup> TCA ORDER 1, *supra* note 25; TCA ORDER 2, *supra* note 26; TCA ORDER 3, *supra* note 26.

<sup>128</sup> PATCHWORK, *supra* note 48.

<sup>129</sup> TCA ORDER 1, *supra* note 25, para. 1; 10 U.S.C. § 168 (2016).

<sup>130</sup> TCA ORDER 2, *supra* note 26, para. 3.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* Traveling contact team events remain undefined by doctrine.

<sup>133</sup> *Id.*

<sup>134</sup> ACI 3900.12, *supra* note 55; CCR 12-4, *supra* note 117.

<sup>135</sup> Lieutenant Colonel Mark B. Parker and John A. Bonin, *RAF and Mission Command*, CARLISLE COMPENDIA OF COLLABORATIVE RESEARCH 19 (2015) (discussing the Regionally Aligned Forces' (RAF) requirement to engage with foreign forces under a myriad of authorities) (on file with author).

engagement law, and the new developments in security cooperation from the 2017 NDAA.

#### A. Funding and Programming TCA

Examining the way the DoD funds TCA events is one of the keys to understanding the intent behind interacting with foreign forces. Combatant commanders receive a specific funding source for TCA events within the annual appropriations provided to the DoD.<sup>136</sup> The manner in which combatant commanders receive and expend these funds demonstrates that combatant commanders have significant discretion to execute TCA events within their respective theater security cooperation plans.

Each year, the President signs an appropriations bill for the Federal Government.<sup>137</sup> This Presidential Act provides the DoD with the funds necessary to carry out its mission in promoting national defense.<sup>138</sup> The DoD Appropriations Act provides the services with O&M funds.<sup>139</sup> For the Army—as the executive agent for security cooperation—a brief description of TCA funding is pertinent.<sup>140</sup>

The Army's O&M appropriations pay for the current operations of the force, and for the maintenance of all of its equipment, including base maintenance services, vehicle maintenance services, civilian salaries, and all expenses required to operate the force.<sup>141</sup> In order for the Army to properly spend its O&M funds, its obligations must satisfy the necessary expense test.<sup>142</sup> The necessary expense test requires expenditures to do three things: (1) bear a logical relationship to its appropriation, (2) not be prohibited by law, and (3) not be otherwise provided for in another appropriation.<sup>143</sup>

In 2015, through the DoD Appropriations bill, the active duty

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<sup>136</sup> See TCA ORDER 2, *supra* note 26, at para. 2(a) (stating that TCA funding is included in the service O&M appropriation).

<sup>137</sup> See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. C, 129 Stat. 2242 (2015).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> RAND SC, *supra* note 79.

<sup>141</sup> See Consolidated Appropriations Act, 2016, Div. C., Title II.

<sup>142</sup> Hon. Bill Alexander, 63 Comp. Gen. 422, App. A (1984) [hereinafter HBA Opinion].

<sup>143</sup> *Id.*

component of the Army received over \$51 billion for its O&M budget.<sup>144</sup> In order to manage this mammoth budget, the Army uses the military decision package (MDEP) construct.<sup>145</sup> The MDEP construct groups the Army's functions and capabilities, defined by program element, appropriation, and organizational codes, into high level packages.<sup>146</sup> This grouping allows the Army to simplify and organize its fiscal resources; it also helps enable the Army leadership defend its resource decisions to challenges external to the Army.<sup>147</sup>

The Army is using over 500 MDEPs to organize its resources.<sup>148</sup> All together, these MDEPs comprise the entirety of Army resources for a given year.<sup>149</sup> The combatant commands account for their prospective TCA missions through a specific MDEP named Joint/Defense Activities (JDJT).<sup>150</sup> The combatant commands submit their funding requests for future TCA events in their program objective memorandum (POM) to the Office of the Secretary of Defense (OSD) via the Army or its Combatant Command Support Agent (CCSA).<sup>151</sup> After discussions with OSD, the Army Justification Book is compiled for the coming fiscal year.<sup>152</sup> The Army Justification Book a detailed budget justification based upon the President's budget for the Army.<sup>153</sup> Before going to the President, it goes to Congress for decisions to modify it (add or subtract funding from it).<sup>154</sup> Funds for TCA missions are not represented in the Army Justification Book.<sup>155</sup> Instead, the funding request for TCA is incorporated into the

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<sup>144</sup> OFFICE OF THE UNDER SECRETARY OF DEFENSE, OPERATIONS AND MAINTENANCE OVERVIEW FOR 2017 1 (2016). Even though the President signs the DoD Appropriations Act, Congress is the true keeper of the nation's purse. U.S. CONST. Art. I, § 9 ("No money shall be drawn from the Treasury, but in consequence of appropriations made by law.").

<sup>145</sup> DEF. FIN. ACCT. SERV., THE ARMY MANAGEMENT STRUCTURE FOR FISCAL YEAR 2017 2C-MDEP1-1 (Aug. 2016) [hereinafter DFAS-IN MANUAL 37-100-17].

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See Lieutenant Colonel Jeffrey C. Powell, The Impact of Strategic Guidance on Army Budget Submissions 3 (Mar. 22, 2010) (unpublished paper submitted in partial fulfillment of Master of Strategic Studies Degree, U.S. Army War College) (on file with author).

<sup>149</sup> DFAS-IN MANUAL 37-100-17, *supra* note 145, at 11-125.

<sup>150</sup> Telephone Interview with James M. Martin, Program Analyst, U.S. European Command (EUCOM) (Dec. 7, 2016) [hereinafter Jim Martin Interview] (stating TCA funds are in EUCOM's budget request for 2018).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> U.S. ARMY WAR COLLEGE, HOW THE ARMY RUNS: A SENIOR LEADER REFERENCE HANDBOOK 8-41 (2015) [hereinafter HTAR].

<sup>154</sup> *Id.*

<sup>155</sup> See generally DEP'T OF THE ARMY, JUSTIFICATION OF ESTIMATES, vol. I, OPERATION AND MAINTENANCE, ARMY (2017) (omitting references to TCA).

COCOM's POM for the president's budget.<sup>156</sup> After the appropriations act is signed, funds are apportioned by the Office of Management and Budget to OSD, to the CCSA and finally to the COCOMs for TCA missions through their sub-activity groups (SAG).<sup>157</sup> For TCA events, the SAG contains funds for headquarters day-to-day operations and mission activities that promote regional stability and shape the international security environment in ways that favor U.S. National Security.<sup>158</sup> The funds sent to the COCOMs for TCA activities are referred to in the TCA Orders as TCA Funds. Although referred to as TCA Funds, these funds remain O&M and therefore beholden to the requirements of the necessary expense test under U.S. fiscal law.

The manner in which further TCA Funds are requested and transmitted to combatant commands is instructive. Essentially, combatant commanders request TCA Funds to pursue their theater campaign goals, and through the multi-layered budgeting processes, involving the CCSA, OSD, the President, and Congress, are provided with the resources to carry out these missions. At no time in the planning, budgeting, or allocation of funds process is TCA discussed in a manner that limits the combatant commander's authority to execute military-to-military contacts.<sup>159</sup> Year after year, the combatant commanders have come to rely on TCA funding and use it as an integral part of their theater strategy.<sup>160</sup> From a policy standpoint, the national leadership provides our combatant commanders with the means to carry out military-to-military contacts with very few restrictions.<sup>161</sup> As such, a COCOM has the authority to determine the way military-to-military contacts should operate in its AOR.

The funding process for TCA events is surprisingly straightforward for a program that is mostly missing from security cooperation doctrine.<sup>162</sup>

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<sup>156</sup> *Id.*

<sup>157</sup> HTAR, *supra* note 153, at 8-16. An O&M budget is generally arranged in three levels (1) budget activity, (2) budget activity group, and (3) sub-activity group (SAG). U.S. DEP'T OF DEF., FIN. MGMT. REG 7000.14R vol. 2A, ch. 3-25 (2010). A SAG is a budgeting term that denotes a grouping of resources. *Id.* Two SAGs within Army's O&M appropriation exist for mission funding (e.g., TCA) and headquarters funding. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Jim Martin Interview, *supra* note 150.

<sup>160</sup> GEN Odierno Speech, *supra* note 53.

<sup>161</sup> *See, e.g.,* DoD LEAHY LAW, *supra* note 14, at tab A (requiring no Leahy Vetting for military-to-military contacts).

<sup>162</sup> *See generally* JOINT PUB. 1-02, *supra* note 9 (omitting a definition for TCA); *see generally* ARMY REG. 11-31, *supra* note 42 (omitting any references to TCA); *see also* NAVY INSTR. 4950.4B, *supra* note 42, at 4-46 (mentioning TCA briefly and only in regards to Marine Corps teams).

The joint service publications' and the security cooperation handbooks' guidance on TCA is scant at best,<sup>163</sup> leaving planning staffs with little to no information regarding the methods to use TCA.

Lacking TCA guidance, planners assume an overly conservative planning posture for military-to-military contacts.<sup>164</sup> This risk-averse posture sacrifices what otherwise may be meaningful content in fear of mission creep. Instead of taking a restrictive, blanket approach to TCA, planning staffs should build their TCA events and tailor their outcomes toward the COCOM's strategic objectives. Planning staffs should then manage the execution of the military-to-military contact events by effectively communicating the mission (and its limits).<sup>165</sup>

In order to effectively plan TCA events, planning staffs and judge advocates must understand the relevant legal considerations. These legal considerations require judge advocates to distinguish between interaction events and training<sup>166</sup> foreign forces.<sup>167</sup> Generally speaking, the service O&M appropriations may not be used for training foreign forces.<sup>168</sup> This was the explicit message from the GAO in its legal opinion to Congress in

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<sup>163</sup> See generally JOINT PUB. 1-02, *supra* note 9 (omitting a definition for TCA); see generally ARMY REG. 11-31, *supra* note 42 (omitting any references to TCA).

<sup>164</sup> See ACI 3900.12, *supra* note 55, at Encl. A (limiting traveling contact teams to only two U.S. personnel for only one week).

<sup>165</sup> See FM 5-0, *supra* note 82.

<sup>166</sup> CRS-R44444, *supra* note 49. Training is defined by the Foreign Assistance Act (FAA) as "formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aids, orientation, and military advice to foreign military units and forces." 22 U.S.C. A. § 2403(n). DoD defines training as "instruction of foreign security force personnel that may result in the improvement of their capabilities." See DOD LEAHY LAW, *supra* note 14, at Tab A.

<sup>167</sup> In 2014, Congress provided the DoD with specific authority to train *with* friendly foreign forces. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1203 (2014) (emphasis added) *repealed* by National Defense Authorization Act 2017 § 1244, S. 2943 (2016). Although the 2017 NDAA repealed § 1203 authority, it codified this same authority anew in 10 U.S.C. § 321, stating "general purpose forces of the United States Armed Forces may train with the military forces or other security forces of a friendly foreign country if the Secretary of Defense determines that it is in the national security interests of the United States to do so." National Defense Authorization Act 2017 § 1244, S. 2943 (2016).

<sup>168</sup> See Foreign Assistance Act of 1961 Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C.A § 2151 (2015)) (creating authority for the executive branch to provide foreign assistance for the United States); see Exec. Order No. 10,973, 26 C.F.R. 639, (1961) [hereinafter Exec. Order No. 10,973] (providing the Department of State with the authority to conduct foreign assistance); see also SAMM, *supra* note 52, para. C1.1.2.2.

the 1980s.<sup>169</sup> Exploring that GAO opinion and its relation to interactions with foreign forces will help bolster an understanding as to what is and what is not a military-to-military contact.

#### B. The Proper Legal Considerations for Military-to-Military Contacts

The fiscal law governing military-to-military contacts is simple to comprehend. Like all Army expenditures, military-to-military contact events must meet the necessary expense doctrine and have a proper purpose to be fiscally sound.<sup>170</sup> Typically, the purpose of a military-to-military contact event is conceived at command echelons far above those which task the service members actually executing the event.<sup>171</sup> As long as military-to-military contact events follow a proper mission, there is little risk for fiscal impropriety. However, imprecise operational orders or misperceptions related to the event can skew the intended purpose or outcome of the event.

The difficulty in understanding the purpose of a military-to-military contact event is only partially related to fiscal law. Instead, the legal trappings for military-to-military contacts are inherent: the Army places training, not interacting, as one of its central priorities.<sup>172</sup> From a fire team's hip-pocket training time to a rotation at a combat training center, it is difficult to imagine any unit not conducting some type of training on any given day. Additionally, many of the DoD's security cooperation activities with foreign forces include permissible training.<sup>173</sup> The constant

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<sup>169</sup> See HBA Opinion, *supra* note 142, at 3 (“Regarding your further questions as to possible violations of purpose funding restrictions . . . it is our conclusion that expenses for training . . . have been charged to DOD’s O&M funds in violation of 31 U.S.C. § 1301(a).”).

<sup>170</sup> 31 U.S.C. § 1301 (2016).

<sup>171</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-568, REGIONALLY ALIGNED FORCES: DoD COULD ENHANCE ARMY BRIGADES’ EFFORTS IN AFRICA BY IMPROVING ACTIVITY COORDINATION AND MISSION-SPECIFIC PREPARATION 8 (2015) [hereinafter GAO-15-568] (“The majority of brigade security cooperation activities are planned and supported by [U.S. Africa Command] in Stuttgart, Germany and [U.S. Army Africa] in Vicenza, Italy”).

<sup>172</sup> David Vergun, *Milley Names Top 3 Focal Points*, U.S. ARMY (Apr. 7, 2016) <https://www.army.mil/article/165671>. General Milley’s top priority for the Army is readiness. *Id.* Within readiness, his focal points are increased aviation flight hours (i.e., training), home-station training, and realistic training for National Guard soldiers at training centers. *Id.*

<sup>173</sup> CRS-R44444, *supra* note 49, at 2 (“Congress has increasingly provided DoD with the means to offer security assistance under authorities in either Title 10 . . . or the annual National Defense Authorization Act . . .”).

focus on training across the Army and even within security cooperation is problematic in analyzing military-to-military contacts. When training is the sole focus in so many events, a mere interaction becomes almost a foreign concept. However, training within a military-to-military contact is prohibited.<sup>174</sup> This is because military-to-military contacts pursue objectives wholly outside of training a foreign force. Therefore, in order to comprehend the legal analyses for interactions, it is imperative to first understand how training and foreign assistance exist independently from military-to-military contacts.

### *1. Security Assistance and Training*

In 1961, Congress doled out the responsibilities for assisting foreign nations in the Foreign Assistance Act of 1961 (FAA).<sup>175</sup> Security assistance, understood as providing supplies, training, and equipment to friendly foreign militaries, is one of the twin pillars of foreign assistance.<sup>176</sup> Generally, the U.S. military is prohibited from providing security assistance to foreign militaries absent congressional authority.<sup>177</sup> The responsibility to provide security assistance belongs primarily to the Department of State (DoS).<sup>178</sup> In order for the DoD to provide security assistance to a foreign military it must first receive specific funding and authority from the DoS. Until recently, the DoD was prohibited from expending its O&M appropriations to provide security assistance except for two specific circumstances: (1) interoperability training; or (2) narrowly tailored training.<sup>179</sup> In 2014, Congress expanded the DoD's

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<sup>174</sup> TCA ORDER 2, *supra* note 26, para. 2 (“TCA funding cannot be used to fund training of foreign militaries normally funded with IMET or FMS or direct support to foreign countries . . . including . . . any provision of the Foreign Assistance Act (FAA).”).

<sup>175</sup> The Foreign Assistance Act.

<sup>176</sup> INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 251 (2016).

<sup>177</sup> See JOINT PUB. 3-22, *supra* note 51, at App. A para. 9.

<sup>178</sup> *Id.*

<sup>179</sup> Major Ryan W. O’Leary, *A Big Change to Limitations on “Big T” Training: The New Authority to Conduct Security Assistance Training with Allied Forces*, ARMY LAW., Feb. 2014 at 23 [hereinafter O’Leary]. Prior to 2014, Congress established an authority to train foreign forces; however, it was not funded with O&M dollars. See National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364 § 1206, 120 Stat. 2083, 2418 (2006); also see Major Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW., Oct. 2008 at 24 (discussing a specific fund for building capacity).

authority to provide security assistance, albeit on a limited basis.<sup>180</sup>

The guarded approach Congress takes toward limiting the DoD in the area of security assistance is not accidental. After all, diplomacy is a mission of the DoS.<sup>181</sup> Each event the DoD undertakes to provide security assistance is congressionally approved and with concurrence of the DoS.<sup>182</sup> One area in security assistance that this is most apparent is in the DoD's surrogate, diplomatic role of training foreign militaries. Today, this authority is found in the newly minted Section 333 of the 2017 NDAA.<sup>183</sup> Section 333 establishes the DoD's general authority for building the capacities of foreign security forces.<sup>184</sup>

Training foreign militaries consumes a large portion of a combatant command's theater security cooperation plan.<sup>185</sup> From building partner capacity programs to joint combined exchange training, the mission to increase our allies' capabilities is vast. Congress defines training broadly and is careful to ensure that training foreign forces only occurs through specific authorizations.<sup>186</sup> At the same time, the DoD conducts numerous annual exercises with foreign forces for strategic purposes and evaluation, not training.<sup>187</sup> Sometimes, however, when the DoD conducts combined

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<sup>180</sup> *Id.*

<sup>181</sup> The mission statement of the Department of State is to "shape and sustain a peaceful, prosperous, just, and democratic world and foster conditions for stability and progress for the benefit of the American people and people everywhere." *Mission Statement*, U.S. DEP'T OF STATE, <https://www.state.gov/s/d/rm/index.htm#mission> (last visited Nov. 28, 2017).

<sup>182</sup> O'Leary, *supra* note 179, at 26.

<sup>183</sup> 2017 National Defense Authorization Act § 333.

<sup>184</sup> FY17 INTERIM IMPLEMENTATION FOR SC ACTIVITIES, *supra* note 29, at 2.

<sup>185</sup> See Jim Garamone, *Africom Campaign Plan Targets Terror Groups*, DOD NEWS (Jan. 5, 2016), <https://www.defense.gov/News/Article/Article/639919/africom-campaign-plan-targets-terror-groups> (displaying two of the U.S. Africa Command's five lines of effort include training foreign forces.); see also Colonel James O. Robinson Jr. and Lieutenant Colonel John C. Lee, *Partnering in the Pacific Theater* 1 (2012) [www.usarpac.army.mil/pdfs/Partnering%20in%20the%20Pacific%20Theater.pdf](http://www.usarpac.army.mil/pdfs/Partnering%20in%20the%20Pacific%20Theater.pdf) ("Engaging the theater and working alongside partners is [U.S. Army Pacific]'s first line of effort in a theater campaign support plan designed to enable the command—by, with, or through allies and partners—to deter aggression, *build capacity*, and assure [U.S. Pacific Command] success.") (emphasis added).

<sup>186</sup> 10 U.S.C. § 301 (2017); see also O'Leary, *supra* note 179, at 26.

<sup>187</sup> An exercise's participants determine whether its focus is training or whether its focus is planning, execution, and evaluation. See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3500.01H, JOINT TRAINING POLICY AND GUIDANCE FOR THE ARMED FORCES (25 Apr. 2014). The definition of an exercise is "[a] military maneuver or simulated wartime operation involving planning, preparation, and execution that is carried out for the purpose of *training* and evaluation." *Id.* (emphasis added). The definition of a joint exercise—or combined



exercises with foreign forces the lines between permissible exercising and statute-directed capacity building tend to blur.

Published over thirty-three years ago, the Honorable Bill Alexander (HBA) Opinion provides substantial analyses into building foreign forces' capacity.<sup>188</sup> The HBA Opinion is still highly relevant to today's practice of fiscal law.<sup>189</sup> In fact, the HBA Opinion still is the single most important fiscal law opinion for combatant commands engaged in training foreign forces.<sup>190</sup> The irony is that the HBA Opinion's ripple effects impose unintended restraints upon military-to-military contacts, activities that are entirely devoid of training.<sup>191</sup> The gravitational pull from the HBA Opinion leads military lawyers to often misapply its concepts to all COCOM security cooperation events, whether they include training forces or not.<sup>192</sup>

## 2. *The Honorable Bill Alexander Opinion of 1984*

The U.S. military's engagements with the Republic of Honduras began as benevolent peacetime engagements but became a defense-wide example of fiscal law promiscuity.<sup>193</sup> Bending the rules of fiscal law, the DoD engaged in impermissible, unauthorized training (i.e., security

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exercise—is “[a] joint military maneuver, simulated wartime operation, or other Chairman—or CCDR-designated—event involving joint planning, preparation, execution, and evaluation. *Id.* Additionally, COCOMs participate in the Chairman, Joint Chiefs of Staff exercise program which pursues strategic engagement objectives, not training foreign forces. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-98-189, JOINT TRAINING: OBSERVATIONS ON THE CHAIRMAN, JOINT CHIEFS OF STAFF EXERCISE PROGRAM 8 (1998).

<sup>188</sup> *See* HBA Opinion, *supra* note 142, at 12-14.

<sup>189</sup> HBA Opinion, *supra* note 142; *see generally* FISCAL LAW DESKBOOK, *supra* note 12, at 10-5 (citing the HBA Opinion in four different chapters).

<sup>190</sup> *Id.* The HBA Opinion created “little t” training for the DoD. FISCAL LAW DESKBOOK, *supra* note 12, at 10-6; *see also* Major Matthew T. Miller, *The Large Utility of “Little T”*: *Conducting Interoperability, Safety, and Familiarization Training*, ARMY LAW., Aug. 2016 at 2 [hereinafter Miller]. Moreover, at the time of this writing, the HBA Opinion is referenced 85 times in WestLaw and its principles are still taught in fiscal law courses within the U.S. Army. Citing references for the HBA Opinion, WESTLAW, <https://1.next.westlaw.com/Search> (search 63 Comp. Gen. 422); Major John Doyle, Operational Funding, at slides 22-26 (Sept. 27, 2016) (unpublished PowerPoint presentation) (on file with author) [hereinafter Doyle].

<sup>191</sup> TCA ORDER 2, *supra* note 26, para. 2 (stating TCA funding cannot fund training).

<sup>192</sup> HBA Opinion, *supra* note 142.

<sup>193</sup> *See* HBA Opinion, *supra* note 142, at 17 (stating that the DoD engaged in three instances of impermissible funding of security assistance).

assistance) with the Honduran security forces.<sup>194</sup> As a byproduct, the lessons resulting from impermissible training in the Republic of Honduras continues to shape the DoD's analysis of security cooperation with all foreign forces today.<sup>195</sup> Despite the HBA Opinion's importance to security cooperation and engagements with foreign forces, its findings are only tangentially related to the proper legal analysis for military-to-military contacts.<sup>196</sup> A close review of the HBA opinion demonstrates that it stands to limit unauthorized training of foreign forces, not to limit a combatant commander's authority to interact with those forces for national and theater strategic goals.<sup>197</sup>

In 1983, the DoD partnered with the Honduran military to conduct a six-month joint exercise in Honduras called Ahuas Tara (Big Pine) II.<sup>198</sup> During Ahuas Tara II, the DoD spent hundreds of thousands of dollars for airstrips, training camps, and medical supplies. A Congressman by the name of William "Bill" Alexander requested that the GAO provide a legal decision into the fiscal propriety of the exercise.<sup>199</sup> The GAO responded with a formal opinion that found the DoD improperly charged its O&M appropriation with construction projects, training events, and humanitarian assistance.<sup>200</sup>

The perceived significance of the HBA opinion to military-to-military contacts arises from the unauthorized funding of training Honduran troops.<sup>201</sup> During Ahuas Tara II, U.S. personnel provided five weeks of medical training to 100 Hondurans, three-to-four weeks of 105 mm

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<sup>194</sup> See *id.* at 12-13.

<sup>195</sup> Doyle, *supra* note 190.

<sup>196</sup> See generally HBA Opinion, *supra* note 142 (refraining from any discussion of military-to-military contacts or similar activities). The HBA Opinion discusses the transfer of skills that occurs between militaries prior to and during an exercise; however, proficiency gains between militaries are not contemplated during military-to-military contacts. *Id.* at 13. Cf. E-mail from Assoc. Counsel, U.S. Africa Command to Captain (CPT) Neville F. Dastoor (4 Apr. 2014, 08:52:00 CET) (on file with author) (recommending the verbiage of familiarization, safety, and interoperability be included in the legal analysis of military-to-military contacts). In this context, the terms familiarization, safety, and interoperability are likely drawn from the HBA Opinion and misapplied to the analysis of military-to-military contacts. Memorandum from CPT Neville F. Dastoor to Colonel Louis P. Yob, Staff Judge Advocate, U.S. Army Africa 2 (Jun. 7, 2016) (on file with author).

<sup>197</sup> HBA Opinion, *supra* note 142, at 13.

<sup>198</sup> *Id.* at 3. Joint exercises with foreign militaries are common across the DoD as a security cooperation activity. JOINT PUB. 3-22, *supra* note 51, at I-8.

<sup>199</sup> HBA Opinion, *supra* note 142, at 1.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 12-13.

artillery training, and Special Forces training for four battalions on mortars, fire direction, and counterinsurgency tactics. At the time, the value of just the 105 mm artillery training, normally purchased through foreign military sales, was estimated at over \$250,000.

In its opinion, the GAO determined that the DoD improperly funded these training activities with O&M funds.<sup>202</sup> The proper funds for such training endeavors were those congressionally approved and provided to the DoD for security assistance.<sup>203</sup> But within the HBA Opinion, the GAO carved out a permissible subset of training that the DoD can fund with O&M.<sup>204</sup> This training, however, is limited only to achieve interoperability between forces through safety and familiarization training “*before* combined forces activities are undertaken.”<sup>205</sup> This language serves as the basis for what is colloquially known as “little t” type training within the DoD.<sup>206</sup> Additionally, “little t” training—a product of the HBA Opinion—is subject to limits on cost, duration, and number of personnel in order to prevent the misuse of O&M funds seen during *Ahuas Tara II*.

Understanding “little t” training is important in analyzing TCA events in only one respect: To inform planning staffs of the bright line legal differences between training foreign forces and mere interactions. Whether the DoD is providing formal training via security assistance or interoperability training prior to a joint airborne exercise, both instances of training increase the capacity and capability of foreign forces.<sup>207</sup> Military-to-military contacts, on the other hand, serve no such purpose.<sup>208</sup> There is no transfer of a training benefit between forces in a military-to-military contact event.<sup>209</sup> While military-to-military contact events fall within the realm of security cooperation and are a key components of a theater campaign plan, they do not serve to increase the capacity of a foreign force.<sup>210</sup> Thus, planning staffs and combatant commanders should not fear that a mere military-to-military contact constitutes impermissible training. Moreover, the legal limits applied to “little t” events are

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<sup>202</sup> *Id.* at 13.

<sup>203</sup> *Id.* at 14.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 13.

<sup>206</sup> Miller, *supra* note 190, at 2-3.

<sup>207</sup> *See id.* at 6; *see* O’Leary, *supra* note 179, at 1.

<sup>208</sup> TCA ORDER 1, *supra* note 25, para. 5 (“Traditional [Combatant Commander] Activities funding fulfills the long-standing requirement to *interact* with the militaries within their area of responsibility . . . .”) (emphasis added).

<sup>209</sup> TCA ORDER 2, *supra* note 26, para. 2(A).

<sup>210</sup> *Id.*

inapplicable to military-to-military contacts. For example, limits on cost, duration and number of personnel for a “little t” event is necessary to ensure its scope does not balloon into a security assistance event.<sup>211</sup> Such restrictions are sensible because both “little t” and security assistance events involve training (i.e., building capacity).<sup>212</sup> Applying these same limits to a traveling contact team, however, is incongruent with the purpose of the event. In other words, there is no risk that a traveling contact team will cross into the realm of security assistance because its mission is to interact with—not train—foreign forces. The key for judge advocates and planners is to analyze the *content* of the military-to-military contact and ensure that the content does not evolve into training. It is imperative to focus on the specific content of a military-to-military contact event to ensure it fits within TCA.

### 3. *Defining a TCA-Exclusive Military-to-Military Contact Event Through its Content*

Each COCOM controls the definition of a military-to-military contact by developing and planning its content within its theater campaign plan. Until doctrine adequately reflects this practice, many judge advocates and lawyers will look to historical examples of these interactions. The TCA Orders and the recently repealed Section 168 authority provide the commonly-known examples of military-to-military contact events.<sup>213</sup> These events include, but are not limited to, traveling contact teams, personnel and information exchanges, seminars and conferences, and military liaison teams.<sup>214</sup>

Recently, Congress narrowed the definition of a TCA-exclusive military-to-military contact event by reforming the security cooperation authorities.<sup>215</sup> Some of the traditional military-to-military contacts that were once tied solely to the TCA Orders or Section 168, are now consolidated within Chapter 16 of Title 10.<sup>216</sup> For example, new sections

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<sup>211</sup> Miller, *supra* note 190, at 6.

<sup>212</sup> *See id.*, at 6; *see* O’Leary, *supra* note 179, at 1.

<sup>213</sup> TCA ORDER 2, *supra* note 26; 10 U.S.C. § 168 (2016).

<sup>214</sup> TCA ORDER 2, *supra* note 26; 10 U.S.C. § 168 (2016). The TCA Orders also lists events such as the State Partnership Program, training program review and assessments, etcetera. TCA ORDER 2, *supra* note 26. Section 168 lists other examples authorized for funding: distribution of publications in the theater of operations, civilian exchanges reimbursement of personnel expenses. 10 U.S.C. § 168 (2016).

<sup>215</sup> 2017 National Defense Authorization Act § 1253.

<sup>216</sup> *Id.* § 1241.

authorize the funding of military-to-military *exchanges*<sup>217</sup> and personnel expenses of foreign nations that are necessary for theater security cooperation.<sup>218</sup> Although the new sections of Title 10 seemingly encompass some of the activities contemplated under the TCA, Congress's new reforms to security cooperation do not abrogate TCA.<sup>219</sup> The activities of TCA-exclusive events are still funded through TCA; no other program within a combatant command exists to fund these specific activities.<sup>220</sup> In spite of the new reforms, the 2017 NDAA does not include language to broadly fund U.S. personnel expenses for security cooperation. As an example, the new Section 312 authority only authorizes the SECDEF to fund "(A) defense personnel of friendly foreign governments; and (B) with the concurrence of the Secretary of State, other personnel of friendly foreign governments and nongovernmental personnel."<sup>221</sup> It does not fund U.S. personnel expenses for traveling contact teams or familiarization visits (i.e., TCA-exclusive events).<sup>222</sup> So, while adding a new authority to fund military exchanges into the 2017 NDAA certainly overlaps with existing exchange authorities under TCA, the new authority in Section 312 has no impact on TCA-exclusive events.

Even with the new reforms to security cooperation, the definitions of certain TCA events are no clearer. Events like traveling contact teams, military liaison teams, and familiarization visits are not defined by the 2017 NDAA<sup>223</sup> nor the DoD at large. Although the lack of definitions for military-to-military contact events, such as a traveling contact team, persists, this in no way inhibits a COCOM from executing military-to-

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<sup>217</sup> *Id.* § 1242 (emphasis added). Section 1242 adds Section 311 at the beginning of subchapter II titled "Exchange of defense personnel between the United States and Foreign Countries." *Id.* Section 311 inserts language from the 1997 NDAA authorizing SECDEF to enter into international defense personnel exchange agreements. *Id.*

<sup>218</sup> *Id.* § 1243. Section 1243 adds Section 312 after Section 311 and is titled "Payment of personnel expenses necessary for theater security cooperation." *Id.* These personnel expenses include travel, subsistence, similar personnel expenses, and special compensation. *Id.*

<sup>219</sup> Although, the 2017 NDAA does repeal Section 168. 2017 National Defense Authorization Act § 1253. However, the effect of this repeal is negligible as Section 168 was dead letter. See Moxley E-mail, *supra* note 24, at 1.

<sup>220</sup> *Cf.* 10 U.S.C.A. § 164 (2017) and 10 U.S.C.A. § 166(a) (2017) (showing these combatant commander authorities do not contemplate TCA-exclusive activities such as traveling contact teams).

<sup>221</sup> 2017 National Defense Authorization Act § 1243.

<sup>222</sup> TCA ORDER 2, *supra* note 26. No funding of foreign defense personnel is contemplated by the TCA Orders because TCA activity expenses are incurred by U.S. personnel, not foreign military personnel. *Id.*

<sup>223</sup> 2017 National Defense Authorization Act § 1253.

military contacts in accordance with its theater campaign plan. It does, however, require that military lawyers analyze whether a particular event with a foreign military fits within the definition of TCA. Ultimately, this is a question of reviewing the event's content.<sup>224</sup> With the new reforms to the 2017 NDAA, it is imperative that legal planners understand how to analyze an event that can be funded by TCA.

#### 4. *How to Analyze a TCA-Exclusive Event*

Whether a proposed military-to-military contact may be funded by TCA depends upon its content. Because DoD guidance is lacking with regard to military-to-military contacts, a legal review of a proposed event's content is of heightened importance. To understand the content of a military-to-military contact, the first question to address is whether the event will increase a foreign force's capability in any manner. This includes not only capacity building, as in security assistance, but also interoperability, safety, and familiarization training.<sup>225</sup>

A common issue with military-to-military contacts is that the U.S. personnel sometimes misinterpret their role in the interaction. This can lead to the U.S. personnel providing an instructional benefit or increased capability to a foreign force.<sup>226</sup> Typically, the risk of unintentional training arises when a team conducting the contact does not understand the permissible methods of interacting versus impermissible training. If a proposed event contemplates classroom presentations, the reviewer must understand the purpose of those presentations and the desired outcome.<sup>227</sup> A fiscal law violation arises when an event provides information to a foreign force that increases its capability to conduct military operations.<sup>228</sup> It is essential that those conducting the event understand the permissible limits to classroom presentations.<sup>229</sup> If the interaction contemplated by the

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<sup>224</sup> Combatant commands have the responsibility for oversight of TCA activities within established policy and fiscal law. TCA ORDER 1, *supra* note 25.

<sup>225</sup> FISCAL LAW DESKBOOK, *supra* note 12, at 10-7; Miller, *supra* note 190.

<sup>226</sup> E-mail from Noreen A. Mallory (G8 Support Agreements, U.S. Army Africa) to Major Anthony Lenze (14 Nov. 2016, 06:05:00 EST) (on file with author).

<sup>227</sup> For example, a presentation on the United States' position regarding International Humanitarian Law topics or a discussion of best practices for vehicle maintenance is permitted under TCA; however, presentations should not be so one-sided to create the appearance of instruction.

<sup>228</sup> HBA Opinion, *supra* note 142.

<sup>229</sup> A reviewing attorney for a military-to-military contact can ensure those conducting the event understand the permissible limits of a classroom presentation by understanding the

command does not increase the capacity of the foreign force, it is deemed non-instructional. Whether a classroom activity lasts thirty minutes or three hours, what is important is to examine what is taking place during the interaction. Once the event is understood as non-instructional, the next question turns on intent.

Events funded as TCA promote regional security and other national security goals.<sup>230</sup> The regional security objectives for combatant commands are found within their theater campaign plans.<sup>231</sup> Military-to-military contacts under TCA must nest within a COCOM's theater campaign plan.<sup>232</sup> The easiest way to ascertain whether the event fits within the theater campaign plan is by reading the operation order associated with the event.<sup>233</sup> The operation order should include verbiage within its execution paragraph to convey the commander's intent.<sup>234</sup> Many times, this information will provide the nexus to the theater campaign. If the operation order does not contain such information, or the order is not yet published, a call over to the combatant or component command's security cooperation office should be helpful.<sup>235</sup> The desk officer at the security cooperation office should have knowledge of the event and be able to provide information that helps fit this piece into the overall puzzle.<sup>236</sup> Once it is understood how this event helps promote regional security objectives or other national security interests, the next question goes to operational authority. Put simply, has the COCOM specifically directed this event?

The final prong of analyzing a TCA event may seem like a formality but it is essential to ensure the event's proper sponsorship. Before executing the event, the COCOM should publish a written order directing

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nature of the presentation and recommending that the staff include language in the operation order that clearly articulates such limits.

<sup>230</sup> TCA ORDER 1, *supra* note 25.

<sup>231</sup> JOINT PUB. 5-0, *supra* note 16, at II-5. Theater campaign plans "operationalize" combatant command's theater or functional strategies. The campaign plans link steady-state shaping activities to the desired strategic and military end states. *Id.*

<sup>232</sup> TCA ORDER 1, *supra* note 25.

<sup>233</sup> JOINT PUB. 5-0, *supra* note 16, at II-35.

<sup>234</sup> *Id.* at IV-46.

<sup>235</sup> The combatant or component command's security cooperation offices are well-suited to liaise with the security cooperation organization within the country of the proposed TCA event. JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERORGANIZATIONAL COOPERATION IV-4 (12 Oct. 2016).

<sup>236</sup> *Id.*

the interaction.<sup>237</sup> Since the authority and funding for TCA events reside at the COCOM level, it is essential that the COCOM directs the event's execution.<sup>238</sup> Executing a TCA event without publishing an order is bad practice since it prevents the proper documentation of the event for tracking and assessment of strategic data.<sup>239</sup> It is also a problematic practice because it prevents those personnel on the mission from having a detailed written understanding of the event. Most importantly, the content of a proposed TCA event cannot be analyzed by military lawyers unless the event is reduced to a written order by the planning staff.<sup>240</sup>

The proper analysis for reviewing a military-to-military contact requires an understanding of TCA and the combatant commander's intent. Furthermore, the content of the interaction drives the analysis. Without an understanding of the content within the proposed event, there can be no analysis. This holds true in simple one to two day interactions with foreign forces or in a more robust, complex contact as in the hypothetical problem presented in the introduction.

### C. A Call for an Increased Understanding of TCA at the COCOMs

Accepting the status-quo and current construct for analyzing military-to-military contacts is a disservice to commanders and judge advocates who work in conjunction with COCOMs. The practice of fiscal law demands measured, well-reasoned counsel in expending appropriated funds. Military lawyers jeopardize their value as staff officers when they are unable to articulate a proper legal basis or the left and right limits of a security cooperation activity such as military-to-military contact.<sup>241</sup> Worse yet are cavalier legal theories amounting to an "I know it when I

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<sup>237</sup> JOINT PUB. 3-0, *supra* note 27, at I-7 ("All [combatant commanders] provide strategic direction; assign missions, tasks, forces, and resources; designate objectives; establish operational limitations such as . . . operation orders[.]").

<sup>238</sup> TCA has not been delegated. The service components of a combatant command do not have the authority to operate under TCA without the combatant command's approval. TCA ORDER 1, *supra* note 25.

<sup>239</sup> JOINT CHIEFS OF STAFF, COMMANDER'S HANDBOOK FOR ASSESSMENT PLANNING AND EXECUTION VI-2 (11 Sep. 2011).

<sup>240</sup> Additionally, when U.S. personnel are conducting a mission in theater a written order will provide basic information. Should questions arise to the intent or scope of the mission, the written order is the best method of memorializing and documenting the event.

<sup>241</sup> Major Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW., Sept. 2014 at 21 (emphasizing the importance of a judge advocate's counsel to commanders regarding authorities).



see it”<sup>242</sup> approach.<sup>243</sup> Like all lawyers, military lawyers pride themselves on their ability to provide sound legal advice from a complex set of facts. The approach to analyzing military-to-military contacts should be no different.

A COCOM’s understanding and approach to military-to-military contacts is particularly important to its subordinate commands.<sup>244</sup> This is because the COCOMs use subordinate commands to exercise authority and plan interactions within the AOR.<sup>245</sup> Typically, the subordinate commands planning the interactions are not the commands actually executing the interactions with the foreign militaries.<sup>246</sup>

Today, the U.S. military relies upon Regionally Aligned Forces (RAF) to be on the ground in the AOR and execute most of its military-to-military contacts.<sup>247</sup> The RAF is composed of a U.S.-assigned Army brigade outside the technical chain of command of the ASCC or COCOM with which it serves.<sup>248</sup> The RAF must receive clear direction from the COCOM or ASCC when engaging with foreign forces.<sup>249</sup> Because of the misconceptions related to military-to-military contacts, few at the RAF brigade or its higher division-level command understand the nuances associated with such interactions.<sup>250</sup> Making matters worse, sometimes higher Army echelons misadvise the RAF on the scope of its mission.<sup>251</sup> Neglecting to inform RAF members or misinforming them of their role in

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<sup>242</sup> *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>243</sup> Interview with Brent E. Fitch, Chief, International and Operational Law, U.S. Army Africa (Dec. 8, 2015) (stating a combatant commander’s staff judge advocate once quipped that he knows military-to-military contacts when he sees them).

<sup>244</sup> The COCOMs have a strategic role in DoD missions. JOINT PUB. 3-0, *supra* note 27, at I-7 (stating COCOMs develop their theater strategies in order to set conditions for achieving strategic end states).

<sup>245</sup> *Id.* at III-4.

<sup>246</sup> *See, e.g.*, GAO-15-568, *supra* note 171, at 16 (stating the ASCC is charged with preparing the event but not actually with executing it).

<sup>247</sup> Colonels Robert J. DeSousa and Scott J. Bertinetti, *RAF and Authorities*, CARLISLE COMPENDIA OF COLLABORATIVE RESEARCH 142 (2015) (discussing the RAF role in military-to-military contacts) (on file with author).

<sup>248</sup> *Id.* at 139.

<sup>249</sup> GAO-15-568, *supra* note 171, at 17. The RAF brigades are tasked to complete many activities for service-component commands but do not receive timely and complete information, which compromises effectiveness. *Id.* at 2.

<sup>250</sup> JENNIFER D. P. MORONEY, ET. AL., RAND NAT’L DEF. RESEARCH INST., REVIEW OF SECURITY COOPERATION MECHANISMS COMBATANT COMMANDS UTILIZE TO BUILD PARTNER CAPACITY xv (2013) [hereinafter RAND BPC]. Depending upon the authority, some engagements with foreign forces will allow for training while others will not. *Id.*

<sup>251</sup> GAO-15-568, *supra* note 171.

a military-to-military contact event can lead to fiscal law violations such as training foreign forces with an inappropriate funding source.<sup>252</sup>

There is no better time than the present to address the legal parameters of funding military-to-military contacts. In an era of regional instability there is also an undeniable national security interest to build and strengthen relationships through interacting, training, and exercising with foreign forces.<sup>253</sup> Funding military-to-military contacts and understanding the legal parameters' associated limitations are of incredible importance to COCOMs.<sup>254</sup>

#### IV. Applying TCA

The hypothetical problem at the beginning of this paper is not uncommon. Planning staffs are often looking to pursue command objectives as efficiently and as effectively as possible. The mantra, "do more with less" is back in vogue. Creativity in operational planning is valued by commanders as long as it is effective and within the legal limits of command authority. To determine the question of legal authority, the problem set in the introduction requires an analysis into TCA.

First, it is important to ascertain from the proposed facts which activity the event most likely resembles. It is apparent from the hypothetical that the OPT is not seeking a personnel exchange, a conference, or an assessment. Nor is the OPT seeking to fund the defense personnel expenses to attend the proposed interaction. Instead, the OPT is proposing a team of ten personnel travel to a foreign nation for an event with a foreign force. The costs to the command for this event will largely be the costs of travel and per diem. While the proposition of this event most likely lends itself to that of a traveling contact team, the devil is in the details (i.e., the event's content).

The second step in the analysis may be the most important. It is a question for TCA events and military-to-military contacts alike: What content will the event contain? This is a fact-driven analysis that starts

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<sup>252</sup> RAND BPC, *supra* note 250.

<sup>253</sup> *The National Military Strategy of the United States of America for 2015*, THE JOINT CHIEFS OF STAFF 9 (2015). [http://www.jcs.mil/Portals/36/Documents/Publications/2015\\_National\\_Military\\_Strategy.pdf](http://www.jcs.mil/Portals/36/Documents/Publications/2015_National_Military_Strategy.pdf).

<sup>254</sup> *Id.* (discussing the importance of military-to-military relationships as a part of the national military strategy).

with basic information regarding the participants conducting the event, the flow of information throughout, and the nexus to the objectives in the theater campaign plan. In the hypothetical problem, the OPT seeks to display the JIABs to the friendly forces to promote this new technology as a way of building trust and fostering relationships.<sup>255</sup> The foreign force participants will rotate through the week-long demonstration as the U.S. personnel remain at the CSL. Because the U.S. personnel are tasked to operate the JIABs as demonstrators and not as instructors, no training benefits will transfer to foreign forces. Although the information flowing from the proposed event will be largely in the direction of the foreign force, the U.S. personnel will benefit from operating the JIABs in austere locations. Additionally, a strategic benefit to the COCOM is likely to transpire from this partnership opportunity with a foreign military. Since the proposed JIAB demonstrations do not increase the capability of the foreign forces, the risk of this TCA event crossing into the realm of security assistance is minimal.

Once the content of a TCA event is determined to be within the bounds of a non-instructive interaction, the next question turns to the theater campaign plan. Here, the JIABs are assets of the theater Army and the OPT is encouraged to utilize the JIABs by the ASCC Commander. While a theater Army commander wields significant clout within his or her organization, the authority to conduct a demonstration event by a traveling contact is not held at the ASCC level. Instead, operational authority and TCA funding is held by the combatant commands.<sup>256</sup> The implication here is that once a planning staff determines the plan, it will need to be validated by the combatant command and supported with TCA funds. In the hypothetical problem set, the regional security cooperation at each of the CSLs may fit nicely into the theater campaign plan—but this is a question of the specific combatant command's objectives and whether the plan will be sponsored by the combatant command. Close coordination between the operations cells at both levels of these commands will aid this determination. Until the combatant command directs the component command to conduct the event, there is no authority to engage under TCA.

The OPT's ability to conduct JIAB demonstrations rests on whether the COCOM is willing to direct the interaction. However, the stage is set for a TCA-exclusive military-to-military contact in the form of a traveling

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<sup>255</sup> A display or demonstration such as this is similar to the showcase events the DoD participated in during the early 1990s in China.

<sup>256</sup> TCA ORDER 1, *supra* note 25.

contact team. Thus, the OPT is likely within the bounds of the authorities set forth in TCA; however, sponsorship and direction from the combatant command is required.

## V. Conclusion

Congress's new reforms to security cooperation altered many of the statutory authorities in play for a combatant command. Presently, combatant commanders can conduct military-to-military exchanges and fund the expenses of foreign military personnel through new sections of the 2017 NDAA. Despite these new reforms, the manner with which a combatant command interacts with a foreign military through a team of U.S. personnel remains unchanged.

A combatant command's TCA funding provides specific funds to interact with foreign militaries via traveling contact teams and familiarization visits. Though TCA has been whittled down from its heyday of the mid-to-late 1990s, it articulates the only written understanding for TCA-exclusive activities. These interactions with foreign forces are valuable within a theater campaign because they promote trust and partnerships—keys to success within any theater of operations.

The lack of information and guidance from DoD concerning TCA is an easy fix. Yet, an update in security cooperation guidance related to TCA will likely take a backseat to the current need to address the reforms in the 2017 NDAA. Therefore, in the short-term, understanding TCA falls squarely on the planners and commanders tasked with executing events in furtherance of a theater campaign plan.

For the DoD to more effectively interact with foreign militaries within the limits of the law (and provide a proper long-term understanding), the DoD should publish guidance that clearly articulates that combatant commanders have discretion to conduct such activities under TCA as they see fit. The sheer volume of interactions that the COCOMs pursue demonstrate that these activities demand the DoD's attention. Guidance from the DoD will aid planners at COCOM and component-level commands in developing and proposing interactions that meet COCOM objectives in accordance with TCA.<sup>257</sup>

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<sup>257</sup> See CRS-R44602, *supra* note 45.

Judge advocates act as both legal planners and reviewers for military plans that execute military-to-military contacts. This necessitates that judge advocates identify the line between permissible interactions under TCA and impermissible security assistance when advising planning teams and commanders. Updating DoD doctrine with regard to military-to-military contacts will help clarify that TCA-exclusive events, though not contemplated in the 2017 NDAA reforms, are viable means of interacting with foreign forces in furtherance of the theater campaign plan.

In order to correctly apply TCA at present day, the 2017 NDAA reforms must be read in conjunction with the current TCA Orders. A side-by-side reading of these two documents shows that the reforms do not cover specific activities listed within the TCA Orders; additionally, with the exception of military and personnel exchanges, the 2017 NDAA reforms do not address the types of activities listed within the TCA Orders. Thus, military-to-military contacts exclusive to TCA can only be executed by COCOMs through the guidance provided by the Joint Staff in TCA.

The DoD should address the TCA-exclusive activities that are not within the 2017 NDAA in order to bring its doctrine into the 21st century of security cooperation. Until then, planning staffs and judge advocates should not deny otherwise lawful engagements due to concerns of crossing into areas of security assistance. The legal analysis should begin with an understanding of the interaction's specific content and objectives. Military lawyers can aid planning staffs and combatant commanders in developing military-to-military contacts according to the broad discretion given to COCOMs under TCA. Blanket limits to duration, cost, and number of personnel for military-to-military contacts misapply the proper legal analysis, unnecessarily restrict the COCOM's ability to conduct interactions under TCA, and undermine the discretion given to combatant commanders. A well-reasoned approach that is rooted in TCA will enable COCOMs to fully realize their ability to interact with foreign forces.

**TAKING VICTIMS' RIGHTS TO THE NEXT LEVEL:  
APPELLATE RIGHTS OF CRIME VICTIMS UNDER THE  
UNIFORM CODE OF MILITARY JUSTICE**

MAJOR SEAN P. MAHONEY\*

*Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to remedy errors of lower courts and this provision [of the Crime Victim Rights Act (CVRA)] requires them to do so for victim's rights. For a victim's right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims' rights will have meaning.<sup>1</sup>*

## I. Introduction

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<sup>1</sup> 150 CONG. REC. S4, 270 (daily ed. Apr. 22, 2004) (statement of Senator Jon Kyl).

The rights of crime victims have been under a spotlight in military criminal jurisprudence since approximately 2013, but many questions remain regarding the rights of victims to appeal decisions from trial courts.<sup>2</sup> Although the recent expansion of, and emphasis on, victims' rights may have appeared novel to military justice practitioners, victims' rights were first established in federal law in 1982 with the passage of the Victim and Witness Protection Act.<sup>3</sup> Since 1982, Congress has passed multiple pieces of legislation to expand and clarify the rights of victims,<sup>4</sup> including the addition of Article 6b to the Uniform Code of Military Justice (UCMJ).<sup>5</sup>

The goal of the victims' rights movement in the military is to articulate base-level rights of victims, increase their understanding of the process, and finally to provide a proper avenue for them to participate in the military justice process.<sup>6</sup> In light of this effort, Congress and the military services established programs for attorneys to represent sexual assault victims throughout investigation and prosecution.<sup>7</sup> In 2013, The Court of Appeals for the Armed Forces (CAAF) established that victims have a right to be represented by counsel during proceedings.<sup>8</sup> Two years later,

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<sup>2</sup> See U.S. DEP'T OF DEF., FISCAL YEAR 2012 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (15 Apr. 2013); U.S. Senator John Cornyn, R-Texas, Opinion., *Someone to Speak For and Protect Sexual Assault Victims*, SAN ANTONIO EXPRESS-NEWS, Aug. 4, 2013, at F6; Joe Nocera, Opinion, *This War is No Longer Invisible*, N.Y. TIMES (Feb. 22, 2013), <http://www.nytimes.com/2013/02/23/opinion/this-war-is-no-longer-invisible.html>.; Jennifer Steinhauer, *Widening Spotlight on Assault of Women*, N.Y. TIMES (Dec. 4, 2014), <https://www.nytimes.com/2014/12/05/us/string-of-sexual-assault-cases-may-lead-to-tipping-point.html>.

<sup>3</sup> Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.

<sup>4</sup> Victims of Crimes Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837; Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, § 502, 104 Stat. 4789, 4820, *repealed by* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12; Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509 (2012); Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261-62 (2004) (codified as amended at 18 U.S.C. § 3771 (2012 & Supp. IV 2016)).

<sup>5</sup> 10 U.S.C. § 806b (Supp. IV 2016).

<sup>6</sup> *Id.*

<sup>7</sup> 10 U.S.C. § 1044e (Supp. IV 2016).

<sup>8</sup> *LRM v. Kastenber*, 72 M.J. 364, 371 (C.A.A.F. 2013) ("It is not a matter of judicial partiality to allow a victim or a patient to be represented by counsel in the limited context

Congress explicitly gave victims the right to file petitions for a writ of mandamus with the service appellate courts if they believe their rights were not protected by trial judges.<sup>9</sup> While the enactment of Article 6b was a major advancement in articulating the rights of crime victims and their enforcement mechanisms, it fails to address whether victims have the right to participate in post-trial appellate proceedings.<sup>10</sup> As such, Article 6b should be considered the starting point for applying principles of victims' rights to the military justice system, like an introductory course.

Clarifying aspects of a victim's right to appeal adverse decisions by trial judges and a limited direct appeal right in post-trial appellate processing are necessary to protect the procedural justice rights of crime victims. In short, the legal process simply works better when standards are clear and processes are well defined. Article 6b has been amended in each of the three National Defense Authorization Acts since it was originally passed in 2013.<sup>11</sup> This article recommends improvements to Article 6b's interlocutory appeal provisions, the establishment of uniform procedures for filing appeals, and the establishment of a limited right of appeal for victims at the post-trial appellate level. It is time for the enforcement mechanisms for crime victim rights to be raised to the more advanced level.

The article begins by briefly explaining the history of interlocutory appeals by victims in the civilian court system, how it evolved in the military, and how the military must make amendments based on lessons learned in the civilian and military courts. This article then proposes that the standard of review and the deference given to lower court rulings, and the procedures for timely filing and hearing of appeals must be amended to make them more clear. Next, a case will be made for the addition of statutory authority for victims to appeal adverse rulings by the Courts of Criminal Appeals (CCA) to CAAF. Finally, this article will address the need for victims to have a defined role in the post-trial appeal process, focused on the privacy and privilege rights already articulated in Article 6b.

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of Military Rule of Evidence 412 or 513 before a military judge, any more than it is to allow a party to have a lawyer.”)

<sup>9</sup> 10 U.S.C. § 806b.

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*



## II. The History of Victims' Rights in Civilian and Military Jurisprudence

Congress has been examining the rights of crime victims and the appropriate role for victims to play in the investigation and prosecution of offenses for at least the last thirty years.<sup>12</sup> It is important to understand at least some of this history at the outset in order to understand the evolution of victim's rights under, and to provide the basis for the argument that the proposed amendments are the next logical step in the evolution of victims' rights in the larger scope of American criminal jurisprudence.

Beginning with state legislation and even the adoption of state constitutional provisions, Congress began examining the rights of crime victims in the mid-1980s.<sup>13</sup> The initial action by Congress revolved around addressing victim restitution, compensation, and participation by victims at presentencing proceedings.<sup>14</sup> This legislation included the Victims' Rights and Restitution Act of 1990 (VRRRA), which provided a statutory list of rights for crime victims.<sup>15</sup> The VRRRA required federal law enforcement and prosecutors to make their best efforts to ensure that all crime victims are afforded seven rights identified in the statute: 1) notice of court proceedings; 2) opportunity to confer with the prosecutor; 3) be present at public court proceedings regarding the crime; 4) reasonable protection from the accused; 5) fair and respectful treatment for the victim's dignity and privacy; 6) restitution; and 7) information about the offender's conviction, sentencing, imprisonment, and release.<sup>16</sup> The major limitation of the VRRRA was a lack of a built-in enforcement mechanism for these rights; rather, federal employees were just charged with making their *best efforts* to ensure compliance.<sup>17</sup>

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<sup>12</sup> Peggy M. Tobolowsky, *Mandamus Muddle: The Mandamus Review Standard for the Federal Crime Victims' Rights Act*, 5 U. DENV. CRIM. L. REV. 109, 111 (2015).

<sup>13</sup> *Id.* at 110.

<sup>14</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-54, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 14–17, 113–16 (2008).

<sup>15</sup> 42 U.S.C. § 10606 (2000) (repealed 2004).

<sup>16</sup> *Id.* All of the rights initially enumerated in the VRRRA are included in Article 6b, UCMJ (*compare* VRRRA, 42 U.S.C. § 10606 *with* CVRA, 18 U.S.C. § 3771 (2012 & Supp. IV 2016)).

<sup>17</sup> *Id.*

In 2004, Congress passed the Justice for All Act, which repealed the VRRRA and replaced it with the Crime Victims' Rights Act (CVRA).<sup>18</sup> The CVRA provides the following rights to federal crime victims:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at the proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
- (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
- (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.<sup>19</sup>

In addition to slightly expanding the rights provided in the VRRRA,<sup>20</sup> the CVRA included a definition of "crime victim": a "person directly and

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<sup>18</sup> Crime Victims' Rights Act, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260 (2004) (codified as amended at 18 U.S.C. § 3771).

<sup>19</sup> 18 U.S.C. § 3771.

<sup>20</sup> Compare VRRRA, 42 U.S.C. § 10606 with CVRA, 18 U.S.C. § 3771. Both the VRRRA and the CVRA are statutory bills of rights for victims of crimes committed in violation of federal law or the laws of the District of Columbia. The CVRA enumerated additional rights not contained in the VRRRA: the limited circumstance when a judge may exclude a

proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia.”<sup>21</sup> In order to protect the rights provided in the CVRA, victims were given statutory authority to petition the court of appeals for a writ of mandamus if they believed a trial judge’s decision violated their rights.<sup>22</sup>

While the CVRA was federal legislation and might therefore be thought to apply to courts-martial, military courts have held that not all generally applicable federal statutes apply to military justice.<sup>23</sup> As a result, Congress began to examine the position of victims of sexual assault in the military justice system separately. Following media attention after the release of the military sexual assault documentary, *The Invisible War*,<sup>24</sup> and allegations that over forty trainees were assaulted by their instructors at Lackland Air Force Base,<sup>25</sup> Congress began to consider legislation to define the rights of crime victims.<sup>26</sup>

Although no statute yet existed to articulate the rights of victims in courts-martial, in 2013, CAAF held that victims had standing to file a writ of mandamus when a military judge’s ruling would “preclude the victim

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victim from the courtroom, the right to be heard by the fact finder during proceedings, and the right to proceedings free from unreasonable delay. 18 U.S.C. § 3771(a)(4), (a)(7). The CVRA also added enforcement mechanisms for investigating violations and the authority for victims to file interlocutory appeals when they believe a judge has violated the rights provided in the CVRA. 18 U.S.C. § 3771(d) (Supp. IV 2016).

<sup>21</sup> 18 U.S.C. § 3771(e)(2) (Supp. IV 2016).

<sup>22</sup> 18 U.S.C. § 3771(d)(3).

<sup>23</sup> See *United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998) (explaining military courts must “exercise great caution in overlaying a generally applicable [victim rights] statute . . . onto the military system”); *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) (stating that although they have many similarities, “the military and civilian justice systems are separate as a matter of law,” and changes to the latter do not directly affect the former).

<sup>24</sup> *THE INVISIBLE WAR* (Chain Camera Pictures 2012).

<sup>25</sup> See Chris Carroll, *Air Force has identified 31 alleged victims in Lackland sex abuse scandal*, STARS AND STRIPES (June 28, 2012), <http://www.stripes.com/news/air-force-has-identified-31-alleged-victims-in-lackland-sex-abuse-scandal-1.181597>; James Risen, *Attacked at 19 by an Air Force Trainer, and Speaking Out*, N.Y. TIMES, Feb. 26, 2013, <http://www.nytimes.com/2013/02/27/us/former-air-force-recruit-speaks-out-about-rape-by-her-sergeant-at-lackland.html>.

<sup>26</sup> See Military Judicial Reform Act of 2013, H.R. 1079, 113th Cong.; Military Justice Improvement Act of 2013, H.R. 2016, 113th Cong.; Military Justice Improvement Act of 2013, S. 967, 113th Cong.; Equal Justice for Our Military Act of 2013, H.R. 1435, 113th Cong.; Article 32 Reform Act, S. 1644, 113th Cong. (2013); Article 32 Reform Act, H.R. 3459, 113th Cong. (2014).

from exercising a claim of privilege or exclusion.”<sup>27</sup> The court went on to hold that a victim also had the right to be heard on these issues through counsel.<sup>28</sup> This ruling gave rise to a shift in military jurisprudence and the creation of victims’ counsel programs in each of the military services.<sup>29</sup>

In 2013, Congress first provided statutory rights to crime victims under the UCMJ.<sup>30</sup> Article 6b included all of the victims’ rights contained in the CVRA with the noticeable exception of an enforcement mechanism.<sup>31</sup> The next year, Congress amended Article 6b to add a subsection (e), which included a vehicle for enforcement authorizing an alleged victim to seek mandamus in the relevant court of criminal appeals.<sup>32</sup> Congress further expanded this enforcement mechanism in 2015 to allow victims to petition for a writ if they believed their rights were infringed during pre-trial proceedings, and expanded the list of protections that could be appealed:

(e) ENFORCEMENT BY COURT OF CRIMINAL APPEALS. –

(1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (Article 32) or a court-martial ruling

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<sup>27</sup> LRM v. Kastenberg, 72 M.J. 364, 368 (C.A.A.F. 2013).

<sup>28</sup> *Id.* at 369.

<sup>29</sup> Memorandum from Secretary of Defense to Secretaries of the Military Departments et al., subject: Sexual Assault Prevention and Response (14 Aug. 2013); Policy Memorandum 14-01, The Judge Advocate General, U.S. Army, subject: Office of the Judge Advocate General Policy Memorandum # 14-01, Special Victim Counsel (1 Nov. 2013).

<sup>30</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1701(a)(1), 127 Stat. 672, 952 (2013). This statute was enacted after CAAF’s decision in *Kastenberg*, which established a victim’s authority to file a petition for a writ of mandamus to protect a victim’s privilege right in mental health records, under the All Writs Act, 28 U.S.C. § 1651. See *Kastenberg*, 72 M.J. at 368–69.

<sup>31</sup> Compare Pub. L. No. 113-66, § 1701(a)(1), 127 Stat. 672, 952 (2013), with 18 U.S.C. § 3771 (2012 & Supp. IV 2016). Both Article 6b and the CVRA begin with a list of enumerated rights of crime victims. The major differences in the statutes is that the CVRA (1) lists responsibilities of government representatives to inform crime victims of their rights; (2) provides judicial enforcement procedures in the form of writ of mandamus petitions; and (3) provides an administrative enforcement mechanism in the form of an office to receive and investigate complaints against government representatives alleged to have violated the rights contained in the CVRA. 18 U.S.C. § 3771. As originally passed in 2013, Article 6b only listed rights of victims and then provided a definition of “victims of crime.” Pub. L. No. 113-66 § 1701(a)(1), 127 Stat. 672, 952 (2013).

<sup>32</sup> National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 535, 128 Stat. 3292, 3368 (2014) (amending Article 6b, UCMJ).

violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.

(2) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(3) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, and, to the extent practicable, shall have priority over all other proceedings before the court.

(4) Paragraph (1) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title.

(C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.

(D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

(E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.

(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.<sup>33</sup>

Article 6b(e)'s enforcement provision only provides for filing a petition for a writ of mandamus with each service's CCA, and is silent regarding any additional appellate review.<sup>34</sup> Following the passage of

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<sup>33</sup> *Id.*

<sup>34</sup> In the American military justice system, each branch of the military has a court of criminal appeals that is staffed by military judges who hear appeals of rulings by trial judges and post-trial appeals. 10 U.S.C. § 866. For example, the Army has the U.S. Army Court of Criminal Appeals (ACCA). In 1950, Congress enacted the UCMJ, which created boards of review that reviewed the results of courts-martial, as well as the U.S. Court of Military Appeals, which provided civilian oversight of courts-martial. Brigadier General (ret.) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY

Article 6b(e), in *EV v. United States*, CAAF held that it lacked jurisdiction to decide a petition for a writ based on Article 6b(e) because the statute only provides for filing a petition with the CCA.<sup>35</sup>

The current statutory structure does not address any post-trial rights of victims beyond notice of parole or clemency proceedings, or the release or escape of the accused.<sup>36</sup> The Senate version of the 2017 National Defense Authorization Act (NDAA) included a provision that would have amended Article 6b to provide victims with standing as a *real party in interest* during appellate review.<sup>37</sup> The amendment would have allowed victims to file pleadings if an accused appeals his conviction.<sup>38</sup> The House version did not have such a provision and in committee, the decision was made to leave out any changes to victim appellate rights because the congressionally created Judicial Proceedings Panel (JPP) was continuing to study the issue.<sup>39</sup>

The understanding of victim appellate rights is still relatively new in the military justice system. Congress only acted after CAAF recognized a victim's ability to seek to enforce their rights and be represented by counsel in *LRM v. Kastenber*.<sup>40</sup> Congress' initial focus has been on ensuring victims have the ability to file an interlocutory appeal, thereby immediately seeking relief from the ruling of a trial judge that infringed on a privacy right or privilege held by a victim. It is to that aspect of the recent reforms we now turn.

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LAW., Mar. 2000, at 2. The Military Justice Act of 1968 introduced additional reforms to the military justice system, making it closely resemble the civilian criminal justice system including the introduction of a tiered appellate system. *Id.* In 1983, Congress first authorized direct appeals to the Supreme Court of the United States of cases decided by the Court of Military Appeals. *Id.* at 4. In 1994, Congress redesignated the Court of Military Appeals as the U.S. Court of Appeals for the Armed Forces (CAAF). *The History of the U.S. Army Court of Criminal Appeals*, U.S. ARMY COURT OF CRIMINAL APPEALS, <https://www.jagcnet2.army.mil/Sites/ACCA.nsf> (last visited Mar. 10, 2017). In summary, under the current system, issues stemming from a U.S. Army court-martial can be appealed to the ACCA, then to CAAF, and then to the Supreme Court of the United States. *Appellate Review of Courts-Martial*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, [http://www.armfor.uscourts.gov/newcaaf/appell\\_review.htm](http://www.armfor.uscourts.gov/newcaaf/appell_review.htm). (last visited Mar. 10, 2017).

<sup>35</sup> *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016).

<sup>36</sup> 10 U.S.C. § 806b (2015).

<sup>37</sup> S. 2943, 114th Cong. § 547 (2016).

<sup>38</sup> *Id.*

<sup>39</sup> H.R. 114-840, at 1042 (2016) (Conf. Rep.).

<sup>40</sup> 72 M.J. 364 (C.A.A.F. 2013).

### III. Interlocutory Appeals

It is essential for victims of crime to have the opportunity to seek appellate review of a military judge's ruling if it infringes on their statutory rights. The first successful interlocutory appeal by a victim came in *LRM v. Kastenberg*, which was decided by CAAF in 2013.<sup>41</sup> The court held that the All Writs Act<sup>42</sup> gave the victim the authority to appeal a military judge's ruling that limited the victim's opportunity to be heard through counsel at evidentiary hearings.<sup>43</sup> Following *Kastenberg*, and with the intent to formalize a victim's right to appeal, Congress enacted Article 6b(e), which gives victims the authority to file for a writ of mandamus to appeal a military judge's ruling.<sup>44</sup>

Unfortunately, the writ of mandamus is a difficult appellate vehicle as writs of mandamus have traditionally carried a high burden for the appellate courts to grant relief.<sup>45</sup> Writs of mandamus are considered *extraordinary writs*, which are looked at with greater scrutiny by the appellate courts. Congress made the same mistake in the original drafting of the CVRA, but later amended the CVRA to clarify that when reviewing writs under the CVRA, the appellate courts should apply an *ordinary* standard of appellate review to CVRA petitions.<sup>46</sup> Congress must learn from these mistakes and should correct Article 6b in the same manner that it did for the CVRA.

An interlocutory appeal is simply an appeal that occurs before the trial court's final ruling.<sup>47</sup> Interlocutory appeals come in various forms and may involve legal points necessary to the determination of a case. In the case of appeals by victims, they may involve collateral orders that are separate from the merits of the case, but which may impact privileges or rights of the victim.<sup>48</sup> On appeal, the courts will apply a standard of review based on the type of ruling made by the trial judge. *Ordinary* standards of review include de novo review of questions of law, clear error review of

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<sup>41</sup> 72 M.J. 364 (C.A.A.F. 2013).

<sup>42</sup> 10 U.S.C. § 1651(a) (2012).

<sup>43</sup> *Kastenberg*, 72 M.J. at 372. It is important to note that while the court held that the All Writs Act gave the court the jurisdiction to hear the victim's petition, the court declined to issue a writ of mandamus because it was not the appropriate remedy. *Id.*

<sup>44</sup> 10 U.S.C. § 806b(e) (Supp. IV 2016).

<sup>45</sup> *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

<sup>46</sup> Tobolowsky, *supra* note 12, at 110.

<sup>47</sup> *Appeal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>48</sup> *Id.*

questions of fact, and abuse of discretion review of matters entrusted to the trial court's discretion.<sup>49</sup>

The Supreme Court has held that mandamus review is a higher, *extraordinary* standard, and that traditional mandamus “is a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’”<sup>50</sup> The Court goes on to state, “only exceptional circumstances amounting to a judicial ‘usurpation of power,’ or a ‘clear abuse of discretion,’ ‘will justify the invocation of this extraordinary remedy.’”<sup>51</sup> In practice, these heightened requirements make a victim's attempt to appeal a trial judge's ruling a discretionary matter. Discretionary appeals are not guaranteed, but rather, certain standards must be met or the appellate court must grant permission before they will consider the appeal.<sup>52</sup>

The original version of the CVRA gave victims the authority to seek a writ of mandamus but it did not specify whether the courts must review petitions or what standard of review should be applied to the decisions of trial judges.<sup>53</sup> The confusion resulted in a split in the circuit courts of appeals and subsequent congressional amendments to the CVRA.<sup>54</sup>

When Congress passed Article 6b, legislators left out multiple essential provisions, which this section will advocate either Congress or the President address. First, Congress drafted the mandamus provision in the same manner as the original version of the CVRA, presenting military courts with the same problem with confusing language that federal civilian criminal courts faced. Second, the authority to establish procedures for filing appeals has been delegated to the Judge Advocate General of each military department, but the President should issue a new rule that creates uniform standards for appellants and the courts across the services.<sup>55</sup>

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<sup>49</sup> See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005).

<sup>50</sup> *Cheney*, 542 U.S. at 370 (citing *Ex parte Fahey*, 332 U.S. 258, 259–260 (1947)).

<sup>51</sup> *Cheney* 542 U.S. at 380 (citing *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

<sup>52</sup> *Review*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>53</sup> Crime Victims' Rights Act, Pub. L. 108-405, 118 Stat. 2260 (2004) (current version at 18 U.S.C. § 3771 (2012 & Supp. IV 2016)).

<sup>54</sup> Tobolowsky, *supra* note 12, at 110.

<sup>55</sup> See 10 U.S.C. § 806b(e)(3) (Supp. IV 2016) (delegating authority to the President to establish procedures for the filing of petitions for a writ of mandamus), *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1203(g) (2016) [hereinafter MCM] (delegating the authority to the Judge Advocates General to establish means by which petitions for writs of mandamus are forwarded to the Courts of Criminal Appeals).



Finally, Article 6b(e) only authorizes appeals to the courts of criminal appeals for each military service. CAAF recently held that there is no authority to appeal decisions of a service CCA to CAAF.<sup>56</sup> This may lead to splits between the various service CCAs resulting in disparate treatment of crime victims in different branches of the military. Although Article 6b is still relatively new to the UCMJ, given that the JPP is considering recommendations on how to improve the enforcement mechanisms for victims' rights now is the perfect time to analyze the issues of confusion and propose solutions.<sup>57</sup> The first major source of confusion and disparity in how a victim's appeal is treated in the civilian versus military justice system is the standard of review applied by the courts.

#### A. Standard of Review

##### 1. Traditional Writ of Mandamus Principles

American jurisprudence regarding writs of mandamus goes back to the U.S. Supreme Court and *Marbury v. Madison*.<sup>58</sup> Mandamus is a writ issued by a court to compel a lower court or government body to correct a prior act or failure to act.<sup>59</sup> The Supreme Court has held the function of mandamus is to correct "an abuse of judicial power, or refusal to exercise it."<sup>60</sup>

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<sup>56</sup> *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016).

<sup>57</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(d)(2); additional duties added by National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(b)(1); additional duties added by the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 545.

<sup>58</sup> 5 U.S. 137 (1803). The case resulted from a petition to the Supreme Court by William Marbury who had been appointed Justice of the Peace in the District of Columbia by outgoing President John Adams. *Id.* at 138. Once the new President James Madison took office, he did not deliver the commission in favor of making a different appointment himself. *Id.* Marbury sought a writ of mandamus to order President Madison to deliver the commission. *Id.* While the Court declined to grant the writ, the Court established the basis for judicial review. *Id.* at 175, 179–80. The Court recognized that a writ of mandamus would have been the proper vehicle to order President Madison to deliver the commission but they found the law that Congress passed to give the Court original jurisdiction over the issue violated the Constitution. *Id.*

<sup>59</sup> *Mandamus*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>60</sup> *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 31 (1943).

Since 1789, federal courts have had jurisdiction to consider petitions for writs of mandamus.<sup>61</sup> This authority was later updated and codified in the All Writs Act.<sup>62</sup> Under the All Writs Act, federal courts could grant all writs necessary or appropriate to aid the jurisdiction of that particular court.<sup>63</sup> The courts still retain discretion on whether to actually issue the writ, based on whether the writ was in line with traditional legal principles.<sup>64</sup>

In *Cheney v. United States District Court*,<sup>65</sup> a case decided during the time Congress was considering the CVRA, the Court again reviewed its mandamus jurisprudence. The Court quoted precedent that the extraordinary remedy of a writ of mandamus is justified only in “exceptional circumstances amounting to a judicial usurpation of power” or a “clear abuse of discretion.”<sup>66</sup> The *Cheney* Court also articulated the now commonly accepted three requirements for an issuance of a writ of mandamus: 1) there must be no other adequate means for the party requesting the writ to attain relief; 2) the petitioner must show a right to the issuance of the writ; and 3) issuance of the writ by the appellate court must be appropriate under the circumstances.<sup>67</sup> The Second Circuit later interpreted these requirements to mean that for the court to grant mandamus relief, petitioners must show a “usurpation of power, clear abuse of discretion and the presence of an issue of first impression.”<sup>68</sup> Accordingly, “mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ.”<sup>69</sup> This high standard carries with it almost insurmountable hurdles for petitioners, including victims of crime, to overcome.

## 2. *The Writ of Mandamus: History of Crime Victim Appeals*

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<sup>61</sup> The Judiciary Act of 1789, 1 Stat. 73 (1789).

<sup>62</sup> 28 U.S.C. § 1651 (2012).

<sup>63</sup> *Id.* § 1651(a).

<sup>64</sup> *Id.*

<sup>65</sup> 542 U.S. 367.

<sup>66</sup> *Id.* at 380 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

<sup>67</sup> *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

<sup>68</sup> *In re “Agent Orange” Prod. Liab. Litig.*, 733 F.2d 10, 13 (2d Cir. 1984).

<sup>69</sup> *Id.*

Article 6b is in large part a mirror image of the CVRA with minor changes to include specific references to uniquely military proceedings such as Article 32 preliminary hearings.<sup>70</sup> Article 6b(e) authorizes victims to file a petition for a writ of mandamus, but it does not specify which standard of review an appellate court should apply in the review of a trial judge's decision.<sup>71</sup> When the CVRA was initially passed in 2004, the mandamus provision similarly did not specify a standard of review.<sup>72</sup> Following a split in the civilian circuit courts of appeals regarding the standard of review, Congress amended the CVRA's writ of mandamus provision in 2015 to reflect that appellate courts "shall apply ordinary standards of appellate review," which gives less deference to the ruling of a trial judge.<sup>73</sup> Although there is no legislative history to explain why Article 6b(e) leaves out the standard of review that appears in the CVRA, Congress should look to the history of the CVRA's mandamus provision for why it is necessary to amend Article 6b(e).<sup>74</sup>

*a. Legislative History of the CVRA's Mandamus Provision*

When the CVRA was introduced in Congress in 2004, Senator Dianne Feinstein, one of its primary co-sponsors, addressed the use of the mandamus provision:

And a new use of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately appeal a denial of their rights by a trial court to the court of appeals, which will rule "forthwith." Simply put, the mandamus procedure allows an appellate court to take timely action to ensure that the trial court follows the rule of law set out in this statute.<sup>75</sup>

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<sup>70</sup> Compare 10 U.S.C. § 806b (Supp. IV 2016), with 18 U.S.C. § 3771 (2012 & Supp. IV 2016).

<sup>71</sup> 10 U.S.C. § 806b(e).

<sup>72</sup> 18 U.S.C. § 3771(e).

<sup>73</sup> *Id.* § 3771(d).

<sup>74</sup> See also Tobolowsky, *supra* note 12; Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U. L. REV. 599 (2010).

<sup>75</sup> 150 CONG. REC. S4, 261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein).

Senator Feinstein and Senator Jon Kyl, the other primary co-sponsor of the CVRA, elaborated on the importance of the mandamus provision:

Mrs. FEINSTEIN. ... I now want to turn to another critical aspect of enforcement of victims' rights, section 2, subsection (d)(3). This subsection provides that a crime victim who is denied any of his or her rights as a crime victim has standing to appellate review of that denial. Specifically, the provision allows a crime victim to apply for a writ of mandamus to the appropriate appellate court. The provision provides that court shall take the writ and shall order the relief necessary to protect the crime victim's right. This provision is critical for a couple reasons. First, it gives the victim standing to appeal before the appellate courts of this country and ask for review of a possible error below. Second, *while mandamus is generally discretionary, this provision means that courts must review these cases*. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. *This provision ensures review and encourages courts to broadly defend the victims' rights.*

Mr. President, does Senator KYL agree?

Mr. KYL. Absolutely. *Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred.* This country's appellate courts are designed to remedy errors of lower courts and this provision requires them to do so for victim's rights. For a victim's right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims' rights will have meaning.<sup>76</sup>

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<sup>76</sup> *Id.* at 270 (daily ed. Apr. 22, 2004) (statements of Sens. Dianne Feinstein and Jon Kyl) (emphasis added); *see also id.* at 271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); *id.* at 230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy) (referencing the inclusion of the mandamus enforcement mechanism in the proposed legislation).

Juxtaposing the *Cheney* Court's standard of "exceptional circumstances amounting to a judicial usurpation of power,"<sup>77</sup> and Senator Feinstein's calls for review to "broadly defend the victims' rights,"<sup>78</sup> it perhaps should have been clear that there would be conflict. After all, the traditional mandamus vehicle is an extraordinary writ, giving appellate courts discretion over whether to decide the merits of an appeal, whereas Congress clearly expressed a desire for victims to have a robust authority to appeal a trial judge's ruling. It did not take long for this conflict to manifest itself in a split among the federal appeals circuits.

*b. Second and Ninth Circuit Courts Adopt an Ordinary Standard of Appellate Review for CVRA Petitions*

The Second Circuit was the first appellate court to articulate a CVRA mandamus review standard in *In re W.R. Huff Asset Management Co.*<sup>79</sup> After considering traditional mandamus review standards, the Second Circuit looked to the "plain language" of the CVRA's mandamus remedy.<sup>80</sup> The Second Circuit found that Congress had chosen the mandamus remedy "as a mechanism by which a crime victim may appeal" a trial judge's denial of relief under the CVRA and thus a CVRA mandamus petitioner "need not overcome the hurdles" of a traditional mandamus review.<sup>81</sup>

The Ninth Circuit followed the Second Circuit's lead when it announced its CVRA mandamus review standard in *Kenna v. United States District Court*.<sup>82</sup> Noting that the "CVRA contemplates active review of orders denying victims' rights claims even in routine cases . . . [T]he CVRA [mandamus provision creates] a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute."<sup>83</sup> The Ninth Circuit applied an abuse of discretion or legal error standard to reviewing the lower court's ruling, rather than a traditional mandamus analysis.<sup>84</sup>

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<sup>77</sup> *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004).

<sup>78</sup> 150 CONG. REC. S4, 270 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein).

<sup>79</sup> *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005).

<sup>80</sup> *Id.* at 562.

<sup>81</sup> *Id.*

<sup>82</sup> 435 F.3d 1011 (9th Cir. 2006).

<sup>83</sup> *Id.* at 1017.

<sup>84</sup> *Id.*

The Second and the Ninth Circuits established their view that an ordinary standard of appellate review should be applied. However, the Fifth and Tenth Circuits took a more literal reading of the CVRA and did not want to look to Congress' intent behind the legislation.

*c. Fifth and Tenth Circuit Courts Adopt an Extraordinary Standard of Appellate Review*

The Tenth Circuit was the first appellate circuit court to apply a traditional mandamus review standard when it “respectfully disagree[d]” with the Second and Ninth Circuits in *In re Antrobus*.<sup>85</sup> The Tenth Circuit noted that Congress “authorized and made use of the term ‘mandamus’” in the CVRA rather than terms such as “immediate appellate review” or “interlocutory appellate review” that Congress had previously used in statutes.<sup>86</sup> Citing the “plain language” of the CVRA, the Tenth Circuit applied “traditional” mandamus standards.<sup>87</sup> In a subsequent petition by the *Antrobus* petitioners, the Tenth Circuit referenced the mandamus remedy as a “well-worn term of art in our common law tradition.”<sup>88</sup>

The Fifth Circuit was the next circuit to adopt a traditional mandamus review standard regarding the CVRA in the petition of *In re Dean*.<sup>89</sup> The Fifth Circuit noted the split in the circuits and announced that it was in accordance with the Tenth Circuit's approach.<sup>90</sup> In *Dean* this standard led to the Fifth Circuit denying relief to a petitioner when the district court “misapplied the law and failed to accord the victims the [notice and ability to confer with the prosecutor] rights conferred by the CVRA,” because under traditional mandamus standards, relief was not appropriate.<sup>91</sup>

With the split in the circuits, the appeal by a victim in one area of the country was being held to a different standard than a similar appeal filed

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<sup>85</sup> 519 F.3d 1123, 1124 (10th Cir. 2008).

<sup>86</sup> *Id.* at 1124–25.

<sup>87</sup> *Id.* at 1125.

<sup>88</sup> *Id.* at 1127–28 (citing *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004); *Morrisette v. United States*, 342 U.S. 246, 263 (1952); and *Marbury v. Madison*, 5 U.S. 137, 170–71 (1803)).

<sup>89</sup> 527 F.3d 391 (5th Cir. 2008).

<sup>90</sup> *Id.* at 393–94.

<sup>91</sup> *Id.* at 394.

in a different area. Congress or the Supreme Court would have to resolve the disagreement.

*d. Congress Resolves the Split in Favor of “Ordinary Standard of Appellate Review”*

Eleven years after passing the CVRA and years of division over the standard of review to be applied to CVRA appeals, Congress amended the CVRA to state explicitly that the appellate courts “shall apply ordinary standards of appellate review” in deciding CVRA mandamus petitions.<sup>92</sup> The CVRA was now clear: appellate courts would apply ordinary review standards including de novo review of questions of law, clear error review of questions of fact, and abuse of discretion review of matters entrusted to the trial court’s discretion.<sup>93</sup> Congress clearly identified the Second and Ninth Circuits as correctly interpreting the original intent behind the CVRA. Although the standard of review for a victim’s appeal in civilian courts was now clear, the CVRA was not being applied to crime victims in military courts.

*e. Consideration of Crime Victim Petitions for Writs of Mandamus in the Military*

In 2013, before Article 6b(e) was enacted, the U.S. Air Force Court of Criminal Appeals (AFCCA) in *LRM v. Kastenberg*,<sup>94</sup> concluded that it did not have jurisdiction to decide a victims’ mandamus petition.<sup>95</sup> In addition to denying its authority to issue the writ under the All Writs Act, AFCCA also held that the CVRA was a “generally applicable [victim rights]

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<sup>92</sup> See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113; see also Tobolowsky, *supra* note 12, at 171. The only discussion of the proposed legislative clarification of the CVRA mandamus review standard appears in the House of Representatives Committee on the Judiciary report: “This section adopts the approach followed by the Ninth Circuit in *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), and the Second Circuit in *In re W.R. Huff Asset Management Company*, 409 F.3d 555 (2d Cir. 2005), namely that, despite the use of a writ of mandamus as a mechanism for victims’ rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards.” H.R. REP. NO. 114-7, at 8 (2015).

<sup>93</sup> See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Huff*, 409 F.3d at 562.

<sup>94</sup> Not Reported in M.J., 2013 WL 1874790 (A.F. Ct. Crim. App. Apr. 2, 2013).

<sup>95</sup> *Id.* at \*5.

statute” that did not apply to the military court-martial system.<sup>96</sup> The victim appealed AFCCA’s decision to CAAF. The court reversed AFCCA with respect to the authority to consider a petition for a writ of mandamus although the court ultimately declined to issue a writ in that case.<sup>97</sup> Neither AFCCA nor CAAF ultimately articulated the standard that they would apply when considering a victim’s petition for a writ of mandamus.

The Army Court of Criminal Appeals (ACCA) in *CC v. Lippert* considered the first Army mandamus petition from a victim’s Special Victim Counsel (SVC) when the military judge ordered disclosure of a victim’s mental health records without conducting an evidentiary hearing as required by Military Rule of Evidence (MRE) 513.<sup>98</sup> Although the procedures outlined in MRE 513 are clear that the military judge must hold a hearing prior to ordering the production (even for *in camera* review) of privileged mental health records, the military judge in this case ordered production for an *in camera* review based simply on the request by defense counsel.<sup>99</sup> Again, this appeal was made prior to the enactment of Article 6b(e), so the victim relied on the All Writs Act for the authority to file the appeal. The court did not address the standard of review it used to analyze the question, seemingly because it was immediately evident from the record that the military judge had erred by not following the process required under MRE 513.<sup>100</sup> ACCA granted the victim’s petition and sent the matter back to the military judge with the instruction that a hearing be held before the production of any mental health records.<sup>101</sup>

Two months later, ACCA received a similar mandamus petition in *HC v. Bridges*.<sup>102</sup> At the trial court, a scheduling conflict arose when the victim’s SVC was unavailable for the trial date set by the military judge.<sup>103</sup> Prior to setting the trial date, the military judge consulted with counsel for the government and defense, but not with counsel for the victim.<sup>104</sup> The military judge refused to alter the trial date after a request by the SVC, because the victim and by extension the victim’s counsel, are not parties

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<sup>96</sup> *Id.* at \*6.

<sup>97</sup> LRM v. Kastenber, 72 M.J. 364 (C.A.A.F. 2013).

<sup>98</sup> *CC v. Lippert*, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (order).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *HC v. Bridges*, ARMY MISC 20140793 (A. Ct. Crim. App. Dec. 1, 2014) (order).

<sup>103</sup> *Id.* at 2–3.

<sup>104</sup> *Id.* at 3.



to the proceedings.<sup>105</sup> Significantly, the government later requested a continuance based on the victim's insistence that she be accompanied by her SVC during the trial.<sup>106</sup> In response, the defense filed a request for a speedy trial because the continuance requested by the government and the SVC would have delayed the trial date significantly.<sup>107</sup> The military judge denied the request for a continuance and the SVC filed the mandamus petition using the All Writs Act for authority, as Article 6b(e) still had not been enacted.<sup>108</sup> ACCA denied the petition based on the fact that the victim is not a party to the proceedings and that they could find no abuse of discretion in the military judge's balancing the request for a continuance with the accused's constitutional right to a speedy trial.<sup>109</sup>

The facts of the case and the court's ruling are not the most significant takeaways from this case. In analyzing its jurisdiction to review the petition, ACCA cited the All Writs Act but it also cited *Kastenberg* for the proposition that while victims are not a party to the proceedings, they are not "strangers," and they enjoy "limited participant standing," and may therefore file interlocutory matters.<sup>110</sup> This recognition of authority to file interlocutory matters is significant because CAAF, in the 2013 *Kastenberg* decision, was the first military court to recognize this authority.<sup>111</sup> In *HC v. Bridges*, ACCA begins to apply CAAF's recognition of victims as having an interest in the proceedings and standing that is on par with those of the government and defense.<sup>112</sup>

In denying HC's petition, ACCA held that the petitioner failed to satisfy each of the traditional extraordinary writ threshold requirements for writs of mandamus.<sup>113</sup> For the first time, ACCA applied the *Cheney*

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 6–7.

<sup>110</sup> *Id.* at 3.

<sup>111</sup> *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

<sup>112</sup> *HC*, ARMY MISC 20140793 at 3.

<sup>113</sup> *Id.* at 4–7 (citing *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)). With respect to the three threshold requirements, the Court held: (1) petitioning an appellate court to deconflict the calendar and schedules of multiple parties at a court-martial is not an appropriate remedy, and the Rules for Practice Before Army Courts-Martial provide no remedy or relief for failing to follow procedural rules (in this case the SVC failed to follow procedural rules of providing notice of conflict dates to the trial counsel); (2) there was no clear and indisputable right to issuance of the writ because the right to status as a party to the court-martial and therefore the authority to influence the scheduling of the proceedings is not a right provided by case law or in Article 6b; and (3) the issuance of a writ in this

standard for extraordinary writs to an appeal by a victim of crime.<sup>114</sup> The application of the extraordinary writ standard was not altogether unexpected because Article 6b(e) had not been enacted yet, so the appeal was filed under the All Writs Act.<sup>115</sup>

*f. Military Courts Have Applied an Extraordinary Standard of Appellate Review to Article 6b(e) Mandamus Petitions.*

Article 6b(e) was enacted in December 2014, creating a new jurisdictional authority for appeal by victims. In the two years following enactment of Article 6b(e), military courts have consistently applied traditional extraordinary writ standards of review, and there has been no discussion of whether Congress intended a different standard of review for Article 6b(e) appeals. The written orders coming from ACCA have included a statement of jurisdiction and the standard of review with absolutely no analysis. This is in stark contrast to the extensive analysis conducted by the civilian courts after the passage of the CVRA, often amounting to multiple pages of discussion. While the sample size is small and the service appellate courts have not given a thorough analysis of the standard of review, only two military courts have even published opinions articulating a standard of review.<sup>116</sup> Both ACCA and the Coast Guard Court of Criminal Appeals (CGCCA) use the traditional mandamus review standard when they refer to petitions as requests for *extraordinary relief*<sup>117</sup> even though the term *extraordinary* does not appear in the language of Article 6b.<sup>118</sup>

*DB v. Lippert* was the first published opinion in a case where the appeal was filed under the Article 6b(e) mandamus provision.<sup>119</sup> The case involved a military judge's ruling regarding production of privileged mental health records of an alleged sexual assault victim. The military

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circumstance would not be appropriate because there was no evidence that the military judge abused his discretion in denying the SVC's request for a continuance. *HC*, ARMY MISC 20140793 at 5–6.

<sup>114</sup> *Id.* at 4 (citing *Hasan*, 71 M.J. at 418; *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004)).

<sup>115</sup> *HC*, ARMY MISC 20140793 at 3.

<sup>116</sup> *HV v. Kitchen*, 75 M.J. 717, 718 (C.G. Ct. Crim. App. 2016); *DB v. Lippert*, 2016 WL 381436, at \*2 (A. Ct. Crim. App. Feb. 1, 2016). Other petitions have resulted in unpublished orders and not published opinions from the Courts of Criminal Appeals.

<sup>117</sup> *Id.*

<sup>118</sup> 10 U.S.C. § 806b(e) (Supp. IV 2016).

<sup>119</sup> 2016 WL 381436, at \*1 (A. Ct. Crim. App. Feb. 1, 2016).

judge ordered the government to produce the victim's mental health records for an *in camera* review before the defense had even submitted a request for the records and before holding a hearing in accordance with MRE 513.<sup>120</sup> The defense filed a motion requesting production of the records after the military judge had already ordered the government to issue a subpoena for production of the records.<sup>121</sup> The military judge eventually did hold a hearing to address the defense motion.<sup>122</sup> The military judge noted his error in ordering production before the hearing had occurred and stated that while the records had already been obtained by the government, he had not reviewed the records prior to the hearing.<sup>123</sup> At the hearing, neither the government nor the defense presented any evidence or called any witnesses.<sup>124</sup>

MRE 513 establishes that a patient has a privilege to refuse to disclose and prevent any other person from disclosing the patient's mental health records.<sup>125</sup> Before the privilege can be overcome, a party must file a written motion, the military judge must hold a hearing, and the military judge must find by a preponderance of the evidence that: 1) there is a specific factual basis demonstrating a likelihood that the records would be admissible; 2) the records meet one of the exceptions to the privilege; 3) the records are not cumulative of other available evidence; and 4) the moving party attempted to obtain the same information through non-privileged sources.<sup>126</sup> Despite the fact that neither party presented evidence at the hearing, the judge issued a verbal ruling that he would conduct an *in camera* review of the records. Following that review, the judge emailed the parties stating that he would disclose "numerous" records.<sup>127</sup> The victim's SVC requested reconsideration by the military judge, which was granted. However, the judge reaffirmed his ruling.<sup>128</sup> The SVC subsequently petitioned ACCA for a writ of mandamus citing Article 6b(e).

The analysis by ACCA first establishes that Article 6b(e) created a new and separate statutory authority for military appellate courts to

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<sup>120</sup> *Id.* at \*4.

<sup>121</sup> *Id.* at \*3.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*4 (citing MCM, *supra* note 55, MIL. R. EVID. 513 (2012)).

<sup>126</sup> *Id.*

<sup>127</sup> DB v. Lippert, 2016 WL 381436, at \*3–4 (A. Ct. Crim. App. Feb. 1, 2016).

<sup>128</sup> *Id.* at \*4.

consider writs from victims of crime.<sup>129</sup> This is significant because up until this point the only authority for a military court of appeals to consider a petition for a writ of mandamus was through the All Writs Act.<sup>130</sup> In other words, this was the first Army case to use Article 6b's new appellate enforcement mechanism.

The ACCA opinion provides no analysis of the standard of review and only dedicates a single paragraph to stating the standard of review as the *Cheney* three-pronged test.<sup>131</sup> The court does not discuss the level of deference to be applied to the military judge's ruling; however, the *Cheney* Court described a writ of mandamus as being "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes,'" suggesting that they would normally give extreme deference to the trial judge.<sup>132</sup>

Unfortunately the actions of this particular judge make it difficult to determine the level of deference the court would apply to the rulings of any other lower court. Less than a year before the military judge's actions in this case, ACCA had directed the same judge to follow MRE 513's requirement to conduct a hearing before ordering production of privileged mental health records.<sup>133</sup> As this was the military judge's second time failing to follow MRE 513's procedures and a prior decision of the appellate court in just a one-year period, ACCA gave little deference to his ruling.

The court found that the military judge's decision to release the privileged materials was a clear abuse of discretion. The court declined to find that the records were inadmissible because a proper hearing had never been held.<sup>134</sup> ACCA set aside the military judge's ruling and remanded the issue for the judge to hold a hearing and make proper findings.<sup>135</sup> This

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<sup>129</sup> *Id.* at \*2.

<sup>130</sup> All Writs Act, 28 U.S.C. § 1615(a) (2012).

<sup>131</sup> *DB*, 2016 WL 381436, at \*2 (citing *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004)).

<sup>132</sup> *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

<sup>133</sup> *DB*, 2016 WL 381436, at \*4 ("[L]ess than a year prior to the military judge's actions in this case, we were required to direct that this same judge follow this same rule. Finally, ordering the production of privileged mental health records 'for the purpose of an in camera review' prior to receiving any motion or conducting a hearing may undermine public confidence in the fairness of the court-martial proceedings.").

<sup>134</sup> *Id.* at \*11.

<sup>135</sup> *Id.*

left open the possibility that the privilege could be pierced if the defense could make a sufficient showing at a new hearing.<sup>136</sup>

The only other published opinion by a service CCA dealing with an Article 6b(e) appeal is from the U.S. Coast Guard in *HV v. Kitchen*.<sup>137</sup> Similar to *DB v. Lippert*, at trial the defense moved to compel production of the alleged victim's mental health records. The military judge held a hearing and then ruled that MRE 513 did "not prevent the disclosure of dates on which a patient was treated, the identity of the provider, the diagnostic code, or the therapies used."<sup>138</sup> The military judge ordered the government to produce for the defense the portions of the victim's mental health records pertaining to psychiatric diagnosis, medications prescribed and their duration, therapies used, and information relating to any resolution of the diagnosed condition.<sup>139</sup> The victim filed a petition for a writ of mandamus asking CGCCA to overturn the military judge's ruling and find that the privilege covering a patient's communications also extends to the psychotherapist's conclusions and resulting treatments.<sup>140</sup>

Unfortunately, the CGCCA gives an even more abridged recitation of the standard of review, citing the traditional three-element test for the issuance of a writ of mandamus with no discussion of the deference to be given to the trial judge.<sup>141</sup> The CGCCA cites *Hasan v. Gross*, a CAAF case as authority for the standard of review.<sup>142</sup> In *Hasan*, CAAF clearly articulated a traditional mandamus review with threshold requirements for a petitioner to succeed when the court held that there is a "heightened standard required for mandamus relief."<sup>143</sup> In CGCCA's analysis, it does not mention "deference" or "abuse of discretion" at all.<sup>144</sup> Without stating as much, CGCCA appears to review the issue of what psychotherapist information is privileged under MRE 513 *de novo*.<sup>145</sup> The court identified the issue as one of first impression for military and civilian appellate courts.<sup>146</sup> After analyzing arguments from a handful of federal district court cases, the CGCCA held that a patient's diagnosis and treatment does

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<sup>136</sup> *Id.*

<sup>137</sup> *HV v. Kitchen*, 75 M.J. 717, 718 (C.G. Ct. Crim. App. 2016).

<sup>138</sup> *Id.* at 718.

<sup>139</sup> *Id.* at 717–18.

<sup>140</sup> *Id.* at 717–19.

<sup>141</sup> *Id.* at 717–18 (citing *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)).

<sup>142</sup> *HV*, 75 M.J. at 717–18 (citing *Hasan*, 71 M.J. at 418).

<sup>143</sup> *Hasan*, 71 M.J. at 416–17.

<sup>144</sup> *HV*, 75 M.J. at 717.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 719.

fall within the privilege in MRE 513. The court reasoned that a psychotherapist's diagnosis and treatment plan is directly based on the communications and descriptions of symptoms that the provider received from a patient and releasing the information would therefore necessarily breach the privilege.<sup>147</sup> The court found that dates of treatment and the identity of the provider are not covered by the privilege but declined to address whether this information would even be considered relevant without the details of those appointments, leaving that question to the trial judge.<sup>148</sup> The CGCCA held that the judge erred as a matter of law.<sup>149</sup>

In these two cases, the courts appear to apply the same standard, but they provide very little discussion or analysis of why they are applying that standard of review. The lack of published opinions from the CCAs on Article 6b(e) petitions and their lack of discussion of the standard of review is illustrative of the need for the standard to be clearly defined by Congress.

### *3. Article 6b(e) Should be Amended to Specify an "Ordinary Standard of Appellate Review"*

The standard of review and the level of deference an appellate court gives to a trial judge's ruling should be added to Article 6b(e) to ensure the rights of victims are protected, to ensure equal treatment across the military branches of service, and to assist in preventing the circuit splits that occurred in civilian courts after the initial passage of the CVRA. The *Congressional Record* makes it clear that Congress intended a mechanism less deferential to the ruling of the trial judge than the writ of mandamus for protecting the rights of victims of crime.<sup>150</sup> Beyond the evidence from the *Congressional Record* surrounding the passage of the CVRA, Congress amended the CVRA to provide for an *ordinary* standard of review rather than the *extraordinary* standard traditionally applied to mandamus review.<sup>151</sup> Nevertheless, the mandamus remedy is an

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Cassell, *supra* note 74 at 600.

<sup>151</sup> See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113; See also Tobolowsky, *supra* note 12 at 171. The only discussion of the proposed legislative clarification of the CVRA mandamus review standard appears in the House of Representatives Committee on the Judiciary report: This section adopts the approach followed by the Ninth Circuit in *Kenna v. U.S. District Court for the Central District of*

important component of both Article 6b and the CVRA.<sup>152</sup> Congress should learn from the history of the CVRA's 2008 amendment, and should amend Article 6b to include a defined standard of review as soon as possible.

As previously mentioned, there are three ordinary appellate review standards: de novo review of questions of law, clear error review of questions of fact, and abuse of discretion review of matters entrusted to the lower court's discretion.<sup>153</sup> These standards form the basis of the understanding of "ordinary standards of appellate review," first identified by the Second and Ninth Circuits and then subsequently endorsed by Congress' amendment of the CVRA.<sup>154</sup>

To understand the difference between *ordinary* and *extraordinary* standards of review, it is helpful to understand that both apply the same ordinary standards. For example under ordinary standards of review, decisions where the trial judge has discretion are reviewed for an abuse of discretion, as opposed to questions of law, which are reviewed de novo.<sup>155</sup> The difference is that an *extraordinary* standard applies to threshold questions before an appellate court can even get to the ordinary standard of review of the trial judge's decision. The writ of mandamus has traditionally been considered an extraordinary writ, meaning that before analyzing the decision, the court must find that the issue is somehow novel,<sup>156</sup> that the relief sought is the only possible option for relief,<sup>157</sup> or that there has been a true "usurpation of power"<sup>158</sup> by the trial judge. If the court doesn't find that the appeal satisfies these threshold requirements, the court will not even consider whether the judge abused his discretion. These threshold standards in effect make the review of the alleged violation of the victims' rights discretionary for the CCA, allowing the court to pick and choose what appeals they want to review on the merits of the military judge's ruling. Instead, it appears Congress intended to

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*California*, 435 F.3d 1011 (9th Cir. 2006), and the Second Circuit in *In re W.R. Huff Asset Management Company*, 409 F.3d 555 (2d Cir. 2005), namely that, despite the use of a writ of mandamus as a mechanism for victims' rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards. H.R. REP. NO. 114-7, at 8 (2015).

<sup>152</sup> Tobolowsky, *supra* note 12 at 169.

<sup>153</sup> *Huff*, 409 F.3d at 562 (citing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*; *Pierce*, 487 U.S. at 558.

<sup>156</sup> *Huff*, 409 F.3d at 562.

<sup>157</sup> *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

<sup>158</sup> *Will v. United States*, 389 U.S. 90, 95 (1967).

provide victims an avenue to petition the appellate court to review any ruling of a military judge that implicates Article 6b rights.<sup>159</sup>

While one alternative would be to amend Article 6b(e) to replace the mandamus mechanism with a more generic term such as “interlocutory appeal,” there are benefits to keeping an improved mandamus system. First, a mandamus system will maintain the similarity between the military and civilian practices, leading to the opportunity to compare outcomes and hopefully achieve equitable results. Second, because civilian courts are using mandamus “under ordinary standards of review,” military courts would be able to look to civilian case law as persuasive authority in analyzing military petitions.<sup>160</sup> With Article 6b(e) in its infancy and only two published opinions from military appellate courts, military courts would greatly benefit from the analysis of the CVRA made by their civilian counterparts.

It is worth noting that the results in *DB v. Lippert* and *HV v. Kitchen* would have been the same under this alternative because, in each case, the court found that the extraordinary writ thresholds had been met so they progressed to applying the ordinary standards of review. *DB v. Lippert* dealt with an appeal of the trial judge’s decision to review mental health records without following the procedures outlined in MRE 513.<sup>161</sup> The trial judge’s decision was reviewed for an abuse of discretion.<sup>162</sup> In *HV v. Kitchen*, the CGCCA dealt with a question of which pieces of a patient’s mental health records were privileged under MRE 513.<sup>163</sup> Whether MRE 513 extends to information such as a diagnosis or specific treatments is a question of law, which received a de novo review.<sup>164</sup> If Article 6b(e) clearly stated Congress’ intended ordinary standard of review, the CCAs would not have stopped at threshold questions and would have actually addressed the decisions of the lower court judges. The result would be the

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<sup>159</sup> 150 CONG. REC. S4, 270 (daily ed. Apr. 22, 2004) (statements of Sens. Dianne Feinstein and Jon Kyl) (emphasis added); *see also id.* at 271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); *id.* at 230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy) (referencing the inclusion of the mandamus enforcement mechanism in the proposed legislation).

<sup>160</sup> *See LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013) (discussing the rights of third parties to assert their interests in preventing the disclosure of materials by looking to practices in numerous civilian federal civilian courts).

<sup>161</sup> *DB v. Lippert*, 2016 WL 381436, at \*11 (A. Ct. Crim. App. Feb. 1, 2016).

<sup>162</sup> *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562 (2d Cir. 2005) (referencing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

<sup>163</sup> *HV v. Kitchen*, 75 M.J. 717, 718 (C.G. Ct. Crim. App. 2016).

<sup>164</sup> *Huff*, 409 F.3d at 562 (citing *Pierce*, 487 U.S. at 558).



protection of victims' rights and additional precedent for practitioners in the area of rights and privileges of victims.

Congress should amend Article 6b to clarify its intentions. Congress' goal was not to add "mandamus hurdles," such as requiring a "novel and significant legal question"<sup>165</sup> to be raised; rather, their expectation was that Article 6b would provide a meaningful process for alleged impermissible violations of a victim's rights to be reviewed.<sup>166</sup> The primary sponsor of the CVRA, Senator Feinstein, made it clear that the mandamus provision included in the law was fundamentally different from traditional mandamus review. On the floor of the Senate, Senator Feinstein stated, "while mandamus is generally discretionary, this provision means that courts must review these cases."<sup>167</sup> Amending Article 6b would benefit counsel and the courts by producing a more predictable analysis of petitions. The initial split in the federal circuit courts of appeals and Congress' amendment of the CVRA proves that amending the language would make a difference.

Amending Article 6b is not the only improvement needed to clarify a victim's interlocutory appeal rights. Guidance is also needed on what procedures must be followed by victims and the courts when an appeal is filed.

## B. Procedural Improvements

There are no current rules or procedures that specifically address a victim's filing of a writ of mandamus petition with the CCAs. RCM 1203 places the responsibility for creating procedures on the Judge Advocate Generals of each military service.<sup>168</sup> This is an unacceptable and unsustainable state of the law and it should be remedied through the amendment of Article 6b and the enactment of a new provision in the RCM. These amendments would make process for filing petitions similar to the requirements of the CVRA and Article 62, UCMJ.

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<sup>165</sup> *Huff*, 409 F.3d at 562.

<sup>166</sup> 150 CONG. REC. S4, 270 (daily ed. Apr. 22, 2004) (statements of Sens. Dianne Feinstein and Jon Kyl) (emphasis added); *see also Id.* at 271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); *Id.* at 230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy) (referencing the inclusion of the mandamus enforcement mechanism in the proposed legislation).

<sup>167</sup> *Id.* at 270 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein).

<sup>168</sup> MCM, *supra* note 55, R.C.M. 1203(g).

### *1. Requirements for Filing Petitions*

Article 6b simply provides that a petition for a writ of mandamus should be filed with the CCA “by such means as may be prescribed by the President.”<sup>169</sup> While the President issued an executive order requiring the Judge Advocate General of each service to establish procedures for petitions to be filed, it does not appear that the services have issued any particular guidance as of the time of the drafting of this paper.<sup>170</sup> The lack of implementing guidance may serve to discourage victims from asserting their rights or at least result in inconsistent quality and uniformity in petitions for relief. The UCMJ already lays out specific procedural requirements for appeals by the Government, which can be used as an outline for Article 6b filings.<sup>171</sup>

Procedural guidance should contain, at a minimum, rules regarding the notice that must be given to parties and the trial judge of the intent to appeal, the effect on the court-martial, and who should act as appellate counsel. RCM 908 addresses each of these issues when the Government elects to file an appeal, and would be a helpful starting point for analysis.<sup>172</sup>

When the Government elects to appeal, counsel must inform the court and the defense that they are considering whether to file an appeal and then request a continuance of no more than 72 hours.<sup>173</sup> Government counsel must decide whether to file an appeal within that 72 hours, and if they decide to appeal, written notice must be served on the military judge and defense counsel, identifying the ruling or order that is being appealed.<sup>174</sup> Government counsel must then “promptly and by expeditious means” file their appeal with the appellate court.<sup>175</sup> If the government decides not to file an appeal, counsel must immediately notify the military judge and the defense so that the stay may be lifted.<sup>176</sup>

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<sup>169</sup> 10 U.S.C. § 806b(e)(3) (Supp. IV 2016).

<sup>170</sup> Exec. Order. No. 13730, 81 Fed. Reg. 33331, 18 (May 20, 2016) (Annex, Section 1(yy)) (adding R.C.M. 1203(g) to the Manual for Courts-Martial).

<sup>171</sup> MCM, *supra* note 55, R.C.M. 908.

<sup>172</sup> *Id.*, R.C.M. 908.

<sup>173</sup> *Id.*, R.C.M. 908(b)(1).

<sup>174</sup> *Id.*, R.C.M. 908(b)(2)–(3).

<sup>175</sup> *Id.*, R.C.M. 908(b)(6).

<sup>176</sup> *Id.*, R.C.M. 908(b)(8).

The procedures of R.C.M. 908 could be easily applied to victim appeals. Despite the concern that continuances may become more prevalent, in the 18 months from June 1, 2014, until January 1, 2017, ACCA only received five mandamus petitions from victims.<sup>177</sup> All five of the petitions filed included a request for a stay of the proceedings until ACCA could consider the petition and the stay was granted in each case in which the appeal was likely to impact the established trial date.<sup>178</sup> Therefore, the concern that the right to appeal would unduly burden or slow down the system is not supported by the evidence. An automatic stay would allow the SVC the opportunity to consider whether to appeal the issue in question without concern for whether the issue could be mooted by the military judge's ruling. In many of these cases, disclosure of privileged information is at issue and once disclosed, the writ is moot. The remaining provisions regarding notice and timely filing, serve to ensure the parties are informed and that the appeal is expedited.

There is one major concern with applying the RCM 908 construct to victim appeals. RCM 908 requires trial counsel to forward their appeal to "a representative of the Government designated by the Judge Advocate General."<sup>179</sup> Army regulations go further by providing that the appeal can only be filed with the appellate court if that representative, the Chief of the Government Appellate Division, approves of the filing.<sup>180</sup> Defense counsel do not have a similar requirement, presumably because their responsibility to zealously represent their client should not be abridged by the judgment of an official in a military chain of command.<sup>181</sup> While it

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<sup>177</sup> This assertion is based on the author's recent communication with the Clerk of Court's Office, U.S. Army Court of Criminal Appeals, and personally traveling to the Court to examine the records of petitions filed by Special Victims Counsel from the time period of June 1, 2014 thru January 1, 2017. The five petitions were: CC v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. 16 Oct. 2014) (order); SC v. Schubert, ARMY MISC 20140813 (A. Ct. Crim. App. 12 Nov. 2014) (order); HC v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. 1 Dec. 2014) (order); AT v. Lippert, ARMY MISC 20150387 (A. Ct. Crim. App. 11 Jun. 2015), DB v. Lippert, 2016 WL 381436 (A. Ct. Crim. App. 1 Feb. 2016) [hereinafter Army Mandamus Petitions].

<sup>178</sup> Army Mandamus Petitions, *supra* note 177.

<sup>179</sup> MCM, *supra* note 55, R.C.M. 908(b)(6).

<sup>180</sup> AR 27-10, para. 12-3.

<sup>181</sup> There is no RCM that provides procedural rules for defense counsel to file an interlocutory appeal, as they are instead governed by the All Writs Act. 28 U.S.C. § 1651(a) (2012). Interlocutory appeals by defense counsel are rare, likely due to the fact that the issues can be addressed in a post-trial appeal of a conviction. The Government would be prevented from filing a post-trial appeal of an evidentiary ruling because double jeopardy would apply after an acquittal. Victims have been granted the authority to file a

would undoubtedly benefit an SVC to consult with an experienced appellate practitioner when deciding to draft an appeal, it would not be appropriate to require a victim appellate division to approve or disapprove the appeal because in the end, that decision should rest with the client and their counsel.

While the services may have differences in the way they formed victims' counsel organizations, procedures for filing appeals are the same for the government and defense to file appeals regardless of their branch of service, and they should also be the same for victims. As such, the President should use his authority to issue procedural rules for courts-martial and either issue a new RCM or amend RCM 1203(g) to provide victims with easy-to-understand and uniform procedures for filing appeals.<sup>182</sup>

## 2. *Requirements for the Appellate Court to Respond*

Timelines for the appellate courts to process petitions, and a requirement that the courts issue written opinions that clearly outline the reasons for granting or denying the petition, are required in order to advance the procedural justice rights of victims and to advance case law in this new area of military jurisprudence. The CVRA contains these procedures for the civilian federal court system and the rationale for the requirements apply equally to the military justice system.<sup>183</sup>

Even without statutory requirements, ACCA has generally responded to petitions in a timely manner<sup>184</sup> and it has also issued written responses to all petitions filed with the court.<sup>185</sup> ACCA's written responses have come in the form of unpublished orders.<sup>186</sup> The orders contain limited analysis and—by virtue of the fact that they are unpublished—they have limited value to practitioners in the field.

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petition for a writ of mandamus under Article 6b. 10 U.S.C. § 806b(e) (Supp. IV 2016). The procedural rules should more closely match those of the Government because their interests in preserving evidentiary issues before a verdict is issued and double jeopardy may apply are more closely analogous.

<sup>182</sup> See *infra* Appendix D.

<sup>183</sup> 18 U.S.C. § 3771(d)(3) (Supp. IV 2016).

<sup>184</sup> See *infra* Appendix B.

<sup>185</sup> See *infra* Appendix A.

<sup>186</sup> Army Mandamus Petitions, *supra* note 177.

In the two years following *Kastenberg*, ACCA has issued orders in response to petitioners in as few as two days<sup>187</sup> and as long as 70 days.<sup>188</sup> The time it has taken for ACCA to decide petitions has steadily increased over these two years as the court has increasingly invited amicus curiae from the SVC programs of other military services, as well as civilian victims' rights organizations.<sup>189</sup> The longer it takes the CCA to decide a petition, the greater the impact on the accused and the government's case. For example, accused faces continued stigma, could be subjected to extended pre-trial confinement,<sup>190</sup> and the government could be forced to expend more resources for witness travel and lodging.<sup>191</sup>

The CVRA requires the court of appeals to take up a petition within 72 hours of being filed unless the parties and the court agree to an extended time period.<sup>192</sup> Article 6b(e) provides that "to the extent practicable, [petitions] shall have priority over all other proceedings before the court."<sup>193</sup> ACCA has demonstrated the ability to respond to a petition within as few as 48 hours so the timeline provided in the CVRA would not be completely unreasonable.<sup>194</sup> The petitions that have taken longer to decide have been due to ACCA's solicitation of amicus curiae.<sup>195</sup> Under the CVRA, the government and defense can agree to extend the timeline for the appellate court to decide the petition so amicus can be solicited.<sup>196</sup> Military appellate court judges are generally less experienced and under-resourced compared to their civilian counterparts, so it is reasonable to

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<sup>187</sup> CC v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (order).

<sup>188</sup> DB v. Lippert, 2016 WL 381436, at \*1 (A. Ct. Crim. App. Feb. 1, 2016). ACCA requested Amicus Curiae from the SVC programs of other military branches as well as civilian victims' rights organizations, which delayed the decision in this case.

<sup>189</sup> See *infra* Appendix B.

<sup>190</sup> In order to address speedy trial issues, the CVRA provides that the continuance will be no more than five days. 18 U.S.C. § 3771(d)(3) (Supp. IV 2016). The same section requires the court of appeals to decide petitions within 72 hours. *Id.* A similar limit on the continuance could be implemented in Article 6b but the length may be different depending on how long the service courts of criminal appeals have to decide petitions.

<sup>191</sup> Under the military justice system, the government is responsible for resourcing witness travel and expert witness expenses for both government and defense witnesses. MCM, *supra* note 55, R.C.M. 703(b).

<sup>192</sup> 18 U.S.C. § 3771(d)(3).

<sup>193</sup> 10 U.S.C. § 806b(e)(3) (Supp. IV 2016). Pending legislation passed by the House will make this into its own sentence and revise the language to read: "To the extent practicable, such a petition shall have priority over all other proceedings before the Court of Criminal Appeals." H.R. 2810, 115th Cong., 1st Session.

<sup>194</sup> CC v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (order).

<sup>195</sup> See *infra* Appendix B.

<sup>196</sup> 18 U.S.C. § 3771(d)(3).

extend the timeline beyond 72 hours. Even with those challenges, setting a standard for an expedited appeal would allow parties to better predict the impact of the appeal on a trial, and it would bring the military justice system more in line with civilian federal courts.<sup>197</sup>

The CVRA includes a requirement for the court of appeals to issue a written opinion clearly stating the reasons for the denial of a petition.<sup>198</sup> As noted earlier, ACCA has issued written orders in response to all of the petitions that have been received from victims, although the level of detail regarding the reasons for denial have varied.<sup>199</sup> Because the courts are already issuing written orders, codifying this requirement with an emphasis on explaining the reasons for a denial would only serve to improve military justice practice. With increased transparency in the form of published opinions from the CCAs, oversight by CAAF will be even more important to resolve any potential split among the CCAs and their interpretation of victims' rights.

### C. CAAF Review of CCA Decisions

When Congress enacted Article 6b(e) in 2014, it added the authority for victims to file petitions for writs of mandamus with "the Court of Criminal Appeals."<sup>200</sup> There is no mention whatsoever of the authority to file appeals with any other court or to appeal decisions from the CCA.<sup>201</sup>

In 2016, CAAF heard the case of *EV v. United States*, where a victim sought to appeal the denial of a writ of mandamus by the Navy-Marine Corps Court of Criminal Appeals (NMCCA).<sup>202</sup> The accused in the case was seeking discovery of the victim's mental health records.<sup>203</sup> The military judge, after conducting a hearing under MRE 513, conducted an in camera review and ordered portions of the victim's records to be turned over to the Defense.<sup>204</sup> In analyzing its authority to hear the appeal, CAAF

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<sup>197</sup> See Judicial Proceedings Panel (Sept. 23, 2016) [hereinafter *September 2016 JPP*] (statements of Judge James Baker, Rear Admiral (Ret.) Christian Reismeier, Colonel (Ret.) William Orr Jr., and Colonel (Ret.) Denise Lind), [http://jpp.whs.mil/Public/docs/05-Transcripts/20160923\\_Transcript\\_Final.pdf](http://jpp.whs.mil/Public/docs/05-Transcripts/20160923_Transcript_Final.pdf).

<sup>198</sup> 18 U.S.C. § 3771(d)(3).

<sup>199</sup> Army Mandamus Petitions, *supra* note 177.

<sup>200</sup> 10 U.S.C. § 806b(e)(3) (Supp. IV 2016).

<sup>201</sup> 10 U.S.C. § 806b.

<sup>202</sup> 75 M.J. 331 (2016).

<sup>203</sup> *Id.* at 332–33.

<sup>204</sup> *Id.*

first determined that while they had authority to grant mandamus and other writs under the All Writs Act, the All Writs Act was not itself a source of jurisdiction.<sup>205</sup> The All Writs Act could only be used to aid a court in the exercise of its jurisdiction.<sup>206</sup> This was the rationale CAAF applied in deciding *Kastenberg*.<sup>207</sup> Because Congress passed Article 6b(e) as an independent means of victims to file appeals, the jurisdictional landscape had changed, and CAAF examined Article 6b(e) to determine whether it granted CAAF authority to review the appeal from the NMCCA.<sup>208</sup> The court dispensed with this review quickly by stating, “[T]he statute is quite straightforward. It is a clear and unambiguous grant of limited jurisdiction to the Courts of Criminal Appeals . . . .”<sup>209</sup> The court noted that there is no mention of CAAF in Article 6b(e) and although Congress could have provided for review of a CCA decision, “it did not.”<sup>210</sup> The court went even further to clarify that the court’s holding in *Kastenberg* also did not provide jurisdiction because *Kastenberg* was decided before Congress enacted legislation in the area of victims’ rights and since Congress acted, the court was bound by the new regime Congress put in place.<sup>211</sup>

During a time when victims’ rights in the military have received so much scrutiny by Congress, it seems incongruous that Congress would go through the effort of creating a victims’ right—the right to file a writ of mandamus—but then severely limit its use through the application of the high hurdles of the *Cheney* standard and then restriction of the reviewing court to only the CCA. Likewise, it makes no sense that Congress would draft Article 6b to create the very same level of authority already granted by the All Writs Act. The authority to file a mandamus petition under standards of extraordinary review had already been recognized by CAAF in *Kastenberg*.<sup>212</sup> The only logical understanding is that Congress intended to create a system whereby the CCA would thoroughly review all petitions from victims and that these reviews would be uniformly conducted across the service courts as ensured by their higher court, CAAF.

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<sup>205</sup> *Id.* at 333.

<sup>206</sup> *Id.*

<sup>207</sup> LRM v. *Kastenberg*, 72 M.J. 364, 372 (C.A.A.F. 2013).

<sup>208</sup> 75 M.J. 331, 333 (C.A.A.F. 2016).

<sup>209</sup> *Id.* at 334.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Kastenberg*, 72 M.J. 364.

Nonetheless, CAAF correctly points out that Article 6b(e) is brief and clearly identifies the CCA and no other court.<sup>213</sup> While one could argue that limiting appeals to only one court serves the interest of judicial economy, the impact of victim mandamus petitions appears minimal based on the evidence of few appeals having been filed with the Army in the first two years since *Kastenber*.<sup>214</sup> Additionally, oversight by CAAF would assist in ensuring that there is equal treatment of mandamus petitions across the service CCAs and equal treatment of victims across the military services.

Adding the authority to appeal denials from the CCA to CAAF would be a simple amendment. The JPP held hearings on this issue in 2016, and in November voted to recommend Congress amend Article 6b to add the authority to file appeals to CAAF.<sup>215</sup>

Improving Article 6b(e)'s interlocutory appeal provision is essential to clarifying the current enforcement mechanism for victims' rights in the military. The next level of concern is the lack of authority to protect a victim's rights and privileges during the post-trial appellate process.

### III. Post-Trial Appeals

The Senate version of the 2017 NDAA included a provision for victims of crime to have *real party in interest* standing during post-trial appellate review.<sup>216</sup> While a few states have passed laws explicitly giving victims standing in the post-trial appellate process,<sup>217</sup> both Article 6b and the CVRA are silent on the issue.<sup>218</sup> The JPP held public hearings on the issue and as noted earlier, Congress did not enact any changes to post-trial

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<sup>213</sup> 10 U.S.C. § 806b(e)(3) (Supp. IV 2016).

<sup>214</sup> See *infra* Appendix A.

<sup>215</sup> See Judicial Proceedings Panel, at 156 (Nov. 18, 2016), [http://jpp.whs.mil/Public/docs/05-Transcripts/20161118\\_Transcript\\_Final.pdf](http://jpp.whs.mil/Public/docs/05-Transcripts/20161118_Transcript_Final.pdf) [hereinafter November 2016 JPP] (voting conducted by Hon. Elizabeth Holtzman).

<sup>216</sup> S. 2943, 114th Cong. § 547 (2016).

<sup>217</sup> Judicial Proceedings Panel, at 17 (Oct. 14, 2016), [http://jpp.whs.mil/Public/docs/05-Transcripts/20161014\\_Transcript\\_Final.pdf](http://jpp.whs.mil/Public/docs/05-Transcripts/20161014_Transcript_Final.pdf) [hereinafter October 2016 JPP] (testimony of Ms. Meg Garvin citing laws in Oregon, Arizona, and New Hampshire).

<sup>218</sup> 10 U.S.C. § 806b; 18 U.S.C. § 3771 (2012 & Supp. IV 2016).



appellate rights at that time in order to allow the JPP and others to provide more input to Congress.<sup>219</sup>

The arguments for victim appellate rights are focused around the concept of procedural justice, a concept most commonly used to view the rights of an accused.<sup>220</sup> Procedural justice centers on the belief that our justice system functions best when those who are directly impacted have their voices integrated throughout the process.<sup>221</sup> This practice is necessary to ensure a system that is transparent and fair to the interests of both victims and accused.<sup>222</sup> This is why Congress codified interlocutory appeal rights for victims in the NDAA<sup>223</sup> and CVRA.<sup>224</sup> However, those laws primarily focused on rights during the pre-trial and trial phases, creating a gap when it came to post-trial rights.<sup>225</sup> Congress is now looking at how to fill that gap.<sup>226</sup>

The first step is to understand that there are differences between the civilian and military criminal justice systems, including differences in terminology. Understanding the fundamental structure of post-trial appeals and the military justice system's appellate process must be the starting point for analysis.

#### A. Terminology

The terminology applied to a victim's interest and the types of appeals can become exceptionally confusing unless it is defined at the outset. First, a *real party in interest* is someone entitled under substantive law, to

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<sup>219</sup> H. REP. NO. 114-840 (2016) (Conf. Report Accompanying S. 2943) (Commentary on Legislative Provisions Not Adopted, Section titled: Appellate standing of victims in enforcing rights of victims under the Uniform Code of Military Justice).

<sup>220</sup> October 2016 JPP, *supra* note 217, at 10 (testimony of Ms. Meg Garvin).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> 10 U.S.C. § 806b.

<sup>224</sup> 18 U.S.C. § 3771 (2012 & Supp. IV 2016).

<sup>225</sup> *See* United States v. Laraneta, 700 F.3d 983, 986 (7th Cir. 2012) (recognizing the CVRA's failure to make provision for appellate participation by a victim who has been successful in the trial court and allowing victim intervention in defendant's appeal when the victim's right was at issue).

<sup>226</sup> H. REP. NO. 114-840 (2016) (Conf. Report Accompanying S. 2943) (Commentary on Legislative Provisions Not Adopted, Section titled: Appellate standing of victims in enforcing rights of victims under the Uniform Code of Military Justice).

enforce a right.<sup>227</sup> This may not necessarily mean that they will benefit from the eventual outcome of a case, but as to the statutory right, they have an interest.<sup>228</sup> For example, MRE 412 provides that a victim must be given the reasonable opportunity to attend and be heard at an evidentiary hearing involving a defense request to introduce evidence of a victim's prior sexual behavior or predisposition.<sup>229</sup> Military Rule of Evidence 412 therefore creates a substantive right for the victim to be heard through counsel during one of these evidentiary hearings. The accused is the one who may be convicted or acquitted at the end of the trial, but the victim has a substantive right and is a *real party in interest* with respect to rights provided by MRE 412. This is in contrast to a party to the trial, of which there are only two—the government, which is bringing the charges, and the accused, who is facing prosecution.<sup>230</sup> Nevertheless, the law recognizes that the victim has a legal interest in enforcing a statutory right to privacy enumerated in MRE 412. The same could be said for the other rights of victims articulated in Article 6b: The victim would be a *real party in interest* with respect to enforcing those rights.

There are various types of appeals that often get confused, especially considering differences between the civilian and military justice systems. In its most basic form, an *appeal* is simply a request to have the decision of a court reconsidered by a higher court.<sup>231</sup> An *interlocutory appeal* is an appeal that occurs before the trial court's final ruling on an entire case, such as the mandamus petitions discussed earlier.<sup>232</sup> After the conclusion of a trial, there is an *appeal by right*<sup>233</sup> where the party making the appeal has a statutory right to appeal, versus when a party must request *leave to appeal* and ask the appellate court to consider their appeal.<sup>234</sup> In the *leave to appeal* circumstance, the appellate court has discretion as to whether to grant the request.<sup>235</sup> A *direct appeal* is an appeal from a trial court's decision directly to the jurisdiction's highest court without having to appeal with an intermediate appellate court.<sup>236</sup> A *cross-appeal* occurs when an appellee files its own appeal against an appellant who generated

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<sup>227</sup> *Party*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>228</sup> *Id.*

<sup>229</sup> MCM, *supra* note 55, MRE 412.

<sup>230</sup> MCM, *supra* note 55, R.C.M. 103(16) (defining parties to a court-martial as the accused and the government).

<sup>231</sup> BLACK'S LAW DICTIONARY, *supra* note 47.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Application for Leave to Appeal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>235</sup> *Id.*

<sup>236</sup> BLACK'S LAW DICTIONARY, *supra* note 47.

the appeal.<sup>237</sup> In the criminal law context, cross-appeals are rare because the accused generally wants to cite any and all error in an attempt to have a conviction overturned and a cross-appeal will not generally assist the government.

Under the military justice system, unless waived, all convictions receive some level of appeal or administrative review.<sup>238</sup> The CCA must review any conviction that results in a sentence to death, a punitive discharge, or confinement for one year or more.<sup>239</sup> The Judge Advocate General can also direct the CCA to review a conviction that would not otherwise qualify.<sup>240</sup> CAAF must review conviction resulting in a death sentence and issues sent to CAAF from the Judge Advocate General of each of the military services.<sup>241</sup> CAAF further has discretion to review any other petitions for review from decisions by the CCA.<sup>242</sup>

Therefore, an accused who is convicted and receives one of the aforementioned significant sentences has an *appeal by right*, which is automatically forwarded to the CCA and they are assigned appellate defense counsel who can allege grounds for overturning the conviction. If an accused receives a lesser sentence, he may seek *leave to appeal* by requesting that the service's Judge Advocate General direct the CCA to review his conviction, but the Judge Advocate General has discretion. There are no *direct appeal* rights to CAAF or the U.S. Supreme Court other than the possibility of filing a writ of habeas corpus.<sup>243</sup>

The UCMJ and Article 6b do not provide any post-trial appellate rights for crime victims<sup>244</sup> and under current rules, they would not be able to file a *cross-appeal* because a victim is not a party to the original appeal. Therefore, we must examine what standing, if any, a victim might have to be heard before the CCA after the final ruling at a court-martial.

## B. The Question of Standing

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<sup>237</sup> *Id.*

<sup>238</sup> MCM, *supra* note 55, R.C.M. 1110 (describing when the accused may waive or withdraw appellate review).

<sup>239</sup> MCM, *supra* note 55, R.C.M. 1201.

<sup>240</sup> *Id.*

<sup>241</sup> MCM, *supra* note 55, R.C.M. 1204.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* 1205.

<sup>244</sup> 10 U.S.C. § 806b (Supp. IV 2016).

The concept of standing revolves around the understanding that a person who has an injury or potential injury to a legal right, can and must be heard by the court before a decision is made in the case.<sup>245</sup> This concept in American jurisprudence dates back to 1803 and the Supreme Court case of *Marbury v. Madison*.<sup>246</sup> CAAF has recognized this concept of standing extends to military courts and specifically that privilege holders have long been known to have standing to protect that privilege in court.<sup>247</sup>

Without specific statutory authority, a victim must argue they have standing on the issues presented, essentially taking a shot in the dark on whether the CCA will hear the case. While the standing argument was successful in *Kastenberg*, the victim in that case had the All Writs Act as authority to file the petition. There is no such statutory authority for victims in the post-trial process.<sup>248</sup> Further complicating the matter, CAAF's recent ruling in *EV v. United States* implies that the appellate courts would find that by passing Article 6b without an express provision for post-trial appeals, Congress signaled its intent to deny victims standing to file post-conviction appeals.<sup>249</sup> The best course of action would be for Congress to establish clear authority and processes for victims to protect their rights and privileges before the appellate courts instead of forcing victims to take that shot in the dark in the argument for standing.<sup>250</sup>

The history of appellate standing in both military and civilian courts has demonstrated the need for a clear and explicit provision for victim

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<sup>245</sup> October 2016 JPP, *supra* note 217, at 12 (testimony of Ms. Meg Garvin).

<sup>246</sup> 5 U.S. 137 (1803).

<sup>247</sup> *LRM v. Kastenberg*, 72 M.J. 368 (C.A.A.F. 2013) (citing *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013) (assuming that CCR had trial level standing to make request); *United States v. Wuterich*, 67 M.J. 63, 66–69 (C.A.A.F. 2008) (assuming standing for CBS in part under R.C.M. 703); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for victim's mental health provider); *United States v. Johnson*, 53 M.J. 459, 461 (C.A.A.F. 2000) (finding standing for a nonparty challenge to a subpoena duces tecum or a subpoena ad testificandum during an Article 32 pretrial investigation); *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); *Carlson v. Smith*, 43 M.J. 401 (C.A.A.F. 1995) (summary disposition) (granting a writ of mandamus where the real party in interest did not join petitioners, but rather was added by the court as a respondent).

<sup>248</sup> *Kastenberg*, 72 M.J. at 368.

<sup>249</sup> 75 M.J. 331, 334 (C.A.A.F. 2016).

<sup>250</sup> *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011, 1018 (9th Cir. 2006) (encouraging district courts to modify procedures so as to give full effect to the CVRA after noting hurdles caused by less than clear procedures in victims' rights context).

standing<sup>251</sup> focused on defending the rights and privileges already identified by Congress in Article 6b.<sup>252</sup> This expression of standing could be as simple as stating that victims of crime have standing to assert the rights contained in Article 6b before both trial and appellate courts.<sup>253</sup> Along with standing, there is a need to define the victim's role in the post-trial proceedings.

### C. What is the Victim's Role? The Importance of a Name

The Senate version of FY17 NDAA bestowed victims with the title of a "real party in interest,"<sup>254</sup> while others have argued that victims should be recognized as *amicus curiae* in appellate proceedings. There are benefits and drawbacks for both designations, but in order to meet the necessity for a clear and unambiguous expression of standing, the focus needs to remain on victims having a statutory right to file an appeal.<sup>255</sup>

The argument for *amicus curiae* status is derived from the current practice in the AFCCA and other military appellate courts where the courts have requested *amicus* from service SVC programs and civilian victims' rights organizations.<sup>256</sup> *Amicus* standing recognizes that the victim is not the appellant or the appellee in the appellate proceeding and therefore is not a named party. It is therefore clear that *amicus* do not have the ability to file an appeal directly, only the opportunity to request to file a brief if proceedings are already underway.

The argument against *amicus* status is that it fundamentally fails to recognize that the individual's rights are at stake.<sup>257</sup> *Amicus curiae* translates to "friend of the court," and it is generally reserved for individuals or organizations who file briefs for a court's review, when the courts request assistance in understanding the wider legal policy implications in deciding a case.<sup>258</sup> A victim who has a legally recognized

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<sup>251</sup> October 2016 JPP, *supra* note 217, at 15–16 (testimony of Ms. Meg Garvin).

<sup>252</sup> 10 U.S.C. § 806b (Supp. IV 2016).

<sup>253</sup> October 2016 JPP, *supra* note 217, at 16 (testimony of Ms. Meg Garvin).

<sup>254</sup> S. 2943, 114th Cong. § 547 (2016).

<sup>255</sup> October 2016 JPP, *supra* note 217, at 11–12 (testimony of Ms. Meg Garvin).

<sup>256</sup> September 2016 JPP, *supra* note 197, at 40 (testimony of Colonel (Ret.) William Orr Jr.) (stating that the current practice at AFCCA is for victims to seek leave to file as an *amicus*. While the AFCCA has not defined a real party in interest, the government and defense have generally agreed that the victim is not a party to the proceedings).

<sup>257</sup> October 2016 JPP, *supra* note 217, at 19–20 (testimony of Ms. Meg Garvin).

<sup>258</sup> *Id.* at 19.

privilege over information contained in mental health records, for example, may want to make an argument to an appellate court when a petitioner seeks to have his or her conviction overturned because the trial judge arguably improperly excluded the victim's records from the trial. The victim has an individual right that is at stake, namely, the privacy of the victim's privileged mental health records, which is a fundamentally different role than a "friend of the court."<sup>259</sup> Appellate courts have discretion regarding whether to accept amicus briefs and court rules generally give lesser page limits to amicus briefs.<sup>260</sup> Courts may also limit the ability of an *amicus* to make an oral argument.<sup>261</sup>

Examining the two major proposals, the Senate's *real party in interest* designation is the most appropriate.<sup>262</sup> The Senate's proposal bestows the status on victims only once counsel for the accused or the government file appellate proceedings that implicate MREs 412, 513, 514, or any other right protected under Article 6b.<sup>263</sup> The victim therefore has the authority to file a brief in response to the appeal on the collateral issue of the military judge's ruling on an Article 6b protected issue. The term identifies the victim as having a legally cognizable interest in the proceedings, which more closely recognizes the stake a victim has than that of amicus. As a *real party in interest*, the victim would be entitled to notice of when their interests are in jeopardy as part of a post-trial appeal.

#### D. Notice

In order to exercise standing in post-trial proceedings, victims must first receive notice of the proceedings.<sup>264</sup> A person who would have standing to speak on an issue must receive notice so that the person can defend the right in question.<sup>265</sup> Article 6b requires victims receive notice of court-martial and clemency or parole hearings but not appellate proceedings.<sup>266</sup> The individual military services can implement

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<sup>259</sup> *Id.* at 20.

<sup>260</sup> *Id.* at 20, 85–88 (testimony of Ms. Meg Garvin, Mr. Don Christensen, Mr. Ryan Guilds, and Mr. Jason Middleton).

<sup>261</sup> *Id.*

<sup>262</sup> S. 2943, 114<sup>th</sup> Cong. § 547 (2016).

<sup>263</sup> *Id.*

<sup>264</sup> October 2016 JPP, *supra* note 217, at 21 (testimony of Ms. Meg Garvin).

<sup>265</sup> *Id.*

<sup>266</sup> 10 U.S.C. § 806b(a)(2) (Supp. IV 2016).

regulations and policies to inform victims of appellate proceedings but the requirement has not been uniformly applied or codified.<sup>267</sup>

One of the major challenges in notifying victims of post-trial proceedings has been the lack of a uniform system of record for court-martial and appellate information similar to the federal court's Public Access to Court Electronic Records (PACER) system. PACER contains a variety case information including documents filed with the court, and the documents are made available to the public via the Internet.<sup>268</sup> In order to meet the notice requirements of the CVRA, the Department of Justice created an automated Victim Notification System (VNS), which gives federal officials and victims access to a repository of information about a case.<sup>269</sup>

Military service regulations require a representative of the government to notify victims of post-trial processes, including receiving an election of whether the victim wants to be notified of post-trial matters.<sup>270</sup> The Army is the only one of the military services that currently has a victim liaison, who works in the Office of the Clerk of Court at ACCA to send notice to victims when an appeal has been filed.<sup>271</sup> The liaison is not an attorney and does not represent or give legal advice to the victim. The military services also differ in terms of whether SVC representation continues past the completion of the court-martial and through appellate proceedings, making contact with the victim more challenging.

The 2017 NDAA included a provision for the creation of a military justice case management system within the next four years.<sup>272</sup> The law requires the Secretary of Defense to establish uniform standards for the creation of the system within two years and for the system to be effective within four years.<sup>273</sup> The JPP has also looked at the issue and has voted to recommend legislation to require victims to be served with copies of all appellate briefs in proceedings that implicate rights enumerated in Article

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<sup>267</sup> AR 27-10, para. 17–14.

<sup>268</sup> November 2016 JPP, *supra* note 215, at 220-3 (Panel Deliberations). PACER is an online electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts. <https://www.pacer.gov/>.

<sup>269</sup> October 2016 JPP, *supra* note 217, at 60 (testimony of Ms. Ann Vallandingham).

<sup>270</sup> *See, e.g.*, AR 27-10, para. 17-14b.

<sup>271</sup> November 2016 JPP, *supra* note 215, at 231 (testimony of Lt. Col. Angela Wissman).

<sup>272</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) [hereinafter FY17 NDAA].

<sup>273</sup> *Id.* at § 543.

6b.<sup>274</sup> With the enactment of the 2017 NDAA,<sup>275</sup> the Department of Defense must create a record system, but there is still no specific requirement to proactively notify victims of appellate proceedings. While the Department of Defense might take this on themselves through internal regulations, Congress should add this as a requirement through the amendment of Article 6b.<sup>276</sup>

#### IV. Conclusion

Victims' rights have only been codified in the military justice system since 2014 and they have undergone steady changes every year since then. The time has come to make improvements to Article 6b and allow victims of crime to have a voice in the military justice appellate process.

The standard of review for writs of mandamus under Article 6b must be amended to clearly provide ordinary standards of appellate review. Within the first four years of the CVRA, Congress amended the legislation to make this same clarification. The time is right to do the same for Article 6b.

Congress and the President must also work together to clarify the procedures for appeals by victims. Congress must amend Article 6b to explicitly allow appeals to CAAF. At the same time, the President needs to promulgate a new R.C.M. to establish uniform standards for how victims and the courts process appeals. There is a current R.C.M. spelling out what steps the government must take to file an interlocutory appeal and similar processes can be applied to victims. The courts also need specific guidance that once an appeal is filed, the proceedings must be stayed while the appellate courts engage in an expedited review of the petition. Clear guidance is likely to result in well-reasoned and uniform petitions that all of the parties to a court-martial can understand and timelines that can be relied on.

To guarantee procedural justice for victims of crime, Congress must ensure that there are adequate enforcement mechanisms for the rights and privileges of crime victims. This imperative is based on the fundamental principle that those who are impacted by crime must have their voices

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<sup>274</sup> November 2016 JPP, *supra* note 215, at 235 (Panel Deliberations).

<sup>275</sup> FY17 NDAA, *supra* note 272, at § 543.

<sup>276</sup> *See infra* Appendix C.



heard through a fair and transparent criminal justice system. The development and understanding of victims' rights have advanced significantly since the enactment of Article 6b in 2013, but enforcement is the means by which we can ensure these developments are protected. The recommendations above are the next evolutionary step in the advancement of procedural justice for victims of crime throughout our military justice system.

## Appendix A

## Army Victim Mandamus Outcomes Table

Petitioner	Primary Issue	Outcome
<i>CC v. Lippert</i> ARMY MISC 20140779 16 October 2014	MRE 513 - Release of records without a hearing.	Granted in Part
<i>SC v. Schubert</i> ARMY MISC 20140813 12 November 2014	Request to Quash Deposition Order	Denied
<i>HC v. Bridges</i> ARMY MISC 20140793 1 December 2014	Scheduling of C-M - granting SVC a continuance of trial	Denied
<i>AT v. Lippert</i> ARMY MISC 20150387 11 June 2015	MRE 514 - Victim - Victim Advocate Privilege	Denied
<i>DB v. Lippert</i> ARMY MISC 20150769 1 February 2016	MRE 513 - Release of records following an in camera review conducted without a hearing.	Granted in Part

## Appendix B

Army Victim Mandamus Processing Table

Petitioner	Stay?	TJ Order	Petition	ACCA Ruling	Days Petition was Pending
<i>CC v. Lippert</i> ARMY MISC 20140779 16 October 2014	Denied as Moot	7-Oct-14	14-Oct-14	16-Oct-14	2
<i>SC v. Schubert</i> ARMY MISC 20140813 12 November 2014	Yes	22-Oct-14	29-Oct-14	12-Nov-14	14 *
<i>HC v. Bridges</i> ARMY MISC 20140793 1 December 2014	No (Moot)	2-Oct-14	20-Oct-14	1-Dec-14	42 *
<i>AT v. Lippert</i> ARMY MISC 20150387 11 June 2015	No	2-Jun-15	3-Jun-15	11-Jun-15	8
<i>DB v. Lippert</i> ARMY MISC 20150769 1 February 2016	Yes	6-Nov-15	23-Nov-15	1-Feb-16	70 *

\* Court requested and received amicus curiae input.

## Appendix C

## Recommended Revision of Article 6b, UCMJ

(e) ENFORCEMENT BY COURT OF CRIMINAL APPEALS AND COURT OF APPEALS FOR THE ARMED FORCES.—

(1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.

(2) A petition as described in this chapter may not be received by the Court of Criminal Appeals unless the victim provides the preliminary hearing officer or military judge, and counsel for the Government and accused, with written notice of the petition within 72 hours of the order or ruling. Such notice shall include a certification by the victim that the petition is not taken for the purpose of delay and which of the protections listed in paragraph (7) are implicated.

(3) A petition described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, and, to the extent practicable, shall have priority over all other proceedings before the court.

(4) The Court of Criminal Appeals must take up and decide such petition within five calendar days after the petition has been filed, unless the victim and the parties, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the Court of Criminal Appeals will apply ordinary standards of appellate review. If the Court of Criminal Appeals denies the relief sought, the reasons for the denial must be clearly stated on the record in a written opinion.

(5) The victim may petition the Court of Appeals for the Armed Forces to review the decision of the Court of Criminal Appeals within 10 days of being notified of the decision of the Court of Criminal Appeals.

~~(2)~~ (6) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

~~(4)~~ (7) Paragraph (1) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title.

- (C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.
- (D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.
- (E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.
- (F) Military Rule of Evidence 615, relating to the exclusion of witnesses.

## Appendix D

## Proposed Rule for Courts-Martial

## Article 6b(e) Petition for Writ of Mandamus

(a) *In general.* In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, a victim of an offense as defined in Article 6b, may file a petition for a writ of mandamus as described in Article 6b(e).

(b) *Special Victims' Counsel.* Pursuant to 10 U.S.C. §1044e, the rights of a victim of an offense defined in Article 6b may be asserted by counsel representing the victim.

(c) *Procedure.*

(1) *Delay.* After an order or ruling which may be subject to an appeal by a victim, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the victim requests a delay to determine whether to file notice of appeal under this rule. The victim is entitled to no more than 72 hours under this subsection.

(2) *Decision to appeal.* The decision whether to file notice of appeal under this rule must be made within 72 hours of the ruling or order to be appealed.

(3) *Notice of appeal.* If the victim elects to appeal, the victim must provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice must identify the ruling or order to be appealed and the charges and specifications affected. The victim must certify that the appeal is not taken for the purpose of delay.

(4) *Effect on the court-martial.* Upon written notice to the military judge under subsection (c)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

(B) When trial on the merits has not begun, (i) a severance may be granted upon request of all the parties; (ii) a severance may be granted upon request of the accused and when appropriate under R.C.M. 906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) *Record.* Upon written notice to the military judge under subsection (c)(3) of this rule, trial counsel must cause a record of the proceedings to be prepared. Such record must be verbatim and complete to the extent necessary to resolve the issues appealed. R.C.M. 1103(g), (h), and (i) will apply and the record must be authenticated in accordance with R.C.M. 1104(a). The military judge or the Court of Criminal Appeals may direct that additional parts of the proceeding be included in the record; R.C.M. 1104(d) will not apply to such additions.

(6) *Forwarding.* The Judge Advocate General may designate a representative responsible for representing the victims of offenses identified in Article 6b on appeal. If such a representative has been identified, the representative will have an attorney-client relationship with the victim. If such a representative has been identified, and upon written notice to the military judge under subsection (c)(3) of this rule, the victim must promptly and by expeditious means forward the appeal to the designated representative. The victim must forward to the representative: the appeal; a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe.

(7) *Appeal filed.* If the victim elects to file an appeal, it must be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court.

(8) *Appeal not filed.* If the victim elects not to file an appeal, the victim must promptly notify the military judge and the parties.

(9) *Pretrial confinement of accused pending appeal.* If an accused is in pretrial confinement at the time the victim files notice of its intent to appeal under subsection (3) above, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the

victim, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

(d) *Appellate proceedings.*

(1) *Appellate counsel.* The Judge Advocate General may appoint counsel to represent the victim of an offense under Article 6b in appellate proceedings, in addition to counsel already representing the victim at the court-martial. The Government and Defense will be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Counsel for the victim must diligently prosecute an appeal under this rule.

(2) *Court of Criminal Appeals.* The Court of Criminal Appeals must take up and decide a petition under Article 6b(e) forthwith within 5 calendar days after the petition has been filed, unless the litigants, with the approval of the Court of Appeals, have stipulated to a different time period for consideration. In deciding such application, the Court of Appeals will apply ordinary standards of appellate review.

(3) *Action following decision of Court of Criminal Appeals.* After the Court of Criminal Appeals has decided any appeal under Article 6b(e), the victim or the accused may petition for review by the Court of Appeals for the Armed Forces, or the Judge Advocate General may certify a question to the Court of Appeals for the Armed Forces. The parties must be notified of the decision of the Court of Criminal Appeals promptly. If the decision is adverse to the victim or the accused, the aggrieved party must be notified of the decision and of the right to petition the Court of Appeals for the Armed Forces for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the aggrieved party is notified orally on the record, trial counsel must forward by expeditious means a certificate that the aggrieved party was so notified to the Judge Advocate General, who must forward a copy to the clerk of the Court of Appeals for the Armed Forces when required by the Court. If the decision by the Court of Criminal Appeals permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Appeals for the Armed Forces or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Appeals for the Armed Forces, it must be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Criminal Appeals. If the case is reviewed by the Court of Appeals for the Armed Forces, R.C.M. 1204 and 1205 will apply.



(e) *Military judge.* For purposes of this rule, “military judge” does not include the president of a special court-martial without a military judge.

**SMALL BUSINESS EXTRA-TERRITORIAL  
SET-ASIDES: IS THE SKY REALLY FALLING?**

MAJOR CRAIG M. SCROGHAM\*

*Chicken Little was in the woods one day when an acorn  
fell on her head. It scared her so much she trembled all  
over. She shook so hard, half her feathers fell out.  
“Help! Help! The sky is falling! I have to go tell the  
king!” So she ran in great fright to tell the king.<sup>1</sup>*

I. Introduction

You advise the command at U.S. Army South (ARSOUTH), the Army Service Component Command for U.S. Southern Command.<sup>2</sup> ARSOUTH has spent months in negotiations with the State Department, the Government of Guatemala, and the Guatemalan military to plan its upcoming training mission to Guatemala. As always, time is of the essence for this mission. During the next planning meeting, the representative from the Contract Support Brigade (CSB) interjects and

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<sup>1</sup> The story of Chicken Little is well known all over the world. The story’s ending changes depending on the storyteller. One version ends with Chicken Little mustering the courage to face her fears. The other version ends with Chicken Little and her friends, who Chicken Little has worked into hysteria, meeting Foxy Loxy along the way to tell the king that the sky is falling. Foxy Loxy eats Chicken Little and her friends. The moral of the story is to stay calm and not believe everything you hear. E.L. Easton, *The Story of Chicken Little*, <http://archive.is/Ev1rT> (last visited May 30, 2017).

<sup>2</sup> “U.S. Southern Command leverages rapid response capabilities, partner nation collaboration, and regional cooperation within our Area of Responsibility in order to support U.S. national security objectives, defend the Southern approaches to the United States, and promote regional security and stability.” U.S. Southern Command, <http://www.southcom.mil/About/>.

informs the commander that the process may take longer than expected on some of the contract actions, saying,

Sir, a number of these actions are going to take a little longer than we are used to. Some rules have changed in the contracting world. This procurement is under the simplified acquisition threshold (SAT)<sup>3</sup> and under the new rule it is now reserved for American small businesses, regardless of the place of performance. We're going to need to make sure an American small business gets first crack at this. But if no U.S. small businesses bid on the contract, we can then resolicit the contract so the Guatemalan companies can bid.

All the commander hears is “the CSB is delaying my mission.” He knows the Guatemalans are not going to be happy about this.

This hypothetical centers around the Small Business Administration's (SBA) efforts to apply Federal Acquisition Regulation (FAR) Part 19 small business set-asides extraterritorially. The efforts have been the topic of numerous protests to the Government Accountability Organization (GAO) over the last twenty years.<sup>4</sup> The debate, while fierce, has only been fought in the world of administrative law courts and chat forums.<sup>5</sup> While the two camps are firmly digging into their trenches, trading dubious stares, and tossing legal hand-grenades labeled “*Chevron* deference”<sup>6</sup> and “validly-promulgated, long-standing regulation,”<sup>7</sup> little has been said about why it should or should not apply practically.

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<sup>3</sup> The Simplified Acquisition Threshold (SAT) is a dollar amount where contracts under that threshold trigger a set of simplified procedures for procuring supplies, services, and items in hopes of lowering costs and providing efficiency. See FAR Part 13.

<sup>4</sup> FAR Part 19 implements acquisition related portions of the Small Business Act (The Act) and typically consists of setting aside certain contracts appropriate for small businesses.

<sup>5</sup> See Don Mansfield, *Did the SBA Invalidate FAR 19.000(b)?*, WIFCON (Jun 17, 2015), <http://www.wifcon.com/discussion/index.php?blog/6/entry-3081-did-the-sba-invalidate-far-19000b/> (discussing the overseas exception to SBA set-asides).

<sup>6</sup> “*Chevron* Deference” is a term derived from a Supreme Court opinion that created a test used to determine whether to give deference to a government agency's interpretation of a statute they administer. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>7</sup> *Latvian Connection Gen. Trading & Constr. LLC, Comp. Gen. B-408633*, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013). The quoted language was used by the Government Accountability Office (GAO) as it denied a protestor's claim that Small Business Administration (SBA) set-asides should be applied extraterritorially.

Why does it matter if FAR Part 19 is read to apply extraterritorially? What is the real world impact of extraterritorial application of FAR Part 19 set-asides for the Army (and the Department of Defense (DoD) for that matter) on the strategic, operational, and tactical levels? Application of mandatory extraterritorial small business set-asides would have serious negative impacts on a commander's ability to contract strategically, negatively affecting his/her ability to accomplish the mission. Chicken Little is not as irrational as the rest of the barnyard might think.

## II. The History of the Small Business Administration and Application of Overseas Small Business Set-Asides

The roots of the SBA took form early in 1932 with the creation of the Reconstruction Finance Corporation (RFC) in hopes of increasing wartime production.<sup>8</sup> The RFC went through various other forms until 1953, when Congress created the SBA. Its mission would be to “aid, counsel, assist and protect, insofar as possible, the interests of small business concerns.”<sup>9</sup> To accomplish the mission, Congress gave the SBA a mandate to ensure small business would receive a “fair proportion” of government contracts.<sup>10</sup> Government agencies, in turn, created internal procedures to ensure that a fair proportion was set aside for small business.<sup>11</sup>

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<sup>8</sup> SMALL BUSINESS ADMINISTRATION, <https://www.sba.gov/about-sba/what-we-do/history> (last visited May 30, 2017). The Reconstruction Finance Corporation, began by Herbert Hoover, in coordination with other government agencies like the Smaller War Plants Corporation, the Small Defense Plants Administration, and the Office of Small Business found in the Department of Commerce, all worked together to help small businesses participate in war-time production. *Id.*

<sup>9</sup> The Small Business Act of 1953, Pub. L. No. 83-163, § 202, 67 Stat. 230, 232 (codified as amended at 15 U.S.C. § 631(a) (2012)).

<sup>10</sup> *Id.*

<sup>11</sup> Two mechanisms have primarily been used to set aside contracts for small businesses. The first and primary mechanism is known as the “Rule of Two.” The rule applies by directing contracting officers to set aside “any acquisition over \$150,000 for small business participation when there is a reasonable expectation that: (1) Offers will be obtained from at least two responsible small business concerns...; and (2) Award will be made at fair market prices.” FAR. 19.502-2(b) (2016). The second mechanism is the automatic set-aside, where any action over the micro-purchase threshold and under the simplified acquisition threshold (SAT), is automatically reserved for small business concerns that are competitive in terms of market prices, quality, and delivery. *See* FAR 19.203(b) (2016). Congress has also created other preferences to award contracts to small businesses owned by socially and economically disadvantaged individuals, women-owned small businesses, small businesses in historically underutilized business zones, and small businesses owned

Almost from the inception of small business set-asides, the DoD, in the Armed Services Procurement Regulation (ASPR), created an overseas exception.<sup>12</sup> This exception continued in 1984 when the ASPR was replaced by the FAR. That same limitation is found in the FAR today. FAR Part 19, which implements the acquisition-related portions of The Small Business Act (The Act), is limited by FAR Part 19.000(b), which states “this part, except for Subpart 19.6, applies only in the United States or its outlying areas. Subpart 19.6 applies worldwide.”<sup>13</sup>

#### A. Small Business Administration Set-Asides’ Expansion Overseas

Since GAO’s first decision regarding a protest on the overseas exception for small business, rationales for whether to apply the exception have been somewhat inconsistent and piecemeal.<sup>14</sup> The first few cases decided by GAO expanded a portion of the SBA’s reach overseas. The first such case, *Eastern Marine, Inc.*, focused on a protest filed by the second-lowest bidder on a contract to deliver a tugboat to Panama.<sup>15</sup> The awardee, a small business concern, did not satisfy the solicitation’s requirement that a “successful bidder must have been engaged in construction of similar tugboats for the past 5 years.”<sup>16</sup> The SBA issued a certificate of competency (CoC) on the awardee’s behalf.<sup>17</sup> The protestor

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by veterans with service-connected disabilities. See 15 U.S.C. § 637 (2012). These socio-economic preferences are discretionary set-asides.

<sup>12</sup> The “overseas exception,” as it first appeared in the Armed Services Procurement Regulation (ASPR) in 1958, stated, “This subpart applies only in the United States, its Territories, its possessions, and Puerto Rico.” Armed Services Procurement Regulation, 23 Fed. Reg. 9209, 9209 (Nov. 29, 1958).

<sup>13</sup> Subpart 19.6 is the SBA’s Certificate of Competency (CoC) program.

<sup>14</sup> GAO, headed by the Comptroller General, attempts to provide an impartial and independent forum where bid protests can be resolved without the delay and cost associated with formal litigation. These decisions “have resulted in a uniform body of law applicable to the procurement process upon which the Congress, the courts, agencies, and the public rely.” Bid Protests at GAO: A Descriptive Guide, 2010. <http://www.gao.gov/assets/210/203631.pdf>

<sup>15</sup> *Eastern Marine, Inc.*, 63 Comp. Gen. 551, 551 (1984).

<sup>16</sup> *Id.* at 552.

<sup>17</sup> *Id.* at 553. “The Certificate of Competency (CoC) program allows a small business to appeal a contracting officer’s determination that it is unable to fulfill the requirements of a specific government contract on which it is the apparent low bidder. When the small business applies for a CoC, SBA industrial and financial specialists conduct a detailed review of the firm’s capabilities to perform on the contract. If the business demonstrates the ability to perform, the SBA issues a CoC to the contracting officer requiring the award

argued there was an overseas exception to small business set-asides and that the contracting officer acted arbitrarily by accepting the CoC.<sup>18</sup> GAO, after inquiring into the SBA's stance on the applicability of the CoC program, gave deference to the SBA.<sup>19</sup> Similarly, six years later in *Discount Machinery*, a small business protested another solicitation by the Panama Canal Commission (PCC), arguing the PCC was not using the SBA's CoC program to award contracts.<sup>20</sup> The PCC again pointed out that FAR Part 19.000(b) did not apply extraterritorially. The SBA's argument, which GAO again accepted, was that the Act imposed no geographical limitation to its applicability.<sup>21</sup> The first round of the fight regarding the overseas exception went to the SBA. In that decision, GAO recommended the Federal Acquisition Regulatory Council<sup>22</sup> (FAR Council) to redraft the FAR specifically to exempt the CoC program. The FAR was then rewritten to exempt the CoC program from 19.000(b)'s geographical limitation.<sup>23</sup>

## B. GAO Begins Limiting Overseas Application

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of that specific contract to the small business." See *Certificates of Competency*, SMALL BUSINESS ADMINISTRATION, <https://www.sba.gov/content/certificate-competency-program> (last visited May 30, 2017); see also FAR 19.600(a) (2016).

<sup>18</sup> The protestor pointed to the Federal Procurement Regulations, 41 C.F.R. § 1-1.700(b) (1984)—another precursor to the FAR—which provided that the small business set-aside regulations applied only in the United States. *Id.* at 2.

<sup>19</sup> GAO held "There is nothing in the SBA's regulations, however, that would limit the application of the CoC program to either contracts awarded or items to be delivered in the United States. In fact, the SBA has informed us that it believes that the CoC program is not so limited. We therefore find no basis to object to the CoC referral." *Id.* at 2.

<sup>20</sup> *Discount Mach. & Equip., Inc.*, 70 Comp. Gen. 108, 109 (1990).

<sup>21</sup> See *id.* at 110.

<sup>22</sup> "The Federal Acquisition Regulatory Council was established to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government, in accordance with Title 41, Chapter 7, Section 421 of the Office of Federal Procurement Policy (OFPP) Act. The Administrator, in consultation with the Council, shall ensure that procurement regulations, promulgated by executive agencies, are consistent with the Federal Acquisition Regulation (FAR) and in accordance with any policies issued pursuant to Section 405 of Title 41. The Council manages[,] coordinates[,] controls[,] and monitors the maintenance and issuance of changes in the FAR." OFFICE OF MANAGEMENT AND BUDGET, [https://obamawhitehouse.archives.gov/omb/procurement\\_far\\_council](https://obamawhitehouse.archives.gov/omb/procurement_far_council) (last visited May 30, 2017).

<sup>23</sup> The FAR went through a number of iterations explaining where the SBA applies. Its current form states, "This part, except for Subpart 19.6, applies only in the United States or its outlying areas. Subpart 19.6 applies worldwide." FAR 19.000(b) (2016).

The next major protest occurred in 2013, in a GAO protest affectionately known in the contracting world as “*Latvian*,” where Latvian Connection General Trading and Construction LLC (Latvian), an American small business, filed a protest with GAO arising from an Air Force request for quotes (brand name or equal armored cable to be used at Thumrait Air Base, Oman).<sup>24</sup> Latvian claimed the procurement should have been set-aside for small business.<sup>25</sup> Latvian argued that Section 644(j) of The Act should have applied, which provides that contracts above the micro-purchase threshold, but not greater than the simplified acquisition threshold, “shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.”<sup>26</sup> The Air Force relied on the plain language of 19.000(b).<sup>27</sup> GAO, siding with the Air Force, made two points: (1) The FAR (and its predecessor) have long applied the overseas exception to small business set-asides; and (2) SBA’s implementing language is silent regarding §644(j)(1)’s application outside of the United States.<sup>28</sup> Using a *Chevron* analysis to resolve that ambiguity and silence, GAO gave deference to the FAR and its longstanding exception.<sup>29</sup> Almost coincidentally, just weeks after this decision, the SBA published redrafted implementing regulations to resolve any ambiguity. The SBA’s implementing regulation, now reads:

Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, and any contract for the sale of Government property, *regardless of the place of performance*, which SBA and the procuring or disposal agency determine to be in the interest of:

- (1) Maintaining or mobilizing the Nation's full productive capacity;
- (2) War or national defense programs;

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<sup>24</sup> Latvian Connection Gen. Trading & Constr. LLC, Comp. Gen. B-408633, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or

(4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.<sup>30</sup>

The addition of those five italicized words to the SBA's implementing regulation fundamentally changed the analysis of SBA set-aside bid protests. Due to the consistent application of *Chevron* in bid protests regarding FAR Part 19.000(b), and its likely application in any new cases heard by GAO or the U.S. Court of Federal Claims, the *Chevron* decision warrants more discussion. In *Chevron*, the Supreme Court of the United States heard a petition regarding whether the Environmental Protection Agency (EPA) had authority to implement permit requirements pursuant to the Clean Air Act Amendments of 1977.<sup>31</sup> Implementation hinged on the EPA's definition of source, which the Court, after applying the test below, determined was a permissible construction of the statute.<sup>32</sup> To get the answer, the Supreme Court came up with a two-part test:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>33</sup>

The next major protest occurred in 2014 where Maersk, a large corporation, protested a small business set-aside it felt was to be performed outside of the United States and its outlying territories, thus making it

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<sup>30</sup> 13 C.F.R. § 125.2(a) (2016) (emphasis added); *see also* 13 C.F.R. § 125.2(c) (describing procuring agency responsibilities to foster small business participation "regardless of the place of performance of the contract").

<sup>31</sup> *Chevron*, 467 U.S. at 839.

<sup>32</sup> *Id.* at 866.

<sup>33</sup> *Id.* at 842–3.



exempt from a small business set-aside.<sup>34</sup> Ruling against Maersk because part of the requirement was to be performed in the United States, GAO attempted to clarify its decision in *Latvian*. GAO explained that when a procurement is conducted outside of the United States and where the work is to be performed outside the United States as well, it is reasonable for an agency to determine that it is not required to set-aside the procurement for small business concerns.<sup>35</sup> GAO made it clear that if both the contracting office and requirement were outside the United States, then SBA set-aside requirements would not apply.<sup>36</sup> The tide had turned again. The Government Accounting Office, thirteen years after deciding its last protest on the extraterritoriality of the Act and ruling in favor of the SBA, based on not much more than SBA's opinion, had now ruled against the SBA.

In an interesting series of events, it seemed the tide was turning back in the SBA's favor. In a protest with the Department of State (DoS), the SBA was prepared to argue that GAO's previous ruling in *Latvian*, based in part on the SBA implementing regulation's silence regarding extra-territoriality, had now been resolved.<sup>37</sup> Department of State in turn canceled the solicitation, resolicited it to include small businesses, and even redrafted the Department of State Acquisition Regulation to extend

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<sup>34</sup> See *Maersk Line, Ltd.*, Comp. Gen. B-410280, 2014 CPD ¶ 359 (Comp. Gen. Dec. 1, 2014). Military Sealift Command (MSC) had a requirement for multimodal cargo transportation services. It involved a contracting officer at MSC attempting to promote small business concerns. Not having the time to do complete market research for the "rule of two," the contracting officer issued a solicitation with a tiered evaluation of offers that first apply the "rule of two" if two or more small businesses replied. If the "rule of two" was not satisfied, then large corporations would be considered. See *id.*

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* The decision in *Maersk* came after the SBA had redrafted its regulations to include the language that applied The Act regardless of place of performance. GAO pointed out that their decision in *Latvian* was made "prior to the issuance of the SBA's regulations on the topic." *Id.* GAO refrained from discussing whether a decision in *Latvian* would be different today now that the SBA redrafted its regulations. *Id.*

<sup>37</sup> "State argues that the GAO decision of [*Latvian*] applies here. In that case, GAO ruled that FAR 19.000(b) limits the application of FAR part 19 . . . to acquisitions conducted in the United States (and its outlying areas). We believe the basis for GAO's ruling was the SBA's regulations were silent on this issue and there, the more specific FAR regulation controlled. Heeding this advice, SBA recently promulgated regulations to address this issue. Specifically, SBA made wholesale changes to 13 CFR § 125.2 on October 2, 2013." Letter from John W. Klein, Associate Gen. Couns. for Procurement L., U.S. Small Bus. Admin., & Laura Mann Eyester, Deputy Associate Gen. Couns. for Procurement L., U.S. Small Bus. Admin., to Gary Allen, Senior Att'y, Procurement L. Division, U.S. Gov't Accountability Off., RE: B-410081 Protest of Latvian Connection, LLC (Aug. 25, 2014), [http://www.wifcon.com/EXHIBIT\\_18\\_Latvian.pdf](http://www.wifcon.com/EXHIBIT_18_Latvian.pdf).

the scope of small business set-asides.<sup>38</sup> At the same time, Latvian protested an Army solicitation for installation of sunshades at Camp Arifjan, Kuwait.<sup>39</sup> In light of the recent developments with the DoS protest and the redrafting of the SBA regulation, the 408th CSB, located in Kuwait, seemed unsure of its legal footing. Despite falling squarely within the type of procurement the *Maersk* decision held did not have to be set aside, the 408th CSB cancelled its solicitation.<sup>40</sup>

### III. The Current Legal Arguments

#### A. The Small Business Administration's Argument

The SBA's argument rests partially in its very existence, being the embodiment of Congress's manifest intent to create an agency whose purpose is to ensure a fair portion of government contracts are awarded to American small business interests.<sup>41</sup> The SBA argues it was designated by Congress to administer the Act, and that nowhere within the Act does it give it the Office of Federal Procurement Policy (OFPP) or the FAR Council responsibility for implementing and administering the Act, pointing to the implementing language of the Act itself, which states:

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<sup>38</sup> The Department of State Acquisition Regulation (DOSAR) now reads:

“(b) It is the Department’s policy to provide maximum opportunities for U.S. small businesses to participate in the acquisition process. DOS contracts that are awarded domestically for performance overseas shall be subject to the Small Business Act as a matter of policy. Contracts that are both awarded and performed overseas should comply on a voluntary basis.”

DOSAR, 619.000(b) (2015).

<sup>39</sup> See *Latvian Connection, LLC*, B-410921, (Comp. Gen. Aug. 11, 2015), <http://www.gao.gov/assets/680/671952.pdf>.

<sup>40</sup> Latvian's protest was dismissed when the 408th CSB cancelled its solicitation. In its cancellation notice, the 408th CSB included the following language: “The purpose of this amendment is to cancel the solicitation in its entirety and pursue a revised acquisition strategy considering small business set-aside requirements, without regard to Federal Acquisition Regulation (FAR) Part 19.000(b).” See Amendment 0004 to W912D1-15-R-0004, <http://www.wifcon.com/W912D1.pdf>.

<sup>41</sup> See Letter from Kevin Harber, Att’y Advisor, U.S. Small Bus. Admin., to Peter Verchinski, Off. Of Gen. Couns., U.S. Gov’t Accountability Off., RE: SBA Comments on Protest of Latvian Connection LLC (B-408633) 2 (Aug. 29, 2013), [http://www.wifcon.com/EXHIBIT\\_17\\_5.pdf](http://www.wifcon.com/EXHIBIT_17_5.pdf) [hereinafter Harber Letter].

In order to carry out the policies of this Act there is hereby created an agency under the name “Small Business Administration” (herein referred to as the Administration), which Administration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the Federal Government.<sup>42</sup>

To the contrary, the SBA argues it is “charged with carrying out the policies of The Act and issuing such rules and regulations as it deems necessary.”<sup>43</sup> Because the SBA is clearly designated by Congress as responsible for the implementation and administration of the Act, SBA argues its interpretation of the Act should be given deference under a *Chevron* analysis. This particular argument was persuasive early in the SBA’s attempts to expand the reach of the Act. In both *Eastern Marine* and *Discount Machinery*, GAO ruled in favor of the SBA, relying on not much more than the SBA’s argument that it was an SBA regulation and SBA’s interpretation controlled.<sup>44</sup>

Second, the SBA points out there is no geographic limitation placed on 15 U.S.C. § 644(j)(1).<sup>45</sup> The SBA argues that if Congress had intended to limit the application of The Act, Congress would have done so, as it did in 15 U.S.C. § 637(d)(2).<sup>46</sup> The SBA argues that absent clear congressional intent to limit the application in certain circumstances, the Act should be applied in a manner that ensures small business concerns are given “the maximum practicable opportunity to participate in the performance of contracts . . .”<sup>47</sup>

Finally, the SBA also relies on the fact that both the U.S. Court of Federal Claims and GAO have held that the SBA’s implementation of a

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<sup>42</sup> *Id.* (quoting 15 U.S.C. § 633(a) (2012)).

<sup>43</sup> *Id.* (quoting *Contract Management, Inc. v. Rumsfeld*, 434 F.3d 1145, 1147 (9th Cir. 2006)).

<sup>44</sup> See *Discount Mach. & Equip., Inc.*, 70 Comp. Gen. 108, 110 (1990); *Eastern Marine, Inc.*, 63 Comp. Gen. 551, 553 (1984).

<sup>45</sup> See Harber Letter, *supra* note 41 at 3.

<sup>46</sup> This portion of the statute required mandatory language to be included in contracts that required prime contractors to effectuate U.S. policy by subcontracting to small business concerns. See 15 U.S.C. § 637(d)(1) (2012). This section specifically stated the required language was not required in “such contracts [which] will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.” 15 U.S.C. § 637(d)(2)(B) (2012).

<sup>47</sup> See Harber Letter, *supra* note 41 at 3 (quoting 15 U.S.C. § 637(d)(1)).

provision of The Act, via regulation, was viewed as controlling when there is an inconsistency with a FAR rule.<sup>48</sup> This argument was persuasive in the mid 1990's regarding application of the CoC program extra-territorially and successfully resulted in the FAR Council's redrafting FAR subpart 19.6 to apply the program globally.<sup>49</sup> At some point though, in the thirteen years between *Discount Machinery* and *Latvian*, something changed at GAO. GAO, which has not explained why this shift occurred, found the SBA's position less persuasive and began consistently giving deference to the plain language in the FAR.

#### B. An Argument for The Department of Defense

A strong argument can be made on behalf of The Department of Defense, relying partly on GAO's most current line of decisions in *Latvian* and *Maersk*, that the FAR deserves deference after applying its version of the *Chevron* test. Combining the facts that the overseas exclusion is a "validly-promulgated, long-standing regulation,"<sup>50</sup> OFPP's statutory

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<sup>48</sup> See *id.* at 4-6.

<sup>49</sup> See *C&G Excavating, Inc. v. U.S.*, 32 Fed. Cl. 231, 239 (1994). In *C&G*, the Court of Federal Claims reviewed a protest where claimant argued the FAR improperly limited the SBA's review of portions for applications within the CoC program when the SBA's regulations were silent. The court stated,

With regard to the direct conflict between 13 C.F.R. § 125.5(e) and FAR § 19.602-2(a)(2), the court finds that the restrictive language in the FAR concerning the scope of SBA's site investigation cannot be interpreted to limit the scope of SBA's general review authority. The clear intent of 13 C.F.R. § 125.5 is that the SBA may perform a site investigation examining all elements of responsibility. This interpretation is consistent with the [Small Business Act] and shall be given deference.

*Id.* In another conflict between the FAR and SBA regulations, GAO held,

While FAR Sec. 19.302(j) treats size status protests received after award of a contract as having no applicability to that contract, SBA's regulations, which we view as controlling in this area, provide that "[a] timely filed protest applies to the procurement in question even though the contracting officer awarded the contract prior to receipt of the protest."

Adams Indus. Services, Inc., B-280186, 98-2 CPD ¶ 56, (Comp. Gen. Aug. 28, 1998).

<sup>50</sup> *Latvian Connection Gen. Trading & Constr. LLC*, Comp. Gen. B-408633, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013).

authority to create government-wide procurement regulations, and the legislative history where Congress has specifically declined to implement language in the Act that would apply set-asides globally, all support applying FAR Part 19.000(b) as business as usual.

The first hurdle of *Chevron* is to determine whether the language at question provides an unambiguous expression of congressional intent. If the intent is clear, analysis ends and Congress's intent will control.<sup>51</sup> The Act itself is silent regarding geographic limitations on small business set-asides. That silence, when combined with the existence of the overseas exception for the last 58 years, along with Congress's knowledge and inaction, seems to clear this hurdle with high jump prowess.

The next step, whether to give deference to the interpretation of an administering agency is dependent on the circumstances.<sup>52</sup> It seems there is an overlap of power (whether real or perceived) between the SBA and OFPP. The power of the SBA to interpret the Act and the power of OFPP to create procurement policy. GAO has recognized the SBA's broad authority under the Act to promote policies and take actions to ensure that small businesses obtain their fair share of contracts awarded by the U.S. government.<sup>53</sup> To extend this power of interpretation to the SBA would functionally give the SBA rulemaking authority over government procurement. Contrast that authority with OFPP, which was specifically delegated the authority to promulgate procurement policies.<sup>54</sup> It seems both the SBA and OFPP have a role to play in changing procurement policy in order to promote the Act. The U.S. Court of Federal Claims warned us of this very predicament in 1989.<sup>55</sup>

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<sup>51</sup> *Chevron*, 467 U.S. at 842-43.

<sup>52</sup> *Id.* at 843.

<sup>53</sup> Latvian Connection Gen. Trading & Constr. LLC, Comp. Gen. B-408633, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013).

<sup>54</sup> "The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget plays a central role in shaping the policies and practices federal agencies use to acquire the goods and services they need to carry out their responsibilities. OFPP was established by Congress in 1974 to provide overall direction for government-wide procurement policies, regulations and procedures and to promote economy, efficiency, and effectiveness in acquisition processes. OFPP is headed by an Administrator who is appointed by the President and confirmed by the Senate." OFPP, [https://obamawhitehouse.archives.gov/omb/procurement\\_default](https://obamawhitehouse.archives.gov/omb/procurement_default) (last visited May 30, 2017).

<sup>55</sup> See *C & G*, 32 Fed. Cl. 231, 242 ("[T]he Government has been on notice since 1989 . . . that the conflict exists and poses problems. The Government's regulatory machinery has perpetuated a conflict that should have been resolved to avert future litigation.").

Finally, “where the agency’s position reflects an informal interpretation, *Chevron* deference is not warranted; in these cases, the agency’s interpretation is ‘entitled to respect’ only to the extent it has the ‘power to persuade.’”<sup>56</sup> The SBA’s argument is not persuasive when Congress has twice decided not to include language in the Act that would apply set-asides globally. The first attempt to amend the statute included a statement of congressional policy stating that “...Federal agencies shall endeavor to meet the contracting goals established under this subsection, regardless of the geographic area in which contracts will be performed.”<sup>57</sup> The second attempt to amend the statute included slightly different language, stating that procurement goals would “apply to all procurement contracts, without regard to whether the contract is for work within or outside the United States.”<sup>58</sup> Neither proposal became law. If DoD’s application of its longstanding overseas exception were contrary to Congress’s intent, Congress would not have passed the chance to correct it.

#### IV. Beyond the Legality: The Practical Impacts Of Applying Set-Asides Globally

More important than the legal arguments are the pragmatic arguments for why small business set-asides should or should not be applied globally. It is important to consider are the practical impacts possibly affecting both the SBA and the DoD. What does the SBA have to gain and what does the DoD have to lose?

##### A. What the SBA Has to Gain

The goal and mission of the SBA—its very “raison d’etre”—is to increase small business opportunities.<sup>59</sup> The SBA will always be in the

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<sup>56</sup> *Latvian Connection Gen. Trading & Constr. LLC, Comp. Gen. B-408633*, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013).

<sup>57</sup> National Defense Authorization Act for Fiscal Year 2006, S. 1042, 109th Cong. (2005).

<sup>58</sup> Small Business Fairness in Contracting Act, H.R. 1873, 110th Cong. (2007).

<sup>59</sup> See 15 U.S.C. § 631(a) (2012) (“The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this

position where it is looking for ways and places to extend the Act. The status quo will never be good enough.<sup>60</sup>

While there may always be the bureaucratic motivation to justify its existence, in the SBA's defense, it is not as if it is an insatiable beast looking to devour all life that comes within its clutches. A good example is the setting of goals. The SBA has a definite self-interest in setting attainable goals, thereby encouraging efforts to reach them.<sup>61</sup> The SBA set its goals for the DoD in 2006 and 2007 at 23% and lowered their goal in 2008 to 22.24%.<sup>62</sup> It seems in 2008 the SBA did a reality check and lowered the goal, which it did again in 2014 when it lowered DoD's goal to 21.60%.<sup>63</sup> So while the SBA is part of the bureaucratic machine, it does not seem to be arbitrarily raising goals, year in and year out, simply in an effort to bring in more business for its constituency.<sup>64</sup>

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Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.”)

<sup>60</sup> That is assuming the status quo is good enough. A good argument could be made that the SBA should focus first on attaining its goals in the United States before trying to extend its reach overseas. Only twice since 2007 has the Government met the goal set by the SBA. *Contracting—See Agency Small Business Scorecards*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/contracting/finding-government-customers/see-agency-small-business-scorecards> (last visited May 31, 2017).

<sup>61</sup> The SBA negotiates its goals with each agency. At the beginning of every fiscal year, agencies propose goals to the SBA and the SBA's Office of Government Contracting evaluates the proposals. The SBA then notifies the agency of their official goal. *See Contracting—Goaling*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/content/small-business-goaling> (last visited May 31, 2017).

<sup>62</sup> U.S. SMALL BUS. ADMIN., 2007 DEPARTMENT OF DEFENSE SCORECARD, [https://www.sba.gov/sites/default/files/files/dod\\_assessment\\_07.pdf](https://www.sba.gov/sites/default/files/files/dod_assessment_07.pdf). *See also* U.S. SMALL BUS. ADMIN., 2008 DEPARTMENT OF DEFENSE SCORECARD, [https://www.sba.gov/sites/default/files/files/goals\\_08\\_dod.pdf](https://www.sba.gov/sites/default/files/files/goals_08_dod.pdf).

<sup>63</sup> For the first time, in 2014, DoD met its goal, spending 23.47% with American small business. *See* U.S. SMALL BUS. ADMIN., DEPARTMENT OF DEFENSE FY2014 SMALL BUSINESS PROCUREMENT SCORECARD (2015), [https://www.sba.gov/sites/default/files/files/FY14\\_DoD\\_SB\\_Procurement\\_Scorecard\\_Public\\_View\\_2015-04-29.pdf](https://www.sba.gov/sites/default/files/files/FY14_DoD_SB_Procurement_Scorecard_Public_View_2015-04-29.pdf).

<sup>64</sup> Just because an agency did not meet its percentage goal does not mean less money is being spent with small business. For instance, in 2007, although DoD was short 2.5%, they still increased spending with small businesses by \$3 billion. In 2008, again falling short of

What is the impetus behind this push to have the overseas set-aside exclusion abolished? In years past, when DoD was short in reaching its goal, the inclusion would have certainly brought them closer. In the SBA's defense, its current goal of 21.60% for DoD is not a true 21.60%. In reaching its percentage determination, the SBA does not include certain procurements, like those procurements made overseas or those that have foreign funding (i.e. Foreign Military Sales).<sup>65</sup> The SBA is attempting to get 21.60% of that which is more reflective of what DoD is really spending.<sup>66</sup> An internal Office of the Secretary of Defense (OSD) study analyzed the potential difference between small business performance with overseas procurements included and without. The OSD determined that if the overseas exception were taken away, the net gain in small business would be roughly half of a percent.<sup>67</sup>

#### B. What the Department of Defense Has to Lose

The Department of Defense has everything to lose and little to gain. The unintentional side effects of mandatory set-asides could have serious ramifications on its unique mission. Most important of those unintended effects would be the negative impact on DoD's ability to contract

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the percentage goal, DoD increased spending by \$7 billion. See 2007 and 2008 DoD Scorecards, *supra* note 63.

<sup>65</sup> The 2012 SBA scorecard mentions how the percentages are essentially skewed, noting that there are some procurements that no small business would ever compete for (i.e. prime contracts for jets and ships). If those contracts were excluded, DoD's percentage goals would be much higher. See U.S. SMALL BUS. ADMIN., DEPARTMENT OF DEFENSE FY2013 SMALL BUSINESS PROCUREMENT SCORECARD (2014), [https://www.sba.gov/sites/default/files/files/FY13\\_DoD\\_SB\\_Procurement\\_Scorecard\\_Public\\_View\\_2014-04-28.pdf](https://www.sba.gov/sites/default/files/files/FY13_DoD_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf)

<sup>66</sup> In an attempt to correct this, the Transparency in Small Business Goaling Act of 2016 was submitted on January 6, 2016. This would amend The Act to apply to all contracts, regardless of where the contract is awarded or performed. Transparency in Small Business Goaling Act of 2016, H.R. 4329, 114th Cong. (2016). The reason for its proposal being that "exclusions allow for an over inflation of small business participation in the federal marketplace." Press Release, Judy Chu, U.S. Congresswoman, Reps. Chu and Kelly Introduce Bill to Help Small Businesses Earn More Government Contracts (Jan. 6, 2016), <http://chu.house.gov/press-release/rebs-chu-and-kelly-introduce-bill-help-small-businesses-earn-more-government-contracts>. The press release for the bill makes the SBA position very clear; if the exclusions are removed, then the federal government will be forced to use overseas contracts to meet its goals. *Id.*

<sup>67</sup> Powerpoint slide, Dina Jeffers, Senior Procurement Analyst, Deputy Secretary of the Army (Procurement), Small Business Prime Contracting FY 2016 Overseas Exclusion Comparison (on file with author).



strategically. In a complex and unpredictable world, Chicken Little needs every weapon it has at its disposal, and to lose one of its most powerful weapons would certainly feel like the sky was falling.

The Department of Defense is like no other government agency the SBA deals with.<sup>68</sup> To highlight that difference, one can look to the United States Army, whose mission, as defined by Congress is:

preserving the peace and security, and providing for the defense, of the United States, the Commonwealths and possessions, and any areas occupied by the United States; supporting the national policies; implementing the national objectives; and overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.<sup>69</sup>

That mission, to defend our nation, is far different than other government agencies whose sole focus is within the bounds of the United States. Take for instance, the Department of Housing and Urban Development, whose mission is limited in both geographical application and scope to “create strong, sustainable, inclusive communities and quality affordable homes for all.”<sup>70</sup>

To meet its mission, the DoD uses contracting officers established throughout the DoD and within each of the military services. However, military contracting and procurement is more than just a mechanism to supply troops with the things they need.<sup>71</sup> Procurement is a force multiplier that enables Soldiers on the ground to win wars, not just by outfitting the Soldier in his gear, but by anticipating their needs and

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<sup>68</sup> The SBA consults with 24 government agencies (as outlined in the Chief Financial Officers Act of 1990) and sets a small business contracting goal for each. [https://www.sba.gov/sites/default/files/FY2015\\_Final\\_Agency\\_Goals\\_Spreadsheet\\_20150313.pdf](https://www.sba.gov/sites/default/files/FY2015_Final_Agency_Goals_Spreadsheet_20150313.pdf).

<sup>69</sup> 10 U.S.C. § 3062(a) (2012) (enumeration omitted).

<sup>70</sup> *Mission*, U.S. DEP'T OF HOUSING & URB. DEV., <http://portal.hud.gov/hudportal/HUD?src=/about/mission> (last visited June 1, 2017).

<sup>71</sup> An example of how procurement is a strategic tool used by commanders is seen in a document created to assist in the counter-insurgency operations of Iraq and Afghanistan. “Money As A Weapon’s System” (MAAWS), a document designed to help attorneys, contracting officers, and Soldiers navigate the complicated contract/fiscal law world in a deployed environment, by its very name highlights the importance of, and recognition of, the role procurement and contracting play in the fight itself. Department of Defense overseas contracting involves strategic aspects that far outweigh the SBA’s attempt to increase American small business.

shaping the environment in which they operate.<sup>72</sup> The importance of DoD's role can be seen in former Chief of Staff of the Army, General Raymond Odierno's introduction to the Army Operating Concept (AOC).<sup>73</sup> The Army sees a future where the enemy is unknown and increasingly skilled; a future where our forces are regionally aligned and part of globally responsive combined arms teams.<sup>74</sup> General Odierno goes on to say that "[w]hile the [AOC] underscores the foundational capabilities the Army needs to prevent wars and shape security environments, it also recognizes that to deter enemies, reassure allies, and influence neutrals, the Army must conduct sophisticated expeditionary maneuver and joint combined arms operations."<sup>75</sup> The last thing the Army needs to consider in the world General Odierno describes is small business set-asides.

The strategic relationships envisioned with partner nations in this increasingly complex world, as described in the AOC, could include the creation of a broad base of contractors and suppliers in areas of operation where future conflict is likely. Just as important could be making a show to our partner nation that we are in a collective effort and that they, and their people, play an important role in that effort. These relationships do not begin at the dawn of a conflict. The loss of goodwill from our partner nations when their own small businesses lose contracts does not appear to be worth the gain in American small business. The application could also have unforeseen consequences where host nations enact laws that so significantly limit foreign businesses from operating in their country that it could potentially create a net loss in American business.<sup>76</sup>

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<sup>72</sup> To highlight the importance of strategic contracting, one can look to the missions of the various Army contracting commands. Army Contracting Command's mission is "[d]elivering readiness through contracting solutions in support of the Army and Unified Land Operations, anytime, anywhere." *Army Contracting Command*, U.S. ARMY, <http://www.army.mil/info/organization/unitsandcommands/commandstructure/acc/> (last visited June 1, 2017). The Expeditionary Contracting Command's mission is to "[p]lan and execute effective and agile contracting support for U.S. Army Service Component Commanders in support of Army and Joint Operations. Provide effective and responsive contracting support for OCONUS installation operations." *ECC: U.S. Army Expeditionary Contracting Command*, U.S. ARMY, <https://www.army.mil/ECC> (last visited June 1, 2017).

<sup>73</sup> The Army Operating Concept is a document that "describes how future Army forces will prevent conflict, shape security environments, and win wars while operating as part of the Joint Force and working with multiple partners." General Raymond Odierno, *Foreword to U.S. DEP'T OF ARMY, TRADOC PAM. 525-3-1, THE U.S. ARMY OPERATING CONCEPT: WIN IN A COMPLEX WORLD* i (31 Oct. 2014).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Many countries already have restrictive laws that essentially prohibit American businesses from operating in their country. For instance, Kuwait only allows foreign

Another strategic aspect of contracting is seen in the context of a humanitarian assistance/disaster relief operation.<sup>77</sup> The initial phase of the operation will be life-saving operations (the basis for DoD's involvement in the operation to begin with is that the incident is beyond the host nation and USAID's ability to respond sufficiently on their own). However, there will be a point in the operation where a strategic choice is made to contract with host nation businesses in order to provide economic stimulus to the affected country. Worse, the operation could take the unfortunate turn to a kinetic environment. In either situation, whether engaged in lifesaving or something akin to conflict, the last thing commanders need to worry about is improving American small business.<sup>78</sup>

Operationally and tactically, there will be an impact, but segregating the strategic impacts from their second- and third-order effects at the operational and tactical level, these issues would be more like growing pains. At the outset of new rules applying the set-asides overseas, as feared in the scenario at the beginning of this article, there would be an undeniable delay to contracting until it became the new norm. It will take

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business to operate under either Article 23 or 24 of its commercial code, which allow a foreigner to conduct business if his/her business has a majority Kuwaiti stake or through a Kuwaiti agent. See Law Decree No. 68 of 1980 ("Commercial Law"), arts. 23, 24 (Kuwait). As restrictive as this seems, imagine what steps Kuwait would take if they learned we were automatically excluding Kuwaiti businesses from possible contracts.

<sup>77</sup> This scenario, a Humanitarian Assistance/Disaster Relief operation (HA/DR), is exactly the kind of event for which the Army has planned, and was the subject of 2014's Unified Quest. "Unified Quest (UQ) is the Chief of Staff of the Army's Title 10 future study plan designed to explore enduring strategic and operational challenges to identify issues and explore solutions critical to current and future development." *Unified Quest*, ARMY CAPABILITIES INTEGRATION CTR., <http://www.arcic.army.mil/Initiatives/UnifiedQuest> (last visited June 1, 2017).

<sup>78</sup> Strategic contracting is often implemented through various means at levels well above the commander. The SBA's interpretation of the Act would conflict with a number of these implementing mechanisms. These mechanisms take the form of class deviations (decisions by the Director of Defense Procurement that allow organizations to deviate from the FAR), Status of Forces Agreements (SOFA), and other bilateral agreements between the executive branch and other nations. For instance, a strategic procurement decision recently made in the form of a class deviation regarding Djibouti, where "[e]ffective immediately, contracting officers shall use the attached deviation to limit competition to, or provide preference for, products or services of Djibouti for procurements in support of DoD operations in the Republic of Djibouti (Djibouti)." Memorandum from the Office of the Under Secretary on Defense on Class Deviation—Enhanced Authority to Acquire Products and Services of Djibouti, DARS Tracking No. 2016-O0005 (Feb. 4, 2016), <http://www.acq.osd.mil/dpap/policy/policyvault/USA000269-16-DPAP.pdf>. DoD should not have its ability to strategically contract like this limited by the SBA's interpretation.

time for contracting professionals to navigate the new rules, apply the rule of two, and conduct market research. It will take time for planners and commanders to factor that into their operational timelines. It may even create an increase in bid protests, further delaying contracting actions, as small businesses protest each and every contract they are not awarded.<sup>79</sup> It may require the hiring of new contracting officers and the restructuring of contracting offices to accommodate the new level of work. Most of these are inevitable ground level impacts associated with any change in rule or law. However, no law or rule change would ever be implemented if the argument “it’s too painful” ruled the day.

#### V. Is There a Common Ground?

Congress could easily end the issue with the stroke of a pen and end all *Chevron* analysis, yet as the court in *C&G* has pointed out, it has chosen to do nothing in the last 27 years to correct it. OFPP could create an official policy, but this would not put to an end the SBA’s argument that the SBA should be given deference. The Court of Federal Claims could easily throw a dart at the board of congressional intent, but the court and Congress seem content with letting GAO handle the issue. In light of congressional silence and GAO’s recent and consistent—albeit not necessarily articulate—application of FAR Part 19.000(b), it seems nothing is likely to change.<sup>80</sup> Yet, in light of the SBA’s redrafting of its regulation and the continued attempts to raise small business goals, this seems far from over.<sup>81</sup> To solve this problem, the logical first step is to have Chicken Little and Foxy Loxy sit down and talk. Maybe Chicken Little’s fear is not so irrational and maybe Foxy Loxy is not so hungry.

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<sup>79</sup> Small businesses will protest each contract they are not awarded, searching for the contracting officer’s explanation. This could be further compounded by the SBA stepping in and issuing a CoC each time only one small business bids on a contract.

<sup>80</sup> GAO dismissed yet another of Latvian’s protests on the ground that the contract was under the micro-purchase threshold and not subject to small business set-asides. *Latvian Connection Gen. Trading and Constr., LLC*, B-412777.1 (Comp. Gen. May 23, 2016) (on file with author). The decision included language, yet again, that deferred to the FAR’s interpretation that FAR Part 19 applied only in the United States and its outlying territories. *Id.*

<sup>81</sup> *See* Greater Opportunities for Small Business Act of 2014, H.R. 4093, 113th Cong. (2014) (attempting to raise the total goal to 25%).

The conversation should begin with the Defense Acquisition Regulation Council (DAR Council) and the SBA.<sup>82</sup> It would make sense for the SBA to find common ground with the DAR Council first (which would make a recommendation to the FAR Council regarding any proposed change or new rule). Each service is represented and would have the opportunity to express its fears over the unanticipated effects application of set-asides overseas may have, and provide the perfect opportunity to craft a rule that benefits the SBA and protects the commander. For instance, if the SBA recognized and took steps to protect the commander in contingency operations, whether it be in combat or humanitarian operations, it would likely garner some goodwill. That goodwill could easily turn into policy that encourages discretionary set-asides. Maybe the fox is not looking to swallow the chicken whole. To find out, they need to talk.

## VI. Conclusion

In light of Congressional silence and the quasi-judicial status quo, it seems DoD and the SBA are at a standoff. The trenches are squarely dug in and bayonets fixed. The SBA wants set-asides to apply globally so it can get a bigger piece of the pie for its constituents. The Army and DoD want the exception to remain, protecting its ability to contract strategically. However, if the SBA keeps poking DoD, SBA will pick a battle it will be hard-pressed to win. In a skirmish between a commander's ability to wage war and protect the nation versus small business getting a little bit more pie, the commander should and will win. American small business cannot hold foreign policy and military strategy hostage.

The Act's history is rooted in supporting wartime production and defense of our nation, not thwarting it. Chicken Little's fears are real and grounded in a complex and unpredictable world. But maybe, if Foxy Loxy reaches across the trench with an open hand and a smile, Chicken Little might give him a nibble.

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<sup>82</sup> The Defense Acquisition Regulation Council (DAR Council) is authorized to make changes to the FAR and likely provides the best forum to create a rule change that could satisfy both DoD and the SBA. It consists of a director (the Deputy Director of Defense Procurement and Acquisition Policy) along with council members from each branch of the military, Defense Logistics Agency, Defense Contract Management Agency, and National Aeronautics and Space Administration (NASA).

**THE COMMAND ACCUSES AND THE COURT DECIDES:  
SELF-EXECUTING JUDGMENTS AND THE CONVENING  
AUTHORITY'S ROLE IN JUDICIAL SENTENCING**

MAJOR M. BLAKE WILLIAMS\*

I. A New Procedure for Sentencing

This paper proposes a change in the authority of commanders in relation to military courts. The change is intended to free convening authorities to speak out against crime and disobedience. Currently, commanders make prosecutorial decisions to refer cases and also make judicial decisions in the review and approval of court-martial results. The need to act neutrally throughout the court-martial process reduces commanders' substantive and procedural input into criminal proceedings while saddling them with a significant burden of review.<sup>1</sup> The historical justifications for the split role of the commander have been overcome by the development of a robust and independent trial judiciary. If commanders are<sup>2</sup> moved firmly into a prosecutorial role whereby they both select charges and recommend sentences, they will be able to deter criminal behavior more effectively. Vesting the power to recommend a sentence with commanders, requires shifting the final determination of sentence into the hands of the independent military trial judiciary.<sup>3</sup> The differences in procedure are imagined in the hypothetical that follows.

In a courtroom on Fort Campbell, a trial is underway for sexual assault. The members are determining the guilt or innocence of a Soldier. The military judge states, "Specialist Johnson, while the members are

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<sup>1</sup> See *infra* pp. 14–16.

<sup>2</sup> See *infra* p. 30.

<sup>3</sup> See *infra* pp. 40–41.

deliberating, I wish to address some matters with you. If the members return with an acquittal, the court will be adjourned and you will be free to go about your business. However, if you are convicted of any offense, we will conduct a presentencing hearing. Under Rule for Courts-Martial (RCM) 1001, the convening authority who referred this case has the right to submit a Commander's Disciplinary Recommendation. The government previously gave notice of their intention to present a commander's disciplinary recommendation. Once you are presented with the recommendation, you have five days to request any new witnesses. Counsel for both sides indicated in an RCM 802 session that a presentencing date in three weeks on November 18 will provide adequate time for all parties.<sup>4</sup>

After the court finds Specialist Johnson guilty of sexual assault, the Staff Judge Advocate (SJA) presents the convening authority with a concise summary of the offense. The Commanding General then provides a written disciplinary recommendation outlining the nature of the offense and specific sentence he finds appropriate to the severity of the offense and needs of the command. This is the last time the Commanding General will act on the case. The trial counsel presents the recommendation in court on November 18. After considering the recommendation and all other evidence, the judge announces a sentence including confinement and a punitive discharge. Specialist Johnson is transferred to Army Corrections Command. Save for the punitive discharge, the sentence is self-executing. The military judge would prepare the record of trial and transfer it to the superior court, in this case, the Army Court of Criminal Appeals.

Following Specialist Johnson's trial, the commander finds himself briefing new incoming Soldiers at Fort Campbell. He speaks frankly about the need for mutual respect and appropriate behavior both at work and play. He condemns sexual assault. He tells the Soldiers, "Anyone accused will receive a fair shake, but if the court finds you guilty, I will recommend the harshest of penalties. Sexual assault is my number one disciplinary priority. You will regulate your behavior or find yourself subject to my sentencing guidelines." Under a revised Article 37, UCMJ,<sup>5</sup> his discussion about sentencing and his intentions concerning his

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<sup>4</sup> The commander's disciplinary recommendation is command's formal position on the appropriate sentence following conviction.

<sup>5</sup> UCMJ art. 37 (2016), *See also* Appendix A.

recommendation are perfectly legal and perfectly clear to those in his command.

The Army and the Department of Defense have spent years fighting sexual assault with mixed results.<sup>6</sup> Unfortunately, the solutions proposed so far largely involve diminishing the role of convening authorities. The solution is empowering commanders. Commanders should have more involvement in the process of sentencing. Currently, Article 37 of the UCMJ bars direct command involvement in the justice process whenever the involvement is not authorized in the rules.<sup>7</sup> Many members of Congress believe military commanders are not serious about eliminating sexual assault.<sup>8</sup> These members fail to appreciate the structure of the law that prevents commanders from influencing outcomes. While Congress is willing to curtail a military career for the lenient execution of post-trial duties under the UCMJ,<sup>9</sup> Congress has not empowered commanders to appropriately influence trial judgments. If Congress wants to hold commanders accountable for indiscipline and criminal activity within commands, commanders must first possess the tools to accomplish disciplinary control of their commands.

Congress should provide the legal instruments necessary for success. A convening authority with prosecutorial responsibility should be able to explain his disciplinary priorities to his formation with the same direct language used to describe the command's positions on combat effectiveness, safety, or training. In addition, a convening authority should

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<sup>6</sup> Mark Thompson, *Military's War on Sexual Assault Proves Slow Going*, TIME MAGAZINE (Dec. 4, 2014), <http://time.com/3618348/pentagon-sexual-assault-military> (explaining the apparent increases in sexual misconduct from 2012 through 2014 despite numerous reforms).

<sup>7</sup> UCMJ art. 37 (2016).

<sup>8</sup> Robert Draper, *The Military's Rough Justice on Sexual Assault*, THE NEW YORK TIMES MAGAZINE (Nov. 26, 2014), <http://nyti.ms/1tjeRSi> (discussing lost faith in commanders' willingness to prosecute crime and quoting Sen. Gillibrand as saying, "For the past 25 years, going back to when Dick Cheney was defense secretary, we've had the military telling us that there's zero tolerance for sexual assault . . . [a]nd all we've seen is zero accountability.").

<sup>9</sup> Craig Whitlock, *General's promotion blocked over her dismissal of sex-assault verdict*, WASHINGTON POST (May 6, 2013), [https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528\\_story.html](https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html) (reporting that Lieutenant General Susan Helms' promotion was held up by Senator Claire McCaskill after she exercised her authority to set aside a verdict under UCMJ Article 60, which was the second time in recent history a General's promotion has been held up over an authorized exercise of post-trial judicial action.).



be able to recommend a sentence. Discipline in the Army will improve if Congress and the President impose a structured system allowing each convening authority to recommend specific sentences and outline his sentencing priorities. It is time to completely remove the convening authority from a judicial role and grant him stronger prosecutorial powers.

## II. History of the Judicialization of Military Justice

Understanding the importance of command control and the impact of the loss of command input in court sentencing requires an appreciation of the many historical alterations to American military justice. Overlapping reforms enacted throughout the latter half of the 20th century created a bewildering set of coexisting prosecutorial and judicial responsibilities in a single individual, the convening authority. To address tensions in military justice between the disciplinary needs of the organization and the individual rights of the servicemember, Congress iteratively increased judicialization in the 20th Century.<sup>10</sup> Prior to the 20th Century, American military justice grew the powers of the command, culminating in the 1916 Articles of War.<sup>11</sup> The experiences of the World Wars, however, brought fundamental changes.

### A. Beginnings of American Military Justice

The Continental Congress passed the Articles of War on June 30, 1775.<sup>12</sup> These Articles were taken straight from the British Articles of War, which in turn mirrored ancient Roman military legal codes.<sup>13</sup> In the

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<sup>10</sup> General William Westmoreland & Major General George Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 60 (1980).

<sup>11</sup> JOHN LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920, at 69 (1990). The effect of the changes in 1916 was to give significant new statutory authority to the concept of the military law not as a system of justice akin to a court, but as an instrumentality of the executive. *Id.*

<sup>12</sup> THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (1959), [https://www.loc.gov/tr/frd/Military\\_Law/pdf/background-UCMJ.pdf](https://www.loc.gov/tr/frd/Military_Law/pdf/background-UCMJ.pdf) [hereinafter UCMJ BACKGROUND].

<sup>13</sup> John Adams, *Adams Papers* (Aug. 19, 1776). Adams encouraged Congress to adopt the Articles of War, arguing,

ancient Roman system, the commander was firmly in charge of not only the process but also the disciplinary outcome.<sup>14</sup> In the first Articles of War, commanders in the field selected the court members, the charges, and the location of trial.<sup>15</sup> The verdicts were subject to the approval of the commander and there were no requirements for qualified legal personnel or provisions for delay in the interests of justice.<sup>16</sup> From 1775 until 1920, the Articles of War allowed U.S. military commanders to send acquittals back for retrial.<sup>17</sup> Likewise, sentences could be returned for review and possible upward revision.<sup>18</sup> All of these early features placed discipline first.<sup>19</sup> George Washington wrote, “Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and

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There was extant one System of Articles of War, which had carried two Empires to the head of Mankind, the Roman And the British: for the British Articles of War were only a littoral [*sic*] Translation of the Roman: it would be in vain for Us to seek, in our own Inventions or the Records of Warlike nations for a more compleat [*sic*] System of military discipline: it was an Observation founded in undoubted facts that the Prosperity of Nations had been in proportion to the discipline of their forces by Sea and Land: I was therefore for reporting the British Articles of War, totidem Verbis.

*Id.*

<sup>14</sup> C.E. BRAND, ROMAN MILITARY LAW 59 (1968). The iron discipline mentality of Roman commanders is epitomized by the story of Manlius Torquatus and his son Titus Manlius told by Livy, Dionysius, Cassius Dio, and other Roman historians. Titus fell under his consul father’s command in a legion. The young Manlius was sent with cavalry to reconnoiter the enemy. He had strict orders not to engage. He encountered a barbarian chieftain who challenged him to single combat. Manlius killed the barbarian. Upon hearing the news, his father turned away from his son and sounded the assembly. Declaring to his legion his love for his son and his admiration of his son’s bravery, he nevertheless told his legionnaires the authority of consul required imposition of the law. It would either be established by the execution of his son or forever abrogated by his impunity. He then proceeded to personally behead the younger Manlius.

<sup>15</sup> Articles of War (June, 30, 1775), in 2 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 111 (Worthington Chauncey Ford ed., 1905), <https://memory.loc.gov/ammem/amlaw/lwjc.html>.

<sup>16</sup> *Id.*

<sup>17</sup> MANUAL FOR COURTS-MARTIAL, page VI (1921).

<sup>18</sup> *Id.*

<sup>19</sup> LINDLEY, *supra* note 11, at 106. As late as 1918, the office in charge of military justice matters in the War Department was called the Military Discipline Division vice the Military Justice Division. Further, convening authorities with the American Expeditionary Force in France were still making significant use of their authority to reject acquittals. During their stay in France, American General Court-Martial convening authorities returned 149 acquittals for renewed proceedings.

esteem to all. . . .”<sup>20</sup> He helped draft the Articles of War,<sup>21</sup> and he used them to keep the Continental Army disciplined through the cold winters of the revolution.

#### B. 19th Century American Military Justice

Throughout the 19th Century, the authority of a commander in the field was not subject to judicial oversight.<sup>22</sup> The Articles of War provided for no courts of review or any form of judicial scrutiny. The Articles predated the Constitution and were not accompanied by debate.<sup>23</sup> The founders did not draft Federalist Papers of war debating the need to balance executive and judicial powers in courts-martial authority. In fact, the only consideration of the servicemember’s rights in the Constitution is a denial of rights.<sup>24</sup> In the nineteenth century, the Supreme Court ultimately determined the courts of the armed forces were not even courts but mere executive instruments.<sup>25</sup> As such, they were not part of Article III powers and only subject to the level of review provided by Congress. This legal view flows from a theory concerning the necessity of unity of control in an Army. General William T. Sherman testified to Congress in 1879:

The object of the civil law is to secure to every human being in a community all the liberty, security and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

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<sup>20</sup> Letter from George Washington, to Captains of Companies, General Instructions (July 29, 1757), <http://founders.archives.gov/documents/Washington/02-04-02-0223>.

<sup>21</sup> UCMJ BACKGROUND, *supra* note 12, at 2.

<sup>22</sup> *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

<sup>23</sup> UCMJ BACKGROUND, *supra* note 12, at 2.

<sup>24</sup> U.S. CONST. amend. V (denying members of the armed forces a right to jury trial).

<sup>25</sup> *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). The case involved a seaman convicted of attempting to desert who challenged his conviction in a habeas writ. The Court ruled a court-martial need only follow the statute governing its procedure and would not be subject to further review under Article III as the court was an executive exercise pursuant to statute and not a regular court.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.<sup>26</sup>

The national experience of civil war reinforced General Sherman's understanding that the fate of the nation can hinge on the performance of the Army both in the field and in occupation.<sup>27</sup> For civil justice to exist, there must be a government with the authority to decide facts and enforce the law. The military exists to safeguard the existence of the government. This view ultimately elevates the interest of the command over the individual. It was a view widely reflected in military legal theory and practice in nineteenth century America.<sup>28</sup>

### C. Change Takes Root

The First World War marked the first rejection of the usages and theories behind traditional military justice. The public did not like stories of severe, unfair, and arbitrary proceedings that were coming back from servicemembers and the press.<sup>29</sup> The first serious advocate for change came from inside the War Department. As Assistant Judge Advocate General, General Samuel T. Ansell became aware of extreme abuses of command authority and fought a battle with Judge Advocate General

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<sup>26</sup> Letter to General W. S. Hancock, President of Military Serv. Inst., from W.T. Sherman (Dec. 9, 1879), reprinted in WILLIAM T. SHERMAN, *MILITARY LAW* 130 (1880) (quoted in David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 21 (2013).

<sup>27</sup> See GREGORY P. DOWNS, *AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR* (2015), 249.

<sup>28</sup> See generally WILLIAM WINTHROP, *MILITARY LAW* (1886).

<sup>29</sup> Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 15 (1970).

Enoch Crowder over the right of review and correction of error.<sup>30</sup> Nevertheless, Judge Advocate General Crowder prevented him from asserting a right to review records.<sup>31</sup> Then Brigadier General Ansell took his indictment of military justice directly to Congress.<sup>32</sup> He proposed clearly defining elements of crimes,<sup>33</sup> the creation of mandatory legal

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<sup>30</sup> *Id.* (noting shocking examples of severe sentences, including the summary execution of 13 black Soldiers, 40 years at hard labor for 20 days' absence without leave and escape from confinement, 30 years for insulting a non-commissioned officer, and 10 years' confinement for unlawful possession of a pass). See John S. Cooke, *Introduction: Fiftieth Anniversary of the UCMJ Symposium Edition*, 165 MIL. L. REV. 1, 6 (2000).

<sup>31</sup> LINDLEY, *supra* note 11, at 74. Brigadier General Ansell was acting as the Judge Advocate General because Major General Crowder was focused on his additional duties as the Provost Marshall General. During this time over a hundred Soldiers were court-martialed for mutiny in Houston, Texas. Many of these African-American Soldiers were executed with no outside review of their record. In addition a number of non-commissioned officers were court-martialed at Fort Bliss, Texas, for mutiny. A review of the Bliss record revealed the charge of mutiny was supported by an order to drill while under arrest. The order to drill violated a standing Army regulation that prohibited arrested individuals from drilling. Brigadier General Ansell concluded there was no basis for the finding of guilt in the facts. He argued to Secretary of War Newton Baker, urging him to recognize a general right of review and revision for the Office of the Judge Advocate. Major General Crowder intervened and wrote a counter-memo to the Secretary. The head of the Military Discipline Division initially supported the memo of Brigadier General Ansell but changed his mind after Major General Crowder became involved. The Secretary attempted to resolve the dispute by granting clemency as to the sentence under his own authority. Brigadier General Ansell believed very strongly that a legal system administering punishments must be accountable to the law and subject to correction on the grounds of legal error alone. Brigadier General Ansell believed any system not subject to correction on the grounds of legal error was unjust. He therefore continued his argument on the need for additional authority and created a rift within the Office of the Judge Advocate. *Id.*

<sup>32</sup> *Trials by Courts-Martial: Hearings on S. 5320 Before the Senate Comm. On Military Affairs*, 65th Cong. 48-52 (1919) (statement of Brig. Gen. Samuel T. Ansell):

Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that "courts-martial are the fairest courts in the world." The public has never shared that view . . . This is not a pleasant duty for me to perform. I realize, if I may be permitted to say it, that I am arraigning the institution to which I belong, not the institution, but the system and practices under it, an institution which I love and want to serve honestly and faithfully always. Yet an institution has got to be based on justice, and it has got to do justice if it is going to survive, and if it is going to merit the confidence and approval of the American people. Indeed, if our Army is going to be efficient, justice has to be done within it, whether in war or in peace.

<sup>33</sup> Sherman, *supra* note 29, at 19.

advice in referral,<sup>34</sup> mandatory panel sizes with judicial selection of panel members,<sup>35</sup> enlisted panels for enlisted members,<sup>36</sup> unanimous verdicts for death sentences,<sup>37</sup> the use of qualified attorneys as judges and defense counsel, use of the federal rules of evidence, and finally, substituting commander approval of sentences with automatic federal court review of sentences in excess of six months or involving a discharge.<sup>38</sup> His vision encompassed all the elements of modern military justice. While Congress did not adopt most of his proposals, in 1920 Congress did prohibit the practice of returning acquittals to courts for reconsideration and returning sentences for possible upward revision.<sup>39</sup> Also, Congress required unanimous verdicts for death cases.<sup>40</sup> For the first time, the Articles of War expressed a preference for the use of non-judicial punishment rather than court-martial.<sup>41</sup> Pre-trial investigation improved as the accused was given a right to cross-examination.<sup>42</sup> Legal advice prior to post-trial action became mandatory.<sup>43</sup> For the first time in American history, Congress and the War Department limited command authority over courts-martial in favor of procedural rights for Soldiers. The reforms would be severely tested in the Second World War.

#### D. The Uniform Code of Military Justice

##### *1. Motivation for Implementation—The Second World War*

When large numbers of citizens were called up to service in WWII, they encountered a system of justice very unfamiliar to them.<sup>44</sup> During

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<sup>34</sup> *Id.* at 20.

<sup>35</sup> *Id.* at 21.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 22–24.

<sup>39</sup> *Id.* at 27.

<sup>40</sup> *Id.* at 26.

<sup>41</sup> UCMJ BACKGROUND, *supra* note 12 at 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 5.

<sup>44</sup> Sherman, *supra* note 29, at 29 (“The emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures for reforms in the court-martial system.” (quoting Rear Admiral Robert White)).

the war, 1.7 million courts-martial occurred.<sup>45</sup> Courts again handed down severe sentences for apparently minor crimes.<sup>46</sup> Command control of the outcome was a central complaint.<sup>47</sup> Although Congress eliminated the ability to return a verdict for revision following World War I, commanders found other methods to influence the disciplinary environment in their units. Through public exhortation and direct influence, many convening authorities convinced subordinates to deliver heavy sentences.<sup>48</sup> These sentences in turn were whittled down to suit the commander's purposes through his power to take action on the court-martial results.<sup>49</sup> In addition, there were other abuses, such as the assignment of blatantly unqualified personnel as defense counsel.<sup>50</sup> The congressional record concerning the need for reform spans hundreds of pages and covers multiple sessions.<sup>51</sup> Many in Congress wanted to remove all inputs of the commander except the selection of charges.<sup>52</sup>

## 2. *The Reform*

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<sup>45</sup> *Id.* at 28 (citing Letter from New York Bar Association Committee on Military Justice, Jan. 29, 1949, at 5, in VI papers of Professor Edmund Morgan on the UCMJ, on file in Treasure Room, Harvard Law School Library).

<sup>46</sup> *Id.*

<sup>47</sup> George S. Prugh, *Observations on the UCMJ: 1954 to 2000*, 165 MIL. L. REV. 21, 22 (2000).

<sup>48</sup> 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-80.00 (4th ed. 2015):

The history of military justice prior to the Uniform Code of Military Justice is filled with examples of court members attempting to comply with the real or perceived desires of the convening authority (their commander) as to findings or sentence or both. During World War II, it was customary in many commands to sentence the accused to the maximum to permit the convening authority to do as he wished with the offender.

<sup>49</sup> *Id.*

<sup>50</sup> *Beets v. Hunter*, 75 F. Supp. 825, 826 (D. Kan. 1948) (*Habeas* relief granted following conviction at court-martial wherein defense counsel announced on record he was unqualified, unprepared, and not the choice of the accused).

<sup>51</sup> U.S. DEPT. OF THE NAVY, CONGRESSIONAL FLOOR DEBATE ON THE UNIFORM CODE OF MILITARY JUSTICE (1950), [https://www.loc.gov/rr/frd/Military\\_Law/Cong-floor-debate-on-UCMJ.html](https://www.loc.gov/rr/frd/Military_Law/Cong-floor-debate-on-UCMJ.html).

<sup>52</sup> Sherman, *supra* note 29, at 29.

The public outcry and congressional record overwhelmed the institutional resistance to reform and resulted in the Uniform Code of Military Justice of 1950.<sup>53</sup> Dwight D. Eisenhower and many others testified to Congress in support of the Articles of War.<sup>54</sup> Eisenhower expressed the same basic view as Generals Washington and Sherman.<sup>55</sup> All three agreed courts-martial should serve first and foremost the disciplinary needs of the command. As discussed, Generals Washington and Sherman could influence outcomes by returning unsuitable sentences for upward revision. General Eisenhower relied on harsh sentences from the courts and the judicious use of clemency power.<sup>56</sup> Congress enacted Article 37 of the UCMJ to prevent commanders from requesting high sentences through any informal means. Outside of court, the accused was given important rights against self-incrimination.<sup>57</sup> Congress protected the legal independence of judge advocates by placing them in a separate system of promotion and subjecting them to oversight of their respective Judge Advocate Generals.<sup>58</sup> However, Congress maintained a commander's right to select panel members and continued the practice of sentencing by command-selected members.<sup>59</sup>

### 3. *Further Development of the UCMJ*

Continued interference with panel sentencing discretion led to judicial action.<sup>60</sup> In *United States v. DuBay*, the Court of Military Review created

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<sup>53</sup> *Id.*

<sup>54</sup> H.R. REP. NO. 80-1034 (1947) (noting General Eisenhower's opposition to any reductions in command authority).

<sup>55</sup> STAFF OF S. COMM. ON ARMED SERVICES, COURTS MARTIAL LEGISLATION 5 (Comm. Print 1948) ("General Eisenhower attempted to present the problem from the field commander's point of view. . . . He was attempting to show how the military courts charged with the responsibility of trying soldiers in the battle areas were responsible only secondarily for incarcerating felons, and primarily for maintaining the morale of the men who fought. If these military courts had . . . imposed extremely light punishment or suspended sentences, General Eisenhower's expedition might have become an undisciplined mob instead of the fighting force with high morale which eventually defeated the Germans.").

<sup>56</sup> *Id.*

<sup>57</sup> UCMJ art. 31 (2016).

<sup>58</sup> UCMJ art. 6 (2016).

<sup>59</sup> UCMJ art. 25 (1950).

<sup>60</sup> *See, e.g., United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). *DuBay* involved pervasive use of *ex parte* command influence, which required detailed factual review



special hearings to revisit widespread court-packing allegations at a particular post.<sup>61</sup> Since the *DuBay* decision, the courts of appeal have been willing and able to revisit facts surrounding court-packing and to undo settled decisions of military courts. On the heels of *DuBay*, the 1968 Congress passed additional reforms establishing an independent judge in all general courts-martial,<sup>62</sup> reinforcing the courts of review as courts of appeals, and allowing servicemembers to elect trial by judge alone.<sup>63</sup> Since 1968, judges are appointed by the service branch Judge Advocate General and rated by no one connected to the convening of a court-martial.<sup>64</sup> Congress also expanded Article 37, UCMJ, to prohibit any reference to judicial performance in an evaluation report of a servicemember.<sup>65</sup> For the first time, an accused could opt out of his commanding general's panel by choosing the Judge Advocate General's military judge.<sup>66</sup> By 1972, the use of special courts-martial fell by half while the use of summary and general courts-martial remained steady.<sup>67</sup> Given the decline in discipline in the Army during this period,<sup>68</sup> it is clear many commands ultimately decided not to use the courts as a tool to further discipline in the ranks. Because the controls on court-packing are very tight and other means of influencing a panel are illegal, the commander has little control over sentencing. The commander still selects charges, creates a forum, and grants clemency, but his input into the court itself is highly diffused and closely checked.

The arc of the development in military justice created a system that insulates the fact-finder in criminal cases from the commander and thereby maintains the impartiality required of a civilian criminal court.<sup>69</sup> The system heavily limits a commander's disciplinary input into the court-

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years after the relevant courts-martial. This case is more famous for the fact-finding hearings it created, now referred to as *DuBay* hearings.

<sup>61</sup> *Id.*

<sup>62</sup> UCMJ art. 27 (2016).

<sup>63</sup> UCMJ art. 16 (2016).

<sup>64</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104 (2016) [hereinafter MCM].

<sup>65</sup> The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

<sup>66</sup> *Id.* (allowing accused to select a military judge).

<sup>67</sup> Westmoreland & Prugh, *supra* note 10, at 92. Major General Prugh notes that the period from 1969 to 1972 saw a widespread decrease in discipline and morale. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *Irvin v. Dowd*, 366 U.S. 717, 722 (1960) (“[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”).

martial process. Her ability to select the panel is controlled<sup>70</sup> and he cannot force an accused to accept trial by his panel.<sup>71</sup> His ability to speak on a specific sentence is non-existent.<sup>72</sup> His ability to speak on the severity of a type of crime is subject to control; misuse of the authority can lead to dismissal of charges.<sup>73</sup> The piecemeal nature of the reforms left the military with a procedurally complex post-trial system with interlocking and overlapping protections. These post-trial protections were created for a system that routinely gave maximum punishments at court and relied on the convening authority for determination of the actual sentence.<sup>74</sup> Military justice has not worked like this since before 1968. Recent developments have increased the disconnect between post-trial convening authority responsibility and authority. The 2014 National Defense Authorization Act (NDAA) severely limited a convening authority's ability to mitigate the results of a court-martial.<sup>75</sup> The entire method of command input is ripe for restructuring.

### III. Restoration of Command Influence

If commanders had a more direct and precise role in the sentencing process, they could use it to reduce crime and improve discipline in both peace and wartime. In order to deter crime, convening authorities must be able to make public comments on the relative severity of offenses in general and to make specific sentencing recommendations in individual cases. Efficiency can be maintained by substituting the post-trial action with the sentencing recommendation. Relieved of post-trial judicial responsibility, the commander would no longer be bound to impartiality as it relates to sentencing. This reform will restore the commander's historic role in framing both the high and low sides of the sentencing range.<sup>76</sup>

#### A. Impact on the Law

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<sup>70</sup> United States v. Redmon 33 M.J. 679 (A.C.M.R. 1991).

<sup>71</sup> UCMJ art. 16 (2016).

<sup>72</sup> GILLIGAN & LEDERER, *supra*, note 48.

<sup>73</sup> United States v. Biagase, 50 M.J. 143 (C.A.A.F. 1999).

<sup>74</sup> GILLIGAN & LEDERER, *supra*, note 48.

<sup>75</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) (making changes to RCM 1107 that largely removed a convening authority's ability to modify the sentence and findings in serious cases) [hereinafter NDAA FY 2014].

<sup>76</sup> See *supra* Section II.

To place the commander in a position to recommend a sentence, Articles 16, 37, 56a, 57, 57a, 58a, and 60 would require modification. Modifications would be required to RCMs 705 (Pretrial agreements), 903 (Accused's elections on composition of court-martial), 1001 (Presentencing procedure), 1003 (Punishments), 1005 (Instructions on sentence), 1008 (Impeachment of sentence), 1009 (Reconsideration of sentence), 1010 (Notice concerning post-trial and appellate rights), 1101 (Report of result of trial; post-trial restraint; deferment of confinement; forfeitures and reduction in grade; waiver of Article 58b forfeitures), 1102 (Post-trial sessions), 1104 (Records of trial, Authentication; service; loss; correction; forwarding), 1105 (Matters submitted by the accused), 1106 (Recommendation of the staff judge advocate or legal officer), 1107 (Action by the convening authority), 1108 (Suspension of execution of sentence; remission), and 1109 (Vacation of suspension of sentence).

Modification of the underlying articles would be tailored to maintain the judicial independence of the court while relieving the commander of judicial obligations of impartiality. The court is a forum for justice. The commander is a party alleging wrongdoing. This is not a neutral position. The commander should be moved out of the role of directly administering justice through post-trial action and into a more natural role of making allegations and requesting redress. If the commander retains any responsibility for reviewing and approving formal courts, he cannot act (or appear to act) partially prior to action.<sup>77</sup> The convening authority's new role would be akin to a public prosecutor. Public prosecutors are expected to use prosecutorial discretion and expected not to keep the use of the discretion or their philosophy toward justice a secret. They can publically urge harder time for certain classes of crime and make individual sentencing recommendations in court. What prosecutors cannot do is suggest an individual accused is guilty prior to trial.<sup>78</sup>

The first step is providing a form for the commander's disciplinary recommendation. The proposed form for the commander's disciplinary recommendation<sup>79</sup> is modeled on the new RCM 1001A,<sup>80</sup> which provides

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<sup>77</sup> *United States v. Davis*, 58 M.J. 100, 103 (C.A.A.F. 2003) (noting that an inflexible disposition on punishment or clemency generally disqualifies a convening authority from taking action on the case).

<sup>78</sup> MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM.BAR ASS'N 1983).

<sup>79</sup> Appendix B, Model RCM 1001B.

<sup>80</sup> MCM, *supra* note 64, R.C.M. 1001A.

a victim the ability to inform the court's decision without making himself a witness at trial. The convening authority's recommendation will only include a summary of the offenses and a specific recommended sentence. Preparing the recommendation will require Staff Judge Advocate advice. Like the pretrial referral advice, the judge advocate and convening authority are not limited in their consideration of matters.<sup>81</sup> A convening authority could poll officers or her enlisted advisor, review the service record of the accused, or read a victim's statement. The only information that must be considered is the offense or offenses. A judge advocate and convening authority might also consider military exigencies such as untestable drug abuse in a combat zone, the fragging of officers, or the loss of local support due to crimes against civilians.<sup>82</sup> The proposed form is purposely vague to avoid entangling the convening authority in error. The form does not allow argument or narrative because a narrative might make the convening authority a witness. Language excluding the convening authority as a witness is taken from the new RCM 1001A.

The procedure to admit the recommendation requires the trial counsel to serve the convicted servicemember with a copy of the recommendation five days prior to the presentencing proceeding. The procedure further provides the defense a meaningful chance to rebut any statement of fact presented in the disciplinary recommendation. It also presents the convicted with a chance to call witnesses to show the convening authority's view of the proposed sentence is not universal. The trial counsel would place the recommendation of the convening authority into evidence using authority granted in a new paragraph under RCM 1001.<sup>83</sup> The trial counsel would be responsible for placing the recommendation in context with admissible aggravation and mitigation evidence and convincing the military judge to accept the recommendation. If the convening authority indicates through the trial counsel no recommendation will be made, the court can move directly from findings to presentencing. A military judge might require notice of the commander's intentions prior to findings through a requirement in the

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<sup>81</sup> MCM, *supra* note 64, R.C.M. 601. In making the referral decision, "The convening authority or judge advocate may consider information from any source." *Id.*

<sup>82</sup> Westmoreland & Prugh, *supra* note 10 at 57-62 (indicating that fragging, drug use and war crimes all figured into the military exigencies of the Vietnam conflict and could be relevant command concerns in the future.).

<sup>83</sup> Appendix C.

local rules of court.<sup>84</sup> Although the delay is a minimum of five days, the arrangement of witness travel will likely result in a delay of two to three weeks from the merits to the presentencing phases of courts-martial.<sup>85</sup> This would mirror federal civilian practice, which normally involves a delay of around twenty-one to thirty-five days from the end of their equivalent of the merits phase until sentencing.<sup>86</sup>

To prevent a conflict with caselaw, the results will no longer be acted on by the convening authority.<sup>87</sup> Article 60, UCMJ, which provides for approval of court-martial results, will be entirely eliminated. If there is no Article 60, there is no need for RCM 1105, 1105a, 1106 or 1107. All of these rules concern the service of the proposed result of trial and the supporting record to the accused and victim for comment and to the convening authority for approval. Without convening authority involvement, records would move directly to higher courts. Historically, Article 60 acted as a safety valve for overly harsh results.<sup>88</sup> Presumably, a convening authority would not recommend a sentence that exceeds his desires in a case. Moreover, if the sentence is severe, a service branch's appeals court will still review the sentence for appropriateness.<sup>89</sup> Any clemency required in fairness would then be delivered by a professional judicial body, that is able to view the full spectrum of sentencing decisions in their respective service.

The need to eliminate post-trial action is not just a convenient and logical outgrowth of the proposed change. The convening authority would disqualify himself as an approving authority if he made sentencing recommendations in advance of approving the results of the trial under RCM 1107.<sup>90</sup> This persistent disqualification would greatly complicate post-trial processing. The normal remedy for disqualification is

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<sup>84</sup> MCM, *supra* note 64, R.C.M 108 (providing authority for military judges to promulgate rules at the trial-judge level).

<sup>85</sup> Currently a court-martial goes directly to sentencing. This means many witnesses called only for sentencing are brought to court only to find they will not testify because the Soldier is acquitted of the offense they were supposed to testify about. The proposed division of proceedings will ensure only those needed at the hearings are brought to the hearings.

<sup>86</sup> FED. R. CRIM. P. 32.

<sup>87</sup> See text accompanying note 77.

<sup>88</sup> GILLIGAN & LEDERER, *supra* note 48 (“During World War II, it was customary in many commands to sentence the accused to the maximum to permit the convening authority to do as he wished with the offender.”).

<sup>89</sup> UCMJ art. 67 (2016).

<sup>90</sup> United States v. Davis, 58 M.J. 100, 102 (C.A.A.F. 2003).

transferring the entire casefile to another convening authority and detailing outside judge advocates.<sup>91</sup> The convening authority must be relieved from the responsibility of taking “judicial acts”<sup>92</sup> in a case to maintain her new ability to make prosecutorial sentencing recommendations.

Without Article 60 authority, possible obligations in pretrial agreements under RCM 705 would have to change significantly. As with a U.S. Attorney,<sup>93</sup> a convening authority would not guarantee a minimum sentence, but only recommend a sentence to the judge. Under the current system a pretrial agreement consists of two halves. The first half is a document the military judge reviews and which contains most of the material promises between the parties; in particular, it contains the accused’s promise to plead guilty. The second half is often called the quantum. This portion dictates the disapprovals the convening authority will make to frustrate a high sentence from the court. It outlines what portions of confinement, a fine, forfeiture, reduction or discharge she promises to disapprove. It may contain other terms from the convening authority, such as an agreement to present no evidence on a charge.<sup>94</sup>

In the new system, the convening authority would not be able to disapprove action taken by the court; therefore, her ability to control the sentence would be limited to making a sentencing recommendation under RCM 1001 and directing the trial counsel not to request a sentence in excess of the recommendation. Of course she could still agree to dismiss the charges. Moreover, the new quantum portion would no longer be unknown to the court during sentencing. The recommendation on sentence would simply be presented during sentencing proceedings pursuant to the new RCM 1001.<sup>95</sup>

A new rule would be required to cover the disposition of a convicted individual in the time between announcement of findings and the presentencing proceeding. The status of the convicted is different from the status of someone who merely has been accused. He is no longer innocent. In an organization built on trust, it is difficult to argue a unit should be forced to receive the convicted back into its ranks pending

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<sup>91</sup> *Id.*

<sup>92</sup> UCMJ art. 37 (2016).

<sup>93</sup> FED. R. CRIM. P. 11.

<sup>94</sup> MCM, *supra* note 64, R.C.M 705 (2016).

<sup>95</sup> *See* Appendix C.

sentence. The current authority to hold him in confinement without a sentence comes from Article 10 of the UCMJ. Article 10 provides broad statutory authority to hold the accused, “as circumstances may require.”<sup>96</sup> Detention prior to the merits phase of trial is controlled by RCM 304 and 305. A new rule would be needed to cover the gray zone between conviction and sentencing. The new rule would grant a commander the authority to order the convicted into confinement on the ground that the convicted is unlikely to appear for sentencing without significant and burdensome monitoring. The convicted could appeal the order to the military judge, but the new rule would create a presumption in favor of confinement for serious offenses. The new rule would assume that a conviction for a serious offense creates a flight risk. Such a presumption would give the government an advantage in arguing the necessity of confinement if the matter were appealed to the military judge. Once there is a conviction, no presumption of innocence will remain in the unit. Any commander would struggle to get his subordinates to treat a servicemember convicted of a serious offense with the same inclusiveness as someone who is innocent. In the close military environment, a determination of whether such treatment is practical should be left in the hands of the commander who is responsible for the whole unit.

In the place of Article 60 and the associated provisions is proposed a rule that would authorize the military judge to order a sentence into execution except for those portions of the sentence subject to the provisions of Article 71, UCMJ. The provisions of Article 71 relate to the management of discharges and the execution of prisoners. Eliminating the sentence approval under Article 60 requires a large number of conforming changes throughout the MCM and in the UCMJ. Thus, RCM 1113 (Execution of sentences) must change to make execution upon announcement of sentence the general rule.<sup>97</sup> The movement of the record and the execution of sentences should be brought in line as closely as possible to federal practice, consistent with the Secretary of Defense’s request to bring the UCMJ into conformity with civilian practice as far as is practicable.<sup>98</sup>

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<sup>96</sup> UCMJ art. 10 (2016).

<sup>97</sup> See Appendix F.

<sup>98</sup> MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 5 (Dec. 22, 2015), [http://ogc.osd.mil/images/report\\_part1.pdf](http://ogc.osd.mil/images/report_part1.pdf).

Further, the underlying statutes related to convening authority action would need to be repealed. Article 57 governs the effective dates of sentences and would cease to have any mention of action by the convening authority.<sup>99</sup> Deferment of a sentence by the convening authority would qualify as a judicial act and thereby entangle the commander in a role inconsistent with one who recommends a sentence. Also, because the case would move directly to the appeals court, there would be no logical reason the convening authority would maintain control over the length of confinement. Deferment and clemency is useful in conditions of full mobilization when it may be necessary to keep deficient Soldiers on the front.<sup>100</sup> However, the Army is currently a highly professional body and not a massive conscripted organization. Even if deferment and clemency authority is taken away from commanders, it could be restored to support full mobilization by regulations issued under Article 74.<sup>101</sup> For simplicity's sake, Article 74 should be made the sole power of clemency in the service. The secretaries could use this authority in the event of a national crisis to keep convicted Soldiers fighting for the Army. The proposed changes in the appendix suggest a format for change to Article 57a.<sup>102</sup>

The other changes needed relate to the composition of the courts under Article 16 (Courts-martial classified) and Article 26 (Military judge of a general or special court-martial). In fairness to the accused, judges must be the sentencing authority. While convening authorities have no control over the assignment, evaluation, and promotion of military judges, they have substantial control over their own personnel. Commanders acting in prosecutorial role cannot remain in charge of selecting any individual that would act in the role of a military judge. For this reason, the option for a special court-martial without a lay judge should be deleted from Article 16, UCMJ. In addition to the problem of subordination, a court-martial

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<sup>99</sup> See Appendix D.

<sup>100</sup> DAVID R. SNYDER, *SEX CRIMES UNDER THE WEHRMACHT 72-81*] (2007). This study of punishment in the German army during World War II explores the Reich's use of deferred confinement to maintain maximum manning right up until total surrender. The decision to avoid the use of prisons was made at the General Headquarters of the Armed Forces and then delegated to field commanders. *Id.*

<sup>101</sup> UCMJ art. 74 (2016). The present article allows for immediate remission and suspension of sentences in most cases, but currently there is no delegation to commanding officers in the field. Snyder reveals through a close analysis how Germany used a suspension of normal punishment processing to maintain the fight on the German Eastern Front. SNYDER, *supra* note 100 at 72. *Id.*

<sup>102</sup> See Appendix E.



without a professional judge lacks the professional experience needed to weigh the various sentencing factors.

Likewise, Article 26's description of the military judge's role would require a new final paragraph. This new paragraph would strip the panel of sentencing authority in non-capital cases. The proposed new paragraph reads as follows:

The military judge alone will preside over all non-capital sentencing proceedings. The appropriate sentence in a non-capital case will be determined by military judge alone in accordance with the interests of justice and the need for discipline within the military organization. Subject to other provisions of law, the military judge will order the sentence to be executed.

In this way, the convening authority will no longer be able to influence sentencing through the selection of panel members.<sup>103</sup> Instead, he will influence sentencing as an interested party with a special right to recommend a sentence. A judicial officer, the military judge, will take this recommendation into consideration when arriving at a proper sentence. If this change is made, conforming changes in Articles 51 and 52 and some RCMs will be necessary to remove unnecessary discussion of non-capital sentence voting procedures. The proposed sentencing reform would reduce manning requirements for courts-martial, bring the procedure in line with civilian practice, and enhance lawful influence in the sentencing process.

Once all of the changes and conforming modifications discussed above are in place, the code will reflect the convening authority as a kind of prosecutor and not as someone charged with taking judicial acts. Given his new role and the proposed judge-alone sentencing, the law related to command influence, Article 37, would have to change. As discussed in Section II, the prohibitions against command influence arose as a means to keep the jury pool impartial. This was particularly difficult to do in sentencing.<sup>104</sup> Article 37 has two basic types of prohibitions. First, there

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<sup>103</sup> While the convening authority would still select panel members, these members would no longer control the sentencing. Their vote would be limited to the matter of guilt or innocence. Any attempt to wrongly convict an individual is already a crime and would remain criminalized under these proposed reforms.

<sup>104</sup> GILLIGAN & LEDERER, *supra* at note 48.

is a restriction against adverse actions against subordinates for their participation in a court whether as a member of the court. Secondly, all persons subject to the code are prohibited from influencing a court through any unauthorized means. Since the recommendation on sentence would be provided for in the rule, the recommendation itself becomes an authorized means. However, Article 37's restrictions interfere with the intent behind the reform. Moreover, the article is drafted as a clumsy double negative. The statute orders persons subject to the code not to influence a court in a way that is not authorized.

While the protections against adverse actions should remain unchanged,<sup>105</sup> it would be easier and more direct to prohibit those specific forms of influence that are injurious to justice. Influence requires communication, either overt or implied. The current prohibition on general influence bars a broad range of both private and public communication. Private communications made with the intent to influence court members should remain prohibited.<sup>106</sup> However, the ban on public communications should be limited to that which tends to materially prejudice the accused's rights to a fair trial. The proposed change models the proscriptions on certain communications and unfair pretrial publicity found in the Model Rules of Professional Conduct 3.6 and 3.8.<sup>107</sup> The changes also remove all references to the judicial acts of the convening authority. The changes reflect the convening authority's expanded prosecutorial role and the abandonment of her judicial role.

With the proposed change, the defense will have to demonstrate a likelihood public comments have tangibly prejudiced the proceedings. With panel members removed from sentencing, this will be very difficult to do unless the comments extend to questions concerning guilt or innocence or the reliability of witnesses. The heightened standard will allow commanders leeway to discuss disciplinary and judicial priorities. In so much as the old standard insulated servicemembers from the opinions and desires of the convening authority, it also deprived servicemembers of the benefit of clearly knowing the expectations of their commander. The change in Article 37 is meant to allow the communications necessary for deterrence. The old prohibition on "influence"<sup>108</sup> is simply too broad. Any communication given to convince subordinates of the gravity of

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<sup>105</sup> See Appendix A.

<sup>106</sup> *Id.*

<sup>107</sup> MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983).

<sup>108</sup> UCMJ art. 37 (2016).

specific crimes is also a communication given to change or influence possible panel members who are drawn from the same pool of subordinates. By eliminating the prohibition on mere public influence and substituting an effects-based test, the commander can now deter and prevent crime by explaining the seriousness of certain types of crime. In conjunction with the change to Article 37, RCM 104 (unlawful command influence) will require conforming modification to reflect the altered language.

## B. Impact on the Court-Martial Participants

These changes to the law will impact the players in the court-martial system in a variety of ways. All impacts are positive except for the impact on the accused, which is largely neutral but has a distinct potential to result in increased penalties.

### 1. *Impact on the Convening Authority*

This reform's greatest benefit to the convening authority is increased input in outcome with reduced application of effort. The commander's time is a factor, which is often overlooked in proposals for reform. Nowhere in the recent 1300-page Military Justice Review Group's report is there any mention of trying to conserve the commander's time or trying to conserve any resource.<sup>109</sup> A commander is focused on running a large and complex organization dedicated to national defense. Currently, a commander has a minimum of two interactions with a successful prosecution. She first refers the case and then later approves or disapproves the result.

Under this proposed reform, the commander would still only participate at two decision points. She would make the prosecutorial decision to refer a case, and she would have to decide what sentence to recommend based on any guilty findings. Commanders are already well versed in both tasks. The majority of recent cases result in guilty pleas.<sup>110</sup> These pleas contain an agreed cap on sentence. Each agreement

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<sup>109</sup> MILITARY JUSTICE REVIEW GROUP, *supra* note 98.

<sup>110</sup> Approximately seventy percent of Army General Courts-Martial from 1995 to 2015 ended with guilty pleas (Notes on file with the Clerk of the United States Army Court of Criminal Appeals).

presumably reflects the sentence a commander believes is appropriate for the offense. When commanders sign pretrial agreements they look at the offenses and consider the advice of judge advocates. The procedure in the commander's disciplinary report is very similar to the manner in which an offer to plead is considered; only instead of agreeing to facts prior to trial, a trial produces the predicate facts required to make a recommendation.

The changes will save time because the only required item for review prior to disciplinary recommendation on a sentence is the court's finding. Acting on a record following a court-martial currently requires a commander to, in theory, consider the complete record, the matters provided by the servicemember convicted, and any matters provided by the victims.<sup>111</sup> He can reread the whole verbatim record or decide to rely primarily on the judge advocate's advice. Because the commander is trapped in this quasi-judicial role, anytime a prosecution is successful, he must not form or state any opinion about the best outcome in a case or in classes of cases.<sup>112</sup> Following the recent implementation of the 2014 NDAA, commanders are also unable to provide any significant clemency in post-trial action.<sup>113</sup> With the reform proposed in this article, commanders can leave the balancing of competing interests in the sentencing to an independent body without running the risk they will exceed the severity of sentence needed for the interests of the command. It would be the court's responsibility to balance the professional recommendation of the commander against the individual needs and circumstances of the accused and of any victims in the case. The command saves time by fully transferring the responsibility to make a just determination to the court.

The change would also put the commander in firmer control in the case of a guilty plea. Under this new system, the commander and his trial counsel would merely recommend a sentence to a court. The court would be free to revise that upward or downward. This would remove commanders from the business of disapproving sentences in excess of the pretrial agreement. A commander would be able to consistently communicate to the court the commander's desires for sentencing and have those desires incorporated into the court's findings.

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<sup>111</sup> MCM, *supra* note 64, R.C.M 1107 (2012).

<sup>112</sup> *United States v. Davis*, 58 M.J. 100, 103 (C.A.A.F. 2003) (indicating that an inflexible disposition on punishment or clemency generally disqualifies a convening authority from taking action on the case.).

<sup>113</sup> NDAA FY 2014, *supra* note 75.

Finally, because the commander would no longer have to review matters in the post-trial phase impartially, it would not be necessary for him to pretend all offenses are created equal. Acting as a prosecutor for crime in his jurisdiction, the commander would naturally be able to speak like a prosecutor. He would be able to make clear what types of crimes he considered most serious, and he would be able to explain to the servicemembers under his command whether findings of guilty for certain offenses would result in harsh sentencing recommendations. The reform would abrogate the rulings of *United States v. Martinez*,<sup>114</sup> and the ban on disposition guidelines that comes from *United States v. Hawthorne*.<sup>115</sup> The education of servicemembers should deter crime and improve the public image of the military by firmly and publicly addressing consequences for criminality.<sup>116</sup>

Finally, and most importantly, any commander would be able to tailor his recommendations to the military exigencies<sup>117</sup> that exist at the time. In this way, the command can ratchet up consequences in response to problems with obedience or when the consequences of mistakes are higher, such as in a deployed environment.

## 2. *Impact on the Court*

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<sup>114</sup> *United States v. Martinez*, 42 M.J. 337 (C.A.A.F. 1995).

<sup>115</sup> *United States v. Hawthorne*, 22 C.M.R. 83 (C.M.A. 1956).

<sup>116</sup> LINDLEY, *supra* note 11, at 37. The expression of desired punishments by senior leaders was common at least as late as the World War I. So also was a harsh stance on sexual assault. Following a 30-year sentence of an American private convicted of rape in France, Brigadier General Ansell, the Acting Judge Advocate of the War Department, told the *New York Times* the Army believed death would be the sentence for rape going forward. *30-Year Sentence for U.S. Soldier in France*, N.Y. TIMES MAG., Sept. 30, 1917, at 3. Further in approving the sentence of 30 years, the Soldier's commander noted the sentence was necessary to uphold "that standard of honor and chivalrous conduct which it has always been the glory . . . of American Soldiers to maintain." *Id.* It would certainly be helpful now if Department of Defense leaders could clearly and openly express their views of deterrence to the representatives of the American people and make it clear opinions on sexual assault remain largely unchanged over the last 100 years.

<sup>117</sup> Westmoreland & Prugh, *supra* note 10, at 51 (The decisive consequence of misconduct must be such as to reinforce with unmistakable clarity a conscious decision for proper conduct.)

The military judge's authority is enhanced, as is consistent with the long historical progression toward civilianization.<sup>118</sup> The court is no longer part of an archaic staff action wherein the court is making a recommendation to the convening authority; the court is the approval authority.<sup>119</sup> Because the sentence is fixed in court, the concerns of the victim, the commander, and the accused can all be balanced there in accordance with the needs of justice. Judicial sentencing is the method used by the federal system<sup>120</sup> and by courts in Australia,<sup>121</sup> Great Britain,<sup>122</sup> Canada,<sup>123</sup> Russia,<sup>124</sup> China,<sup>125</sup> and most civil law nations.<sup>126</sup> Moreover, using this method should improve public confidence in the military justice system. Scholars in the last 30 years expended a tremendous volume of ink discussing panel sentencing. The primary advantage put forward has been that the panel serves as a reflection of the shared disciplinary sense of the military leadership in the community.<sup>127</sup> This view sees the panel as a cross-section of the convening authority's best lay judges. Through careful selection, the panel may represent the convening authority's own judicial temperament and his way of lawfully influencing the proceeding.<sup>128</sup>

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<sup>118</sup> Sherman, *supra* note 29, at 15.

<sup>119</sup> *Id.* This is what Brigadier General Ansell envisioned nearly 100 years ago with his 1919 reform proposals.

<sup>120</sup> FED. R. CRIM. P. 32.

<sup>121</sup> David Biles, *Australia*, in BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), <http://www.bjs.gov/content/pub/ascii/WFBCJAUS.TXT>.

<sup>122</sup> Correta Phillips, G. Cox, & K. Pease, *England and Wales*, in BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), <http://www.bjs.gov/content/pub/ascii/WFBCJENG.TXT>.

<sup>123</sup> Debra Cohen & Sandra Longtin, *Canada*, in BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), <http://www.bjs.gov/content/pub/ascii/WFBCJCAN.TXT>.

<sup>124</sup> Ilya Nikiforov, *Russia*, in BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), <http://www.bjs.gov/content/pub/ascii/WFBCJRUS.TXT>.

<sup>125</sup> Jianan Guo et al., *China*, in BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), <http://www.bjs.gov/content/pub/ascii/WFBCJCHI.TXT>.

<sup>126</sup> See JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 28 (1995).

<sup>127</sup> See Major Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 243 (2003).

<sup>128</sup> See *id.* at 293.

The loss of panel sentencing substitutes a general sense of the community for the judgment of a centrally selected military judge. In exchange, the commander is allowed to tell the judge her sense of community appropriateness. For the panel members in courts-martial, the change gives them their time back. The savings in military manpower are worth noting. The military judge is placed under increased pressure because all the pressures to reach a correct decision on sentence are placed on him. The integrity of the court-martial rests in his hands. The judge advocates in the Department of Defense are excellently prepared to handle this responsibility. Military judges are specially selected for the bench by a fellow attorney and three-star flag officer, namely the judge advocate general of the service involved.<sup>129</sup> Their qualifications and selection under statute<sup>130</sup> and the enforcement of Federal standards for impartiality<sup>131</sup> have maintained the impartiality of the bench and will continue to do so under the proposed reform.<sup>132</sup>

### 3. *Impact on the Accused*

An accused loses no privileges or rights. Once convicted, however, an individual loses some privileges, but no substantive rights under this proposed reform. Specifically, he loses his ability to plead for post-trial clemency in front of the commander. In remanding cases for new action<sup>133</sup> and finding ineffective assistance of counsel,<sup>134</sup> the military appellate courts have noted that review by the convening authority is the most likely place for a convicted servicemember to find relief. In the proposed system, convicted servicemembers cannot appeal to the commander for a lighter sentence.

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<sup>129</sup> UCMJ art. 26 (2016).

<sup>130</sup> *Id.*

<sup>131</sup> *United States v. Martinez*, 19 M.J. 652 (C.M.R. 1984) (Applying Article III judicial standards when evaluating the impartiality of a military judge.).

<sup>132</sup> *But see* Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629 (1994) (arguing the inadequacy of current protections for the military trial judiciary). While no court has ruled courts-martial to be inherently unfair, Lederer and Hundley call for more insulation of the military trial judiciary. *Id.*

<sup>133</sup> *United States v. Fisher*, 45 M.J. 159, 161 (C.A.A.F. 1996).

<sup>134</sup> *United States v. Gilley*, 56 M.J. 113, 125 (C.A.A.F. 2001).

Under the proposed reform, convicts will no longer be guaranteed a sentencing cap in a guilty plea. They might find a judge sentencing them to a punishment in excess of a convening authority's recommendation. Nonetheless, none of these losses will deprive the accused of any substantive rights. None of these changes will impair access to an impartial fact-finder or the opportunity to present evidence on one's own behalf. The accused still will have the right to contest the charges and a right to an impartial determination of guilt or innocence. The convicted will still have the chance to respond in their sentencing hearings to the commander's recommendation. In the case of more serious sentences, the convict's case will still be automatically reviewed for appropriateness.<sup>135</sup> The sentencing hearing will remain a lively contested proceeding rather than a severely constrained process that matches the accused to a sentence determined by a table.<sup>136</sup> In the federal system, the sentencing guidelines focus primarily on the offense and not on the individual circumstances.<sup>137</sup> Under this proposed reform, the convicted will still be able to call witnesses and present and plead their case in full to the court.

The accused is likely to face increased psychological pressure to enter a plea deal. Currently, the accused's counsel might, in negotiation, learn the position of the convening authority on a proper sentence. The accused is safe knowing the convening authority cannot express her sentencing desires to the court even if the accused is found guilty. Under the proposed system, the trial counsel would give the court the precise sentence recommendation. The knowledge of a possible harsh recommendation following a finding of guilty will be a burden in the mind of anyone who, while guilty, wishes to exercise the right to plead not guilty. In addition, all members of the command, to include an accused, will probably know the commander's general disciplinary outlook. In this way, the system will be more transparent to military members including the accused. However, the fear of a high disciplinary recommendation also increases pressure on the not guilty to plead guilty in order to receive a more lenient and secure sentence. The continuation of a robust plea inquiry should continue to deter anyone wrongly accused from attempting to enter a fraudulent plea.

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<sup>135</sup> UCMJ art. 67 (2016).

<sup>136</sup> FED R. CRIM. P. 32.

<sup>137</sup> Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, in GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 119 (Gene Healy ed., 2004) (noting the whole federal sentencing regime is "a convoluted, hypertechical, and mechanical system that saps moral judgment from the process of punishment").



The accused also will lose the ability to plea-bargain for continued financial support for dependents. The convening authority's lack of control over deferments and waiver of forfeiture prevents any agreement on deferment or waiver. While this may seem harsh to our sensibilities, all current methods of deferral rely on the use of post sentencing modification of the effect of the court's judgment. Without the ability to modify the judgment of the court, the convening authority will not have access to these powers. In addition, the new system favors confinement between conviction and sentencing. Although not intended to punish the convicted servicemember, this confinement will be just as real and as painful as confinement served pursuant to a sentence. However, it is possible many servicemembers will not complain about the confinement in the case of a serious offense because it offers a chance to begin serving a probable sentence while the member is still guaranteed pay. The desire to continue to receive pay will be particularly strong under the new system because the convening authority will have no means of mitigating the financial impact of a sentence. She will not be able to stop automatic or adjudged forfeitures because such decisions would be judicial acts. To those familiar with the existing military system, this new result may appear harsh.

This perceived harshness imposed by the reform does not exceed the harshness present in the federal criminal system for civilian convicts. As to monetary penalties, the federal court may also adjudge a fine for any felony conviction.<sup>138</sup> It is normal for federal felons to pay a fine.<sup>139</sup> The majority of fines go to finance a permanent victim's fund.<sup>140</sup> The federal district courts also can cause forfeitures of property for criminal defendants.<sup>141</sup> These forfeitures are fundamentally different from those found in RCM 1003. Military forfeitures are prospective losses of pay governed by Articles 57 and 58b of the UCMJ. A military forfeiture

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<sup>138</sup> Fines can be ordered in most federal cases. *See* 18 U.S.C. § 3571 (2012); FED R. CRIM. P. 32. Unlike fines under RCM 1003(b), federal fines are not generally limited to circumstances of unjust enrichment.

<sup>139</sup> 18 U.S.C. § 3571 (2012) (providing that anyone convicted of a felony in a federal district court may be fined up to \$250,000, with lesser fines authorized for those convicted of a misdemeanor).

<sup>140</sup> 42 U.S.C.A. § 10601 (West 2013 & Supp. 2017).

<sup>141</sup> U.S. DEP'T OF JUSTICE, A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 31 (2009), <https://www.justice.gov/criminal-afmls/file/794696/download> [hereinafter DOJ FORFEITURE GUIDE].

sentence does not affect any pay until two weeks after the sentence is announced.<sup>142</sup> Criminal forfeiture in the federal system is retrospective, it applies to property possessed prior to the commission of the crime.<sup>143</sup> Forfeitures in the federal criminal system require a special jury finding tying the property to the crime.<sup>144</sup> In short, the federal criminal system favors monetary penalties while the military system applies fines to only certain classes of cases and limits the entire system of forfeiture to future government pay. Therefore, although the proposed reform will likely result in reduced payments to military members convicted of crimes, this impact does not affect substantive rights. None of the negative impacts of the reform place the convicted servicemember in a position inferior to the one held by a federal defendant.

#### 4. *Impact on Immediate Command*

The impact on the immediate command will be felt in the presentencing phase. The convening authority will require time to staff the disciplinary recommendation back to the convicted and the court. The convict and his counsel require time to prepare a rebuttal to the recommendation. It will likely take a month between announcement of findings and announcement of sentence. The command might be saddled with a dejected and unmotivated convict still assigned to a unit whose members may not wish to work with him. The simplest resolution is ordering the convict into confinement pending the sentencing proceeding. Because the command has to support the accused, the initial decision should fall not to an attorney, but to the commander. As outlined in the proposed revision to RCM 1000,<sup>145</sup> the law already allows confinement, subject to some limits on discretion. The proposed rule respects these limits but creates presumptions that support a decision to confine anyone convicted of a serious offense. There remains a possibility that military judges would curtail the discretion of the commander if they were to consistently view the confinement as punishment under Article 13. The new presumptions in RCM 1000 are meant to prevent this outcome.

Article 13 remains a bar against unreasonable decisions to order confinement such as orders to confinement upon conviction for minor

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<sup>142</sup> UCMJ art. 57 (2016).

<sup>143</sup> See DOJ FORFEITURE GUIDE, *supra* note 141 at 31.

<sup>144</sup> See *id.*

<sup>145</sup> See Appendix H.

offenses. For example, a servicemember accused of adultery and sexual assault is convicted of adultery and acquitted of sexual assault. Adultery is a minor offense normally handled below the summary court-martial level. A commander who disagrees with the acquittal might be tempted to order the convict into confinement pending the sentencing hearing. Because the offense is clearly minor, there is no reason under RCM 1000 to suspect the convict will not be present. Appeal of the confinement should result in a finding the commander abused his discretion and confined for the purpose of punishing in violation of Article 13 rather than for the purpose of maintaining accountability under RCM 1000. So long as serious offenders can be ordered to confinement pending sentencing, the immediate command will not have any significant new burdens.

#### *5. Impact on Staff Judge Advocate's Office*

The preparation of the post-trial action and promulgation of the result is a technical and time-consuming task that dominates the schedule of the lead prosecutor serving any convening authority. Army judge advocates receive approximately 8 hours of specific instruction in preparing these documents during their Graduate Course<sup>146</sup> and normally an additional 13 hours of instruction at the Military Justice Manager's Course.<sup>147</sup> It is hard to know exactly how much prosecutorial time will be saved by these reforms, but it is not difficult to claim the time saved by eliminating post-trial processing will yield a substantial reduction in effort within legal offices in all branches. Notably, RCMs 1105, 1105a, 1106, and 1107 alone compose eleven pages of detailed procedural rules. Under the proposal, they will be replaced by RCM 1001B, which is not even a page long. The change will allow military justice managers to focus more on the training and management of personnel and less on the management of technical approvals and the collating of post-trial submissions and staffing. The shift in focus should help the services sustain and build on gains in advocacy instruction and resourcing generated by the new Special Victims' Prosecutor programs within the Department of Defense.

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<sup>146</sup> The Graduate Course is a specializing judge advocate training program that runs nine months and results in the granting of an LL.M. It is attended by active duty Army judge advocates following their selection for promotion to the rank of major (syllabus on file with the Judge Advocate General's Legal Center and School).

<sup>147</sup> The Military Justice Manager's Course is a 40-hour block of instruction administered by the Judge Advocate General's Legal Center and School in Charlottesville, VA (syllabus on file with the Judge Advocate General's Legal Center and School).

While the overall burdens on the players are limited and arguably reduced in this reform, the new system will increase the command's direct input into the sentencing process. Because commanders will receive less information on the individual circumstances of an accused and are more likely to look to the institutional issues affecting their command, there is a reasonable chance the recommendations will be more harsh and lead to a higher sentences. There is justice and no profit in allowing a command to demand more unless such demands are reasonably likely to improve discipline and reduce crime in military communities.

#### IV. The Impact on Crime and Discipline

Any attempt to change the UCMJ must be dedicated to perfecting the goals of the code. The goals are unchanged. "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."<sup>148</sup> History is the best guide to foreseeing the practical result in advancing a sentencing recommendation from a convening authority. Given the history<sup>149</sup> of sentencing prior to the development of the unlawful command influence concept, it is reasonable to expect the proposed reforms will result in many commanders recommending and obtaining higher sentences. Draconian sentencing drove most of the major UCMJ review efforts, notably the Crowder-Ansell Dispute and the passage of the UCMJ.<sup>150</sup> Further, given the vast responsibilities of a commander, it is reasonable to assume a commander will favor the general interests of discipline and deterrence over an individual need for mercy and ask for higher sentences. When originally implemented, the UCMJ granted commanders the authority to grant mercy,<sup>151</sup> while denying them the power to seek severity. The danger of the new system is a delivery of higher sentences without a reduction in crime or indiscipline. Such a change would be inconsistent with the goals of the code because it would unnecessarily harm the convicted. Further, if the change generally undermines servicemembers' faith in the system of military justice, it would be a failure.

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<sup>148</sup> MCM, Preamble, I-1, para. 3 (2016).

<sup>149</sup> See generally *supra* Section II.

<sup>150</sup> See generally *supra* Section II.

<sup>151</sup> UCMJ art. 60 (2016).

Thankfully, there are strong indications that increased sentences will deter crime, especially if the likelihood of such sentences is known to servicemembers prior to the commission of an offense. Dr. Steven D. Levitt, author of the popular book *Freakonomics*,<sup>152</sup> published a study confirming the deterrent effect of increased sentences.<sup>153</sup> If an increased role for commanders generates harsher sentencing, it should aid discipline in the units so long as the likely punishments are understood in advance.

Punitive measures reduce criminal activity through deterrence and through incapacitation.<sup>154</sup> Incapacitation works to reduce crime by removing the individual from the community: If a person is not located in a community, he lacks the opportunity to commit crime in that community. In the United States, incapacitation primarily includes arrest, imprisonment, and even execution. All methods remove a person either temporarily or permanently from a community. Historically, many ancient systems used exile as an additional means to exclude individuals from the community.<sup>155</sup> The military justice system exercises several modes of incapacitation. An offender can be confined pending trial,<sup>156</sup> imprisoned by sentence,<sup>157</sup> executed on the approval of the President,<sup>158</sup> or permanently excluded from the military community by punitive discharge.<sup>159</sup>

The ability to make a recommendation directly on sentence increases the likelihood of discharge, one of the primary modes of incapacitation. Although most offenders do not commit a second crime, any given offender is more likely to commit further criminal acts than an individual selected at random.<sup>160</sup> Because incapacitation within the military community is possible without additional confinement, any increase in

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<sup>152</sup> STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005).

<sup>153</sup> Daniel Kessler & Steven D. Levitt, *Using Sentencing Enhancements to Distinguish Between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 343 (1999).

<sup>154</sup> *Id.* at 345.

<sup>155</sup> BRAND, *supra* note 14 at 59.

<sup>156</sup> MCM, R.C.M. 305 (2016).

<sup>157</sup> UCMJ art. 56 (2016).

<sup>158</sup> UCMJ art. 71, (2016).

<sup>159</sup> UCMJ art. 57 (2016).

<sup>160</sup> Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 UNIV. ST. THOMAS L.J., 536–58, 546 (analyzing studies of recidivism demonstrating that offenders as a group are much more likely to commit crime than non-offenders).

discharges will have a positive impact on crime reduction within the military community.<sup>161</sup> Given the special nature of the military environment and the narrow goals of military law, incapacitation theory justifies recommendations for more punitive discharges.

If incapacitation within the military community can be accomplished without confinement, incapacitation theories do not strongly support increases in confinement. Rather, deterrence justifies harsher confinement recommendations. Commanders do not wish to deal with problems solely as they arise. Ideally, commanders want misconduct deterred. Deterrence is a psychological event.<sup>162</sup> An individual is deterred when he decides to refrain from misconduct based on an understanding of the consequences.<sup>163</sup> Military deterrence is similar to deterrence in civil society. The inevitability of capture and inevitability and degree of punishment drive deterrence.<sup>164</sup> One of the historic problems with measuring deterrence versus incapacitation comes from the linked nature of the two. In the civilian world, higher sentences increase incapacitation because they lengthen the time of segregation from the free community. Dr. Levitt's study created a model for measuring deterrence independent of incapacitation. He did so by focusing on the immediate drop in crime for specific serious offenses covered by a broadly enforced sentence enhancement law in California.<sup>165</sup> The sentence enhancements covered only offenses for which a sentence would already be given. The enhancement increased the overall sentence, but in the early years of implementation there was no additional incapacitating impact. The study confirmed that the threat of higher sentences deterred crime.<sup>166</sup>

Deterrence is incomplete without clear expectation guidance from the convening authorities. The theory underpinning deterrence is an economic theory of rational choice.<sup>167</sup> The more information a potential offender has about consequences, the more likely there will be deterrence. Allowing,

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<sup>161</sup> Although incapacitation through discharge no doubt aids the military in accomplishing its mission by isolating criminals from the military community, it must be admitted discharge does nothing to prevent the discharged from committing crimes in the civilian community.

<sup>162</sup> Kessler & Levitt, *supra* note 153 at 348.

<sup>163</sup> *Id.*

<sup>164</sup> Leipold, *supra* note 160 at 539.

<sup>165</sup> Kessler & Levitt, *supra* note 153, 352-59.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 348.

even encouraging, convening authorities to comment on proper punishments for classes of crimes and to make specific recommendations has the potential to reduce crime.<sup>168</sup> The ability to speak is just as important as the ability to recommend. Unless the commander is allowed to inform his subordinates of the likely consequences of misbehavior, there is little chance for deterrence. The subordinates would lack the information needed to make a rational choice. As with any rational choice, improved information transfer improves decision making.<sup>169</sup>

The use of harsh sentencing recommendations paired with clear expectation management will reduce crime in the military through psychological means and through incapacitation. Input into sentencing allows a commander to follow through on his announced sentencing philosophy. The deterrent effect of following through is positive.<sup>170</sup> The additional harshness introduced in the system is justified by expected improvements in discipline and reductions in crime and will be guarded against by the independent trial judiciary.

Prior to the completion of this article, the Military Justice Review Group published a study calling for a different form of sentencing.<sup>171</sup> The overall work of the group is admirable and replete with excellent suggestions. The Group's proposals on sentencing parallel some of the material in this article. The primary difference between this article's proposal and the Group's is the basis for sentencing determinations. Rather than empowering commanders to influence sentencing in their respective jurisdictions, the group proposes to consolidate sentencing with universal standards issued by the Command in Chief. Sentencing terms for a large range of crimes would be closely governed by parameters implemented by executive order.<sup>172</sup>

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<sup>168</sup> Westmoreland & Prugh, *supra* note 10, at 51 (The decisive consequence of misconduct must be such as to reinforce with unmistakable clarity a conscious decision for proper conduct.)

<sup>169</sup> See MICHAEL ALLINGHAM, CHOICE THEORY: A VERY SHORT INTRODUCTION (2002).

<sup>170</sup> See Francesco Drago, *The Deterrence Effect of Prison: Evidence from a Natural Experiment*, 117 J. POL. ECON. 257 (2009) (showing that after individuals in Italy who were released early from prison were told they would suffer greatly increased penalties if they committed any new offenses, their recidivism rate was much lower than expected).

<sup>171</sup> MILITARY JUSTICE REVIEW GROUP, *supra* note 98, at 503.

<sup>172</sup> See *id.* at 32.

The Group's proposed parameters create a problem of overbreadth in sentencing. All proposals in the United States for guidelines, parameters, and enhancements in the last century increased sentences.<sup>173</sup> The courts in the military can currently assign no punishment to most offenses, therefore parameters may be intended to reduce discretion for lenient sentences in addition to making sentencing predictable. Under the Group's proposal, the parameters would be derived largely from practical experience. Sentences derived now may be inadequate for the many special circumstances convening authorities encounter when they take servicemembers outside the country and place them into combat conditions. The problem of military exigency and the need for variable pressure is well known to military commanders, officers, leaders and judge advocates.<sup>174</sup> The Group's approach does not directly support the achievement of a commander's mission. The approach furthers the expansion of a civilianized system of justice that works well in usual and expected conditions but is unadaptable to enforcing discipline in the face of a breakdown in order such as the Army faced in the late 1960s.

In addition to being unadaptable to the disciplinary needs of individual jurisdictions, the system proposed by the Group is likely to be dictated in greater part by a manual of parameters. Currently, a servicemember is sentenced for criminal acts, but the severity is judged in the context of events and circumstances. If a servicemember is sentenced according to a table of parameters, the judgment will be based on what is listed in the parameters. The decision to mention a weapon, specify an amount of drugs, or allege a higher mens rea will impact the parameters. With careful charging, prosecutors will box judges into minimum sentences and create tremendous pressure to plead guilty. The sentences handed down would vary based not on the outlook of commanders or even on the specific acts of an accused, but on the outlook of the judge advocates determining the wording of the charge sheets.<sup>175</sup> For comparison, the use of guidelines in the federal system also relies on the discretion of professional prosecutors.

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<sup>173</sup> See Kessler & Levitt, *supra* note 153 at 350; see also TAMASAK WICHARAYA, SIMPLE THEORY, HARD REALITY: THE IMPACT OF SENTENCING REFORMS ON COURTS, PRISONS, AND CRIME 157 (1995) ("The nominal goal of sentencing reform legislation in the United States [is] to deter crime by increasing the rates of incarceration for a variety of high priority crimes").

<sup>174</sup> See Westmoreland & Prugh, *supra* note 10 at 40.

<sup>175</sup> See WICHARAYA, *supra* note 177 at 167 (1995) ("Removal of human elements in decision making—that is, official discretion in sentencing—requires remarkable effort and a body of knowledge theorists have not yet discovered.").



That system has rather infamously resulted in massive racial and ethnic sentence disparity.<sup>176</sup> Guidelines have a troubling pattern of not producing the consistency in sentencing they promise. Judges find ways to deviate from or resist compulsory models of sentencing.<sup>177</sup> As the Army attempts to control for variance, it is easy to imagine the parameters system suggested by the Military Justice Review Group will suffer the same expansion in complexity which sent the Federal Guidelines Manual from just over 300 pages in 1987<sup>178</sup> to nearly 1500 pages of advice, tables, appendices and data by 2015.<sup>179</sup> Ultimately, the Group's suggested approach strives for a universal consistency that will be difficult to attain and may not yield helpful reductions in crime. This article proposes to instead accept that disciplinary conditions and needs vary in time, location, and circumstance. It is a proposal to empower commanders to address the direct disciplinary problems before them both in word and action.

## VI. Conclusion

Commanders remain responsible for discipline in their formations and need to have continued input in judicial outcomes. As the system is increasingly civilianized, it must be actively reformed to maintain a meaningful role for the commander. The U.S. military won the Revolution, the Civil War, the First World War, and the Second World War while using court-martial systems that deferred heavily to commanders' wishes. John Adams advocated using the British Model with its extensive commander's control.<sup>180</sup> The Articles of War were adopted

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<sup>176</sup> See DOUGLAS C. McDONALD & KENNETH E. CARLSON, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER?: THE TRANSITION TO SENTENCING GUIDELINES, 1986–90, at 177 (1993), <https://www.ncjrs.gov/pdffiles1/bjs/145332.pdf> (indicating that the application of the guidelines drove black/white sentencing disparity from 8% to upwards of 40%); see also Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 8 J. EMPIRICAL LEGAL STUD. 729 (2012) (noting ongoing racial disparity despite numerous alterations to sentencing laws and guidelines and suggesting restoration of judicial discretion as the remedy).

<sup>177</sup> See *id.* at 164 (“[T]he assumption that a statute can turn judges into mindless robots, who can be programmed in advance to do what legislators tell them to do with strict obedience, is naïve.”) In analyzing all jurisdictions in the United States that had implemented sentencing guidelines, the author found wide variance in the application of even the presumptive guidelines in the statistical data. *Id.*

<sup>178</sup> U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1987).

<sup>179</sup> U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (2015).

<sup>180</sup> UCMJ BACKGROUND, *supra* note 12 at 2.

on his recommendation and used by General George Washington to maintain discipline<sup>181</sup> even under the harsh conditions of Valley Forge. General Sherman likewise believed strongly in the need for a commander-centric system of justice adaptable to individual commanders.<sup>182</sup> He spoke at length in support of keeping commanders in the center of military justice.<sup>183</sup> Likewise, General Dwight Eisenhower spoke with Congress against limits on commanders and in favor of retaining command influence.<sup>184</sup> These commanders—all of whom led American forces to victory against equal or even superior adversaries—believed in commander control over military justice.

Even today, commanders at the highest levels are keen to maintain a voice in military justice.<sup>185</sup> General Raymond Odierno “want[s] the commander fully involved in the decisions that have an impact on the morale and cohesion of the unit, to include punishment, to include UCMJ. That’s their responsibility. It’s not too much responsibility.”<sup>186</sup> Increasing control is in line with the wishes of Generals Washington, Sherman, Eisenhower, and Odierno.

The input given by Article 60 of the UCMJ was never adequate and has been gutted by the 2014 NDAA. The long judicialization of the court-martial process in the 20th Century created the independence needed for allow direct commander input into sentencing. If the convening authority surrenders his ability to act judicially, he can move into a prosecutorial role, making the decisions to refer matters to court and making the recommendation for sentence. The new system eliminates approval procedures under Article 60, UCMJ. This reform creates significant time savings for the convening authority and his staff judge advocate. Victims will no longer worry about whether the result of the trial will be overturned in part by a commander. Sentences will be largely self-executing and convicted Soldiers will receive a faster appeal. Although sentences may become harsher, they will still be regulated by independent judges. Any additional harshness is likely to deter crime and disobedience so long as

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<sup>181</sup> *Id.*

<sup>182</sup> Schlueter, *supra* note 26..

<sup>183</sup> *Id.*

<sup>184</sup> H.R. REP. NO. 80-1034 (1947).

<sup>185</sup> *Top Brass Reject Overhauling Military Justice System to Reduce Sexual Assault*, PBS NEWSHOUR (Jun. 4, 2013), [http://www.pbs.org/newshour/bb/military-jan-june13-sexualassaults\\_06-04](http://www.pbs.org/newshour/bb/military-jan-june13-sexualassaults_06-04) (presenting Gen. Raymond Odierno, U.S. Army Chief of Staff, discussing his belief that commander involvement is the solution to indiscipline and that removal of commanders will worsen the sexual assault problem).

<sup>186</sup> *Id.*

the commander use his new authority under Article 37 to make his likely recommendations and prosecutorial philosophy clear to his subordinates.

Appendix A. Revised Article 37

- (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. A person subject to this chapter may neither attempt *to influence the action of any court-martial, military tribunal or military judge through communications with the members or military judge, nor attempt to undermine the ability of a court-martial or military tribunal to fairly try the accused through public statements.*
- (b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the army forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

## Appendix B. RCM 1001B Commander's Disciplinary Recommendation

*a) In general.* The convening authority will be promptly informed of the findings announced under RCM 922. In a non-capital case, the convening authority may submit a commander's disciplinary recommendation in writing under this rule. The convening authority is not considered a witness for purposes of Article 42(b). Trial counsel shall ensure the court is promptly informed of whether the convening authority wishes to submit a recommendation. The military judge will establish a date for the presentencing hearing consistent with judicious application of this rule.

*b) Content of commander's disciplinary recommendation.* The convening authority responsible for the court-martial will recommend a specific sentence. A written summary of the offenses as known to the commander will be included in the commander's disciplinary recommendation, the commander will not consider any charges or specifications accompanied by a finding of not guilty. The recommendation must be prepared with the assistance of a Staff Judge Advocate. The convening authority and his judge advocate may consider information from any source. The recommendation will only include a sentence and a summary of the offenses.

*c) Service Upon the Convicted.* The commander's disciplinary recommendation will be served upon the convicted individual and the presiding military judge. The convicted will be provided adequate time to object to any misstatement of fact in the commander's disciplinary recommendation and to call for additional witnesses to rebut the recommendation under RCM 703. In no circumstance will the court-martial reconvene for sentencing proceedings until five days have elapsed following the service of the recommendation upon the convicted.

Appendix C. RCM 1001 (redacted)

(a) *In general.*

*Procedure.* After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation;

(v) evidence of rehabilitative potential; and

(vi) *the commander's disciplinary recommendation...*

#### Appendix D. Article 57, Effective Date of Sentences

- (a) ~~(1)~~ Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect ~~on the earlier of—~~  
~~(A) the date that is 14 days after the date on which the sentence is adjudged; or~~  
~~(B) the date on which the sentence is approved by the convening authority.~~
- ~~(2) On application by an accused, the convening authority may defer a forfeiture of pay or allowances or reduction in grade that would otherwise become effective under paragraph (1)(A) until the date on which the sentence is approved by the convening authority. Such a deferment may be rescinded at any time by the convening authority.~~
- ~~(3) A forfeiture of pay or allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect.~~
- ~~(4) In this subsection, the term “convening authority”, with respect to a sentence of a court martial, means any person authorized to act on the sentence under section 860 of this title (article 60).~~
- (b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended ~~or deferred~~ shall be excluded in computing the service of the term of confinement.
- (c) All other sentences of courts-martial are effective on the date ordered executed.

### Appendix E. Article 57a

~~(a) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court martial jurisdiction over the command to which the accused is currently assigned.~~

~~(b)~~ (1)

In any case in which a court-martial sentences a person referred to in paragraph (2) to confinement, the *Secretary concerned* may defer the service of the sentence to confinement, without the consent of that person, until after the person has been permanently released to the armed forces by a State or foreign country referred to in that paragraph.

(2) Paragraph (1) applies to a person subject to this chapter who—

(A) while in the custody of a State or foreign country is temporarily returned by that State or foreign country to the armed forces for trial by court-martial; and

(B) after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(3) In this subsection, the term “State” includes the District of Columbia and any commonwealth, territory, or

~~(e)~~ In any case in which a court-martial sentences a person to confinement and ~~the sentence to confinement has been ordered executed, but in which~~ review of the case under section 867(a)(2) of this title (article 67(a)(2)) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.



## Appendix F. RCM 705 (Pretrial Agreements)

a. *In general.* Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

b. *Nature of agreement.* A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) ~~Take specified action on the sentence adjudged by the court-martial.~~ Agree to recommend a specific sentence under RCM 1001B and have the trial counsel argue for no greater sentence.

c. *Terms and conditions.*

(1) *Prohibited terms or conditions.*

(A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

(2) *Permissible terms or conditions.* Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well

as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 preliminary hearing, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

*(d) Procedure.*

(1) *Negotiation.* Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. ~~If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.~~

(3) *Acceptance.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

*(4) Withdrawal.*

(A) *By accused.* The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.

(B) *By convening authority.* The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure

by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(e) *Nondisclosure of existence of agreement.* ~~Except in a special court-martial without a military judge,~~ no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

**Appendix G.** 1113 (Execution of Sentences)

(a) *In general.* A sentence of a court-martial will be executed upon order of the military judge.

(b) A dishonorable or bad-conduct discharge may be ordered executed only by a final judgment within the meaning of R.C.M. 1209.

(c) *Dismissal of a commissioned officer, cadet, or midshipman.* Dismissal of a commissioned officer, cadet, or midshipman may only be ordered executed only by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

(d) *Sentences extending to death.* A punishment of death may be ordered executed only by the President.

(d) *Self-executing punishments.* Under regulations prescribed by the Secretary concerned, a dishonorable or bad conduct discharge that has been approved by an appropriate convening authority may be self-executing after final judgment at such time as:

(1) The accused has received a sentence of no confinement or has completed all confinement;

(2) The accused has been placed on excess or appellate leave; and,

(3) The appropriate official has certified that the accused's case is final. Upon completion of the certification, the official shall forward the certification to the accused's personnel office for preparation of a final discharge order and certificate.

d. *Other considerations concerning the execution of certain sentences.*

(1) *Death.*

(A) *Manner carried out.* A sentence to death which has been finally ordered executed shall be carried out in the manner prescribed by the Secretary concerned.

(B) *Action when accused lacks mental capacity.* An accused lacking the mental capacity to understand the punishment to be suffered or the reason for imposition of the death sentence may not be put to death during any period when such incapacity exists. The accused is presumed to have such mental capacity. If a substantial question is raised as to whether the accused lacks capacity, the convening authority then exercising general court-martial jurisdiction over the accused shall order a hearing on the question. A military judge, counsel for the government, and counsel for the accused shall be detailed. The convening authority shall direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining whether the accused understands the punishment to be suffered and the reason therefore. The military judge shall consider all evidence presented, including evidence provided by the accused. The accused has the burden of proving such

lack of capacity by a preponderance of the evidence. The military judge shall make findings of fact, which will then be forwarded to the convening authority ordering the hearing. If the accused is found to lack capacity, the convening authority shall stay the execution until the accused regains appropriate capacity.

(2) *Confinement.*

(A) *Effective date of confinement.* Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but the following shall be excluded in computing the service of the term of confinement:

(A) Periods during which the sentence to confinement is suspended or deferred;

(B) Periods during which the accused is in custody of civilian authorities under Article 14 from the time of the delivery to the return to military custody, if the accused was convicted in the civilian court;

(C) Periods during which the accused is in custody of civilian or foreign authorities after the convening authority, pursuant to Article 57a, has postponed the service of a sentence to confinement.

(D) Periods during which the accused has escaped or is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon the prisoner's petition for a writ of habeas corpus under a court order which is later reversed; and

(E) Periods during which another sentence by court-martial to confinement is being served. When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense and sentenced to confinement, the later sentence interrupts the running of the earlier sentence. Any unremitted remaining portion of the earlier sentence will be served after the later sentence is fully executed.

(e) *Nature of the confinement.* The omission of "hard labor" from any sentence of a court-martial which has adjudged confinement shall not prohibit the authority who orders the sentence executed from requiring hard labor as part of the punishment.

(f) *Place of confinement.* The authority who orders a sentence to confinement into execution shall designate the place of confinement under regulations prescribed by the Secretary concerned, unless otherwise prescribed by the Secretary concerned. Under such regulations as the Secretary concerned may prescribe, a sentence to confinement adjudged by a court-martial or other military tribunal, regardless whether the

sentence includes a punitive discharge or dismissal and regardless whether the punitive discharge or dismissal has been executed, may be ordered to be served in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. When the service of a sentence to confinement has been deferred and the deferment is later rescinded, the convening authority shall designate the place of confinement in the initial action on the sentence or in the order rescinding the deferment. No member of the armed forces, or person serving with or accompanying an armed force in the field, may be placed in confinement in immediate association with enemy prisoners or with other foreign nationals not subject to the code. The Secretary concerned may prescribe regulations governing the place and conditions of confinement.

(4) *Confinement in lieu of fine.* Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

(5) *Restriction; hard labor without confinement.* When restriction and hard labor without confinement are included in the same sentence, they shall, unless one is suspended, be executed concurrently.

(6) *More than one sentence.* If at the time forfeitures may be ordered executed, the accused is already serving a sentence to forfeitures by another court-martial, the military judge may order the later forfeitures executed when the earlier sentence to forfeitures is completed.

#### Appendix H. RCM 1000

(a) *In general* A commander may order a convicted Soldier, not already in confinement pursuant to RCM 305, into confinement pending a sentencing hearing.

(b) *Factors* When making a decision to order an individual into confinement, the commander must determine confinement is necessary to ensure the individual's presence. The commander should foresee significant burdens associated with ensuring the presence of the convicted person at the sentencing hearing. The commander may presume an individual convicted of an offense or offenses normally tried at summary court-martial will be present at the sentencing hearing. The commander may presume individuals convicted of more serious offenses have a strong motivation to absent themselves.

(c) *Review* An order to confinement may be appealed to the military judge.

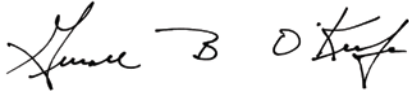




By Order of the Secretary of the Army:

Official:

MARK A. MILLEY  
*General, United States Army*  
*Chief of Staff*

A handwritten signature in black ink, appearing to read "Gerald B. O'Keefe". The signature is written in a cursive style with a large initial "G" and a distinct "B" and "O'Keefe" following.

GERALD B. O'KEEFE  
*Administrative Assistant to the*  
*Secretary of the Army*  
1804604

