Volume 225 Issue 2 2017

ACADEMIC JOURNAL 27-100-225-2

Military Law Review

Articles

MILITARY LAW REVIEW

VOLUME 225 • 2017

Academic Journal 27-100-225-2

Military Law Review

Volume 225 **Issue 2** **2017**

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Articles

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

Academic Journal No. 27-100-225-2, 2017

Military Law Review
Volume 225
Issue 2

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

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

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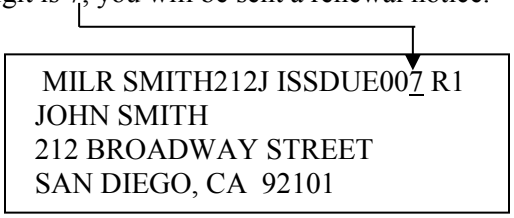

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MILITARY LAW REVIEW

Volume 225 **Issue 2**

CIVILIANS WITH SKIN IN THE GAME: THE *LAW OF WAR MANUAL'S* REJECTION OF THE ICRC *GUIDANCE ON DIRECT PARTICIPATION IN HOSTILITIES*

MAJOR CYNTHIA MARSHALL*

> *Mr. Obama also acknowledged the dilemma the United States and its allies face in Raqqa and other urban areas in Syria and Iraq, noting that the Islamic State "is dug in, including in urban areas, and they hide behind civilians". . . . Current and former residents of Raqqa, however, say the group's leaders move constantly, mixing with the civilian population . . . . The group's top leaders work and live in the city, and the bureaucracy they have created to run the self-declared caliphate is based there. There are financial specialists, computer experts, field commanders and as many as 10,000 foot soldiers . . . .*[1]

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[1] Matthew Rosenberg & Eric Schmitt, *In ISIS Strategy, U.S. Weighs Risk to Civilians*, N.Y. TIMES (Dec. 19, 2015), http://www.nytimes.com/2015/12/20/us/politics/in-isis-strategy-us-weighs-risk-to-civilians.html.

I. Introduction

Urban centers have become the battlefields for contemporary armed conflicts resulting in an unprecedented mingling of civilians and armed actors. To complicate matters, civilians are increasingly participating in these conflicts, from planting explosives to providing intelligence.[2] While historically civilians have supported war efforts by generating food, weapons, or political support, these actions usually took place away from battlefields.[3] In contrast, twenty-first century theaters of operations swarm with civilians providing support to combatants.[4]

Civilians in and around contemporary armed conflicts present a problem to the fundamental principle of international humanitarian law (IHL) requiring warring parties to distinguish between combatants and civilians, as the former are lawful military targets and the latter are immune from direct attack.[5] Civilians forfeit this targeting immunity if they directly participate in hostilities (DPH),[6] but DPH is not defined by treaty IHL, nor does State practice or international jurisprudence provide clear instruction on the term's meaning.[7]

The concept of DPH[8] comes from Common Article 3 of the Geneva Conventions of 1949[9] and is found in other IHL provisions: For example,

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[2] Trevor A. Keck, *Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, 211 MIL. L. REV. 115, 127 (2012).

[3] Nils Melzer, *The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 103 AM. SOC'Y INT'L L. PROC. 299, 299 (2009) [hereinafter Melzer, *Clarification*].

[4] *See* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 8-9 (2010) [hereinafter Schmitt, *Analysis*] (citing unprecedented numbers of contractors and civilian government employees on the battlefields of Iraq and Afghanistan).

[5] Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT'L L. & POL. 637, 637 (2010).

[6] *Id.*

[7] INT'L COMM. OF RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 41 (Nils Melzer ed., 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].

[8] Melzer, Clarification, *supra* note 3, at 300.

[9] "Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . . ." Geneva Convention for the Amelioration of the Condition of the Wounded

Article 51(3) of Additional Protocol I (API) to the Geneva Conventions says civilians may not be targeted "unless and for such time as they take a direct part in hostilities."[10] This language is repeated verbatim in Article 13(3) of Additional Protocol II (APII).[11] And while the United States has not ratified these protocols, it accepts the DPH language of API and APII as customary international law (CIL).[12] To clarify the meaning of DPH, one would normally look to the International Committee of the Red Cross (ICRC) *Commentary to Additional Protocol I*, but it offers minimal guidance on what is DPH[13] and for how long a civilian who DPH forfeits targeting protection.[14]

To resolve this situation, in 2003 the ICRC launched an informal expert process to research and discuss the interpretation of DPH.[15] The result was the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (*Interpretive Guidance* or the *Guidance*), published in 2009.[16] The *Guidance* both proposed a three prong test for determining what activity constitutes DPH, and defined the duration for which a civilian who DPH loses his targeting protection.[17] For six years the United States did not officially respond to the *Guidance*.

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and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31.

[10] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3.

[11] "Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, U.N. Doc. A/32/144, Annex I. Additional Protocol II applies to non-international armed conflicts. J. Jeremy Marsh & Scott L. Glabe, *Time for the United States to Directly Participate*, 1 VA. J. INT'L L. ONLINE 13, 15 (2011).

[12] *Id.*

[13] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 618-19 (Yves Sandoz et al eds., 1987).

[14] *Id.; see also* Marsh, *supra* note 11, at 15 (observing the ICRC *Commentary to Additional Protocol I* (API) "offered minimal and unworkable guidance" for interpreting the terms "direct part" and "for such time as"). The notion of DPH is a "notoriously vexing concept." Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225, 250 (2014). Debate over the meaning of DPH could fill books. *Id.* at 268.

[15] Melzer, Clarification, *supra* note 3, at 300-01.

[16] ICRC INTERPRETIVE GUIDANCE, *supra* note 7.

[17] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 46, 65, 70-71.

On June 12, 2015, the Department of Defense (DoD) published its long awaited *Law of War Manual* (*LoW Manual* or the *Manual*). The *Manual* expressly rejected the *Guidance* and gives its own instruction on what constitutes DPH.[18] The *Manual's* criteria for DPH is more expansive than the ICRC's three prong test, capturing more activity and removing the ICRC's targeting immunity after the second act of DPH.[19] The result is the *Manual* strips civilians[20] of their immunity from attack for more activity and for longer periods of time, making stark the risk assessment civilians who put their skin in the game[21] face in modern armed conflicts.

To demonstrate this, first this article looks at the history of the *Guidance*. This is followed by an analysis of both the *Guidance's* three prong DPH test and the temporal boundaries of its DPH determination. Then this article looks at criticism of the *Guidance* before turning to the *Manual* and examining its criteria for DPH. Lastly, this article concludes by exploring the implications of the *Manual's* rejection of the *Guidance*.

II. Civilians and the ICRC *Interpretive Guidance*

A. The ICRC Expert Group

The purpose behind the ICRC's *Guidance* was to recommend an interpretation of IHL as it relates to DPH.[22] The project originated in 2003

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[18] U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 4.26.3 at 180, §§ 5.8-5.8.5 at 226-36 (2015, Updated December 2016) [hereinafter DOD LOW MANUAL]. The updated DOD LOW MANUAL changed the section and page numbering of the DPH section but not its content. The updated numbering is used in this paper. This revised *Manual* did seek to "provide greater clarity on the DoD legal view of human shields" (discussed in Part III. B. 3, *infra*.). Jennifer M. O'Connor, Gen. Counsel of the Dep't of Def., Speech at New York University School of Law: *Applying the Law of Targeting to the Modern Battlefield* (Nov. 28 2016), *in* https://www.defense.gov/Portals/1/ Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf, at 12 (explaining how the *Manual* needs "to be a living document" so as to provide JAGs "clarity on the very tough issues" on which they give advice).

[19] *Id.* at §§ 5.8.3, 5.8.4-5.8.4.2.

[20] The Department of Defense *Law of War Manual* refers to civilians who engage in hostilities as "private persons" as that conduct results in forfeiting "many of the protections afforded civilians under the law of war." DOD LOW MANUAL, *supra* note 18, § 4.18.2; *see id.* § 4.18, at 155-58.

[21] Warren Buffett is credited with coining this metaphor for having an investment in a venture, but he denies doing so. William Safire, *Skin in the Game*, N.Y. TIMES (Sept. 17, 2006), http://www.nytimes.com/2006/09/17/magazine/ 17wwln_safire.html.

[22] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9.

when the ICRC and the TMC Asser Institute[23] jointly launched an expert meeting process with the goal of clarifying: (1) who is a civilian for the purpose of the principle of distinction, (2) what conduct equates to DPH, and (3) "what modalities govern the loss of protection against direct attack," in the context of both international and non-international armed conflicts.[24]

From 2003 to 2008, the ICRC held five expert meetings of forty to fifty legal experts from academia, the military, governments, and non-governmental organizations, acting in their private capacity.[25] The group included experts on IHL from over a dozen countries.[26] The expert group utilized a variety of legal sources, including customary and treaty IHL, international jurisprudence, and military manuals.[27] According to Dr. Nils Melzer, ICRC Legal Adviser and author[28] of the *Interpretive Guidance*, the project's purpose was not to modify existing IHL rules but to ensure they were being interpreted according to the fundamental principles underlying IHL.[29]

1. The Interpretive Guidance Arrives

In the spring of 2009, the ICRC published the *Guidance*, offering "a balanced and practical solution" to the issue of DPH.[30] The document contains three key recommendations: the first defines three constituent elements for determining DPH; the second delineates the beginning and end of DPH; and the third recommends the temporal scope of a civilian's

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[23] The Institute is a non-profit research organization, primarily funded by the Dutch Government. *About the Institute*, ASSER INSTITUTE CENTRE FOR INTERNATIONAL & EUROPEAN LAW, http://www.asser.nl/about-the-institute (last visited May 24, 2017).

[24] Melzer, *Clarification*, *supra* note 3, at 300.

[25] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9.

[26] Bill Gertz, *Terrorists and Laws of War*, WASH. TIMES, June 18, 2009, http://www.washingtontimes.com/news/2009/jun/18/inside-the-ring-95264632/?page=all. Some countries represented included Argentina, France and India. *Id.*

[27] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9.

[28] The *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* acknowledges ICRC Legal Adviser Nils Melzer as its author. ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 8.

[29] Melzer, *Clarification*, *supra* note 3, at 301. The ICRC's *Interpretive Guidance* does not try to change existing international humanitarian law (IHL) rules. *Id.*

[30] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9. The *Guidance* "takes into account the wide variety of concerns involved and, at the same time, ensures a clear and coherent interpretation of the law consistent with the purposes and principles of IHL." *Id.* at 9-10.

loss of protection.[31] These recommendations apply to both international and non-international armed conflicts.[32]

2. Guidance not Law

The *Interpretive Guidance* reminds readers it provides guidance, not law, on the notion of direct participation[33] as only States produce "binding law."[34] Yet, as was noted at the third meeting of experts, the *Guidance* could influence States as they developed conventional or customary law addressing DPH.[35]

B. The Three Constitutive Elements of Direct Participation in Hostilities

To determine what constitutes DPH, the *Guidance* provides a three prong cumulative test consisting of three constitutive elements.[36] The test's first prong requires the harm from the act, or harm likely to result from the act, reach a certain threshold; the second prong requires a direct causal relationship between the act and the expected harm; and the third prong requires a close relation between the act and the hostilities transpiring between parties of the armed conflict.[37] As noted by the *Guidance*, these elements are closely related and may overlap with each other.[38]

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[31] *Id*. at 46, 65, 70-71.

[32] Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 698 (2010) [hereinafter Schmitt, *Deconstructing*].

[33] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 6. "[W]hile reflecting the ICRC's views," the *Guidance* "is not and cannot be a text of legally binding nature." *Id.*

[34] *Id.* Binding international law is made through State agreements, or State practice followed out of a sense of legal obligation on a certain issue. *Id.*

[35] ICRC THIRD SUMMARY REPORT, *supra* note 29, at 6. The "importance and persuasive influence" of the experts was "not to be underestimated . . . . [T]he final document could subsequently serve states as guidance with regard to questions to be addressed and the problems to be resolved in developing conventional or customary IHL relevant to" direct participation in hostilities (DPH). *Id.*

[36] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 46. See Appendix A for a diagram of the *Guidance's* DPH test.

[37] Melzer, *Clarification*, *supra* note 3, at 303.

[38] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 46.

1. The Threshold of Harm Element

> In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.[39]

The first element requires an action have an adverse effect on the enemy, therefore harm is the decisive criteria.[40] For an act to qualify as DPH, the harm it produces, or is reasonably expected to produce, must reach a certain threshold.[41] If there was no harm, one uses an objective standard accounting for prevailing circumstances to determine the likelihood of an act causing harm.[42] Acts against protected persons or objects that do not reach the required threshold of death, injury, or destruction are not DPH, and therefore do not result in a civilian losing his protection against attack.[43]

Citing to API and the Hague Convention (IV), the *Guidance* explains how acts that do not cause harm "of a military nature nor inflict death, injury, or destruction on protected persons or objects cannot be equated with the use of means or methods of warfare," nor can they be equated to injuring the enemy, as required to qualify as an act of hostility.[44] For example, civilians clearing mines placed by an adversary meets this

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[39] *Id.* at 47.

[40] Schmitt, *Deconstructing*, *supra* note 32, at 718. This element "appears under-inclusive" by focusing "solely on adverse effect on the enemy" and not addressing action likely "to enhance a party's military operations or military capacity. . . . [T]he strengthening of the enemy's capacity can prove as much a concern as the weakening of one's own forces." *Id*. at 718-719.

[41] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 47. "This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack." *Id.*

[42] *Id.* The "threshold determination must be based on 'likely' harm, . . . harm which may reasonably be expected to result from an act in the prevailing circumstances." *Id.*

[43] Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 862 (2010) [hereinafter Melzer, *Response*].

[44] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 50 (internal citations and quotations omitted) (citing to Article 35 of API and Article 22 of the Hague Convention (IV)). Actions like building roadblocks or interrupting electricity supplies might hurt the public's security or health, but without an adverse military effect, they would not constitute DPH. *Id.*

threshold of harm element[45] because the civilians are depriving the adversary of a military advantage.[46] Still this conduct might not constitute DPH[47] as the *Guidance* requires an act satisfy two more prongs, the element of direct causation and the element of a belligerent nexus.[48]

2. The Direct Causation Element

> In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.[49]

An act satisfies the direct causation element when it causes, or may reasonably be expected to cause, "in one causal step," harm that meets the necessary threshold.[50] An act that is an integral part of a military operation aiming to inflict the necessary harm satisfies this element.[51] Preparatory steps and deployments to and from the operation are integral parts of the act.[52]

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[45] *Id.* at 48.

[46] ICRC THIRD SUMMARY REPORT, *supra* note 35, at 31.

[47] *See id.* at 31-32. Some *Guidance* experts said minesweeping by civilians posed "no direct threat," therefore was not DPH. *Id*. at 31. Other experts said minesweeping was DPH as the "removal of mines deprived the adversary of the military advantage related to the mine laying." *Id.* Some experts believed other factors had to be part of a DPH determination, such as whether the territory was occupied or under military control. *Id.* at 32.

[48] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 50.

[49] *Id*. at 51.

[50] *Id.* at 58. For example, assembling or storing of an improvised explosive device (IED) are actions that do not directly cause harm, as they are more than one causal step from the harm, whereas planting and detonating an IED are actions that directly cause harm. *Id* at 54.

[51] *Id.* For example, a "civilian truck driver of ammunition to an active firing position at the front line" is most likely an integral part of a combat operations, so he is DPH. However, if he were taking "ammunition from a factory to a port for further shipping to a storehouse in a conflict zone," his actions are too remote from any ensuing harm to constitute DPH. *Id.* at 56. Still, a civilian with a minor role in a group operation can lose his protection if his contribution is integral to the operation producing the required harm. Melzer, *Response, supra* note 43, at 865.

[52] Melzer, *Response, supra* note 43, at 865. Preparatory measures are that "of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act." ICRC INTERPRETIVE GUIDANCE,

The *Guidance* adopts a direct causation standard for the relation between the act and resulting harm but creates its own definition for that standard,[53] focusing on the difference between direct and indirect causation.[54] The *Guidance* cites as examples of indirect causation "conduct that merely builds up or maintains the capacity of a party to harm its adversary," "scientific research and design," and "the recruitment and training of personnel."[55] The *Guidance* notes that only when people are recruited and trained for a "predetermined hostile act" can recruiting and training possibly constitute DPH.[56] Acts satisfying the first two prongs must additionally meet the third prong of having a belligerent nexus to constitute DPH.[57]

3. The Belligerent Nexus Element

> In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the

supra note 7, at 65-66. "The return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation . . . ." *Id.* at 67. Discussed in Part II. C, *infra.*

[53] Schmitt, *Deconstructing*, *supra* note 32, at 726. By inventing its own definition of direct causation, the *Guidance* ignored established "understanding of the term, such as that of 'proximate cause' used in US tort law." *Id.*

[54] *Id*. at 726. Schmitt argues that the direct causation element usefully distinguishes between direct and indirect participation but that "the constitutive element as proffered by the ICRC does not represent a sure-fire formula for unambiguous and unassailable determinations." *Id.* at 734-35.

[55] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 53. These are "potentially important" actions but still only indirectly impact the "military capacity or operations" unless they are "an integral part of a specific military operation designed to directly cause the required threshold of harm." *Id.*

[56] *Id.* Recruiting and training of personnel "is crucial to the military capacity of a party to the conflict," but the "causal link with the harm inflicted on the adversary will generally remain indirect." *Id.* There is an argument civilian fuel truck drivers who generate income for combatants are directly enabling combat activities. *See* Butch Bracknell, *Warnings to Civilians Directly Participating in Hostilities: Legal Imperative or Ethics-Based Policy?*, LAWFARE (Nov. 29, 2015, 10:03 AM), https://www.lawfareblog.com/warnings-civilians-directly-participating-hostilities-legal-imperative-or-ethics-based-policy (arguing that the actions of civilian fuel truck drivers generating income for the self-proclaimed Islamic State (ISIS) satisfy all three prongs of the *Guidance's* DPH test).

[57] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 58. This is because the *Guidance's* three prong DPH test is cumulative. See Appendix A that shows the cumulative nature of the *Guidance's* three prong DPH test.

conflict and to the detriment of another.[58]

As the *Guidance* explains, treaty law uses the term hostilities to describe actions to injure the enemy or actions directed against the adversary.[59] The *Guidance* concludes that an action must be specifically designed to inflict harm "*in support of a party to an armed conflict and to the detriment of another*."[60] As the *Guidance* notes, determining if an act has a belligerent nexus poses difficulties, but the determination must be made on information reasonably available and based on objective, verifiable factors.[61]

The belligerent nexus element presumes hostilities are "a zero-sum game" where one party has to benefit from the harm suffered by the other.[62] Actions that directly enhance the military capacity or operations of a party without resulting in direct and immediate harm to the enemy do not satisfy the belligerent nexus element.[63] Violence not aimed at harming a party to an armed conflict, or that is not intended to do so in support of another party, does not qualify as DPH.[64]

According to the *Guidance*, this test creates "a reliable distinction" between DPH and conduct that is not part of hostilities,[65] like criminally

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[58] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 58.

[59] *Id.* The rationale behind the belligerent nexus element comes from API, Article 49(1) that defines "attacks" as "as acts of violence 'against the adversary.'" *Id*. at n.146.

[60] *Id.* (emphasis in the original). An action that meets the threshold of harm element and the direct causation element only satisfies the belligerent nexus element if it is "specifically designed" to hurt a party to the conflict and to support another party to the conflict. *Id.*

[61] *Id*. at 63. "In practice, the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party." *Id.* at 63-64.

[62] Schmitt, *Deconstructing*, *supra* note 32, at 736. As Schmitt points out, in today's complex conflicts, a civilian "might be opposed to both sides of a conflict," therefore the belligerent element would be "better styled as acts 'in support of a party to the conflict *or* to the detriment of another.'" *Id*. (emphasis in the original).

[63] *Id*. "[A]rmed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to any form of 'participation' in hostilities. . . ." ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 59.

[64] Melzer, *Response*, *supra* note 43, at 872-73. Unless the violence is enough to result in "a separate armed conflict, it remains of a non-belligerent nature and, therefore, must be addressed through law enforcement measures." ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 59.

[65] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 64. The *Guidance's* DPH test distinguishes between acts that are DPH and acts that occur "in the context of an armed conflict" but are not part of the hostilities. *Id.*

or politically motivated violence against a party to the conflict not designed to benefit an opposing party.[66] In addition to providing the constitutive elements of direct participation, the *Guidance* addresses the temporal scope of the loss of protection for a civilian whose actions meet its DPH test.

C. The Beginning and End of DPH and the Revolving Door of Protection

A civilian loses his protection and may be targeted for the duration of his DPH,[67] including the necessary preparation and the deployment to and return from the act's location.[68] This period covers any integral actions before or after a hostile act, not just the time immediately surrounding the act.[69] Preparatory measures for an unspecified hostile act or to establish some general capacity for hostilities do not result in the loss of protection.[70] The period of return from a hostile act ends once a civilian has left the operation and taken some positive act of disengagement, such as putting away his equipment.[71]

The *Guidance* states, "[c]ivilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities . . . ."[72] The result is a civilian loses his protection and regains

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[66] ICRC, SUMMARY REPORT OF FOURTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 51 (Nils Melzer ed., 2006) [hereinafter ICRC FOURTH SUMMARY REPORT] (noting how once the acts of violence directed against one party were "designed to support another party to the conflict," the actions would qualify as being part of the hostilities) *Id.*

[67] Melzer, *Clarification*, *supra* note 3, at 305 (distinguishing between the temporary loss of protection for civilians who DPH and the continuous loss of protection for members of state armed forces and organized armed groups).

[68] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 65. Preparatory measures "cannot be comprehensively described in abstract terms" as there are a "multitude of situational factors involved." *Id.*

[69] Melzer, *Clarification*, *supra* note 3, at 305. Integral parts of a specific hostile act include preparatory measures and deployments to and from the act, so the start and end of DPH extends beyond the act's immediate execution. *Id.*

[70] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 66. Furthermore "it is neither necessary nor sufficient for a qualification as direct participation that a preparatory measure occur immediately before . . . or in close geographical proximity to the execution of a specific hostile act or that it be indispensable for its execution." *Id.*

[71] *Id.* at 67. Examples of physically separating from the operation include "laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation." *Id.*

[72] *Id*. at 70 (noting how civilians who DPH do not lose their status as civilians but only temporarily lose their immunity from direct attack).

it after each act, creating a revolving door of protection.[73] The purpose of this temporary loss of protection is "to respond to spontaneous, sporadic, or unorganized hostile acts carried out by civilians,"[74] the justification being a civilian does not represent a military threat between acts of DPH.[75]

While providing a revolving door of protection may make it more difficult to respond to these civilians' actions, the *Guidance* says this is to protect civilians "from erroneous or arbitrary attack" and is necessary as long as their DPH is only spontaneous, unorganized, or sporadic.[76] This seeming erosion of the equal application of IHL to parties in the conflict[77] was just one of the controversial outcomes of the Guidance.[78]

D. Not Necessarily the Majority of Experts' Opinion

The *Guidance* acknowledges it does not necessarily reflect the unanimous or even the majority view of its experts.[79] Twelve of the experts withdrew their support from the ICRC's final report in protest, making the news.[80] Some of the protesting experts thought the final report

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[73] *Id.* (arguing the "'revolving door' of civilian protection" is an integral part of IHL).

[74] Melzer, *Clarification*, *supra* note 3, at 305 (contrasting this to the permanent loss of protection by members of state armed forces or organized armed groups, regardless if determined by formal or functional criteria).

[75] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 70. "The 'revolving door' . . . . prevents attacks on civilians who do not, at the time, represent a military threat." *Id.*

[76] *Id.* at 71 (recognizing the impact the revolving door may have on armed forces' ability to "respond effectively" to civilians who DPH, but arguing for its necessity to protect civilians "from erroneous or arbitrary attack").

[77] Bill Boothby, *"And For Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 742, 757 (2010). By acknowledging providing a revolving door of protection handicaps an armed force effectively responding to DPH, the *Guidance* creates a "legal inequality" between opposing parties. *Id.*

[78] The fiercest criticism was aimed at the *Guidance's* treatment of the rules and principles of conducting attacks against those who DPH. Schmitt, *Analysis*, *supra* note 4, at 14.

[79] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9 (stating how the *Guidance* was "widely informed" by the "expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts"). "As there was no unanimous consent among the experts, it was decided that no list of participating experts would be published." ICRC, OVERVIEW OF THE ICRC'S EXPERT PROCESS *(2003-2008)* 4 (2009).

[80] Citing some of the experts anonymously, *The Washington Times* reported that experts who withdrew their support included a Tel Aviv University law professor, a German professor, and a Dutch IHL specialist, among others. Gertz, *supra* note 26. Experts known to have withdrawn their support include Air Commodore (Retired) William Boothby, Colonel (Retired) W. Hays Parks, Professor Michael Schmitt, and Brigadier General (Retired) Kenneth Watkins. Lieutenant Colonel Walter E. Narramore, *American*

did not appropriately account for military necessity and was prejudiced against it.[81]

After publication of the historic[82] *Guidance*, there was concern that despite being criticized by leading commentators, it would become the "authoritative guidance" on DPH for the international community.[83] The worry was unless a prominent military power like the United States responded, the *Guidance* would become binding custom and ripen into CIL.[84] That worry was laid to rest in when the DoD finally published its *Manual* that explicitly rejected the *Guidance*.

III. The DoD *LoW Manual* Takes the Field

A. DoD Practice and the Rejection of the *Interpretive Guidance*

The *Manual's* purpose is to "provide information on the law of war to DoD personnel," declaring it only represents the DoD's views as to what the law is,[85] and provides "legal rules, principles . . . with respect to DoD practice."[86] Under the "Special Status of the ICRC" section, the *Manual* rejects the ICRC's *Guidance* and says the *Manual* has an opposing view.[87]

Indifference: The Lack of U.S. Response to Evolutions in the Law of Armed Conflict and How it Should be Addressed, ARMY LAW., Oct. 2015, at 12, 14 n.23.

[81] The *Guidance's* handling of DPH skewed the delicate balance of IHL towards humanity, sacrificing military necessity. Schmitt, *Analysis*, *supra* note 4, at 6. The document generally failed "to fully appreciate the operational complexity of modern warfare," and the three prong DPH test had "serious shortcomings with respect to both law and military common sense." Schmitt, *Deconstructing*, *supra* note 32, at 699.

[82] Narramore, *supra* note 80, at 12 (calling the *Guidance* "one of the most important modern statements on the law of armed conflict").

[83] Marsh, *supra* note 11, at 14. "In the absence of state response," the *Guidance* "is becoming the authoritative guidance on defining and interpreting DPH," despite published criticism by "leading commentators." *Id*. Those commentators include Bill Boothby, W. Hays Parks, Michael Schmitt, and Kenneth Watkin. *Id*. at n.5.

[84] *See id.* (highlighting the need for an official United States response because of the ICRC's "unique role in shaping customary international law; the important nexus between direct participation in hostilities and ongoing U.S. military operations; and the need for legal legitimacy in conducting those operations"). *Id.*

[85] DOD LOW MANUAL, *supra* note 18, § 1.1.1. "[T]his manual does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole." *Id.*

[86] *Id.*, § 1.1.2.

[87] *Id.*, § 4.26.3, at 180. "For example, the United States has not accepted the ICRC's study on customary international humanitarian law nor its 'interpretive guidance' on direct participation in hostilities." *Id.*

How opposing that view is becomes clear in the *Manual's* treatment of DPH.

The *Manual* begins addressing DPH by reasserting the United States has neither adopted the API, Article 51 rule[88] nor thinks API, Article 51(3) is CIL.[89] The *Manual* acknowledges parts of the *Guidance* are consistent with CIL but notes much of it is not.[90] Then the *Manual* gives an abstract definition of the minimum requirements for DPH elaborated by five considerations followed by examples,[91] as described next.

B. The Minimum Requirements for DPH and Five Categories of Consideration

According to the *Manual*, a civilian is DPH if at a minimum his actions, "by their nature and purpose," are intended to harm the enemy, are "an integral part of combat operations," or if his actions "effectively and substantially contribute to the adversary's ability to conduct or sustain combat operations."[92] "[G]eneral support" by a civilian to a State's war effort, like purchasing war bonds, does not constitute DPH.[93] The *Manual* emphasizes that a DPH determination is highly contextual and gives five

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[88] *Id.*, § 5.8.1 (using the term DPH "does not mean that the United States has adopted" the API, Art. 51 DPH rule).

[89] *Id.*, § 5.8.1.2. "[A]s drafted, Article 51(3) of AP I does not reflect customary international law . . . ." *Id. Contra* Jordan J. Paust, *Egregious Errors and Manifest Misconceptions in the 2015 DOD Law of War Manual*, U OF HOUSTON LAW CENTER NO. 2016-W-1, 24 (Feb 10. 2016) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id =2712004 (stating the *Manual* is wrong, that Article 51(3) of API does reflect customary international law, and the *Manual* "attempts to expand the test regarding who is DPH" in error, such that it "will not protect U.S. military personnel from responsibility under international law").

[90] DOD LOW MANUAL, *supra* note 18, at § 5.8.1.2. ". . . the United States supports the customary principle on which Article 51(3) is based. Similarly, although parts of the ICRC's interpretive guidance on the meaning of direct participation in hostilities are consistent with customary international law, the United States has not accepted significant parts of the ICRC's interpretive guidance as accurately reflecting customary international law." *Id.* (footnotes omitted).

[91] This was the method originally envisioned by the *Guidance* expert group, but they had doubts "an abstract definition, with or without a list of examples" could cover all "conceivable situations and whether it could sufficiently reflect the complexity of the legal issues at stake." ICRC THIRD SUMMARY REPORT, *supra* note 35, at 5.

[92] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 228-29 (footnote omitted).

[93] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 229.

categories to consider when evaluating a civilian's actions.[94]

1. Degree of Harm by Act

The first consideration is the degree of harm a civilian's act causes the opposition's people or objects.[95] The *Manual* examines if the act is the proximate cause of death, damage, or injury to the opposing party or their objects.[96] Alternatively, the *Manual* looks at the act's likeliness to adversely affect the opposition's military operations or military capacity and to what degree.[97]

Unlike the *Guidance*, the *Manual* does not place a threshold requirement of "death, injury or destruction" for harm to "persons or objects protected against direct attack."[98] By asking what degree an action is the "proximate or 'but for' cause of death, injury or damage to persons or objects belonging to the opposing party,"[99] the *Manual* integrates the idea captured by the direct causation element of the *Guidance*'s DPH test. As to activity against the military, the wording of the *Manual* and *Guidance* are very similar, therefore capturing the same acts.

While the *Manual* implies a high threshold of harm, meeting that threshold is not a requirement, allowing more actions to be DPH than the *Guidance*'s first element. Also, the *Manual* classifies acts that meets this criteria as DPH, whereas the *Guidance* requires activity meeting its threshold of harm element to also satisfy its direct causation and belligerent nexus elements.[100]

2. Degree of Connection Between Act and Hostilities

Next, the *Manual* examines the degree of connection between an act and hostilities, giving no parameters of how closely connected the act

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[94] *Id.* For example, context variables include "the weapons systems or methods of warfare employed by the civilian's side in the conflict." *Id.*
[95] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 230.
[96] *Id*. (examining whether the act is "the proximate or 'but for'" cause of the harm).
[97] *Id.* (examining "the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party").
[98] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 47.
[99] DOD LOW MANUAL, *supra* note 18, at § 5.8.3, at 230.
[100] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 50 (reiterating the requirement of all three elements).

needs to be.[101] The *Manual* directs attention to the act's proximity in time or geography to hostilities, or alternatively, the act's degree of connection to military operations.[102] This is in sharp contrast to the *Guidance*'s direct causation prong that disqualifies activity more than "one causal step"[103] from the harm done. Without such a limitation, the *Manual* qualifies more actions as DPH so long as the act meets the minimum criteria.[104]

For example, the *Guidance* only categorizes the acts of recruiting and training as DPH if those activities are for "a predetermined hostile act."[105] Whereas the *Manual* would look at when or where the recruiting and training took place relative to hostilities to determine if these activities are DPH.[106] Likewise the *Guidance* does not consider the preparatory steps of purchasing components, assembling, or storing improvised explosive devices (IED) as DPH, as these actions are more than one causal step from the harm (the direct steps being planting and detonating the IED).[107] The *Manual* would classify these preparatory steps as DPH depending on their connection in time or place to hostilities.

3. Purpose Underlying Act

Another consideration is "the specific purpose underlying the act," which the *Manual* refines by asking if the purpose is to "advance the war aims of one party to the conflict to the detriment of the opposing party."[108] This consideration is similar to the *Guidance*'s belligerent nexus element but potentially includes more activity as the *Manual* does not require that the purpose include achieving the "required threshold of harm."[109]

Under this category, civilian mine clearers would be DPH if they were

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[101] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 230. The *Manual* gives no indication what degree of connection is unreasonable. *See id.*

[102] *Id.* The *Manual* does not give any examples to demonstrate when an act's degree of connection in time or geography, or connection to military operations is too great to be considered DPH. *See id.*

[103] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 53. Discussed in Part II. B. 2, *supra*.

[104] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 228-29. Discussed in Part III. B, *supra*.

[105] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 53.

[106] *See* DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 230 (looking to degree of connection in time or geography of the act to hostilities).

[107] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 54. While these actions may be connected "through an uninterrupted causal chain of events" to the resulting harm, "they do not cause that harm directly." *Id.*

[108] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 230.

[109] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 58.

trying to deprive an adverse party of the military advantage of their mines, to the benefit of an opposing party.[110] Likewise, voluntary human shields[111] would be DPH if they were purposely trying to hinder the war aims of one party to advance an opposing party.[112] Again, according to the *Manual*, an activity that satisfies this category qualifies as DPH, unlike the *Guidance's* requiring the act also satisfy its threshold of harm and direct causation prongs.

4. Military Significance of Act to War Effort

The *Manual* considers an activity's military significance[113] by examining: (1) the degree the activity helps a party to the conflict against

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[110] For example, the civilian minesweepers employed by the British during the Dardanelle campaign to clear mines placed by the Turks were DPH. *Cf.* ICRC THIRD SUMMARY REPORT, *supra* note 35, at 31.

[111] The 2015 *Manual* did not distinguish between voluntary and involuntary human shields. Adil Ahmad Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, 92 INT'L L. STUD. 31, 64 (2016) [hereinafter Haque, *Off Target*]. The updated 2016 *Manual* does not make clear that "voluntary human shielding may itself" be DPH. Adil Ahmad Haque, *Human Shields in the (Updated) Dept of Defense's Law of War Manual*, JUST SECURITY (Dec. 15, 2016, 8:01 AM), https://www.justsecurity.org/35589/human-shields-updated-dept-defenses-law-war-manual/. Futhermore, "battlefield realities typically make it impossible to divine whether or not the persons in an area controlled by the enemy are voluntarily or involuntarily taking part in hostilities." Charles J. Dunlap, *No Good Options against ISIS Barbarism? Human Shields in 21st Century Conflicts*, 110 AJIL UNBOUND 311, 313 (2016), https://www.cambridge.org/core/article/div-class-title-no-good-options-against-isis-barbarism-human-shields-in-21-span-class-sup-st-span-century-conflicts-div/FEABC5AA76F50213C2C79F6815BEB2B7 (last visited March 15, 2017).

[112] DOD LOW MANUAL, *supra* note 18, at § 5.12.3.4 (stating the "use of human shields violates the rule that civilians may not be used to shield, favor, or impede military operations. . . . Based on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part of hostilities"). For example, if civilian fuel tanker truck drivers for ISIS were "deliberately attempting to protect their trucks from attack" they "may be deemed" to be DPH. Beth Van Schaack, *Targeting Tankers—and Their Drivers*—Under the Law of War (Part 2), LAWFARE (Dec. 3, 2015, 9:30 AM), https://www.justsecurity.org/28071/targeting-tankers-drivers-law-war-part-2/. "[H]ow can it be said that someone knowingly, actively, and–especially–*voluntarily* attempting to shield an otherwise legitimate military target from attack" is doing anything other than DPH, and as a matter of law should lose protection from attack. Charles J. Dunlap, Jr., *A Squarable Circle?: The Revised DoD Law of War Manual and the Challenge of Human Shields*, JUST SECURITY (Dec. 15, 2016, 8:06 AM), https://www.justsecurity.org/35597/squarable-circle-revised-dod-law-war-manual-challenge-human-shields/ (emphasis in original) [hereinafter Dunlap, *Revised*].

[113] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 230.

its opposition;[114] (2) if the value of the act to a fighting party is equal or greater than acts regularly thought of as DPH;[115] or (3) if the opposing party is significantly threatened by the act.[116]

Because the *Guidance* has no similar category, and because this category neither requires the opposition suffer harm nor looks at the degree of connection to hostilities, this category holds the greatest potential to capture activity as DPH that the *Guidance* would not.[117] For example, the *Manual* considers it DPH when civilian scientists research and develop weapons programs "vital to a nation's national security or war aims."[118] The *Guidance,* on the other hand, says scientific research is not DPH unless it is a preparatory measure for a concrete military operation.[119]

5. Degree Act is Inherently or Traditionally Military

Lastly, the *Manual* looks at the degree an act is seen as inherently or traditionally military, meaning is the act usually performed by military personnel, such as "combat, combat support, and combat service support functions." [120] By including combat service support functions, this category acknowledges the importance of logistics to the conduct of military operations, something the *Guidance* does not.[121] This category

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[114] *Id. (*determining "the degree to which the act contributes to a party's military action against the opposing party"*).*

[115] *Id*. *(*evaluating "whether the act is of comparable or greater value to a party's war effort than acts that are commonly regarded as taking a direct part in hostilities").

[116] *Id.* (asking "whether the act poses a significant threat to the opposing party").

[117] *See* Ryan Santicola, *War-Sustaining Activities and Direct Participation in the DOD Law of War Manual*, LAWFARE (Dec. 15, 2015, 10:16 AM), https://www.justsecurity .org/28339/war-sustaining-activities-direct-participation-dod-law-war-manual/ (arguing the *Manual's* "reference to 'contributions to military action' in the context of DPH appears to open the door on directly targeting these activities" that rise above general war support). *But see* Paust, *supra* note 88, at 25 (arguing the "DOD should abandon the erroneous attempt to expand DPH status to those who merely 'contribute' to an enemy's 'ability' to conduct and sustain combat").

[118] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 230, n.245 (citing examples of civilian scientists with the Manhattan Project and those working at the Peenemunde, Germany, rocket sites).

[119] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 53. *See* also *id.* at n.123; ICRC FOURTH SUMMARY REPORT, *supra* note 66, at 48-49.

[120] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 230-31.

[121] *See* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 685 (2010). The *Guidance's* "focus on the tactical level of war" for its DPH determination "does not match the realities of how warfare is conducted." *Id.* The

also classifies making decisions on "the conduct of hostilities, such as determining the use or application of combat power" as DPH.[122]

By including combat service support functions and not requiring harm, this category classifies acts as DPH that the *Guidance* would not. For example, civilians providing the logistical support for IED and suicide bombers by scouting potential targets and providing safe houses would qualify as DPH under this category.[123] While the *Manual* and *Guidance* differ in what they categorize as DPH, their greatest divergence is the duration for which a civilian who directly participates more than once in hostilities loses his immunity.

C. Duration of Liability of Attack: Targetable Until Permanently Ceases DPH

The *Manual* declares that a civilian who has permanently ceased DPH may not be targeted because there is no military necessity to do so.[124] The *Manual* makes clear that a civilian who participates in an isolated event of DPH is not a lawful target after that single event.[125] The implication is that after a civilian directly participates at least twice in hostilities, he is targetable until he permanently ceases participation, a determination to be made in good faith,[126] requiring case specific fact analysis.[127] Unlike the *Guidance*, the *Manual* does not give civilians who repeatedly participate

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Guidance would likely characterize combat service support functions as being more than one step removed from hostilities. Discussed in Part I.B.2, *supra*.

[122] DOD LOW MANUAL, *supra* note 18, § 5.8.3, at 231.

[123] *See id*. § 5.8.3, at 229, n.243 (describing the vital role of logistical support for IED and suicide-bomber cells).

[124] *Id.* § 5.8.4 (acknowledging a range of views on the topic exist, and in "the U.S. approach, civilians who have taken a direct part in hostilities must not be made the object of attack after they have permanently ceased their participation because there would be no military necessity for attacking them").

[125] *Id.* at § 5.8.4.1, at 234. There is no military necessity to target a civilian who does not repeatedly DPH. *Id.*

[126] *See id.* §§ 5.8.4.1-5.8.4.2, at 234-35. While the *Manual* never states a second act of DPH removes a civilian's targeting protection until he permanently ceases DPH, one can deduce this is the result after a non-isolated, i.e. second, act of DPH. *Id.*

[127] *Id*. § 5.8.4. "There is thus no escaping examination of each and every case." *Id.* n.259 (citing the Israeli Supreme Court from HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507, ¶40 (2006) (Isr.)). While "[a]ffirmatively opting-out" may be a difficult standard, as "the person chose to opt-in to his targetable status" by DPH, it is reasonable he be responsible for demonstrating "he has opted-out." Colonel Randall Bagwell & Captain Molly Kovite, *It Is Not Self-Defense: Direct Participation in Hostilities Authority at the Tactical Level*, 224 MIL. L. REV. 1, 34 (2016).

in hostilities a revolving door of protection. [128] The *Manual* notes how revolving door protection gives civilians who DPH an advantage over lawful combatants, possibly increasing the risk for uninvolved civilians.[129] The *Manual's* position is reasonable in an era of non-international armed conflicts where determining membership in non-State armed groups is challenging due to the lack of uniforms or the active concealment of membership.[130]

A civilian who repeatedly participates in hostilities represents a danger to opposing forces,[131] possibly as much as any non-uniformed, non-State hostile group member, regardless of any "continuous combat function,"[132] and therefore should remain targetable.[133] After a civilian has repeatedly DPH, the pause between hostile acts includes preparing for the next act.[134] It is the civilian's repeated decision to participate in the fight[135] that justifies his forfeiting immunity from direct attack until he permanently divests from hostilities—until he no longer poses the threat of a part-time combatant. Having defined the differences between the *Guidance's* and

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[128] DOD LOW MANUAL, *supra* note 18, §§ 5.8.4, at 234; 5.8.4.2, at 235-36. The United States' practice of IHL does not include giving "'revolving door' protection." *Id.* § 5.8.4.2. There is no revolving door of protection in customary international law. Boothby, *supra* note 77, at 743.

[129] DOD LOW MANUAL, *supra* note 18, at § 5.8.4.2, at 236. "The United States has strongly disagreed with . . . international law that, if accepted, would operate to give the so-called 'farmer by day, guerilla by night' greater protections than lawful combatants" as it "would risk diminishing the protection of the civilian population." *Id.*

[130] *See id.* § 4.18.4.1, at 158 (noting members of non-State armed groups "may seek to conceal their association with the group"); *see also id.* § 17.5.1.1 (commenting "non-State armed groups often seek to blend in with the civilian population"). For example, Al-Qaeda "does not have conventional forces" and hides "among civilian populations." *Id.* n.92 (citation omitted) (quoting Harold Koh, Legal Advisor, Department of State, in 2010).

[131] Boothby, *supra* note 77, at 755-56.

[132] The *Guidance's* position is that members of organized armed groups in non-international armed conflict may only be targeted if they have a continuous combat function. Otherwise they are considered civilians not subject to attack. ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 36. As this topic is beyond the scope of this paper, *see* Watkin, *supra* note 122, at 641.

[133] *See* ICRC, SUMMARY REPORT OF FIFTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 36-37 (Nils Melzer ed., 2008). According to some of the experts, "in operational reality, soldiers" would not "accept that civilians could repeatedly 'opt in' and 'opt out' of the conduct of hostilities," but would see their actions as "a continuous mode of direct participation in hostilities." *Id*. at 36.

[134] Boothby, *supra* note 77, at 757. "The intervals between the persistent participator's activities are likely, really to be preparation for the next act of DP [direct participation]." *Id.*

[135] *See id*. at 756 (noting how "persistent participation" indicates a choice "to become part of the fight").

the *Manual's* DPH criteria, and the length of time which targeting immunity is forfeited by those who DPH, next this article looks at the implications of these differences in theory and in combat.

IV. Implications of the *LoW Manual*'s Rejection of the *Interpretive Guidance*

A. The *Manual* Calls More Activity DPH and Removes Targeting Immunity After Second Act

The *Manual's* criteria for DPH is more expansive than the *Guidance*'s. The *Manual* captures all the activity covered by the *Guidance's* DPH test and more by: (1) not requiring the opposition suffer harm; (2) not having a one causal step limit for activity to be direct; (3) having an amorphous "military significance" category; and (3) including combat support activities. Yet the *Manual's* five categories of consideration overlap, such that an act would likely qualify as DPH under multiple categories.[136] This means the difference between the amount of activity captured by the *Manual's* DPH determination and the *Guidance's* is not as great as it first appears. In fact, because all the DPH examples provided by the *Manual*[137] also qualify as DPH using the *Guidance's* DPH test, one concludes there is a general consensus about the minimal requirements of DPH.

This general consensus highlights that the greatest difference between the *Manual* and the *Guidance* is the length of time a citizen who repeatedly DPH remains a lawful target.[138] According to the *Manual*, after a second act of DPH, a citizen remains a target until he renounces his participation, whereas the *Guidance* returns a civilian's targeting immunity to him each time he uses the revolving door of protection. Now the question remains, how might these differences between the *Guidance* and the *Manual* impact battlefield operations?

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[136] See Appendix B for examples of how an act would qualify as DPH under multiple *Manual* considerations.

[137] DOD LOW MANUAL, *supra* note 18, § 5.8.3.1, at 231-32 (listing examples of "Taking a Direct Part in Hostilities"). See Appendix C for how the *Manual's* DPH examples also satisfy the *Guidance's* DPH test.

[138] See Appendix D that compares when a civilian losses targeting immunity according to the *Guidance* as contrasted to the *Manual*. *Cf.* Bagwell, *supra* note 127, at 31 (commenting how the greatest divergence between the *Guidance* and *Manual* is the analysis of actions "temporarily or geographically remote from actual fighting," and how such analysis is "generally unnecessary . . . at the tactical level" as there both approaches would reach the same DPH conclusion).

B. Impact on of *LoW Manual*'s DPH Criteria on Combat Operations

While it is difficult to determine which States[139] have adopted any or all of the *Interpretive Guidance*,[140] the *Guidance* has already impacted combat operations, such as NATO's rules of engagement in Afghanistan,[141] likely increasing the challenges of inter-operability of coalition operations.[142] For example, what happens when coalition forces face a civilian whose actions qualify as DPH under the *Manual* but not under the *Guidance*, like an IED builder who does not have a planned attack but is connected to hostilities? The IED builder is immune from attack by forces following the *Guidance's* DPH test, therefore U.S. forces will bear the risks involved in targeting him. Likewise when coalition forces identify a civilian who has DPH at least twice: After that civilian has disengaged from the hostile act, he is immune from attack by forces

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[139] The *Guidance* has been translated into French, Spanish, Chinese and Arabic, and the ICRC has proactively promoted it to militaries and governments. ICRC, REP. 31-10-2011, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 42 (2011). It is still early to determine to what extent the *Guidance* has influenced military manuals and shaped rules of engagement. Modirazdeh, *supra* note 14, at 270.

[140] *See* Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT'L L. STUD. 171, 188 (2015) [hereinafter Schmitt & Watts]. For example the Colombian Manual of Operational Law draws upon the *Guidance's* concept of restricting the use of force to that which is necessary, as similarly did the Israeli High Court. Melzer, *Response*, *supra* note 46, at 909-12. *But see* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 793 (2010) (arguing the High Court's decision in The Public Committee against Torture in Israel v. The Government of Israel is unique to that country's "geography, history, circumstances, and threats," such that the *Guidance's* reliance on it misrepresents existing law).

[141] Schmitt & Watts, *supra* note 140, at 186 (stating that the *Guidance* has influenced "military training for a number of NATO States and has affected the content of NATO rules of engagement in Afghanistan" while giving no specifics). *But see* Bagwell, *supra* note 127, at 35 (describing how the NATO rules for engagement did not state "when the authority to attack would terminate," but in combat this "did not prove to be an issue," as at the tactical level "the difference between the ICRC and U.S. approaches on when direct participation ends had no practical effect").

[142] Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limits of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 52, 91 (2010). *Cf.* RICHARD EKINS ET AL, CLEARING THE FOG OF LAW: SAVING OUR ARMED FORCES FROM DEFEAT BY JUDICIAL DIKTAT 22 (2015) (noting the application of the European Convention on Human Rights (ECHR) posed a legal obstacle for military co-operation for the U.K. and U.S. in Afghanistan, as the U.K. could only give detainees to NATO countries who were parties to the ECHR).

utilizing the *Guidance,* but U.S. forces may still target him until he permanently divests from hostilities. This means in conflicts where civilians participate in hostilities, U.S. forces will likely shoulder more of the responsibility, and peril, of missions against those who DPH.

Coalition partners using different DPH criteria will also reach different proportionality assessments when evaluating targets voluntarily shielded by civilians.[143] Under the *Guidance*, depending on the circumstances, voluntary human shields protecting a military object will likely not qualify as DPH.[144] Whereas the *Manual* would classify their actions as DPH because of the specific purpose underlying their act,[145] or because of their act's military significance, such that they would not be collateral damage accounted for in proportionality assessments.[146] As these examples show, it is likely that U.S. forces will bear more of the burden, both in blood and treasure, than those coalition partners utilizing the *Interpretive Guidance*.

There is another foreseeable outcome of this division of labor between the U.S. forces and those following the *Guidance's* DPH test. As U.S. forces may directly attack civilians who repeatedly DPH in between those acts—when it appears they merit targeting protection—it will be easy for uninformed observers to accuse the United States of killing innocent civilians.[147] In an era of social media,[148] whomever kills someone not

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[143] If "based on the facts and circumstances" a commander determines voluntary human shields are DPH, they need not be part of the proportionality assessment. *See* DOD LOW MANUAL, *supra* note 18, § 5.12.3.4.

[144] ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 56-57. A woman physically shielding shooters with her robes is DPH. *Id*. at 56 n.139. But when voluntary human shields pose a legal as opposed to physical obstacle, "the causal relation between their conduct and resulting harm remains indirect" such that they are not DPH. *Id.* at 57.

[145] Discussed in Part III. B. 3, *infra.*

[146] Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 326 (2009). *See* also ICRC, SUMMARY REPORT OF SECOND EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 15 (Nils Melzer ed., 2004).

[147] *See* Nash Jenkins, *U.S.-Led Air Strikes Targeting ISIS Kill 26 Civilians in Syria, Activists Say*, TIME (Dec. 8 2015), http://time.com/4140046/syria-airstrikes-coalition-civilians/ (reporting a "monitoring group's" accusation that a U.S.-led coalition air strike on December 7, 2015, "killed only civilians"). *But see* Jamie Crawford, *Coalition Forces Kill ISIS Leader Connected to Paris Attack*, CNN (Dec. 30, 2015, 5:15 AM), http://www.cnn.com/ 2015/12/29/politics/isis-leader-connected-to-paris-attack-killed-by-coalition-forces/ (describing U.S.-led coalition airstrikes that killed "multiple figures within ISIS senior leadership," including on December 7, 2015).

[148] *See* Charles J. Dunlap, Jr., *The DoD Law of War Manual and Its Critics: Some Observations*, 92 INT'L L. STUD. 85, 94 (2016) (twenty-first century information

readily identifiable as a combatant is quickly accused of war crimes.[149] Such accusations may diminish public support for any U.S. war effort.[150] These battlefield repercussions of the *Manual's* rejection of the *Guidance* are important, but the potential impact of the *Manual* on developing IHL is also worth examining.

C. Shaping State Practice and Shaping International Law

While the *Manual* is neither law nor *opinio juris*,[151] it serves as evidence of the United States position on IHL.[152] Specifically, because the *Manual* guides DoD personnel—personnel who represent the United States—in determining what constitutes DPH, the *Manual* will shape international law.[153] This is because State agents "enjoy unique relevance in the formation and interpretation of international law and LOAC [law of

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technologies allow belligerents to "rapidly and effectively exploit" deaths of human shields) [hereinafter Dunlap, *Critics*]. *Cf. Campaign of Exposing Israeli Crimes via Social Media*, FACEBOOK, https://www.facebook.com/ Exposing.Israeli.Crimes (last visited Mar. 2, 2017). (vowing "to raise the Western world's consciousness to the reality hidden by mainstream media," with postings, photos, and videos alleging Israeli war crimes).

[149] *See* Jenkins, supra note 147; *cf.* Michele Kelemen, *Was Kunduz Attack A War Crime? Legal Analysts Say It's Difficult To Prove*, NPR (Oct. 8, 2015, 3:08 PM), http://www.npr.org/sections/parallels/2015/10/06 /446109292/was-kunduz-attack-a-war-crime-legal-analysts-say-its-difficult-to-prove (reporting after U.S. forces bombed a hospital in Kunduz, Afghanistan, the Executive Director of Doctors Without Borders said "[w]e're under the clear presumption that a war crime has been committed").

[150] *Cf.* Dunlap, *Critics*, *supra* note 148, at 92 (remarking on the "truly unprecedented sensitivity to *any* civilian casualties" in current operations) (emphasis in original). "). *See also* Dunlap, *Revised*, *supra* note 112 (speculating that the 2015 *Manual's* handling of human shields "was too blunt," leaving "the unwarranted impression that the U.S. was not sensitive enough to civilian losses," so was revised).

[151] DOD LOW MANUAL, *supra* note 18, § 1.1.1. *But see* John Dehn, *The DOD Law of War Manual's Potential Contribution to International Law*, JUST SECURITY (July. 16, 2015, 9:10 AM), https://www.justsecurity.org/24675/ dod-law-war-manuals-potential-contribution-international-law/ (proposing the DoD's disclaimer should not "detract from the effect of the Manual as an expression of *opinio juris*"). *See also* Dunlap, *Critics*, *supra* note 148, at 117 (speculating the *Manual* will "quickly become considered the definitive statement of the United States on the LoW [law of war]"). *Contra* Haque, *Off Target*, *supra* note 111, at 83 (arguing "the *Manual* cannot be assumed to reflect U.S. *opinio juris* or to generate customary international law").

[152] *See* Schmitt & Watts, *supra* note 140, at 212. As they often reflect operational and policy concerns, military manuals are not *opinio juris* but are evidence of a State's position on IHL. *Id.*

[153] *See* Julian Ku & John Yoo, *Globalization and Sovereignty*, 31 BERKELEY J. INT'L L. 210, 226 (2013) (explaining how state practice shapes traditional international law).

armed conflict],"[154] therefore increasing the *Manual's* influence on how other countries interpret DPH.[155]

Even if it is the *Guidance's* interpretation of DPH that shapes other countries' practices, such that its three prong DPH test and revolving door of protection ripen into CIL, the *Manual* should establish the basis of a U.S. persistent objection.[156] As evidence of the DoD's objection to the *Guidance*, and as instruction to DoD personnel on how to identify DPH, the *Manual* should prevent the United States from being bound by any alternate DPH interpretation in CIL.[157]

V. Conclusion

When compared to the *Guidance*, the *Manual* qualifies more activity as DPH and strips a civilian who has repeatedly DPH of immunity from attack until he permanently divests from hostilities. By doing so, the *Manual* makes stark the life versus death risk evaluation a civilian faces by choosing to participate in armed conflict. Fairness demands this risk be clear to civilians, as those who choose to DPH are a mortal danger to the combatants who have knowingly assumed the risk of death in conflict.[158] A civilian who decides to DPH should have no illusions about

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[154] Sean Watts, *Reviving Opinio Juris and Law of Armed Conflict Pluralism*, JUST SECURITY (Oct. 10 2013), https://www.justsecurity.org/1870/reviving-opinio-juris-law-armed-conflict-pluralism-2/. States make and use IHL the most, therefore they should be the ones shaping its content. *Id.*

[155] *See* Dunlap, *Critics*, *supra* note 148, at 118 (remarking it is likely that other nations will consider the *Manual* "the most influential document of its genre" because of the United States' experience fighting complex, twenty-first century conflicts). *See also* Dehn, *supra* note 152 (arguing that the DoD's "long history" of applying the law of war should mean the *Manual* is influential in shaping international law).

[156] Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 150-51 (1996). To not be bound by a forming customary rule, a state must object early in the rule's formation and continue to object consistently, as silence is considered consent. *Id. See* Narramore, *supra* note 80, at 18 (increasing the expression of the U.S. position on evolving IHL issues establishes a foundation "to assert persistent objector status").

[157] *See* John B. Bellinger, III & William J. Haynes II, *A US Government Response to the ICRC Study Customary International Humanitarian Law*, INT'L REV. OF THE RED CROSS, Vol. 89 No. 866, 443, 446-447 (2007). The authors fault the ICRC's undue reliance on military manuals as a source of evidence of a State's *opinio juris*, making the *Manual's* express rejection of the *Guidance* more important to IHL. *Id.*

[158] *See generally* Schmitt, *Analysis*, *supra* note 4, at 6 (balancing military necessity and humanity requires IHL to recognize no country would "accept norms that place its military success, or its survival, at serious risk"). Parks, *supra* note 140, at 772-73 (describing the

the repercussions of his choice.[159] Yet the *Guidance's* three prong DPH test and revolving door of protection incentivize civilians to participate in combat by minimizing the gamble they take with targeting immunity. Whereas the *Manual* makes the risk of DPH clear to civilians. By doing so, it is the *Manual* that makes the modern battlefield safer for civilians who do not DPH.

As the *Manual's* more expansive interpretation of DPH allows for maximum operational flexibility,[160] the judge advocate should recognize this flexibility comes with added scrutiny. The wise judge advocate will keep the *Guidance's* three prong test in mind to further buttress DPH decisions that the ICRC would not qualify as such. Specifically, in situations where a civilian's activity does not constitute DPH under the *Guidance* but does under the *Manual*, a judge advocate should make a case leaving no doubt how a civilian is directly participating in the fight. By being aware of the differences between the *Manual* and *Guidance*, the judge advocate will be best prepared to defend DPH targeting decisions, especially in multinational or NATO environments. By clarifying that those with skin in the game are DPH, the *Manual* has maintained the balance between military necessity and humanity that form the foundation of IHL.

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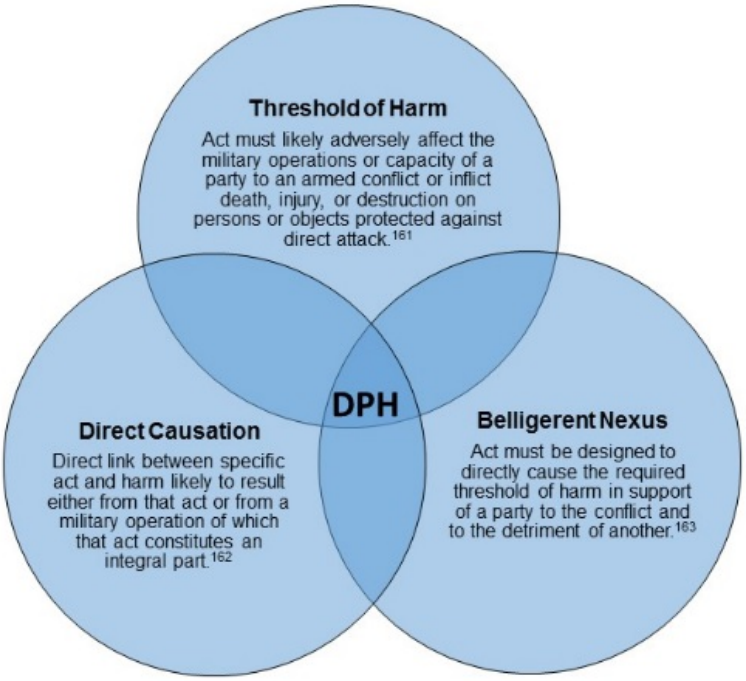
principal of discrimination being "based upon mutual responsibilities," including a civilian's not using his protected status "to engage in hostile acts").

159 *See* Boothby, *supra* note 77, at 756-57 (framing the issue in terms of an individual's decision to participate, not the danger or risk of his specific act).

160 *See* Richard B. Jackson, Spec. Assistant to the U.S. Army Judge Advocate General for Law of War Matters, Capstone Lecture for The Judge Advocate General's Legal Center and School's 64th Graduate Course: LOAC Update (Dec. 4, 2015) (remarking the *Manual* allows for maximum operational ability).

Appendix A: The ICRC's *Interpretive Guidance's* Three Constitutive Elements of Direct Participation in Hostilities (DPH)

The *Interpretive Guidance's* three prong DPH test is cumulative such that activity constitutes DPH only by satisfying all three constitutive elements, indicated at the intersection of the elements below.



[161] INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 47 (Nils Melzer ed., 2009) [hereinafter INTERPRETIVE GUIDANCE].
[162] *Id*. at 51.
[163] *Id*. at 58.

Appendix B: The *Law of War Manual's (LoW Manual)* Five Categories of Relevant Considerations. "At a minimum, taking a DPH includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy. . . .and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations."[164]

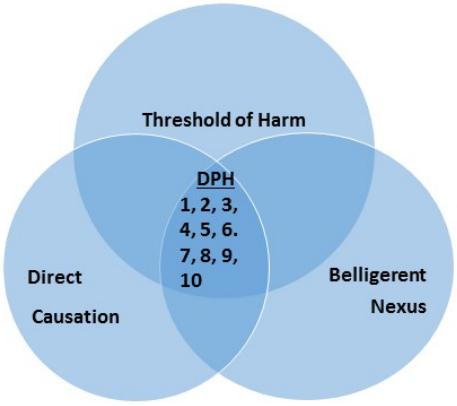
Acts Qualifying as DPH Under Multiple Categories

DPH Criteria	Improvised explosive device maker or storer	Voluntary human shield	Recruiter or trainer of suicide bombers	Civilian removing mines from minefield
1. The degree to which the act causes harm to the opposing party's persons or objects; is the proximate or "but for" cause of death, injury, or damage to persons or objects belonging to the opposing party; or is likely to affect adversely the military operations or capacity of the opposition.[165]	X		X	X
2. The act is temporally or geographically near the fighting; or the degree to which the act is connected to military operations.[166]	X	X	X	
3. [T]he specific purpose underlying the act, such as whether it is intended to advance the war aims of one party to the detriment of the opposing party.[167]	X	X	X	X
4. [T]he military significance of the activity to the party's war effort, the degree to which the act: contributes to a party's military action against the opposition; is of comparable or greater value to a party's war effort than acts that are commonly regarded as taking a direct part in hostilities; and poses a significant threat to the opposing party.[168]	X	X	X	X
5. [T]he degree to which the activity is viewed inherently or traditionally as a military one; whether it is traditionally performed by military forces in conducting operations against the enemy; or whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power.[169]			X	X

[164] U.S. DEP'T. OF DEF., LAW OF WAR MANUAL § 5.8.3 at 228-29. (2016) [hereinafter DoD LoW Manual].
[165] *Id.* at 230.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.* at 230-3

Appendix C: The Ten DPH Examples from the *LoW Manual*

The DPH examples listed in the *Manual* also meet the *Interpretive Guidance's* three prong DPH test, indicating a general consensus as to what constitutes minimum DPH conduct.

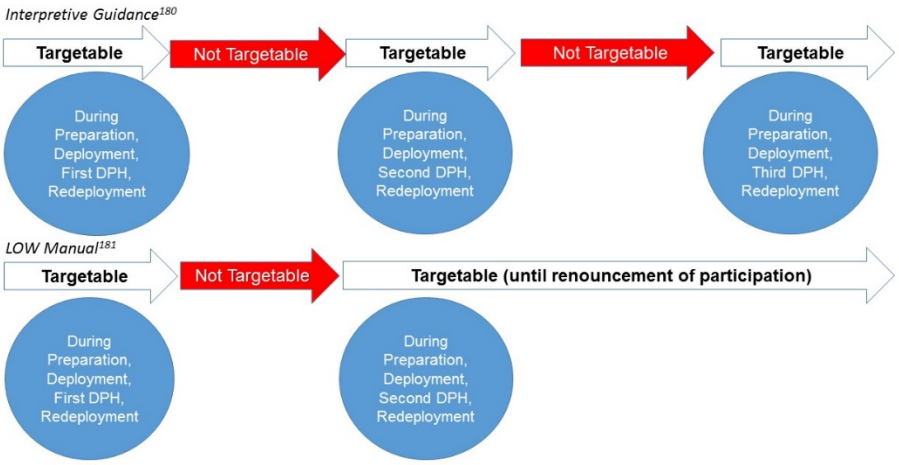


1. Manning an antiaircraft gun, acting as a bodyguard for an enemy combatant.[170]
2. Acting as a member of a weapons crew.[171]
3. Engaging in an act of sabotage.[172]
4. Emplacing mines or improvised explosive devices.[173]
5. Preparing for combat and returning from combat.[174]
6. Planning, authorizing, or implementing a combat operation against the opposing party.[175]
7. Acting as an artillery spotter or member of a ground observer corps or otherwise relaying information to be used to direct an airstrike, mortar attack, or ambush.[176]
8. Acting as a guide or lookout for combatants conducting military operations.[177]
9. Delivering ammunition to the front lines in close geographic or temporal proximity to their use.[178]
10. Outfitting and preparing a suicide bomber to conduct an attack in close geographic or temporal proximity to its use.[179]

[170] DOD LOW MANUAL § 5.8.3.1 at 231.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.* § 5.8.3.1 at 232.
[177] *Id.*
[178] *Id.*
[179] *Id*

Appendix D: Comparison of the *Interpretive Guidance's* and *LoW Manual's* Duration of Targeting Immunity

The starkest difference between the *Interpretive Guidance* and the *Manual* is the *Interpretive Guidance* provides protection between a civilian's DPH, whereas the *Manual* strips a civilian of immunity from attack after his second DPH until he permanently ceases participation.



[180] *See* INTERPRETIVE GUIDANCE, *supra* note 1, at 65-67, 70-71.

[181] *See* DOD LOW MANUAL, *supra* note 4, §§ 5.8.4-5.8.4.2 at 234-36.

PRIVILEGED COMMUNICATIONS OF MILITARY CHAPLAINS AND MENTAL HEALTH PROFESSIONALS: CASE LAW OF MILITARY RULES OF EVIDENCE 503 AND 513

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I. Introduction

Alarmingly high rates of post-traumatic stress disorder (PTSD) and suicide among Service members returning from military action[1] has increased focus within the United States military about effectively providing mental health services.[2] Concerns include problems related to an insufficient mental health workforce, military culture, and delivery of services.[3] Within this context, how sensitive personal information is handled while seeking mental healthcare is a major concern for servicemembers. The Department of Defense (DoD) and the U.S.

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[1] *See* Robert H. Pietrzak et al., *Risk and Protective Factors Associated with Suicidal Ideation in Veterans of Operations Enduring Freedom and Iraqi Freedom*, 123 J. OF AFFECT. DIS. 102, 102-07 (2010) (discussing rates of suicide among Iraq and Afghanistan war service members and risk factors); Josefin Sundin et al., *PTSD after deployment to Iraq: conflicting rates, conflicting claims*, 40 PSYCH'L MED. 367, 367-82 (2010) (discussing data and rates of PTSD prevalence among veterans following deployment to the Middle East).

[2] *See* INSTITUTE OF MEDICINE, PREVENTING PSYCHOLOGICAL DISORDERS IN SERVICE MEMBERS AND THEIR FAMILIES: AN ASSESSMENT OF PROGRAMS 9-10 (2014) (discussing the need to address mental health issues for military service members and their families in the wake of deployment); INSTITUTE OF MEDICINE, RETURNING HOME FROM IRAQ AND AFGHANISTAN: READJUSTMENT NEEDS OF VETERANS, SERVICE MEMBERS, AND THEIR FAMILIES 13-14 (2013) (outlining the scope of the military and estimates of mental health issues among its members).

[3] *See* Audrey Burnam et al., *Mental Health Care for Iraq and Afghanistan War Veterans*, 28 HEALTH AFF'S 771, 771-82 (providing an overview of mental health services and challenges within the military in light of continued deployments to Iraq and Afghanistan).

Department of Veterans Affairs (DVA) recently partnered to examine opportunities for chaplains to have a role in improving mental health efforts, largely because of their well-respected place within military culture, and the absolute confidentiality they enjoy with communications.[4] This initiative—the Integrated Mental Health Strategy—recognizes the important potential chaplains have to promote mental healthcare.[5] However, it generates a need to address important practical concerns. A primary issue is how chaplains and mental health providers can work—separately or together—to handle sensitive mental health information of servicemembers.[6] This is a major concern because many servicemembers fear that disclosure of mental health issues can jeopardize their military careers if they are perceived as being unfit.[7] At the same time, the appropriate handling of such information can be instrumental in helping servicemembers obtain assistance if needed. This raises the question of what the current legal landscape is for the treatment of confidential information by either chaplains or mental health providers within military courts. Military rules regarding privileged communications are currently the primary sources of guidance on these issues. This article provides an overview of applicable military case law on the treatment of privileged communications for both chaplains and mental health professionals. After the introduction in Part I, Part II provides an overview of military chaplaincy, their potential role in addressing mental health needs among servicemembers, and a summary of the mental health landscape. Part III focuses on a review of military cases concerning Military Rule of Evidence 503: Communications to clergy. It identifies the policy rationale behind the clergy privilege, and outlines major military appellate cases which have examined privileged communications under this rule for chaplains, many of which are relevant to situations involving instances of self-harm or harm to others. Part IV outlines case law concerning Military Rule of Evidence 513: Privileged Communications and Psychotherapists. This section identifies the policy rationale of the psychotherapist privilege, and discusses major military appellate cases which have arisen since the privilege was created by presidential order in

[4] *See infra* discussion at notes 71-74.

[5] DEPARTMENT OF DEFENSE & DEPARTMENT OF VETERANS AFFAIRS, INTEGRATED MENTAL HEALTH Strategy (Sept. 2010).

[6] For example, HIPAA privacy protections for personal health information contains exceptions for servicemembers. The military may access personal health information in order "to assure the proper execution of the military mission." 45 CFR 164.512(k)(1)(i).

[7] *See* DoD Regulation 6025.18-R(C7.11.1.3) (allowing disclosure of health information to military command to determine fitness for duty)

1999. Finally, part V discusses the implications of this case law within the framework of the wider policy goals of each rule of evidence, and offers suggested guidance for those working in this area.

II. Chaplaincy and Mental Health in the Military

Chaplains have been active in the nation's military since General George Washington requested them to serve in the continental army in 1775.[8] Congress first funded chaplaincy positions for the Army and Navy in 1791.[9] Since then, chaplains have taken part in hundreds of military missions and served in over 120 countries.[10] Chaplains occupy a unique space in military service. As stated by the Joint Chiefs of Staff, chaplains' main duties are to "accommodate religious needs, to provide religious and pastoral care, and to advise commanders on the complexities of religion with regard to its personnel and mission."[11] The military must provide for the free exercise of religion under the U.S. Constitution, so chaplains play a primary role in facilitating religious activities for troops and commanders.[12] This includes advising commanders about religious affairs, ethical and moral issues, troop morale during all operations, and providing or facilitating religious worship and support.[13] Thus, the historical and still most important function of military chaplains is to facilitate the free expression of religion within the services.[14]

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[8] *See The Chief of Chaplains, Strategic Roadmap: Connecting Faith, Service, and Mission*, ARMY.MIL 10 (n.d.), http://www.chapnet.army.mil/usachcs/pdf/chaplain_roadmap.pdf (discussing history of American chaplaincy in military service); DEP'T OF ARMY, REG. 165-1, RELIGIOUS SUPPORT: ARMY CHAPLAIN CORPS ACTIVITIES 1 (2009) [hereinafter RELIGIOUS SUPPORT].

[9] *See* CHARLOTTE HUNTER, A DEAL WITH THE DEVIL? THE CLERGY-PENITENT PRIVILEGE IN THE U.S. MILITARY, 140-41 (2006) (discussing history of chaplains in U.S. armed forces).

[10] *See The Chief of Chaplains*, *supra* note 7, at 4 (summarizing service of chaplains in the U.S. military).

[11] JOINT CHIEFS OF STAFF, RELIGIOUS AFFAIRS IN JOINT OPERATIONS, JOINT PUBLICATION 1-05, I-1 (Nov. 2013) [hereinafter JOINT CHIEFS OF STAFF].

[12] *See id*. at I-1–2 (discussing the role of chaplains in military service).

[13] *See id*. at II-1 (outlining religious advisement and support activities of chaplains). *See also* Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 5-8 (2002) (discussing historical role of chaplains in the U.S. military).

[14] *See* JOINT CHIEFS OF STAFF *supra* note 11 at I-1 ("US military chaplains are a unique manifestation of the nation's commitment to the values of freedom and conscience and free exercise of religion proclaimed in her founding documents.").

Some commentators have questioned the constitutionality of military-supported chaplaincy, arguing that it amounts to an establishment of religion.[15] However, the services have emphasized the fundamental importance of chaplaincy in maintaining freedom of religious expression within the military.[16] Although these broad legal questions have been discussed elsewhere, it is worth recognizing that federal courts have ruled in favor of the constitutionality of military and government-sponsored chaplaincy.[17]

Contemporary chaplains play many day-to-day roles in the military. Obvious examples include providing sacramental rites and religious services for service members, advising command on troop morale, and coordinating educational, community, family, or recreational activities.[18] Yet beyond religious services and counseling, a major role of chaplains in both operational and garrison settings is monitoring the emotional well-being of servicemembers, in either informal or formal settings. This is what chaplains commonly refer to as providing a "ministry of presence"—a mix of emotional and social support, frequent visitation, clinical pastoral

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[15] *See* William J. Dobosh, *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1499-1530 (2006) (discussing various establishment clause tests and their applicability to chaplaincy sponsored by the government); Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167, 174-81 (2007) (discussing and critiquing the reasoning behind the Katcoff v. Marsh decision); Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NORTHWESTERN U. L. REV. 145, 185-86 (2008) (noting James Madison's support for chaplains in military service around the time of the War of 1812); Richard D. Risen, *Katcoff v. Marsh at Twenty-One: The Military Chaplaincy and the Separation of Church and State*, 38 U. TOL. L. REV. 1137, 1138-42 (2006) (discussing the history and merits of the Katcoff v. Marsh case).

[16] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). *See also* Emilie Kraft Bindon, *Entangled Choices: Selecting Chaplains for the United States Armed Forces*, 56 ALA. L. REV. 247, 247-53 (2004) (discussing the case of James Yee and the obligations of military chaplains); JOINT CHIEFS OF STAFF, JOINT PUB. 1-05, RELIGIOUS AFFAIRS IN JOINT OPERATIONS I-1(Nov. 2013) (noting the obligation of military chaplains to ensure freedom of religion).

[17] *See Marsh v. Chambers*, 463 U.S. 783 (1983) (finding the use of government-sponsored chaplains in state legislatures to be constitutional); *Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y 1984) (finding the use of chaplains in the U.S. military to be constitutional).

[18] *See generally* RELIGIOUS SUPPORT, *supra* note 8, para. 1-2–1-7 (outlining the roles of chaplains in the Army); U.S. DEP'T OF NAVY, OPNAV INSTR. 1730.1E, 4-7 (Apr. 2012) (outlining the duties and responsibilities of chaplains in the Navy); NANCY B. KENNEDY, MIRACLES & MOMENTS OF GRACE 20-232 (2011) (presenting stories of chaplain experiences and activities in the armed forces); Pauletta Otis, *An Overview of the U.S. Military Chaplaincy: A Ministry of Presence and Practice*, 7 REV. OF FAITH & INT'L AFF'S 3, 3-10 (2009) (providing an overview of military chaplains).

counseling, or religious ministry for those who request it.[19] Because many chaplains in deployment settings are literally where the Soldiers, Marines, Airmen/women or Sailors are, they play a critical role in triaging those individuals in need of help by determining whet her the need is for emotional "first aid," or more intensive clinical care by professionals.[20]

Some servicemembers are more likely to seek out chaplains to discuss emotional or mental health issues than they would with mental health professionals. This is because within military culture there may be less stigma[21] attached to talking with a chaplain than with a mental health professional. Chaplains are more accessible, and mental health professionals are not obliged to the same standards of confidentiality as

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[19] *See* Bruce W. Crouterfield, The Value of the Naval Chaplain in the Fleet Marine Force Environment (Doctor of Ministry Thesis) 18-26 (Mar. 2009) (discussing the roles and responsibilities of naval chaplains during deployment); Mark A. Tinsley, The Ministry of Service: A Critical Practico-theological Examination of the Ministry of Presence and its Reformulation for Military Chaplains 11-70 (Jan. 2012) (unpublished Master of Theology Thesis, Liberty University) (on file with Liberty University) (discussing the ministry of presence, its dynamics and limitations).

[20] *See* Denise Bulling et al., *Confidentiality and Mental Health/Chaplaincy Collaboration*, 25 MIL. PSYCH. 557, 558 (2014) (discussing the roles of chaplains within the military services).

[21] Military culture is generally considered to be unconducive to discussions about mental health. *See* affidavit of James Anthony Martin in *U.S. v Kreutzer*, 59 M.J. 773, 813 (2004):

> The peculiar culture at Fort Bragg was a tremendous influence in this case. The pervasive atmosphere at Fort Bragg was that soldiers with mental health problems should not seek mental health services. Soldiers with mental health problems need to "suck it up and drive on" and failure due to mental health falls into the area of "no excuses."

Id. *See also* Paul Y. Kim, Thomas W. Britt, Robert P. Klocko, Lyndon A. Riviere, & Amy B. Adler, *Stigma, Negative Attitudes About Treatment, and Utilization of Mental Health Care Among Soldiers*, 23 MIL. PSYCH. 65, 65-81 (2011) (discussing impact of attitudes toward mental health care and impact among mental health care usage among Iraq and Afghanistan servicemembers); Robert H. Pietrzak et al., *Perceived Stigma and Barriers to Mental Health Care Utilization Among OEF-OIF Veterans*, 60 PSYCH. SERV. 1118, 1118-22 (2009) (discussing stigma and barriers to mental health care among Iraq and Afghanistan war veterans); Tiffany Greene-Shortridge, Thomas Britt, & Carl Andrew, *The Stigma of Mental Health Problems in the Military*, 172 MIL. MED. 157, 157-61 (2007) (discussing the problem of stigma in the military generally towards individuals with mental health issues). Generally speaking, servicemembers would prefer to visit a chaplain rather than a mental health professional because of the knowledge that chaplains enjoy higher confidentiality protections. *See* Barbara J. Zanotti & Rick A. Becker, *Matching To The Beat of A Different Drummer: Is Military Law and Mental Health Out-of-Step after* Jaffee v. Redmond?, 41 AIR FORCE L. REV. 66-67 (1997) (discussing the stigma surrounding mental health care and the preference for chaplains among service members).

are chaplains.[22] Chaplains are professionally and ethically obliged to maintain strict confidentiality in all matters, principally to maintain absolute trust and confidence.[23] Legally, individuals have an official privilege to prevent their communications to clergy from being disclosed.[24] This is codified in the Military Rule of Evidence 503, Communications to clergy, which remains a near absolute privilege.[25] In contrast, Military Rule of Evidence 513, psychotherapist-patient privilege, permits exceptions to the privilege to prevent disclosure in cases of child abuse or neglect, legal obligations, safety to the person or others, future commission of crime or fraud, or anything else that would jeopardize safety of military personnel, property or mission.[26]

There is a profound contrast in the absolute privilege that chaplains enjoy, versus that of the psychotherapist. This has resulted in a *defacto* situation where servicemembers will prefer to speak about their actions with chaplains rather than mental health professionals about behavior that may be illegal, pose dangers to themselves or others, or jeopardize their military careers or family lives. This *defacto* reality is acknowledged in *United States v. Thompson* (C.A.A.F. 1999),[27] in which a military attorney involved in a claim for effective assistance of council testified as to why he always advises military clients to confer with chaplains rather than mental health professionals:

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[22] For a discussion of attitudes towards military mental health professionals prior to the establishment of a confidential privilege in communications, see James Corcoran & John Breeskin, *Absence of Privileged Communications and its Impact on Air Force Officers*, 19 A.F.L.REV. 51 (1977). In this article, the authors discuss the results of a survey of U.S. Air Force officers and their preferences regarding whom to seek out to disclose personal mental health matters. Results indicated that chaplains were the most cited category of professionals to seek out, and that officers would also strongly prefer civilian mental health professionals rather than military ones. The main reason for these choices was the lack of confidentiality and fear that matters disclosed to military mental health professionals could damage the careers of officers if they were disclosed to command.

[23] *See* ROBERT C. LYONS, A CHAPLAIN'S GUIDE TO PRIVILEGED COMMUNICATION (Master of Theology Thesis) 70-79 (2001) (discussing the expectation of strict confidentiality among chaplains). See also DEPARTMENT OF THE ARMY, RELIGIOUS SUPPORT: ARMY CHAPLAIN CORPS ACTIVITIES, ARMY REGULATION 165-1, 49-50 (2009) (outlining the definition and parameters of privileged communications under U.S. Army regulations). *But see* Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 58-59 (2002) (noting that definitions of privileged communications and confidentiality differ between the services).

[24] Manual for Courts-Martial, United States, MIL. R. EVID. 503 (2016) [hereinafter MCM].

[25] *Id*.

[26] *Id*. at r. 513

[27] 51 M.J. 431 (C.A.A.F. 1999).

> I remember him being distraught and informed him I was not a counselor. However, I advised him to talk with a priest or a chaplain, because of the penitent-priest privilege. I informed him there would be no confidentiality with mental health. It has been my habit to inform my clients they could talk to anybody, but I recommend they talk only to my paralegal, a chaplain, or me about the case, because of confidentiality. I never prohibited a client from speaking to or seeking help from someone other than myself, my defense paralegal, or chaplain; however, I always warned them of the possible consequences.[28]

Because of both the surge in mental health needs among the military, and a defacto culture which places less stigma on conferring with chaplains rather than psychotherapists, there has been renewed focus on utilizing military chaplains as key front-line personnel in military mental health. In 2010, the DoD and DVA developed the Integrated Mental Health Strategy (IMHS).[29] The purpose of the IMHS was to develop a coordinated and comprehensive strategy to address mental health among active duty service members, reserve and guard members, veterans, and family.[30] The initiative was a direct response to the mental health needs of those serving in Operation Enduring Freedom and Operation Iraqi Freedom.[31] In particular, Strategic Action #23 of the IMHS focused on the role of chaplains in improving services for integrated mental health and spiritual care in the DVA system, and how chaplains can facilitate continuity of mental health care between the armed services, DVA system, and community.[32]

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[28] *Id*. at 434.

[29] DEPARTMENT OF DEFENSE & DEPARTMENT OF VETERANS AFFAIRS, INTEGRATED MENTAL HEALTH Strategy (Sept. 2010).

[30] *See id*. at 2 ("The Departments will advance an integrated and coordinated public health model to improve the access, quality, effectiveness, and efficiency of mental health services for all Active Duty Service members, National Guard and Reserve members, Veterans, and their families.").

[31] *See id*. ("The population of [servicemembers] and Veterans with mental health needs continues to grow. Operation Enduring Freedom (OEF), the war in Afghanistan, and Operation Iraqi Freedom (OIF), the war in Iraq, are the longest wars in U.S. history that have been fought with an all-volunteer force.").

[32] *See* DEPARTMENT OF DEFENSE & DEPARTMENT OF VETERANS AFFAIRS, INTEGRATED MENTAL HEALTH Strategy 119-23 (Sept. 2010) (outlining Strategic Action #23–Chaplains role).

The practical implications of chaplains' involvement in mental health support are profound. By providing ministry, presence, and formal or informal pastoral counseling, chaplains can identify individuals in need of assistance. Operational settings present significant mental health stresses: continued deployments,[33] marital separation,[34] combat trauma, injury, or death. This puts servicemembers at long-term risk for drug or alcohol abuse, post-traumatic stress disorder,[35] serious or terminal illnesses, and long-term spiritual injuries.[36] Chaplains are well-placed to refer serious cases of concern to mental health professionals. Commenters have discussed collaborative practices and models in which chaplains can work with mental health professionals in operational settings to triage or refer personnel for adequate help.[37] These practices leverage the accessibility and lack of stigma that chaplains enjoy, and link them with mental health and health care professionals.[38]

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[33] *See* Joshua E. Buckman et al., *The Impact of Deployment Length on the Health and Well-being of Military Personnel: A Systematic Review of the Literature*, 68 OCCUP'L & ENVIR'L MED. 69, 69-76 (2011) (discussing findings from a meta-analysis of studies on the impacts of deployment length on health outcomes and noting that longer deployment generally resulted in worse outcomes).

[34] *See* Major Peter S. Jensen, at al., *The Military Family in Review: Context, Risk, and Prevention*, 25 J. AM. ACAD. OF CHILD PSYCH'Y 225-34 (1986) (discussing reviews of studies on military families, including the impacts of marital separation).

[35] *See* J. Douglas Brenner et al., *Chronic PTSD in Vietnam Combat Veterans: Course of Illness and Substance Abuse*, 153 AM. J. PSYCH'Y 369-75 (1996) (discussing onset and development of PTSD and substance abuse among veterans of the Vietnam War over an extended period); Matthew Jakupcak et al., *Posttraumatic Stress Disorder as a Risk Factor for Suicidal Ideation in Iraq and Afghanistan War Veterans*, 22 J. TRAUM. STRESS 303-06 (2009) (discussing prevalence of PTSD and other mental illnesses and risk for suicidal ideation among veterans of Iraq and Afghanistan wars); Miles E. McFall et al., *Combat-related Posttraumatic Stress Disorder and Severity of Substance Abuse in Vietnam Veterans*, 53 J. STUD. ON ALCOHOL & DRUGS 357-63 (1992) (discussing impacts of PTSD on substance abuse outcomes among Vietnam veterans).

[36] *See* Kent D. Drescher et al., *An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans*, 19 TRAUM'Y 243-50 (2013) (outlining the construct and presence of spiritual or moral injuries among war veterans from the perspectives of chaplains and health professionals); Brett T. Litz, Nathan Stein, Eileen Delaney, Leslie Lebowitz, William P. Nash, Caroline Silva, & Shira Maguen, *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCHOLOGY REV. 695-706 (2009) (discussing the concept of moral or spiritual injury among veterans and potential interventions).

[37] *See* Jason A. Nieuwsma et al., *Chaplaincy and mental health in the Department of Veterans Affairs and Department of Defense*, 19 J. HEALTH CARE CHAPLAINCY 3, 4-14 (2013) (discussing recent initiatives in which chaplains in the DoD and DVA have identified strategies for collaboration with mental health professionals)

[38] *See* Frank C. Budd, *An Air Force Model of Psychologist-Chaplain Collaboration*, 30 PROF'L PSYCH.: RES. & PRACTICE 552-56 (1999) (discussing and recommending the need for greater collaboration between mental health professionals and chaplains); Michael D.

The active duty contexts in which mental health professionals work varies widely, and depends on the service branch, deployment status or garrison environment. Depending on the situation, a range of formal counseling or behavioral health services can be available.[39] Much emphasis has been placed on meeting the needs of those deployed for Operation Enduring Freedom and Operation Iraqi Freedom. For example, the United States Army has structured its Comprehensive Behavioral Health System of Care (CBHSOC) to align with force deployment cycles.[40] This initiative is intended to provide a seamless system of care from screening to treatment during all phases of active duty, and employs the use of embedded mental health professionals within units.[41] Within the Army, division psychiatrists still oversee all clinical activities within command positions, and as part of their duties are regularly expected to coordinate with medical personnel, chaplains, social workers and other command officers.[42] In addition to providing direct clinical services, these psychiatrists and mental health specialists are also responsible for command directed evaluations, general and specialized screenings and clearance evaluations, medical evaluation and forensic examinations, and suicide incident-related activities, both in garrison and during active deployment.[43] The Marine Corps has evolved a similar model called OSCAR (Operational Stress Control and Readiness), in which psychiatrists, psychologists, and psychiatric technicians are embedded

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Howard & Ruth P. Cox, *Collaborative Intervention: A Model for Coordinated Treatment of Mental Health Issue within a Ground Combat Unit*, 173 MIL. MED. 339-48 (2008) (discussing models for collaborative practices between unit chaplains and mental health officers).

[39] *See, e.g.*, DEPARTMENT OF DEFENSE, DEPARTMENT OF VETERANS AFFAIRS, & DEPARTMENT OF HEALTH AND HUMAN SERVICES, INTERAGENCY TASK FORCE ON MILITARY AND VETERANS MENTAL HEALTH 12-16 (2013) (listing a variety of services for suicide prevention and mental health services within each of the four service branches).

[40] *See* REBECCA PORTER, THE ARMY COMPREHENSIVE BEHAVIORAL HEALTH SYSTEM OF CARE (CBHSOC) CAMPAIGN PLAN: STANDARDIZE TO OPTIMIZE (2011).

[41] *See* Christopher Warner et al., *Division Mental Health in the New Brigade Combat Team Structure: Part I. Predeployment and Deployment*, 172 MIL. MED. 907, 907-11 (2007) (describing structure of clinical services within Task Force Baghdad in pre-deployment and deployment); Christopher Warner et al., *Division Mental Health in the New Brigade Combat Team Structure: Part II. Redeployment and Post Deployment*, 172 MILI. MED. 907, 912-17 (2007) (describing structure of clinical services within Task Force Baghdad in redeployment and post deployment).

[42] *See* Christopher Warner et al., *The Evolving Roles of the Division Psychiatrist*, 172 MILITARY MEDICINE 918, 918-924 (2007) (discussing overall restructuring of mental health resources within Army and role of the division psychiatrist).

[43] *See id*. at 921 (outlining roles of Army division mental health).

with combat units through deployment.[44] The purpose of the embedding is to intentionally expose the mental health provider to the Marine in combat and vice versa, so repeated contact creates trust and facilitates early monitoring, intervention and treatment.[45]

Despite the presence of mental health resources, confidentiality remains a principal barrier to seeking help from mental health professionals. An anonymous survey of Army Soldiers post-deployment from Iraq or Afghanistan revealed up to four times the rate of depression or PTSD than those reported on standard questionnaires.[46] A study involving incidence of child sexual abuse indicated that Navy Sailors were far more likely to report experiences on anonymous surveys rather than screenings requiring identification.[47] The principal concern with disclosing mental health problems is that doing so will jeopardize one's security clearance or entire military career.[48] For this reason, mental health professionals in the armed services are widely known as "wizards" – because they can make one "disappear" from the unit, or service altogether.[49] Indeed, under the Health Insurance Portability and

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[44] *See* William Nash, *Operational Stress Control and Readiness (OSCAR): The United States Marine Corps Initiative to Deliver Mental Health Services to Operating Forces* 1-10 (2006) (describing the OSCAR model and its creation and objectives).

[45] *See id*. at 6-8 (discussing the functions of the OSCAR team).

[46] *See* Christopher Warner et al., *Importance of Anonymity to Encourage Honest Reporting in Mental Health Screening After Combat Deployment*, 68 ARCHIVES OF GENERAL PSYCHIATRY 1065, 1065-1071 (2011) (discussing findings from the use of anonymous post deployment surveys compared to standard screening instruments and finding much higher rates of depression and PTSD in anonymous surveys).

[47] *See* Cheryl Olson, Valerie Stander, & Lex Merrill, *The Influence of Survey Confidentiality and Construct Measurement in Estimating Rates of Childhood Victimization Among Navy Recruits*, 16 MILITARY PSYCHOLOGY 53, 53-69 (2004) (discussing results from anonymous and non-anonymous survey conditions for questionnaire involving child sexual experiences).

[48] *See* Camilla Schwoebel & Roger Schlimbach, *Confidentiality: A Conundrum in Veterans Behavioral Health Care*, 32 DEVELOPMENTS IN MENTAL HEALTH LAW 1, 1 (2013) (discussing the example of a Navy Sailor worried about a PTSD diagnosis that would be a "career ender").

[49] *See* David A. Litts, *Suicide and Veterans, What we Know, How We Can Help*, HEALTH PROGRESS: JOURNAL OF THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES 24, 27 (May – June 2013) ("In some sectors of military culture, mental health professionals are called 'wizards.' Go to the 'wizard' and he'll make you disappear — from your military unit that is — and leave you stereotyped as someone with a weak character."); William Nash, *Operational Stress Control and Readiness (OSCAR): The United States Marine Corps Initiative to Deliver Mental Health Services to Operating Forces* 1, 2 (2006) ("In U.S. military services, a common derogatory term for psychiatrists and psychologists among the troops is "wizard," referring disparagingly to mental health professionals' one

Accountability Act (HIPAA), which governs the management of personal health information, specific exceptions are made for military service members. Otherwise protected health information under the HIPAA privacy rule may be provided to military command to assure "proper execution of the military mission."[50]

Department of Defense health information privacy regulations allow for the disclosure of health information about service members if it is deemed necessary by command to properly execute a military mission,[51] to determine the member's general fitness for duty,[52] and to determine a member's fitness to perform a particular mission or activity.[53] Although the DoD regulations do distinguish between general medical records and psychotherapy notes, such notes are exempted from authorization requirements for disclosure in order "to avert a serious and imminent threat to health or safety of a person or the public, which may include a serious and imminent threat to military personnel or members of the public or a serious or imminent threat to a specific military mission or national security."[54] For positions that require security clearances, evidence of mental health "issues" may derail the clearance process, jeopardizing an individual's career opportunities within the service. For example, U.S. Army regulations governing the process for obtaining security clearances

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consistent trick of being able to make service members with problems disappear from the ranks of their services.").

[50] *See* 45 C.F.R. § 164.512(k) (1)(i) ("Armed Forces personnel. A covered entity may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission."). See also Camilla Schwoebel & Roger Schlimbach, *Confidentiality: A Conundrum in Veterans Behavioral Health Care*, 32 DEVELOPMENTS IN MENTAL HEALTH LAW 1, 1-2 (2013) (discussing both HIPAA and DoD regulations that implicate release of health information in military settings).

[51] *See* Department of Defense, Health Information Privacy Regulation, C7.11.1.1, at 69 (DoD 6025.18-R) (January 2003):

> A covered entity (including a covered entity not part of or affiliated with the Department of Defense) may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission. *Id.*

[52] *See id*. C7.11.1.3.1, at 70. ("To determine the member's fitness for duty, including but not limited to the member's compliance with standards and all other activities…").

[53] *See id*. C7.11.1.3.2, at 70. ("To determine the member's fitness to perform any particular mission, assignment, order, or duty, including compliance with any actions required as a precondition to performance of such mission, assignment, order, or duty.").

[54] *Id*. at C5.1.2.2.5.

state that, "[i]f information developed by the command indicates the existence, current or past, of any mental or nervous disorder or emotional instability, a request for a PSI will not be submitted and interim clearance will not be granted."[55]

An affirmative mandate for reporting incidents of child abuse in federal jurisdictions exists through the Victims of Child Abuse Act of 1990, codified at 42 U.S.C. 13031. The statute requires that persons engaged in covered professional capacities or activities on federally owned or operated property must report suspected child abuse to applicable authorities.[56] The statute specifically requires reporting by physicians, health care practitioners, mental health professionals, social workers, counselors, alcohol/drug treatment professionals, and a variety of other professions.[57] Chaplains or clergy are not, however, identified in the statute's list of covered professionals, no military cases and only one federal case—*Zimmerman vs. U.S.*—has explored the issue of whether military chaplains are covered in the statute's reporting requirements, but reached no direct conclusion.[58] The statute does however, specifically

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[55] Army Regulation 380-67: Security: Personnel Security Program, at 5-8 (Ground for denial).

[56] *See* 42 U.S.C.A. § 13031(a)-(h):

> A person who, while engaged in a professional capacity or activity described in subsection (b) of this section on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section.

Id.

[57] *See id*. at (b) Covered professionals (listing professionals mandated to report suspected child abuse).

[58] *See* Zimmerman v. U.S., 171 F.Supp.2d 281 (2001). In, *Zimmerman* the plaintiff's daughter had been sexually assaulted by a naval officer at West Point military academy, was caught, and subsequently sentenced to confinement and dismissal from the Navy. The officer had previously engaged in behavior that suggested he was a sexual predator, and that information had been provided to a chaplain and other staff of a ministry program at the academy. The chaplain and other staff had not warned authorities about the behavior, and plaintiff sued arguing that they breached their responsibility to report suspected child abuse under 42 U.S.C. 13031, allowing the officer to later assault his daughter. *See id*. at 283-287. The government argued that the chaplain staff was not covered under the statute as they were clergy. Without ruling on the substance of the issue, the court held that in order for them to not be covered, they needed to be acting in their capacities as clergy. *See id*. at 298. This suggests that clergy acting in their professionals as chaplains may not be covered by the statute's reporting requirements, but the court never specifically answered that inquiry.

require psychologists, psychiatrists, and other mental health professionals to report suspected child abuse.[59] The 42 U.S.C. 13031 reporting requirements have been recognized and integrated into Department of Defense[60] and Veterans Affairs[61] regulations. Additionally, DoD instructions such as Instruction 6400.01 and others recognize DoD policy to promote early identification and reporting of suspected child abuse, assessment and treatment of abusers, and establishment of reporting mechanisms.[62]

Arguably, embedding mental health providers within active duty units might alleviate the stigma of mental health professionals and enhance trust within military culture. However, the regulatory framework that allows personal health information to be provided to command is still a significant barrier to communication between Service members and mental health professionals. It should be noted that the military has developed services that offer a degree of confidentiality and/or anonymity for Service members concerned with mental health issues, such as Military OneSource (www.militaryonesource.mil) and Military Pathways (www.militarymentalhealth.org). However, communications are still subject to stated exceptions that mandate reporting in some instances.[63] The development of mechanisms for chaplains (who enjoy complete confidentiality) to work with mental health providers (whose communications are subject to significant exceptions) would aid in fulfilling the objectives of an integrated mental health strategy for military personnel.[64]

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[59] 42 U.S.C.A. § 13031(b)(2).

[60] *See generally* U.S. DEPARTMENT OF DEFENSE, INSTRUCTION 6400.03 (Apr. 2014) (outlining instructions for Family Advocacy Command Assistance Team).

[61] *See generally* U.S. DEPARTMENT OF VETERANS AFFAIRS, VHA DIRECTIVE 2012-022 (Sept. 2012) (outlining instructions for reporting cases of abuse and neglect).

[62] *See generally* U.S. DEPARTMENT OF DEFENSE, INSTRUCTION 6400.01 (Feb. 2015) (outlining instructions regarding identification, reporting, and prevention of domestic and child abuse).

[63] *See* Frequently Asked Questions on Confidential Face-to-Face Non-medical Counseling, http://www.militaryonesource.mil/counseling?content_id=267023 (stating "exceptions to confidentiality are legal and military requirements to report child abuse, spouse abuse, elder abuse, threats of harm to self or others and any present or future illegal activity").

[64] *See* Barbara J. Zanotti & Rick A. Becker, *Matching To The Beat of A Different Drummer: Is Military Law and Mental Health Out-of-Step after* Jaffee v. Redmond? 41 AIR FORCE L. REV. 66-67 (1997) (discussing the case of an Airman who committed suicide and did not seek help because of fear it would jeopardize his career, concern about confidentiality with mental health problems, and preferences for services members to talk with chaplains because of the privileged communications).

III. Military Rule of Evidence 503: Privileged Communications and Chaplaincy

The legal application of chaplain confidentiality is the concept of privileged communication. Black's Law Dictionary defines privileged communication as "[t]hose statements made by certain persons with a protected relationship such as husband-wife, attorney-client, priest-penitent and the like which the law protects from forced disclosure on the witness stand at the option of the witness, client, penitent, spouse."[65] Privileged communication is a long-standing legal device recognized in common law and Rule 501 of the Federal Rules of Evidence.[66] It was first cited in the United States in the case of *People v. Phillips*[67], in which the court ruled that a priest could not be compelled to testify in court against an alleged thief before a grand jury.[68] In 1828, New York enacted the first statute recognizing the privilege, stating that no minister could be forced to testify to the contents of a confession made to him.[69] The functional basis of the privilege is that the social benefit of maintaining confidentiality between an individual and their religious minister outweighs the evidentiary value of that information presented in court.[70] By the early 1960s, almost all the states had developed a statute recognizing a clergy privilege.[71] Generally speaking, these statutes

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[65] HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY (6th ed.) 832 (1991).

[66] FED. R. EVID. 501 (Privilege in General).

[67] *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813) (unpublished decision).

[68] *See* Shawn P. Bailey, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 BYU L. REV. 489, 489-490 (2002) (describing the case of *People v. Phillips*, in which a catholic priest was protected from testifying in court against the defendant).

[69] *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 106 (1983) (discussing New York state legislation N.Y. Rev. Stat. § 72, pt. 3, ch. VII, art. 8 (1828)).

[70] *See id*. at 109-110 ("First, it is often stated that protecting the privacy of the conversation between minister and penitent is in the general interests of society."); Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENTS U. L. REV. 145, 160-161 (2000) (discussing the balancing of interests between compelled testimony and preservation of confidentiality between a minister and penitent). Whittaker notes that there is a constitutional argument for maintaining the privilege as well: If the contents of a confession were to be disclosed in a court of law, it would impede an individual's freedom of religious expression as he might be discouraged from confessing sins or thoughts to a minister—an important part of a person's religious activity. *Id*.

[71] *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 107-108 (1983) ("From 1955 to 1963 fourteen more states enacted minister's privilege statutes. Today forty-six states and the District of Columbia have enacted such statutes.")

recognize the existence of a privilege in cases where an individual is seeking spiritual counsel with a member of the clergy while acting in his or her professional capacity.[72] Since the creation of the privilege statutes, civil law courts have grappled with a number of issues, including the definition of who is considered a qualifying member of the clergy,[73] whether clergy were acting in their "official capacity" at the time they received communications,[74] and other issues. The privilege has been recognized by the Supreme Court, which stated in *Trammel v. United States* (1980)[75]:

> The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.[76]

This understanding of the intent of the clergy privilege was also reflected in the important case of *United States v. Moreno* (A.C.M.R.),[77] discussed *infra*,[78] in which the Army Court of Military Review stated that:

> The privilege regarding communications with a clergyman reflects an accommodation between the public's right to evidence and the individual's need to be able to speak with a spiritual counselor, in absolute confidence, and disclose the wrongs done or evils thought and receive spiritual absolution, consolation, or guidance in return.[79]

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[72] *See* R. Michael Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege? 44 WM. & MARY L. REV. 1627, 1647* (2003) (discussing the majority trends in state clergy-penitent statues).

[73] *See* Yellin, *supra* note 69, at 114-121 (discussing cases defining covered clergyman).

[74] *See id*. at 121-126 (discussing cases examining the status and situation of clergymen while receiving communications from penitents).

[75] 445 U.S. 40 (1980).

[76] *Id*. at 51.

[77] 20 M.J. 623 (A.C.M.R. 1985).

[78] *See infra* notes 102-110 and accompanying discussion on the *Moreno* case.

[79] *Moreno*, 20 M.J. at 626 (A.C.M.R. 1985).

The compelling policy rationale for the clergy privilege in the military thus seems to be the protection of deeply personal communications about spiritual matters with chaplains. This aligns with the primary historic role of chaplains in the military to facilitate the free expression of religion within the ranks.[80] The clergy privilege is the legal mechanism which protects the confidentiality of servicemembers' spiritual and religious communications as a manifestation of the free practice of religion.

In recent years, however, the clergy privilege has been modified in the civilian world as a matter of social policy. The most common situations in which clergy privileges do not apply are in cases of child abuse or other serious crimes.[81] Criticism of the privilege has grown sharper with the revelation of child sexual abuse cover-ups within some Roman Catholic parishes.[82] Many states thus currently maintain mandatory reporting statutes for child abuse which include members of the clergy.[83] In such cases, the reporting exceptions abrogate the privilege. The variation within state statutes, however, has prompted some to call for the adoption of uniform statutes to rectify conflicts between protecting victims of abuse with clergy confidentiality.[84]

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[80] *See* JOINT CHIEFS OF STAFF *supra* note 11 at I-1 ("US military chaplains are a unique manifestation of the nation's commitment to the values of freedom of conscience and free exercise of religion proclaimed in her founding documents.").

[81] *See id*. at 1687-1699 (arguing for an exception to clergy-penitent statutes in cases where a parishioner notifies a member of the clergy about intent or activity of harm to another person); J. Michael Keel, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681, 681 (1997-1998) (discussing disparities of treatment that might manifest due to the exercise of the clergy-penitent privilege).

[82] *See generally* Mary G. Frawley-O'Dea, *The History and Consequences of the Sexual-Abuse Crisis in the Catholic Church*, 5 STUDIES IN GENDER AND SEXUALITY 11 (2004) (discussing the sexual abuse crisis in the Catholic church and its impact on survivors and the church); Christina Mancini & Ryan T. Shields, *Notes on a (Sex Crime) Scandal: The Impact of Media Coverage of Sexual Abuse in the Catholic Church on Public Opinion*, 42 J. CRIMINAL JUSTICE 221 (2014) (discussing news media stories about the Catholic Church sex abuse scandals and public opinion about the church's response); Thomas G. Plante & Courtney Daniels, *The Sexual Abuse Crisis in the Roman Catholic Church: What Psychologists and Counselors Should Know*, 52 PASTORAL PSYCHOLOGY 381 (2004) (discussing the sexual abuse crisis in the Catholic church and stereotypical "myths" involved with the crisis).

[83] *See* Child Welfare Information Gateway, Clergy as Mandatory Reporters of Child Abuse and Neglect (discussing the status of state laws on mandatory reporting and clergy), http://www.bishop-accountability.org/news2010/03_04/clergymandated.pdf

[84] *See* Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C.L. REV. 1127 (2003)

The creation of the Integrated Mental Health Strategy, and its recommendations for integrating chaplaincy more closely with military mental health, does present a new context in which to consider the clergy privilege, and its policy rationale. However, the military rule itself has remained relatively static since its creation, and maintains no exceptions. The heart of the privileged communication rule within the armed services is Military Rule of Evidence 503, Communications to clergy.[85] In its entirety, the rule states:

> Rule 503. Communications to clergy
>
> (a) General rule of privilege
> A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.
>
> (b) Definitions
> As used in this rule:
> (1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.
> (2) A "clergyman's assistant" is a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor.
> (3) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(discussing the problem of conflict of societal interests and proposing uniform state laws that rectify reporting with exercise of religion).

[85] MCM, *supra* note 24, MIL. R. EVID. 503.

> (c) Who may claim the privilege
> The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

The critical components of the rule are (1) identification of the speaker as the holder of the privilege; (2) requirement that the communication be made as an act of religion or matter of conscience; and (3) requirement that the clergyman be acting in a capacity as a "spiritual advisor". If those conditions are met, the communication cannot be revealed in courts-martial against a defendant.[86] The party asserting the privilege—the one attempting to stop the introduction of information in a court (usually the defendant)—has the burden of showing the communication is privileged by a preponderance of the available evidence.[87] The few cases that have examined the clergy privilege typically involve defendants' counsels requesting suppression of evidence in appellate cases. Whether the privilege applies is a mixed question of fact and law.[88]

It should be noted that communications to clergy is one of several forms of privileged communication that were specifically identified in

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[86] *See* MIL. R. EVID. 1101 (discussing applicability of the rules of evidence and stating that "[e]xcept as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial…."). It should be noted that the version of this rule in the Military Commission Rules of Evidence is significantly different, as it carves out a wide exception for communications about future commissions or a crime, or concealment of a past crime. *See* MIL. C'MMN. R. EVID. 503(D). The military commission rules – applicable to aliens in military commissions – thus contemplate situations in which clergy are made aware of information about potential terrorist strikes or plans. This would be the case for example of a U.S. service clergyman counseling a foreign national prisoner in Guantanamo Bay. For a discussion of this hypothetical, see Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 62-63 (2002) (discussing interview with a U.S. military chaplain who counsels detainees at Guantanamo Bay).

[87] *See U.S. v. McCollum*, 58 M.J. 323 (2003) (discussing the framework for application of communication privileges).

[88] *See U.S. v. Coleman*, 26 M.J. 407, 409 (1988) ("The question of whether a privilege exists is a mixed question of law and fact."); *U.S. v. Isham*, 48 M.J. 603, 605 (1998) ("The question of whether a privilege applies to a conversation 'is a mixed question of law and fact.'"); *U.S. v. Shelton*, 64 M.J. 32, 37 (2006) ("Whether a communication is privileged is a mixed question of fact and law.").

section V of the Military Rules of Evidence. Thus, unlike the Federal Rules of Evidence (FRE), which contain no individual privileges and defer to the courts to recognize such, the MRE codify specific privileged communications.[89] The specification of privileges within the MRE was a significant departure from the FRE, which served as the general foundation for the military rules. When the MRE were created, the drafting committee sought to align the MRE with the FRE where possible, in order to create symmetry between the military and federal laws.[90] The codification of individual privileges within the MRE, however, reflected a desire to minimize uncertainty and promote uniformity in the military environment and courts-martial.[91] The new privileges in the MRE were derived from the Manual for Courts-Martial, and commentary on proposed privileges from the FRE adapted to this military environment.[92] MRE 501 outlines general rules for privileges, stating that no other claims of privilege exist beyond those listed therein, unless required or provided by the Constitution,[93] an Act of Congress,[94] or common law principles of the federal courts.[95] It should be noted that rule 501 specifically bars a privilege on communications to medical officers or civilian physicians.[96] As noted in the official commentary of the Military Rules of Evidence, this is because "such a privilege was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel."[97]

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[89] *See* FED. R. EVID. 501 (stating that the interpretation of common law by the federal courts governs claims of privilege).

[90] *See* Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 12-13 (1990) (describing the intention of the MRE drafting work group to base the MRE on the FRE to the extent possible, with necessary modifications to the military context).

[91] *See* Major David L. Hayden, *Should There Be A Psychotherapist Privilege in Military Courts-Martial?* 123 MIL. L. REV. 31, 70 (1989) (noting the intention of the MRE drafters to provide simple, clear rules to privileges in order to fit the military environment).

[92] *See* Lederer, *supra* note 81, at 26-27 (discussing codification of the individual privileges in the MRE).

[93] *See* MIL. R. EVID. 501(a)(1) (stating that no privilege exists unless required by "[t]he Constitution of the United States as applied to members of the armed forces").

[94] *See* MIL. R. EVID. 501(a)(2) (stating that no privilege exists unless required by "[a]n act of Congress applicable to trials by courts-martial").

[95] *See* MIL. R. EVID. 501(a)(4) (stating that no privilege exists unless required by "principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence").

[96] *See* MIL. R. EVID. 501(d): "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity."

[97] *See* MANUAL FOR COURTS MARTIAL UNITED STATES A22-39 (2012).

A. The seminal cases: *Moreno*, *Beattie*, *Isham*, and *Shelton*

Only a handful of cases that significantly implicate Rule 503 have come before the military courts. The seminal case is *United States v. Moreno* (A.C.M.R. 1985),[98] in which the Army Court of Military Review reviewed the major criteria for the privilege to apply. The holding in *Moreno* would thus serve as a major precedent for subsequent cases analyzing the basic requirements for application of Rule 503. Although the courts have yet to deal with a case involving the flow of communications among or between chaplains and psychotherapists in a mental health treatment setting, there are also two important cases that are relevant to referral of servicemembers to other help-providing entities within the service environment: *United States v. Beattie* (A.F.C.M.R. 1987),[99] and *United States v. Isham* (N-M. Ct. Crim. App. 1998).[100] Additionally, *United States v. Shelton* (C.A.A.F. 2006)[101] provides further guidance on the Moreno requirements, and discussion on the intent of the communicator as a component of the Rule 503 privilege.

In *United States v. Moreno* (A.C.M.R. 1985),[102] the defendant Moreno intentionally shot and killed another soldier he was having an affair with in the barracks. Immediately after the killing, and before he had been caught, Moreno went to a chapel on base to speak to an Army chaplain. According to the chaplain, Moreno was extremely emotional and upset and said, "I've sinned. I've hurt somebody real bad," and confessed to the shooting.[103] The chaplain called the barracks, learned that the killing had occurred, and then told Moreno he would have to contact the police. Moreno apparently consented to that action. The chaplain subsequently contacted the military police, who came and arrested Moreno. Moreno opted to remain silent after being taken into custody as per his Article 31 rights of the Uniform Code of Military Justice, which states that no person may be interrogated without being notified of his right to remain silent to not incriminate oneself.[104] The trial judge allowed the chaplain's

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[98] 20 M.J. 623 (A.C.M.R. 1985).

[99] 1987 CMR LEXIS 622 (A.F.C.M.R. Aug. 7, 1987).

[100] 48 M.J. 603 (N-M. Ct. Crim. App. 1998).

[101] 64 M.J. 32 (C.A.A.F. 2006).

[102] 20 M.J. 623 (A.C.M.R. 1985).

[103] *See id*. at 624-625 (outlining the facts to the case and the encounter between Moreno and the chaplain after the shooting.)

[104] *See* 10 U.S.C.A. § 831. Art. 31. Compulsory self-incrimination prohibited. The article states that:

testimony about the event at court, considering Moreno's actions as a confession to a crime, and not a spiritual discussion.[105] He was subsequently convicted of murder by the trial court.

On appeal, Moreno argued that the chaplain's testimony should have been privileged under Rule 503 and not introduced in court. The Army Court of Military Review identified three criteria for the rule to apply:

> (1) The communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor or to his assistant in his official capacity; and (3) the communication must be intended to be confidential.[106]

The court then found that the first two conditions were met, because Moreno was 1) clearly wanting to communicate about a spiritual issue ("I've sinned"), and 2) the Army chaplain was clearly a clergyman on duty acting in his official role as a spiritual advisor.[107] As to the third condition, the court noted that the chaplain believed that the primary purpose of

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> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Id.

[105] *See* U.S. v. Moreno, 20 M.J. 623, 626 (A.C.M.R. 1985) (discussing the trial court's consideration of the facts of the case and disagreeing with them).

[106] *Id*. at 626.

[107] *See id*. ("Chaplain George testified that, among the reasons he thought appellant came to him, was because appellant had a conscience and knew the chaplain to be a man of God. That testimony, plus appellant's opening remark to George, "I have sinned," satisfy the first two criteria.").

Moreno's visit was to confess to the crime through the chaplain. However, the court observed that Moreno himself could have easily turned himself in without even seeing a chaplain, and from Moreno's standpoint, the primary purpose of this communication was to seek spiritual counsel for his actions. The court thus held that, "As we read Mil. R. Evid. 503, appellant's intent is controlling, not [the chaplain's] impression of it."[108] Because Moreno intended for the conversation to be confidential, it thus met all the requirements of Rule 503, and thus the chaplain's testimony should not have been admitted to the trial court.[109] The *Moreno* holding suggests that a necessary requirement of the Rule 503 test—that the communication is intended to be confidential—is interpreted in favor of the speaker, and should not be presumed to be meant as a confession to command beyond the chaplain. An additional by-product of the *Moreno* decision was its structuring of the Rule 503 requirements into a three-pronged test, which would be cited in subsequent cases by courts examining the clergy-penitent privilege.[110]

United States v. Beattie[111] (A.F.C.M.R. 1987) involved a question of whether advising a service member to report himself for a crime was a violation of Rule 503. In *Beattie*, the defendant airman went to a U.S. Air Force base chapel to seek advice from a chaplain. Beattie met the chaplain, and told him he wanted to turn himself in and seek help for child sexual abuse. The chaplain believed that Beattie was basically asking for a referral, and the chaplain thus suggested he go to the family advocacy office to talk to a commander, but did not direct or order him to go. The defendant went there, where the commander told him to go to the military police. Beattie went to the police, and confessed to sexually abusing his children. His statements were introduced at the trial court, and he subsequently pled guilty to sexual abuse.[112]

On appeal, Beattie argued that the chaplain's referral amounted to a violation of Rule 503. The Air Force Court of Military Review disagreed,

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[108] *Id*.

[109] *Id*. ("Instead, we believe appellant's intent that the communication be confidential is adequately revealed by his initial purpose for speaking with George and by his later refusal to make a statement to investigators after being apprehended. We conclude the military judge committed error in allowing Chaplain George to testify over appellant's objection.").

[110] *See infra* notes 114-136 and accompanying discussion on *U.S. v. Isham*, 48 M.J. 603 (1998) and *U.S. v. Shelton*, 64 M.J. 32 (2006), two recent Rule 503 cases which made use of the three part Moreno test.

[111] 1987 CMR LEXIS 622 (A.F.C.M.R. Aug. 7, 1987).

[112] *See id*. at 1-3 (outlining background to the case).

and held that "[t]he privilege provided for under Rule 503 is against the disclosure of a confidential communication, not giving advice when it is requested."[113] Therefore, there was no violation of Rule 503, and Beattie's conviction was affirmed. *Beattie* thus stands for the important holding that a chaplain—upon being told of a troubling, illegal action—can refer the speaker to another entity, and even inform them that their actions are illegal, and such a referral would not be considered a privileged communication. In this sense, the holding in *Beattie* supports what is a critically important role for military chaplains—to refer troubled servicemembers to other entities or available resources, but without coercing the servicemember, or violating confidentiality.

United States v. Isham[114] revisited some of the same concerns involving referral, and spoke to the extent confidential communications to clergy can be shared with others and still be privileged under Rule 503. In *Isham*, the defendant was a Marine experiencing anxiety and depression, and went to seek help from the unit chaplain. During a private meeting, Isham told the chaplain he had thoughts of shooting other people and then killing himself.[115] The chaplain stopped Isham, and told him he would have to break confidentiality and tell others of his thoughts. The chaplain's testimony was later provided in the court-martial in which Isham was convicted of communicating a threat.[116]

On appeal to the Navy-Marine Corps Court of Criminal Appeals, Isham argued that the military trial judge had erred by allowing the chaplain to testify against him. The court agreed with Isham. First, the court held that the controlling rule in the case was the three-prong test established in *Moreno*: whether the communication was an act of religion or conscience, whether the chaplain was acting in official capacity as a spiritual advisor, and whether the communication was intended to be confidential.[117] The court found that the first two conditions were met

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[113] *Id*. at 4.
[114] 48 M.J. 603 (N-M. Ct. Crim. App. 1998).
[115] *See id*. at 604-607 (discussing the conversation between Isham and the chaplain).
[116] *See id*. (same).
[117] *See id*. at 605 citing *Moreno* discussed *supra*:

> In *Moreno*, 20 M.J. at 626, our Army brethren listed three criteria for the privilege on communications to clergy to apply: '(1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor...; and (3) the communication must be intended to be confidential.'

because Isham had sought out the chaplain, and met with him "in the chaplain's office, while he was wearing the cross on his collar, and discussed matters of conscience with obvious religious overtones."[118] The third prong, however, was at issue. The chaplain had explained to Isham that he would inform others about the situation only to the specific and limited extent that it could prevent Isham from carrying out his thoughts of shooting others, and "[t]he appellant agreed to this further disclosure for the limited purpose of getting help and preventing him from carrying out his threats."[119] In other words, Isham had agreed that information would be disclosed only to the extent for him to get necessary help, but believed that he would continue to serve as a Marine and not be court-martialed. In Isham's words: "I wanted to keep it confidential. That way, nothing would affect me in the battalion. I could get help for my problems and without making everybody look at me as a bad Marine."[120] Isham believed that his communication would thus still be protected under Rule 503.[121] However, the chaplain's testimony at Isham's court-martial was a clear breach of privileged communication. The appellate court stated:

> The appellant properly expected that he would be able to meet with a mental-health professional and that his unit would bar him from having access to any weapons. He no doubt anticipated that reassignment or administrative separation would be forthcoming. However, the chaplain did not go on to explain that he would have to testify against the appellant at a court-martial.

Thus, the Navy-Marine Corps Court of Criminal Appeals ruled that the trial court had erred by allowing the chaplain to testify, and the conviction and sentence were removed.[122] Importantly, the *Isham* decision established a key holding: chaplains may relay information from a penitent to others for the limited and specific purpose of addressing the penitent's

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Id.

[118] *Id*.

[119] *Id*. at 606.

[120] 48 M.J. 603, 604 (N-M. Ct. Crim. App. 1998).

[121] *See id*. at 606 ("The appellant agreed to this further disclosure for the limited purpose of getting help and preventing him from carrying out his threats. Therefore, his statements fell directly within the expansive definition of a "confidential communication" under Military Rule of Evidence 503(b)(2).").

[122] *See id*. at 608 ("We hold, therefore, that the provisions of Military Rule of Evidence 503 applied such as to bar the communications the appellant made to the chaplain from coming into evidence against him.").

immediate situation. In this case, the *Isham* court believed that the immediate situation permitted the chaplain to relay enough information to prevent Isham from harming himself or others, and no more. The *Isham* holding thus suggests that the chaplain could and should have had mental health professionals or command remove his weapon and monitor him, so long as the reason for doing so was not relayed to others. Doing so preserves the multiple interests of maintaining confidentiality with chaplains, and preventing impending violence.

United States v. Shelton[123] involved another situation concerning admission of child abuse. In *Shelton*, an army soldier had sexually abused his daughter. The daughter had told her mother (Shelton's wife) about the abuse, and the mother then confronted Shelton but he refused to acknowledge the matter. She then went to seek help from the civilian chaplain at the church she and Shelton attended. Shelton and his wife had been receiving marriage counseling from this chaplain for some time on other issues. She told the chaplain about the alleged abuse, and he agreed to talk to Shelton about it.[124] Shelton went to the church and met the chaplain and the chaplain's assistant, where they prayed together and then talked. During the discussion, the chaplain said, "Your wife told me something and I want to know if you did it because it's serious and you can go to jail for it . . . you claim to be a Christian, Christians don't tell lies, and so I need to know."[125] Shelton then admitted to sexually abusing his daughter. The chaplain told him he should bring his wife back to the church, and he immediately did so. Once she was there, Shelton told his wife, "I did it. I did it. I'm wrong. I did it."[126] The chaplain then told both the defendant and his wife that Washington state law required him to report the abuse. Weeks later, the chaplain advised the wife that she should report her husband or he would do so. She went to the military police, who conducted an investigation that led to Shelton's admission of abuse. He later told both a social worker and psychotherapist about the abuse as well. The chaplain's testimony, among others, was introduced into trial against Shelton, and he was subsequently convicted.[127]

On appeal, Shelton argued that his communications to the chaplain were privileged, and thus wrongly used against him in the court-martial.

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[123] 64 M.J. 32 (C.A.A.F. 2006).

[124] *See id*. at 34-35 (discussing factual circumstances of the case).

[125] *Id*. at 34.

[126] *Id*. at 35.

[127] *See id*. at 34-35 (discussing factual circumstances of the case leading to Shelton's eventual confession of abuse to the military investigators).

The appellate court first examined whether the three-part test in *Moreno* was satisfied. It held that the discussion between Shelton and the chaplain qualified as a "matter of conscience" because of its heavy religious overtones. Specifically, they had prayed together prior to their discussion, and the chaplain had admonished him that, "You claim to be a Christian, Christians don't tell lies, so I need to know."[128] Even though the chaplain had previously counseled Shelton and his wife on secular matters, that did not preclude the possibility that their subsequent conversation was a religious one:

> These circumstances burdened Appellant's conscience, and following the advice of his pastor, Rev. Dennis, Appellant confessed. We note that the past secular discussion between Appellant and Rev. Dennis related to financing, budgeting, and family matters. But there is nothing in the record to establish that these counseling sessions were as spiritually charged as the counseling involved in the present case. The mere prior counseling contact between Rev. Dennis and Appellant on other matters does not preclude a conclusion that, in the present instance, Appellant's communication with Rev. Dennis was a matter of conscience.[129]

For these same reasons, the court also concluded that the second prong of the test was met—the communication was made to a clergyman in his capacity as a spiritual advisor.[130] Finally, there was the question of whether Shelton intended the communication to be confidential, which required that the "[c]ourt focuses on Appellant to make this determination."[131] Even though the defendant's wife was present in the second conversation, there was, from Shelton's perspective, a "reasonable expectation that the counseling was indeed confidential."[132] This was because the "wife's presence was

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[128] *See* 64 M.J. at 38 (citing testimony from the trial court to show that the discussion between the chaplain and Shelton had clear religious overtones that qualified the discussion as one of a "matter of conscience").

[129] *Id.*

[130] *See id.* ("Again, we consider the circumstances of Rev. Dennis beginning the meeting with prayer, the fact that the counseling session occurred at the church, and the religious atmosphere and spiritual language of the meeting as critical facts establishing that Appellant's communication with Rev. Dennis was in the clergy's official capacity.").

[131] *Id.*

[132] *Id*. at 39.

necessary for his redemption"[133] and she thus fell under the meaning of those whom "disclosure is in furtherance of the purpose of the communication" under 503(b)(3). In support of this holding, the appellate court cited the Third Circuit decision of *In re Grand Jury Investigation,*[134] which held that the presence of a third party in a family counseling session did not preclude the existence of a clergy-penitent privilege.[135] The appellate court thus concluded that Shelton's communication was privileged and should not have been introduced in court.[136]

B. Determining who is a qualified chaplain under Rule 503: *Kidd*, *Coleman*, *Napolean*, and *Garries*

The military courts have examined cases involving the question of who qualifies as a chaplain covered by the Rule 503 privilege. This question is a pertinent one and deserving of judicial review, particularly with military chaplains potentially serving in multiple roles and settings while interacting with servicemembers. However, the military cases which have examined this issue have been based on very narrow factual bases.

A very early pre-*Moreno* case was *United States vs. Kidd* (A.F.B.R. 1955),[137] in which the Air Force Board of Review examined the circumstances following an airman's desertion from Andrews Air Force Base. Defendant Kidd left the base without permission for several months. Kidd was tried before a Staff Judge Advocate and convicted of desertion. Prior to sentencing, the Staff Judge Advocate considered the opinion of a chaplain who was a staff member at the confinement facility that held Kidd. The chaplain had interviewed Kidd and concluded he was not suited to be in the Air Force, and should therefore be removed.[138] Kidd argued that the Staff Judge Advocate should not have heard the chaplain's opinion

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133 64 M.J. at 39.

134 918 F.2d 374 (1990).

135 *Id*. (citing *In re Grand Jury Investigation,* 918 F.2d 374(1990): "[a]s is the case with the attorney-client privilege, the presence of third parties, [which is] essential to and in furtherance of the communication, does not vitiate the clergy-communicant privilege.").

136 *See* 64 M.J. at 39 ("Because M.R.E. 503 grants Appellant a right to keep this privileged conversation confidential, we conclude that the military judge abused his discretion by ruling that Appellant's statements to his pastor were not privileged and would be otherwise admissible evidence.").

137 20 CMR 713 (A.F.B.R. 1955).

138 *See id*. at 719 (discussing the circumstances in which the chaplain interviewed the defendant and recommended his severance from service).

because it was privileged communication. The court considered the fact that:

> [A]n Air Force Chaplain assigned to a confinement facility as an additional duty occupies a dual role. On the one hand he is a staff officer whose function is to aid in the retraining and rehabilitation of the prisoners and to advise the commander in matters concerning prisoner policy . . . On the other hand, he acts as clergyman for those prisoners who profess his faith or who desire his spiritual services. Whether a chaplain acts in his secular or spiritual role may vary from time to time depending upon the circumstances involved.[139]

The Air Force Board of Review held that there was no affirmative showing that the information gathered by the chaplain was done so in his official capacity as a clergyman, nor was it clear if the nature of the chaplain's conversation with Kidd was about religious or spiritual matters. Rather, the board simply noted that it was possible that the information about Kidd was gathered from the chaplain in his non-clergy capacity. Thus, "absent clear evidence" of that fact, the "presumptions operate in his [the chaplain's] favor rather than the reverse" and the board therefore ruled that there was no privileged communication in this case.[140] Thus, the *Kidd* case suggests that for chaplains who have dual roles as clergy and non-clergy staff, unless there is clear evidence that the chaplain heard information while acting in his capacity as a clergyman, then it is presumed that he was acting as non-clergy.

Because of the lack of factual information presented in *Kidd*, the fact that it was adjudicated decades before *Moreno*, and has not yet been revisited to any significant extent by subsequent courts, it is unclear what value *Kidd* has to the question of chaplains having dual roles in professional settings. Clearly, *Kidd* does touch on the important issue of where Rule 503 ends for clergy serving in professional settings in non-chaplain roles, and seemingly demarcates those limits based on whether the chaplain is serving as a clergyman or a non-clergyman. Subsequent cases exploring this issue, however, offer little guidance in this area because of the limited factual scenarios presented.

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[139] *Id.*
[140] *Id*.

In *United States v. Coleman* (C.M.A. 1988),[141] the Court of Military Appeals focused on the questions of whether a communication was made to a clergyman "in the clergyman's capacity as a spiritual adviser."[142] In *Coleman*, the defendant Coleman had sexually abused his daughter. The daughter had told her mother (Coleman's wife) about the abuse, and both the daughter and mother testified against Coleman in a court-martial. The wife had also informed her father—a church reverend—about the sexual abuse.[143] The reverend had also received a call from Coleman, and testified in the court-martial to the following:

> I received a phone call from Sergeant Coleman, and . . . he said to me . . . Dad, can you help me, my marriage is falling apart, and knowing what I had known—my daughter had come from Michigan . . . and she had told me about the alleged incident, and . . . I was upset and I'm sure that . . . [appellant] was upset . . . the whole family was upset, and I said, "Son, is there any wonder that your marriage is falling apart? Is it true that you took liberties with your daughter?" And that, basically was the end of that conversation, and he said, "to pray for me" and I said, "I will," and that's basically what was said.[144]

The lower court had admitted the reverend's testimony over Coleman's objection that it be suppressed under Rule 503. The court's reasoning was that Rule 503 did not apply. Although they held that the reverend was a chaplain, the communication itself was not considered a formal act of religion or a matter of conscience, and it was not communicated to a chaplain in an official capacity as a spiritual advisor.[145] That was evidenced by the fact that the defendant had referred to the reverend as "dad" several times.[146] Additionally, Coleman had argued that the admission of the testimony was information that materially prejudiced the court against him. However, the appellate court noted that there was overwhelming evidence from the daughter which indicated his guilt, and

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[141] 26 M.J. 407 (C.M.A. 1988).
[142] MIL. R. EVID. 503(b).
[143] *See Coleman*, 26 M.J. at 407-408 (discussing the factual background of the case).
[144] *Id*. at 408.
[145] *See id*. at 409 (discussing the trial court's reasoning).
[146] *See id*. ("I find that the accused did not perceive the communications to have been made to the clergyman in his capacity as spiritual adviser, as evidenced by his repeated use of the term "Dad" throughout the conversation.").

the father's testimony added little or no additional prejudice.[147] The appellate court also held that the communication was not intended to be confidential either.[148]

The Court of Military Appeals affirmed the appellate court, stating that the communication neither amounted to an act of religion nor pertained to a matter of conscience.[149] The Military Appeals court was silent on the other requirements of the rule. The *Coleman* holding seems to indicate that the fact the reverend was the defendant's father in law was a significant factor excluding the conversation from the privilege. It is unclear exactly why the conversation itself was not considered a matter of conscience nor act of religion. That conclusion could have arisen from the perception that the substance of the conversation did not rise to that level. Additionally, the fact that the conversation was deemed not intended to be confidential seems to have arisen from the fact that Coleman's abuse was already known to both the reverend and Coleman's wife. The *Coleman* holding in totality seems to suggest that when a clergyman is also a family member, a discussion with that person cannot be privileged if the facts of the case suggests that person was communicated to primarily as a family member.

The issue of defining clergy under Rule 503 when another personal relationship existed was revisited in *United States v. Napolean* (C.A.A.F. 1997).[150] In that case, Air Force member Napolean stabbed and killed another person. She was subsequently confined in a holding facility. Napolean's friend Sgt. Walters visited her in jail. Walters testified at the court-martial that at the jail, Napolean had said that "she wasn't angry or

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147 *See id*.:

> Competent evidence, independent of the communication, overwhelmingly established appellant's guilt of the offense as charged. The victim, appellant's daughter, using an anatomically correct doll, testified clearly, convincingly, and in detail about the indecent acts committed on her. In addition, appellant's wife testified he admitted his misconduct to her when she confronted him about the allegation.

Id.

148 *See Coleman*, 26 M.J. at 409 (discussing holding of the case).

149 *Id*. at 409:

> The threshold for claiming the privilege is that "such communication is made either as a formal act of religion or as a matter of conscience." Mil.R.Evid. 503(a). As was found by both the military judge and the Court of Military Review, neither of these two elements is present in the record before us.

150 46 M.J. 279 (C.A.A.F. 1997).

enraged or anything when the incident occurred."[151] Walters also testified that he visited her "as a friend"[152] but that he prayed with her and was a lay minister at a base chapel.[153] Napolean was convicted of pre-meditated murder, and she argued on appeal that her attorney had erred by allowing Walter's testimony at trial. She asserted that without his testimony, her conviction would have been to a lesser charge of murder or manslaughter.[154] Even though Napolean argued that she believed her communication to Walters was privileged under Rule 503,[155] the appellate court held that she could not have "reasonably believed" he was a clergyman.[156] In the court's view, a lay minister did not rise to the status of a clergyman.[157] Additionally, the communication itself fell short of being an act of religion or matter of conscience. Rather, it was a communication of emotional support and not "guidance and forgiveness."[158] Interestingly, the court in *Napolean* also added the distinction that a "communication is not privileged, even if made to a clergyman, if it is made for emotional support and consolation rather than as a formal act of religion or as a matter of conscience"[159] and that a satisfactory definition of the latter would be a communication reflecting "guidance and forgiveness."[160] This definition seems to suggest that the Court of Appeals for the Armed Forces recognizes a clear distinction between communications made to clergy for purposes of emotional support, which would not be covered by the rule, and communications based in spiritual or religious concerns about forgiveness and guidance, which would be covered language. *Napolean* is thus relevant in that sense as it can speak to the dual roles that pastoral chaplains may have in providing emotional support, or spiritual or religious guidance.

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151 *Id*. at 284.
152 *Id*. at 283.
153 *See id*. at 284 (quoting testimony from Sergeant Walters about his visits to Napolean).
154 *See id*. ("Appellant argues that she was prejudiced by TSgt Walters' testimony because it was the only direct evidence of premeditation and without it, she probably would have been convicted only of unpremeditated murder or voluntary manslaughter.").
155 *See* 46 M.J. at 284 (describing the defendant's arguments that she believed her communications with Walters were privileged).
156 *Id*. at 285.
157 *See id*. (noting that a lay minister is not a clergyman).
158 *See id*. ("Finally, we hold that appellant has failed to show that her admissions to TSgt Walters were a 'formal act of religion' or were made 'as a matter of conscience.'. . . The circumstances of TSgt Walters' visit, as described in the affidavits, suggest that appellant was seeking emotional support and consolation, not guidance and forgiveness.").
159 *Id.*
160 46 M.J. at 285.

A final case in this line worth noting is the earlier decision of *United States v Garries*.[161] In *Garries*, the defendant Garries allegedly murdered his wife in a premeditated fashion. A significant amount of evidence and witness testimony pointed to Garries' guilt, and an Air Force trial court convicted him of murder.[162] The issue in the case involved the testimony of a church deacon and friend of Garries. The deacon was a fellow Air Force member and Garries' neighbor. Both of them attended the same off-base church. Prior to the murder, Garries had come to the deacon, and asked him where he could find the church pastor. The deacon said the pastor was out of town. In private, Garries then made remarks to the deacon that he was upset with his wife and wanted to "bust her in the face."[163] The deacon testified that at that time, he was only a deacon and not a pastor certified to do pastoral counseling, and had only presented himself to the defendant as a friend, and not a religious figure. On appeal, Garries argued that the witness testimony from the church deacon was wrongfully introduced into court as it violated Rule 503. The appellate court ruled against Garries on this matter. They held that the deacon was not a clergyman, that the defendant did not at the time believe he was a clergyman, and therefore the discussion they had was not privileged communication under Rule 503.[164] *Garries* confirmed that the definition of a "clergyman" is a narrow one, and limited to those who provide spiritual or pastoral preaching, teaching, and counseling, and not administrative members of a religious organization such as a church deacon.

C. Clergy communications and criminal investigation warning requirements: *Richards* and *Benner*

Two MRE 503 cases have presented factual scenarios in which defendants have raised Uniform Code of Military Justice Article 31 arguments. Article 31 prohibits compulsory self-incrimination, and any violation of such renders subsequent communications inadmissible in trial.[165] This scenario emerges when a servicemember communicates with a chaplain about a purported crime, and later raises as a defense the

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[161] 19 M.J. 845 (A.F.C.M.R. 1985).
[162] *See id*. at 848-852 (describing background of the case).
[163] *Id*. at 860.
[164] *See id*. at 860 ("First, we hold that Sgt. Hinton was not a person who could act as a clergyman. Second, we find that the accused did not reasonably believe that Hinton was a clergyman. Third, we find that the conversation between Hinton and the accused was not under circumstances amounting to a privileged communication.").
[165] UCMJ art. 31 (2008).

argument that the chaplain should have warned the speaker to his Article 231 rights prior to making the communication. An early case was *United States v. Richards* (N.M.C.M.R. 1984).[166] In *Richards*, the defendant was a Navy clerk who had stolen funds from his ship. Richards met with the ship chaplain to express his feelings of guilt and to seek advice about next steps. The chaplain suggested that she meet with a legal officer to consult about the situation, without disclosing Richards' identity, and Richards agreed. At the meeting, the legal officer advised the chaplain that the defendant should voluntarily admit to the crime. The chaplain communicated that advice to Richards, and he agreed to have the chaplain tell command about his crime. He was subsequently convicted and sentenced by a court-martial.[167]

On appeal to the Navy-Marine Court of Military Review, Richards argued that the chaplain should have read him his Article 31 rights prohibiting self-incrimination.[168] He argued that because the chaplain had not read him those rights prior to their initial discussion, all the subsequent information revealed should have been inadmissible in a court-martial. The court, however, ruled against Richards, noting that Article 31 rights are only required when there is a "criminal investigatory purpose."[169] In this case, the initial conversation between the chaplain and Richards was a privileged communication covered under Rule 503 as an "a matter of conscience," and not a criminal investigation. Additionally, Richards' subsequent confession to the crime through the chaplain was considered a waiver to the privilege under Rule 510 (Waiver of privilege by voluntary disclosure).[170] His conviction was thus affirmed. Richards thus holds that

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[166] 17 M.J. 1016 (N.M.C.M.R. 1984).

[167] *See id*. at 1017-1079 (discussing the factual background to the Richards case).

[168] *See* 10 U.S.C.A. § 831. Art. 31. Compulsory self-incrimination prohibited (discussed *supra* on Moreno case).

[169] *See* 17 M.J. 1016, 1019 (1984):

> In our judgment the considerations of concern to Congress in the enactment of Article 31, UCMJ, are not present in the instant case. There was no criminal investigatory purpose in the communication between the chaplain and appellant. The only motivation was the conduct of a privileged conversation pursuant to MIL.R.EVID. 503. *Id.*

[170] *See* MIL. R. EVID. 510(a):

> A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege

a discussion about issues of conscience with a clergyman resulting in information about criminal activity is not automatically an "investigation," and such discussions do not require the reading of one's rights against self-incrimination.

United States v. Benner (C.A.A.F. 2002)[171] also implicated Article 31. In *Benner*, the defendant's wife caught Benner sexually abusing their daughter. The wife and daughter left Benner and urged him to seek help, but did not report him to authorities.[172] Benner decided to seek counseling from an Army chaplain, and at their first meeting, he told the chaplain he had sexually abused his daughter. The chaplain told Benner he would have to report this information to the military police. The chaplain contacted the Army Family Advocacy office, where he was (erroneously) informed that he was required to report the abuse. He then told Benner it would be best if he turned himself in, and would escort him to the military police. Benner was hesitant, but went with the chaplain. Once there, he was notified of his Article 31 rights, and confessed to the police. He was subsequently convicted of sodomy with a child.[173]

On appeal, Benner argued that Rule 503 had been violated when the chaplain told him he was required to report the abuse. The appellate court acknowledged that privileged communications with a clergyman are sealed, and that such communications do not require clergyman to warn penitents of Article 31 rights against self-incrimination or rights to an attorney.[174] However, if a military officer happens to be a clergyman, but "acts on the premise that the penitent's disclosures are not privileged, then warnings are required."[175] The court held that because the chaplain had (erroneously) told Benner he had to report Benner's actions, and encouraged him to turn himself in, it effectively tainted his confession. The appellate court ruled that Benner had come to the chaplain seeking

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> voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. *Id.*

171 57 M.J. 210 (C.A.A.F. 2002).
172 *See id*. at 211-212 (discussing factual background of Benner and his family).
173 *See id*. (discussing factual background of Benner's interaction with the chaplain and subsequent confession to the military police).
174 *See id*. at 212 ("When a chaplain questions a penitent in a confidential and clerical capacity, the results may not be used in a court-martial because they are privileged. Therefore, the Article 31(b) and *Tempia* warnings are not required.").
175 *Id*.

confidential communications, but instead, the chaplain had acted not as a chaplain giving proper counseling, but as an ordinary officer. Because he had not properly warned Benner of his rights, his resulting confession was invalid.[176]

D. Synopsis of Rule 503 Cases

The evolved case law on Rule 503 has direct application for chaplains working in the field, and provides guidance on what to expect in the event of a legal case. The *Moreno* case offers an important starting foundation. The military courts have consistently relied[177] on the three-part test elucidated in *Moreno* that operationalizes Rule 503.[178] *Moreno* is clear that if a Service member "confesses" as a matter of conscience or religion to a chaplain in his or her role as a spiritual advisor, that communication should be kept confidential and not shared with command. If it is shared, the communication will be ruled inadmissible under Rule 503. The *Moreno* case was reaffirmed in *Benner* where a military chaplain erroneously believed he had to report a Service member who had confided in him that he had abused children.[179] However, both *Benner* and *Moreno* should be compared to the facts and holding in the *Beattie* case, where a chaplain advised a Service member who had committed child abuse to report himself to command, and the Service member voluntarily decided to do so.[180] The *Beattie* case illustrates an example of a chaplain acting within his legal and ethical bounds in a proper fashion, whereas in *Benner* and *Moreno* the chaplains acted improperly. In the very difficult situation when a chaplain is told information by a Service member in confidence that suggests he poses an actual, immediate threat to himself or others – such as suicide or murder – the chaplain should advise the person to seek help voluntarily. In a dire situation involving immediate harm, *Isham* suggests that a chaplain can inform others to take necessary action to prevent that Service member from committing harmful activity (such as

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[176] *See* 57 M.J. 210, 213-214 (C.A.A.F. 2002) ("Appellant was seeking clerical help. Instead of providing confidential counseling, the chaplain informed appellant that he was obliged to report appellant's action and thus, unknown to the chaplain, breach the "communications to clergy" privilege. At this point, the chaplain was acting outside his responsibilities as a chaplain, and he was acting solely as an Army officer. As such, he was required to provide an Article 31 warning before further questioning.").

[177] *See supra* discussions at notes 114-22 and accompanying text on *U.S. v. Isham*, 48 M.J. 603 (1998) and notes 123-36 and accompanying text on *U.S. v. Shelton*, 64 M.J. 32 (2006), two recent Rule 503 cases which made use of the three-part Moreno test.

[178] U.S. v. Moreno, 20 M.J. 623, 626 (1985).

[179] 57 M.J. 210, 211-212 (2002) (discussing the facts of the case).

[180] *See* 1987 CMR LEXIS 622 at 1-3 (discussing facts in the *Beattie* case).

removing that person's weapon or placing him under observation) but not the reason for doing so in order to preserve confidentiality.[181]

The *Moreno* and *Coleman* rulings also indicate that the intention of the penitent has important implications for the applicability of Rule 503. Courts will examine whether communications are intended to be confidential from the perspective of the confessor, but as per *Coleman* will examine the totality of the factual background to determine whether the substance of the communication had already been known to others (and therefore not intended to be confidential),[182] and if the person communicated to was a clergyman acting within his/her professional capacity as a spiritual advisor. *Coleman* holds that if a person is primarily approached as a family member, Rule 503 does not apply.[183] The *Garries* and *Napolean* cases support *Coleman* in holding that for a person to be a clergyman covered by Rule 503, he/she must be a professional clergyman responsible for religious preaching, teaching, and counseling, and the confessor must "reasonably believe" the person to be so.[184] Rule 503 only applies to clergy or their assistants,[185] and not to deacons or lesser administrative positions within a church,[186] or to lay ministers.[187] The *Kidd* case is also relevant, as many chaplains may serve in dual roles as a matter of official assignment. In *Kidd*, a chaplain assigned to serve on a review board within a confinement facility was not considered a clergyman for purposes of Rule 503.[188] Additionally, the *Kidd* court indicated that in such a situation, there must be "clear evidence" that the chaplain was serving in a role as a clergyman as a spiritual advisor in order for coverage to apply.[189] This case law indicates that courts will permit a strict interpretation of Rule 503's requirements for who constitutes a clergyman,

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[181] 48 M.J. 603, 606 (1998) (holding that in the specific facts of *Isham*, action could be taken for the limited purposes of getting help to a service member while preserving confidentiality).

[182] *See Coleman*, 26 M.J. at 409 (discussing confidentiality in the *Coleman* case).

[183] *See id*. (discussing facts and holding of the *Coleman* case).

[184] *See* 19 M.J. 845, 860 (1985) (discussing whether the church deacon was a clergyman, and deciding that he was not).

[185] MIL. R. EVID. 503(B)(1-2).

[186] *See* 19 M.J. 845, 860 (1985) (discussing whether the church deacon was a clergyman, and deciding that he was not).

[187] *See* 46 M.J. at 116 (holding that a lay minister is not a covered clergyman).

[188] *See* 20 CMR 713, 714-719 (1955) (discussing whether chaplain was acting in hiscapacity as a clergyman while serving at a confinement facility and holding that he was not at the time he had received information about a plaintiff).

[189] *See id*. at 719 (discussing the court's consideration of the chaplain's dual roles at the confinement facility in Kidd).

and in what circumstances. Military chaplains should be cognizant of whether they are working in their professional capacities as spiritual or religious figures in their interactions with service members, and their assignments, circumstances, and individual relationships all factor into a determination of whether they are covered by Rule 503.

IV. Military Rule of Evidence 513: Privileged Communications and Psychotherapists

The military psychotherapist-patient privilege was created by an executive order from President Clinton in November of 1999.[190] The privilege is codified as Rule 513 of the Military Rules of Evidence. It creates a privilege on the part of a patient to prevent disclosure of confidential communications with psychotherapists in military courts.[191] As defined by the rule, a "psychotherapist" includes psychiatrists, clinical psychologists, clinical social workers, or other mental health professionals, who are licensed to provide such services, and their assistants, or people reasonably believed by a patient to have those credentials.[192] "Confidential" communications include those that are not

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[190] *See* 64 FR 55155 (1999) §2 (amending the Manual for Courts-Martial by Executive Order No. 13140 to include a psychotherapist-patient privilege).

[191] *See* MIL. R. EVID. 513(a):

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. *Id.*

[192] *See* MIL. R. EVID. 513(b)(2):

> A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials. *Id.*

intended to be disclosed to third persons other than those necessary for transmission of the communication.[193]

The establishment of the privilege came after the federal courts recognized its existence in the 1996 case of *Jaffee v. Redmond*.[194] In *Jaffee*, the Supreme Court identified the social policy rationale for creating the federal psychotherapist privilege:

> Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace . . .
>
> The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.[195]

Prior to *Jaffee*, the military courts had affirmatively rejected the notion that this privilege existed within the military, largely because the Military Rules of Evidence expressly barred—and still bars—a physician/doctor-patient privilege.[196] Following the lead of the federal courts, the military psychotherapist privilege was also created in recognition of the benefits of

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[193] *See* MIL. R. EVID. 513(b)(4): A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication. Id.

[194] 518 U.S. 1 (1996).

[195] *Id*. at 8-9.

[196] *See* MIL. R. EVID. 501(d): "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." See also Stacy E. Flippin, Military Rule of Evidence (MRE) 513: A Shield To Protect Communications of Victims and Witnesses to Psychotherapists, ARMY LAWYER 1, 2-7 (Sept. 2003) (outlining the development of the privilege in federal law and military cases ruling against it prior to 1999); Barbara J. Zanotti & Rick A. Becker, Marching to the Beat of a Different Drummer: Is Military Law and Mental Health Out-of-Step after Jaffee v. Redmond? 41 A.F. L. REV. 1, 1-25 (1997) (discussing the Jaffee ruling by the Supreme Court and historical treatment of the psychotherapist-privilege in federal law).

confidential mental health counseling. As recognized in the rule commentary, the military privilege "is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege."[197] The psychotherapist privilege thus facilitates a wider policy goal of encouraging servicemembers to seek help, albeit balanced against the special considerations of the military context. As also noted in the MRE commentary, these exceptions largely exist to further operational and mission success:

> In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules, when practicable and not inconsistent with the UCMJ or MCM, with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security.[198]

Thus, unlike the absolute privilege clergy have with Rule 503, there are seven significant exceptions to Rule 513. No psychotherapist privilege applies when the patient dies,[199] in communications which are evidence of child abuse/neglect, or in a proceeding in which a spouse is charged with a crime against a child or either spouse,[200] when federal or state law or service regulations require reporting of information,[201] when the psychotherapist believes the patient is a danger to others or himself,[202] in communications involving future commissions of crime,[203] when

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[197] *See* MCM, *supra* note 24, at analysis at App. 22-51 ("Rule 513 is not a physician-patient privilege. It is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege.").

[198] *Id*.

[199] *See* MIL. R. EVID. 513(d)(1) (stating privilege does not exist "when the patient is dead").

[200] *See* MIL. R. EVID. 513(d)(2) (stating privilege does not exist "when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse").

[201] *See* MIL. R. EVID. 513(d)(3) (stating privilege does not exist "when federal law, state law, or service regulation imposes a duty to report information").

[202] *See* MIL. R. EVID. 513(d)(4) (stating privilege does not exist "when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient").

[203] *See* MIL. R. EVID. 513(d)(5) (stating privilege does not exist "if the communication clearly contemplated the future commission of a fraud or crime").

necessary to ensure safety of military personnel, property, or missions,[204] and when a defendant provides information about his mental conditions pursuant to a military case not covered under other privileges.[205] The exceptions generally mirror those found in state law[206] and are thus very broad.

It is significant to note that the psychotherapist privilege has recently been amended for policy reasons. Prior to 2015, the privilege contained an eighth exception for "when admission of disclosure of a communication is constitutionally required."[207] This exception was often exploited by defense counsel to introduce mental health information as evidence for witness impeachment,[208] and was criticized for being particularly problematic in cases involving sexual assault.[209] The amendment removing that exception was directed through the National Defense Authorization Act (NDAA) for 2015 *Subtitle D, Military Justice, Including Sexual Assault and Domestic Violence Prevention and Response*,[210] ostensibly reflecting congressional intent to reform Uniform Code of Military Justice and MRE provisions dealing with the problem of sexual assault and violence in the military.[211] Eliminating the

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[204] *See* MIL. R. EVID. 513(d)(6) (stating privilege does not exist "when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission").

[205] *See* MIL. R. EVID. 513(d)(7) (stating privilege does not exist "when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302").

[206] For a discussion of legal requirements implicating confidentiality of psychotherapists, see Bruce Sales, Mark DeKraai, Susan Hall & Julie Duvall, Child Therapy and the Law, in THE PRACTICE OF CHILD THERAPY 519-542 (Richard Morris & Thomas Kratochwill eds., 4th ed., 2007); Mark DeKraai & Bruce Sales, Confidential communications of psychotherapists, 21 Psychotherapy 293-318 (1984); Mark DeKraai & Bruce Sales, Privileged communications of psychologists, 13 Professional Psychology: Research and Practice 382 – 388 (1982).

[207] Manual for Courts-Martial, United States, MIL. R. EVID. 513(d)(8) (2012).

[208] *See* Major Michael Zimmerman, *Rudderless: 15 Years and Still Little Direction on the Boundaries of Military Rule of Evidence 513, 223 MIL. L. REV. 312, 313 (2015) (discussing the scenario of using the constitutionality exception in defenses to impeach witnesses based on mental health information).*

[209] *See* Major Angel M. Overgaard, *Redefining the Narrative: Why Changes to Military Rule of Evidence 513 Require Courts to Treat the Psychotherapist-Patient Privilege as Nearly Absolute. 224 MIL. L. REV. 979, 980-81 (2016) (discussing the scenario of defense counsel using the constitutionality exception in sexual assault cases, and asserting that the "privilege's misapplication was re-victimization of sexual assault victims").*

[210] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter NDAA 2015].

[211] *See* Overgaard, *supra* note 228 at 982-83 (discussing congressional intent and national interest in preventing sexual assault and providing due protections to victims).

constitutionality exception thus prevented the possibility of a broad search through a potential victim's therapy records on the basis of constitutionality for purposes of impeachment, a concern the MRE drafting committee had when crafting the exceptions.[212]

Similarly, the NDAA of 2015 also clarified the procedural requirements for MRE 513 hearings. Prior to the changes, if a party sought to introduce evidence in which there was a dispute as to whether it was covered by an exception, the rule simply stated that the military judge must first examine the evidence *in camera*, though no further guidance was provided as to when that would be appropriate.[213] Thus, highly sensitive information could be easily reviewed in closed sessions. As discussed at length by Major Michael Zimmerman,[214] the 2015 amendments incorporated elements from the *Klemick* case,[215] discussed *infra*,[216] establishing clear thresholds necessary to conduct *in camera* review of the mental health information. This includes a finding by the judge by a preponderance of evidence that the moving party has shown a reasonable likelihood that the evidence fits under one of the MRE 513 exceptions,[217] is not cumulative of other information,[218] and the moving party made reasonable efforts to obtain the same information from non-privileged sources.[219] The NDAA amendments also provided victims the right to

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[212] *See* Manual for Courts-Martial, United States, MIL. R. EVID. 514 (2012), analysis at App. 22-46 (discussing exceptions to MRE 513 and 514 and noting concern that "this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless"). See also Major Cormac M. Smith, Applying the New Military Rule of Evidence 513: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice, THE ARMY LAWYER, Nov. 2015, 6, at 6 (describing the scenario where sexual assault victims' psychotherapy records are produced for in camera review under the constitutionality exception); Zimmerman, supra note 227 at 329-333 (discussing concern brought about by the constitutionality exception that would allow searching through very private and personal mental health records of victims).

[213] *See* Manual for Courts-Martial, United States, MIL. R. EVID. 513(3)(3) (2012) (stating that review of evidence must be done by a military judge in camera). For an example of a pre-Klemick case in which in camera review of mental health records with little additional guidance is presumed, see United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

[214] *See* Zimmerman, *supra* note 227 at 331-336 (discussing post-NDAA 2015 requirements to MRE 513 derived from the Klemick case).

[215] 65 M.J. 576 (2006).

[216] See discussion *infra* on the 2006 *Klemick* case at notes 261-270.

[217] MCM, *supra* note 24, MIL. R. EVID. 513(e)(3)(A-B).

[218] *Id*. at MIL. R. EVID. 513(e)(3)(C).

[219] *Id*. at MIL. R. EVID. 513(e)(3)(D).

petition for a writ of mandamus to compel compliance to these requirements if they believed they were being violated.[220]

Another noteworthy addition in the 2015 amendments to the rule included an expansion of the definition of psychotherapists to include other mental health professionals.[221] Previously, the privilege's definition of a psychotherapist was restricted to a psychiatrist, clinical psychologist, or clinical social worker.[222] Expanding that definition to include other mental health professionals ostensibly indicates that professionals such as licensed professional counselors, alcohol and drug abuse counselors, nurse psychotherapists, and marital and family therapists, may also now be covered by the privilege. In theory, this broadening of the definition of psychotherapists should also include pastoral counselors—clergy members with clinical training to provide counseling or psychotherapy. Some states do specifically license clinical pastoral therapists, or if not, pastoral counselors can apply for and practice as other types of mental health professionals, such as licensed marriage and family therapists.[223] Pastoral counselors typically blend clinical psychotherapy and counseling techniques with their theological and spiritual training to address issues like addiction and recovery, relationships, and spiritual and moral injuries.[224] The inclusion of pastoral counselors as psychotherapists covered by Rule 513 has important implications for clearly identifying relationships, roles, and ethical boundaries during interactions with patients and other professionals in a mental health setting.

By both removing the constitutionality exception, and expanding the coverage of the privilege to include a greater scope of mental health professionals, Congress effectively strengthened the psychotherapy privilege, a trend which ostensibly facilitates the goal of encouraging servicemembers to seek confidential mental health counseling from qualified professionals.

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[220] *See* NDAA 2015, *supra* note 229, at §537(1) (providing for victims to petition for a writ of mandamus to enforce compliance with the MRE 412 and 513).

[221] *See id.* §537(1) (stating that Rule 513 be expanded to cover "other licensed mental health professionals").

[222] *See* Manual for Courts-Martial, United States, MIL. R. EVID. 514 (2012),

[223] *See* American Association of Pastoral Counselors, Licensing, http://www.aapc.org/Default.aspx?ssid=74&NavPTypeId=1189 (last visited April 6, 2017) (outlining state licensing status for pastoral counselors).

[224] *See generally*, ROBERT J. WICKS, RICHARD D. PARSONS, & DONALD CAPPS, CLINICAL HANDBOOK OF PASTORAL COUNSELING, VOL. 1 (1993).

A. Setting the foundations in *Jenkins* and *Klemick*

Two early cases in which a military court examined the new privilege of Rule 513 were *United States v. Rodriguez* (C.A.A.F. 2000)[225] and *United States v. Paaluhi* (C.A.A.F. 2000).[226] *Rodriguez* involved a defendant stationed in Bosnia who rigged a weapon to shoot himself in order to avoid duty. During counseling treatment with a psychiatrist, Rodriguez admitted he intentionally shot himself to get out of duty and was not suicidal. That testimony was later introduced in his court-martial, and he was subsequently found guilty of wounding himself to avoid hazardous duty.[227] The shooting, communication with the psychiatrist, and original court-martial all took place prior to when Rule 513 was established. Rodriguez argued to the Court of Appeals for the Armed Forces that the psychotherapist privilege prevented the testimony from being introduced, but the court instead ruled that because the military psychotherapist privilege was not yet in force at the time of the activity in question, it did not shield the communications.[228] Similarly, *Paaluhi* involved a defendant's confession to a Navy psychologist that he had been having sexual relations with his stepdaughter, though those communications also occurred before the military psychotherapist privilege had been recognized.[229] As in *Rodriguez*, the Court of Appeals for the Armed Forces also ruled that the privilege did not apply because the incriminating statements were made in 1996, prior to the creation of the privilege.[230]

It was not until 2006 that the courts examined two cases with significant substantive repercussions. One was *United States v. Jenkins* (C.A.A.F. 2006),[231] in which the Court of Appeals for the Armed Forces scrutinized the breadth of the exceptions under Rule 513. The other major case was *United States v. Klemick* (N-M. Ct. Crim. App. 2006).[232] *Klemick* established parameters for Rule 513 hearings that would later be

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225 54 M.J. 156 (C.A.A.F. 2000).
226 54 M.J. 181 (C.A.A.F. 2000).
227 *See Rodriguez*, 54 M.J. 156, 156-158 (C.A.A.F. 2000) (stating background facts to the case).
228 *See* 54 M.J. at 160-61 (finding that presidential intent towards the psychotherapist privilege controlled the outcomes of the case).
229 *See id*. at 182-84 (discussing the timing and background of Paaluhi's communications to the Navy clinical psychologist).
230 *See id*. at 183 (holding no military psychotherapist privilege existed at the time of the activity in question).
231 63 M.J. 426 (C.A.A.F. 2006).
232 65 M.J. 576 (N-M. Ct. Crim. App. 2006).

incorporated into the 2015 NDAA amendments, and is thus significant for strengthening the psychotherapist privilege in light of its many exceptions.

In *Jenkins*, the defendant was drunk and accosted a black airman with racial taunts. During the confrontation, Jenkins drew a knife and chased the airman while yelling "I'm going to kill y'all n****** tonight." He was apprehended by military police and released the next day, and ordered to walk home by the officer in charge. He then told friends about the officer in command: "That f****** bitch made me mad . . . I would have cut her f****** throat." His behavior was reported to command, and he was directed to a mental health evaluation by the command clinical psychologist.[233] At his court-martial, the psychologist testified that Jenkins had abnormally high anger, low self-control, should be confined due to his danger to others, and should ultimately receive treatment outside of the military.[234] He was subsequently found guilty on several charges of disorderly conduct, threats, and substance abuse, and ordered to jail time and then dishonorable discharge.[235]

Before the Court of Appeals for the Armed Forces, Jenkins argued that the court-martial judge had erred by allowing the psychologist to testify via the "dangerousness" exceptions to the psychotherapist privilege: 513(d)(4)—when a psychotherapist believes the patient is a "danger to any person, including the patient";[236] and 513(d)(6)—"when necessary to ensure the safety and security of military personnel."[237] He asserted that the exceptions were so broad and vague, that a reasonable Service member could not know what would or would not qualify under these dangerousness exceptions, and that their ambiguity was thus unfair to prospective mental health patients.[238] The court recognized that the exceptions were broad, and their applicability necessitated a fact-specific inquiry by judges.[239]

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[233] *See id*. at 427 (describing the defendant's behavior).

[234] *See id*. at 428 (describing the findings and testimony of the clinical psychologist to Jenkins' mental state of mind).

[235] *See id*. at 426 (describing charges and sentencing for defendant).

[236] MIL. R. EVID. 513(d)(4).

[237] MIL. R. EVID. 513(d)(6).

[238] *See* 63 M.J. at 429-430 (describing defendant's arguments that the exceptions to Rule 513 were unfairly broad and demanded more specific definitions).

[239] *See id*. at 430 (noting that "Whether the exceptions apply is necessarily a fact-specific determination for a military judge to consider with an accurate awareness of the facts underlying the dispute, just as hearsay determinations necessarily involve context. It is for this reason that the M.R.E. forego detailed analyses of their application in different factual scenarios").

In its ruling, the court declined to establish new tests, and held that the factual evidence was sufficient to indicate that the dangerousness exceptions applied. Jenkins had chased another airman with a knife, threatened to kill the commanding officer, and the psychologist had tested and confirmed Jenkins' anger and control issues. The court concluded that, "[a]lthough we may not at this point be able to determine every context in which M.R.E. 513(d)(4) and (6) might apply, we conclude with confidence that the two exceptions were implicated when Appellant made threats to kill persons while brandishing a fourteen-inch knife."[240] *Jenkins* serves as a clear example of the rationale for these dangerousness exceptions to psychotherapy communications. The court found no need to further narrow the exception language beyond the text of the rule. The presence of actual death threats, as well as the findings of the clinical psychologist establishing the defendant's dangerousness, were sufficient to trigger those exceptions to the psychotherapist privilege.

United States v. Klemick[241] involved a determination of whether a factual basis was necessary to review evidence *in camera* (in private) for admissibility under the Rule 513(d)(2) exception for communications that are evidence of child abuse. Klemick had been charged with assault and manslaughter following the shaking death of his baby child. During his court-martial, the government had sought admission of treatment information from discussions between Klemick's wife and her psychotherapist following the child's death. The military prosecutor argued that the information could be introduced as an exception to the psychotherapist privilege because it was relevant to the case, over the protests of both Klemick and his wife, who was unavailable to testify due to a high-risk medical situation.[242] The trial judge reviewed the psychotherapist records *in camera*, and then released portions of it to both the defense and prosecution to be potentially used in cross-examination as part of Rule 513(e) procedures for evidentiary review.[243] Klemick was subsequently convicted of manslaughter, and argued on appeal that prior

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[240] *Id*. at 431.

[241] 65 M.J. 576 (N-M. Ct. Crim. App. 2006).

[242] *See id*. at 578 (noting the argument that the psychotherapist records which show information about "substantive events in the instant case").

[243] *See* MIL. R. EVID. 513(e)(2-3) (stating that "[b]efore ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing . . . The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion").

to *in camera* review of evidence, some threshold indication of evidentiary relevance must be established to use the exception.[244]

The Navy-Marine Court of Criminal Appeals noted that there was no prior precedent within military or federal law to the immediate question, and then looked to state law for relevant cases.[245] Citing the Wisconsin Supreme Court case of *Wisconsin v Green*,[246] the military court quoted Wisconsin's ruling requiring in such circumstances "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence."[247] Adapting this threshold, the Navy-Marine Court identified a three-part test for Rule 513 requiring a determination of whether (1) a specific factual basis showed a "reasonable likelihood" that privileged records were admissible under the child abuse exception, (2) the information had independently probative value and was not just cumulative to other information already available, and (3) a requirement that reasonable efforts were made to obtain the "same or substantially similar information through non-privileged sources."[248] In *Klemick*, the government had satisfied each of these requirements. The known facts of the case were enough to demonstrate the likelihood that the psychotherapist records of Klemick's wife were reasonably likely to contain information related to child abuse, that information had independent probative value, and attempts had been made to interview the wife but were unsuccessful as she was experiencing medical issues.[249] The *Klemick* ruling thus established the threshold to determine requirements for review of privileged communications, with the relevant standard being "reasonable likelihood" that it was admissible. As noted *supra*,[250] the *Klemick* analysis was incorporated into the NDAA 2015 amendments as part of an effort to strengthen the privilege.

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[244] *See* 65 M.J. at 579 (outlining the defendant's arguments about that the "[g]overnment showing in this case was not sufficient to pierce the veil of privilege").

[245] *See id*. ("We have found no applicable military or Federal case law. For their persuasive authority only, we will consider State appellate court decisions addressing the issue of prerequisites for in camera review under State psychotherapist-patient privilege rules similar to MIL. R. EVID. 513.").

[246] 253 Wis. 2d 356 (2002).

[247] *See* 65 M.J. at 579 (citing *Wisconsin v. Greene*, 253 Wis. 2d 356 (2002)).

[248] *Id*. at 580.

[249] *See id*. (outlining reasons why "the Government satisfied this three-part standard").

[250] *See* footnotes 226-243 *et seq* and accompanying text discussing the NDAA 2015 changes.

B. Introducing sexual behavior evidence via the constitutionality exception to Rule 513: *Nixon, Hohenstein, Palmer*, and *Hudgins*

United States v. Nixon (A.F. Ct. Crim. App. Nov. 14, 2012),[251] *United States v. Hohenstein* (A.F. Ct. Crim. App. July 1, 2013),[252] *United States v. Palmer* (A.F. Ct. Crim. App. Nov. 25, 2013),[253] and *United States v. Hudgins* (A.F. Ct. Crim. App. Nov. 25, 2013),[254] are pre-NDAA 2015 cases that illustrated how the constitutionality exception of MRE 513 was litigated as a defense tactic. Under this exception, a move to admit mental health records under an argument that it furthered constitutional rights to a fair trial (e.g. via the sixth amendment) was possible. Defense would also seek to introduce evidence about sexual behavior that would bypass MRE 412,[255] the military rape shield provision (which was also strengthened under NDAA 2015 amendments to protect victims of sexual assault).[256]

United States v. Nixon[257] was an appeal based on an asserted error in the introduction of potential impeachment or exculpatory evidence. Defendant Nixon allegedly sexually assaulted three of his daughters, which he had admitted to his wife.[258] Nixon was subsequently convicted of rape and sentenced to 18 years confinement.[259] Prior to his court-martial, the military judge had reviewed *in camera* the mental health records of his wife and three daughters, and subsequently released a summarized portion of the records – but not all of them – to the defense and prosecution. On appeal to the Air Force Court of Criminal Appeals, Nixon argued that the judge erred by not releasing all of those records, as they arguably would have showed that A) one of his daughters had been untruthful about her sexual activity, and B) another daughter may have been sexually abused by her brother, not Nixon, and that her recollection about who assaulted her may thus not have been correct.[260] To support his assertion, Nixon relied on the Military Rules of Court Martial

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[251] 2012 WL 5991775 (A.F. Ct. Crim. App. Nov. 14, 2012).
[252] 2013 WL 3971576 (A.F. Ct. Crim. App. July 1, 2013)
[253] 2013 WL 6579713 (A.F. Ct. Crim. App. Nov. 25, 2013).
[254] 2014 WL 2038866 (A.F. Ct. Crim. App. Apr. 3, 2014).
[255] MCM, *supra* note 24, MIL. R. EVID. 412.
[256] *See* NDAA 2015, *supra* note 229, at §537(1) (providing for victims to petition for a writ of mandamus to enforce compliance with the MRE 412 and 513).
[257] 2012 WL 5991775 (A.F. Ct. Crim. App. Nov. 14, 2012).
[258] *See id*. at 1 (discussing facts involving Nixon's sexual assaults on his daughters).
[259] *See id*. (discussing court-martial and sentencing of defendant).
[260] *See id*. at 16 (outlining Nixon's arguments that information not released may have altered or mitigated the case against him).

701(a)(2)(B), which allow the defense in discovery to obtain "results or reports of physical or mental examinations . . . which are within the possession, custody, or control of military authorities . . . and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial."[261]

The court disagreed with Nixon. It noted that Rule of Evidence 412[262] prevents the admission of evidence of a victim's sexual behavior unless it is offered to prove someone other than the accused was the source of semen, injury or other evidence, proves consent, or violates the constitutional rights of the accused.[263] It also noted that despite the Courts-Martial Rule 701(a)(2)(B), Rule 513 protects psychotherapist records.[264] In this case, the court held that the information from the records was appropriately withheld by the trial judge because its alleged contents

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[261] Rules for Court Martial 701(a)(2)(B).

[262] *See* MIL. R. EVID. 412(a)(1-2):

> (a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> (2) Evidence offered to prove any alleged victim's sexual predisposition.

Id. It is noted in the official commentary to the Military Rules of Evidence that the purpose of Rule 412 is "intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses." *See* MANUAL FOR COURTS MARTIAL UNITED STATES A22-36 (2012).

[263] *See* MIL. R. EVID. 412(b)(1)(A-C):

> (1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
> (C) evidence the exclusion of which would violate the constitutional rights of the accused.

Id.

[264] *See* 2012 WL 5991775 at 17 (stating that "Mil. R. Evid. 513(a) protects the records covered under R.C.M. 701(f), and none of the exceptions under Mil. R. Evid. 513(d)(1)-(8) justify disclosure in the case sub judice").

amounted to an "alleged act of a third party, and not the accused."[265] The alleged content would not have resulted in a reasonable probability that its disclosure would have changed the result of the case in light of the totality of the evidence, as enough evidence existed pointing to Nixon's guilt, and it would outweigh any probative value of speculation that the records may have helped Nixon's position.[266] Finally, the contents of the records were not admissible under any of the exceptions of Rule 412.[267]

United States v. Hohenstein[268] featured a similar discovery-based argument as that in *Nixon*. Defendant Hohenstein had allegedly sexually assaulted a friend of his daughter's during a sleepover. Hohenstein denied the assault had occurred.[269] The trial record showed that in addition to the assault, there was a dispute about whether the victim had been truthful about another sexual assault that had allegedly occurred a year earlier by a different perpetrator.[270] The military judge, however, had not introduced evidence of that prior alleged assault as it was prevented by Rule of Evidence 412, which bars admissibility of evidence of prior sexual behavior unrelated to the immediate case.[271] Hohenstein argued that evidence of her untruthfulness regarding the prior assault should be used to question her credibility.[272] Following his conviction, the Air Force Court of Criminal Appeals ruled that the trial judge had correctly excluded evidence regarding the alleged prior assault because it was not relevant to Hohenstein's case and risked prejudice towards the victim.[273] Hohenstein also argued that the judge erred by not admitting evidence from the victim's discussions with a psychotherapist, which he argued was admissible under Rule 513(d)(8) (no psychotherapy privilege "when admission or disclosure of a communication is constitutionally required"), because he could use that information to impeach the victim.[274] The court

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[265] *Id*. at 17.

[266] *See id*. at 18 (noting that the alleged information not disclosed, in order to be material to Nixon's case, had to have been information that would have created a reasonable probability that its disclosure would have resulted in a different conclusion).

[267] *See id*. (noting that "[f]inally, even if the appellant was entitled to discover this information, Mil. R. Evid. 412 barred its admission, and none of the exceptions under Mil. R. Evid. 412(b) apply").

[268] 2013 WL 3971576 (A.F. Ct. Crim. App. July 1, 2013).

[269] *See id*. at 1-2 (discussing the facts of the case).

[270] *See id*. at 1-2 (discussing the alleged sexual assault a year earlier).

[271] *See* MIL. R. EVID. 412(a)(1-2) (barring evidence about a victim's prior sexual behavior).

[272] *See* 2013 WL 3971576 at 2 (outlining the appellant's argument about judicial error).

[273] *See id*. at 4 (agreeing with the trial judge that the evidence of the prior alleged sexual assault was correctly excluded under Rule 412).

[274] *See id*. at 5 (discussing the alleged error under Rule 513).

also ruled against Hohenstein on this point, noting that the trial judge had correctly reviewed the psychotherapist records *in camera*, found that there was no or little information relevant to the defense within the privileged information, and thus properly excluded it.[275] The *Hohenstein* ruling, along with *Nixon*, confirmed that the courts are reluctant to admit evidence from psychotherapy records via the 513 child abuse ((d)(2)) or constitutionality ((d)(8)) exceptions, though they also reflect how the constitutionality exception served as an opportunity for defense counsel to exploit.

Palmer involved an assignment for error regarding a trial judge's discretion in the limited release of psychotherapist records. Palmer was the next door neighbor of the alleged victim. During a night of drinking at his house, Palmer slipped some GHB "date rape" drug into the victim's drink, and sexually assaulted and raped her while she was unconscious. Upon waking up, she was taken to the hospital for examination, where doctors found both traces of GHB in her urine, and physical evidence of the sexual assault.[276] The victim also testified to having nightmares and being emotionally upset after the experience.[277] Palmer was subsequently convicted by the trial judge of rape, and sentenced to four years in prison.

Before the Air Force Court of Criminal Appeals, Palmer argued that the trial judge had erred by not allowing further evidence from the victim's psychotherapist records be used in cross-examination.[278] Prior to the rape, the victim had been seeing a psychotherapist and had taken a mental health questionnaire with forty-five questions on it. Several weeks after the rape, she re-took the same questionnaire. The military judge had released all records to both parties prior to trial, but only allowed the defense to cross-examine the victim on 5 of the 45 questions. Palmer's argument was that being allowed to cross-examine her on all the questions would have shown that her test results had not changed following the incident, indicating that the rape did not badly affect her.[279]

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[275] *See id*. (stating "[w]e agree with the military judge. As he pointed out, the evidence in the mental health records was 'scant.'")

[276] *See* Palmer, *supra* note 273 at 1-3 (describing the facts of the case).

[277] *See id*. at 4 (noting that the victim had testified about having nightmares and becoming upset whenever she encountered the perpetrator after the attack).

[278] *See id*. (outlining Palmer's assertions on appeal regarding the victim's mental health records).

[279] *See id*. ("The trial defense counsel's argument was that her overall interpersonal relations score remained essentially the same, which showed she was not affected by the rape.").

In its review of the trial judge's discretion, the court noted that judges "have broad discretion to impose reasonable limitations on cross-examination"[280] as per Rule 513(e)(4) procedures in the judge's determination of admissibility of patient records.[281] However, the Rule 513(8) exception allowing disclosure of communication when constitutionally required still requires admission of evidence if it is necessary for one's constitutional right to confront witnesses under the sixth amendment.[282] In the immediate case, the victim had testified about having nightmares after the incident, and the trial judge had restricted cross-examination using the questionnaire only to those items relevant to that specific testimony, and not all the mental health records. The court thus concluded that this narrowing by the trial judge had "struck an appropriate balance between the appellant's constitutional rights and the alleged victim's privileged communications to her mental health provider."[283] The conviction of Palmer was therefore upheld.

Hudgins[284] involved a similar situation to that of *Palmer*. In *Hudgins*, the defendant allegedly raped two airwomen in two different and separate times. Physical medical examination had confirmed at least one of the sexual assaults. One victim had reported the alleged rape weeks after it had occurred, only after experiencing nightmares and her boyfriend encouraged her to report it to her command. Hudgins had denied the charges and testified that the sex was consensual. The trial judge reviewed records from a psychotherapist the victim had been seeing, and released selected amounts to the defense.[285] Hudgins was ultimately convicted of the charges, but on appeal he argued the trial judge had erred by not providing more of the victim's psychotherapist records under the constitutionality exception of Rule 513(d)(8).[286] He argued the theory that the

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[280] *See* 2013 WL 6579713 at 4 (citing *U.S. v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F.2000)).

[281] *See* MIL. R. EVID. 513(e)(4) ("To prevent unnecessary disclosure of evidence of patient's records or communications, the military judge may issue protective orders or may a admit only portions of the evidence.").

[282] *See id*. at 4-5 (discussing the constitutionality requirements regarding cross examination and exceptions to privileged psychotherapist records).

[283] *Id*. at 5.

[284] 2014 WL 2038866 (A.F. Ct. Crim. App. Apr. 3, 2014).

[285] *See id*. at 1-4 (discussing the factual background to the case and the situation involving airman A1C PS).

[286] *See id*. at 5 (outlining the defendant's arguments that more of the victim's mental records should have been release because they were constitutionally required for at least two reasons).

psychotherapist records would have shown the victim's relationship with her boyfriend was not strong, and that she made up the allegation of assault so her boyfriend would not know the sex was consensual.[287]

In reviewing *Hudgins*' argument, the appellate court recognized that Rule 513(d)(8) required disclosure of psychotherapist records when constitutionally required.[288] It applied an analysis to determine if any error in not releasing further records was harmless beyond a reasonable doubt.[289] Noting that the records in question did not have any compelling evidence to show a poor relationship between the victim and her boyfriend, and the fact that defense counsel had an opportunity to cross examine the victim on the alleged issue but did not, the appellate court decided that any error was harmless beyond a reasonable doubt, and thus had no or little impact on the court-martial to find that the information was constitutionally required.[290]

D. Synopsis of Rule 513 Cases

Significant case law surrounding Military Rule of Evidence 513 case law has largely focused on evidence admissibility issues for information covered under one of the rule's broad exceptions. The *Klemick* case, and the incorporation of the court's holding into the post-NDAA 2015 Rule 513, have provided additional protections for mental health records by closing the constitutionality exception and clarifying the evidentiary

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[287] *See id*.:

> "He argues such records were constitutionally required for two reasons: (1) The defense could have used the records to counter A1C PS's testimony in the Mil. R. Evid. 412 hearing that her relationship with her boyfriend was very strong; and (2) The statements in the mental health records could have supported the defense's theory that A1C PS fabricated the sexual assault allegation to cover up a consensual sexual encounter with the appellant out of fear that her boyfriend would be upset with her."

Id.

[288] *See id*. (citing Rule 513(d)(8) regarding the constitutional exception to the psychotherapist privilege record).

[289] *See* 2014 WL 2038866 at 5-6 (examining the trial judge's admittance of evidence to determine if an error was harmless beyond a reasonable doubt).

[290] *See id*. at 5 ("Trial defense counsel's own actions therefore demonstrate that the additional evidence contained in A1C PS's mental health records was not so probative as to be constitutionally required, or if it was required to be disclosed, its absence was harmless beyond a reasonable doubt.").

threshold for *in camera* review of evidence for introduction. These changes presumably support the wider policy objectives of protecting victim's rights, as well as encouraging individuals to seek help from psychotherapists without fear that highly personal information would be used in cross-examination.

Outside of these cases, there is a dearth in case law examining the other parameters of the Rule 513 exceptions. *Jenkins* remains a vitally important holding. The narrow ruling indicates that testimony of a psychotherapist will be allowed under the dangerousness exception if the behavior of the person at issue rises to level of assault and death threats. This suggests that courts will examine the total circumstances of a case to determine if a psychotherapist's assessment of an individual as dangerous is warranted. The broader relevance of *Jenkin*s is that it reflects judicial deference to psychotherapists' determinations of dangerousness, and the extent to which the psychotherapist privilege is limited by the exception. This clearly reflects the valid military concerns of ensuring the safety and security of other personnel, and the success of military operations and missions.

V. Conclusion: Towards Guidance for Chaplains and Mental Health Practitioners in the Military

We found no cases directly involving chaplains and mental health providers working together in a military context, either by design or happenstance. Additionally, we found no instances of official regulation for the joint handling of confidential, sensitive information by chaplains and mental health providers working together. This seems to suggest that this is an area in need of policy guidance, particularly given the fact that the handling of sensitive mental health-related information is a significant concern for many servicemembers, and that efforts to integrate chaplains and mental health providers together have become more pronounced with the Integrated Mental Health Strategy. Recent surveys conducted by the DoD to explore implementation strategies of the Integrated Mental Health Strategy indicate that military chaplains welcome collaboration with mental health professionals.[291] The desire by both professionals in the field and leadership to improve collaboration also justifies a

[291] *See* Jason A. Nieuwsma et al., *Chaplaincy and mental health in the Department of Veterans Affairs and Department of Defense*, 19 J. HEALTH CARE CHAPLAINCY 3, 13 (2013) (discussing results of DVA / DoD chaplain survey which indicated 95% support for closer collaboration between chaplains and mental health professionals).

reconsideration of how the military rules of evidence would facilitate such collaboration, and whether any changes to the rules, or to practices, are necessary.

This review of the MRE 503 and 513 case law is helpful in conceptualizing how each rule facilitates the wider policy rationales of each privilege, and its applicability to the current needs of the military. Developments in Rule 513 demonstrate an adherence to wider policy goals. As recognized by the Supreme Court in *Jaffee* and the MCM commentary, the policy rationale behind the psychotherapist privilege codified in MRE 513 is to encourage servicemembers to seek help and counseling from mental health professionals.[292] This rationale is, however, balanced against the military interests of preventing dangers to oneself or others, criminal activities, or other issues that jeopardize safety, security, and the success of military missions.[293] This includes exceptions for other compelling societal and military interests, such as preventing child abuse.[294] Appellate case law surrounding MRE 513 reflected how the constitutionality exception of the rule allowed for mental health records to be scrutinized in courts. The NDAA 2015 amendments eliminating that exception thus reflect a clear intent to strengthen the psychotherapist privilege, furthering the policy of encouraging servicemembers to seek help from psychotherapists without a concern that such very personal information might be reviewable in evidentiary hearings. This development should thus be welcome by patient-servicemembers, plaintiff-victims, mental health professionals, and the military in general.

Whereas the policy rationale of the psychotherapist privilege is to encourage help-seeking behavior among servicemembers, the historical and still main policy reason behind MRE 503 is to facilitate free expression of religion within the services.[295] Courts like *Moreno* have recognized that this includes safeguarding communications between individuals and clergyman about deeply personal, troubling matters.[296]

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[292] *See supra* footnotes 208-216 and accompanying discussion about the policy rationale behind Rule 513.
[293] *See* MCM, *supra* note 24, MIL. R. EVID. 513(d)(1-7) (listing exceptions to the psychotherapist privilege).
[294] *See id*. at (d)(2) (stating no privilege for evidence of child abuse or neglect).
[295] *See supra* footnotes 77-84 and accompanying discussion about the policy rationale behind Rule 503.
[296] *See United States v. Moreno*, 20 M.J. 623 (A.C.M.R. 1985):

Cases under MRE 503 such as *Beattie*, *Isham*, and others, do indeed indicate that, at times, military chaplains are confronted with situations that present clear and sometimes immediate dangers.[297] Although it is unclear how often this occurs, it does raise legitimate questions about the clergy privilege. Commenters have debated why, for example, the compelling state interest in protecting children from abuse does not apply to military chaplains vis-a-vis an exception to privileged communications, when it does for military psychotherapists and their civilian clergy counterparts through state law.[298] No official rationale has been offered by military or courts to precisely explain the uniquely absolute privilege military clergy maintain, but it is likely a combination of historical deference to the profession, an unwillingness by the military to intrude on religious expression generally, and most importantly, a recognition that weakening the privilege would dis-incentivize confidential communications and counseling with chaplains. The absolute nature of the privilege thus seems to affirm an unspoken position by the military placing great value on the importance of completely confidential communications with chaplains and its role in troop morale and military life. This policy position is affirmed in rulings like *Beattie* and *Isham*, which recognize an important role for chaplains in referring troubled servicemembers to others in cases of immediate danger, while maintaining the confidentiality of communications.[299]

The desire of the military to integrate chaplains more prominently in mental health presents at least two different policy approaches. Professional military chaplains, such as certified pastoral counselors, have shown both greater aptitude and willingness to address servicemembers' mental health issues. This signifies an opportunity to potentially expand the role of military chaplaincy from its historical role of facilitating freedom of religious expression to a more pronounced and specific role in

> The privilege regarding communications with a clergyman reflects an accommodation between the public's right to evidence and the individual's need to be able to speak with a spiritual counselor, in absolute confidence, and disclose the wrongs done or evils thought and receive spiritual absolution, consolation, or guidance in return.

Id. at 626.

[297] *See supra* footnotes 111-122 and accompanying discussion on MRE 503 cases.

[298] For a comprehensive discussion of this debate, see Shane Cooper, *Chaplains Caught in the Middle: The Military's 'Absolute' Penitent-Clergy Privilege Meets State "Mandatory' Child Abuse Reporting Laws*, 49 NAVAL L. R. 128 (2002).

[299] *See supra* footnotes 111-122 and accompanying discussion on MRE 503 cases.

facilitating spiritual care within the larger military health system. The argument for doing so would be grounded in two general assertions. First would be that spiritual well-being plays an important role in overall well-being and health, and that chaplains are uniquely fit to address this role.[300] The second assertion would be that chaplains already play a *defacto* role as informal (and sometimes formal) mental health professionals, in addition to their traditional role of facilitating religious expression. A formal recognition of a shift in the overall responsibilities of military chaplains would be a major sea change in policy, however. Arguably, such a shift *might* involve a corresponding change in the MRE 503 as well, but such a debate would involve multiple considerations. We would anticipate that major questions would revolve around the extent to which the absolute privilege for clergy would be suitable in situations where chaplains assume a role that falls outside of religious communications, and into the realm of psychotherapy. The related major question would therefore be whether "spiritual care" is a part of religious communications (covered under MRE 503), or psychotherapy (covered under MRE 513), and identifying where the line between the two exists.

A second approach, and likely the approach that will be maintained for the foreseeable future, is maintenance of the status quo in terms of the official roles of chaplains and psychotherapists in the military, and their respective privileges of communication. However, this does not diminish the need to address the need to better facilitate integration and collaboration between the two professions in terms of improving practices. For example, the presence of chaplains in treatment settings is not new, but their role as an active treatment team member may not be fully understood by servicemembers who have expectations of complete confidentiality in

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[300] Numerous studies have linked spiritual health, religiosity, and well-being with the presence or absence of depression or other mental health issues, substance abuse issues, and health resiliency in general. This can be particularly prominent among military veterans and/or PTSD survivors. See for example, Kenneth Pargament & Patrick J. Sweeney, Building Spiritual Fitness in the Army: An Innovative Approach to a Vital Aspect of Human Development, 66 AM. PSYCHOLOGIST 58 (2011) (presenting the conceptual model for spiritual fitness within the U.S. Army). Numerous studies or models have linked spiritual health, religiosity, and well-being with the presence or absence of depression or other mental health issues, substance abuse issues, and health resiliency in general. See Jill Bormann et al., Spiritual Wellbeing Mediates PTSD Change in Veterans with Military-Related PTSD, 19 INTL. J. BEHAVIORAL MED. 496 (2012); Joseph m. Currier et al., Spiritual Functioning among Veterans Seeking Residential Treatment for PTSD: A Matched Control Group Study, 1 SPIRITUALITY IN CLINICAL PRACTICE 3 (2014); Brett Litz et al., Moral Injury and Moral Repair in War Veterans: A preliminary Model and Intervention Strategy, 29 CLINICAL PSYCH. R. 695 92009).

their interactions with them. Commenters have offered suggestions for how practices can be improved to clarify role boundaries and expectations, and develop or augment systems of support to further collaboration, effective communication, and positive outcomes for servicemembers. For example, credentialing of chaplains to work in mental health environments within military settings should include guidance to assist chaplains as they navigate the roles they occupy as spiritual advisors in conjunction with that of mental health treatment team member.[301] Standard language should be developed for chaplain use to explain the limits of privilege and the type of information they will share with other team members. Additionally, clear guidance must be made available to mental health professionals about what to expect from chaplains participating on treatment teams and the role of chaplains in general.[302] In cases where referrals to or from mental health professionals or chaplains to the other is an appropriate option, clear protocols should be developed for communications of necessary information while adhering to confidentiality.[303] The ultimate goal of such recommendations is to enhance access to safe, coordinated, quality mental health care for servicemembers that recognizes spiritual care as a treatment component.

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[301] *See* Denise Bulling et al., *Confidentiality and Mental Health/Chaplaincy Collaboration*, 25 MIL. PSYCH. 557, 565 (2014) (discussing recommendations for training chaplains to collaborate with mental health professionals).

[302] *See* Jason A. Nieuwsma et al., *Chaplaincy and mental health in the Department of Veterans Affairs and Department of Defense*, 19 J. HEALTH CARE CHAPLAINCY 3, 9-10 (2013) (discussing the need to improve understanding and trust between mental health professionals and chaplains in order to promote collaboration).

[303] *See* Jason A. Nieuwsma et al., Improving Patient-Centered Care via Integration of Chaplains with Mental Health Care, DVA/DoD Joint Incentive Fund project final report 26 (2015) (outlining progress towards streamlining and adjusting referral practices between mental health and chaplaincy within DVA and DoD settings).

THE TWENTY-EIGHTH MAJOR FRANK B. CREEKMORE, JR. LECTURE

Pascale Helene Dubois[*]

I. Introduction

Thank you, Colonel, for the introduction, and thank you very much for inviting me. It's a true honor to be here.

I looked at the course description for this week, and I saw that, so far, you have focused mostly on the latest developments in U.S. government procurement law, which is the purpose of this course. This afternoon we'll actually talk about a very different world; the world of international organizations, international anti-corruption, fraud in development projects, and the debarment system at the World Bank. I often speak at conferences dealing with international anti-corruption, in particular conferences dealing with the enforcement of the U.S. Foreign Corrupt Practices Act (FCPA). And when I start my address, I usually start with: "And now, for something entirely different."

So, speaking to you after you've been hearing for the past three days about all the latest and greatest in the area of U.S. government procurement law, I'll start the same way: "And now, for something entirely different!" But as you will see, there are actually some interesting things that we have in common, and the bank's suspension and debarment system was actually based on the U.S. system. More about that later.

First, I will start my remarks by telling you about the World Bank. Second, I will give you a quick history of international anti-corruption, and how this has influenced what international organizations, such as the World Bank, are doing to fight fraud and corruption, and you will again see many links to the U.S. system. Third, I will discuss the World Bank's suspension and debarment process and draw some comparisons with the U.S. system. And I will finish with some latest developments from where I'm sitting.

So let me start first by telling you a little bit more about the World Bank.

II. History of the World Bank and Key Statistics

The World Bank is an international organization that was established in 1944, just before the end of the Second World War, at the Bretton Woods conference.[1] It is the oldest and, to this day, largest Multilateral Development Bank.[2] The initial purpose of the World Bank was to contribute to the reconstruction of Europe after the end of the war. The first loan of $250 million was made to France in 1947, to meet the cost of purchasing and importing into France certain equipment and materials required as part of a general plan of reconstruction and modernization.[3] Once the reconstruction of Europe was complete, the bank targeted economic development for poor countries, especially in the late sixties and seventies, when the Bank was under the leadership of former U.S. Secretary of Defense Robert McNamara.[4] In those years, the primary focus was to fund large infrastructure projects, such as dams, electrical grids, irrigation systems, and roads.[5] As time went on, these "brick and mortar" type of projects were supplemented with projects focusing on what you might call human development: health, education, and financial inclusion, to name a few.[6]

Fast-forward to today: Since that very first loan in 1947, the Bank has financed more than 12,000 projects all over the developing world.[7] Last year, the World Bank committed nearly $61 billion dollars in loans

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[1] *History*, THE WORLD BANK, http://www.worldbank.org/en/about/archives/history (last visited Jan. 29, 2017).

[2] *Id.*

[3] *Governance and Goals of the World Bank*, THE WORLD BANK, http://siteresources.worldbank.org/ESSDNETWORK/Resources/481106-1129303936381/1777397-1129303967165/chapter1.html (last visited Jan. 29, 2017).

[4] William Clark, *Reconsiderations: Robert McNamara at the World Bank*, FOREIGN AFFAIRS (1981), https://www.foreignaffairs.com/articles/1981-09-01/reconsiderations-robert-mcnamara-world-bank.

[5] THE WORLD BANK, *supra* note 1.

[6] *Id.*

[7] *Projects & Operations*, THE WORLD BANK, http://www.projects.worldbank.org/ (last visited Jan. 29, 2017).

and other forms of financing.[8] Some recent examples: we made a $700 million dollar loan to Ghana for a natural gas project that could increase their power generation capacity by 40 percent.[9] We committed $205 million dollars to Ecuador for the Metro Line in their capital, Quito, this should reduce carbon emissions and unlock congestion.[10] We approved a $350 million dollar program for Iraq to help rebuild seven cities and towns liberated from ISIS.[11] We also step up in emergency situations, as with the $150 million dollars that was offered in support of Zika-affected countries, to help with their response to the virus.

Now as you might imagine from all this, the World Bank is not a bank in the traditional sense. The Bank's primary activity is to provide financing to low- and middle-income countries to promote economic development and the reduction of poverty.[12] When you enter the main building of the World Bank, there is a big plaque on the left wall that says "The World Bank—Our Dream is a World Free of Poverty."[13]

We are an international organization—technically, we are a specialized agency of the United Nations, although our operations and identity are completely independent of the UN. So who owns the World Bank? Basically, all of the countries of the world including, of course, the U.S. We have 189 member countries, and it's those member countries that have provided the World Bank with its capital over the years.[14]

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[8] *World Bank Group Support Tops $61 Billion in Fiscal Year 2016*, THE WORLD BANK (July 12, 2016), http://www.worldbank.org/en/news/press-release/2016/07/12/world-bank-group-support-tops-61-billion-in-fiscal-year-2016.

[9] *The World Bank, World Bank Approves Largest Ever Guarantees for Ghana's Energy Transformation*, THE WORLD BANK (July 30, 2015), http://www.worldbank.org/en/news/press-release/2015/07/30/world-bank-approves-largest-ever-guarantees-for-ghanas-energy-transformation.

[10] *Projects & Operations: Quito Metro Line One*, THE WORLD BANK, http://projects.worldbank.org/P144489/ecuador-quito-metro-line-one?lang=en&tab=overview (last visited Jan. 29, 2017).

[11] Yerevan Saeed, *World Bank Loan to Help Iraq Rebuild in Areas Retaken from ISIS*, RUDAW (Dec. 7, 2015), http://www.rudaw.net/english/middleeast/iraq/120720153.

[12] *What is IDA*? THE WORLD BANK, http://ida.worldbank.org/about/what-ida (last visited Jan. 29, 2017); *Middle Income Countries Overview*, THE WORLD BANK, http://www.worldbank.org/en/country/mic/overview (last visited Jan. 29, 2017).

[13] *Overview*, THE WORLD BANK, http://www.worldbank.org/en/topic/poverty/overview (last visited Apr. 26, 2017) (The World Bank Group's mission is [also] carved in stone at our Washington headquarters . . . .).

[14] *What We Do*, THE WORLD BANK, http://www.worldbank.org/en/about/what-we-do (last visited Jan. 29, 2017).

Our Headquarters is located in Washington, D.C.—we're actually a block away from the White House.[15] We also have offices in 120 countries around the world, in all of the developing countries such as Argentina, Afghanistan, Sudan, and Indonesia.[16] The World Bank is governed by a Board of Directors composed of representatives from the ministries of finance from all of our member countries. We employ more than 10,000 staff in Washington and around the world.[17]

III. The Broader World Bank Group

Now, I've been talking about the World Bank. But the World Bank is actually the "World Bank Group," consisting of five separate institutions.[18] You first have the International Bank for Reconstruction and Development, or IBRD—that is the initial World Bank entity that was established at the Bretton Woods conference back in 1944.[19] The IBRD lends money to middle-income countries, such as Argentina, South Africa and Thailand.[20] The International Development Association (IDA), was set up later on, to be able to give "concessional loans" at extremely good rates to the poorest countries, for example, Afghanistan, Liberia, and Cambodia.[21]

Then, in addition to IBRD and IDA, which are making loans to countries, there are three other World Bank Group entities that deal directly with the private sector.[22] The first is the International Finance Corporation, or IFC.[23] You could see IFC as an investment bank that

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15 *Id.*

16 *What We Do*, THE WORLD BANK, http://www.worldbank.org/en/about/what-we-do (last visited Jan. 29, 2017).

17 *Id.*

18 *About the World Bank*, THE WORLD BANK, http://www.worldbank.org/en/about (last visited Apr. 26, 2017) (listing the five organizations).

19 *The Roles and Resources of IBRD and IDA*, THE WORLD BANK, http://www.worldbank.org/en/about/annual-report/roles-resources (last visited Jan. 29, 2017).

20 *World Bank Group Finances*, WORLD BANK GROUP, https://finances.worldbank.org/countries (last visited Apr. 26, 2017) (Country Summaries).

21 *The Roles and Resources of IBRD and IDA*, *supra* note 19; *Borrowing Countries*, THE WORLD BANK, https://ida.worldbank.org/about/borrowing-countries (last visited Jan. 29, 2017).

22 *See About IFC: Overview*, INT'L FIN. CORP., http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new (last visited Jan. 29, 2017).

23 *Id.*

wants to do development.[24] As an example of what IFC does, they recently invested in the first power plant in Afghanistan that was fully financed and developed by the private sector.[25]

Then there is also MIGA, which stands for Multilateral Investment Guarantee Agency.[26] MIGA provides political risk insurance to private sector investors.[27]

And then finally, we have the International Centre for Settlement of Investment Disputes, or ICSID.[28] ICSID is the arbitration arm of the World Bank Group, dealing with investment disputes between the private sector and our member countries.[29]

So in sum, the World Bank Group has two sovereign lending arms, meaning where we lend directly to governments, that's IBRD and IDA. And then there are the three private sector arms, which try to make sure that the private sector invests in poor countries. I'll be speaking about IBRD and IDA, since that's the part that I work for. That's also what's traditionally been referred to as the "World Bank" as opposed to the World Bank Group.[30]

IV. The Twin Goals

Now, the World Bank's official goals, what we call the Twin Goals, are (1) Ending Extreme Poverty and (2) Promoting Shared Prosperity.[31] Promoting Shared Prosperity is a different way of saying that we want

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[24] *Id.*

[25] *Press Release, International Finance Corporation, IFC Supports Development of Afghanistan's First Privately Financed Power Plant*, INT'L FIN. CORP. (Sept. 22, 2016), http://ifcextapps.ifc.org/IFCExt/Pressroom/IFCPressRoom.nsf/0/BCEDEB32B22429288 5258036002DB8AE.

[26] *See Who We Are*, MULTILATERAL INVEST. GUAR. AGENCY, https://www.miga.org/who-we-are (last visited Jan. 29, 2017).

[27] *Id.*

[28] *See About ICSID*, INT'L CENT. FOR SETT. OF INVEST. DISP., https://icsid.worldbank.org/en/Pages/about/default.aspx (last visited Jan. 29, 2017).

[29] *Id.*

[30] *See World Bank Units*, THE WORLD BANK, http://www.worldbank.org/en/about/unit (last visited May 30. 2017) (describing the international organization).

[31] THE WORLD BANK, ANNUAL REPORT 2016, 3 (June 30, 2016), https://openknowledge.worldbank.org/bitstream/handle/10986/24985/9781464808524.pdf; *Shared Prosperity: A New Goal for a Changing World*, THE WORLD BANK, (May 8, 2013), http://www.worldbank.org/en/news/feature/2013/05/08/shared-prosperity-goal-for-changing-world.

everybody in these countries to benefit as their economies improve. In order to fulfil those Twin Goals, we make loans to help our member countries grow their economies and lift their people out of poverty. But unlike a traditional bank, which will only care whether its loan gets paid back, we also care very much about whether the project for which the loan was made gets implemented.[32] If we lend money to Kenya to build roads, for example, we want to make sure that the roads actually get built.

Let's use this Kenya example to set the stage. Kenya comes to the World Bank and says, "I need a new roads system." We then develop the project together, and we end up signing a loan agreement—let [us] say for $300 million dollars—so that Kenya has money to build the new roads.

V. Procurement at the World Bank

So when Kenya gets that $300 million, what does it do? As you might suspect, it starts doing a lot of public procurement. And even though those contracts will be between Kenya and the contractors, the World Bank requires that these procurements follow the World Bank procurement rules, not the Kenyan ones.[33] Legally speaking, one of the conditions of that loan agreement between Kenya and the World Bank will be that Kenya has to conduct all of the necessary public procurement in accordance with the World Bank's procurement rules.[34] So the role that the World Bank plays in those procurements is going to be quite different than the role that you and your colleagues play here in the United States.

In U.S. government procurement, the U.S. government contracts directly with corporations and individuals to obtain the goods and services it needs.[35] Now, in the Kenya example that we've been using, it is Kenya that is responsible for procuring the goods and services needed to

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[32] *See World Bank Sanctioning Guidelines*, THE WORLD BANK, http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf (last visited May 30, 2017) ("The purpose of the WBG's sanctions regime has been and remains to assist the WBG in upholding its fiduciary duty under the Articles of Agreement to ensure that the funds entrusted to it are used for the purposes intended.").

[33] *Project Procurement*, THE WORLD BANK, http://www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework (last visited May 29, 2017) (containing policies for projects after July 1, 2016).

[34] *Id.*

[35] *Government Procurement: Bids and Contracts*, FIND RFP, https://findrfp.com/Government-Contracting/Contract-Method.aspx (last visited Apr. 26, 2017).

implement the roads project.[36] The World Bank is providing the financing, but we are not the end-user of the goods or services being procured. We do not have a direct relationship with the contractors. In sum, the contract is between Kenya and a contractor, financed by the World Bank, and is using the World Bank's procurement rules, not the Kenyan rules.[37]

Why, at least until recently, has the Bank always insisted on the use of its own procurement rules? Well, remember that the World Bank gets its money from its member countries.[38] And so it has a fiduciary duty[39] to ensure that its loans are used for their "intended purposes."[40] As an aside, "intended purposes" is language that comes from our Articles of Agreement, the international treaty that set up the World Bank.[41] And this brings us to the issue of fraud and corruption. Obviously, if money that was supposed to go into the construction of roads ends up going missing, or lining the pockets of government officials, that is a big problem. When that happens, the loan proceeds were obviously not used for their "intended purposes."

VI. History of FCPA, OECD, and UNCAC

Now it may seem obvious that the World Bank would be concerned about fraud and corruption in its operations. It wasn't always so, and it took years for the World Bank to get involved in the fight against corruption.[42] It all started with the United States getting involved in

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[36] Pascale Hélène Dubois, Paul Ezzeddin & Collin Swan, *Suspension and Debarment on the International Stage: Experiences in the World Bank's Sanctions System*, 25 PUB. PROCUR. L. REV. 61, 62 (2016).

[37] *Id.*

[38] *See Member Countries*, THE WORLD BANK, http://www.worldbank.org/en/about/leadership/members (last visited May 29, 2017).

[39] *Procedure: Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects*, THE WORLD BANK 4 (June 28, 2016), http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/3601045137710539092 5/Procedure_Bank_Procedure_Sanctions_Proceedings_and_Settlements_in_Bank_Financed_Projects(6.28.2016).pdf.

[40] *Id.*

[41] *International Monetary Fund & International Bank for Reconstruction and Development, Articles of Agreement*, THE WORLD BANK (July 1–22, 1944), http://siteresources.worldbank.org/EXTARCHIVES/Resources/IBRD_Articles_of_Agreement.pdf (last visited Feb. 3, 2017).

[42] *Helping Countries Combat Corruption: The Role of the World Bank*, THE WORLD BANK (Sept. 1997), http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf.

international anti-corruption. You may have heard about the wonderful book *A Little History of the World* by E. H. Gombrich[43]—well, here is a little history of international anti-corruption.

Why did the United States become interested in fighting corruption overseas? Believe it or not, it started with the Watergate scandal.[44] Beyond the part of Watergate that we all know well, the Watergate hearings also happened to expose corporate slush funds that were used to pay bribes to foreign government officials.[45] It turns out that a number of prominent firms were involved in bribery scandals overseas. One company was Lockheed Aircraft Corporation.[46] They were implicated in the bribery of multiple foreign governments. This included a $10-million-dollar payment to West Germany's Minister of Defense and over $100 million dollars in commissions to a Saudi arms dealer.[47] They also paid some smaller bribes to officials in Japan, the Netherlands, and Italy.[48]

Now, at the time, there was no bar to paying bribes to foreign government officials, either in the securities laws or elsewhere. Sure, there were laws against domestic bribery, but—perhaps understandably—no one had enacted laws that prevented U.S. businesses from paying bribes overseas. The fact that bribing foreign officials was not illegal prompted the Chairman of the Senate Committee on Banking, Housing, and Urban Affairs to state: "Well, then, it would seem to me that maybe we ought to consider, as the legislative body for our Government, making [bribery of foreign officials] a violation of the law."[49] And that's just what Congress did.

In 1977, the United States enacted the Foreign Corrupt Practices Act, or FCPA, as the first national law intended to fight transnational bribery, meaning, and the bribery of foreign government officials.[50] It was, and

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43 E.M. GOMBRICH, A LITTLE HISTORY OF THE WORLD (Caroline Mustill ed., 2005).

44 *See* Public Broadcasting Service, *Spotlight: History of the FCPA*, WETA (Feb. 13, 2009), http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html

45 *Id*.

46 Robert Smith, *Corporate Bribery Files: The Latest in Diplomatic Secrets*, N.Y. TIMES (Mar. 21, 1976), http://www.nytimes.com/1976/03/21/archives/corporate-bribery-files-the-latest-in-diplomatic-secrets.html?_r=0 (containing archived documents).

47 *Birth Of The FCPA: This Bribery Is Positively Bananas*, WHISTLEBLOWER JUST. NET., https://whistleblowerjustice.net/birth-of-the-fcpa/ (last visited Jan. 29, 2017).

48 *Id.*

49 Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 954 (2012).

50 *See Spotlight: History of the FCPA*, *supra* note 44.

remains the case that many, if not most, countries prohibit the payment of bribes by their own nationals to their own government officials; but the FCPA is different, in that it prohibits the payment of bribes by American firms to foreign government officials.[51]

Jumping ahead now to 1989: the United States has the FCPA on its books, and wants to make sure there is a level playing field, so that U.S. firms don't have an unfair disadvantage against their foreign competitors[52] —after all, if you cannot bribe, but your competitors can, it's not going to feel like a fair fight. So, the United States, led by the Commerce Department, briefly thinks of going to the UN to do something, but then decides to approach the Organization for Economic Cooperation and Development (OECD) in Paris—where all the major industrialized countries are members.[53]

And, in 1989, the OECD agrees to form a working group, and a few years later—by the way, a few years[54] is very quick for any international agreement—a Convention is signed, obliging all OECD countries and a few others to criminalize the payment of bribes to foreign officials.[55]

At the time, the countries that signed the Convention accounted for more than "70 percent of world exports and [more than] 90 percent of foreign direct investment"—these were the United States' major trading partners.[56]

Fast-forward again to another key milestone: In 2005, a much larger group—this time, almost every country in the world—signs the United Nations Convention Against Corruption (UNCAC), which requires its signatories to prohibit the payment of bribes to foreign officials.[57] So, in

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[51] *Id.*

[52] *See* MARK PIETH, ET AL., THE OECD CONVENTION ON BRIBERY: A COMMENTARY 4 (2007).

[53] *Id.*

[54] Since the Organisation for Economic Co-Operation and Development's (OECD) conventions are binding on all its members, their adoption must be unanimous and therefore usually take a very long time. *See* OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 1, 3 (Sept. 18, 2001), http://www.imf.org/external/np/gov/2001/eng/091801.pdf. Here, the OECD opted for interim steps. The first step was in 1994 and was a non-binding recommendation. The final step was adoption of the convention in 1997. *Id.*

[55] *Id.*

[56] *Id.* at 2.

[57] *U.N. Convention Against Corruption, Signature and Ratification Status as of 12 December 2016*, U.N. OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/

a way, the United States "exported" its FCPA. What started as a piece of legislation in one country, the FCPA, led to the creation of a first convention: the OECD Convention, which covered the world's major trading partners, and then led to a second convention, UNCAC, this time covering almost every country in the world.

Now, as you might imagine, enforcement is stronger in some countries than in others, but as of today, it is safe to say that almost every country in the world has some sort of criminal law prohibiting transnational bribes.

And, of course, international organizations like the World Bank do not operate in a vacuum. So, against the historic backdrop that I just described, it should come as no surprise that around the same time that the U.S. is helping the OECD convention to get off the ground, we see the World Bank starting to get involved in the fight against international corruption.

VII. Anti-Corruption Comes to the World Bank

It all started with the then-President of the World Bank, Jim Wolfensohn, who declared in a seminal 1996 speech that the World Bank needed to "deal with the cancer of corruption."[58] The corrosive effects of fraud and corruption on economic development, and particularly the poor, were becoming impossible to ignore.

When you think about it, the estimated economic impacts are staggering. Christine Lagarde, Managing Director of the International Monetary Fund ("IMF"), our sister organization, in a recent speech said: "The annual costs of bribery alone—a subset of corruption—is estimated at a massive US $1.5–2 trillion dollars—roughly 2 percent of global GDP."[59] In the words of our World Bank President, Dr. Jim Yong Kim: "Each dollar lost to corruption is a dollar diverted from a pregnant woman

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treaties/CAC/signatories.html (last visited Jan. 29, 2017); *The United Nations Convention Against Corruption*, GAN INTEGRITY, http://www.business-anti-corruption.com/anti-corruption-legislation/united-nations-convention-against-corruption (last visited Jan. 29, 2017).

[58] Dubois, Ezzeddin & Swan, *supra* note 36.

[59] Christine Lagarde, IBA Washington 2016 Opening Ceremony Speech (Sept. 2016), http://www.ibanet.org/Conferences/washington-oc-christinelagarde.aspx.

who needs health care; or from a girl or a boy who deserves an education; or from communities that need roads and clean water."[60]

VIII. Prevention and Enforcement

And so now, two decades after President Wolfensohn's famous "cancer of corruption" speech, the World Bank works to address corruption from two different angles: enforcement and prevention.[61] Enforcement, because we respond to fraud and corruption detected in our own operations through our suspension and debarment system. And prevention, because we work with our member countries to try to prevent fraud and corruption from happening in the first place.

For example, on the prevention side, we finance anti-corruption and rule of law projects. We also carefully review potential projects before we enter into the loan agreement, and projects are actively supervised during implementation.

The need for supervision becomes very apparent in some cases like one we recently saw in Liberia on an emergency infrastructure project that had a sanitation component. A garbage removal contractor was reported because instead of picking up garbage, as they had been contracted to do, they had been making their first and last scheduled runs and relaxing in the shade the rest of the day but faking the relevant records to overstate the number of garbage pickups made. The folks at the supervising entity who were supposed to be checking all of this were looking the other way in exchange for things like fancy watches. This meant trash was stacking up all over the city, defeating the purpose of this project and making things not only unpleasant but also unhealthy. And a case like this highlights the need for enforcement—and yes, this contractor ended up getting debarred by my office.

We'll come back to enforcement in a minute, but first a few words on prevention. When trying to prevent corruption, transparency is a corruption fighter's strongest ally. For example, by simply posting budgets on the doors of schools and in newspapers, the Government of

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[60] *Report on Functions, Data and Lessons Learned 2007 – 2015*, THE WORLD BANK, 1, 2 (2015), http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf.

[61] *The World Bank Sanctions System & Anti-Corruption Efforts*, CREATE (May 6, 2016), https://create.org/news/world-bank-sanctions-system-anti-corruption-efforts/.

Uganda increased the amount of money going to local schools by 60 percent. We also recognize that it is the citizens of our member countries who will be the ones who ultimately hold governments accountable. And so we are trying to help people by simply giving them access to information about the services they are supposed to receive. If you know what it is that your government is supposed to give to you, you are a lot more likely to ask for it.

We know that technology is critical, too. Let's look at the example of Smart Cards in India. With the World Bank's support, India created a biometric smart card system that helps people establish their identity and ensures that any payments go to them personally and not into the pockets of the wrong people.[62]

These are just a few prevention examples. But we know that, in addition to the good work being done on prevention, enforcement is still a very necessary part of the picture. When we catch someone engaging in fraud and corruption on World Bank-funded projects, there is obviously a need to act – both to ensure that corrupt firms don't benefit from future World Bank business, and to deter those firms, and all firms, from engaging in misconduct in the future.

This is where our sanctions system comes in. And this is where our language starts to sound a lot like yours in the U.S. – suspension, debarment, aggravating factors, mitigating factors, and negotiated resolutions. As we'll see, there are some features of the World Bank system that are unique to the international context; which makes sense given that we are an international development bank and not a sovereign power. And this leads to some interesting comparisons to the U.S.

IX. History of the World Bank's Debarment System

As a U.S. audience involved in government contracting, you might be interested to know that it was the U.S. system that the Bank looked at most closely when our sanctions system—again, this is what we call our suspension and debarment system—was being designed.[63]

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[62] *Id.*

[63] Pascale Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of U.S. Suspension and Debarment with the World Bank's Sanctions System*, U. CHI. LEGAL F. 195 (2012).

You may remember that I just talked about the "cancer of corruption" speech in 1996. Well, that was the year that the Bank first put into place some rules for debarment.

Now, the system has evolved quite a bit over the years. But, the system that we have today can be traced back to 2002, when the World Bank commissioned Dick Thornburgh, the former U.S. Attorney General and U.N. Undersecretary General, to propose new debarment rules for the Bank.[64]

During this review, a number of approaches were considered. Thornburgh looked at models from several different countries and international organizations. Ultimately, Thornburgh pointed to the practice of debarment in the U.S. federal system as the most useful starting point. He referred specifically to the suspension and debarment provisions within the Federal Acquisition Regulation ("FAR"). From there, the World Bank, of course, adjusted a number of things to fit its particular operating model.[65]

X. World Bank Sanctions Systems Basics

So how does our system work? Let's take a look at the basics. I'll start by looking at what can get you into trouble, and who is subject to our jurisdiction. Then we'll look at how the cases are investigated and adjudicated. And then we'll look at the different types of sanctions that the World Bank can impose, including debarment.

A. Causes for Debarment from World Bank-Financed Contracts

I have been using the term "corruption" a lot – it's a nice simple term. But many of the cases we see involve more than just traditional corruption, meaning bribery. We often see forged documents and other types of fraud, either when a company is trying to win a contract, or during its execution. These situations can vary from forged bid securities and performance guarantees to false invoicing and misrepresentations about past experience. We've also seen situations where a company

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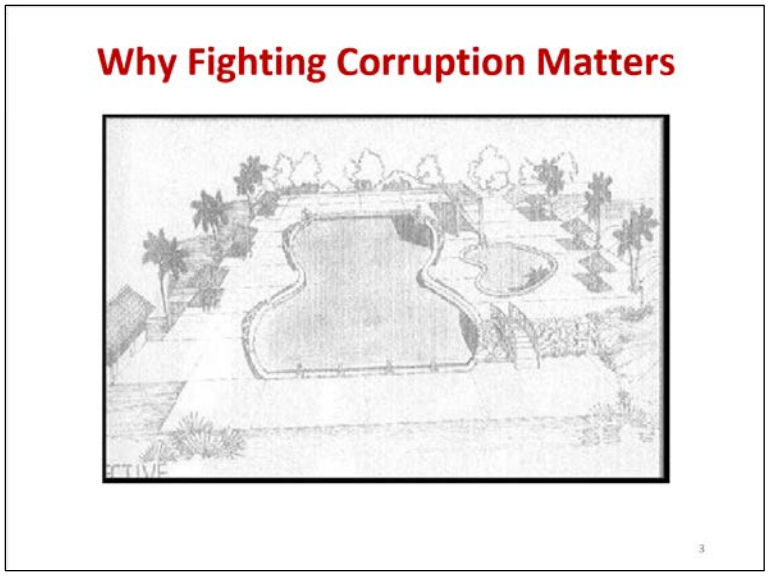
[64] Dubois, Ezzeddin & Swan, *supra* note 21.

[65] THE WORLD BANK, WORLD BANK GROUP SANCTIONS REGIME: AN OVERVIEW, http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/Overview-SecM2010-0543.pdf (last visited Jan. 20, 2017); Dubois, *supra* note 63.

"borrowed" the experience of a larger firm to qualify for a contract by falsely claiming that they intended to perform the contract with the larger firm as part of a joint venture. In reality, the larger firm never planned to be a part of the project but just pretended to be, for a small payment. And of course we see things like bid-rigging as well.

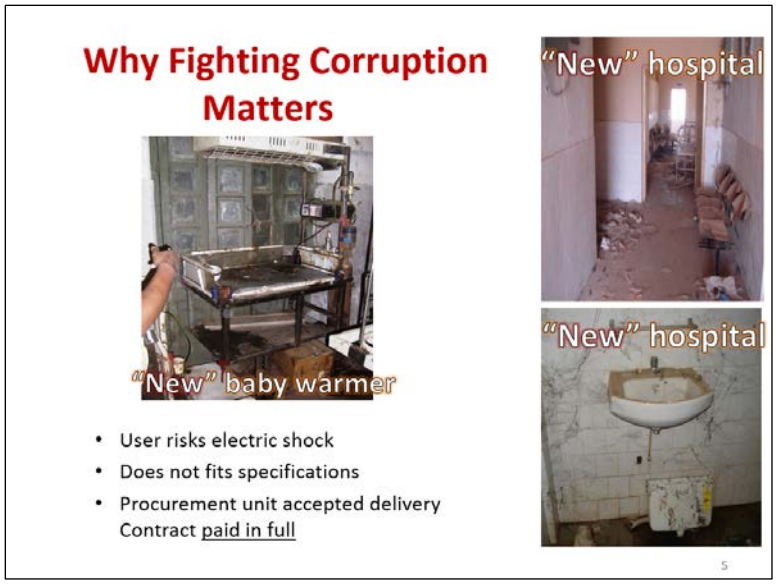
Now sometimes, there is nothing like a few photographs to show you the types of things we see and why fighting corruption matters to us.

This is a road in an Asian country. The World Bank is investigating accusations that something funny is going on. The guy in the pink shirt is the World Bank INT investigator. He jumped on a plane and took a well-known investigative tool with him: a tape measure. You'll see that this road is not only 30 percent narrower than specifications, but also does not have any surfacing. In a tropical country, this means that after the first rain, this road will not exist anymore. But, the contract was paid in full.



Here we have an architectural rendering of an eco-spa and hotel in a lovely resort area.

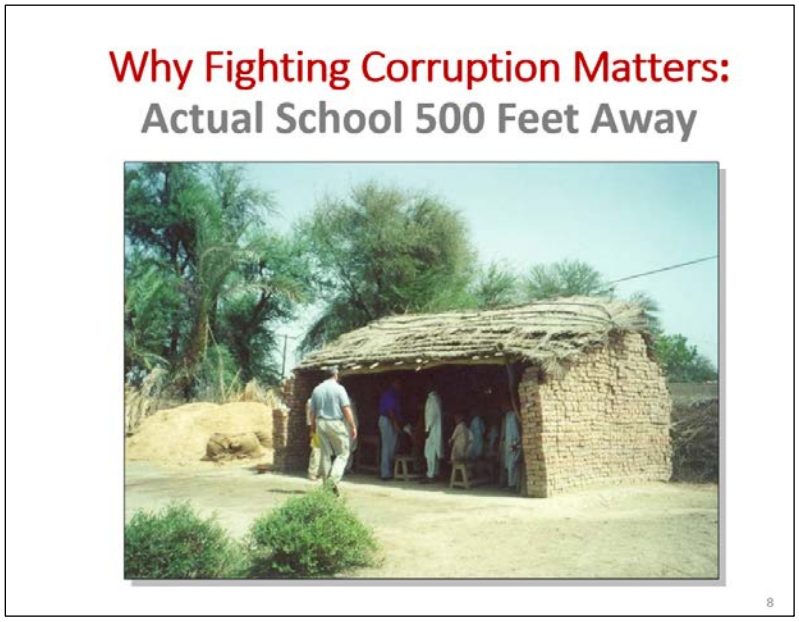
But, here's what the country got. No, this is not a hippo pond – it was supposed to be a swimming pool for humans. This is the swimming pool 30 days from completion and more than half of the funds paid.



Here we have some photos of a project to build a new hospital. Even though none of this was usable, the contract was paid in full.

And, finally, we have here a new school that the Bank financed. Looks like it would be a pretty nice school, doesn't it?

Except, this is what the school was actually used for. It turns out that the local official was an onion farmer and thought that the school would be better used to dry his onion crop.



Meanwhile, this is where the students were actually going to school. The guy with his back to the camera is the INT investigator.

At the World Bank, we have several grounds for debarment. Specifically, the World Bank has five things that we call "Sanctionable Practices": Corruption, fraud, collusion, coercion, and obstruction.[66] These have precise legal definitions at the World Bank, and while the meaning of each is probably somewhat intuitive, obstruction may be a bit less so. What is an obstructive practice? Well, anything that a company does to obstruct the World Bank's investigation, be it destroying evidence, lying to investigators or refusing to comply with contractual audit rights.[67] Any one of these things is considered a sanctionable practice in its own right.

Let me show you how this played out in a recent case. A contractor was hired for a project in Ukraine. Unfortunately, the company paid large bribes to government officials responsible for project implementation, and there was bid-rigging as well. When the Bank started investigating the corruption and collusion charges, the contractor and its executives impeded the Bank's contractual inspection and audit rights by continually refusing to grant our investigators access to the documents that they had requested. Ultimately, we determined that the contractor and two of its executives had engaged in corrupt and collusive practices and also had engaged in an obstructive practice, and they all received lengthy debarments.

B. Jurisdiction

Now, can the World Bank just debar anybody, anywhere, any time? No, our rules require that the misconduct be related to our operations. Without getting overly technical, what I generally say is that the World Bank can debar any company or individual that engages in one of the sanctionable practices while competing for, or executing, a World Bank-financed contract. So it could be a U.S. company, a Belgian company, a Senegalese company, a company from anywhere—we can debar them if we catch them engaging in one of those prohibited practices on a World Bank-financed contract. But we can't debar a company for something that has nothing to do with us—if you commit some sort of crime, but

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66 WORLD BANK, *supra* note 60.
67 *Id.*

there is no link to the World Bank's activities, we will not have any basis to act.

C. Explanation of the Sanctions Process

So we have talked about the grounds for debarment, and who can be debarred. Let's take a look at how our adjudicative process works—in other words, if you have been accused of fraud or corruption for any of the other three sanctionable practices, how will the case be decided?

There are three players to know about. We have an investigative unit, the Integrity Vice Presidency ("INT")—they are sort of like the World Bank's inspector general for fraud and corruption on our projects. And we have two levels of adjudication[68]: my office, which is somewhat parallel to a U.S. agency's Suspension and Debarment Officer ("SDO"), and then an appeals board, which is called the World Bank Group Sanctions Board and is composed entirely of non-World Bank staff.

Any sanctions case starts with an allegation received by the investigators. INT has the responsibility for selecting which matters are investigated, and their job is to conduct an objective fact-finding. Once INT completes its investigation, it may decide to start sanctions proceedings by submitting a document with all the accusations and evidence (the Statement of Accusations and Evidence ("SAE")) to my office, the Office of Suspension and Debarment ("OSD"). INT's evidence may include, among other things, information about the project, records of interviews with the respondents and witnesses, and documentary evidence. In many cases INT will have sent out a "show cause" letter to the accused company, giving them a chance to respond to the investigative findings—and, if the company responded, that will be part of the evidence as well.

By the way, what are some of the more interesting things we've seen in the evidence over the years? Let's just say there are differing levels of sophistication. A large cash bribe was once found in the backseat of a public official's car. In another case, a few companies openly kept receipts of bribe payments as part of their records—they'd been hit up for bribes by the same government officials so many times that they wanted to have proof that they had already paid! Those are some of the easy

[68] CREATE, *supra* note 61; WORLD BANK, *supra* note 60.

ones. Other situations, of course, prove much more complicated to unravel and have involved the use of agents and other third parties as conduits for paying bribes. Or sometimes we have to sift through fake names or false invoices for services not actually rendered.

So all of this evidence gathered by INT is turned over to my office for review. Once we receive the case, my colleagues and I then carefully review every accusation made by INT to decide if there is "sufficient evidence" that the accused company, "the respondent," as we call them, engaged in the alleged sanctionable practice(s). Notice that reference to the "sufficient evidence" standard. "Sufficient evidence" is defined in the World Bank's Sanctions Procedures as "evidence sufficient to support a reasonable belief, taking into consideration all relevant factors and circumstances, that it is more likely than not that the respondent has engaged in [the alleged sanctionable practice(s)]."[69]

Still on the evidence, note that the Sanctions Procedures require INT, as a neutral fact-finder, to disclose all relevant evidence that would reasonably tend to exculpate the respondent or mitigate the respondent's culpability.[70]

Now, if we determine that INT does not have sufficient evidence to support one or more of the alleged sanctionable practices, the case is referred back to INT for the removal of the unsupported accusation(s)—or, at INT's discretion, they could decide to investigate further.

If we do find sufficient evidence for all of INT's accusations in the SAE, we issue a Notice to the respondents that incorporates INT's accusations and the whole evidentiary record. At that time, we also tell the company what the proposed sanction is, which we calculate based on the World Bank's Sanctioning Guidelines. Also, when that Notice is issued, we temporarily suspend the respondents, which means that they cannot receive any new contracts that are financed by the Bank. That temporary suspension will remain in place until the case is over.[71]

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[69] THE WORLD BANK, *supra* note 60.

[70] *Procedure: Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects* § III.A.3.02, THE WORLD BANK, http://teresources.worldbank.org/EXTOFFEVASUS/Resources/3601045-377105390925/procedure_Bank_Procedure_Sanctions_Proceedings_and_Settlements_in_Bank_Financed_Projects(6.28.2016).pdf (last visited June 13, 2017).

[71] *Id.* at § III.A.4.02.

Once we have issued the Notice, the respondents have 30 days to submit to my office a written "Explanation." They can try to convince me to revise the recommended sanction, based on additional mitigating factors—for instance, new information about the company's compliance program. Or, if they can show a clear basis for it, I may withdraw the Notice, terminate the suspension and close the case.

We get one of these Explanations in about one third of all the cases. And we've adjusted the recommended sanction a number of times, but withdrawal of the whole case has been rare.

So this is the essence of what happens at my level. Now, respondents are also given 90 days to appeal the case to the World Bank Group Sanctions Board—which is the second and final tier of adjudication in our system. They do this by filing a document called a "Response" with the Sanctions Board. The appeal is *de novo*, meaning that the Sanctions Board is not bound in any way by my office's findings or recommended sanction. One other thing to point out: At my level everything is "on the papers," which is very different from the U.S. experience, while at the Sanctions Board there can be a hearing.[72] The Sanctions Board will review the evidentiary record, look at what the parties have to say, and then issue a decision. If they find that the company more likely than not engaged in the alleged sanctionable practice(s), the Sanctions Board will impose an appropriate sanction, again taking into account the World Bank's Sanctioning Guidelines. The decision of the Sanctions Board is final and not appealable. It's also published on the World Bank's website.

You may be wondering how often we see appeals to the Sanctions Board. The answer: roughly one third of the time. And so what happens when a company does not appeal? When the 90-day period to appeal is over and there's no appeal, then I impose my recommended sanction, and the case is over. And so that's how approximately two thirds of the cases get resolved. In those non-appealed cases, my office posts a short document on the Bank's website that contains basic

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[72] *See Procedure: Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects*, THE WORLD BANK §6.01, §4.02 (Jun. 28, 2016), http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/3601045-1377105390925/Procedure_Bank_Procedure_Sanctions_Proceedings_and_Settlements_in_Bank_Financed_Projects(6.28.2016).pdf.

information about the case, including the accusations and the sanction imposed.

D. Types of Sanctions

Now, let's take a closer look at the types of sanctions we impose. First, I should emphasize that—just like in the U.S.—for us at the World Bank, suspension and debarment are administrative remedies, not criminal sanctions. So far, you have heard me talk mainly about debarments. But there are actually five different sanctions with three forms of debarment: debarment with conditional release, fixed-term debarment, and conditional non-debarment.[73] And then there are two others: Letters of reprimand and letters of restitution, which are fairly self-explanatory.[74]

The sanction that we use the most often is something that we call debarment with conditional release. Under our Sanctioning Guidelines, this is the "default" sanction.[75] It means that a company will be ineligible to receive new Bank-financed contracts for a minimum period; the effect is prospective, so ongoing contracts are not affected.[76] The starting point is three years, but it can be higher or lower depending on mitigating and aggravating factors, which are set out in our Sanctioning Guidelines. At the end of that minimum period, the company is released from debarment only if it has complied with the specified conditions, which usually means that they have put into place a compliance program that is satisfactory to the Bank—the office at the World Bank that decides on this is the Integrity Compliance Office ("ICO"), which is housed in INT. If the company doesn't comply, they remain debarred, even after that minimum period of debarment is over.

Why the conditions for release? Well, the Bank wants to be sure that a debarred company is serious about compliance and remediation before it regains its eligibility to get new World Bank-financed contracts.

So that's debarment with conditional release, and that is the form of debarment that we use the most, especially at my level of the system. I

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73 THE WORLD BANK, *supra* note 60 at 13.

74 *Id.*

75 *World Bank Sanctioning Guidelines*, THE WORLD BANK http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf (last visited May 29, 2017); THE WORLD BANK, *supra* note 60 at n. 33.

76 CREATE, *supra* note 61.

also want to quickly mention one other form, which is conditional non-debarment. A conditional non-debarment is somewhat similar to an administrative agreement in the U.S. system, in which a respondent agrees to take certain corrective measures to avoid debarment. The company remains eligible for new contracts, but at the end of the period, it has to show that it has complied with certain conditions—and again the primary condition will involve a compliance program. If the company fails to comply with the conditions by the specified date, then they get debarred. If they comply, they don't get debarred.

Now, any final sanctions, whatever they may be, that are imposed by either my office or the Sanctions Board are announced to the public. And like in the United States with the SAM.gov system, our list of debarred firms and individuals is posted in a public place, on the World Bank's public website. So, that means anybody in the world can see who we've debarred.[77] And if you look at the list, you will probably recognize several of the companies. In terms of numbers, since 1999, we have sanctioned more than 770 firms and individuals.

E. Due Process

So, that's a description of our process. Now you may wonder, why do we have this process? Couldn't the World Bank simply make a unilateral management decision that Contractor X will no longer be able to get contracts financed by the World Bank? Well, part of the answer, of course, is that the Bank isn't just deciding for itself. Our decision impacts our member countries since debarring a company means none of our member countries can use that company anymore on a Bank-financed project; at least for the period that the company is debarred.

Debarment, as we all know, is a serious thing. Our system therefore provides the accused company with due process before the World Bank makes its decision.[78] Now, when we look around the world, there really are no uniform standards for due process across suspension and debarment systems. The rules can vary, depending on the different purposes and

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[77] *World Bank Listing of Ineligible Firms & Individuals*, THE WORLD BANK http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984 (last visited Jan. 29, 2017); THE WORLD BANK, supra note 60.

[78] THE WORLD BANK, *supra* note 60.

objectives of the system.[79] For example, the United States views suspension and debarment actions as business decisions that merit a decision-making process that, per the FAR, is "as informal as is practicable, consistent with principles of fundamental fairness."[80]

For the World Bank, we have a slightly more formal approach,[81] although a number of the elements will be familiar to you and are consistent with basic notions of fairness and due process. First, we provide respondents with notice of our action and an opportunity to be heard, both during the investigation and then after my office issues the Notice to the company. Secondly, our office presents respondents with a copy of all the evidence that has been used in making the suspension or debarment decision. The one exception that we have, by the way, is for confidential witnesses. The testimony of confidential witnesses is kept separate and their identities are not revealed to the respondents. And finally, our two-tier system means that respondents have an opportunity to appeal to an independent tribunal—our Sanctions Board—if they are not satisfied with the result at my level.

F. Settlements or Negotiated Resolution Agreements

Most of our cases are handled in the regular sanctions process. But, we also have a way for contractors to settle or what we call a Negotiated Resolution Agreement. This can happen at any stage of the process, starting from the investigative phase all the way up to the Sanctions Board.[82]

There are some interesting comparisons between the Bank's settlements and the use of administrative agreements by U.S. SDOs. As you know, in the U.S., administrative agreements can allow a respondent to avoid suspension or debarment by agreeing to take certain corrective

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79 *Id.* at 22.

80 *See* FAR 9.406-3(b)(1) (2016) ("Agencies shall establish procedures governing the suspension decision making process that are as informal as is practicable, consistent with principles of fundamental fairness.").

81 *Compare*, THE WORLD BANK, AMENDMENT TO THE IBRD/IDA SANCTIONS PROCEDURES (2011), http://siteresources.worldbank.org/EXTOFFEVASUS/ Resources /WB_ Sanctions_Procedures_Jan_2011.pdf *with* FAR 9.406-3(b)(1) (2016), (stating that US "[a]gencies shall establish procedures governing the debarment decision making process that are as informal as is practicable, consistent with principles of fundamental fairness.").

82 THE WORLD BANK, *supra* note 60.

measures, like implementing a robust compliance program, giving training to employees, and providing regular reports to the SDO on its progress.[83] In many World Bank settlements, the sanction imposed still involves some period of debarment.

To give you another real-life example, in one recent settlement case, we saw a contractor on an electric power project in North Africa who engaged in fraud because it falsely claimed that it had not made any payments to agents in connection with its bid whereas in fact it had. In the settlement, the contractor agreed to a period of debarment.

G. Comparing Systems

So, what would I highlight as some of the key differences between our systems? First of all, aside from the obvious jurisdictional issues, I would look at the grounds for debarment. The Federal Acquisition Regulation, as you all know, lists enumerated grounds for debarment, but it includes a broad catch-all provision. In other words, a respondent could be debarred for any cause determined to affect its "present responsibility."[84] At the Bank, there are simply not as many grounds for debarment.[85] And that's perhaps not a huge surprise, given that the original purpose of the World Bank's system was to respond to fraud and corruption. At the Bank, we only have those five sanctionable practices: fraud, corruption, collusion, coercion and obstruction. What really jumps out to you is probably the absence of performance—we cannot debar for poor performance. Another big distinction as far as grounds are concerned: Criminal convictions or civil judgments are not grounds for debarment in and of themselves in our system. A criminal conviction in one of our member countries does not automatically lead to debarment. As we know, for the World Bank to debar, the misconduct has to be related

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[83] *See* U.S. DEPARTMENT OF THE INTERIOR, PUBLIC GUIDE TO U.S. DEPARTMENT OF THE INTERIOR SUSPENSION AND DEBARMENT PROGRAM 1, 13-14 (2015), https://www.doi.gov/sites/doi.gov/files/migrated/pam/programs/acquisition/upload/DOI-Debarment-Program-Informational-Guide_4_23_15.pdf (DOI calls these "Compliance and Ethics Agreements"); *see also* GENERAL SERVICES ADMINISTRATION, ADMINISTRATIVE COMPLIANCE AGREEMENT 1 (2015), http://procurement-reform.org/wp-content/uploads/2015/11/Tremco-ACA-with-GSA.pdf (sample administrative agreement with GSA).

[84] FAR 9.406-2(a)(5) (2017).

[85] Pascale Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, U. CHI. LEGAL F. 195 (2012).

to World Bank operations, and our own investigators have to find sufficient evidence to prove the case in our system.

A second difference between the U.S. and World Bank systems is that, in the World Bank system, if there is a finding of misconduct, a sanction will be imposed. It may be lower or higher, depending on the existence of aggravating or mitigating circumstances, but a finding of misconduct will lead to a sanction, and that will usually be a period of debarment. That is not necessarily the case in the U.S. In the U.S. system, the SDO will look at whether the company is presently responsible, and if so, debarment is not necessary.[86] Some would argue that there is a difference in perspective between the U.S. and World Bank systems. In the U.S., the SDO is making a determination of present responsibility moving forward. This is about whether to do business with a firm or individual in the future, based on its condition today. On the other hand, the Bank's SDO is making a determination of whether there was *past* misconduct. If there was past misconduct, some sort of sanction will be imposed, even if there is substantial mitigation. We do not have the "present responsibility" concept that exists in the FAR.

XI. Cross Debarment

A. Other Multilateral Development Banks

One other feature of the World Bank's system that I should mention is something that we call "cross-debarment."[87] There are five Multilateral Development Banks—essentially mini-World Banks for each region—that are part of a cross-debarment agreement signed in 2010: the World Bank, the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, those are the Latin American countries, as well as the European Bank for Reconstruction and Development.[88] When one of these banks, say the World Bank, imposes a debarment of longer than one year, all the other Multilateral Development Banks will impose that debarment as well. So if you get debarred by one Multilateral Development Bank, you get debarred by all

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86 FAR 9.406-1(a) (2016).

87 THE WORLD BANK *supra* note 42; *see also* THE WORLD BANK, MUTUAL ENFORCEMENT OF DEBARMENT DECISIONS AMONG MULTILATERAL DEVELOPMENT BANKS 1 (2010), http://siteresources.worldbank.org/INTDOII/Resources/Bank_paper_cross_debar.pdf [hereinafter MUTUAL ENFORCEMENT].

88 MUTUAL ENFORCEMENT, *supra* note 86.

of them.[89] So imagine being a company that does business in a lot of emerging markets. A World Bank debarment that leads to cross-debarment by all of the other Multilateral Development Banks will take a big chunk out of that company's business. That's why a lot of companies are paying close attention to our debarment system these days.

B. Other Governments

At the national level, though, meaning with individual countries, things are different. We do not have any cross-debarment arrangements with national governments. So if the U.S. debars a company, we will not automatically cross-debar with the U.S., and the U.S. will not automatically cross-debar with us.

There was an article in the Washington Post not too long ago that touched on some of these issues.[90] The Bank had debarred a firm and its owner for eight years – for multiple instances of misconduct. It seems that after the World Bank sanctioned this firm, the firm went on to win several million dollars' worth of work with the U.S. government. But the article didn't seem to recognize that the U.S. government has a different debarment system than the World Bank. The U.S. government is not bound by our debarments, and U.S. agencies need to determine for themselves whether or not a company is presently responsible.

XII. Closing

So now, we've looked at what the World Bank does, how it came to be that the World Bank adopted debarment as a way to combat corruption, and along the way we also did a little history of international anti-corruption. We then took a look at the World Bank's suspension and debarment system and made a few comparisons to the U.S. system.

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[89] THE WORLD BANK, *supra* note 42, at 1, 5.

[90] Katia Savchuk, Bethan McKernan, Michael Phillis & Annie Zak, *Contractor Blacklisted by World Bank Still Gets Millions in Work*, WASH. POST (Sept. 23, 2016), https://www.washingtonpost.com/business/contractor-blacklisted-by-world-bank-still-gets-millions-in-work/2016/09/23/8bbc0f14-7ea1-11e6-9070-5c4905bf40dc_story.html?utm_term=.cc2f995e4f45.

I'd like to just wrap up our time together by drawing your attention to some recent and interesting developments in the fields of international anti-corruption and debarment.

A. New Multilateral Development Banks

First, there are two brand-new Multilateral Development Banks. The first is the Asian Infrastructure Investment Bank ("AIIB"), which was established in 2014.[91] The AIIB, which will focus on infrastructure investment in the region, is headquartered in Beijing. The World Bank has started to partner with the AIIB on several projects in the region.[92]

You may have also heard of the New Development Bank ("NDB")—formerly known as the BRICS Development Bank—which was established in 2014 by the BRICS states: Brazil, Russia, India, China and South Africa. The NDB will also focus on investments in infrastructure, mainly in the BRICS countries.[93]

As a member of the oldest development bank, it will be very interesting for me to collaborate with these two new institutions and see how their sanctions systems evolve.

B. UK Summit

Another recent development comes out of a big anti-corruption summit that was conducted by the UK government in May of this year–pre-Brexit. The event brought together more than 40 countries (including Brazil and China) and tackled some of the key corruption challenges around the world, including secrecy jurisdictions, illicit financial flows and even corruption in sports, think FIFA scandal.[94] Now

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[91] *Quick Facts & Numbers,* ASIAN INFRASTRUCTURE INVESTMENT BANK, https://www.aiib.org/en/index.html (last visited Jan. 29, 2017).

[92] *About AIIB* ASIAN INFRASTRUCTURE INVESTMENT BANK, https://www.aiib.org/en/about-aiib/index.html (last visited Jan. 29, 2017); Saibal Dasgupta, *AIIB Takes Big Strides Amid Fears About China's Dominance*, VOA NEWS, June 27, 2016, http://www.voanews.com/a/aiib-big-strides-fears-china-dominance/3394153.html.

[93] *Formation of the New Development Bank*, NEW DEVELOPMENT BANK, http://ndb.int/genesis.php (last visited Jan. 29, 2017).

[94] *The Anti-Corruption Summit: Now the Hard Work Begins*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/news/feature/anti_corruption_summit_now_the_hard_work_begins (last visited Jan. 29, 2017).

what's interesting is that, after the Summit, Transparency International, the well-known anti-corruption NGO, published a list of all of the commitments that these countries made to fight corruption. Interestingly, several countries committed to look at debarment as a way to combat corruption in public procurement. Remember the history of anti-corruption? It was all about criminal laws: the FCPA in the U.S., the OECD and the UNCAC conventions. This seems like a big development: That we are seeing several countries openly looking at administrative remedies—i.e., debarment systems—as an additional tool in the fight against corruption.

C. National Systems / Research

And it may be that debarment is already more prevalent around the world than we think. My office has been doing research on national debarment systems, and they seem to exist in many more countries than one might expect. We've done a preliminary look at 28 countries and have found some sort of exclusion mechanism in all but two of them. So that's 26 out of 28 countries we looked at that have a debarment system.

D. Colloquium

So, to my colleagues and I, debarment is an interesting and growing field. Which brings me to my last item, which is really a plug. My office will be hosting our Fourth Colloquium on Suspension and Debarment in late March[95] at the World Bank's headquarters in DC. If you're interested in debarment, we would be happy to have you as our guest.

And if you are interested in learning more about the World Bank's debarment system, my office's public report is a useful resource. It's easy to find at worldbank.org/sanctions.

[95] The colloquium was rescheduled to September 14, 2017.

HYPOTHETICALLY SPEAKING: THE CONSTITUTIONAL PARAMETERS OF CAPITAL VOIR DIRE IN THE MILITARY AFTER *MORGAN V. ILLINOIS*

MAJOR JANAE M. LEPIR*

> *Were voir dire not available to lay bare the foundation of petitioners challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the States right, in the absence of questioning, to strike those who would never do so.*[1]

I. Introduction

In *Morgan v. Illinois*,[2] the Supreme Court reversed the Illinois Supreme Court, finding that inadequate voir dire called into question the constitutionality of petitioner's death sentence.[3] In reaching this conclusion, the Court delved into two topics; whether a defendant is "entitled to challenge for cause and have removed on the ground of bias a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions on law" and "whether on voir dire the court must, on defendant's request, inquire into

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[1] Morgan v. Illinois, 504 U.S. 719, 733-34 (1992).

[2] *Id.* at 719.

[3] *Id.* at 739.

prospective juror's views on capital punishment."[4]

Since the Supreme Court's decision in *Morgan*,[5] state and federal courts have had to decide whether hypothetical questions designed to test juror bias in a capital case are permitted, required, or prohibited; with disparate results. Hypothetical questions can take many forms, as will become apparent through the course of this paper. The difficulty is often in deciphering exactly in what form and to what end a hypothetical question has been formulated. For example, some questions are directed at prospective panel members or jurors' willingness to consider different sentences given certain facts, while others are directed at determining prospective panel members or jurors' willingness to consider certain mitigation and extenuation evidence given certain facts. For purposes of the analysis, this paper will rely primarily on a district court case, *United States v. Johnson*[6], discussed in detail in Section II.B *infra*, for its formulation of the five different types of categories of hypothetical questions. To the extent certain cases contain unique or notable formulations, they will be highlighted and discussed. Until *United States v. Hennis*,[7] military appellate courts have not had to address this issue.[8]

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[4] *Id.* at 726.

[5] *Id.* at 719.

[6] United States v. Johnson, 366 F. Supp. 2d 822 (N.D. Iowa 2005).

[7] United States v. Hennis, No. 20100304 (Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, N.C., Apr. 15, 2010). Defense counsel in United States v. Martinez also used hypothetical questions, similar to those used in United States v. Hennis, to test panel member bias during voir dire. However, that case resulted in a full acquittal, so there were never any appellate litigation of the issue. Tom Brown, *U.S. Soldier Acquitted in Iraq "Fragging: Case*, REUTERS, Dec. 5, 2008, http://www.reuters.com/article/us-usa-iraq-trial-idUSTRE4B44X220081205.

[8] Although military appellate courts have addressed case-specific hypothetical questions, they have never done so in the capital setting. The most recent case, *United States v. Nieto*, dealt with case-specific hypothetical questions from the trial counsel as to the members' willingness to convict in a drug use case where there were deviations from the standard operating procedures for collection of the sample. United States v. Nieto, 66 M.J. 146 (C.A.A.F. 2008). This case can be distinguished from the other two cases to which it cites, *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987), and *United States v. Heriot*, 21 M.J. 11 (C.M.A. 1985). Both of those cases involved challenges to members who demonstrated some inflexibility toward a proper sentence, based solely on the charged offenses. While *Reynolds* and *Heriot* are more applicable to the question posed here, neither are capital cases, and, therefore, do not carry the same constitutional considerations as to panel member attitudes toward appropriate sentence. Furthermore, it is well settled in the military context, even in capital cases, that an inflexible disposition toward the appropriate sentence, based solely on the charged offenses, will sustain a challenge for cause under

Based upon the peculiarities of military practice, hypothetical questions, specifically, those hypothetical questions in categories two through four, as identified by *Johnson,*[9] are not only permissible, but are constitutionally required in order to protect the due process rights of the accused. Furthermore, in order to avoid "stake-out" questions, military courts should adopt *Johnson's* three-part inquiry to differentiate between an improper "stake-out" question and a constitutionally required "case-specific" question.[10]

The first part of this paper will explore the cases leading up to *Morgan* and the developments since *Morgan*.[11] The second part will examine the differences between panel selection procedures in military courts and jury selection procedures in federal courts, as well as sentencing procedures in military and federal courts. It will also provide background on capital voir dire practices generally. Two case studies will form the basis of the analysis of capital voir dire in the third part of this paper. The first is *United States v. Hennis*,[12] a military capital case currently on appeal at the Army Court of Criminal Appeals.[13] The second is *United States v.*

RCM 912. United States v. Akbar, 74 M.J. 364 (C.A.A.F. 2015). Even so, in finding no plain error in *Nieto*, the Court of Appeals for the Armed Forces noted that not only was the court "presented with a question that . . . is a matter of first impression with this Court, but also a matter on which there is little guidance from other federal courts." *Nieto*, 66 M.J. at 150. In reaching its conclusion, the court cited to a smattering of federal and state court decisions. However, its list is far from exhaustive and includes only one capital case, *State v. Ball*, 824 So. 2d 1089, 1110 (La. 2002). *Nieto* can best be understood to preview the difficult task the military appellate courts will face in deciding the exact issue presented in *Hennis*. Although all five Judges agreed on the result in *Nieto*, the case resulted in three different opinions, with Judge Stuckey providing the deciding "vote" in his concurring opinion for the two-judge majority opinion's rationale.

[9] *Johnson*, 366 F. Supp. 2d at 836-40.

[10] *Id.* at 845.

[11] Morgan v. Illinois, 504 U.S. at 719.

[12] *Hennis*, No. 20100304.

[13] On October 6, 2016, the Army Court of Criminal Appeals rendered its decision in the case, granting no relief. In its decision, the court found that the military judge did not prevent defense counsel from using the Colorado Method.

> We appreciate appellate defense counsel's citation to Matthew Rubenstein's, *Overview of the Colorado Method of Capital Voir Dire*, for it offers an excellent survey of the technique. However, when we compare roughly 2,000 pages of voir dire transcript in this case to the method's principles, appellant's argument is unpersuasive, for it is difficult to imagine a defense voir dire more strictly adherent to the Colorado Method. We recognize the Colorado Method is not the standard for assessing the sufficiency of voir dire; we briefly focus on it, however, to illustrate our conclusion

Tsarnaev,[14] commonly known as the Boston Marathon bomber case. Relying on the differences between the two systems—military and federal—the final part of this paper will analyze why certain types of hypothetical questions designed to test juror bias are constitutionally required in military capital cases, using the voir dire and sentencing from the two case studies as examples.

II. *Morgan* and its Progeny

Morgan v. Illinois[15] is the reference point for what is constitutionally required during capital voir dire. In *Morgan*, the State was allowed to inquire, under *Witherspoon v. Illinois,*[16] whether jurors would be unalterably opposed to the death penalty, no matter the circumstances.[17] By contrast, the petitioner was not allowed to ask: "'If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?'"[18] On appeal, the State argued that "general fairness" and "follow the law"[19] questions, used in this case, were sufficient to detect those jurors that would automatically vote for the death penalty.[20] The Supreme Court disagreed. "[T]he belief that death should

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> after reviewing this record that the military judge's involvement did not prevent the defense from using it.

Id. at 50. The court did not address the underlying issue of whether such voir dire was constitutionally required. *Id.* Rather, the court decided the issue based primarily on the wide latitude given to military judge's in overseeing voir dire generally. *Id.* at 51. The case is currently pending appeal before the United States Court of Appeals for the Armed Forces. United States Court of Appeals for the Armed Forces, http://www.armfor.uscourts.gov/newcaaf/journal/2017Jrnl/2017Mar.htm (last visitedMay 15, 2017).

[14] United States v. Tsarnaev, No. 13-10200-GAO (D. Mass. May 15, 2015).

[15] *Morgan*,504 U.S. at 719.

[16] *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

[17] *Morgan*, 504 U.S. at 722 ("[T]he trial court, over opposition from the defense, questioned each venire whether any member had moral or religious principles so strong that he or she could not impose the death penalty 'regardless of the facts.' . . . All of the jurors eventually empaneled were also questioned individually under Witherspoon . . . 'Would you automatically vote against the death penalty no matter what the facts of the case were?'").

[18] *Id.*

[19] Such questions generally include those aimed at confirming whether potential jurors will follow the judge's instructions on the law, even if they do not agree. *Id.* at 723-24.

[20] *Id.* at 734.

be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's ability to follow the law."[21] However, as the Court noted, without being pressed on that particular issue, a juror may not realize that he or she has in fact predetermined the sentence. "It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him from [following the dictates of the law]."[22]

In reaching its conclusion, the Court delved into two topics. First, the Court grappled with whether a defendant is "entitled to challenge for cause and have removed on the ground of bias a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of law."[23] Second, and related to the first topic, the Court inquired "whether on voir dire the court must, on defendant's request, inquire into prospective juror's views on capital punishment."[24] The majority determined that the answer to both questions was yes.

As the Court noted with regard to the first issue, a "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." [25] The presence or absence of aggravating or mitigating circumstances is "entirely irrelevant" to a juror who has already formed an opinion "on the merits."[26]

With regard to the second issue, the Court began by noting that the adequacy of voir dire "is not easily the subject of appellate review."[27] Although a great deal of voir dire must be left to the "sound discretion" of the court, there are "certain inquiries" which must be made "to effectuate constitutional protections."[28] One of those areas of inquiry is prospective juror views of the death penalty. "Petitioner was entitled, upon his request,

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[21] *Id.* at 735.
[22] *Id*.
[23] *Id.* at 726.
[24] *Morgan*, 504 U.S. at 726.
[25] *Id.* at 729.
[26] *Id*.
[27] *Id.* at 730 (citing Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) ("The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses.") (citations omitted)).
[28] *Morgan*, 504 U.S. at 729-30.

to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of the trial, that being whether to impose the death penalty."[29]

A. Developments since *Morgan*

United States v. Johnson,[30] a 2005 district court case, is the most important case to interpret *Morgan*.[31] *Johnson* held that "case specific" hypothetical questions were "appropriate—indeed necessary—during voir dire of prospective jurors to allow the parties to determine the ability of jurors to be fair and impartial in the case actually before them, not merely in some 'abstract' death penalty case."[32] Importantly, the district court noted:

> While the decision in *Morgan* establishes the *minimum* inquiry constitutionally required to life-qualify[33] a jury, it does not, on its face, require, permit, or prohibit any degree of case-specificity in voir dire questions for the purpose of life- or death-qualifying prospective jurors, because the inquiry proposed by the defendant in that case did not involve any case-specific component.[34]

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[29] *Id.* at 739. As the Court pointed out, in response to the State's argument that "general fairness" and "follow the law" questions were adequate to effectuate this inquiry, if this were true, "the State's own request for questioning under *Witherspoon* and *Witt*" would be "superfluous." *Id.* at 734.

[30] United States v. Johnson, 366 F. Supp. 2d at 822.

[31] *Morgan*, 504 U.S. at 719. John H. Blumea et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209 (2001). This article discusses applying *Morgan* to civilian juries. Importantly, it does not contain an analysis of the military system and it was written prior to *Johnson* and other decisions that have attempted to interpret and give effect to *Morgan*.

[32] *Johnson*, 366 F. Supp. 2d at 850.

[33] As *Morgan* explained the concept, to "life-qualify" is to allow a defendant, upon his request, "to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Morgan*, 504 U.S. at 736. This line of inquiry is sometimes referred to as "reverse-*Witherspoon*," after the Supreme Court case which gives the government the right to inquire whether a potential juror will refuse to impose the death penalty under any circumstances, but does not go so far as to grant the government the ability to challenge for cause any potential juror who might "express[] conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1950). *See also* Blumea, *supra* note 31, n.4.

[34] *Johnson*, 366 F. Supp. 2d at 831.

Johnson is a particularly useful case, as it lays out the different types of hypothetical questions. It also proposes a test for determining the difference between a permissible "case-specific" hypothetical question and a "stake-out" question.

The first type identified by *Johnson* was the "abstract question."[35] "The quintessential example of an 'abstract question' is, of course, the question proposed by the defendant and approved by the Court in *Morgan*: 'If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?'"[36]

The second type identified by *Johnson* was the "defendant status question."[37] Such questions "do not raise facts about the alleged crime, but rather are about the defendant's status separate and independent of the alleged crime."[38] Examples of defendant status questions include questions about race, past convictions, or youth as a mitigating factor.[39]

The third type identified by *Johnson* is the "case categorization question."[40] "Such a question asks a prospective juror about his or her ability to consider a life or death sentence, or both, in the particular category of capital case, such as murder-for-hire, felony-murder, or rape-murder, that the jurors would hear."[41]

The fourth type is the "case-specific" question.[42] "This court defines 'case-specific' questions as questions that ask whether or not jurors can consider or would vote to impose a life sentence or a death sentence in a case involving stated facts, either mitigating or aggravating, that are or might be actually at issue in the case that the jurors would hear."[43]

The fifth and final type is the "stake-out" question.[44] These types of questions "seek to ask a juror to speculate or precommit to how that juror might vote based on any particular facts . . . ."[45] In order to differentiate

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[35] *Id.* at 835.
[36] *Id.* (quoting *Morgan*, 504 U.S. at 723).
[37] *Johnson*, 366 F. Supp. 2d at 836.
[38] *Id.* at 837.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 837-38.
[42] *Id.* at 840.
[43] *Id.*
[44] United States v. Johnson, 366 F. Supp. 2d at 842.
[45] *Id.*

between a "stake-out" question and a "case-specific" question, the court in *Johnson* formulated a three-part inquiry:

> (1) Does the question "ask a juror to speculate or precommit to how that juror *might vote* based on any particular facts" or (2) Does it "seek to discover in advance *what a prospective juror's decision will be* under a certain state of evidence" or (3) Does it "seek to cause prospective jurors to pledge themselves to a future course of action and indoctrinate [them] regarding potential issues before the evidence has been presented and [they] have been instructed on the law."[46]

As the court in *Johnson* recognized, "courts generally agree that first-category ('abstract') questions are permissible, but that the fifth-category ('stake-out') questions are not. However, what is also apparent is that courts do not always agree on the permissibility of questions in the second ('defendant's status'), third ('case-categorization'), or fourth ('case-specific') categories, or even which questions fall into which categories."[47] Even so, the court recognized that "the clear majority of courts reject '*Morgan* questions' with any degree of case specificity."[48]

Two months after *Johnson*,[49] another United States district court issued an opinion, *United States v. Fell*, endorsing the use of "case-specific" hypothetical questions, as long as they were not "stake-out" questions.[50] In *Fell*, the court noted: "There is a crucial difference between questions that seek to discover how a juror might vote and those that ask whether a juror will be able to fairly consider potential aggravating and mitigating evidence."[51] Even so, the court in *Fell* was clear that while it would allow "case-specific" hypothetical questions that were

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[46] *Id.* at 845 (citations omitted).
[47] *Id.* at 844.
[48] *Id.* at 840 (citing United States v. McVeigh, 153 F.3d 1166, 1207-08 (10th Cir. 1998), *overruled in part by* Hooks v. Ward, 184 F.3d 1206, 1227 (10th Cir. 1999); Richmond v. Polk, 375 F.3d 309, 329-31 (4th Cir. 2004); Oken v. Corcoran, 220 F.3d 259, 266 n.4 (4th Cir. 2000); Trevino v. Johnson, 168 F.3d 173, 183 (5th Cir. 1999); United States v. Tipton, 90 F.3d 861, 879 (4th Cir. 1996), *cert. denied*, 520 U.S. 1253 (1997); United States v. McCullah, 76 F.3d 1087, 1113 (10th Cir. 1996), *cert. denied*, 520 U.S. 1213 (1997); *Ball*, 824 So. 2d at 1110; Schmitt v. Commonwealth, 547 S.E.2d 186, 196 (Va. 2011); Lucas v. State, 555 S.E.2d 440, 446-47 (Ga. 2001); Hogwood v. State, 777 So. 2d 162, 177-78 (Ala. Crim. App. 1998)).
[49] United States v. Johnson, 366 F. Supp. 2d at 822.
[50] United States v. Fell, 372 F. Supp. 2d 766 (D. Vt. 2005).
[51] *Id.* at 771.

"reasonably directed towards discovering whether the juror will be able to fairly and impartially weigh aggravating and mitigating factors" it would strike questions that were an "attempt to commit the juror to a particular position."[52]

By comparison, in *United States v. Wilson*, the District Court for the Eastern District of New York ruled against a defense motion to include "case-specific" hypothetical questions concerning potential mitigating and/or aggravating factors to be raised during the penalty phase.[53]

> This court finds that the five questions posed by the Defendant . . . are not constitutionally required in order to select a jury that is both "life qualified" and "death qualified" pursuant to *Morgan v. Illinois* and *Witherspoon v. Illinois*. Moreover . . . the court believes that such questioning is not necessary to serve the primary goal of voir dire, *i.e.* to ensure a fair trial by empaneling an impartial jury.[54]

Subsequently, in *United States v. Basciano*, a United States district judge issued a ruling on the defendant's proposed "case-specific" hypothetical questions.[55] Citing to *Johnson*,[56] the court allowed "case-specific" hypothetical questions, however, it rephrased the questions[57] and

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[52] *Id.* at 773. *See also* United States v. Dervishaj, No. 13-CR-668 (ENV), 2015 U.S. Dist. LEXIS 78622, at *5 (E.D.N.Y. Jun. 17, 2015) (discussing the prohibition against "stake-out" questions in a non-capital case).

[53] United States v. Wilson, 493 F. Supp. 2d 402, 403 (E.D.N.Y. 2006).

[54] *Id.* (citations omitted).

[55] United States v. Basciano, No. 05-CR-060 (NGG), 2011 U.S. Dist. LEXIS 11077, at *1 (E.D.N.Y. Feb. 4, 2011).

[56] United States v. Johnson, 366 F. Supp. 2d at 822.

[57] For example:

> Proposed Question 1: "Are your views on the death penalty such that you would find it difficult to consider a sentence of life without the possibility of release for someone who planned and premeditated an intentional murder and was found to be a future danger to others?"
>
> Rephrased Question 1: "Are your views on the death penalty such that you would be unable to consider a sentence of life without the possibility of release if the evidence at trial showed a defendant allegedly planned and premeditated an intentional murder?"

disallowed one question.

> The court will not include . . . proposed Question 3, which asks: "What would be important to you in making the decision to choose between a sentence of the death penalty or life in prison without the possibility of release?" Given that potential jurors will not be fully instructed on the law applicable to the jury's sentencing decision or the specific facts of the case at the time the jury questionnaire is filled out, asking potential jurors to speculate on what factors will be important to their decision will not effectively reveal bias and is unduly open ended and vague to serve a permissible purpose.[58]

The confusion on what is allowed in capital voir dire extends beyond proposed defense questions. In another district court case, *Harlow v. Murphy*, the judge granted a writ of *habeus corpus* based in part on the trial court's "refusal to allow trial counsel for Mr. Harlow to engage in meaningful voir dire of prospective jurors."[59] However, in that case, the court focused on the trial judge's prohibition on the defense counsel's ability to "follow-up on jurors who proffered or volunteered case-specific reasons limiting their ability or willingness to impose a life sentence."[60] This was because, as the court pointed out, "the jurors already knew much about the case through the media."[61] According to the district court, "Counsel explained that he wished to ascertain whether jurors could realistically consider a life sentence if the State's basic allegations were proven, not whether jurors would tend to vote for a particular sentence under particular facts."[62]

In 2012, a United States district court judge in Puerto Rico cited approvingly to *Fell* and issued an order allowing defense counsel to "*properly* inquire about the jurors' ability to consider mitigating and

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Basciano, 2011 U.S. Dist. LEXIS 11077, at *1, 8. As the court noted, "[a] question combining aggravators together does not effectively reveal juror bias and instead requires potential jurors to prejudge and reveal how they will weigh the evidence at the penalty phase." *Id.* at *7.

[58] *Id.* at *9-10.

[59] Harlow v. Murphy, No. 05-CV-039-B, 2008 U.S. Dist. LEXIS 124288, at *2 (D. Wyo. 2008).

[60] *Id.* at *221-22.

[61] *Id.*

[62] *Id.* at *225-26.

aggravating factors."[63] Echoing the court in *Fell*, the district court stated that "properly formulated" hypothetical questions may expose juror bias.[64]

> For example, a juror may not be asked whether evidence of rape would lead him or her to vote for the death penalty. However, a juror may be asked if, in a murder case involving rape, he or she could fairly consider either a life or death sentence. The first question is an improper stake-out question. The second question is not a stake-out question because it only asks whether the juror is able to fairly consider the potential penalties.[65]

State appellate courts have also recently considered the issue. In 2010 the Arizona Supreme Court took on the use of hypothetical questions from the government's perspective.[66] In that case, the court found no error where the trial judge allowed "the State to ask prospective jurors if they could consider imposing a death sentence if a defendant had not actually shot the victim."[67] The State was not asking jurors to "precommit to a specific position," but to fairly consider the death penalty in a circumstance where state law authorized it.[68]

The Georgia Supreme Court weighed in on the issue in 2012. On appeal, the appellant argued that the trial court erred when it did not allow him to ask whether prospective jurors would automatically impose the death penalty and not consider life with or without the possibility of parole, in a case involving the murder of two young children.[69] The court agreed, affirmed the convictions, but reversed the sentence.[70] With reference to a Georgia statute describing the scope of voir dire in criminal and civil cases, the court found that while state case law is clear that counsel may not ask questions which seek to precommit prospective jurors to a particular outcome, the statute did not preclude the type of questioning sought by the appellant.[71] Furthermore, the court determined that it was error for two reasons under the specific facts of the case. First, "experience, common

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[63] United States v. Montes, No. 06-009-01 (JAG), 2012 U.S. Dist. LEXIS 49916, at *7 (Apr. 7, 2012) (emphasis added) (citing *Fell*, 372 F. Supp.2d at 771).
[64] *Id.* at *7 (citing *Fell*, 372 F.Supp.2d at 771).
[65] *Id.* at *6-7.
[66] State v. Garcia, 226 P.3d 370 (Ariz. 2010).
[67] *Id.* at 378.
[68] *Id.* (citing United States v. Johnson, 366 F. Supp. 2d at 845).
[69] Ellington v. State, 735 S.E.2d 736, 750 (Ga. 2012).
[70] *Id.* at 750.
[71] *Id.* at 753-54.

sense, and background law" all pointed to the fact that the child victims were the "critical issue."[72] Second, the court looked to the way in which the State tried the case. "After strenuously objecting to any inquiry about the jurors' views as to child victims, the prosecutor focused on that fact from opening statement in the guilt/innocence phase to closing argument in the sentencing phase as a principal reason that Ellington should receive the death sentence."[73]

The Kansas Supreme Court considered the limitations of *Morgan* late last year in *State v. Robinson*.[74] In a lengthy opinion the court found that the trial judge's limitations did not prevent defense counsel from disclosing case-specific facts and inquiring whether such facts "rendered prospective jurors unable to be impartial and prevented them from meaningfully considering mitigation evidence or a life sentence."[75] The court first recognized that "since *Morgan*, the majority of federal appellate courts have rejected the notion that the Constitution mandates case-specific questioning during voir dire in capital proceedings."[76] Second, the court recognized that among the minority of courts that had found case-specific hypothetical questioning to be required under certain circumstances, "these courts have adopted a balancing approach, finding it improper to categorically deny case-specific questioning but also recognizing that such questioning is not without limits and cannot be used to stake-out jurors."[77]

The most recent state court appellate litigation occurred in Pennsylvania in 2015. There, the appellant argued, with reference to *Morgan*, that the trial court erred when it refused to permit the following voir dire question: "'You will hear that [appellant] was convicted, by plea of guilty, to the crime of [v]oluntary [m]anslaughter in 1980. Is there any one of you who feels that[,] because of the defendant's prior convictions,

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[72] *Id.* at 755. While the appeal was specific to the trial court ruling precluding the use of case-specific hypothetical questions designed to test juror bias, the Georgia Supreme Court's decision relied heavily on the fact that prospective jurors should be made aware of the fact of child murder victims in order to allow for proper voir dire. In making this distinction, the court cited approvingly to its decision in Lucas while highlighting similarly premised decisions of two other state courts involving child victims. Id. at 759 (citing Lucas, 735 S.E.2d at 446; State v. Jackson, 836 N.E.2d 1173, 1192 (Oh. 2005); State v. Clark, 981 S.W.2d 143, 147 (Mo. 1998)).

[73] *Ellington*, 735 S.E.2d at 755.

[74] State v. Robinson, No. 90,196, 2015 Kan. LEXIS 929, at 1 (Kan. Nov. 6, 2015).

[75] *Id.* at 235.

[76] *Id.* at 231.

[77] *Id.* at 235-36.

that you would not consider a sentence of life imprisonment[?]'"[78] The court found no error on the basis that appellant's question was "designed to elicit what the jurors' reactions might be when presented with a specific aggravating circumstance."[79] In his dissent, the Chief Justice of the Pennsylvania Supreme Court took issue with the majority's conclusion.

> I recognize that the form of case-specific questions geared to assessing juror biases should be controlled by trial courts, and that Appellant's specific framing was not ideal, in that the interrogatory was not couched conditionally, in terms of what the trial evidence might show. Nevertheless, since the Commonwealth clearly had committed to pursuing the relevant aggravator and the Appellant's proposed question did not require jurors to commit to a particular result, but rather, concerned whether they could fairly consider the evidence at large and the trial court's instructions, I do not find this factor to be dispositive. Indeed, only a modest adjustment to the query was required to bring it into conformance with *Johnson's* sound guidance.[80]

Since the Supreme Court's decision in *Morgan*,[81] only two petitioners have sought certiorari at the Supreme Court. The Supreme Court denied both summarily.[82] As expected, litigation continues with no end in sight. While most federal courts have settled on *Johnson*[83] as their operative case to interpret *Morgan*, state courts have been deciding the issue piecemeal, often with reference to state statute. However, as the next section will make clear, one of the primary difficulties in this area is that even if most courts can agree that "stake-out" questions are impermissible, many cannot agree what a "stake-out" question looks like. Hypothetical questions can take many different forms in a multitude of contexts, leading to the problem of comparing apples to oranges when it comes to deciding whether a proposed question is required, permissible, or prohibited.

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[78] Commonwealth v. Smith, No. 681 CAP, 2015 Pa. LEXIS 3002, at *18 (Pa. Dec. 21, 2015) (citing Morgan v. Illinois, 504 U.S. at 736-37).
[79] *Id.*
[80] *Id.* at *27-28 (Taylor, C.J., dissenting) (citing United States v. Johnson, 366 F. Supp. 2d at 849).
[81] Morgan, 504 U.S. at 719.
[82] United States v. Tipton, 90 F.3d at 879, *cert. denied*, 520 U.S. at 1253; United States v. McCullah, 76 F.3d at 1113, cert. denied, 520 U.S. at 1213.
[83] Johnson, 366 F. Supp. 2d at 822.

The next section will focus on the differences between the military and the federal systems in terms of panel/jury selection procedures and sentencing procedures. It will not examine state schemes. The reason for this is two-fold. First, the military is a federal system and many of its rules are modeled on the federal rules, making for a more straightforward comparison. Second, while state case law can be persuasive, military appellate courts look to federal case law first when no military case law exists.[84]

B. Military Panel and Federal Jury Selection Procedures

The differences between selection procedures for military panels and federal juries differ vastly, even in the non-capital context. These differences have been the subject of criticism, discussion, and defense by an endless stream of commentators.[85] In the capital context, however, the differences are even more notable, and important. This section will, first, discuss military and federal civilian capital selection procedure. It will reference notable differences, in order to inform the analysis of why certain categories of hypothetical questions should be constitutionally required during military capital voir dire. Second, it will provide a basic overview of voir dire in a capital case, which is treated differently by judges, military and civilian alike, in addition to being the subject of specialized training for prosecutors and defense counsel.

1. Comparing the Two Systems

Article 25 of the Uniform Code of Military Justice (UCMJ) governs

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[84] United States v. Klemick, 65 M.J. 576, 579 (N-M. Ct. Crim. App. 2006).

[85] *See*, *e.g.*, Victor Hansen, *Symposium, Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military*, 44 Creighton L. Rev. 911, 940-44 (2011); Major James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 Mil. L. Rev. 117 (2010); Major Christopher W. Behan, *Don't Tug on Superman's Cape: Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 Mil. L. Rev. 190 (2003); Colonel James A. Young, III, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 91, 107 (2000); Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three--Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 4 (1998); Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 1, 25 (1998).

eligibility criteria for panel members in capital and non-capital cases.[86] According to Article 25, the convening authority,[87] pursuant to RCM 503(a)(1),[88] shall detail members who are "in his opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[89] There are no specific provisions that bar discrimination based on age, sex, or any other basis.[90] Because of the way in which command functions, an Army convening authority can only practically choose panel members from within his own command.[91] The selection procedure reflects this reality. Normally, the Staff Judge Advocate compiles a list of potential panel members from across the command, as supplied by the various units in response to an official tasking, from which the General Court Martial Convening Authority makes his selections in accordance with Article 25.

In the federal system, jurors are chosen randomly, in accordance with the Jury Selection and Service Act of 1968 [hereinafter Jury Selection Act].[92] The pool is defined by the district or division in which the district court sits.[93] By contrast to the UCMJ, the Jury Selection Act explicitly bars exclusion specifically on account of "race, color, religion, sex, national origin, or economic status."[94] Otherwise, any person is qualified to serve, so long as they do not fall into one of the categories listed in 28 U.S.C. § 1865(b)(1)-(5).[95]

Article 25a requires twelve members for a capital case, "unless twelve members are not reasonably available because of physical conditions or

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[86] UCMJ art. 25 (2012).

[87] "Convening authority" is defined as a "commissioned officer in command for the time being and successors in command." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(6) [hereinafter MCM]. Rule for Courts-Martial 504 discusses the role of the convening authority in convening a court-martial. *Id.* at R.C.M. 504.

[88] *Id.* at R.C.M. 503(a)(1).

[89] *Supra* note 86.

[90] *Id.* During voir dire, however, "[n]either the prosecutor nor the defense may engage in purposeful discrimination on the basis of race or gender in the exercise of a peremptory challenge." United States v. Chaney, 53 M.J. 383, 384 (citing Batson v. Kentucky, 476 U.S. 79 (1986)). As the court explained in *Chaney*, if one party believes the other has done so, it may raise an objection, thereby forcing the challenging party to offer a race or gender neutral basis for the challenge. Chaney, 53 M.J. at 384.

[91] *See* MCM, *supra* note 87, R.C.M. 503(a)(3).

[92] 28 U.S.C. §§ 1821-69 (2006).

[93] 28 U.S.C. § 1861 (2006).

[94] 28 U.S.C. § 1862 (2006).

[95] The five categories cover citizenship, literacy and fluency, mental and physical infirmities, and criminal history.

military exigencies."[96] Even so, no capital case can be tried with less than five members.[97] In that regard, the military system is now aligned with the federal system which provides for twelve jurors, in both capital and non-capital cases, absent agreement by the parties to a lesser number.[98] However, where the federal system contains a provision for empaneling alternate jurors in both capital and non-capital cases,[99] the military does not have such a provision.[100]

As to how to arrive at the required number of panel members or jurors, that is a matter of discretion, for both convening authorities and federal judges. The Jury Selection Act does not mandate a certain number of initial jurors. In drafting the *Resource Guide for Managing Capital Cases, Volume I: Federal Death Penalty Trials* [hereinafter *Resource Guide for Managing Capital Cases]*, the authors interviewed federal judges[101] on their jury pool procedures.

> The judges we interviewed summoned from 125 to 500 jurors for their death-penalty cases, the average being about 225. One judge who did not give an absolute number said he summoned a panel about twice the size he would normally summon for a criminal case, although he later determined that was unnecessary. Similarly, a judge who had two death-penalty trials summoned a smaller

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[96] *Supra* note 86.

[97] Article 25a was enacted as part of the 2002 National Defense Authorization Act. Pub. L. No. 107-107, 115 Stat. 1012 (2001). *See* United States v. Curtis, 32 M.J. 252, 267-68 (C.A.A.F. 1991) (citing Williams v. Florida, 399 U.S. 78 (1970); Ballew v. Georgia, 435 U.S. 223 (1978)).

[98] Fed. R. Crim. P. 23(b)(1).

[99] Fed. R. Crim. P. 24(c).

[100] Rule for Courts-Martial 505(c)(2)(A) governs changes to members after assembly and RCM 505(c)(2)(B) governs the detailing of new members where an excusal results in a reduction below quorum. MCM, *supra* note 87, R.C.M. 505(c)(2)(A), RCM 505(c)(2)(B). Rule for Courts-Martial 805 governs the procedures for resuming trial after the addition of a new member pursuant to RCM 505(c)(2)(B). MCM, *supra* note 88, R.C.M. 505. However, in the Discussion, it notes that "[w]hen the court-martial has been reduced below a quorum, a mistrial may be appropriate." *Id.* at discussion. *See* UCMJ art. 29(b) (2012); United States v. Vazquez, 72 M.J. 13 (C.A.A.F. 2013).

[101] According to the authors, they used the following methodology to select judges for interviews: "In preparing this guide, FJC staff did the following: reviewed case materials from twenty of the first twenty-five federal judges who had handled post-Furman federal death-penalty cases; interviewed sixteen of those judges . . . ." Molly Treadway Johnson & Laura L. Hooper, *Resource Guide for Managing Capital Cases* (2004), http://www.fjc.gov/public/home.nsf.

> jury panel the second time (150 jurors) than she had the first time (200 jurors). In addition to the fact that the case is a capital one, other factors—such as the amount of local publicity the case is receiving—will have an influence on the size of the panel to be summoned.[102]

Unfortunately, the military has no comparable study or publicly available compendium for the conduct of capital cases, in terms of panel selection pool. Rule for Courts-Martial 504 contains no additional guidance for convening capital cases.[103]

The use of juror questionnaires appears consistent between the two systems. Rule for Courts-Martial 912(a)(1) specifically authorizes the use of juror questionnaires, to "expedite voir dire and . . . permit more informed exercise of challenges." The trial counsel is required to submit questionnaires to members upon defense request. In the federal system, juror questionnaires are employed, in all types of cases. This is done pursuant to Federal Rule of Criminal Procedure 24 and provides federal judges' "ample discretion in determining how best to conduct the voir dire."[104] In the Federal Judicial Center's[105] Benchbook for U.S. District

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[102] *Id. See also* United States v. Hammer, 25 F. Supp. 2d 518, 519 (M.D. Pa. 1998) (noting that more than 200 additional jurors were required to be summoned during the jury-selection process to supplement the 250 originally summoned).

[103] MCM, *supra* note 88, R.C.M. 504.

[104] *Rosales-Lopez*, 451 U.S. at 182. *See also* United States v. Gambino, 809 F. Supp. 1061, 1068 (S.D.N.Y. 1992) (discussing the utility of juror questionnaires in anonymous jury cases to ensure both the Government and defense counsel will have "an arsenal of information" about each potential juror . . . to intelligently exercise their challenges for cause and peremptory challenges") (quoting United States v. Barnes, 604 F.2d 121, 142 (2d Cir. 1979)). This use of juror questionnaires is to be distinguished from the use of questionnaires to determine the initial pool. The United States federal courts website instructs those who have been summoned to federal jury service to contact their local district court website to complete a "Juror Qualifications Questionnaire." UNITED STATES COURTS, http://www.uscourts.gov/services-forms/jury-service, (last visited May 16, 2017). Ostensibly, this form is meant to identify those who are not qualified to serve and those who are exempt pursuant to the Jury Selection Act. Each federal district also maintains its own excusal policy and procedure, in addition to the excusal provision for "undue hardship or extreme inconvenience" in the Jury Selection Act. U.S. COURTS, http://www.uscourts.gov/services-forms/jury-service/juror-qualifications, (last visited May 26, 2017) (quoting 28 U.S.C. § 1866(c)(1)). According to the federal courts website, "[e]xcuses for jurors are granted at the discretion of the court and cannot be reviewed or appealed to Congress or any other entity." U.S. COURTS, *supra*.

[105] "The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-29), on the

Court Judges there is an entire section dedicated to the conduct of capital trials. It notes, "[c]onsider having venire members complete a juror questionnaire, and consider providing attorneys with the responses prior to jury selection."[106] Likewise, as the authors note in *Resource Guide for Managing Capital Cases,* "[n]early all federal judges who have had a death-penalty trial to date have used a written juror questionnaire to help inform the voir dire process and identify jurors who will be unable to serve."[107] On its website, the Federal Judicial Center maintains an inventory of sample questionnaires and orders for use in capital cases.[108]

Both systems rely, to some degree, on standard voir dire questions from the judge to begin the selection process. In the military, U.S. Dep't of Army, Pamphlet 27-9, The Military Judges' Benchbook, commonly known as the Military Judges' Benchbook, contains an entire section dedicated to the conduct of capital voir dire.[109] While most of the questions are the same as those for non-capital voir dire, there are two questions—one "abstract" and one "case-categorization"—that specifically address the potential members' attitudes about the death penalty and appropriate punishments.[110] In the federal system, the Benchbook likewise contains sample scripts for the conduct of voir dire in criminal trials.[111] The section dedicated to capital cases contains two

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recommendation of the Judicial Conference of the United States." FEDERAL JUDICIAL CENTER, http://www.fjc.gov (last visited May 26, 2017).

[106] FEDERAL JUDICIAL CENTER, BENCHBOOK 115 (2013), https://www.fjc.gov/sites/default/files/materials/2017/Benchbook-US-District-Judges-6TH-FJC-MAR-2013_0.pdf

[107] Johnson & Hooper, *supra* note 101.

[108] FEDERAL JUDICIAL CENTER, *supra* note 105.

[109] U.S. DEP'T OF ARMY, DA PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 8-3-1 (10 Sept. 2014) [hereinafter DA PAM 27-9].

[110] *Id. at 1156.*

> *32. Members, as I have told you earlier, if the accused is convicted of (premeditated murder) (_____) by a unanimous vote, one of the possible punishments is death. Is there any member, due to his/her religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to the imposition of the death penalty?*
>
> *33. Is there any member who, based on your personal, moral, or ethical values, believes that the death penalty must be adjudged in any case involving (premeditated murder) (_____)?*

Id.

[111] BENCHBOOK, *supra* note 106, at 115-17.

additional questions for the judge to ask potential jurors.[112] Both are "abstract questions." Furthermore, the Federal Judicial Center's website contains sample scripts for judges in capital cases, which appear to incorporate questions from both parts of the Benchbook.[113]

While the Discussion to RCM 912(d) expresses a preference for military judges to allow counsel to conduct voir dire in all cases, in the federal system, Federal Rule of Criminal Procedure 24 states that "[t]he court may examine prospective jurors or may permit the attorneys for the parties to do so."[114] However, if the court conducts the examination it "must" permit both sides to "ask further questions that the court considers proper; or . . . submit further questions that the court may ask if it considers them proper."[115] As such, attorney-led voir dire is rare in the federal system.[116] In capital cases, attorney participation in voir dire is, however, common. As of August 11, 2014, attorney questioning of potential jurors was allowed in 186 (or 82%) of the 227 trials where jury selection begun,[117] according to an affidavit prepared by the Director of the Federal Death Penalty Resource Counsel Project.[118]

Both military and federal courts provide for challenges for cause in capital trials. In the federal system, such challenges are often based on the standard set forth in *Wainright*, specifically, "whether the juror's views would 'prevent or substantially impair the performance of his duties as a

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[112] "(a) Would you never find, under any circumstances, in favor of the death penalty under the law as I will explain it? (b) If the defendant is found guilty of conduct that is a capital offense, beyond a reasonable doubt, would you always find in favor of the death penalty?" *Id.* at 119-20.

[113] FEDERAL JUDICIAL CENTER, *supra* note 105.

[114] FED. R. CRIM. P. 24. *See* Rosales-Lopez v United States, 451 U.S. at 189.

[115] FED. R. CRIM. P. 24.

[116] *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 159 (2010) (citing GREGORY E. MIZE ET. AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 27 (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOS CompendiumFinal.ashx; Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 Rutgers J.L. & Pub. Pol'y 287, nn. 50, 53 (2006)).

[117] Mem. of Law at Ex. 2, United States v. Tsarnaev, No. 13-10200-GAO (No. 682).

[118] "The Federal Death Penalty Resource Counsel Project (FDPRCP) is a program of the Defender Services Office of the Administrative Office of the United States Courts (AOUSC) designed to assist the federal courts, federal defenders, and appointed counsel in connection with matters relating to the defense function in federal capital cases at the trial level." FEDERAL DEATH PENALTY RESOURCE COUNSEL PROJECT, http://www.capdefnet.org/FDPRC/aboutus.aspx (last visited May 15, 2016).

juror in accordance with his instructions and his oath.'"[119] The Jury Selection Act also contains provisions governing removing otherwise eligible jurors from the pool.[120] Rule for Courts-Martial 912(f) governs challenges for cause during all courts-martial.[121] In addition to the multiple bases for challenge laid out by the rule, RCM 912(f)(1)(N) has been interpreted to cover both actual and implied bias.[122]

The final and most notable difference between the two systems is the availability and use of peremptory challenges. Rule for Courts-Martial 912(g) governs peremptory challenges in all military cases.[123] Both sides have one challenge. In the federal system, each side has twenty peremptory challenges in a capital case.[124]

2. The Methodology of Capital Voir Dire

Voir dire has long been the subject of study and academic discussion.[125] This is especially true of capital voir dire, where the stakes could not be higher. While there are clear distinctions to be made related to death penalty practice between civilian and military practitioners, voir dire training and methodology is an area in which there are more commonalities than differences. Even though this paper is focused on the constitutionality of hypothetical questions during capital voir dire, it is impossible to fully appreciate the applicability of such arguments without

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[119] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[120] 28 U.S.C. § 1866(c).

[121] MCM, *supra* note 88, R.C.M. 912(f).

[122] *See* United State v. Nash, 71 M.J. 83 (C.A.A.F. 2012); United States v. Briggs, 64 M.J. 285, 286 (C.A.A.F. 2007).

[123] MCM, *supra* note 88, R.C.M. 912(g).

[124] FED. R. CRIM. P. 24(b)(1). It is worth noting that while the military has the "liberal grant mandate," available only to defense counsel, the federal courts have nothing comparable. See United States v. Clay, 64 M.J. 274, 276-77 (C.A.A.F. 2007); United States v. James, 61 M.J. 132, 139 (2005).

[125] The Capital Jury Project is among the most notable sources of research for those writing scholarly articles on capital voir dire. In 1995, William J. Bowers, the principal research scientist for the study, wrote a law review article introducing it and describing its methodology. William J. Bowers, *SYMPOSIUM: THE CAPITAL JURY PROJECT: The Capital Jury Project: Rational, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043 (1995). *See also* UNIVERSITY AT ALBANY, STATE UNIVERSITY OF NEW YORK, SCHOOL OF CRIMINAL JUSTICE, http://www.albany.edu/scj/13194.php (last visited May 16, 2017) (containing a partial listing of publications based on research from the Capital Jury Project).

understanding the actual practice of capital voir dire once the parties enter the courtroom. For that reason, this section presents a working overview of the various methodologies, in order to both inform the reader generally but also to help shed some light on the voir dire in the case studies in Part III *infra*.

Capital voir dire practice among prosecutors tends to track the same lines as traditional voir dire. Other than, perhaps, expanded use of questionnaires and individual voir dire, the process is essentially similar to that for any other complex case.[126]

As compared to prosecutors, the capital defense bar has invested substantial time and effort into developing specialized methods of voir dire for capital cases. A reasonable explanation for this might be two-fold. First, in cases where the facts are likely to be the most aggravated, capital defense counsel need to maximize any procedural advantage in order to preserve their clients' lives. Second, the specter of ineffective assistance of counsel claims is ever present in capital cases. Therefore, adhering to the most widely accepted and well-used capital voir dire methods is among the best defenses against such claims on appeal.

With that distinction in mind, let us turn to a discussion of those specifically enumerated methods, all of which are associated with the capital defense bar. The most commonly cited method in civilian practice is the Colorado Method. Because of the peculiarities of military panel

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[126] In support of this conclusion, one need only consult the training calendars of the three most well-known training organizations for prosecutors. The National District Attorney Association's website does not list any death penalty training for prosecutors through December 2016. NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, http://www.ndaa.org/upcoming_courses.html (last visited May 16, 2017). Under the heading Capital Litigation Project, the NDAA details two three-day trainings it offered in July and August of 2009 on death qualification of capital juries and penalty phase practice, pursuant to a federal grant. NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, http://www.ndaa.org/capital_litigation_home.html (last visited May 16, 2017). Although that training has apparently not been offered since, prosecutors may access the training by requesting an account from the New York Prosecutors Training Institute and downloading it. *Id.* By contrast, the Association of Government Attorneys in Capital Litigation does offer voir dire training as part of its 2016 conference agenda. However, over a four-day span, voir dire training is scheduled for only one hour. ASSOCIATION OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION, http://agacl.com/conference-agenda/ (last visited May 16, 2017). Similarly, the United States Department of Justice's Offices of the United States Attorneys offers a three day seminar once a year on capital cases. UNITED STATES DEPARTMENT OF JUSTICE, http://www.justice.gov/usao/training/course-offerings/schedule-2016 (last visited May 16, 2017).

practice, the military also has the Ace of Hearts Strategy. Finally, while not specific to capital voir dire, this paper will also discuss the Trial Lawyers College (TLC) method.

Developed by David Wymore, a former Deputy Chief with the Colorado Public Defender, the Colorado Method "seeks to reduce the force of social conformity and get the life votes out of the deliberation room."[127] Practically, the method has two parts:

> The first part is designed to get jurors to accurately express their views on capital punishment and mitigation in order for the defense to rationally exercise their peremptory challenges for cause.[128] The second part is designed to address the Asch findings on group dynamics.[129] This part focuses on teaching the juror the rules for deliberation; that he is making an individual moral decision, that he needs to respect the decision of others; and that he is entitled to have his individual decision respected by the group. The goal is not to teach the juror to change everyone else's mind—the goal is to

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[127] Lieutenant Colonel Eric Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, 2011 Army Law. 6, 22 (2011).

[128] As the author of the article points out, this portion of the method plays a "small role" in the military justice system. *Id.* n.217.

> Under the Colorado method, defense counsel exercise their peremptory challenges based only on the juror's death views. The method uses a ranking system based on juror responses. . . . In the federal system, the defense gets twenty peremptory challenges in a capital case. However, in the military, the accused in a capital case only gets one.

Id. (citations omitted). For more information on the ranking system, *see* Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, THE CHAMPION, Nov. 2010, at 18-19.

[129] In his article, Lieutenant Colonel (LTC) Carpenter provides a brief summary of Solomon Asch's experiments in the 1950s, sponsored by the United States Navy. Carpenter, *supra* note 127, at 22. Asch's research "revealed the dynamic of social conformity, which is essentially the fear of disagreeing with the majority in a public setting." *Id.* at 7 (citation omitted). Citing research from the Capital Jury Project, LTC Carpenter provides a lengthy explanation of how this research is applicable to capital jury deliberations. "Capital jurors, dealing in norms and values, faced with the requirement to produce a unanimous answer, are affected by group pressure—even when someone's life is on the line." *Id.* at 8.

> teach the juror how not to fold and to teach the other jurors to respect everyone else's opinions.[130]

As the Colorado Method is both proprietary and an important part of trial strategy for capital defense counsel, public information discussing the method is limited.[131] Matthew Rubinstein of the Capital Resource Counsel published an article in *The Champion*[132] in 2010 on the basics of the Colorado Method. His article appears to be the most in-depth, publicly available discussion of the methodology. As he explained it:

> Colorado Method capital voir dire follows several simple principles: (1) jurors are selected based on their life and death views only; (2) pro-death jurors (jurors who will vote for a death sentence) are removed utilizing cause challenges, and attempts are made to retain potential life-giving jurors; (3) pro-death jurors are questioned about their ability to respect the decisions of the other jurors, and potential life-giving jurors are questioned about their ability to bring a life result out of the jury room; and (4) peremptory challenges are prioritized based on the prospective jurors' views on punishment.[133]

Where the Colorado Method is highly selective when it comes to potential jurors, the Ace of Hearts Strategy[134] is at the other end of the spectrum. In this strategy, counsel's goal is to preserve as many panel members as possible, to increase the likelihood that someone will cast the "life-giving" vote during sentencing. The most famous discussion of this strategy comes from Judge Morgan's concurring opinion in *United States*

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[130] *Id.* at 22-23.

[131] For example, the National College of Capital Voir Dire, co-founded by Mr. Wymore, provides training once a year on the Colorado Method. DAVID WYMORE, http://davidwymore.com/about/about.htm (last visited Jul. 1. 2016). The on-line application includes a certification that the applicant is "a capital defense counsel . . . not involved in any prosecution or law enforcement activities, and . . . will not distribute these materials without obtaining express permission from David Wymore." NATIONAL COLLEGE OF CAPITAL VOIR DIRE, http://www.nccvd.org/application (last visited May 16, 2016).

[132] The Champion is a publication of the National Association of Criminal Defense Lawyers (NACDL). NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, http:// http://www.nacdl.org/default.aspx (last visited May 16, 2017). It is available to members of the NACDL or via LexisNexis and Westlaw.

[133] Rubenstein, *supra* note 128, at 18.

[134] United States v. Akbar, 74 M.J. 364, 384-85 (C.A.A.F Aug. 19, 2015); *see also* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 Mil. L. Rev. 1, 34-36 (1998).

v. Simoy. In that case, appellant alleged that his counsel were *per se* ineffective for failing to retain a mitigation specialist for the sentencing portion of his trial.[135] While the majority addressed this specific allegation, Judge Morgan, in his concurring opinion, took issue with defense counsels' decision to successfully challenge for cause three members and then use a peremptory challenge on another, thereby accounting for four out of five dismissed panel members and resulting in a panel of eight as opposed to twelve or possibly thirteen members.[136] "To use a simple metaphor—if appellant's only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of 52 playing cards, would he prefer to be dealt 13 cards, or 8?"[137] In a more recent opinion, the Court of Appeals for the Armed Forces summarized the strategy like this:

> An ace of hearts strategy is predicated on the fact that in order for a panel to impose a death sentence, the members must vote unanimously to impose that sentence. Therefore, the strategy posits that the accused will benefit from having the largest possible number of panel members because that will increase the chances that at least one member of the panel (the so-called "ace of hearts") will vote for a sentence other than the death penalty.[138]

In sum, the Ace of Hearts Strategy is simply a "numbers game."

By contrast to both the Colorado Method and the Ace of Hearts strategy, the TLC method is predicated on building a relationship between the lawyer and the juror. Although this method is not specific to capital voir dire, it is used by capital defense practitioners and is taught for use in such cases.[139]

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[135] United States v. Simoy, 46 M.J. 592, 604 (A.F. Ct. Crim. App. 1996).
[136] *Id.* at 624-26.
[137] *Id.* at 625.
[138] *Akbar*, 74 M.J. at 785 (citing MCM, *supra* note 88, R.C.M. 1006(d)(4)).
[139] On its home page, the Trial Lawyers College notes, "We do not offer training for those lawyers who represent the government, corporations or large business interests." GERRY SPENCE TRIAL LAWYERS COLLEGE, http://www.triallawyerscollege.org/Default.aspx (last visited May 16, 2017). The Trial Lawyers College maintains a website that lists its upcoming courses for 2016. According to one of the faculty team members, Haytham Faraj, "DD-2016 In Defense of the Damned: Criminal Defense Seminar," includes

The purpose of this method is to create a tribe amongst the jurors.[140] To do so, the lawyer begins by revealing something about himself. In a capital case, it may be that the lawyer himself used to believe in the death penalty, but no longer does. This is designed to facilitate an open dialogue between the lawyer and the jurors.[141] From there, the method has six additional steps to assemble the "tribe": (1) look at each other, eye to eye; (2) tell the truth to each other; (3) listen to each other; (4) accept each other; (5) empathize with each other, and; (6) remain loyal to each other.[142] According to this method, the lawyer should not have to exercise any challenges for cause or use any peremptory challenges unless a prospective juror says that he or she cannot accept being on the jury.[143] The idea is to avoid the normal dynamic between lawyers and prospective jurors during voir dire.

> [T]he tenor and intent of the questioning undertaken by most lawyers is almost always couched in a method that, despite the smiling and friendly lawyer, are seen by the prospective juror as an attempt of the lawyer to find something negative about the prospective juror. Can the lawyer find something about me that will give him a reason to kick me off this jury? . . . Even those who seek

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instruction on the TLC method of voir dire in capital cases. *Id.*; telephone interview with Haytham Faraj, Faculty Team, The Trial Lawyers College (Jan. 8, 2016).

[140] Gerry Spence, Voir Dire: What We Teach and How We Teach (unpublished information paper) (on file with author).

[141] Telephone interview with Haytham Faraj, *supra* note 140.

[142] Spence, *supra* note 140.

[143] In an article arguing for office policies in favor of waiving peremptory challenges in criminal trials, the author describes the philosophy underlying the TLC method. "[A]ccepting the jurors without challenge may actually help the prosecutor build credibility and rapport with the final petit jury." Maureen A. Howard, *Taking The High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 3 Geo. J. Legal Ethics 369, 418 (2010). The author goes on to quote Gerry Spence:

> "[A] person without an opinion on most things is an idiot . . . I begin with the proposition that everyone has an opinion, but everyone is basically fair. The questioning takes on the flavor of friends talking, accepting the other's opinions and feelings with respect. . . . I've finished many a voir dire examination not wanting to strike a single person from the original jury panel.

Id. at 419 (quoting Gerry Spence, *Win Your Case: How to Present, Persuade, and Prevail--Every Place, Every Time* 112-13 (2005)).

> to get off a jury do not want to be rejected. . . . Rejection is pain.[144]

Where the Colorado Method aims to uncover inner biases, the TLC method assumes that we all have them, lawyers and prospective jurors included, and seeks to forge a relationship between the defense counsel and the jurors such that, so long as the defense counsel maintains his credibility, the jurors will follow him through the case as members of the same "tribe," despite their individual biases.[145]

In discussing capital voir dire and constitutional requirements, this paper will reference to the Colorado Method to further the analysis. Although "case-specific" hypothetical questioning and the Colorado Method are not necessarily synonymous, the Colorado Method, as described by its founder, Mr. Wymore, seeks to determine whether prospective jurors and panel members are impaired with regard to mitigation evidence,[146] which is one version of the "case-specific" hypothetical question.

C. Sentencing Procedures[147]

As compared to voir dire, the sentencing procedures in the military and federal court are far simpler. By the time either court has reached sentencing, even in a capital case, the panel or jury has been set since opening statement, and there are no additional procedures necessary to qualify that same panel or jury to hear the aggravation and mitigation (and extenuation in the military) evidence before determining an appropriate

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[144] Spence, *supra* note 140.

[145] Telephone interview with Haytham Faraj, *supra* note 139.

[146] Telephone interview with David Wymore, Co-founder, National College of Capital Voir Dire (Jan. 7, 2016).

[147] As a preliminary manner, there is bound to be some potential confusion in this section and subsequent sections based on terminology. Procedures, when discussing capital cases, can refer not only to those statutory procedures designed to ensure compliance with applicable Supreme Court rulings on constitutional imposition of the death penalty, but also to rote courtroom procedures that govern the order of march for counsel and the presentation of evidence. Unfortunately, these two terms are used throughout the applicable literature making use of an alternate term unfeasible, lest there be dissonance between the text and the references. Therefore, whenever possible, this paper will use the term "courtroom procedure(s)" to refer to procedures which govern the order of march for counsel and the presentation of evidence.

sentence.[148] While the Supreme Court's decisions in *Furman v. Georgia*[149] and *Gregg v. Georgia*[150] created a generally accepted standard for a constitutionally valid death penalty scheme, there are still differences between the military and federal systems that merit discussion.

Rule for Courts-Martial 1004 governs the imposition of the death penalty in military cases.[151] As a preliminary matter, an accused does not have the option of judge-alone sentencing in a military capital case.[152] The Court of Appeals for the Armed Forces described the four current procedural requirements for imposing death under RCM 1004 in *Akbar*:

> Panel members are required to make four unanimous

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[148] One interesting proposal to remedy the underlying problem is to allow defense counsel to conduct voir dire a second time with panel members or jurors, to ensure they remain "life-qualified." Under the Federal Death Penalty Act of 1994 [hereinafter FDPA], the court can empanel a separate jury to determine an appropriate sentence where "the jury that determined the defendant's guilt was discharged for good cause." 18 U.S.C. § 3593(b)(2)(C) (2015). In *United States v. Young*, the Sixth Circuit Court of Appeals vacated a district court's pretrial order finding "good cause" to empanel a second jury during any potential guilt phase. Finding that the district court lacked such authority prior to conviction, the court also considered the defendant's arguments that "good cause" existed where "concerns about the impact of death qualification on the racial composition of the jury, and social science evidence suggesting death-qualified jurors may be more prone to convict and may decide sentencing issues before the penalty phase." United States v. Young, 424 F.3d 499, 502 (6th Cir. 2005) (citation omitted). *See also* United States v. Green, 407 F.3d 434 (1st Cir. 2005) (finding that the FDPA did not permit a pretrial order for a non-unitary jury).

[149] Furman v. Georgia, 408 U.S. 238 (1972). *See* Johnson v. Texas, 509 U.S. 350 (1993) (explaining that, despite a splintered opinion, a majority of the Court concluded that the system in place for determining a death sentence was "cruel and unusual" as defined by the Eighth Amendment).

[150] Gregg v. Georgia, 428 U.S. 153 (1976) (finding Georgia's revised death penalty statute did not violate the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments). *See* Colonel Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 Mil. L. Rev. 1, 4 (2006) (noting that "[i]n the four years that followed *Furman*, thirty-five states and the federal government revised their capital punishment systems." . . . thereby ushering in the "'modern era of capital punishment'" in the United States).

[151] MCM, *supra* note 88, R.C.M. 1004. According to the Analysis of the Rules, RCM 1004 was drafted prior to the Court of Military Appeals' decision in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983). *Id.* at A21–76. In *Matthews*, the Court of Military Appeals reversed the death sentence where there existed no requirement for the members to "specifically identify" the aggravating factor they relied upon in determining that death was the appropriate penalty. *Matthews* , 16 M.J. at 379.

[152] UCMJ art. 18 (2012); UCMJ art. 16(1)(B) (2012). *See* Major Tyler J. Harder, *All Quiet on the Jurisdictional Front . . . Except for the Tremors from the Service Courts*, 2002 Army Law. 3, 3-4 (2002).

> findings before imposing the death penalty: (1) the accused was guilty of an offense that authorized the imposition of the death penalty, R.C.M. 1004(a)(1)-(2); (2) one aggravating factor existed beyond a reasonable doubt, R.C.M. 1004(b)(7); (3) "the extenuating or mitigating circumstances [were] substantially outweighed by any aggravating circumstances," R.C.M. 1004(b)(4)(C); and (4) the accused should be sentenced to death, R.C.M. 1006(d)(4)(A).[153]

Rule for Courts-Martial 1004 also controls the presentation of aggravation and mitigation and extenuation evidence.[154] For trial counsel, evidence of aggravating factors may be presented in accordance with RCM 1001(b)(4).[155] For defense counsel, the language of the rule is extremely permissive: "The accused shall be given broad latitude to present evidence in extenuation and mitigation."[156]

While the procedural requirements of RCM 1004 differ greatly from the sentencing requirements in a non-capital case, the presentencing courtroom procedures are exactly the same. Department of the Army Pamphlet 27-9 "sets forth pattern instructions and suggested procedures applicable to trials by general and special court-martial."[157] Although primarily intended for use by Military Judges, practitioners also use DA PAM. 27-9 as a practice guide to prepare for courts-martial. Chapter 8 specifically governs capital trials.[158] There are no substantive differences between the "Presentencing Procedure" for capital versus non-capital cases.[159] There are also no substantive differences between the "Sentencing Proceedings" for capital versus non-capital cases.[160]

In the federal system, the Federal Death Penalty Act of 1994

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[153] United States v. Akbar, 74 M.J. 364, 401 n.21 (C.A.A.F. 2015). Following the Court of Military Appeals' Decision in *Matthews* and the signing of Executive Order 12,460, there have been no direct, facial challenges to the constitutionality of the military death penalty system on appeal.

[154] MCM, *supra* note 88, R.C.M. 1004.

[155] *Id.*

[156] In RCM 1001(c), the defense "may" present matters in mitigation and extenuation. MCM, supra note 87 at R.C.M. 1001(c).

[157] DA PAM. 27-9, *supra* note 109, at vi.

[158] *Id.* Ch. 8.

[159] *Id.* para. 2-15-16 to 8-3-14.

[160] *Id.* para. 2-15-17 to 8-3-16.

[hereinafter FDPA][161] governs the imposition of the death penalty in eligible federal cases.[162] Under that law, a defendant may elect sentencing by a judge alone, subject to approval from the government attorney.[163] The Federal Judicial Center's *Resource Guide for Managing Capital Cases* contains a description of the statutory procedures for imposing death:

> [T]to impose the death penalty, the jury must find that the defendant acted with one of four mental states set forth in section 3591(a)(2) and that at least one statutory aggravating factor in section 3592(c) exists. Furthermore, the jury is required to return special findings with respect to the aggravating factors. . . . [T]he Federal Death Penalty Act provides that a finding of a statutory aggravating factor must be unanimous, whereas a finding of a mitigating factor may be made by a single jury member. Similarly, the Act directs the jury to "consider

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[161] 18 U.S.C. §§ 3591-3598 (1994).

> The [FDPA] was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective on September 13, 1994. In passing this legislation, Congress established constitutional procedures for imposition of the death penalty for 60 offenses under 13 existing and 28 newly-created Federal capital statutes, which fall into three broad categories: (1) homicide offenses; (2) espionage and treason; and (3) non-homicidal narcotics offenses. Drug-related killings under 21 U.S.C. 848(e) and political assassinations under 18 U.S.C. 1751 (presidential and staff) and 18 U.S.C. 351 (congressional and cabinet, etc.) are not expressly included in the Act's otherwise exhaustive listing of death penalty offenses. However, Section 3591(a)(2) of the Act expressly extends to "any other offense for which a sentence of death is provided . . . ."

U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 69, http://www.justice.gov/usam/criminal-resource-manual-69-federal-death-penalty-act-1994 (citations omitted).

[162] The Anti-Drug Abuse Act of 1988 authorizes the death penalty for certain drug offenses. 21 U.S.C. § 848 (2015). However, President Bush repealed the Act's procedures for imposing the death penalty, effective March 6, 2006, when he signed the USA PATRIOT Improvement and Reauthorization Act of 2005. Pub. L. No. 109-177, 120 Stat. 231 (2006).

[163] 18 U.S.C. § 3593(b)(3) (2015). *See also* U.S. ATTORNEYS' MANUAL § 9-10.170, http://www.justice.gov/usam/usam-9-10000-capital-crimes#9-10.170 (noting that the government attorney must obtain approval from the Assistant Attorney General for the Criminal Division before agreeing to a request by the defendant pursuant to this section).

> whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify the death sentence."[164]

With regard to the courtroom procedures, the Federal Rules of Evidence do not apply during the sentencing phase. The FDPA contains its own standards for the admission of evidence.[165] Notably, no presentence report is prepared[166] and information relevant to aggravating factors "is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials[167] except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[168] The government must prove the existence of any aggravating factor beyond a reasonable doubt.[169] The defense is held only to a preponderance of the information standard for the existence of any mitigating factor.[170]

Despite the differences, both the military and the federal systems share one commonality, at least on paper. There is no requirement, statutory or otherwise, for a break between the guilt phase and the sentencing phase.

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[164] Johnson & Hooper, *supra* note 101 (citations omitted). In *United States v. Quinones*, the Second Circuit entertained a facial challenge to the constitutionality of the FDPA. The court rejected this argument, reversed the district court, and wrote: "to the extent the defendants' arguments rely upon the Eighth Amendment, their argument is foreclosed by the Supreme Court's decision in *Gregg v. Georgia*." 313 F.3d 49, 52 (2d Cir. 2002) (citing 428 U.S. 153 (1976)), *cert. denied*, 540 U.S. 1051 (2003)). In doing so, the Second Circuit overruled the district court. *See* United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002).

[165] 18 U.S.C. § 3593(c) (2015).

[166] Pursuant to Rule 32 of the Federal Rules of Criminal Procedure, a presentence report is normally required prior to sentencing. However, the FDPA is specifically listed as an exception to this requirement. Fed. R. Crim. P. 32.

[167] The inapplicability of the Federal Rules of Evidence to sentencing procedures under the FDPA was the subject of litigation in *United States v. Fell*, wherein the Second Circuit Court of Appeals found no constitutional error with the statute's specialized procedures for the admission of information relevant to aggravation and mitigation. 360 F.3d 135, 144-46 (2d Cir. 2004).

[168] 18 U.S.C. § 3593(c) (2015).

[169] *Id.*

[170] *Id.* As compared to the military, the federal statute does not specifically discuss extenuation evidence. However section 3592(a), which delineates mitigation evidence, contains items that would appear to fit within the definition of "extenuation" as it is defined in RCM 1001(c)(1)(A), for example "Duress" or "Minor Participation." *See* MCM, *supra* note 88, R.C.M. 1001(c)(1)(A).

However, in practice, there is often a break,[171] sometimes of weeks, between the guilt phase and the sentencing phase in federal court. This, and the importance of such, will be discussed in greater detail in the analysis portion of this paper.

With this background in mind, and in consideration of the differences between federal and military courts, two case studies help to illustrate how voir dire can shape the outcome of capital cases. The next portion of this paper will examine two cases, one military and one federal civilian; *United States v. Hennis*[172] and *United States v. Tsarnaev,*[173] with an emphasis on the voir dire process and sentencing timeline.

III. Case Studies

A. *United States v. Hennis*

On July 4, 1986, a North Carolina state court convicted Master Sergeant (MSG) Timothy Hennis, who was on active duty in the Army at the time, of one count rape and three counts of premeditated murder.[174] The jury sentenced him to death.[175] On October 6, 1988, the North Carolina Supreme Court reversed his conviction and ordered a new trial.[176] At his retrial, another North Carolina state jury acquitted him on April 19, 1989.[177] Master Sergeant Hennis returned to active duty in the Army and retired on July 31, 2004.[178] Following new analysis of DNA evidence linking MSG Hennis to the murders, the Army recalled him to active duty and charged him with three specifications of premeditated murder.[179]

On April 8, 2010, a general court-martial empowered to adjudge a capital sentence found MSG Hennis guilty of the charge and all three

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171 United States v. Glover, 43 F. Supp. 2d 1217, 1234 (D. Kan. 1999).
172 *Supra* note 7.
173 *Supra* note 14.
174 *Hennis v. Hemlick, 666 F.3d 270, 271 (4th Cir. 2012).*
175 *Id.*
176 State v. Hennis, 373 S.E.2d 523, 528 (N.C. 1988).
177 *Hennis*, 666 F.3d at 271.
178 *Id.*
179 *Id.* The Army did not charge MSG Hennis with rape as it was barred by the statute of limitations. The military judge rejected MSG Hennis' claim that the military prosecution violated the Double Jeopardy Clause of the Constitution. RULING - Defense Motion to Dismiss for Double Jeopardy, *Hennis*, No. 20100304 (No. 236).

specifications.[180] Master Sergeant Hennis' only defense was that he did not commit the murders.[181] The panel sentenced him to death seven days later, on April 15, 2010.[182]

The convening authority first selected twelve primary officers, six primary enlisted members, twenty alternate officers, and twenty alternate enlisted members for general and special courts-martial on December 30, 2009.[183] The convening authority also selected an additional thirty officer alternates and thirty enlisted alternates.[184] On February 22, 2010, the staff judge advocate[185] recommended that the convening authority select an additional twenty officer alternates and ten enlisted alternates to replace those who had been excused since December 30, 2009.[186] According to its website, Fort Bragg is currently home to approximately 63,000 active duty soldiers.[187] As one of the largest military installations in the world, it is reasonable to assume this number remains fairly consistent, year to year. As such, the potential panel members selected for *United States v. Hennis* represented less than 0.2% of the available members.[188] Even absent any comparison to the federal system, this is admittedly an extremely small cross section for the defense to then choose from during voir dire.

Defense counsel filed his proposed voir dire with the court on January 12, 2010.[189] Included on that list was one question, with multiple subparts, to elicit panel member views on the death penalty generally and also under specific circumstances.[190] Although question 120, subparts d. through g. are hypothetical questions, it lacks the salient details of the case, notably the ages of the child victims and the lack of mitigating and extenuating

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[180] *Supra* note 7.
[181] *Hennis*, 666 F.3d at 271.
[182] *Id.*
[183] Packet of Panel Selection Docs., *Hennis*, No. 20100304 (No. 305).
[184] *Id.*
[185] "Staff judge advocate" is defined as "a judge advocate so designated in Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate." MCM, *supra* note 88, R.CM. 103(17).
[186] *Supra* note 183.
[187] FORT BRAGG, http://www.bragg.army.mil/directorates/DES/FireEmergencyServices/Pages/AboutUs.aspx (last visited July 1, 2016).
[188] Article 25 lays out the categories of individuals who are ineligible to serve, *i.e.*, an accuser or witness. Even so, such exceptions should not be expected to comprise enough individuals to alter the overall percentage, even in a case like *Hennis*. *Supra* note 86.
[189] Defense General Voir Dire Questions, *Hennis*, No. 20100304 (No. 296) (Appendix A).
[190] *Id.* at 11-12.

circumstances. In that regard, question 120 would fall into the third category described by *Johnson*, "case-categorization," opposed to the fourth category, "case-specific."[191] The military judge also provided potential panel members with a thirteen page questionnaire, containing mutually agreed upon questions from the prosecution and the defense.[192] The questionnaire contains one "abstract" question that tests prospective panel members' willingness to consider mitigation evidence in the form of a person's background when deciding whether to impose the death penalty, however, it lacks the most salient details of the case and is therefore not "case-specific."[193]

Voir dire began on March 2, 2010, and continued through March 15, 2010. After four rounds of voir dire for a combined total of thirty-nine potential members, Hennis was tried by a panel of fourteen members: six officers and eight enlisted.

For each round of voir dire, the military judge brought in the entire set of panel members and asked them some close variation of the standard questions from DA PAM. 27-9, specifically questions thirty-one through thirty-six from section 8-3-1.[194] Although the list does not include "case-specific" questions like those envisioned by *Johnson* and the accompanying cases discussed in Section B *supra*, it does include "abstract" questions and "case-categorization" questions aimed at discovering whether prospective panel members would automatically impose the death penalty based on the nature of the charged offenses or fail to fairly consider all of the evidence before reaching a decision on the appropriate sentence. However, in response to these questions, the military judge only received responses indicating an inability to fairly consider all of the sentencing options or evidence in the case to arrive at a sentencing decision, from five members of the thirty-nine he questioned; four during round two and one during round three.[195]

Initially, the military judge allowed defense counsel to ask question

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[191] United States v. Johnson, 366 F. Supp. 2d.
[192] Panel Member Questionnaire, *Hennis*, No. 20100304 (No. 242) (Appendix B).
[193] *Id.* at 8. Notably, the initial proposed questionnaire from the military judge contained some "case-categorization" questions designed to test prospective panel members' biases with regard to appropriate sentence, however, the questions also lacked the most salient details of the case and were therefore not "case-specific." The final version did contain these questions. Proposed Panel Member Questionnaire, *Hennis*, No. 20100304 (No. 228).
[194] *See*, *e.g.*, Tr. of R. at 1735-37, *Hennis*, No. 20100304 (Appendix C).
[195] Tr. of R. at 2812-14, 3267-69, *Hennis*, No. 20100304.

120 and its subparts (or some close variation) without objection or amendment.[196] By comparison to the military judge, during each round of group voir dire, defense counsel consistently received different responses from prospective members when he asked whether they agreed with the statement that "if someone is convicted of premeditated murder they should be given the death penalty?" versus when he asked whether they agreed with the statement that "if someone murders children they should be given the death penalty?" In every instance, more prospective panel members responded affirmatively to the second question than to the first.[197] Furthermore, as compared to the military judge's hypothetical questions described above, defense counsel had four prospective panel members during round one, one additional prospective panel member during round two, three additional prospective panel members during round three, and one prospective panel member during round four respond in the affirmative to his second hypothetical question.[198] In short, where all or most members told the military judge they could fairly consider all of the sentencing options and evidence in the case to arrive at a sentencing decision, some of those same members subsequently told defense counsel that someone convicted of the premeditated murder of children should receive the death penalty.

In addition to question 120 from his proposed voir dire, defense counsel also used a "case-specific" hypothetical question. However, unlike the many federal cases in Section II.B *infra*, defense counsel in *Hennis* did not litigate his use of a "case-specific" hypothetical question, or any variation thereof, prior to commencing voir dire, resulting in substantial litigation with the government. Defense counsel used two variations of a "case-specific" hypothetical question: one using the specific facts of the case and another probing the member's ability to consider mitigation and extenuation evidence prior to sentencing.

Defense counsel posed his first "case-specific" question with Colonel (COL) T, the very first member called for individual voir dire during the first round of voir dire.

> Let me ask you a question and again, this is not about this case. This is a hypothetical case. If you would be selected as a member of a military panel who would have

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[196] *Id.* at 1698-1700, 2812-14, 3267-69, 3522-25.
[197] *Id.* at 1844, 2915, 3372-73, 3609.
[198] *Id.*

> responsibility to sentence an accused who has already been found guilty of three counts of premeditated murder, including the premeditated murder of a mother and two children ages 3 and 5. Okay.
>
> And in this hypothetical and on this panel, you understand that under the UCMJ, premeditated murder involves the unlawful killing of another person and that's with premeditation. That is, meaning that there was a specific intent to kill and an opportunity to consider the act before the result—before the act that resulted in their death. So meaning that the killer knew what they wanted to do and deliberately did it; had the opportunity, knew what they wanted to do, and deliberately killed somebody. That's premeditated murder.
>
> Now, let's say that in this case, there's no issue of self-defense. There's no issue of heat of passion, meaning that some event that caused an uncontrollable heat of passion. There was no provocation. These were innocent victims. They didn't do anything to provoke this person. There's no mistaken identity. There's no accident or defense of others. Okay, sir. So you've got a premeditated murder of a mother and two children with no issues of self-defense, heat of passion, provocation, mistaken identity, accident, or defense of others.
>
> I want you to assume that you are a member on that premeditated murder case, and you've heard all the evidence. And you've determined that none of these defenses, none of those issues of self-defense, heat of passion, provocation, mistaken identity, accident, defense of others, or the person wasn't drunk or under the influence of alcohol—none of those things are present. Under that case, what is your opinion of the death penalty as the only appropriate punishment for that guilty murderer?[199]

The member ultimately conceded that if he heard nothing more than what was offered by defense counsel in his hypothetical question, death would

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[199] *Id.* at 1897-99.

be the "only appropriate punishment" under the facts of the hypothetical.[200]

Colonel T offers the first chance to examine the efficacy of defense counsel's lengthy "case-specific" question as compared to the military judge's "abstract" and "case-categorization" questions and defense counsel's "case-categorization" questions during group voir dire. As noted, no prospective member during round one responded affirmatively to the military judge's questions indicating an inability to fairly consider all of the sentencing options or evidence in the case to arrive at a sentencing decision. Colonel T also did not respond affirmatively to defense counsel's question whether someone convicted of the premeditated murder of children should be given the death penalty.[201] However, following the "case-specific" question, COL T agreed with defense counsel that, after further thought, he was "inclined" to view the death penalty as the "only appropriate penalty" for the premeditated murder of children.[202] Of note, although the defense counsel challenged COL T on the basis of these statements, the military judge granted the challenge for cause on a different basis and did not address his statements about the appropriate penalty for the murder of children.[203]

By comparison, with LTC R, another potential panel member, defense counsel employed a more limited version of the "case-specific" question to explore LTC R's response during group voir dire that life imprisonment was not sufficient punishment for the premeditated murder of children.[204] Specifically, defense counsel stated "as I understand it . . . if you were to sit on a military panel and be confronted with the decision to sentence a guilty murderer for the premeditated murder of two children, ages 3 and 5, that you would not consider life imprison [sic] to be an appropriate punishment?"[205] Lieutenant Colonel R responded that although it would be a "fair statement" that he would be "predisposed to the death penalty," that did not mean he would not consider "other things."[206] However, after confirming that LTC R considered death the appropriate punishment in a case where a guilty individual showed no remorse because he maintained his innocence throughout sentencing, the military judge granted defense

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[200] *Id.* at 1902.
[201] *Id.* at 1844.
[202] Tr. of R. at 1908-09, *Hennis*, No. 20100304.
[203] *Id.* at 2029, 2051.
[204] *Id. at 2065.*
[205] *Id. at 2066.*
[206] *Id.*

counsel's challenge for cause.[207]

Defense counsel successfully challenged another panel member, Command Sergeant Major (CSM) G, on the basis of her predisposition toward death in a case that involved the premeditated murder of children. Command Sergeant Major G, like COL T, also did not initially answer affirmatively to either the military judge's hypothetical questions or defense counsel's hypothetical questions during group voir dire.[208] With her, defense counsel used a version of his "case-specific" question.[209]

Defense counsel did not always succeed in successfully challenging a prospective member for cause with his use of "case-specific" questions. During group voir dire, LTC B and Major (MAJ) W agreed with defense counsel that "life in prison is not really punishment for premeditated murder of children?"[210] In exploring that response with LTC B, defense counsel posed a limited "case-specific" question as he did with LTC R, ". . . as I understand you though it is . . . your belief . . . that . . . life imprisonment would not be an appropriate punishment for someone who had with premeditation killed innocent children, meant to do it, did do it, killed innocent children, that just simply wouldn't be an appropriate punishment?"[211] Based on LTC B's responses to the "case-specific" question, the military judge denied the defense counsel's challenge for cause.[212]

By contrast, with MAJ W, defense counsel used the same "case-specific" question as with COL T.[213] The prospective member remained firm in his position that the death penalty was simply one legal option.[214] The military judge denied defense counsel's challenge for cause of Major W.[215]

Increasingly, the military judge sought to confine the defense counsel's use of "case-specific" questions as voir dire progressed. Based on his rulings, it is clear the military judge concluded that defense counsel

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[207] *Id.* at 2068, 2307.
[208] *Id.* at 2457-58.
[209] Tr. of R. at 2391-92, *Hennis*, No. 20100304.
[210] *Id.* at 1844.
[211] *Id.* at 2132.
[212] *Id.* at 2307.
[213] *Id.* at 2195.
[214] *Id.* at 2196-97.
[215] *Id.* at 2309.

had strayed into "stake-out" territory based on the nature of the defense counsel's final query to the prospective members, *i.e.*, some variation of "What are your views with regard to the death penalty as the appropriate penalty for this guilty murderer?"[216] Before issuing his final detailed ruling on the proper scope of voir dire, the military judge gave the following guidance in the midst of round one:

> You may ask them generally what their views are on the death penalty. I'm not—I said—again, I'm not going to allow you to make—require a commitment from the members on what they view is appropriate when they haven't heard all the evidence.
>
> And the case law does not require me to allow you to draw a commitment from the members on a particular sentence when they have not heard all of the evidence. The case law does not require me to do that.[217]

In response to these limitations, defense counsel began to use "case-specific" questions to probe how prospective members would consider mitigation and extenuation evidence. In two instances during round one, defense counsel successfully used a fact-based "case-specific" question to facilitate a discussion with members about their willingness to consider certain mitigation evidence, despite the military's judge's limitations and the trial counsel objections. Defense counsel successfully challenged both prospective members on their inability to consider the accused's military record and background information, respectively.[218] With a third member, defense counsel successfully used a limited version of his fact-based "case-specific" question to challenge a member who indicated he would impose the death penalty if he did not hear evidence of any mental health issues on the part of the accused.[219]

Furthermore, despite these limitations, defense counsel continued to

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[216] For example, following a government objection to defense counsel's "case-specific" question involving the premeditated murder of a child, the military judge made the following ruling: "Counsel, you may ask the member if he is willing to consider all the evidence in the case before he makes a decision on what an appropriate sentence is. But to ask him to commit to a particular sentence without knowing what that evidence is, I'm not going to allow." Tr. of R. at 2429, *Hennis*, No. 20100304.

[217] *Id.* at 2437.

[218] *Id.* at 2634.

[219] *Id.* at 2786.

successfully use "case-specific" questions incorporating children as victims to test prospective panel member biases. For example, one prospective member, Sergeant Major (SGM) M, stated in response to the trial counsel's question about his view of the death penalty, that it was "just punishment in some cases, certainly murder with aggravating circumstances."[220] After defense counsel's follow-up questions on this point, with specific regard to child victims, the military judge granted the defense counsel's challenge for cause based upon the prospective member's "rather obvious emotional response to the young children."[221]

After individual voir dire of the first member during the second round, the military judge held an Article 39(a) session[222] wherein he specifically disallowed variations of defense counsel's "case-specific" question.[223] According to the military judge, this type of question was "misleading, inartful, and confusing."[224] Ultimately, the military judge found that defense counsel was attempting to "indoctrinate the members to potential issues and to pre-commit to a certain outcome before the evidence has been presented and they have received the court's instructions on the law."[225] He provided the defense counsel with the following approved "case-specific," "case-categorization, and "abstract" questions for use during voir dire:

> If the evidence shows the accused committed the premeditated murders of a mother and two of her daughters, would you automatically vote to impose the death penalty?
>
> . . . if you find the accused guilty of premeditated murders of a mother and two of her daughters, would you automatically vote to impose the death penalty?
>
> Can you fairly consider a life sentence if the evidence shows the accused committed the premeditated murders

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[220] *Id.* at 2569.

[221] *Id.* at 2635.

[222] Article 39(a) allows the military judge to "call the court into session without the presence of members" for various purposes including, "hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court." UCMJ, art. 39(a)(2) (2012).

[223] Tr. of R. at 3005-15, *Hennis*, No. 20100304.

[224] *Id.* at 3012.

[225] *Id.* at 3013.

> of a mother and two of her daughters?
>
> Would you automatically reject a life sentence if the evidence shows that the accused committed the premeditated murders of a mother and two of her daughters?
>
> If you find the accused guilty, would you automatically impose a death sentence no matter what the facts of this case were?
>
> Have you given much thought to the death penalty before being notified as a court member?
>
> Can you fairly consider all of the evidence before reaching your determination of a sentence?
>
> Can you fairly consider all of the sentencing alternatives, if the accused were convicted of premeditated murder, to include life and death?
>
> What types of extenuation and mitigation evidence would you want to see from the defense?[226]
>
> Would you automatically reject a life sentence for a premeditated murder?
>
> Do you believe the death sentence or death penalty must be imposed for all premeditated murders?
>
> Would you automatically reject a life sentence for premeditated murder regardless of the facts and circumstances in a case?[227]

The military judge did not prohibit defense counsel from asking follow-up questions to the above questions in addition to follow-up questions about the members' questionnaires.[228]

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[226] This model question was subsequently amended by mutual agreement of the parties and the military judge to exclude "from the defense." *Id.* at 3023.
[227] *Id.* at 3007-11.
[228] *Id.* at 3012.

The remaining rounds of voir dire proceeded quickly, following the judge's ruling. Prior to the military judge's detailed ruling, defense counsel challenged fourteen of sixteen prospective members and succeeded eleven times. After the military judge's detailed ruling, defense counsel challenged eight of fifteen prospective members and succeeded seven times. Even so, three of defense counsel's successful challenges were based upon "case-categorization" questions.[229] Defense counsel successfully challenged two members who responded negatively to the military judge's hypothetical questions but affirmatively to defense counsel's hypothetical questions as to whether death was the appropriate penalty for someone convicted of the premeditated murder of children.[230] Finally, defense counsel successfully challenged another member by probing the prospective member's view of death as the appropriate penalty for someone who intentionally murders "two young children." Although the member had responded negatively to this question during group voir dire, during individual voir dire he stated, "I'll put it this way: I can't think of a circumstance where I would [think] that it should not be."[231]

The members delivered their unanimous guilty verdict at 10:54 AM on April 8, 2010.[232] The military judge instructed them to return at 9:00 AM the following day for sentencing.[233] Sentencing commenced at 9:25 AM on April 9, 2010.[234] The members delivered their sentence at 2:50 PM on April 15, six days later.[235] The relative speed with which the court proceeded through to the pronouncement of sentence stands in stark contrast to the following case, and will be discussed in further detail below.

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[229] For two of the four, the government did not oppose after the prospective members responded affirmatively to defense counsel's questions regarding life as an inappropriate penalty for someone who commits the premeditated murder of children during group voir dire. *Id.* at 2915, 3153. For the third, the military judge granted the opposed challenge based on the prospective member's responses to defense counsel's questions regarding life as an inappropriate penalty for someone who commits the premeditated murder of children during group voir dire. Tr. of R. at 2915, 3242, *Hennis*, No. 20100304. For the fourth member, the government did not oppose after the prospective member indicated he would expect the defense to respond to the government's evidence during the defense's case-in-chief. *Id.* at 2925-28.

[230] *Id.* at 3267-68, 3371-74.

[231] *Id.* at 3371-74, 3690-91, 3267-68, 3371-74.

[232] *Id.* at 6709.

[233] *Id.*

[234] *Id.* at 6782.

[235] Tr. of R. at 7312, *Hennis*, No. 20100304.

B. *United States v. Tsarnaev*

On April 15, 2013, two improvised explosive devices (IEDs) exploded on the Boston Marathon route while the race was still underway.[236] Each explosion killed at least one person and maimed, burned, and wounded many others.[237] On April 8, 2015, a jury convicted Dzhokhar Tsarnaev of all thirty counts of the indictment.[238] During her opening statement, Tsarnaev's defense attorney admitted that her client committed the murders.[239] She offered no legal defense for his action.[240] The jury sentenced him to death on May 15, 2015.[241]

Tsarnaev's initial appearance occurred on April 22, 2013.[242] On November 4, 2014, with trial pending, the federal judge assigned to the case, George A. O'Toole, Jr., ordered the parties to confer and provide a joint statute report to include proposed jury questionnaires.[243] During a pretrial status conference on November 24, 2014, Judge O'Toole requested the defense file their proposed jury questionnaire on December 1, 2014, and the government file their response a week later, on December 8, 2014, assuming the parties could not agree on a joint submission.[244] Furthermore, he suggested beginning with 1,200 potential jurors.[245] He later reduced that number to 1,000, with the expectation that ten percent would remain, leaving a comfortable margin for peremptory or other strikes.[246]

Tsarnaev's defense counsel moved the court to allow "case-specific" hypothetical questions. As Tsarnaev's counsel explained in his motion:

> In this case, the defendant is charged with multiple counts of use of a weapon of mass destruction resulting in death, bombing of a place of public use resulting in death,

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236 Indictment, United States v. Tsarnaev, No. 13-10200-GAO (No. 58).
237 *Id.*
238 Verdict, *Tsarnaev*, No. 13-10200-GAO (No. 1261).
239 Tr. at R. at 4-5, *Tsarnaev*, No. 13-10200-GAO (No. 1117).
240 *Id.* at 5-6.
241 Penalty Phase Verdict, *Tsarnaev*, No. 13-10200-GAO (No. 1434).
242 *Tsarnaev*, No. 13-10200-GAO (No. 7).
243 Order, *Tsarnaev*, No. 13-10200-GAO (No. 631).
244 Tr. of R. at 30, *Tsarnaev*, No. 13-10200-GAO (No. 671).
245 *Id.* at 31.
246 Tr. of R. at 6-7, *Tsarnaev*, No. 13-10200-GAO (No. 915).

> malicious destruction of property resulting in personal injury and death, and firearms violations resulting in death. It is these offenses, not simply "murder," that the government has elected to charge. Upon conviction for these crimes, therefore, he is entitled not only to twelve jurors who could consider imposing life imprisonment rather than the death penalty for some kinds of murder, but for these kinds. And that is the relevant question that *Morgan v. Illinois* entitles him to put to each prospective juror.[247]

In that same motion, echoing the "case-specific" question in *Hennis*[248] and the model Colorado Method "strip question,"[249] Tsarnaev's attorneys laid bare the problem of properly "life-qualifying" jurors, absent the ability to ask "case-specific" questions:

> Abstract or general questions risk eliciting answers that obscure disqualifying bias rather than expose it. For example, an affirmative answer to the question, "Could you weigh all of the aggravating and mitigating evidence and return either a death sentence or a sentence of life imprisonment, depending on the evidence presented?" could mean easily that the juror could vote against the

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[247] Mem. of Law at 9, *Tsarnaev*, No. 13-10200-GAO (No. 682) (citing *Morgan*, 504 U.S. at 719; *Johnson*, 366 F. Supp. 2d at 847-48).

[248] *Supra* note 199.

[249]

> Defense attorneys use leading questions to strip away extraneous defenses or other irrelevant facts in order to gather meaningful, relevant answers and information from a prospective juror regarding her views of the death penalty and life imprisonment. The lawyer puts the prospective juror in the place of having been personally convinced that a hypothetical capital defendant is guilty of capital murder. The "strip question" normally incorporate relevant case-specific facts in a manner that avoids "staking-out" and "precommitment." Defense counsel says to the prospective juror, "I would like you to imagine a hypothetical case. Not this case. In this hypothetical case, you heard the evidence and were convinced the defendant was guilty of premeditated, intentional murder. Meant to do it and did it. It wasn't an accident, self-defense, defense of another, heat of passion, or insanity. He meant to do it, premeditated it, and then did it. For that defendant, do you believe that the death penalty is the only appropriate penalty?"
>
> Rubenstein, *supra* note 128, at 20-21.

> death penalty so long as:
>
> 1. the evidence did not conclusively establish guilt;
> 2. the killing was accidental or committed in sudden heat and passion;
> 3. the killing was not intentional;
> 4. the defendant was insane;
> 5. the defendant acted in self-defense or was otherwise provoked;
> 6. the victim was engaged in criminal conduct at the time of his or her death;
> 7. only a single victim was killed;
> 8. the victim was not a child; or
> 9. the crime did not involve terrorism.
>
> This list could be extended indefinitely. The point is simply that a "yes" response to such a question is virtually meaningless unless the juror first understands that the question pre-supposes the defendant's guilt of both the charged offenses and the statutory aggravating factors that the government has actually alleged in the case to be tried. Otherwise a seemingly qualifying response is likely to mean only that the juror might not favor the death penalty in cases where it is legally unavailable in any event, or in categories of cases far removed from the one about to be tried.[250]

In its response, the government objected to Tsarnaev's request to conduct "case-specific" questioning.[251] The government alleged this would result in "staking-out" the jury.

> Tsarnaev essentially seeks permission to read out for jurors one by one the crimes and aggravating factors charged in the indictment and notice of intent, and then ask them whether, assuming the defendant is guilty of those crimes and the aggravating factors exist, they could consider imposing a life sentence rather than a death sentence. The problem with this approach is that it asks jurors to commit (or "precommit") to a penalty decision

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[250] *Supra* note 247, at 11-12.
[251] Govt.'s Resp. to Def.'s Mem. of Law at 7, *Tsarnaev*, No. 13-10200-GAO (No. 737).

> before they have heard any mitigation evidence or been told that the law requires them to weigh aggravating and mitigating factors and consider whether the aggravating factors "sufficiently outweigh" all the mitigating factor[s] . . . to justify a sentence of death."[252]

In their reply to the government's response, Tsarnaev's lawyers noted that not every "case-specific" question is a "stake-out question" (citing *Johnson*) and cited to *Ellington* for the proposition that "only focused questioning will suffice to reveal such a commonly-held disqualifying bias." [253] Unfortunately, to the extent Judge O'Toole issued a final ruling on the matter, it remains sealed.[254]

The final juror questionnaire in this case reflected a number of questions that dealt, generically, with jurors attitudes about the death penalty.[255] These are best categorized as "abstract" questions. Although the questionnaire contained a limited recitation of the facts of the case, it did not contain specifics of the crimes with which Tsarnaev was charged or his role in causing the deaths of a child and a police officer.[256] None of these facts were used to form the basis for any questions in *Johnson's* categories two through four. Rather, the facts were provided in order for potential jurors to determine whether they or anyone close to them had a personal connection to any of the victims or the places mentioned.[257]

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[252] *Id.* at 8 (citing 18 U.S.C. § 3593 (2004)).

[253] Reply to Resp. at 4, *Tsarnaev*, No. 13-10200-GAO (No. 758) (citing *Johnson*, 366 F. Supp. 2d at 822; *Ellington*, 735 S.E.2d at 756). In order to ensure a properly qualified jury, Tsarnaev proposed, as a preliminary matter, that the court include "three screening questions" on its questionnaire "to identify those jurors who are especially likely to believe that the death penalty should be automatic for terrorism-murders, or for murderers of children or police officers." *Id.* at 5. Unfortunately, the exhibit which contains those sample questions remains sealed.

[254] During a final pretrial status conference on December 23, 2014, the court noted that it would be scheduling an in-camera session with both sides to discuss the mechanics of jury selection and voir dire. Tr. of R. at 18, *Tsarnaev*, No. 13-10200-GAO (No. 800). A thorough review of the docket does not reveal any additional unsealed court orders or published transcripts relevant to the litigation over the proper scope of voir dire.

[255] Juror Questionnaire at 23-26, *Tsarnaev*, No. 13-10200-GAO (No. 1178) (Appendix D).

[256] *Id.* at 21. According to one news report, when one of Tsarnaev's defense attorneys attempted to question a potential juror about whether she might be particularly sensitive to a case involving a child's death, the judge disallowed the question following the prosecution's objection. Masha Gessen, *For Prospective Jurors in the Boston Bombing Trial, a Detailed Questionaire* [sic], The Washington Post (Jan. 29, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/01/29/for-prospective-jurors-in-the-boston-bombing-trial-a-detailed-questionaire/.

[257] *Supra* note 255, at 21-22.

While all of the underlying jury selection procedures in *United States v. Tsarnaev* remain under seal,[258] additional court filings and news report paint a limited picture of the voir dire in the case.[259] According to one news report, the eighteen jurors were selected from a "pool of 75 jurors who were chosen from a pond of 256 jurors who were chosen for individual questioning from an ocean of 1,373 jurors randomly picked and summonsed to court by Judge George O'Toole."[260] In particular, one online report indicated that, despite requests from Tsarnaev's attorneys to the contrary, the judge conducted all the voir dire in the case, at least at the outset.[261] Subsequent news reports indicated perhaps a more active role by the attorneys on both sides.[262] In all, jury selection in *United States v. Tsarnaev* lasted for twenty-four days. In accordance with Federal Rules of Criminal Procedure 23 and 24, eighteen jurors were sat; twelve primary

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[258] The court is currently in the process of unsealing documents in the case. On January 27, 2016, more than 600 documents were unsealed, however, none of these related to jury selection. David Boeri and Zeninjor Enwemeka, *Court Begins Unsealing Documents In Tsarnaev Case*, WBUR (Jan. 27, 2016), http://www.wbur.org/2016/01/27/tsarnaev-court-documents-unsealed. Recently, the judge ordered the public release of the names of the 12 jurors on the case. Zeninjor Enwemeka, *Judge Releases List of Tsarnaev Jurors*, WBUR (Feb. 12, 2016), http://www.wbur.org/2016/02/12/tsarnaev-jury-list. As of June 19, 2016, the jury selection documents remained under seal.

[259] Even so, as one legal commentator wrote:

> It may well be that whatever the selection process, this jury was that fair subset—those without the pro death biases reflected in the social science. While we have some idea of the *Tsarnaev* trial voir dire from the media coverage, there is much we do not know. The transcripts—like most of the critical pleadings in the case—were sealed. So we are left to wonder and to speculate: How probing was the voir dire? To what degree were careful distinctions made even among those who could be death qualified, to select out those who could be fair about death? Which jurors were accepted? Which were rejected?

Nancy Gertner, *Death Qualified: The Tsarnaev Jury, His Sentence and the Questions that Remain*, WBUR (May 28, 2015), http://cognoscenti.wbur.org/2015/05/28/death-penalty-nancy-gertner.

[260] David Boeri & Zoë Sobel, *Judge's Quest To Find A 'Fair And Impartial' Tsarnaev Jury In Boston Finally Comes To A Close*, WBUR (March 4, 2015, 6:15 AM), http://www.wbur.org/2015/03/03/tsarnaev-jury-boston-judge-otoole.

[261] Emily Rooney, *A Week At The Tsarnaev Trial: Jury Selection—A Close Up*, WGBH NEWS (Jan. 16, 2015), https://news.wgbh.org/post/week-tsarnaev-trial-jury-selection-close. *See* Mem. of Law at 17-20, Tsarnaev, No. 13-10200-GAO (No. 682).

[262] Gessen, *supra* note 256.

and six alternate.[263]

Following the verdict, sentencing began in the case on April 21, 2015, approximately two weeks later. As the judge explained to the jurors, following the verdict, "I anticipated we would take a short recess between the guilt phase and the penalty phase of the trial. And that is not uncommon in capital cases."[264]

IV. Conclusion

In *United States v. Gray*,[265] the Court of Appeals for the Armed Forces adopted the standard set forth in *Wainright v. Witt* for determining when prospective jurors must be excluded for cause based on their views of capital punishment. "The standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[266] As to how to determine those views, *Morgan* is the operative case.[267] However, the complexity of *Hennis*[268] and *Tsarnaev*[269] mirror the complexity that has developed in the federal case law interpreting *Morgan*.[270]

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[263] *Tsarnaev*, No. 13-10200-GAO (No. 1112).
[264] Tr. of R. at 3, *Tsarnaev*, No. 13-10200-GAO (No. 1287).
[265] 51 M.J. 1, 31-32 (C.A.A.F. 1999).
[266] Wainright v. Witt, 469 U.S. at 424 (quoting *Adams*, 448 U.S. at 45).
[267] 504 U.S. at 719. Although the specific issue in *Morgan* was "whether, during voir dire, for a capital offense, a state trial court may, consistent with the Due Process Clause of the Fourteenth Amendment, refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant," the decision is equally applicable to courts-martial by way of the Fifth Amendment's Due Process Clause. Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring). *See* United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988) (cited by United States v. Loving, 41 M.J. 213, 304 (C.A.A.F. 1994)).
[268] *Supra* note 7.
[269] *Supra* note 14.
[270] Counsel in *Fell*, *Wilson*, *Richmond*, *Trevino*, *Tipton*, *McCullah*, *Lucas*, *Montes* and to a more limited extent, *Robinson*, were concerned with the role of mitigation and extenuation evidence. United States v. Fell, 372 F. Supp. 2d at 767; *Wilson*, 493 F. Supp. 2d at 402-03; Trevino v. Johnson, 168 F.3d 173; United States v.Tipton, 90 F.3d 879; United States v. McCullah, 76 F.3d at 1113; Lucas v. State 555 S.E.2d at 446-47; United States v. Montes, 2012 U.S. Dist. LEXIS 49916, at *6-7; State v. Robinson, 2015 Kan. LEXIS 929, at *219-20. Counsel in *Basciano*, *Harlow*, *McVeigh*, *Oken*, *Ball*, *Hogwood*, *Schmitt*, *Garcia*, *Ellington*, *Robinson*, and *Smith* and the approved questions in *Johnson* were more concerned with the impact of case-specific facts, although *Basciano* did include one open-ended question about what jurors would find "important" when making the decision between life in prison or the death penalty. United States v. Basciano, 2011 U.S.

In *Hennis*, defense counsel asked "case-specific" hypothetical questions that touched both specific facts and mitigation and extenuation evidence. In *Tsarnaev*, defense counsel's proposed "case-specific" questions were targeted at the former. However they are phrased, both types are ultimately aimed at the same key inquiry: can prospective jurors or panel members meet the requirements of *Wainright*? It is hard to imagine how it is possible to extract the type of knowing commitment from a potential juror or panel member absent such information. It seems a matter of common sense that most prospective jurors and panel members will suspect that if the death penalty is an option, then they are likely dealing with the most heinous of alleged crimes. This will be confirmed when they receive a copy of the flyer in a military case or are read the indictment in a federal case.[271] However, as the flyer in *Hennis* makes clear, the details will remain scant, even if murder is alleged.[272] To inquire of a prospective juror or panel member, using an "abstract question," whether he believes that the nature of the charges alone is sufficient to render automatic imposition of the death penalty hardly seems to scratch the surface of the typical capital case.[273]

Essentially, it is as if a court is asking a prospective juror or panel member to sign a contract, without knowing the most important term, the "critical issue" as it were. As the court in *Ellington* explained:

> We believe that Ellington was entitled to ask whether the prospective jurors in this case would automatically vote for a death sentence in any case in which two murder victims were young children, regardless of any other facts

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Dist. LEXIS 11077, at *3-5; Harlow v. Murphy, 2008 U.S. Dist. LEXIS 124288, at *226; United States v. McVeigh, 153 F.3d at 1205; *Oken*, 220 F.3d at 266 n.4; State v. Ball, 824 So. 2d at 1104; Hogwood v. State, 777 So. 2d at 177; State v. *Garcia*, 226 P.3d at 377-78; Ellington v. State, 735 S.E.2d at 751; Richmond v. Polk, 375 F.3d at 329; Commonwealth v. Smith, No. 681 CAP, 2015 Pa. LEXIS 3002, at *18; United States v. Johnson, 366 F. Supp. 2d at 849.

[271] BENCHBOOK *supra* note 106, at 89.

[272] Flyer, United States v. Hennis, No. 20100304 (No. 285) (Appendix E). Without an unsealed transcript of jury selection in *Tsarnaev*, it is unclear how much detail prospective jurors were provided from the indictment.

[273] Under current Supreme Court caselaw, to even qualify for the death penalty, there must be at least one statutorily-defined aggravating factor present. *See generally* Lindsay H. Tomenson and Hannah M. Stott-Bumsted, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: IV. Sentencing: Capital Punishment*, 89 Geo. L.J. 1738, 1742-50 (May 2001).

> or legal instructions. As to the jury's decision on the sentences in this case, our experience in criminal justice matters and simple common sense indicate that the fact that two of the victims were young children was the critical issue.[274]

In both *Hennis* and *Tsarnaev*, counsel identified the "critical issue" or "issues" in the case. In *Hennis*, the critical "issues" were the fact of two child victims and the accused's only defense—that he did not commit the crimes—a position he would not waiver from during presentencing, making for a challenging case in mitigation and extenuation. In *Tsarnaev*, it was the specter of terrorism and murders of a child and a police officer.

In *Hennis*, to the extent defense counsel was allowed to ask "case-specific" questions that incorporated these critical issues, he did so to great effect. This was true even during group voir dire using a limited "case-specific" question. As noted, defense counsel's proposed voir dire questions specifically asked prospective members about the appropriateness of the death penalty for someone who commits premeditated murder and someone who commits premeditated murder of children.[275] In all cases, more prospective panel members responded affirmatively to the second question than to the first.[276]

Furthermore, as compared to the military judge's hypothetical questions, defense counsel was able to probe members in a much deeper, and more effective way. The best evidence of this is defense counsel's voir dire of COL T, LTC R, and CSM G, as discussed above. Even where defense counsel did not succeed in challenging a prospective member, as with LTC B and MAJ W, by subjecting these latter two members to the specific facts of the case, defense counsel ultimately demonstrated their ability to comply with *Wainright*.[277] In that regard, expanded voir dire benefits both parties and the judge by laying bare the bases for legitimate challenges for cause in addition to increasing public trust in the fairness of the system.

In *Hennis*, defense counsel's primary issue was not in the substance or purpose of the "case-specific" questions, but rather the phrasing. Too often defense counsel strayed into "stake-out" territory, by requesting a

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[274] Ellington v. State, 735 S.E.2d at 755.
[275] *Supra* note 192, at 11-12.
[276] Tr. of R. at 1844, 2915, 3372-73, 3609, *Hennis*, No. 20100304.
[277] Wainright v. Witt, 469 U.S. at 424.

commitment from the members, whether that was if they thought death was the only appropriate penalty or how much weight they would give certain aggravating or mitigating factors during sentencing.[278] Although in the former instance defense counsel modeled the Colorado Method "strip question," it is difficult to see how the final inquiry does not run afoul of *Johnson*'s three-part inquiry. In that regard, the military judge was correct when he limited defense counsel's phrasing of the "case-specific" question.

The problem with the military judge's final formulation of questions was that, even though they could be fairly considered to be "case-specific" questions, they were missing the "critical issues." None of his approved questions included the ages of the two child victims, or specifically that they were children. Likewise, none of his approved questions included anything that touched upon the lack of defenses or true mitigation in this case. Hennis offered nothing that approached the classic types of mitigation or extenuation evidence, such as mental health issues, mental infirmity, provocation, or youth. His entire case rested on the fact that he did not commit the murder. By comparison, while Tsarnaev did have relative youth to offer as a mitigating factor—he was nineteen at the time of the murders[279]—he too was without the full complement of classic mitigating and extenuating circumstances.

Aside from the practical utility of such questioning, the constitutional requirement for hypothetical questions in *Johnson* categories two through four is rooted in the differences between military panel selection and sentencing as compared to federal jury selection and sentencing, as discussed below.

One of the most pervasive and persistent criticisms of the military system is the lack of transparency in selecting members.[280] Whereas in

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[278] On multiple occasions, the military judge, either *sua sponte*, or in response to a government objection, interjected on account of defense counsel's insertion of words including "important," "seriously," and "honestly," when asking how prospective members how they would evaluate certain migration and extenuation evidence in the case. *See*, *e.g.*, Tr. of R. at 2199, 2201, 2493-95, 2549-50, 2603, 2710-11, 3001-06, 3106-08, *Hennis*, No. 20100304.

[279] *See supra* note 236.

[280] *See*, *e.g.*, Hansen, *supra* note 85, at 912; Hill, *supra* note 85, at 121 (citing Colonel James A. Young, III, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 91, 107 (2000); Glazier, *supra* note 85, at 4; JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURT-MARTIAL 18 (1999) ("To the extent that

the federal system, the procedures used to determine potential members is prescribed and subject to validation, confirmation, and litigation; in the military system it is much more difficult to determine whether the convening authority in fact selected members in accordance with Article 25, as the criteria are subjective.

In *Tsarnaev*, for example, counsel litigated multiple motions over the court's jury selection process.[281] As the motions make clear, not only did Tsarnaev's attorneys ultimately gain access to the records for purposes of litigation, but they also had experts to assist them. While their challenges might not have been successful,[282] not only was the procedure subject to litigation, but the grounds upon which potential jurors were selected were entirely objective. Whether the district court has complied with the Jury Service Act is much easier to divine than whether the convening authority has in fact exercised the judgment that is called for under Article 25, assuming such a subjective system is even appropriate. In *Hennis*, by comparison, the panel selection process was not subject to litigation or challenge, according to a review of the appellate exhibits in the case. The panel selection documents, discussed in Part III.A., *supra*, are all that is known about the selection of panel members in *Hennis*.

The constitutional argument for certain types of hypothetical questioning becomes even clearer when you combine the differences between the Jury Selection Act and Article 25 as to the notable disparity between available peremptory challenges in both systems. Whereas defense counsel in a federal case have twenty, defense counsel in a military case have one. Furthermore, as Judge Cox observed in his concurring opinion in *United States v. Carter*:

> The Government has the functional equivalent of an unlimited number of peremptory challenges. Article 25(d)(2) provides that "the convening authority shall

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there is a possibility of abuse in the current system, there will always be a perception that that convening authorities and their subordinates may abandon their responsibilities and improperly attempt to influence the outcome of a court-martial.").

[281] Mot. for Disclosure of Jury Rs., *Tsarnaev*, No. 13-10200-GAO (No. 305); Sealed Mot. for Disclosure of Jury Rs., *Tsarnaev*, No. 13-10200-GAO (No. 912); Order, *Tsarnaev*, No. 13-10200-GAO (No. 1005); Second Mot. to Dismiss Indictment and Stay Proceedings Pending Reconstituting Jury Wheel to Conform with Statutory and Constitutional Requirements, *Tsarnaev*, No. 13-10200-GAO (No. 1080); Govt.'s Opp'n to Def.'s. Second Mot. to Dismiss the Indictment and Stay Proceedings Pending Reconstitution of the Jury Wheel, *Tsarnaev*, No. 13-10200-GAO (No. 1110).

[282] Op. and Order, *Tsarnaev*, No. 13-10200-GAO (No. 1149).

> detail as members . . . such members of the armed forces as, in his opinion, are best qualified for the duty." The statutory authority to choose the members necessarily includes the corollary right not to choose.[283]

Even though military defense counsel have a broader right to conduct voir dire than do their federal counterparts, they are operating at such a procedural disadvantage to start that RCM 912 cannot possibly level the playing field.

The differences in sentencing procedures only strengthen the argument. The FDPA explicitly includes a procedure to allow for a binary panel; one for findings and one for sentence. Even if district court judges rarely grant this remedy, there is at least the possibility of such for federal defendants. The military has no such procedural mechanism. Furthermore, the judge in *Tsarnaev* echoed what appears to be common practice in federal death penalty cases—a break between the verdict and sentencing. Whatever the reason, this functions as a "cooling off" period for jurors between phases.

In *Hennis*, for example, where the accused maintained his innocence throughout the trial, the court was essentially asking panel members who disbelieved his defense to sit fairly and impartially through mitigation and extenuation evidence less than twenty-four hours after determining he brutally murdered a woman and her two young children.[284] What is more, the government presents their sentencing case first, so, they are in essence "piling on" from the guilt phase, cementing for the panel members whatever animus they might feel toward such an accused. Hypothetical questions, notably "case-specific" ones which incorporate "critical issues," during voir dire at least give military defense counsel the possibility of presenting prospective panel members with this potential scenario, to determine if they can be truly impartial, and follow the

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[283] United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988).

[284] In that regard, this case can be distinguished from *Akbar*, where, in the course of litigating the ineffective assistance of counsel claim on appeal, it became clear that Akbar's attorneys' strategy was to lay the groundwork for their mitigation case during the findings phase, by introducing evidence of his mental instability as it related to premeditation, rather than strictly contesting his factual responsibility for the charged conduct. 74 M.J. at 385-87.

mandate of *Wainwright*.[285] While the voir dire in *Hennis*[286] may provide the empirical evidence for the utility of hypothetical questioning, the constitutional argument is much deeper than simple utility. The constitutional argument is rooted in the requirement to ensure a fair trial for an accused facing the ultimate penalty.

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[285] An even cursory review of military capital cases indicate that the majority of appeals include some allegation of ineffective assistance of counsel. *See*, *e.g.*, United States v. Akbar, 74 M.J. at 371; Loving v. United States, 64 M.J. 132, 134 (C.A.A.F. 2006); United States v. Gray, 51 M.J. at 18; United States v. Murphy, 50 M.J. 4, 8 (C.A.A.F. 1998); United States v. Curtis, 44 M.J. 106, 118 (C.A.A.F. 1996); Loving v. United States, 41 M.J. at 241; United States v. Witt, 73 M.J. 738, 766 (A. F. Ct. Crim. App. 2014). Even if such claims are not effective, the lack of time between findings and sentencing only increases the likelihood that counsel will not be adequately prepared for sentencing. If for no other reason than to remove fuel from the fire, the military should consider imposing a break between phases in capital cases, subject to a military judge's discretion, in order to guard against not only this claim, but this reality.

[286] *Supra* note 7.

Appendix A

Defense General Voir Dire Questions, *United States v. Hennis*

UNITED STATES OF AMERICA

vs.

MSG Timothy B. HENNIS.
U.S. Army
HHC, Special Troop Battalion
XVIII Airborne Corps
Fort Bragg, NC 28310

PROPOSED DEFENSE GENERAL VOIR DIRE

12 January 2010

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The defense proposes to conduct the following general voir dire of the court-martial panel. Subject to the Court's guidance, the defense reserves the right to alter the order of the voir dire, once approved.

The defense proposes to address the panel members' attitudes towards the imposition of the death penalty primarily during the time the Court has allotted for individual voir dire.

1. Do you believe that MSG Hennis is under tremendous pressure as he sits there?

2. Do you agree that, regardless of the verdict, these days in court will be some of the most difficult days in MSG Hennis's life?

3. Will you hold it against MSG Hennis if he looks nervous?

4. If he has a little sweat break out on his forehead?

5. If he makes some sort of facial expression during trial?

6. If he takes any notes?

7. If he whispers something to one of his counsel?

8. If I, Mr. Spinner or LTC Glass do anything or say anything that you find distasteful, would you hold it against MSG Hennis?

9. The presentation of evidence in a trial is governed by certain rules which are designed to assist the panel in reaching its decision and to ensure fairness to both sides. Does each member agree that the rules must be enforced in order to have a fair trial?

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10. Does each member understand that the way the rules are enforced in a trial is by either side making objections or the military judge ruling on those objections?

11. If the military judge agrees that an objection is valid, he will say sustained. If he disagrees, he will say overruled. Would any member hold it against counsel for either side if an objection counsel made was overruled?

12. One of these rules is that MSG Hennis is legally innocent unless the prosecutors prove every element of each offense beyond a reasonable doubt. A foundation of the military justice system is the presumption of innocence. Has everyone heard of that concept?

13. Have you ever had an occasion to think about what that means to you?

14. Please tell me what you think of the statement that you have no duty to decide if MSG Hennis is innocent?

15. Do you believe that MSG Hennis is presumed innocent even after all the evidence is presented and the attorneys stand up and make closing arguments?

16. Do you believe that MSG Hennis is innocent as you would proceed into the deliberation room after hearing all the evidence?

17. Do you believe that the presumption of innocence alone is enough to find MSG Hennis not guilty unless at least two thirds of the panel members individually are convinced beyond a reasonable doubt of his guilt?

18. Do you believe that if, after careful consideration of all the evidence, the government fails to meet its burden, you have a duty to find MSG Hennis not guilty?

19. After hearing all the evidence, do you believe you must find MSG Hennis not guilty if there is any other reasonable theory except that of guilt?

20. If at the end of the trial, you determined that two reasonable theories can be drawn from the evidence, one establishes guilt and the other something other than guilt, would you vote not guilty?

21. What do you think of the statement "MSG Hennis is not on trial, the government's case is on trial?"

a. Do you agree with that statement?

b. Do you believe that is a proper way to view a trial?

22. Do you believe that it is the defense counsel's job to provide you with any evidence to prove the innocence of MSG Hennis?

23. If the defense were to put on no evidence, what would you think?

24. Would that bother you?

25. Would you believe MSG Hennis is likely guilty because his attorneys did not put on any evidence?

26. The government has charged MSG Hennis with three specifications of premeditated murder: Do you think that the fact that MSG Hennis has been charged is evidence in the case?

27. Does the fact that MSG Hennis has been charged make it any more likely that he is guilty in your mind?

28. As you sit here today, do you have any reason to believe that MSG Hennis is guilty of the charged offenses?

29. Do you believe that the military justice system will be satisfied with a not guilty verdict?

30. Do you understand that the military judge will be satisfied with a not guilty verdict?

31. Do you understand that the United States Government will be satisfied with a not guilty verdict?

32. The government has the burden of proof in this case. This means the government must prove every element of the charged offenses to an evidentiary certainty which our system describes as proof beyond a reasonable doubt. Should the government fail to meet its burden of proving its case to an evidentiary certainty, what is the verdict you must reach?

33. Under the law, the burden never shifts to the defense to establish innocence or to disprove the facts necessary to establish each element of each offense. Do you feel that that is the right way to conduct a trial?

34. Do you think that it would be a better system if an accused should have to prove their innocence?

35. How many of you believe you have a duty to convict MSG Hennis as to the charged offenses in this case?

36. Does anyone believe that the panel must reach a unanimous decision?

37. Once you have individually made a decision regarding the sufficiency of the evidence of the government's case, do you expect that the other panel members will respect your decision?

38. Once each of the other panel members has individually made a decision as to the sufficiency of the evidence of the government's case, will you respect your fellow panel members' decisions?

39. Do you believe that each panel member must explain and justify their decisions and votes in this case to any other panel member?

40. Do you believe that it is the duty of any panel member to be an advocate for the government and convince the other panel members to vote for a finding of guilty?

41. What does the concept of one person one vote mean to you?

42. Would your compassion for the family members of the victims cause you difficulty in voting for a finding of not guilty?

43. If the victims family members are in court during the presentation of evidence will that have an effect on your view of the evidence?

44. If you think the evidence has shown that it possibly was MSG Hennis who committed the offense but you still have a reasonable doubt about this would you be able to find him not guilty?

45. If you are not sure someone else committed the offenses would you be able to find him not guilty?

46. If you are not sure anyone else will ever be brought to justice for the offenses would you be able to find him not guilty?

47. Does every member agree that the system only works if the process is fair?

48. Is a finding of not guilty a failure of the system?

49. Have you ever heard anyone express the view that a finding of not guilty was a failure of the system in any case?

50. Would you be troubled if you were to sit on a panel that found MSG Hennis not guilty when you personally thought the government had proved an offense beyond a reasonable doubt?

51. Are you comfortable with the idea that you are fulfilling your individual duty as a panel member by voting not guilty unless the government has proven each element of the offense beyond a reasonable doubt?

52. The family and friends of the victims in this case have suffered a tremendous and tragic loss. How will your sympathy for the families of the victims affect you when making a decision in this case?

53. Do you believe that evidence offered by the government is more reliable than the evidence offered by the defense?

54. If the defense attorneys decide to call witnesses and present evidence in this case, should that evidence be weighed in the same way evidence presented by the government is weighed?

55. The government counsel will present you with a theory of what happened on 9 May 1985. As to that theory what do you think of the proposition that:

a. The government's theory is just the trial counsel's personal theory of what happened?

b. The government's theory may be just one of several potential theories?

c. You are not bound by the government's theory?

d. You are not required to accept the government's theory just because the government counsel presented it?

e. You alone have the duty of evaluating the government's theory in light of the evidence presented?

f. You alone have the duty of deciding whether there are other fair and reasonable theories inconsistent with guilt?

56. If you find that the government's theory is one of two or more fair and reasonable theories, one of which is inconsistent with guilt, how will you vote?

57. If you feel the government's theory of MSG Hennis' guilt is more likely than a reasonable theory under which he is not guilty, how will you vote?

58. What does the phrase "agree to disagree" mean to you?

59. What do you think of the idea that reasonable people can come to different conclusions regarding the same facts?

60. In those situations where you have "agreed to disagree" were you able to accept and respect the person's conclusion that was different than yours?

61. In those situations, were you able to stop trying to change the mind of a person with whom you "agreed to disagree" with?

62. Would you be able to stand firm on your theory if, after fair deliberation, you still believe that it is a reasonable theory despite strong opinions of others on the panel?

63. For the next few questions, I want you to picture yourselves in the deliberation room. All the evidence and argument from counsel has been presented and you and the other panel members are discussing the evidence and whether the government has proved the elements of the offenses beyond a reasonable doubt. Imagine that you and the others have discussed the evidence, the different possible scenarios and respectfully listened to one another's opinions. After all that, you personally disagree with one or more of the panel members as to whether the government proved the offenses beyond a reasonable doubt.

a. Does it matter that some people are more articulate than others?

b. Does it matter that it may be hard for someone to articulate how they came to their opinion?

c. Does any member feel that one member's opinion is entitled to less respect just because he may not be able to articulate the basis of the opinion as well as another member may be able to do?

d. Does any panel member owe any other panel member an explanation of his opinion?

64. Would you be able to respect other opinions even if it should mean that MSG Hennis is found not guilty while you personally may think he is guilty?

65. The offenses charged here stem from the killing of a mother and her two young daughters. The evidence about the offenses is likely to be very emotional at times. Has any panel member ever viewed photographs from autopsies before?

66. Has any panel member ever seen photographs of victims' bodies at a crime scene?

67. The photographs introduced into this case as evidence will likely involve graphic images of murdered children. Has any panel member ever seen photographs of murdered children before?

68. If upon seeing the pictures you experience a strong emotional reaction that interferes with your ability to reamin impartial, will you inform the military judge?

69. Have you ever been in the situation where you have been confronted with a highly emotional event but had to make an objective decision?

70. The defense expects that one or more police officers, sheriff's deputies or other law enforcement officials may testify. Are police officers more credible than other witnesses?

71. Do you believe police officers are more accurate in their testimony than other witnesses?

72. May police officers have a personal interest in persuading others that they did good work?

73. Can a police officer's personal interest in the investigation be:

a. Pride?

b. Embarrassment?

c. Fear of professional repercussions?

74. In your opinion, is it likely that the more high profile a particular case the greater that personal interest of the police officer might be?

75. Do you think it would be difficult for a police officer to concede that the police investigation was not conducted properly?

76. In determining whether a police officer's testimony is credible, is it proper to consider:

a. Evidence that police officers experienced "tunnel vision" as to one theory out of many possible theory of how the offenses occurred?

b. Evidence that because police officers focused on one theory, other fair and reasonable theories were never investigated?

c. Evidence that due to the passage of time, it may now be impossible to investigate other theory?

77. In your opinion, would it be important to consider evidence, if presented, that the investigation was compromised by any of the following:

a. A desire to solve the case quickly?

b. Tunnel vision on the part of the investigators?

c. Coming to a conclusion too early and then looking for evidence to support that conclusion?

e. Selective forensic testing of evidence in search of proving the conclusion?

f. Ignoring evidence tending to contradict the early conclusions of the investigations?

78. At some time in your Army career, each of you have provided urine samples for testing. Is it important to you that the people collecting, handling and storing your urine sample follow proper procedures?

79. What kinds of procedures regarding the collecting, handling and storing of your urine sample might be important to you?

80. What is the risk if proper procedures are not followed?

81. We anticipate that forensic science evidence will be presented in this case. Has anyone been exposed to or received training in fingerprint analysis?

82. Has anyone been exposed to or received training in footprint analysis?

83. Has anyone been exposed to or received training in DNA analysis?

84. Has anyone been exposed to or received training in trace evidence analysis?

85. Has anyone been exposed to or received training in hair analysis?

86. What is your impression of forensic science evidence?

87. Has anyone ever seen a movie or watch a television program where a crime has been solved by "forensic evidence"?

88. What movies or programs?

89. Is there anything you have heard about forensic science which may lead you to believe that it automatically solves the crime?

90. Is there anything you have heard about forensic evidence which may lead you to believe it's not reliable?

91. Is there anything you have heard about forensic evidence which may lead you to believe it's always reliable?

92. In your opinion, is it important to know precisely what a forensic test is incapable of proving or disproving?

93. Can the bias of the investigators, if any, be shown from evidence the investigators chose to have tested and not tested?

94. The military judge will instruct you regarding circumstantial evidence. Do you each agree that you will exercise the utmost caution and vigilance before coming to conclusions regard what circumstantial evidence proves or disproves?

95. If the prosecution asks you to consider circumstantial evidence in support of its theory of guilt, will you also fully consider whether a fair and reasonable theory other than guilt is also supported by the circumstantial evidence?

96. Is someone potentially having financial problems more inclined to commit violent crimes?

97. Do you agree that a witness's testimony simply reflects an expression of belief or observation by the witness?

98. Do you believe that a person can make an honest mistake identifying another person?

99. Do you believe that a person's memory fades, improves or stays the same over time?

100. Do you believe that a person of one race is more or less likely to be able to accurately identify a stranger of another race?

101. Do you believe that after-acquired information like newspaper stories and photographs or information given by police officers could alter a witness's original memory?

102. Do you believe that a person can be influenced to identify a person as a suspect by such outside influences such as media report, rumors, and suggestions by others that a certain person is a suspect or by the fact that others have identified that person as a suspect?

103. Has any member ever had an experience or heard of a situation where a witness was absolutely certain of what he had perceived, but turned out to be absolutely wrong?

a. Does anyone have a similar experience?

b. Has anyone heard of something similar?

104. Do you think that a witness's confidence in an identification is related to the accuracy of that identification?

105. Do you think that a witness's accuracy should be determined by whether the person appears confident about his perception and memory of events?

106. In the case of a witness who was involved with an event, how do you think a witness's accuracy may be affected by the following:

a. The proximity of the witness to the event?

b. The physical condition of the witness?

c. The time of the event?

d. The amount of light at the time?

e. The weather condition at the time of the event?

g. The rarity of the event?

h. The witness' relationship with the victims?

i. The witness' animosity or dislike of the potential suspect?

j. The witness' efforts to piece things together in his own mind?

k. The extent to which the nature of the events may have been suggested to the witness?

l. The desire of a witness to be a part of the solution and "solve the crime"?

107. Do you think that people give unconscious cues about the "correct" answer to a question in their body language or tone?

108. Have you heard the term "blind testing" or "double blind testing" before?

109. What do you understand "blind testing" or "double blind testing" to mean?

110. Why is "blind testing" or "double blind testing" important?

111. Do you believe that, if the culprit is not in a photo display, the witness will pick (a) no one, or (b) the person who looks most like the culprit?

112. Do you believe that if a person's picture is in a photo array, the person must have done something wrong in the past?

113. Do you believe that it is important to tell the witness that the culprit might not be in the photo array?

114. Do you believe that a witness might be worried that if he or she does not pick someone from the photo array, the investigation will end?

115. Do you believe that a witness viewing an array believes that the police are as concerned with clearing the innocent as with finding the guilty?

116. Is the credibility of a witness automatically suspect if that witness is a co-worker of the accused?

117. Is the credibility of a witness automatically suspect if that witness describes themselves as a friend of the accused?

118. Is credibility of a witness automatically suspect if that witness is a family member of the accused?

119. If a witness makes a sworn statement close in time to an event and then later makes a conflicting statement, should that witness' credibility be questioned?

120. Please understand that because the government has referred this case capital, we are required to ask you a few questions regarding your understanding of the death penalty in the military. What do you think of the following statements?

a. It costs too much to keep someone in prison for premeditated murder, it is better to give him the death penalty.

b. Death penalty cases take too much time.

c. There would be less crime if the death penalty were used more.

d. If someone commits premeditated murder, "they should fry that guy."

e. If someone is convicted of premeditated murder, they should be given the death penalty.

f. If someone murders children, they should be given the death penalty.

g. Life in prison is not a really punishment for premeditated murder.

121. Has anyone received any information about this case other than from the military judge here today?

122. There has been a book published and a television movie made about the Eastburn murders and the previous court proceedings involving MSG Hennis titled "Innocent Victims."

123. Has any panel member ever read or heard about the book?

124. Has any panel member watched or heard about the movie?

125. Do each of you agree to disclose to the military judge any information you may receive about this case during trial which comes from outside the courtroom?

126. Have you ever read a book about a crime or a murder trial?

127. Have you read any books, watched any television programs or movies involving the death penalty?

128. Have you ever written a letter to the editor?

129. Do you use the internet in your off-duty time?

130. Do you regularly view, author, or participate in any blogs on the internet?

131. This case may last up to eight weeks. During that time, your duty here will be your only duty. With that in mind, is there any professional or personal obligation that will require your attention within the next eight weeks?

132. Is there any reason that you may not be able to devote your full time and attention to this duty?

133. Is any member aware of any matter which might raise a question concerning your participation in this trial as a court member?

134. I ask each of you to carefully examine your own conscience. Does anyone feel there is any reason you truly should not sit in judgment of this case?

135. Does any panel member believe that his or her service on the panel could in some way affect the appearance of fairness and impartiality of the panel or the court-martial process?

136. Given your experiences in life, your experiences in the Army, your personal believes and temperament, as well as the nature of the accusations in this case, if you were sitting in MSG Hennis' seat, would you be uncomfortable having someone like you serve on the panel?

KRIS R. POPPE
LTC, JA
Trial Defense Counsel

Appendix B

Panel Member Questionnaire, *United States v. Hennis*

6 JANUARY 2010

SUSPENSE DATE: 25 JANUARY 2010

PANEL MEMBER QUESTIONNAIRE
UNITED STATES V. MSG TIMOTHY B. HENNIS

This questionnaire is designed to obtain information from you for the purpose of assisting the parties in selecting a fair and impartial court-martial panel in this case. Careful and complete responses may shorten the member selection process. This written questionnaire is just one step in the panel selection process.

Please answer every question carefully, truthfully and completely. Do not leave any questions blank. Your responses should reflect you own personal knowledge, beliefs, or opinions.

If you do not understand a question, please indicate so and the question will be explained to you. If a question is not relevant to you, please write "N/A" to indicate that it is not applicable to you in the space provided. Feel free to fully explain any response to any question. If your answers or explanations to any question will not fit completely in the space provided, please attach a continuation sheet to the questionnaire with your answers numbered to correspond with the questions.

During another step in the panel selection process, the military judge and the attorneys will have an opportunity to follow up on these questions in court. At that time, you will be given an opportunity to explain or expand on any of your answers in open court.

Please do not discuss this questionnaire or your answers with anyone, including family members, friends, co-workers, or other prospective members. The answers to these questions will be used by the court and the attorneys solely for the selection of the panel members in this case and for no other reason. The information contained within the questionnaire will become part of the court record.

Please return the competed questionnaire **NLT 25 January 2010** to MAJ Robert Leone, Chief of Justice, Office of the Staff Judge Advocate, XVIII Airborne Corps, building 2-1133, corner of Armistead and Macomb. If you would prefer to scan the completed questionnaire, his email address is: robert.leone@us.army.mil; phone number is 910-396-4113/2405

Patrick J. Parrish
PATRICK J. PARRISH
Colonel, Judge Advocate
Military Judge

APPELLATE EXHIBIT 242
Pg 1 of 13

CONFIDENTIAL
PAGE 1 OF 13

COURT-MARTIAL MEMBER QUESTIONNAIRE
(PLEASE PRINT CLEARLY & USE INK)

DATE PREPARED: _____

1. Full name: _____
(First) (Middle) (Last) (Maiden, if applicable)

2. Date of birth: _____ Age: _____ Sex: _____ Race: _____

Birthplace (City/Town & State): _____

3. Current duty station and office telephone number: _____

4. Grade/rank: _____ Date of grade/rank: _____

5. MOS: _____
Job title, description and duties: _____
Length of present assignment: _____
Name and title of supervisor: _____
Current rating scheme: _____
Rater
_____
Intermediate Rater / Senior Rater
_____
Senior Rater / Reviewer

6. Have you or any family member ever served as either a legal officer or legal clerk? ☐ YES ☐ NO If *YES*, please explain: _____
_____

7. Have you ever worked as a police officer, military police, in military law enforcement or investigations? ☐ YES ☐ NO If *YES*, please indicate:

DATES	RANK	DUTIES

8. Years of active duty: _____ Years of reserve duty: _____

9. ***(Officers only)*** Source of commission: _____

10. ***(Officers only)*** Have you had any enlisted service? ☐ YES ☐ NO If *YES*, please indicate:

DATES	YEARS	HIGHEST RANK

11. Have you ever been employed as a civilian? ☐ YES ☐ NO If *YES*, please indicate the following for each employment:

DATES	LENGTH OF EMPLOYMENT	NAME & NATURE OF BUSINESS	TITLE & DUTIES	REASON TO LEFT THE JOB

12. Have you attended technical or trade schools (including any military schools)? ☐ YES ☐ NO If *YES*, please indicate the following for each school you attended:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	MAJOR	MINOR	DEGREE EARNED

13. Have you attended college (***undergraduate***): ☐ YES ☐ NO If *YES*, please indicate the following for each undergraduate college you attended:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	MAJOR	MINOR	DEGREE EARNED

14. Have you attended post-graduate school? ☐ YES ☐ NO If *YES*, please indicate the following for each post-graduate school you attended:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	MAJOR	MINOR	DEGREE EARNED

15. Have you attended law school or taken any law courses (including any vocational, undergraduate or Army schools)? ☐ YES ☐ NO If *YES*, please indicate the following for each:

DATES	NAME OF SCHOOL	LOCATION (CITY/STATE)	LENGTH	TOPIC	DEGREE EARNED

16. Have you taken any courses, seminars, or training in the following areas ***(please check all that apply)***:

☐ BIOLOGY ☐ FAMILY THERAPY ☐ SOCIOLOGY
☐ CRIMINAL JUSTICE ☐ PHILOSOPHY ☐ COUNSELING
☐ EMERGENCY RESPONSE ☐ SOCIAL WORK ☐ EDUCATION
☐ PHARMACOLOGY ☐ CONSTITUTIONAL LAW ☐ MEDICINE
☐ RELIGION ☐ CRISIS INTERVENTION ☐ PSYCHIATRY
☐ CHEMISTRY ☐ LAW ENFORCEMENT ☐ GENETICS
☐ CRIMINOLOGY ☐ PSYCHOLOGY

17. Please indicate your current personal status:

☐ SINGLE (NEVER BEEN MARRIED)
☐ DIVORCED (HOW LONG?) _____
☐ WIDOWED (HOW LONG?) _____
☐ SEPARATED (HOW LONG?)_____
☐ DIVORCED/REMARRIED (HOW LONG?) _____
☐ WIDOWED/REMARRIED (HOW LONG?)_____

18. Current and/or former spouse's employer, job title, description and duties: _____

19. Has your (current and/or former) spouse ever served in any branch of the Armed Forces? ☐ YES ☐ NO If *YES*, please give a summary of your spouse's military career ***(please include all significant or unusual jobs and service in any other branch of the Armed Forces)***:

DATES	BRANCH	ENLIST/ COMMISSION/ REENLIST	HIGHEST RANK	DUTY STATION/ COMMAND	DUTIES & SPECIFIC ASSIGNMENT	DATE/TYPE OF DISCHARGE

20. Has your current and/or former spouse ever worked as a police officer in a military or civilian law enforcement capacity? ☐ YES ☐ NO If *YES*, please indicate:

DATES	RANK	DUTIES

21. Has your current and/or former spouse or any family member attended law school or taken any law courses (including any schools)? ☐ YES ☐ NO If *YES*, please indicate the following for each:

DATE	NAME OF SCHOOL	LOCATION (CITY/STATE)	LENGTH	TOPIC	DEGREE EARNED

22. Please provide the following information about each of your children, stepchildren, foster children or grandchildren:

RELATIONSHIP (SON, STEPSON, ETC.)	AGE	STATUS	LIVING IN YOUR HOME
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO
		☐ LIVING ☐ DECEASED	☐ YES ☐ NO

23. Have your parents (including stepparents or foster parents) or siblings (including stepsiblings or foster siblings) ever served in any branch of the Armed Forces?

RELATIONSHIP	DATES	BRANCH	ENLIST/ COMMISSION/ REENLIST	HIGHEST RANK	DUTIES & SPECIFIC ASSIGNMENT

24. Have any of those listed above ever worked as a police officer in a military or civilian law enforcement capacity? ☐ YES ☐ NO If *YES*, please indicate:

RELATIONSHIP	DATES	RANK	DUTIES

25. Please list the civil clubs, societies, professional associations, or other organizations to which you now belong or to which you have belonged in the past: _____

_____

26. Have you ever served as an officer or held a position of leadership in any of these organizations? ☐ YES ☐ NO If *YES*, please explain: _____

_____

27. On ***social*** issues, are you:

☐ VERY CONSERVATIVE ☐ MODERATE ☐ VERY LIBERAL
☐ CONSERVATIVE ☐ LIBERAL

28. On ***financial*** issues, are you:

☐ VERY CONSERVATIVE ☐ MODERATE ☐ VERY LIBERAL
☐ CONSERVATIVE ☐ LIBERAL

29. What is your religious preference? _____

30. On ***religious*** issues, do you consider yourself to be:

☐ VERY CONSERVATIVE ☐ MODERATE ☐ VERY LIBERAL
☐ CONSERVATIVE ☐ LIBERAL

31. Which best describes how often you attend religious services:

☐ DAILY ☐ MONTHLY ☐ OCCASIONALLY
☐ WEEKLY ☐ HOLIDAYS ☐ DO NOT ATTEND

32. Other than services, what activities sponsored by your religious organization are you involved with and how are you involved? _____

_____

_____

33. Does your spouse practice or belong to a religion different from yours?

☐ YES ☐ NO If *YES,* to which religion does your spouse belong? _____

_____

34. Have you ever held any offices or positions of leadership in your church or congregation? ☐ YES ☐ NO If *YES,* which offices or positions and how long did you hold that office or position? _____

_____

35. Have you studied for the ministry, priesthood, rabbinical order, or any other clergy position? ☐ YES ☐ NO If *YES*, when, what position and what was the outcome of your studies? _____

36. On ***political*** issues, do you consider yourself to be:

☐ VERY CONSERVATIVE ☐ MODERATE ☐ VERY LIBERAL
☐ CONSERVATIVE ☐ LIBERAL

37. Please express the extent of your agreement with the following statement:

A person's background should be considered when it comes to deciding whether or not he should be sentenced to death for murder.

☐ STRONGLY AGREE ☐ MODERATELY AGREE ☐ SLIGHTLY AGREE

☐ STRONGLY DISAGREE ☐ MODERATELY DISAGREE ☐ SLIGHTLY DISAGREE

☐ NEITHER AGREE OR DISAGREE

38. Do you know the official position of your religion, philosophy or spiritual training regarding the death penalty? If ***yes***, what is that position? _____

_____

_____

_____

39. Have you or any family members or close friends ever worked in medicine, healthcare or a related field (nurse, pharmacist, doctor, radiologist, etc.)?

☐ YES ☐ NO If *YES,* please tell us who, when and what that person's job duties included: _____

_____

40. Have you or any family members or close friends ever worked in the mental health or related field (psychiatrist, psychologist, psychiatric nurse, social worker, counselor, etc.)? ☐ YES ☐ NO If *YES,* please tell us who, when and what that person's job duties included: _____

_____

41. Have you ever read books or articles dealing with psychiatry, psychology, social work or mental health issues? ☐ YES ☐ NO If *YES,* please tell us which books, if you remember the title _____

_____

_____

42. Have you ever taken any courses or seminars in the fields of psychiatry, psychology, social work or counseling? ☐ YES ☐ NO If *YES,* please tell us what courses and approximately when: _____

_____

_____

43. Have you ever known anyone who you believe suffered from severe emotional problems? ☐ YES ☐ NO If *YES*, please explain: _____

44. Have you or any family members or any close friends ever undergone counseling, treatment, or hospitalization for psychiatric, emotional, family, behavioral, or substance abuse problems? ☐ YES ☐ NO If *YES*, please tell us who and provide the general circumstances: _____

45. Have you or anyone close to you ever called the police or other law enforcement agency, been interviewed by police or filed a complaint or a police report? ☐ YES ☐ NO If *YES*, please explain: _____

46. Have you or any family member or close friend ever witnessed a crime (other than on television)? ☐ YES ☐ NO If *YES*, please explain: _____

47. Were you or a close friend or relative satisfied with how you/they were treated as a victim/witness in that matter?_____

48. Have you or any family member or close friend ever been accused, arrested, convicted or acquitted of a criminal offense? ☐ YES ☐ NO If *YES*,, please explain: _____

49. Were you or a close friend or relative satisfied with how you/they were treated an accused in that matter?_____

50. With respect to any of the two previous questions, do you feel that you/they were justly accused, charged or convicted? ☐ YES ☐ NO Were you/they treated fairly? If *NO* as to either question, please explain: _____

51. Have you ever had any interaction with CID or any other investigative agency of any branch of the military? ☐ YES ☐ NO If *YES*, please explain: _____

_____

_____

52. Have you ever had any interaction with the Cumberland County Sheriff's Office, Cumberland County District Attorney's Office, or the North Carolina State Bureau of Investigation? ☐ YES ☐ NO If *YES*, please explain: _____

_____

_____

53. Do you know anyone who has been in jail or who has been to prison?

☐ YES ☐ NO If *YES,* please explain: _____

_____

54. Have you or any member of your family ever been associated or worked with any program involved with supporting victims of crime? ☐ YES ☐ NO If *YES,* please explain: _____

_____

55. Have you or any member of your family ever been associated or worked with any program involved with rehabilitation of persons convicted of a crime?

☐ YES ☐ NO If *YES,* please explain: _____

_____

_____

56. Is there a crime prevention group in your neighborhood? ☐ YES ☐ NO If *YES,* what is the name of the group, do you or any family members participate in it, and if so, how do you participate in it? _____

_____

57. Have you or anyone close to you ever been employed in any capacity by or volunteered to help any local, state, federal, private, or military law enforcement or other investigative agency, including:

_____Military Police, Army CID, Other Military Investigative Agencies
_____Police/Sheriff's Department, State Police, Highway Patrol, School Police
_____U.S. Marshal's Service, FBI, ATF, DEA
_____IRS, CIA, INS/ICE, DHS, U.S. Customs
_____Security/Detective
_____Other, please specify:_____

If *YES*, please explain: _____

_____

58. Have you or any family members or friends ever worked in a security or detective service? ☐ YES ☐ NO If *YES,* who, what type of service(s), what are that person's duties and are they currently with that organization? _____

_____

_____

_____

59. Have you or any family members or friends ever worked in a correctional facility or program, such as a prison, jail, state hospital, halfway house or detention center? ☐ YES ☐ NO If *YES,* who, what facility(ies), what is that person's duties and are they currently associated with the facility(ies)? _____

_____

_____

60. Have you ever served as summary court-martial officer? ☐ YES ☐ NO If *YES,* please provide information about when, the cases and results: _____

_____

61. Have you ever convened or appointed any of the following? ☐ YES ☐ NO
If *YES* to any, please explain:

SUMMARY COURT-MARTIAL	☐ YES ☐ NO	_____
SPECIAL COURT-MARTIAL	☐ YES ☐ NO	_____
ARTICLE 32 INVESTIGATION	☐ YES ☐ NO	_____
GENERAL COURT-MARTIAL	☐ YES ☐ NO	_____

62. Have you ever imposed nonjudicial punishment under U.C.M.J., Article 15?
☐ YES ☐ NO If *YES,* please estimate the number of Article 15 proceedings in which you have imposed punishment: _____

Please estimate the number of cases in which you have found the Soldier "Not Guilty" at the Article 15 hearing. _____

63. Have you ever watched any criminal trial (civilian or military) in person?
☐ YES ☐ NO If *YES,* please explain circumstances: _____

_____

64. Have you or any family members or friends ever worked in the justice system (military or civilian)? ☐ YES ☐ NO If *YES,* please tell us who, when, what were their duties and are they still working there? _____

_____

65. Have you or any family members or friends ever been a party to or a witness for any criminal trial (military or civilian)? ☐ YES ☐ NO If *YES*, who, when and what were the circumstances? _____

_____

_____

66. Have you served as a panel member in a court-martial? ☐ YES ☐ NO If *YES,* please explain the type of case:

DATE	TYPE/NATURE OF CASE

67. Have you ever served on a civilian jury? ☐ YES ☐ NO If *YES*, please indicate the court, the dates served, the nature of the case and the verdict.

_____

_____

68. Have you ever served on a civilian grand jury? ☐ YES ☐ NO If *YES*, please indicate the court, and dates served.

_____

_____

69. Have you ever served as an Article 32, U.C.M.J., Investigator Officer?
☐ YES ☐ NO If *YES*, please explain: _____

_____

70. Have you ever served as an AR 15-6, Investigating Officer or conducted any other type of investigation? ☐ YES ☐ NO If *YES*, please explain: _____

_____

71. Have you or anyone you know ever worked for a lawyer or law firm?
☐ YES ☐ NO If *YES,* who, which lawyer or law firm, what type of law does that lawyer/firm practice and what were your/their job responsibilities: _____
_____
_____

72. Do you know any lawyers, prosecutors or judges on a personal or professional basis? ☐ YES ☐ NO If *YES*, who do you know, what type of law does that person practice and what is the nature of your relationship? _____
_____
_____

73. Are you aware of any media coverage of this case? ☐ YES ☐ NO If *YES*, please list the media sources in which you have heard about this case.
_____
_____

74. How would you describe the amount of media coverage you have seen about this case:

☐ A GREAT DEAL ☐ MODERATE ☐ NONE
☐ QUITE A BIT ☐ LITTLE

75. Do you know Master Sergeant Timothy B. Hennis? ☐ YES ☐ NO If *YES,* please explain: _____
_____

76. Did you know Katherine, Kara, and Erin Eastburn? ☐ YES ☐ NO If *YES,* please explain:_____
_____

77. Are you personally acquainted with anyone at Fort Bragg in the trial counsel office, Office of the Staff Judge Advocate, or Trial Defense Service? If *YES*, please explain: _____

Appendix C

Transcript of Record, *United States v. Hennis*

With that in mind, does anyone know of anything of a personal or professional nature which would preclude you from giving your full attention to these proceedings?

[Pause.]

MJ: And that's a negative response by each member.

Now, it's a ground for challenge for cause if you believe that the commission of crime "X" must always result in punishment "Y." Having read the charge and its specifications, does anyone believe you would be compelled to vote for a particular punishment based solely on the nature of these offenses?

[Pause.]

MJ: That's a negative response.

And I will advise you -- if we get to sentencing, I will advise you of the full range of punishments that would be available.

Can each of you assure me that you will consider the full range of punishments if we get to sentencing? Can each of you do that?

[Pause.]

MJ: That's an affirmative response by each member.

Now, I told you earlier, Members, that if the accused is convicted of premeditated murder by unanimous vote, one of the possible punishments is death.

Is there any member due to his or her religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to imposition of the death penalty?

[Pause.]

MJ: That's a negative response by each member.

Is there anyone who, based on your personal moral, or ethical values, believes that the death penalty must be adjudged in any case involving premeditated murder?

[Pause.]

MJ: And that's a negative response by each member.

Now, if sentencing proceedings are required, I will instruct you in detail before you begin your deliberations. You must keep an open mind and not make a choice nor foreclose from consideration any possible sentence until you are altogether in your closed-session deliberations.

Can each of you follow that instruction to keep an open mind?

[Pause.]

MJ: That's an affirmative response by each member.

Can each of you then be fair, and impartial, and open minded in your consideration of an appropriate sentence in this case if called to do so?

[Pause.]

MJ: That's an affirmative response by each member.

So each of you then can reach a decision on a sentence, if required to do so, on an individual basis and not based solely on the nature of the offenses involved? Can each member do that?

[Pause.]

MJ: That's an affirmative response by each member.

Is any member aware of any matter which you believe may raise a substantial question concerning your participation as a court member in this case?

[Pause.]

MJ: And that's a negative response by each member.

Trial Counsel, do you have any questions?

TC: Thank you, Your Honor.

Please bear with me a moment while I put the microphone on.

[Pause.]

Appendix D

Juror Questionnaire, *United States v. Tsarnaev*

For Official Use Only: _____
Juror Number

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

_____
Juror Name

For Official Use Only: _____
Juror Number

United States v. Dzhokhar Tsarnaev
Cr. No. 13-10200-GAO

Juror Questionnaire

The information that you provide in this questionnaire will be used by the Court and the parties to select a qualified jury in this case; that is, a jury that can render a verdict fairly and impartially based upon the evidence offered at trial in accordance with the law as instructed by the Judge. Both parties are entitled to a jury that is fully fair and impartial. This questionnaire and the jury selection process that we are about to begin is not meant to be intrusive; rather, it serves the important function of ensuring that a fair and impartial jury is selected to hear and decide this case.

It is very important that you answer these questions as completely and accurately as you can. Please write legibly and answer the questions as candidly as possible. There are no right or wrong answers to these questions. But honesty and candor are of the utmost importance. You have taken an oath promising to give truthful answers. The integrity of the process depends upon your truthfulness.

Please bear the following instructions in mind:

- Do not consult, confer, or talk with any other person in completing this questionnaire.
- If you are unable to answer a question because you do not understand the question, please write "Do not understand" in the space after the question. Do not ask anyone, including court personnel, for clarification or assistance.
- If you are unable to answer a question because you do not know the answer, please write "Do not know" in response to the question.
- If you believe that your response to a particular question is of a sensitive or private nature and would like to request that your response not be made public, please write the number of that question in your response to Question #100. Alternatively, if you would prefer not to write an answer to a particular question because of the sensitive or private nature of your response, please write "Private" after the question. The Court may still need to speak with you about the topic, but will endeavor to do so bearing your concerns in mind.
- Please do not write on the back of any page. Use the blank space at the end of the questionnaire (front side only) where there is insufficient room on the form for your answer to any question. When using this space, please include the number of the question(s) you are answering.
- Please write legibly.

You will be permitted to leave for the day when you have completed the questionnaire. Do not discuss any of the questions or your answers on this questionnaire with anyone, including

For Official Use Only: _____
Juror Number

members of your family, co-workers, or other potential jurors. If anyone approaches you and attempts to discuss any aspect of this questionnaire, the jury selection process, or any aspect of this case, you may not answer their questions or engage in any discussion.

Do not discuss anything about this case with anyone and do not read, listen to, or watch anything relating to this case until you have been excused as a potential juror, or if you are selected as a juror, until the trial is over. You may not discuss this case or allow yourself to be exposed to any discussions of this case in any manner.

When you have completed the questionnaire, please sign it, affirming the truth of your answers and confirming that you had no assistance in completing it. As explained by the Court, you will receive further instructions about whether you need to return for the next phase of jury selection by calling the juror information line and entering your nine-digit participant number.

The Court thanks you for your attention and willingness to serve as a juror, an important duty of citizenship in our democracy.

For Official Use Only: _____
Juror Number

1. Date of birth: _____

2. Gender: ☐ Male ☐ Female

3. Race: (This information will not affect your selection for jury service.)
☐ Black/African American ☐ Asian ☐ American Indian/Native Alaskan
☐ White ☐ Native Hawaiian/Pacific Islander ☐ Other: _____

4. In what city or town do you live? _____

5. How long have you lived there? _____

If you have lived at that location fewer than 5 years, please list the cities or towns in which you have lived since 2010:

_____

_____

6. In what city, state, and country were you born and raised?

Born: _____ Raised: _____

If you were born in another country, when did you move to the United States, and when did you obtain U.S. citizenship?

Moved: _____ Citizenship: _____

7. Have you ever lived in another country? ☐ Yes ☐ No

What Country? For How Long?

_____ _____

_____ _____

8. Do you have any problem understanding English that would make it difficult or impossible for you to serve as a juror in this case? ☐ Yes ☐ No
If "yes," please explain:

_____

For Official Use Only: _____
Juror Number

9. If you believe you have a medical, physical, psychological, or emotional problem, issue, or condition that would affect your ability to serve as a juror, including difficulty hearing, seeing, reading, or concentrating, please explain:

_____

_____

_____

If you believe you could serve as a juror if such condition were accommodated in some way, please state the accommodation:

_____

10. If you are selected to serve on this jury, the trial is scheduled to start immediately after jury selection is completed and to continue for three or four months. The jury will sit on Monday through Thursday from 9:00 a.m. to 4:00 p.m. with a mid-morning break and a lunch break. The jury will also sit on Friday during a week in which the Monday is a legal holiday, such as President's Day. Once the jury begins its deliberations, the jury will sit at least every weekday from 9:00 a.m. until the end of the day (usually 4:30 p.m.).

The Court is well aware that this is a demanding schedule. However, in fairness to all involved in this important process, the Court will only excuse someone from jury duty for the most compelling reasons. That is, answering "yes" to this question will not necessarily result in the Court allowing you to be excused from service. With this in mind, does the schedule described above impose a special hardship on you such that it would be difficult or impossible for you to serve in this case?
If "yes," please explain:

_____

_____

_____

For Official Use Only: _____
Juror Number

11. If you take any medications that you think might affect your ability to serve as a juror, please describe them and their effects:

Medication	Side Effects
Example: Xanax	*Makes me sleepy*
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

12. What is your current relationship status?

☐ Married ☐ Single ☐ Separated
☐ Divorced ☐ Widowed ☐ Civil Union/Domestic Partner

13. Please identify your current spouse or domestic partner (if any) and all former spouses and domestic partners (if any) and provide their highest levels of education and occupations while you were together:

Relationship to You	Highest Education Level	Occupation
Example: Ex-wife	*BA in Physics*	*Engineer*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

For Official Use Only: _____
Juror Number

14. Please describe your parents' and/or step-parents' current or, if retired, former occupations. Write "none" or "deceased" if that applies.

Father: _____

Step-father: _____

Mother: _____

Step-mother: _____

15. Please identify all your children and step-children (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	____	____	_____	_____
#2	____	____	_____	_____
#3	____	____	_____	_____
#4	____	____	_____	_____

16. Please identify all your siblings and step-siblings (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	____	____	_____	_____
#2	____	____	_____	_____
#3	____	____	_____	_____
#4	____	____	_____	_____
#5	____	____	_____	_____

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Juror Number

17. Have any of your siblings tried to influence your direction in life or your major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

18. Have you tried to influence any of your siblings' direction in life or major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

19. Do you feel that any of your siblings has had a major positive or negative influence on you? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

20. Do you believe most teenagers are easily influenced by older siblings? ☐ Yes ☐ No

21. If you or any close family member has (or ever had) a mental health or addiction problem that you know about, please describe it:

_____

_____

_____

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Juror Number

22. Please list all schools you attended after high school, what you studied, and any certificates or degrees that you received:

School	Location	Area of Study	Degree/Certificate

23. If you have studied law, medicine, psychiatry, psychology, counseling, sociology, social work, or religion, please describe your training:

_____

_____

24. If you have studied ballistics, explosives, arson, criminology, terrorism, computer science, crime scene investigation, or law enforcement, please describe your training:

_____

_____

25. Do you plan to attend school in the future? ☐ Yes ☐ No
If "yes," what do you intend to study?

_____

_____

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26. List any jobs you have held for the past 10 years, in reverse chronological order, noting periods of unemployment, retirement, disability, homemaking, study, or stay-at-home parenting. Check "Sup." if you supervised others. If you can't remember exact names, titles, or time periods, please give your best estimate.

Employer	Title/Position	Years	Sup.
_____	_____	____ to 2015	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐
_____	_____	____ to ____	☐

27. If you are currently employed, please describe your job responsibilities:

_____

_____

28. If you have ever been a published or unpublished author, please describe the things you have written and when you wrote them:

_____

_____

29. If you blog or post messages or opinions on websites, please describe the websites, the types of things you blog or post, and how often you do it:

_____

_____

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Juror Number

30. If you use social media (Facebook, Instagram, Twitter, etc.), please list all the social media you use and how frequently you use each one:

_____

_____

31. If you, a family member, or close friend ever served in the military (including Reserves, National Guard, or ROTC), please describe the nature and length of that service:

_____

_____

_____

32. If one or more of the people you listed ever experienced combat (that you know about), please explain:

_____

_____

33. Have you, a family member, or close friend ever worked for, applied for a job at, or volunteered at a prosecutor's office, public defender's office, criminal defense attorney's office, or any other law office? ☐ Yes ☐ No
If "yes," please explain (including employer and dates of work):

Relationship	Office	Dates
Example: Wife	*State Prosecutor*	*2007-present*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

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34. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at a law enforcement agency (e.g., FBI, DEA, ATF, ICE, IRS, U.S. Marshals Service, police, sheriff, or correctional department)?
☐ Yes ☐ No
If "yes," please explain (including agency and dates of affiliation):

Relationship	Agency	Dates
Example: Son	*FBI Agent*	*2007-present*

35. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at any federal, state, or local department of corrections, prison, jail, board of prisons, pardons or parole board or probation agency, youth authority, or correctional or detention facility? ☐ Yes ☐ No
If "yes," please explain:

Relationship	Agency	Dates
Example: Self	*Parole Officer*	*2007-present*

36. The jurors in this case will be instructed that the testimony of a law enforcement officer is to be treated the same as the testimony of any other witness. Jurors are to give neither greater nor lesser weight to the testimony based solely upon the witness's status as a law enforcement officer. Do you have any concerns about your ability to follow this instruction? ☐ Yes ☐ No
If "yes," please explain:

_____

For Official Use Only: _____
Juror Number

37. Have you ever done paid or volunteer work for the benefit of people accused of crimes or people who served time in prison? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

38. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with victims' rights? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

39. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with the reform of any laws? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

40. If you, a family member, or a close friend have ever (to the best of your knowledge) committed a crime and/or been arrested, accused of a crime, charged with a crime, or prosecuted for a crime, other than a minor traffic violation, please explain (include the person's relationship to you, the charge, the approximate date, the location, and the outcome):

Example: Close friend, Drug Possession, 1982, New Mexico, Pleaded guilty

_____

_____

_____

_____

For Official Use Only: _____
Juror Number

41. If you, a family member, or close friend, have ever (to the best of your knowledge) been the victim of a crime, please explain (including the person's relationship to you, when and where the crime occurred, and the outcome of any prosecution):

Example: Sister, Victim of assault, 1999, Chicago, Defendant convicted

_____

_____

_____

_____

42. If you (to the best of your recollection) have ever had to appear in court or in any court proceeding (e.g., court trial, court or administrative hearing, civil or criminal deposition, etc.) OTHER THAN as a defendant (e.g., as a witness), please explain:

_____

_____

43. If you, a family member, or a close friend (to the best of your knowledge) have ever been treated unfairly by a law enforcement officer or by the criminal justice system, please explain:

_____

_____

_____

44. If you have strongly positive or negative views about prosecutors, please explain:

_____

_____

45. If you have strongly positive or negative views about defense attorneys, please explain:

_____

_____

For Official Use Only: _____
Juror Number

46. If you have strongly positive or negative views about law enforcement officers, please explain:

_____

_____

47. Have you ever served on a jury before? If "yes," please describe (to the best of your recollection), for each case on which you served, whether it was state or federal, civil or criminal, what the charges or allegations were, when, where, whether the jury reached a verdict, and whether you were a foreperson:

_____

_____

_____

48. If you answered "yes" to #47, is there anything about the experience that would make you want to serve, or not serve, on a jury again? Please explain:

_____

_____

_____

49. Have you ever served on a grand jury? If "yes," when and where?

_____

50. In the past 10 years, what court cases have you followed with interest? What interested you about these cases?

_____

_____

For Official Use Only: _____
Juror Number

51. If, to the best of your knowledge, you, or anyone close to you has participated in a group that takes positions on political or social issues (e.g., civil rights, prisoners' rights, crime control, the environment, death penalty, digital freedom, tax reform), please describe the group and any relevant leadership position:

Relationship	Organization	Level of Participation
Example: Spouse	*The Sierra Club*	*Board of Directors*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

52. Have you ever changed your mind about an important decision you had to make in your life? If "yes," please give a specific example or examples:

_____

_____

If you answered the previous question affirmatively, what do you think led you to change your mind? Answer as many as apply:

___ Additional information
___ Reconsideration of pros and cons
___ Opinions of others
___ Other: _____

53. What religion were you born into (if any)? _____

54. What religion do you currently practice (if any)? _____

55. How religious do you consider yourself? _____

56. How often do you attend your place of worship (if any)? _____

57. How familiar are you with the teachings of Islam (i.e., the Muslim religion)?

☐ Very familiar ☐ Somewhat familiar ☐ Not at all familiar

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Juror Number

58. Do you have any interactions with people who are Muslim or practice Islam?
☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

59. Do you have strongly held thoughts or opinions about Muslims or about Islam?
If "yes," what are they?

_____

_____

_____

60. Do you believe the United States government acts unfairly towards Muslims in this country or in other parts of the world? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

61. Do you believe the "war on terror" unfairly targets Muslims? ☐ Yes ☐ No

62. Do you believe the "war on terror" is overblown or exaggerated? ☐ Yes ☐ No

63. Do you have strong feelings about our laws or government policies concerning legal immigration? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

For Official Use Only: _____
Juror Number

64. Do you believe that our government allows too many Muslims, or too many people from Muslim countries, to immigrate legally to the United States? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

65. The defendant was born in Kyrgyzstan and is of Russian descent. Do you have any beliefs, attitudes, or opinions regarding Kyrgyzstan, Russia, Chechnya, or Dagestan, or the people who live there that would make it difficult for you to be a completely fair and impartial juror in this case?

_____

_____

66. If you know anyone who, to the best of your knowledge, is Chechen, Avar, Dagestani or of Chechen, Avar, or Dagestani descent, please describe who it is you know and how you know them:

_____

_____

67. Do you understand any of the following foreign languages:
☐ Russian ☐ Chechen ☐ Arabic

_____

68. What is your primary source of news (e.g., newspapers, internet, TV, radio, word-of-mouth, etc.)? Please list all that apply.

_____

69. What newspapers do you read and how often do you read them? Please include online editions of newspapers in your answer:

_____

_____

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Juror Number

70. What news or talk radio programs do you listen to on the radio or over the internet and how often do you listen?

_____

_____

71. What national or local news programs do you watch on TV or over the internet and how often do you watch?

_____

_____

72. To the best of your recollection, have you ever called into a talk show, written a letter to the editor, or posted a comment on a website to express your opinion about ANY issue? If "yes," what was the issue?

_____

_____

73. How would you describe the amount of media coverage you have seen about this case:

___ A lot (read many articles or watched television accounts)
___ A moderate amount (just basic coverage in the news)
___ A little (basically just heard about it)
___ None (have not heard of case before today)

74. What did you think or feel when you received your jury summons for this case?

_____

_____

75. To the best of your recollection, what kinds of things did you say to others, or did others say to you, regarding your possible jury service in this case?

_____

_____

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Juror Number

76. If you did any online research about this case, or about anything relating to it, after receiving your jury summons, please describe it:

_____

_____

77. As a result of what you have seen or read in the news media, or what you have learned or already know about the case from any source, have you formed an opinion:

(a) that Dzhokhar Tsarnaev is guilty? ☐ Yes ☐ No ☐ Unsure
(b) that Dzhokhar Tsarnaev is not guilty? ☐ Yes ☐ No ☐ Unsure
(c) that Dzhokhar Tsarnaev should receive the death penalty? ☐ Yes ☐ No ☐ Unsure
(d) that Dzhokhar Tsarnaev should not receive the death penalty?
☐ Yes ☐ No ☐ Unsure

If you answered "yes" to any of these questions, would you be able or unable to set aside your opinion and base your decision about guilt and punishment solely on the evidence that will be presented to you in court? ☐ Able ☐ Unable

78. If you answered "yes" to subparts (a), (b), (c), or (d) of #77, have you expressed or stated your opinion to anyone else? ☐ Yes ☐ No
If "yes," please explain:

_____

79. If you have commented on this case in a letter to the editor, in an online comment or post, or on a radio talk show, please describe:

_____

_____

_____

80. If you or, to the best of your knowledge, a family member, or close friend witnessed the Boston Marathon explosions or the response to them IN PERSON, please describe who was there and what he or she saw:

_____

_____

_____

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Juror Number

81. If you or, to the best of your knowledge, a family member, or close friend were personally affected by the Boston Marathon bombings or any of the crimes charged in this case (including being asked to "shelter in place" on April 19, 2013), please explain:

_____

_____

_____

82. If you or, to the best of your knowledge, anyone in your family or household has personally (1) taken part in any of the activities, events, or fundraisers that have been held in support of the victims of the Boston Marathon bombings; (2) contributed to the One Fund; or (3) bought or worn any merchandise, clothing, or accessories that have logos such as "Boston Strong" that relate to the Boston Marathon bombings, please explain:

_____

_____

_____

The following is a summary of the facts of this case. Please read it carefully and answer the questions that follow.

On Monday, April 15, 2013, two bombs exploded on Boylston Street in Boston near the Boston Marathon finish line. The explosions killed Krystle Marie Campbell (29), Lingzi Lu (23), and Martin Richard (8), and injured hundreds of others. Four days later, on Thursday, April 18, 2013, at approximately 10:30 p.m., MIT Police Officer Sean Collier (26) was shot to death in his police car near the corner of Main Street and Vassar Street in Cambridge. Approximately 90 minutes later, a man named Dun Meng called the police from a gas station on Memorial Drive in Cambridge; he said that two men had carjacked him in Boston, kidnapped and robbed him, and still had his car. Approximately 20 minutes after that, two men in Watertown had a confrontation with police near the intersection of Laurel Street and Dexter Avenue in which shots were fired and bombs were thrown. One of the men, Tamerlan Tsarnaev, was injured at the scene and died shortly thereafter. The other, Dzhokhar Tsarnaev, was captured some 15 hours later after he was found hiding in a boat in Watertown.

Dzhokhar Tsarnaev has been charged with various crimes arising out of these events. Mr. Tsarnaev was raised in Cambridge and attended Rindge and Latin High School. At the time he is alleged to have committed the crimes, he was a 19-year-old student at UMass-Dartmouth.

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83. To the best of your knowledge, do you or anyone close to you have any PERSONAL connection to any of the individuals or places mentioned in the case summary you just read? If "yes," please explain:

_____

_____

_____

84. Do you believe you know any of the following people, their colleagues, staff members, or family members? ☐ Yes ☐ No

(a) Presiding judge: The Honorable George A. O'Toole, Jr.;

(b) Defense lawyers: Judy Clarke, David I. Bruck, Miriam Conrad, Timothy Watkins, and William Fick;

(c) Prosecutors: William D. Weinreb, Aloke S. Chakravarty, Nadine Pellegrini, and Steven Mellin;

(d) Defendant: Dzhokhar Tsarnaev

If you answered "yes," please identify whom you know and how you know them:

_____

_____

85. Attached to this document as Attachment A is a list of people who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, identify them here by number and describe how you know them.

_____

_____

_____

86. Attached to this document as Attachment B is a list of people who do not live in the United States and who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, please circle them directly on Attachment B. Do not write their names on this part of the questionnaire.

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Juror Number

87. The evidence in this case may include graphic photographs and videos showing very severe injuries suffered by victims of the bombings. Do you think that seeing such graphic pictures would affect your ability to serve as a juror? _____

88. Mr. Tsarnaev is charged with 17 crimes that carry the possibility of a sentence of death. If the jury finds Mr. Tsarnaev guilty of one or more of those crimes, the same jury will then decide whether to sentence Mr. Tsarnaev to death or to a sentence of life imprisonment without the possibility of release.

    If you have any views on the death penalty in general, what are they?

    _____

    _____

    _____

89. Please circle one number that indicates your opinion about the death penalty. A "1" reflects a belief that the death penalty should never be imposed; a "10" reflects a belief that the death penalty should be imposed whenever the defendant has been convicted of intentional murder.

Strongly Oppose									**Strongly Favor**
1	2	3	4	5	6	7	8	9	10

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Juror Number

90. Which of the following best describes your feelings about the death penalty in a case involving someone who is proven guilty of murder?

(a) I am opposed to the death penalty and will never vote to impose it in any case no matter what the facts.

(b) I am opposed to the death penalty and would have a difficult time voting to impose it even if the facts supported it.

(c) I am opposed to the death penalty but I could vote to impose it if I believed that the facts and the law in a particular case called for it.

(d) I am not for or against the death penalty. I could vote to impose it, or I could vote to impose a sentence of life imprisonment without the possibility of release, whichever I believed was called for by the facts and the law in the case.

(e) I am in favor of the death penalty but I could vote for a sentence of life imprisonment without the possibility of release if I believed that sentence was called for by the facts and the law in the case.

(f) I am strongly in favor of the death penalty and I would have a difficult time voting for life imprisonment without the possibility of release regardless of the facts.

(g) I am strongly in favor of the death penalty and would vote for it in every case in which the person charged is eligible for a death sentence.

(h) None of the statements above correctly describes my feelings about the death penalty.

If you selected (h) as your answer, please explain:

_____

_____

91. If your views about the death penalty have changed over the past 10 years (e.g., now more in favor or less in favor), please explain how and why your views have changed:

_____

_____

_____

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92. If your views about the death penalty are informed by your religious, philosophical, or spiritual beliefs, please describe how they are so informed:

_____

_____

_____

93. Which of the following best describes your opinion? Please check only one.

Life imprisonment without the possibility of release is:

☐ Less severe than the death penalty
☐ About the same as the death penalty
☐ More severe than the death penalty
☐ No opinion

Please explain your answer:

_____

_____

_____

94. Do you believe that anyone close to you would be critical of you or disappointed in you if you voted for the death penalty in this case? If you voted for life imprisonment without the possibility of release? If your answer is "yes" or "I'm not sure" to either question, please explain:

_____

_____

_____

95. If you found Mr. Tsarnaev guilty and you decided that the death penalty was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for the death penalty?

☐ Yes
☐ I am not sure
☐ No

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96. If you found Mr. Tsarnaev guilty and you decided that life imprisonment without the possibility of release was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for life imprisonment without the possibility of release?

☐ Yes
☐ I am not sure
☐ No

97. Is there any other matter or any information not otherwise covered by this questionnaire—including anything else in your background, experience, employment, training, education, knowledge, or beliefs—that would affect your ability to be a fair and impartial juror?

_____

_____

_____

98. Is there anything else that you would like to tell us, or that you feel we should know about you?

_____

_____

_____

99. Did you have any problems reading or understanding this questionnaire?

_____

100. Did you have a response to any specific question above that you deem private or sensitive that you request not be made public at this time? If so, list the number of that question here:

_____

_____

_____

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101. Additional Space (Please indicate question number):

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Additional Space (continued): _____

I do hereby certify, under the pains and penalties of perjury, that I had no assistance in completing this questionnaire and the answers that I have given in this questionnaire are true and complete to the best of my knowledge and belief.

_____ _____
Signature Date

_____
Print Name

Appendix E

Flyer, *United States v. Hennis*

FLYER

CHARGE: VIOLATION OF UCMJ, ARTICLE 118.

SPECIFICATION 1: In that Master Sergeant Timothy B. Hennis, U.S. Army, did, at or near Fayetteville, North Carolina, on or about 9 May 1985, with premeditation, murder Mrs. Kathryn Eastburn by means of stabbing and cutting her with a sharp object.

SPECIFICATION 2: In that Master Sergeant Timothy B. Hennis, U.S. Army, did, at or near Fayetteville, North Carolina, on or about 9 May 1985, with premeditation, murder Ms. Kara Eastburn by means of stabbing and cutting her with a sharp object.

SPECIFICATION 3: In that Master Sergeant Timothy B. Hennis, U.S. Army, did, at or near Fayetteville, North Carolina, on or about 9 May 1985, with premeditation, murder Ms. Erin Eastburn by means of stabbing and cutting her with a sharp object.

APPLYING COMBATANT STATUS UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT TO THE DOMESTIC MILITIA SYSTEM OF THE UNITED STATES

SECOND LIEUTENANT TRAVIS R. STEVENS-WHITE*

I. Introduction

The militia is a historical hallmark of the United States' national defense system as well as a tool for domestic law enforcement.[1] At its crux is the principle of civic responsibility through the participation of the body politic.[2] Notwithstanding that, the nature of our system of national defense has largely transitioned from a force raised only in time of need and comprised of loosely regulated state militias to a standing professional fighting force. This resulted in a National Guard heavily regulated by a federal accreditation process.[3] Nevertheless, many of the legal mechanisms providing for citizen participation through militia service in

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* Armor Officer, U.S. Army National Guard. Presently assigned as an M1 Abrams Platoon Leader with the 2/116th CAB of the Idaho Army National Guard. J.D. Candidate, anticipated Spring 2018, University of Wyoming College of Law; B.A., Virginia Tech, 2015; A.A.S., Cochise College, 2015. Commissioned through the University of Wyoming Army ROTC program, May 2017. Previous assignments include enlisted service between October 2007 and May 2017 as a Cadet with 19th SFG of the UT ARNG from 2015–2017, with additional duties in the Utah State Judge Advocate's Office; Military Intelligence Systems Integrator & Maintainer with 19th SFG of the WV ARNG from 2012–2015; Infantryman with 1/116th IN of the VA ARNG from 2011–2012; Infantryman with 3/172nd IN of the VT ARNG from 2009–2010, including a 2010 deployment to Paktia Province, Afghanistan; Infantryman with 1/111th IN of the PA ARNG from 2008–2009, including a 2009 deployment to Taji, Iraq; Infantryman with 1/116th IN of the VA ARNG from 2007–2008. Special recognition and appreciation to his mother, Janice A. Stevens, and father, Michael D. White, for their continuous support in his endeavors to achieve higher education while continuing to serve in the National Guard.

[1] *See* United States v. Miller, 307 U.S. 174 (1939); Martin v. Mott, 25 U.S. 19 (1827); Luther v. Borden, 48 U.S. 1 (1849); see also Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L. J. 149, 170–175 (2004) (citing and discussing the significance of *Martin v. Mott and Luther v. Borden* with regard to martial law).

[2] *Miller*, 307 U.S. at 179–80.

[3] *See* JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920 (Mark Grimsley & Peter Maslowski eds., 1997); s*ee also Federalizing the National Guard: Preparedness, reserve forces and the National Defense Act of 1916*, NATIONAL GUARD BUREAU (June 2, 2016), http://www.nationalguard.mil/News/Article/789220/federalizing-the-national-guard-preparedness-reserve-forces-and-the-national-de/.

a time of crisis remain in full effect.[4] Although the State militia system has developed into what we now know as the National Guard, a dual state-federal entity with significant funding and oversight, other forms of legitimate governmental militias exist both at law and in practice.[5] These other forms chiefly include the State Defense Force (SDF), the Naval Militia, and the Unorganized Militia of the states as authorized under federal and state law.[6]

The *Law of Armed Conflict* (hereafter LOAC) provides that certain categories of persons constitute *privileged combatants*, carrying with them both immunities and responsibilities under international law.[7] Aside from service in regular armed forces, LOAC also provides various means through which militias and civilians may be recognized as falling within the purview of privileged combatant status, and thereby legally engage in hostilities under international law.[8] This aspect of international law would likely prove critical should the United States ever again find itself under threat of invasion as the U.S. has expansive domestic military laws. This article will analyze and apply substantive international LOAC to the primary domestic legal mechanisms for national defense regarding militia forces of the United States and its states and identify likely conflicts that may arise at the intersection of our domestic system and the overarching international LOAC. A key aspect of this analysis is the ability of the general population, acting either as individuals or as some ad hoc militia (under domestic law) independent of governmental oversight, to qualify for privileged combatant status under LOAC. Furthermore, the potential for domestic mechanisms to assimilate the general population, likely operating under the limited temporal authority of a *levée en masse*,[9] into a legitimate military force with continued long-term standing under LOAC is both strategically promising and academically fascinating.

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[4] *See, e.g.,*10 U.S.C.A. § 246 (West 2016) (unorganized militia for federal purposes); VA. CODE ANN. § 44-1 (West 2016) (unorganized militia for state purposes).

[5] *See, e.g.*, CONNECTICUT GOVERNOR'S HORSE AND FOOT GUARDS, https://ct.ng.mil/Community_Actions/Pages/Horse_Foot_Guards.aspx (last visited June 18, 2017); CONN. GEN. STAT. ANN. §§ 27-6a to -8 (West 2016) (statutory basis for the Connecticut Governor's Foot and Horse Guards).

[6] *See, e.g.*, *supra* note 4 (unorganized militia); *supra* note 5 (Connecticut Governor's Horse Guard); NEW YORK NAVAL MILITIA, http://dmna.ny.gov/nynm/ (last modified Aug. 19, 2015); VIRGINIA DEFENSE FORCE, www.vdf.virginia.gov (last visited June 17, 2017).

[7] Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45, 45–46 (2003).

[8] *Id.* at 46 (discussing the doctrine of *levée en masse* whereby the citizenry may spontaneously rise up while under invasion without having to meet the traditional requirements for combatant status).

[9] *Id.*

II. Constitutional Basis for the Militia

The United States Constitution as well as the constitutions of the various states establish the validity of the United States' domestic system of militia-based common defense. The federal Constitution provides that "Congress shall have the power . . . to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[10] As for the militia's utility for federal purposes, the Constitution likewise provides the federal government the right to call on "the militia to execute the laws of the Union, suppress insurrections, and repel invasions."[11] Furthermore, the Constitution explicitly stipulates that the "President shall be the Commander in Chief of the Army and Navy . . . and of the Militia of the several States, when called into the actual Service of the United States."[12]

The federal Constitution also contains two key Amendments of relevance to the militia. Firstly, the Second Amendment provides, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."[13] Secondly, the Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[14] Accordingly, the United States Supreme Court, in its solitary twentieth century case interpreting the Second Amendment, held that there was no individual right to possess a sawed-off shotgun, holding in part:

> In the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an

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[10] U.S. CONST. art. I, § 8, cl. 16.
[11] U.S. CONST. art. I, § 8, cl. 15.
[12] U.S. CONST. art. II, § 2, cl. 1.
[13] U.S. CONST. amend. II.
[14] U.S. CONST. amend. X.

> instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[15]

While it remains a contentious point as to what extent the Second Amendment grants a private right to own weapons, there is now settled case law providing a minimal right to own and carry firearms, irrespective of any official state-sponsored militia nexus. The United States Supreme Court, in *District of Columbia v. Heller*, held that the Second Amendment provides a minimal individual right to own a firearm.[16] In so doing, the *Heller* Court mentioned in dicta that "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."[17] Furthermore, in *McDonald v. Chicago,* the Supreme Court ruled that the Second Amendment's individual right to keep and bear arms was likewise applicable to the states through the Fourteenth Amendment's Due Process Clause.[18]

The constitutions of many states likewise provide for the provision and maintenance of militia and generally make the Governor the Commander in Chief of the state's militia forces when not in active federal service.[19] The state constitutions also frequently contain provisions similar to the Second Amendment to the United States Constitution, providing some minimal guarantee of a right to keep and bear arms.[20] As with the contentious interpretative debate surrounding the federally conferred right to keep and bear arms, there are varying interpretations of the corresponding rights guaranteed in state constitutions.[21] Regardless of

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[15] *Miller*, 307 U.S. at 178 (citing Aymette v. State of Tennessee, 21 Tenn. 154, 158 (1840)).

[16] District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[17] *Id*. at 627.

[18] McDonald v. Chicago, 561 U.S. 742, 791 (2010).

[19] *E.g.*, CAL. CONST. art. V, § 7; FLA. CONST. art. X, § 2; *id.* art. 4, § 1; WYO. CONST. art. IV, § 4; *id.* art. XVII, § 5.

[20] *E.g.*, COLO. CONST. art. II, § 13; VA. CONST. art. I, § 13; WYO. CONST. art. I, § 24.

[21] *See, e.g.*, Benjamin v. Bailey, 234 Conn. 455, 465–66 (1995) (holding that the Connecticut Constitution, article I, section 15 guarantees a minimal right to own weapons for self-defense, but not an individual right to own an assault weapon); Salina v. Blaksley, 72 Kan. 230, 230 (1905) (holding that, as it was worded at that time, section 4 of the Kansas Constitution's Bill of Rights only applied to and protected weapons possession directly related to militia service); Carfield v. State, 649 P.2d 865, 871–72 (Wyo. 1982) (holding that Wyoming Constitution article I, section 24 confers only a limited right to bear arms, and that a prohibition on possession of firearms by convicted felons is constitutional); State v. McAdams, 714 P.2d 1236, 1236 (Wyo. 1986) (holding that Wyoming Constitution

the *collective* versus *individual* rights theories, the states appear unanimous in their establishment and acknowledgment of bona fide militia forces under their respective constitutions and laws.

III. Statutory Basis for the Militia

Article I, section 8, clause 16 of the United States Constitution explicitly grants Congress the power to organize, equip, and discipline the militias of the several states, while reserving command and control of those forces to the respective States. The sole exceptions allowing for federal control are the situations and purposes enumerated in clause 15 of the same article and section. Several years after the Constitution was ratified, Congress enacted two acts related to the militia. The Militia Acts of 1792 were two separate acts that implemented the authorities granted to the various branches of the federal government over the militia by the Constitution.

The first act, passed on May 2, 1792, expressly granted the President authority to call a state militia into federal service "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe"[22] or "whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[23] The second act, passed on May 8th of that same year, set minimal framework for the organization of a state's militia. Accordingly, the state militia was divided into "divisions, brigades, regiments, battalions, and companies, as the legislature of each State shall direct."[24] The act established mandatory militia service, requiring:

> [E]ach and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia, by the Captain or Commanding Officer of the

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article I, section 24 does confer a minimal individual right to bear arms but not in a concealed manner).

[22] Militia Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264, 264 (replaced 1795).

[23] *Id.* § 2.

[24] Militia Act of May 8, 1792, ch. 33, § 3, 1 Stat. 271, 272.

> company, within whose bounds such citizen shall reside . . . .[25]

As for equipment, the act further required:

> [E]very citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder . . . .[26]

The act also provided for a system of courts-martial to enforce the act's provisions.[27] With the notable exception of eliminating the racial distinction in 1862,[28] these provisions existed largely unaltered until 1903.

In 1903, Congress undertook a major overhaul of the United States' militia system. The "Dick Act," named in honor of its author, Representative Charles Dick of Ohio, established the modern day National Guard, both in name and in substance, while still maintaining the collective membership in the militia of the male citizenry at large.[29] The act established a federal accreditation system, known as "federal recognition," through which state militia units, thereafter dubbed the "National Guard," could receive federal pay, equipment, and funding if they met such federally prescribed standards.[30] The act also had the major effect of dividing the militia (at least for federal purposes) into two primary groups: the Organized Militia (comprised of the National Guard) and the Reserve Militia (comprised of all "able bodied male[s] . . . more than eighteen and less than forty-five [years old]").[31] The statute was amended several times throughout the early twentieth century. Four notable amendments occurred in the following years: in 1914 to

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[25] *Id.* § 1 at 271.
[26] *Id*.
[27] § 5, 1 Stat. at 264.
[28] Militia Act of 1862, ch. 201, § 1, 12 Stat. 597, 597.
[29] Efficiency in Militia (Dick) Act of 1903, ch. 196, 32 Stat. 775, 775–80.
[30] *Id.*
[31] *Id.* § 1 at 775.

encompass the addition of the Naval Militia;[32] in 1916 to rename the Reserve Militia the Unorganized Militia;[33] in 1947 to modify the minimum age to seventeen;[34] and in 1956 to include female members of the National Guard within the overall definition of militia.[35]

Despite the many benefits of the federal recognition process and the federal equipment and funding with which it brought on National Guard readiness, the fact remained that the National Guard was still a militia. This characterization subjects the Guardsmen to the restrictive conditions contained in the Constitution as to when they could be called into federal service and for what purposes.[36] When World War I began, there was contention as to the constitutionality of deploying National Guard units overseas, even in a federalized capacity, due to their characterization as a militia and the constraints contained in the Constitution.[37] The workaround was a draft *en masse* of National Guardsmen into the United States Army.[38] This changed their classification as a militia and enabled them to participate in WWI as members of the federal Army. In 1933, Congress resolved this problem by creating the National Guard of the United States, a reserve component of the federal Army. All federally recognized members and units of the National Guard of each state would simultaneously be a member of the National Guard of the United States and could be utilized as such by the federal government independent of their concurrent state militia membership.[39] This dual membership dichotomy of the National Guard remains the law to this day.[40]

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[32] Naval Militia Act of 1914, Pub. L. No. 63-57, ch. 21, 38 Stat. 283, 283–90.
[33] National Defense Act of 1916, Pub. L. No. 64-85, ch. 134, § 57, 39 Stat. 166, 197.
[34] Act of June 28, 1947, Pub. L. No. 80-128, ch. 162, § 7, 61 Stat. 191, 192.
[35] Act of July 30, 1956, Pub. L. No. 84-845, ch. 789, § 1, 70 Stat. 729, 729.
[36] *See supra* note 11.
[37] *See* Authority of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322, 323–324 (1912) ("It is certain that it is only upon one or more of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done."); *see also The Army-Militia Plan*, N.Y. TIMES, Jan. 16, 1914, at 8.
[38] *Wilson to Draft Guard August 5*, N.Y. TIMES, July 10, 1917, at 1.
[39] Act of June 15, 1933, Pub. L. No. 73-64, ch. 87, § 5, 48 Stat. 153, 155.
[40] *See* 10 U.S.C.A. §§ 10105, 10111 (West 2016) (federally recognized members of the Army National Guard to also be members of Army National Guard of the United States and federally recognized members of the Air National Guard to also be members of the Air National Guard of the United States); *see also* Perpich v. Department of Defense, 496 U.S. 334, 347–48 (1990) (the Court discussed the concurrent membership of Minnesota National Guardsmen in the National Guard of the United States, holding that the President has the authority to use them in their concurrent Armed Forces reserve capacity without

The current federal statute also stipulates that the Organized Militia consists of the National Guard and the Naval Militia and that the Unorganized Militia consists of all persons otherwise meeting the definition of militia (by virtue of age, gender, and citizenship requirements) not otherwise a member of the Organized Militia.[41] There are certain categories of individuals exempted from militia service by a companion federal statute,[42] however the numbers and effect of such exempted classes would likely prove *de minimis* in the event of invasion and will not be discussed here. The current law pertaining to the National Guard is largely contained in Title 32 of the U.S. Code. This title provides the current statutory basis for membership, equipment, uniformity, regulation, federal recognition, and in what instances a state may utilize its Guardsmen in a federally funded status.[43] Likewise, law pertaining to the federal Armed Forces is contained in Title 10 of the U.S. Code.[44] Federal law defines the "Armed Forces" to include the "Army,"[45] and further defines the "Army" as including the Regular Army, the Army Reserve, the Army National Guard of the United States (ARNGUS), and the Army National Guard (ARNG) of the states while in federal service.[46] The Air Force, the Air National Guard of the United States (ANGUS), and the Air National Guard (ANG) of the states feature an identical relationship.[47] Current law provides two methods by which the states' National Guard may be called into active federal service. The National Guard of a state may still be called into federal service in its militia capacity (i.e. same as before the amendments in the 1933 act) for one of the purposes enumerated in the U.S. Const. article I, as now codified in the modern day descendant of the Insurrection Act.[48] Relatively speaking, this method of using the National Guard as a federalized militia has seldom been used in the past century. The exceptional cases largely occurred in

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the Governor's approval); Nyberg v. St. Mil. Dep't, 65 P.3d 1241, 1246 (Wyo. 2003) (citing N.J. Air Nat'l Guard v. Fed. Lab. Rel. Auth., 677 F.2d 276, 279 (3d Cir. 1982)) ("At the state level, the National Guard is a state agency, under state authority and control. At the same time, federal law provides for a large part of the activity, makeup, and function of the Guard.").

41 10 U.S.C.A. § 246 (West 2016); *see also* 32 U.S.C.A. § 101 (West 2016) (defining the National Guard as the "organized militia of the several States and Territories").

42 10 U.S.C.A. § 247 (West 2016).

43 32 U.S.C.A. §§ 101–908 (West 2016).

44 10 U.S.C.A. §§ 101–18506 (West 2016).

45 *Id.* § 101(a)(4).

46 *Id.* § 3062(c).

47 *Id.* § 8062(d).

48 *Id.* §§ 251–255.

the Southern States during the Civil Rights movement, ironically, to enforce federal law against their own defiant state governments.[49] The other method for federalization is to call units and members of the National Guard to active duty in their concurrent reservist capacity as a member of the National Guard of the United States.[50] With the recent exception of Dual Status Commanders, federal law operates to relieve National Guard members of their duty in the National Guard of their respective states, and thus their militia status, when called to active duty in the federal Armed Forces in their National Guard of the United States capacity.[51] Unless and until specifically ordered to federal active duty in a Title 10 status, Guardsmen are in a Title 32 (state militia) status by default.[52] When in either of the two federalized (Title 10) statuses, Guardsmen are subject to the federal Uniform Code of Military Justice (UCMJ).[53] In addition to Title 32 and Title 10 statuses, Guardsmen may be utilized in a purely state funded capacity, generally referred to as "State Active Duty" (SAD).[54] In Title 32 and SAD statuses, Guardsmen are subject to their respective state's military justice laws, the extent, jurisdiction, and operation of which is a question of substantive state law.[55] Furthermore, federal law extends the Federal Tort Claims Act's civil liability coverage to National Guardsmen acting in a Title 32 (i.e. federally funded militia) status despite the fact that they retain a state chain of command and generally remain

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[49] *See* Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957) (Arkansas National Guard federalized to desegregate schools in Little Rock); Exec. Order No. 11,053, 27 Fed. Reg. 9681 (Sept. 30, 1962) (Mississippi National Guard federalized for desegregation efforts); Exec. Order No. 11,111, 28 Fed. Reg. 5709 (June 11, 1963) (Alabama National Guard federalized for desegregation and other efforts); Exec. Order No. 11,118, 28 Fed. Reg. 9863 (Sept. 10, 1963) (Alabama National Guard again federalized for similar reasons).

[50] *See* 10 U.S.C.A. §§ 12301–12304, 12304b (West 2016).

[51] 32 U.S.C.A. § 325 (West 2016). The exception for Dual Status Commanders contained in this statute is questionable in that it purports to render the commander subject to the authority of two sovereigns at once.

[52] 10 U.S.C.A. § 10107 (West 2016); *see also* United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997) (citing *Perpich*, 496 U.S. at 343–44, 348) ("Guardsmen do not become part of the Army itself until such time as they may be ordered into active federal duty by an official acting under a grant of statutory authority from Congress. . . . When that triggering event occurs, a Guardsman becomes a part of the Army and loses his status as a state serviceman.").

[53] 10 U.S.C.A. § 802 (West 2016) (UCMJ personal jurisdiction over Guardsmen only when in federal service).

[54] Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, ARMY LAW, Dec. 2007, at 30, 34.

[55] *Id.* at 34–35.

state employees.[56] For arming purposes, a state is free to arm its Guardsmen with state owned or personally owned firearms while in a SAD status in addition to requesting to use federally owned firearms. However National Guard Bureau (NGB) regulations generally restrict the use of firearms in a Title 32 status to federally owned firearms.[57] Furthermore, even while in a Title 32 or SAD status, Guardsmen wear the uniform of their corresponding federal service.[58]

Federal law also allows a state to maintain two other forms of militia: the Naval Militia and a State Defense Force (SDF).[59] In a somewhat reverse fashion, the statutory framework for the Naval Militia aims to accomplish a result similar to the National Guard's dichotomy—a state militia force comprised of members who are concurrently federal reservists of the United States Armed Forces, that may use federal funding and equipment, adheres to minimal federally prescribed standards, and whose members are likewise relieved from militia duty when called into superseding federal service in any concurrent capacity as reservists.[60] Currently, it appears only a few states actively maintain a Naval Militia that meets all the requirements (namely the 95% reservist membership) for federal funding.[61] Additionally, several states have the statutory

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[56] 28 U.S.C.A. § 2671 (West 2016); *see also* United States v. State of Hawaii, 832 F.2d 1116, 1119 (9th Cir. 1987) (holding that the State of Hawaii was still liable in a contribution action to the United States for the negligence of its National Guardsman, regardless of FTCA coverage); Teurlings v. Larson, 320 P.3d 1224, 1228–29 (Idaho 2014) (holding that an Idaho National Guardsmen was a state employee under Idaho's law of *respondeat superior*, and that the U.S. Government's assumption of liability through the FTCA was coextensive with the respective state law civil immunity protections for state employees).

[57] *See* U.S. NAT'L GUARD BUREAU, REG. 500-5, NATIONAL GUARD DOMESTIC LAW ENFORCEMENT SUPPORT AND MISSION ASSURANCE OPERATIONS paras. 5-5, 5-6 (18 Aug. 2010) (only federal weapons may be used in a Title 32 status, and federal weapons may also be used in State Active Duty (SAD) status as long as the state refunds the federal government for any loss or expenditure of supplies).

[58] *See* 32 U.S.C.A. § 701 (West 2016) (Guardsmen to wear the same uniform as their corresponding federal branch).

[59] *See* 10 U.S.C.A. §§ 7851–54 (West 2016); 32 U.S.C. § 109 (West 2016).

[60] 10 U.S.C.A. §§ 7851, 7853 (West 2016) (requiring 95% membership to be federal Navy or Marine reservists and adhere to federal standards as a condition of federal funding and equipment and relief from militia duty when ordered to Active Duty as a federal reservist, respectively).

[61] *See, e.g.*, ALASKA NAVAL MILITIA, https://dmva.alaska.gov/ANM/AlaskaNavalMilitia (last visited June 18, 2017); NEW YORK NAVAL MILITIA, *supra* note 6; *see also* Deano L. McNeil, *Naval Militia: The Overlooked Homeland Security Option*, IN HOMELAND SECURITY (Apr. 25, 2016), http://inhomelandsecurity.com/naval-militia-overlooked-homeland-security/?utm_source=IHS&utm_medium=newsletter&utm_content=naval-militia-overlooked-homeland-security&utm_campaign=20160426IHS.

framework in place for a Naval Militia, the activation of which is contingent upon a triggering event or an executive order from the Governor.[62]

On the opposite end of the spectrum, the authorization under federal law of a state to maintain a Defense Force lacks any such features of prescribed federal standards, funding, or concurrent membership in the U.S. Armed Forces that characterizes both the National Guard and the Naval Militia.[63] Aside from clarifying that membership in a SDF does not excuse any current or future federal military obligations, federal law is silent on the structure, standards, funding, use, and membership of such a force.[64] There are presently only a handful of states that actively maintain an SDF, often applying alternate pseudo names to them at the state level.[65] To further complicate the dichotomy of the state National Guard and the SDFs, some states also maintain historical militia entities that have been in continuous existence since at least the American Revolution.[66] At one point, federal law specifically acknowledged such *historical* militias and stipulated that those militias may continue in existence, provided they are willing to fight alongside the National Guard if called upon.[67] There is no longer such an explicit provision in the U.S. Code, and in light of the provisions allowing for the maintenance of SDFs by the states, it is likely that such organizations would now be deemed to fall under the contemporary umbrella of an SDF, if they maintain any legitimacy at all.

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[62] *E.g.*, CONN. GEN. STAT. Ann. § 27-5 (West 2016); FLA. STAT. ANN. § 250.04 (West 2016); ME. REV. STAT. ANN. tit. 37-B, § 223 (West 2016).

[63] *See* 32 U.S.C.A. § 109 (West 2016) (authority of states to maintain a Defense Force).

[64] *Id.*

[65] *E.g.*, CAL. MIL. & VET. CODE § 550 (West 2016) ("California State Military Reserve"); IND. CODE ANN. § 10-16-8-1 (West 2016) ("Indiana Guard Reserve"); OHIO REV. CODE ANN. § 5923.01(A)(3) (West 2016) ("Ohio Military Reserve"); TENN. CODE. ANN. § 58-1-401 (West 2016) ("Tennessee State Guard").

[66] *E.g.*, CONNECTICUT GOVERNOR'S HORSE AND FOOT GUARDS, *supra* note 5; ANCIENT AND HONORABLE ARTILLERY COMPANY OF MASSACHUSETTS, http://www.ahac.us.com/history.htm (last visited June 18, 2017); VETERANS CORP OF ARTILLERY, STATE OF NEW YORK, http://www.vcasny.org (last visited June 18, 2017); *see also* CONN. GEN. STAT. ANN. §§ 27-7 to -8 (West 2016) (statutory basis for the Connecticut Foot and Horse Guards); MASS. GEN. LAWS ANN. ch. 33, § 132 (West 2016) (Ancient and Honorable Artillery Company rights preserved).

[67] National Defense Act of 1916, Pub. L. No. 64-85, § 63, 39 Stat. 166, 198 ("Any corps of Artillery, Cavalry, or Infantry existing in any of the States on the passage of the Act of May eighth, [1792], which by the laws, customs, or usages of said States has been in continuous existence since the passage of said Act . . . shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That said organizations may be a part of the National Guard and entitled to all the privileges of this Act . . . .").

As with the Naval Militia, there are several states that have a statutory scheme in place to create an SDF upon executive order or some other triggering event.[68] During the Second World War a *full mobilization* of the armed forces was in effect, with all National Guard forces ordered to federal service in their Armed Forces reserve capacity for the duration of the war, leading a substantial portion of the states to create and maintain active State Guards.[69] These State Guard forces, the equivalent of the modern day SDFs, generally served to provide internal defense and carry out the National Guard's normal peacetime mission.[70] One notable characteristic that both the Naval Militia and SDF generally have in common with the National Guard of their state is their shared jurisdiction under the military justice laws of the state.[71] This will play a key role in demonstrating their governmental relationship during subsequent LOAC analysis.

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[68] *E.g.*, CONN. GEN. STAT. ANN. § 27-9 (West 2016) ("Whenever the Connecticut National Guard is called into the federal service or whenever such a call, in the opinion of the governor, is deemed to be imminent, the governor shall forthwith raise, organize, maintain and govern, from the unorganized militia, a body of troops for military duty."); FLA. STAT. ANN. § 251.01 (West 2016) ("Whenever any part of the National Guard of this state is in active federal service, the Governor is hereby authorized to organize and maintain . . . such military forces as the Governor may deem necessary to assist the civil authorities in maintaining law and order. Such forces . . . shall be known as the Florida State Defense Force."); W. VA. CODE ANN. § 15-4-1 (West 2016) ("Whenever any part of the national guard of this State is in active federal service, the governor is hereby authorized to organize and maintain . . . such military forces as the governor may deem necessary to defend this State . . . . Such forces shall be additional to and distinct from the national guard and shall be known as the 'West Virginia state guard.'"); WYO. STAT. ANN. § 19-10-101(a) (West 2016) ("If the national guard of Wyoming is ordered into the service of the United States, the governor may organize and maintain within this state during that period . . . such military forces . . . as the governor deems necessary for the defense of the state. The forces shall be known as the Wyoming state guard.").

[69] Barry M. Stentiford, *Forgotten Militia: The Louisiana State Guard of World War II*, 45 LA. HIST.: J. LA. HIST. ASS'N 323, 326 (2004) (forty-four states and three territories formed State Guards during WWII); *see also* 10 U.S.C.A. §§ 12301(a), 12302(a) (West 2016) (authority for full mobilization of the armed forces reserve components during a time of war).

[70] *See generally* Stentiford, *supra* note 69 (discussing the various domestic uses and context of state guards during WWII).

[71] *E.g.*, N.Y. MIL. LAW §§ 2, 130.2 (McKinney 2016) (applying the N.Y. Code of Military Justice to the entire organized militia of the state, defined to include the N.Y. Guard, N.Y. National Guard, and N.Y. Naval Militia); VA. CODE ANN. § 44-54.10 (West 2016) (Virginia Defense Force subject to same judicial and non-judicial punishments as the Virginia National Guard); WYO. STAT. ANN. § 19-12-101 (West 2016) (state military justice code applies "to all persons in the military forces of the state").

The final militia component is referred to as the *Unorganized Militia* under federal law and generally under the laws of most states. This component of the militia generally functions as a categorical designation of a class of citizens, usually characterized by an age bracket, citizenship, and frequently gender,[72] from which the President or Governor may call forth members into active service under state and federal law. Federal law is silent as to the disposition of militia forces upon such a call into active federal service. To the contrary, it is a common feature of state law to stipulate that such members of the Unorganized Militia, as defined by state law, are to be folded in with the respective SDF of the state upon such a call to state active duty.[73] These systems create a mechanism from which the respective state Governors may effectively raise a fighting force independent of the National Guard and conscript citizens to serve in its ranks. When coupled with the applicability of state military justice laws to the SDF and activated militia at large, the net effect is that a legal duty to answer such a call is imposed on such members of the militia, and it is enforceable through threat of arrest and criminal liability. Practically speaking, whether the population at large is actually aware that such a legal duty exists is an entirely separate issue. Regardless, the fact remains that a legal process is in place to incorporate otherwise regular citizens into a legitimate military force under the authority of the several states and to impose military discipline therein.

IV. Sources of Combatant Status under International Law

There are two predominant sources of combatant status and classification which exist under international law. The first is the

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[72] For federal purposes, *see* 10 U.S.C.A. § 246 (West 2016) ("[males] 17 years of age and . . . under 45 years of age who are . . . citizens of the United States and of female citizens . . . who are members of the National Guard."). For state purposes, *see, e.g.*, N.D. CONST. art. XI, § 16 ("The reserve militia of this state consists of all able-bodied individuals eighteen years of age and older residing in the state"); GA. CODE ANN. § 38-2-3 (West 2016) ("the unorganized militia shall consist of all able-bodied male residents of the state between the ages of 17 and 45"); VA. CODE ANN. § 44-1 (West 2016) ("able-bodied . . . resident[s] in the Commonwealth . . . at least 16 years of age and . . . not more than 55 years of age."); WYO. STAT. ANN. § 19-8-102(a) (West 2016) ("residents of the state between the ages of seventeen (17) and seventy (70) years").

[73] *E.g.*, COLO. REV. STAT. ANN. § 28-4-103.5 (West 2016) (Establishing that the Unorganized Militia will directly be called into the SDF: "[e]very able-bodied male citizen . . . between the ages of eighteen and sixty-four years . . . are subject to military duty in the state defense force."); VA. CODE ANN. § 44-88 (West 2016) ("Whenever the Governor orders out the unorganized militia . . . it shall be incorporated into the Virginia Defense Force . . . .").

historically accepted and followed practice of nations with regard to warfare, known as *customary international law*. The second major source is the various treaties and conventions related to the Law of War, namely the Geneva Conventions and the two subsequent Additional Protocols. Customary international law is the portion of international law, or the law of nations, that exists by virtue of general and consistent state practice that is followed through a sense of obligation.[74] In order to constitute customary international law, the practice must be out of a sense of obligation and not a mere courtesy from which a nation feels privileged to deviate.[75] Furthermore, "[g]eneral principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate," thereby allowing commonality among things such as the military practices of nations to have precedential value even in the absence of rising to the level of customary international law.[76] The applicable restatement comment also provides:

> International agreements constitute practice[s] of states and as such can contribute to the growth of customary law . . . [and s]ome multilateral agreements may come to be law for non-parties that do not actively dissent . . . [specifically] where a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states. A wide network of similar bilateral arrangements on a subject may constitute practice and also result in

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[74] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (AM. LAW INST. 1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

[75] *Id.* § 102 cmt. c.

> For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation . . . a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. *Id.*

[76] *Id.* § 102(4).

> customary law. If an international agreement is declaratory of, or contributes to, customary law, its termination by the parties does not of itself affect the continuing force of those rules as international law. However, the widespread repudiation of the obligations of an international agreement may be seen as state practice adverse to the continuing force of the obligations.[77]

It is in that key regard that the formation and development of international law is in many ways inverse to the Anglo-American common law system embraced by England and the United States. While in the United States, statutory law generally acts to supersede and supplant the judicially created *common law* when there is a conflict between the two, the prevalence of bilateral and multilateral treaties in the international law context can give rise to a rule or practice becoming a matter of customary law.

While the common practices of warfare developed over the centuries, the first major contemporary effort to reduce those practices to a singular work came in 1863 by Professor Francis Lieber.[78] The "Lieber Code," as it is commonly known, was officially promulgated by President Lincoln during the American Civil War as General Order No. 100.[79] Lieber's work was highly influential in the drafting of subsequent treaties and conventions dealing with the law of war.[80] Concurrently, a number of European powers congregated in Geneva, Switzerland in 1864 to develop and sign the first Geneva Convention, which primarily dealt with the treatment of the sick, dead, and wounded.[81] Following the Lieber Code and the 1864 Geneva Convention, an international conference of nations was held in Brussels in 1874 from which a multinational declaration on the law of war emerged which shared many of the principles declared in

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[77] *Id.* § 102 cmt. i (citing in part North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands), 1969 I.C.J. 1, at 28–29, 37–43 (Feb. 20)).

[78] U.S. WAR DEP'T, Gen. Order No. 100 (Apr. 24, 1863) ("Instructions for the Government of Armies of the United States in the Field").

[79] *Id.*

[80] Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, Proc. of the Annual Meeting, 95 AM. SOC'Y INT'L L. (PROC. ANN. MTG.) 112, 113 (2001).

[81] Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 1 Bevans 7, T.S. No. 377.

the Lieber Code.[82] Building upon the Brussels Conference, two separate conventions were held in The Hague, in 1899[83] and 1907[84] respectively, from which additional progress was made in international standardization, regulation, and recognition of the law of war.

In the first half of the twentieth century, there were three additional Geneva conventions. The second came in 1906[85] and the third convention, largely dealing with the treatment of prisoners of war (POWs), came in 1929.[86] Finally, the fourth convention, itself containing four separate treaties, came in 1949 in the immediate aftermath of the Second World War, adding provisions to protect civilians in wartime as well as implementing a major revision of the previous three conventions.[87] In the latter half of the twentieth century and early years of the twenty-first century, there have been three additional protocols, with varying levels of

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[82] Project of an International Declaration Concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, 65 B.F.S.P. 1005.

[83] *See, e.g.*, Hague Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 1 Bevans 230; Hague Convention Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter *1899 Hague II*]; Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899, 32 Stat. 1827, 1 Bevans 263.

[84] *See, e.g.*, Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577; Hague Convention Concerning the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 1 Bevans 619; Hague Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter *1907 Hague IV*]; Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654; Hague Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681; Hague Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371, 1 Bevans 694; Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723.

[85] Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field, July, 6 1906, 35 Stat. 1885, 1 Bevans 516.

[86] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

[87] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *G.C. I*]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter *G.C. II*]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *G.C. III*]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *G.C. IV*]; see also Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L L. 462, 462–75 (1951).

support and acceptance through signatory ratification. These collective Geneva Conventions of 1949 constitute the core of modern LOAC.[88] Additional Protocols I and II were put forth in 1977, dealing with the protection of victims of international armed conflict and non-international armed conflict, respectively.[89] Additional Protocol III, establishing the *Red Crystal* as a third protective emblem for medical personnel in addition to the *Red Crescent* and *Red Cross*, came in 2005.[90] The United States is currently a party to the Geneva Conventions and Additional Protocol III, while only a signatory to Additional Protocols I and II.[91] These treaties and works, from the Lieber Code, Brussels Declaration, and Hague Conventions, through the Geneva Conventions and Additional Protocols, form the substantive basis for privileged combatant status under current international law.

The developments noted above resulted in a test comprised of four general elements required for privileged combatant status of persons not otherwise members of their nation's armed forces: "(1) operating under a military command; (2) wearing a fixed distinctive sign (or uniform for regulars); (3) carrying arms openly; and most important, (4) conducting military operations consistently with the laws and customs of war."[92] With regard to entitlement to POW status, G.C. III likewise provides a nuanced definition of armed forces to include the regular "armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."[93] The convention likewise covers "other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied,

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[88] *Id.*

[89] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *A.P. I*]; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *A.P. II*].

[90] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, TREATY DOC. NO. 109-10, 2404 U.N.T.S. 1 [hereinafter *A.P. III*].

[91] *Supra* notes 87, 89–90.

[92] W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts*, 42 L. Contemp. Probs., no. 2 (Changing Rules for Changing Forms of Warfare), Spring 1978, at 4, 5; *see also Practice Relating to Rule 4. Definition of Armed Forces*, INTERNATIONAL COMMITTEE OF THE RED CROSS (2017), https://ihl-databases.icrc.org/cust omary-ihl/eng/docs/v2_rul_rule4 (last visited June 16, 2017).

[93] G.C. III, art. 4, *supra* note 87.

provided that such militias or volunteer corps, including such organized resistance movements [meet the four conditions for lawful combatant status discussed above]."[94] The internal field manuals and regulations of militaries around the world reiterate this expansive definition of armed forces, and these general requirements that militias and volunteer corps must meet in order to have standing as a legitimate combatant during hostilities in an international armed conflict.[95] Based on such widespread and uniform adaptations of these four common elements of lawful combatant status, they can now be readily said to exist as a matter of customary international law.[96]

These sources of international LOAC also widely acknowledge an alternate, albeit temporary, means by which the population at large of a nation under invasion may collectively take up arms during the initial phase of that invasion. This principle, known as *levée en masse*, provides that the general population of a nation under invasion,[97] but not yet occupied, be allowed to spontaneously rise up against the invader, particularly when the situation precludes their ability to assimilate into the armed forces, militia, or volunteer corps. This principle grants those people status as privileged combatants and POWs (if captured).[98] This mechanism for gaining privileged combatant status is only temporary in nature, and upon the beginning of actual occupation by the invading army, individuals still wishing to engage in hostilities must assimilate into the armed forces (or otherwise meet the requirements of a militia or volunteer corps as discussed) to maintain lawful combatant status and subsequent POW status upon capture.[99]

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[94] *Id.*; *see also* G.C. III, arts. 2–3, *supra* note 87 (G.C. III provisions generally limited in applicability to international armed conflicts).

[95] Practice Relating to Rule 4, *supra* note 92 (containing excerpts from the military manuals of: Argentina, Australia, Belgium, Burkina Faso, Cameroon, Canada, Chad, Congo, Côte d'Ivoire, Croatia, France, Germany, Hungary, Indonesia, Israel, Italy, Kenya, Mali, Mexico, Netherlands, New Zealand, Nigeria, Peru, Philippines, Russia, Senegal, Sierra Leone, Spain, Sweden, Ukraine, United Kingdom, United States, and Yugoslavia).

[96] *See* 1899 Hague II, *supra* note 83; 1907 Hague IV, *supra* note 84; *see also Mallison, supra* note 92.

[97] The term "invasion" is used here in the context of an international armed conflict.

[98] *See* Dörmann, *supra* note 7, at 46; *see also Practice Relating to Rule 106. Conditions for Prisoner-of-War Status, Section B. Levée en masse, INTERNATIONAL COMMITTEE OF THE RED CROSS (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_ch apter33_rule106_sectionb (last visited June 16, 2017).*

[99] *Id.*

V. Application of the Four-Part Combatant Status Test to the Militia

As discussed, the numerous works declaring the customary law of war, as well as the formal treaties relating thereto, have resulted in a test containing four universally accepted elements for privileged combatant status of irregular military forces: "(1) operating under a military command; (2) wearing a fixed distinctive sign (or uniform for regulars); (3) carrying arms openly; and most important, (4) conducting military operations consistently with the laws and customs of war."[100] The subsequent analysis will consist of the application of these four elements to the various forms of militias that exist, both presently and prospectively, under federal and state law. Additionally, the widely accepted principle of *levée en masse* is applicable to those forces as an alternative, albeit temporary, means of legitimate combatant status under LOAC. Aside from militia service and membership, there are additional mechanisms of domestic law that grant citizens the ability to act to enforce domestic criminal law and to use force in a private or public capacity for that purpose, such as the common law authorities of *citizens arrest*[101] and *posse comitatus*,[102] respectively. Such authority, while being highly attenuated from the battlefield context, may nevertheless play into the underlying domestic law basis or practical circumstances for an immediate armed response by citizens organized by local law enforcement during the initial phase of an invasion in an international armed conflict.

Determining the combatant status of National Guard forces mobilized into federal service in their capacity as a reserve component of the U.S. Armed Forces is so straight forward that it almost goes without

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[100] Mallison, *supra* note 92, at 5.

[101] *See* Phoenix v. State, 455 So. 2d 1024, 1025 (Fla. 1984) ("A private citizen [has] the common law right to arrest a person who commits a felony in his presence . . . ."); *see also Arrest*, BLACK'S LAW DICTIONARY (10th ed. 2014) (Citizen's arrest: "An arrest of a private person by another private person on grounds that (1) a public offense was committed in the arrester's presence, or (2) the arrester has reasonable cause to believe that the arrestee has committed a felony.").

[102] *See* State v. Parker, 199 S.W.2d 338, 339–40 (Mo. 1947) ("[T]he sheriff can summon to his aid in the performance of his duty the 'posse comitatus,' or the whole power of the county, and persons so called upon are bound to aid and assist him. . . . [A] member of a posse comitatus, while co-operating with the sheriff and acting under his orders, is clothed with the protection of the law as is the sheriff."); *see also Posse Comitatus*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations."); *Posse Comitatus*, BLACK'S LAW DICTIONARY (4th ed. 1951) ("The power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting felons, etc.").

mentioning—they are fully integrated federal soldiers, subject to federal command authority, paid for with federal funding, armed with modern federal equipment and weapons, subject to the federal UCMJ, and in a federal uniform. In this status, Guardsmen are a fully integrated part of the U.S. Armed Forces, in the eyes of both domestic and international law. Similarly, Guardsmen called into federal service in their capacity as a militia under the Insurrection Act are likewise members of the federal Army or Air Force in that status, and bear all the same key characteristics as discussed above for LOAC purposes, with the sole difference—their status as a federalized *militia*—amounting to an immaterial matter of domestic semantics for international law purposes. A more in-depth analysis is required when assessing National Guard forces under state command in a Title 32 or SAD status.

From the outset, it is worth noting that the President would almost certainly federalize all National Guard forces upon an invasion to bring them under a unified federal command, rendering this discussion largely moot.[103] Regardless, in a Title 32 status Guardsmen are retained under their respective state Governor's command as well as the state's military justice laws, while simultaneously authorized the use of federal weapons, equipment, uniforms, and funding.[104] In a SAD status, Guardsmen bear almost identical resemblance to those in a Title 32 status with the possible exception of the sanctioned use of state owned and personally owned weapons in addition to their federal supply of weaponry and receiving pay as provided in state law.[105] This dichotomy, while being more nuanced than the Title 10 analysis, nevertheless is sufficient to establish privileged combatant status for Guardsmen under state command, with their domestic funding source being irrelevant for purposes of international law. Two points of contention are noteworthy: (1) the validity of a military force commanded by a sub-national Commander in Chief, and (2) the effectiveness of various state codes of military justice in ensuring compliance with LOAC. Because it is generally customary for nations to engage in warfare at the national level, a precarious situation would present itself should, as our system allows,[106] a separate sub-national

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[103] *See* 10 U.S.C.A. §§ 12301(a), 12302(a) (West 2016) (authority for full mobilization of the armed forces reserve components during a time of war).

[104] *See supra* notes 29, 57–58.

[105] *See id.*; Martin, *supra* note 54, at 34 ("When serving in a [SAD] status, National Guard personnel receive their pay and allowances from the state . . . ."); s*ee also, e.g.*, FLA. STAT. ANN. § 250.23 (West 2016) (pay for state active duty).

[106] *See supra* note 19 (state constitutions establishing that the Governor is the Commander in Chief of their state's militia).

sovereign remain in command of military forces in a conflict in which the United States is a party. This difference under domestic law would also likely prove immaterial in the eyes of international law. The respective Governors, acting with the general interest of the United States in the conflict, would constructively render their forces as "belong[ing] to a party to the conflict" as required in G.C. III, art. 4, and "responsible to that party" as required by A.P. I,[107] and instill the discipline necessary for adherence to LOAC within their forces, thus satisfying international law.

While the scenario presented proposes that the President has left Guardsmen under state command, the supremacy clause[108] of the Constitution would nevertheless likely provide the President the necessary domestic mechanism to ensure compliance by state commanders with federal military directives during such an incredibly exigent circumstance as an invasion. Such domestic authority would almost surely be sufficient to put to rest any doubt that the state forces belong to, and are acting on the behalf of, the United States for international law purposes. Further, the military justice laws of the states, while having a large degree in variance in form and substance, are also almost surely sufficient to enforce the command structure and ensure subordinates follow orders which comply with LOAC. Some states have adopted portions of the Model State Code of Military Justice,[109] a model code largely modeled after the federal UCMJ, drafted by the National Guard Bureau and offered to the state legislatures for consideration,[110] yet others have systems varying greatly from the federal model.[111] Regardless of the form under domestic law, the simple fact that Guardsmen under state control are subject to criminal liability in some form should prove sufficient to establish a military command relationship and internal mechanism for enforcing the law of war to satisfy the corresponding requirements for privileged combatant status.

The situation of the SDFs, with their sole full-time duty status being SAD (state funded and state commanded), is almost identical in the eyes

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[107] Although the United States is not a party to A.P. I, some of its provisions are considered customary international law and thus worth considering here.

[108] U.S. CONST. art. VI, cl. 2.

[109] NATIONAL GUARD BUREAU, MODEL STATE CODE OF MILITARY JUSTICE (2007), *available at* http://www.ngb.army.mil/jointstaff/ps/ja/conference/2007/MODEL_STATE_CODE_OF_MILITARY_JUSTICE.doc.

[110] *See* Martin, *supra* note 54, at 36.

[111] *Compare* W. VA. CODE ANN. §§ 15-1E-1 to -148 (West 2016) (model code with slight modifications) *with* UTAH CODE ANN. §§ 39-6-1 to -114 (West 2016) (unique state code).

of domestic law to that of National Guard forces in that same duty status. SDF personnel are subject to state command authority and state military justice laws, with the only caveat being their uniform. While federal law authorizes National Guard to wear the uniform of their corresponding federal branch, the uniforms worn by SDFs are at the discretion of the respective states and generally are a slight variation of the Army uniform with distinguishing insignia.[112] The distinctive alterations required to wear the modified Army uniform are minimal, merely requiring that the nametape over their left breast have the SDF's name in lieu of "U.S. ARMY," a distinctive red name tape on dress uniforms in place of the standard black one, and the use of the two-digit state abbreviation in lieu of "U.S." on insignia (such as officer's collar insignia) where they appear.[113] Insofar as international law is concerned, any SDF uniform with such minor alterations undoubtedly meets the *fixed distinctive insignia* requirement under LOAC, and these minute differences are immaterial.

A comparable analysis applies to the Naval Militia. In the rare case that a state maintains a Naval Militia, in lieu of or in addition to a maritime SDF unit, it is generally done for purposes of federal funding and therefore the 95% federal reservist membership requirement is a prerequisite.[114] As a result, it is accepted custom for Naval Militia members to wear the uniform of their corresponding federal branch (USN, USMC, or USCG) and to likewise make minor insignia alterations to their uniforms to distinguish themselves while in a state militia duty status.[115] It is also worth noting that, while the scenario here revolves around them acting as militia under state command, the fact that a Naval Militia is staffed by 95% or more federal reservists gives the President the practical option of calling them into federal service as either militia or as regular armed forces, even when already underway. With regard to the potential 5% non-federal

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[112] *See* U.S. NAT'L GUARD BUREAU, REG. 10-4, NATIONAL GUARD INTERACTION WITH STATE DEFENSE FORCES para. 2-2 (18 Aug. 2010) (SDFs are not authorized to wear the uniforms of any of the armed forces of the United States except Army uniforms as authorized and modified under Army Regulation 670-1).

[113] U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 21-8c (25 May 2017) [hereinafter AR 670-1].

[114] *See supra* notes 60–61.

[115] *See, e.g.*, N.Y. NAVAL MILITIA INSTR. 1020.1, NEW YORK NAVAL MILITIA UNIFORM REGULATIONS para. 1-1e (16 Aug. 2012) (New York Naval Militia (NYNM) options for distinguishing their uniforms, including an alternative nametape above their left breast, a distinctive badge, etc. The regulation also stipulates that current drilling reservists may continue to wear the nametape of their federal branch and only wear a badge or pin beneath it to distinguish themselves while in NYNM service.).

reservists mixed in, federal law allows the Secretary of the Navy (and thus by extension, the President) to appoint a member of the Naval Militia as a member of the Navy or Marine Corps reserve.[116] In the event that such an impromptu federalization occurred while Naval Militia forces were already underway, this would be a potential domestic mechanism to get the entire force into federal service in an Armed Forces status, thereby avoiding the domestic limitations of the Constitution and Insurrection Act that would arise by using them as federalized militia.[117]

The disposition of the population at large under LOAC will be a mixed issue of law and fact. Their status as combatants and to what extent they may engage in prolonged hostilities will depend on both the factual circumstances surrounding the hostilities as well as the operative state law involving the assimilation of the population at large into the various militia forces of the state. In the event of an invasion into United States territory, the doctrine of *levée en masse* under international law will provide the population at large the immediate ability to fight back against the invading force. In terms of domestic law and practice, such immediate resistance may come in the form of local law enforcement organizing citizens as some permutation of a *posse*,[118] or even a general proclamation by the President or Governor calling all citizens, or possibly only those falling within the purview of Unorganized Militia under the applicable law of the jurisdiction,[119] to fight back. Regardless of the domestic mechanism for organizing such an immediate resistance, the broad, yet temporary, privilege to engage in hostilities conferred by the doctrine of *levée en masse* is not dependent on domestic law for legitimacy.

At some point, should the invasion transition to an occupation, that privilege will dissipate and civilians wishing to continue engaging in hostilities will either need to assimilate into the armed forces of the United States or into a militia or volunteer corps meeting the required elements under LOAC, or cease hostilities altogether and adhere to a status as non-combatants. The ability of a civilian to assimilate into an acceptable military organization that satisfies the requisite elements of LOAC, be it

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[116] *See* 10 U.S.C.A. § 7852 (West 2016) ("In the discretion of the Secretary of the Navy, any member of the Naval Militia may be appointed or enlisted in the Navy Reserve or the Marine Corps Reserve in the grade for which he is qualified.").

[117] *See supra* notes 11, 48 (discussing the limited and enumerated purposes for which the militia may be called into federal service).

[118] *See supra* note 102 (discussing the common law authority of sheriffs to form a *posse comitatus*).

[119] *See supra* note 72 (definitions of "unorganized militia" under federal and state law).

the U.S. Armed Forces, or one of the various forms of legitimate state militia discussed, will be entirely domestic law dependent. While the establishment of a federal draft may be a highly likely result of entry into a prolonged war, thereby conscripting citizens directly into the United States Armed Forces,[120] present domestic law provides several mechanisms through which civilians could assimilate into government-controlled militias and thereby gain prolonged standing to engage in hostilities under LOAC. While the President has the ability to call forth the militia, to include the Unorganized Militia as defined under federal law, into active federal service, federal law is simultaneously silent as to the disposition of such Unorganized Militia forces upon such a call up. This readily leaves open the possibility of the President establishing a federal organization that satisfies the requisite elements of LOAC for those militia forces to be assimilated into by executive order. The laws of some states as to the disposition of the Unorganized Militia, as defined by state law, upon call to active state service may too fall silent, potentially leaving to the Governor's executive discretion how to utilize those forces.[121] On the contrary, other states have developed a statutory pipeline for the assimilation of the Unorganized Militia into the militia organizations of the state, namely the SDF.[122] For the reasons already discussed, the assimilation of the Unorganized Militia forces into a SDF would meet the requirements of LOAC for privileged combatant status, as would the creation of, and assimilation into, any impromptu state-controlled militia organization provided the organization is under formal state military command, particularly if subject to the state code of military justice, and wears some form of military uniform (albeit with distinct state-specific insignia).

The analysis of *historical* militias[123] that continue in existence under state law or as private entities, and were once formally recognized by federal law, poses a harder question. While such organizations are exceedingly rare, the ones that are still in existence show a great variance

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[120] *See, e.g.*, Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885, 885–97 (draft for World War II) (replaced 1948).

[121] *E.g.*, CONN. GEN. STAT. ANN. § 27-9 (West 2016) ("Whenever the Connecticut National Guard is called into the federal service or whenever such a call, in the opinion of the governor, is deemed to be imminent, the governor shall forthwith raise, organize, maintain and govern, from the unorganized militia, a body of troops for military duty.").

[122] *E.g.*, *supra* note 73 (state laws directing the assimilation of unorganized militia called forth to state duty into the SDF).

[123] *See supra* note 67 (discussing the former statutory preservation of historical militia's ancient privileges).

in governmental involvement and control. Some are now akin to a purely civilian historical society that performs a strictly ceremonial function,[124] while others are, by state statute, under the direct command of the state's military department, namely the Adjutant General with the Governor as their Commander in Chief.[125] In the former case, the members of the organization, while potentially in some fashion of uniform, would likely not have adequate governmental command to satisfy the first element in the LOAC analysis—that of military command. For this reason, such organizations, as with any veterans' society or group, would not hold any special standing or significance under LOAC aside from any independent affiliation the members may have with the U.S. Armed Forces[126] or the Unorganized Militia generally. It is however foreseeable that Governors, in their executive discretion, could elect to call forth members of such groups, that otherwise fall within the Unorganized Militia category under state law, as a continuous body and assimilate them at that point into the SDF of the state as an *ad hoc* unit. In the later case, where the historical militia unit is incorporated into the command and organizational structure of the state government's militia forces, such forces would meet the requirements of LOAC from the onset and would be nearly indistinguishable from an SDF unit.

Persons who are not within the scope of Unorganized Militia, as well as those that are within its scope but nevertheless remain unassimilated into any governmental militia or armed forces entity, likely fall outside the scope of lawful combatant status as it exists under LOAC. The temporary exception would be as allowed under the doctrine of *levée en masse.* Such a categorical denial of prolonged lawful combatant status under international law also logically applies to private organizations that profess to be some sort of "militia" due to a lack of a governmental military command. While they may self-identify as some sort of "militia," and may even meet the common dictionary definition in a very general sense, such organizations are not legitimate *militia* in the sense it is used as a legal term of art under federal and state law to refer to governmental military organizations of the states. Furthermore, it is likely that many of these independent paramilitary organizations exist in direct contravention of various state statutes barring the maintenance of *unauthorized troops*

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[124] *E.g.*, Veterans Corp of Artillery, State of New York, *supra* note 66.
[125] *E.g.*, Connecticut Governor's Horse and Foot Guards, *supra* note 5.
[126] *See, e.g.*, 10 U.S.C. §§ 10141, 10154, 12301 (West 2016) (containing the statutory basis for the retired reserve membership and call up).

within a state's borders.[127] They are also potentially in violation of various state statutes prohibiting the impersonation of state *officers* insofar as they claim formal rank and title in their state's militia without lawful authority.[128]

VI. Conclusion

The domestic militia system of the United States provides an effective legal mechanism to provide a substantial portion of the population privileged combatant status under international law. When coupled with the sweeping authority of *levée en masse* and the well established right to firearm ownership of the U.S. civilian population, the potential for armed resistance in the face of an invasion is likely unmatched by any nation on earth. The domestic militia structure and laws are capable of then assimilating a substantial portion of the population into a uniformed fighting force for prolonged lawful combatant status. While dating to well before the nation's founding, the United States' militia system of today nevertheless remains a relevant force multiplier for national defense.

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[127] *See* Ellen M. Bowden & Morris S. Dees, *An Ounce of Prevention: The Constitutionality of State Anti-Militia Laws*, 32 GONZ. L. REV. 523, 525 (1997) (as of 1997, twenty-four states had laws barring unauthorized militias); *see also, e.g.*, MASS. GEN. LAWS ANN. ch. 33, § 129 (West 2016) ("[N]o body of men shall maintain an armory or associate together as a company or organization for drill or parade with firearms . . . ."); WYO. STAT. ANN. § 19-8-104(a) (West 2016) ("No group or assembly of persons other than the regularly organized national guard or the troops of the United States shall associate themselves together as a military company or organization, or parade in public with arms without license of the governor.").

[128] *See, e.g.*, TEX. PENAL CODE ANN. § 37.11 (West 2016) (impersonation of a public servant).

FROM ROME TO THE MILITARY JUSTICE ACTS OF 2016 AND BEYOND: CONTINUING CIVILIANIZATION OF THE MILITARY CRIMINAL LEGAL SYSTEM

FREDRIC I. LEDERER*

I. Introduction

The recent, but unenacted, proposed Military Justice Act of 2016,[1] the very different and less ambitious, but enacted, Military Justice Act of 2016,[2] and congressional actions and proposals to sharply modify the military criminal legal system to combat sexual assault and harassment[3] provide both opportunity and necessity to reevaluate the fundamental need for and nature of the military criminal legal system. With the exception of the 1962 amendment to Article 15 of the Uniform Code of Military Justice to enhance the commander's punishment authority,[4] the modern history of military criminal law largely is defined by its increasing civilianization. My thesis is that we are close to the point at which that process will no longer meet the disciplinary needs of the modern armed forces, if, indeed, it does today. Further, the policy justifications traditionally used to defend a military criminal legal system that is separate and distinct from civilian law increasingly appear less

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[1] MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS (December 22, 2015) [hereinafter REVIEW GROUP REPORT], http://www.dod.gov/dodgc/images/report_part1.pdf, (last visited May 22, 2017).

[2] National Defense Authorization Act for Fiscal Year 2017 §5001 et seq (December 23, 2016).

[3] *See, e.g.*, Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process,* 220 MIL. L. REV. 129,132-33 (2014).

[4] *See* text at note 53 *infra.*

compelling than in the past.[5] Congress, which has enhanced justice in the armed forces, should act to ensure that the traditional military need to ensure discipline is satisfied. This article proposes a possible solution that would ensure both justice and discipline for members of the armed forces. For purposes of simplicity, I will largely deal with these matters from an Army perspective.[6]

Although I will discuss the nature of the military legal system in detail later, it may suffice at present to note that the current system is commander driven, meaning that at least legally commanders[7] are responsible for making nearly all important case-related disposition decisions; that military personnel serve as court-members (jurors); and that implementing lawyers are military officers. Only at the appellate stage when the Court of Appeals for the Armed Forces and the Supreme Court may be involved do we depart from the truly military system. As will be evident below, "civilianization" has often meant fostering procedural due process, largely a highly commendable goal and result. However, if taken too far, it may, and likely has already, harmed the disciplinary goals of the military criminal justice system. At its most extreme, the alternative to a military criminal legal system, full "civilianization," would mean civilian jurisdiction resolution and adjudication of offenses committed by military personnel, a system that would imperil seriously both the disciplinary and justice needs of the armed forces.

The initial question must be what are the traditional needs and goals for a separate military criminal legal system. Then after an historical analysis of how military law has evolved over the centuries the issue becomes how well the current system serves those needs and goals. Finally, in light of that appraisal the fundamental question must be

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[5] Indeed, that could clearly be the case if the entirely of the proposed Military Justice Act of 2016 were to be enacted, which at the time of this writing in summer, 2016, seems to be unlikely.

[6] The origins of criminal law in the Army (and the Air Force which was created from the Army in 194) are very different from those of the Navy and Coast Guard. *See, e.g.,* JAMES E. VALLE, ROCKS & SHOALS, ORDER AND DISCIPLINE IN THE OLD NAVY 1800-1861 (1980); NAVAL JUSTICE, NAVPERS 16199 (October 1945). However, I believe that contemporary perspectives will be similar in all of the armed forces.

[7] Service secretaries, the Secretary of Defense, and the President may all be involved in law making. Each may prescribe regulatory requirements which are legally binding absent contradiction by the Constitution or Congressional statute. E.g., U.S. CONST. art. II § 2.

whether a separate military criminal legal system can still be justified, and what steps need to be taken to protect military discipline and justice regardless of who runs that system.

II. Setting the Stage – Systemic Needs and Goals

The armed forces have long been considered a distinct and separate society:

> As the Supreme Court has stated, the military remains a "specialized society separate from civilian society . . . [because] it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." This separateness of purpose and mission has shaped the values and traditions that are embodied in the UCMJ, . . . [8]
>
> On a practical level, this requires that our military criminal legal system take into account:
>
> The worldwide deployment of military personnel;
>
> The need for instant mobility of personnel;
>
> The need for speedy trial to avoid loss of witnesses due to combat effects and needs;
>
> The peculiar nature of military life, with the attendant stress of combat or preparation for combat;

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[8] REVIEW GROUP REPORT, *supra* note 1, at 17 (2015) (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)) (Report note, "internal quotation and citation omitted," omitted). As the Supreme Court also observed:

> [The Uniform Code of Military Justice] cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated.
>
> Parker v. Levy, 417 U.S. 733, 749 (1974).

The need for disciplined personnel.[9]

If these needs and goals are accurate, any legal system that fails them fails the armed forces.

A. Discipline and Justice

There is near unanimous agreement that the fundamental purpose of a military legal system is discipline. Although there are any number of definitions, we might initially define "discipline" as compliance with military orders.[10] If troops do not do what they're told when and in the manner instructed, the mission likely fails.[11] If they exceed instructions or violate given constraints, the mission may fail. Even if successful, departing from orders may create unacceptable negative consequences, as in killing non-combatants and vastly complicating the applicable political situation. Such a definition then includes compliance with positive instructions, *e.g,*. "take that hill," and negative ones, such as "Don't rape, plunder, pillage, or mutiny." Under the traditional view of discipline, to be safe a soldier should do no more and no less than instructed. Anything else puts the solider at risk. Article 134 of the Uniform Code of Military Justice, an offense that dates back to pre-Revolution British military law, thus criminalizes conduct that is "prejudicial to good order and discipline." Accordingly, even if given conduct has not previously been criminalized a service member is at risk if he or she does something out of the ordinary.[12] Although this can be justified by the need to deter unexpected misconduct with serious adverse

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[9] FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, I COURT-MARTIAL PROCEDURE 1-4 (4th ed. 2015) (notes omitted).

[10] "[Discipline] means an attitude of respect for authority developed by precept and by training. Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed—is not characteristic of a civilian community. THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 11 (Jan 18, 1960), quoted in REPORT OF THE DEPARTMENT OF DEFENSE STUDY GROUP ON THE UNITED STATES COURT OF MILITARY APPEALS 1, 34–35 (1989).

[11] More broadly, mission accomplishment depends on a background of training and lifestyle that results in an effective military force. *See, e.g.* Madeline Morris, By *Force of Arms: Rape, War, and Military Culture*, 45 Duke L.J. 651, 691–98 (1996).

[12] *See, e.g.* United States v. Sadinsky, 34 C.M.R. 343 (C.M.A. 1964) (involving a case where, after having made a large bet with shipmates as to whether he would do it, the accused did a backflip off an aircraft carrier in heavy seas at twilight requiring a destroyer to leave the escort screen and a small boat to be launched from the destroyer placing men
at risk).

military consequences, it also strongly communicates the message "Don't take initiative because if things go wrong punishment may result." Given such a constrained definition of discipline, a commander's primary objective when determining what to do with an alleged offense by a subordinate may be to send a "message" to the rest of the troops to encourage or deter them generally. And, indeed as we will discuss with relation to Rome, historically disciplinary punishment can be heavy-handed with little concern for the equities as they affect a given charged offender. As Fran Gilligan and I have reported:

> In 1946, a War Department Committee commented:
>
> > A high military commander pressed by the awful responsibilities of his position and the need for speedy action has no sympathy with legal obstructions and delays, and is prone to regard the courts-martial primarily as instruments for enforcing discipline by instilling fear and inflicting punishment… .[13]

Or, as Professor Wigmore put it in 1918, "The prime object of military organization is Victory, not Justice."[14]

In short, a pure discipline-based system may care little or not at all for "justice" for the individual offender. Eisenhower observed that

> It [the armed services] was never set up to [e]ensure justice. It is set up as your servant … to do a particular job … and that function … demands within the Army somewhat, almost of a violation of the very concepts upon which our government is established …. "[15]

"Justice" customarily means fairness. At the very least no one should be punished unless he or she did something wrong, and, ordinarily, the

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[13] GILLIGAN & LEDERER, *supra* note 9, at 1-7 (quoting REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 5 (13 December 1946)).

[14] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, 131 (1975).

[15] Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 35 (1970) (quoting November 17, 1948 remarks quoted in Letter from New York State Bar Association to Committee on Military Justice (January 29, 1949) at 4 in VI Papers of Professor Edmund Morgan on the Uniform Code of Military Justice, on file in Treasure Room, Harvard Law School).

punishment should be compatible with at least the degree of harm caused.[16]

> A justice-based system seeks accurate determination of individual responsibility and proportional punishment. It is based upon fairness, and to be functional, must be so perceived by the personnel operating under it. It encourages individual responsibility and institutional loyalty, for the crux of such a system is individual accountability. One can only be punished for what one has done wrong. Other goals are institutionally subordinated to accuracy and fairness. Such a system inherently assumes that people fight for reasons other than fear. The shortcomings of such a system are clear: accuracy requires a significant procedural process that is usually slow and expensive, at least by comparison to summary procedure. Further, depending upon the burden of proof used, a justice-based system will yield acquittals of guilty persons, thus potentially calling the system into disrepute and encouraging violations.[17]

As Senator Nunn observed in 2002, however:

> Morale and discipline of the armed forces are at the heart of military effectiveness. Military Law is a vital element in maintaining a high state of morale and discipline. Members of the armed forces must have a clear understanding of the standards of conduct to which they must conform, and they must also have confidence that the system of justice will ***operate in a fair and just manner.***[18]

The argument that "discipline" does not require justice is short sighted. It erroneously presumes that personnel will endure indefinitely the unjust punishment of others and comply fully with orders themselves despite the risk of personal unfair punishment. Further, our prior definition of discipline is flawed from a modern perspective. I would argue that a more useful, modern definition would be that "discipline" is

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[16] This is not to suggest that other factors aren't at least equally important. I am attempting to posit the most basic criminal justice considerations as many would accept.

[17] GILLIGAN & LEDERER, *supra* note 9, at 1-7 (note 21 omitted).

[18] Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases, in* EUGENE FIDELL & DWIGHT H. SULLIVAN, EVOLVING MILITARY JUSTICE 3, (2002) (emphasis added).

the prompt obedience to orders ***and*** a willingness to use personal initiative in an appropriate fashion in pursuit of mission. This is surely a more nuanced and modern view than the traditional one that wanted only simple obedience, and the difference is meaningful. In the modern world where we prize and require initiative, we need to ensure that the solder has the right and ability to be judged on the basis of what he or she did and why. Even Article 134, punishing among other matters, conduct "prejudicial to good order and discipline," theoretically only comes into play when a service member's well-intentioned actions fail to achieve their positive military-acceptable goal.

In short, although the relationship between "discipline" and justice" remains an important conversation,[19] viable fairness likely is essential to maintain a modern form of American discipline. Accordingly, the modern United States military legal system considers justice to be at least as essential as discipline. The 2015 Report of the Military Justice Review Group opined that:

> The current structure and practice of the UCMJ embodies a single overarching principle based on more than 225 years of experience: a system of military law can only achieve and maintain a highly disciplined force if it is fair and just, and is recognized as such both by members of the armed forces and by the American public. "Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. . . . It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline."[20]

Justice also requires that decision makers understand the unique nature of military life, including the special stresses and consequences of service, especially combat service.

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[19] *See, e.g.,* David A. Schlueter, *The Military Justice System Conundrum: Justice or Discipline,* 215 MIL. L. REV. 1 (2013).

[20] REVIEW GROUP REPORT, *supra* note 1, at 16 (2015) (quoting at note 13, AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO THE HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11 (Jan. 18, 1960)), http://www.dod.gov/dodgc/images/report_part1.pdf.

Ultimately, however, it is not only the reality of justice which is important but also the perception of justice, especially for the armed services members who are subject to military law. And, as Hamlet despairs in his soliloquy, "There's the rub," for it seems clear that our perception of justice is based on civilian law and procedure. Certainly the historical evolution of modern American military criminal law supports that conclusion and, if that is correct, the resulting legal system, mirroring the civilian system, may fail to successfully meet the armed forces' systemic needs. If that proves to be the case, Congress will need to consider how best to restructure the Uniform Code of Military Justice to ensure that it complies with the disciplinary needs of the armed forces as well as justice.

Before proceeding further it may be useful to note what I am not addressing. In Herbert Packer's 1964 article, *Two Models of the Criminal Process*,[21] which I and others use to explain differing policy understandings of the purpose of criminal law, he postulated two differing models of the criminal justice system, the crime control model and the due process model. Although the models are highly useful, and can be applied to military criminal law,[22] my ultimate concern is with the relationship between discipline and justice. Although there arguably is a strong relationship between discipline and crime control, the fact that discipline must at least be seen to be fair, makes the comparison questionable.

II. The Evolution of American Military Criminal Law

It seems clear that the earliest form of military criminal law was the commander's personal authority and responsibility to determine whether perceived misconduct had taken place and to punish it if so.[23] Such discretionary power was not tempered by any form of courts-martial and was subject only to the power of more senior commanders or mutiny. Rome provides a useful example.

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[21] Herbert Packer, *Two Models of the Criminal Process*, 118 U. PA. L. REV. 1-68 (1964).
[22] *See* David A. Schlueter, *The Military Justice System Conundrum: Justice or Discipline,* 215 MIL. L. REV. 1 (2013).
[23] *E.g*. Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment—A Short History of Military Justice*, 11 A. F. REV 212 (1969) ("Among the early Germans, in the absence of written law, justice was administered summarily by the chief commander through priests."

Roman resolution of misconduct was command-based. Although scholarship has focused on the legions' use of extreme punishments such as decimation[24] for purposes of general deterrence, procedure appears to largely have been simply the commander's discretionary, and often arbitrary, decision—although there seems to have been some evidence of councils of tribunes in some cases.[25] Roman practice incorporated the assumptions that speedy and certain punishment provided general and specific deterrence. Further it embodied the view that it was essential for the troops to be aware of at least the realistic risk of disciplinary punishment. Harsh punishments, including decimation, met those needs.

In his seminal work, *Military Law and Precedents*, Colonel Winthrop declared that "of the written military laws of Europe the first authentic instance appears to have been those embraced in the Salic Code, originally made by the chiefs of the Salians at the beginning of the fifth century . . . ."[26] The famed 1621 code of King Gustavus Adolphus of Sweden included procedures, some of which required deliberative bodies. Article 19 declared that whoever

> behaves himself not obediently until our great Generall [sic], or our Ambassador coming in our absence, . . . shall be brought to his answer, before a Counsell of Warre where being found guilty … he shall stand to the order of the Court, to lay what punishment upon him they shall thinke [sic] convenient. . ."

Article 138 established a high court and a lower court, and Article 139 declared that "Every regiment has a lower Court" with a minimum of 13 officers with the Colonel as president. Appeals to a higher court were permitted by Article 151, and article 155 required all lower court sentences to be approved by the General. Notably, Article 161 required sentences to be read to all the men.[27]

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[24] Execution of every tenth man, often by fellow legionnaires.

[25] C.E. BRAND, ROMAN MILITARY LAW 77 (1968).

[26] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17 (2d ed. 1920 Reprint). *See also* Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment--A Short History of Military Justice*, 11 A.F. L. REV 212 (1969).

[27] WINTHROP, *supra* note 26, at 1418.

European and early American (if not later American as well) military justice was to remain a rather summary thing. There was usually little ceremony attendant upon the event of trial or hearing. Concern for the rights of the individual were of little or no moment. And punishment followed the judgment in rapid "one-two" order. In most instances the "convening authority," i.e., the commander, "presided" with the sentence being executed without confirmation and/or review by any superior authority.[28]

That discipline was not necessarily the only goal in the time period is illustrated by the following quote, which I use in my military law books:

> Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience.[29]

There were no peacetime British courts-martial until 1689; instead, serious offenses were tried by the civilian courts. With creation of a standing army in 1689, Parliament enacted the first (annual) Mutiny Act which both established parliamentary control and provided military punishments extending to life or limb) in peacetime, working in tandem with the pre-existing British Articles of War.[30] Those Articles of War, which included courts-martial, largely were adopted by the Continental Congress on June 30, 1775, although a number came from the intermediate Massachusetts Articles of War dating from a year earlier.[31] Then General Washington found them seriously deficient as he concluded that the new American Articles of War lacked sufficient summary discipline powers.

> What Congress did not see fit to provide by statute, however, General Washington and other commanders of the Revolutionary Army provided for themselves. By General Orders dated September 19, 1776, Washington

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[28] Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment--A Short History of Military Justice*, 11 A. F. REV 212, 214 (1969).

[29] LOUIS DE GAYA, THE ART OF WAR (1678).

[30] *See generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 18-20 (2d ed. 1920 Reprint); G.A. Steppler, *British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century*, 102 ENG. HIST. REV. 859 (1987).

[31] WINTHROP, *supra* note 26, at 21-22.

> directed that: [AI11 . . . officers are charged . . . to seize every soldier carrying Plunder . . . [and the] Plunderer [is to] be immediately carried to the . . . Brigadier or commanding officer of a regiment, who is instantly to have the offender whipped on the spot.'' Apparently because he was experiencing difficulty in disciplining the Army (and possibly having some doubt as to the authority by which he was ordering summary punishment), Washington sent a letter to the President of Congress on September 22, 1776, wherein he said: Some severe and exemplary Punishment to be inflicted in a summary Way must be immediately administered, or the Army will be totally ruined. I must beg the immediate Attention of Congress to this Matter as of the utmost Importance to our Existence as an Army." Two days later, in another letter to Congress, Washington renewed his complaint concerning lack of adequate laws to punish offenders and notified Congress that he had ordered instant corporal punishment for disobedience of orders."[32]

Unlike the Navy, Army commanders lacked significant recognized summary punishment powers until Article 15 of the Uniform Code of Military Justice was expanded in 1962.

The Articles of War were amended, sometimes extensively, particularly in 1786, 1806, and 1874.[33] There were few changes in basic military procedure in the 19th Century despite the Civil War. As Colonel Harold Miller noted:

> The increase in the size of the Army during the Civil War brought with it a corresponding increase in disciplinary problems. Since statutory authority to summarily punish minor offenses was still not available, Washington's device of supplying the needed authority by issuing general orders was put to work again.
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> [Some of the punishments administered during the Civil War were, to say the least, rather unusual. One punishment that must have been particularly effective was

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[32] Harold Miller, *A Long Look at Article 15,* 28 MIL. L. REV. 37, 41 (1965).
[33] WINTHROP, *supra* note 26, at 22-24.

> that of staking an offender out on the ground and pouring molasses on his hands, feet, and face. Whipping, confinement in the guard house, carrying a ball and chain, and tieing [sic] up by the thumbs were other punishments awarded to offenders without benefit of a trial.[34]

Rapid summary punishment may assist effective discipline, at least from the Roman perspective, but it may be neither fair nor perceived as fair. Ideally, the determination of misconduct must be accurate and perceived to so, and any punishment adjudged and implemented must be fair and perceived as fair. From a pragmatic perspective, discipline requires that resolution of alleged misconduct be *perceived* as fair. However distressing it may be, from a disciplinary perspective it is likely that personnel will accept procedures and results that they feel is "fair" and just even if from an objective perspective they are not. Of course, should some form of appellate procedure exist, a reversed sanction won't be perceived having been fair initially, especially if the punishment has already been carried out. Concern about both the reality and perception of justice became critical in the Army in the early twentieth century.

In 1917, black soldiers near Houston rioted against racial injustice; fifteen white men died. Sixty-three black soldiers were tried at Ft Sam Houston with the Staff Judge Advocate doing a daily review of the trial transcript. Five were acquitted, 58 convicted, and the 13 sentenced to death were executed the day after the trial without opportunity for review by higher authority.[35] Ultimately the trial and the internal Army legal dispute that followed "caused a nationwide clamor for revision of the 1916 Articles of War.[36]

The then Judge Advocate General of the Army, Major General Enoch Crowder also served as Provost Marshall General (and thereby Director of Selective Service).[37] Author of the 1916 Articles of War, General Crowder was a traditionalist. The Acting Judge Advocate General of the Army, serving in General Crowder's stead, was Brigadier General

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[34] Miller, *supra* note 32.

[35] ARMY LAWYER: *supra* note 14, at 126. *See also* Fred L. Borch III, "*The Largest Trial in the History of the United States": The Houston Riots Courts-Martial of 1917, Murder* THE ARMY LAWYER, February 2011 at 1.

[36] ARMY LAWYER: *supra* note 14, at 128.

[37] *Id*. at 113. *See generally* Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932),* THE ARMY LAWYER, *May, 2012, at 1.*

Samuel Ansell, a comparative liberal. General Ansell was appalled at the executions and believed that the Judge Advocate General had statutory authority to review convictions for serious error. The disagreement between Generals Crowder and Ansell was extensive and highly public, historically termed the "Ansell-Crowder debates.[38] Ultimately, a general order was published that permitted review in the Office of The Judge Advocate General "in the nature of an appellate tribunal" before a death sentence or dismissal could be carried out.[39] "Civilianization" of military law had begun. General Ansell's efforts to further civilianize military criminal law and to rely more heavily on lawyers via the 1920 Articles of War largely failed[40] — although the revised Articles prohibited reversing an acquittal, required a judge advocate "law member" in general courts and non-lawyer defense counsel in general and special courts-martial and established a board of review as an appellate authority.[41] Ultimately, conflicts between the two generals and dissatisfaction with his public advocacy for reform resulted in General Ansell's reduction to his permanent grade of lieutenant colonel and his resignation.[42] Perhaps ironically, one of his staff, Major Edmund Morgan, later became a Harvard Law School professor and the principal author of the Uniform Code of Military Justice.

The World War II mobilization subjected large numbers of Americans to the Army and Navy's military criminal legal systems. The resulting dissatisfaction (and the spin-off of the Air Force from the Army Air Corps) resulted in Congressional action. The first, interim measure, was the Elston Act of 1948. For our purposes, the Elston Act is useful as one small part illustrates and supports a key part of the thesis of this article, that civilian procedure provides the role model for military procedure.

Because it was unclear whether the Bill of Rights protects members of the Armed Forces,[43] the Articles of War contained statutory

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[38] ARMY LAWYER *supra* note 14, at 128.

[39] *Id.* at 130 (but it is possible that a convening authority could disregard the Judge Advocate General's decision. *Id.*).

[40] *Id*. at 130.

[41] *Id*. at 136-38.

[42] *Id*. at 114-115.

[43] A matter resolved by the Court of Military Appeals in United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960) but as yet unaddressed by any Supreme Court holding. See Frederic L. Borch & Fredric I. Lederer, *Does the Fourth Amendment Apply to the Armed Forces?* 3 WM & MARY BILL RIGHTS J. 219

protections for rights such as the right against self-incrimination. Article of War 24 protected that right, making it applicable to members of the armed forces. It did not include, however, any requirement to warn a service member of that right during interrogation, custodial or otherwise. There was no warning requirement legally required in the United States at that time, and none was required until the Supreme Court *decided Miranda v. Arizona* in 1966.[44] The FBI gave such a warning but only as a matter of policy. Notwithstanding this, Article 24 was amended to require such a warning after one member of Congress simply asserted that such a warning was the civilian requirement:

> Mr. Elston–"give the accused the same right a civilian has who is charged in the civil courts, with a crime, of being told that any statement he may make may be used against him?
>
> Mr. Burleson: That is right."[45]

When the Uniform Code of Military Justice subsequently was enacted, the amended Article of War became U.C.M.J. Article 31(b), a forerunner of the *Miranda* warnings. Military law had been modified on the basis of assumed civilian procedure.

The Elston Act contained other military law provisions, especially the creation of the Army's Judge Advocate General's Corps. Notably, General Eisenhower testified against creation of the Corps.

In response to World War II complaints about military criminal law, Congress created the Uniform Code of Military Justice.[46] Enacted in 1950 and effective in 1951,[47] the Uniform Code of Military Justice governed all of the armed forces. Perhaps its most important element was the establishment of the three judge (now five judge) civilian Court of Military Appeals. Feared by many military traditionalists as a potential major source of possible civilianization, the Court, albeit lacking explicit supervisory jurisdiction,[48] did become a major player in military law via

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(1994); reprinted in 144 MIL. L. REV. 110 (1994) and SEARCH & SEIZURE L. REP. December, 1994.

[44] Miranda v. Arizona, 384 U.S. 436 (1966).

[45] 94 Cong. Rec. 185 (January 14, 1948).

[46] *See, e.g.,* Burns v. Wilson, 346 U.S. 137, 140-41 (1953).

[47] ARMY LAWYER, *supra* note 14, at 200.

[48] Whether and if so, to what extent, the court has supervisory power is controversial and unclear. *Clinton v. Goldsmith*, 526 U.S. 529,534-35 (1999) seems to hold that if the Court

its case law, recognizing, for example, the application of the Bill of Rights to service members[49] and incorporating *Miranda* into military law and this requiring the right to counsel at custodial interrogations.[50] Although, the Court has to some extent "civilianized" military criminal law, it has operated within the statutory framework of the U.C.M.J and not threatened command control of the system.[51] Notably, the Court has condemned both the reality and appearance of unlawful command influence, elevating due process over result-oriented discipline.

The new U.C.M.J. also contained Article 36, providing that the President could for courts-martial prescribe rules "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . ." This led to the Military Rules of Evidence largely based on the Federal Rules of Evidence and the Rules for Courts-Martial, partially based on the Federal Rules of Criminal Procedure.

Against this backdrop of civilianization, in 1962 Congress amended Article 15 to expand commander's summary hearing and punishment power.[52] Major changes were made in the 1968 amendments to the Uniform Code of Military Justice, among which was the creation of the position of military judge for general and special courts-martial, to be filled by military lawyers certified by the Judge Advocate General of the relevant service, provided the right to lawyer defense counsel at special courts-martial (unless not possible, for example by reason of military exigency), and renamed the Boards of Review as the Courts of Military Review.[53] As the history of the Army JAG Corps puts it,

> Thus, the Military Justice Act of 1968 was the culmination of more than 15 years of debate among the persons and agencies responsible for ensuring justice to the American serviceman. It was the first change to the concept of and structure for the administration of criminal justice in the Armed Forces since 1951, and continued the

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of Appeals for the Armed Forces has such power, it is strictly constrained. *See generally* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, II COURT-MARTIAL PROCEDURE 1§25-90.00 (4th ed. 2015).

[49] United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

[50] United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967)).

[51] Although it has safeguarded procedural decision making from unlawful "command influence." *See e.g.*, GILLIGAN & LEDERER, *supra* note 9, at §8-16.00.

[52] *See, e.g.,* ARMY LAWYER *supra* note 14, at 236.

[53] *Id.* at 245-47.

> theme of making that system as much like civilian courts as possible.[54]

In 1983, Congress altered the post-trial responsibilities of convening authorities from that of a quasi-judicial reviewer to that of an officer empowered to adjudge clemency. Further, the Uniform Code was amended to provide limited discretionary appeal to the Supreme Court.[55]

Although the UCMJ provides that the convening authority appoints both defense and trial counsel (prosecutors)–and the military judge, actual practice differs. Pursuant to applicable regulations, defense counsel are now part of defense organizations, except in the Coast Guard, which uses counsel from other commands, and judges are assigned by other judges. Only the trial counsel can be appointed by an officer subject to the convening authority, in the Army usually the staff judge advocate.

In 1994, Congress renamed the Court of Military Appeals as the United States Court of appeals for the Armed Forces and the Courts of Military Review as the Courts of Criminal Appeals.

In 1999, Congress amended Article 19 of the Uniform Code to increase the maximum sentence of special courts-martial from six month's confinement to one year, making the general/special courts roughly parallel to the civilian felony/misdemeanor structure.[56]

In short, the modern history of military criminal law shows an ongoing "civilianization," but one which largely retained command control over much of the process. Although administrative discharges substantially supplanted courts-martial as the preferred disposition of UCMJ violators, courts-martial remained a defining element of military criminal law. Indeed, as Colonel (Ret.) Fred Borch reports in his Judge Advocates in Combat in Operation Desert Storm, "In the 1st Armored Division, . . . " junior enlisted soldiers 'were surprised, if not shocked'

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[54] *Id.* at 245.

[55] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 1406. *See also U.C.M.J. art.67a.*

[56] Except that most U.C.M.J. offenses can be sent to either a general or special court-martial. Article 19 of the U.C.M.J. prohibited only trial of capital cases. The National Defense Authorization Act of 2014 amended article 18 of the U.C.M.J. to provide that certain sexual assault cases may be tried only be general courts-martial. U.C.M.J. 18 (c).

upon hearing that a trial by court-martial was being conducted the night before the attack on Iraq."[57]

And, then came the modern era and the widespread recognition of the need to better resolve the problem of sexual assault and harassment in the Armed Forces

III. Combatting Sexual Assault and Harassment – The Amendment of Article 60 and Afterwards

Recognition of the military's major problems with sexual assault and harassment focused attention on the Uniform Code of Military Justice. In addition to bolstering the protections afforded sexual assault victims,[58] the power and responsibility of commanders were criticized extensively. One case served to crystalize the issues for many. Air Force Lieutenant Colonel James Wilkerson, a fighter pilot, was accused of sexually assaulting a female house guest. After a highly-contested trial, he was convicted and sentenced to dismissal, one year's confinement, and forfeitures.[59] Pursuant to his powers under Article 60 of the UCMJ, the convening authority, Lieutenant General Franklin, subsequently disapproved the conviction and sentence, later stating that he simply did not believe that the prosecution evidence was sufficient to convict a reasonable doubt. Although appellate courts hold this power,[60] that a line commander would reach such a conclusion, especially in the case of a highly-favored accused, one who was considered a near certainty for eventual promotion to general officer, was highly disturbing for many. Ultimately Congress amended Article 60 to largely eliminate the convening authority's post-trial powers. The revised Article 60 now limits such powers to minor cases except as necessary to effectuate plea bargaining.[61] Interestingly, there appear to be few if any cases in modern history of a convening authority disapproving an entire verdict, and the assumption of many was that the power would be used on the advice of a

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[57] FREDERICK BORCH, JUDGE ADVOCATES IN COMBAT 190 (2001).

[58] *E.g.,* U.C.M.J. Art. 60(d) allowing victims to submit matters for consideration by convening authorities.

[59] *See, e.g.,* Major Angela D. Swilley*, A Whole Other Matter: The New Article 60(d) and Handling Victim Submissions During Clemency,* THE ARMY LAWYER, July, 2015 at 16, 17-18.

[60] When they conclude that no reasonable fact finder could convict given the admissible evidence.

[61] *See, e.g*., Major Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60*, UCMJ, ARMY LAWYER, July, 2014 at 23.

staff judge advocate to cure major legal error. From a command perspective, the power might be useful in the admittedly unlikely circumstance of a commander needing the convicted accused for a military mission of great importance.[62] On balance, the need to disapprove a finding, as distinguished from an optional grant of sentence clemency seems entirely unnecessary. Yet, the amendment of Article 60 further "civilianized" the military criminal legal system. It virtually eliminated the convening authority's power to grant clemency based on their intimate understanding of the nature of military life. Although the need for such clemency might be minimal in the event of member sentencing, assuming that the members had requisite experience, such cannot be said of judge alone sentencing where few military lawyers would have the knowledge and experience of combat arms personnel. It was, however, not just the post-conviction powers of the convening authority that came under legislative fire. The Article 32 Investigation was converted to a Preliminary Hearing with a provision that victims need not testify.

Dissatisfied with commanders having prosecutorial decision-making power and responsibility, Senator Kirsten Gillibrand led an effort to remove from convening authorities at least the power to refer sexual assault cases, arguing that such power should be vested in Judge Advocates.[63] As of the time this article was written, this legislative reform effort has failed, although there now are UCMJ provisions that for sexual assault cases provide for prosecutorial decision making at higher levels,[64] and we can expect that most commanders will now rely heavily upon the advice of their legal advisors which, of course, may not be any better than a commander's judgment. We can expect similar efforts to be made in the future. If successful, they will remove at least referral power for sexual assault cases from the convening authority—and perhaps more. At the extreme, prosecution of such cases could be moved to

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[62] *Id*. at 24 quoting Eisenhower's position as transmitted during the 1949 House hearing on the U.C.M.J.

[63] *Id.* at 25. The goal, of course, is the increase the number of sexual assault prosecutions, assuming that lawyers will be free of bias presumably held by commanders. Even assuming that such a distinction exists, which is questionable, such a change could result in less prosecution as prosecutors choose not to charge questionable cases or more cases in an effort to assure good annual efficiency/fitness reports. Prosecutorial power is broad enough that via allegations of other offenses, especially under the general articles, Articles 133 and 134, pretrial agreements likely could be obtained for at least other offense.

[64] *See* The Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015. See generally GILLIGAN & LEDERER, *supra* note 9, at §8-14.30.

civilian courts. Notably, the stage is set for a change which would make the military criminal legal system mirror civilian prosecutions.

IV. Other changes

Meanwhile there have been other major changes in military law that call into question the traditional assertions for a special military criminal legal system. Despite general agreement that speedy trials are particularly important in the armed forces so as to ensure the ability to deploy and reassign personnel (and to ensure availability of witnesses), the traditional emphasis on speedy trial no longer exists.

Article 10 of the UCM requires that:

> Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

For a significant period, the then Court of Military Appeals required that under *United States v. Burton*,[65] that dismissal of charges was required if the accused was in confinement in excess of ninety days, after subtracting defense delays. Ultimately, as of 1991 the Rule 707(a) set forth a 120-day rule, filled with escape holes, and *Burton* was no longer applied.

Faced with lengthy delay in approving convictions and appeals, the Court of Military Appeals in *Dunlap v. Convening Authority*[66] required dismissal of charges based on the extensive appellate delay involved and created a ninety-day rule giving rise to a presumption of unacceptable

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[65] 44 C.M.R. 166 (C.M.A. 1971), *overruled by* United States v. Kossman, 38 M.J. 258, 261 (C.M.A. 1993).

[66] 48 C.M.R. 751 (C.M.A. 1974).

delay.[67] The Court overruled *Dunlap* in *United States v. Banks*[68] in 1979, however.

Recent data shows that for calendar years 2014 and 2015 the number of days between preferral of charges to trial termination for Army General Courts-Martial were 173.[69] Insofar as special courts-martial are concerned, the delay in 2014 was ninety-nine days; in 2015, eighty-five days, and as of May 2, 2016, seventy-six.

Data is also available for the time between preferral of charges and the first Article 39 (court session). For general courts-martial, that delay was 109 days in 2014, 108 days in 2015, and 100 as of May 2, 2016. For special courts-martial, the delay was seventy-three days in 2014, sixty-eight days in 2015, and sixty-one days as of May 2, 2016.

Greater delay occurs after sentencing. Current data shows that in 2015, average time from sentencing to action was 203 days.[70] In the appellate area, in 2015 the average time from receipt to ACCA decision was 298 days; of 537 decisions, 474 were rendered within 18 months. For the Court of Appeals for the Armed Forces, the most recent data shows ninety-four days from petition filing to grant; 129 days from grant to argument and 115 days from argument to final decision for Total CAAF time of 338 days.

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[67] *Id*. at 754:

> 30 days after the date of this opinion, a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial.

[68] United States v. Banks, 7 M.J. 92, 94 (C.M.A. 1979) (instead requiring proof of prejudice). *See generally* 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 24-80.00 (4th ed. 2015).

[69] Email from Homan Barzmehri, Management & Program Analyst, Army Court of Criminal Appeals on behalf of Mac Squires, Clerk of Court of the Army Court of Criminal Appeals (available through Professor Lederer). As of May 2, 2016. The 2016 delay was 171 days.

[70] S*ee* the ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD JANUARY 1, 1968 TO DECEMBER 31, 1968 at 23-24, http://www.armfor.uscourts.gov/newcaaf/annual/1968AnnualReport.pdf.

Especially given the post-trial delay figures, it is hard to argue that military necessity justifies a special military legal system

At the same time that delay has become endemic, the number of cases has dropped sharply. In 1968, using the year of my commission, as a simple baseline, there were a total of 57,685 general and special courts-martial in the Army, 3.82 percent of a strength of 1,510,064 strength. Those cases were handed by 1,490 active duty judge advocates, an average of thirty-one general and special courts-martial per judge advocate.[71] In 2015, the Army had a total of 1,010 cases, .2 percent of a strength of 491,363 with 1,819 active duty judge advocates for an average of .47 percent general and special courts-martial per judge advocate.[72] There are similar data for the other services. One of the reasons for the sharp decrease in cases is known to all—the armed forces now administratively discharge many of those who in earlier days would have been tried. It is unclear as to whether this is due to enlightened justice and management or to the increasingly civilian bureaucracy we have evolved, complete with delays.

V. The Military Justice Acts of 2016

The interservice Military Review Group headed by retired Chief Judge Effron of the Court of Appeals for the Armed Forces drafted a

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[71] This number is misleading as in those days, non-lawyers could try special courts-martial. UCMJ art. 27 (c) (1951). The right to counsel came in the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. This gave rise to "AWOL mills" in which special commands were created for the express purpose of holding and trying (and/or administrative discharging) minor offenders, especially those absent without leave. Those offices had some lawyers but often had non-lawyers as well. By the time I graduated from law school, including the summer before I began, I tried about 300 courts-martial. In correspondence with me, Colonel Borch has opined that the absence of military judges at that time was also a significant reason for the period's faster and more numerous trials. It's certainly true that the absence of a legally trained judge discouraged motion practice. It is clear that we used to try many cases which today have been diverted from the criminal justice system. Overall, the change from a fast and efficient disposition process with fewer due process protections to the present due process system illustrates the on-going shift in military criminal law from discipline to justice.

[72] *See* the ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF HOMELAND SECURITY AND THE SECRETARIES OF THE ARMY, NAVY AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2014 TO SEPTEMBER 30, 2015 at 48-49, http://www.armfor.uscourts.gov/newcaaf/annual/FY15AnnualReport.pdf.

proposed Military Justice Act of 2016, hereinafter the "Proposed Act."[73] The Review Group's product encapsulated the drive to civilianize the military criminal legal system. Congress chose not to enact the Proposed Act. Instead, the actual Military Justice Act of 2016 (the "Enacted Act"), enacted as part of the fiscal year 2017 National Appropriations Act,[74] made far less sweeping changes.

A brief examination of the Proposed Act illustrates its scope and inherent philosophic perspective. The Report that that summarized the review group's findings stated that:

> This Report examines many of the distinctions that remain between military practice under the UCMJ and federal and state civilian practice. The proposals recommend aligning certain procedures with federal civilian practice in instances where they will enhance fairness and efficiency and where the rationale for military-specific practices has dissipated.[75]

The Report recommended the creation of special courts-martial without members with sentences restricted to six month's confinement, a recommendation adopted by Congress in the Enacted Act.[76] Critically, the Proposed Act would have placed enlisted personnel on courts-martial panels for trial of enlisted personnel subject to objection by the accused;[77] eliminated member sentencing for all non-capital cases, placed sentencing authority in the hands of the military judge, and eliminated

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[73] REVIEW GROUP REPORT, *supra* note 1.

[74] National Defense Authorization Act for Fiscal Year 2017 §5001 et seq (December 23, 2016) [hereinafter NDAA 2017].

[75] REVIEW GROUP REPORT, *supra* note 1, at 20. The Report added:

> This Report's proposals recommend retaining military-specific practices where the comparable civilian practice would be incompatible with the military's purpose, function, and mission, or would not further the goals of justice, discipline, and efficiency in the military context. Maintaining distinct military practices and procedures—where appropriate—remains vital to ensuring justice within a hierarchical military organization that must operate effectively both at home and abroad, during times of conflict and times of peace. *Id.* As will be seen below, I think that some of the proposed changes would not have complied with this intent.

[76] NDAA 2017, at § 5163.

[77] *See also* NDAA 2017, at §5182.

automatic appeals. It would have also increased the military judge's power to act before referral. The "civilianization" impact of these proposed changes, had they all been enacted, is clear.

Although military justice has been increasingly divorced from the average member of the armed forces in recent years, member sentencing has survived as a relatively rare but important exception. From the perspective of the accused, member sentencing means sentencing by persons who have likely experienced the realities of military life, especially the impact of deployments and combat duty. But in a time in which most service members have little knowledge of what happens to an accused, especially given the lengthy delays in the process, the members are likely are also a valuable information conduit. Instead the military judge, a judge advocate, likely to have never served in a combat unit let alone have been in combat personally,[78] would have full sentencing responsibility. In the Enacted Act, Congress rejected the total elimination of member sentencing. Instead, it created fixed sizes for is no unrescourts-martial panels and permitted an accused tried by members to elect sentencing by members.[79]

Both the Proposed and Enacted Acts increase the ability of the prosecution to file interlocutory appeals,[80] and sentencing appeals are now possible.[81] Both changes likely increase the time to try a case to finality.

In accordance with the Proposed Act, the Enacted Act largely removes the requirement for convening authorities to take "action" on a court-martial finding. Instead, non-summary court-martial sentences other than death or punitive discharges are self-executing.[82] Sentencing by Military Judge will now follow civilian procedure with each

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[78] Many judge advocates served in non-legal positions before going to law school as members of the Funded Legal Education Program or, more rarely, an Excess Leave Program. *See generally* U.S. DEP'T OF ARMY REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 10. Overall, however, there is no reason to believe that military judges necessarily would have had substantial backgrounds. Of course, this criticism can be met with the reasonable counter argument that there is no requirement that members with such backgrounds be appointed even though Article 25 of the Uniform Code of Military Justice requires appointment of "best qualified" members.

[79] NDAA 2017, at §5183.

[80] *Id.* at §5326.

[81] *Id.* at §5330.

[82] *Id.* at §5324; 5325.

specification (offense) receiving a separate sentence with the judge's decision to run consecutively or concurrently.

Interestingly, neither the Proposed nor Enacted Act removed commanders from serving as convening authorities, the power and responsibility to create (convene) courts-martial, refer cases to them, or to select court-members.[83] Although both the Proposed and Enacted Acts create a form of fixed assignment term for military judges, neither created an independent judiciary and both ignored the risk of post judicial-term retribution.[84] And, neither the review committee nor Congress seems to have even contemplated statutorily enacting limits on military jurisdiction over peacetime offenses in the form of the overruled *O'Callahan v. Parker*[85]—or following the United Kingdom model of further civilianizing the military criminal justice process.[86] In short, military law continues the civilianization process but apparently more slowly than some would prefer.

VI. Where are we going? Where might we want to go?

The Military Review Group opined in its report that:

> The need to promote discipline through an instrument of justice requires a court-martial system that differs in important respects from civilian criminal justice systems. As the Supreme Court has stated, the military remains a "specialized society separate from civilian society . . .

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[83] The Military Justice Review Group chose not to address this issue in light of the recent review of the Response Systems Panel. *See* REVIEW GROUP REPORT, *supra* note 1, at note 34.

[84] *See generally* Fredric Lederer & Barbara Hundley, *Needed: An Independent Military Judiciary: A Proposal To Amend the Uniform Code of Military Justice,* 3 Wm. & M. Bill. Rts. J. L. Rev. 629 (1994).

[85] O'Callahan v. Parker, 395 U.S. 258 (1969) (prohibiting military jurisdiction over "non-service-connected" offenses in the United States during peacetime), *overruled* by *Solorio v. United States,* 483 U.S. 435 (1987); *see generally* GILLIGAN & LEDERER, *supra* note 9, at §2-32.

[86] Prosecutorial decision-making in the U.K. is controlled by a civilian head, the Service Prosecuting Authority. *Service Prosecuting Authority*, MINISTRY OF DEFENCE, http://spa.independent.gov.uk/index.htm (last visited January 29, 2017). All courts-martial judges in the UK are civilians. *See, e.g., Military*, COURTS AND TRIBUNALS JUDICIARY, https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction/ (last visited January 29, 2017).

> [because] it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." This separateness of purpose and mission has shaped the values and traditions that are embodied in the UCMJ . . . . [87]

I know of no scientific way to determine the degree to which a court system delivers justice, as distinguished from efficiency. It is my impression, and I think that of many others, that the military criminal legal system viewed as a whole has done extremely well in its delivery of justice, at least once a case makes it to trial.[88] And, in all fairness military justice should be compared to its highly flawed civilian counterpart, which is hardly an enviable model.[89] Yet, if justice is the goal, the current structure of the military criminal legal system clearly needs further major change. At least at the general court-martial level, which deals with our most serious offenses, there is no contemporary justification in placing prosecutorial decision-making power and even more so juror selection power in commanders. It is not unreasonable for commanders intimately familiar with military life to make prosecutorial recommendations, and, in some compelling cases, decisions. Ordinarily, however, that value is heavily outweighed by concerns about untrained and potentially biased decision-making by non-legally trained officers whose primary goals are mission readiness and victory. Once a case reaches a general court, there should be no reason to believe that anything other than justice is appropriate. That does not negate the potential value in permitting commanders in exceptional circumstances to refer cases to trial or to discontinue a case for sound military reasons.[90] This conclusion might suggest to some that major cases might better be tried by civilian, perhaps Article III federal courts. But, to do so—even if the Article III courts could handle the caseload expansion—would remove the military knowledge necessary for fundamental fairness. Military judges and other

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[87] REVIEW GROUP REPORT, *supra* note 1, at 17.

[88] Concerns about sexual assault and related cases are well known, especially insofar as pretrial decision-making is concerned.

[89] Notably, the accused appearing before special and general courts-martial not only have free counsel, they have competent counsel, and the military appellate courts have been especially active to ensure competency. *See* GILLIGAN & LEDERER, *supra* note 9, at §5-55.00 (4th ed. 2015).

[90] The 2016 mistaken attack on a Doctors Without Borders Afghan medical center might be such a case. But see Eugene Fidell, *The Wrong Way to Handle the Kundez Tragedy*, N.Y. TIMES, May 1, 2016, https://www.nytimes.com/2016/05/02/opinion/the-wrong-way-to-handle-the-kunduz-tragedy.html?_r=0.

judge advocates[91] may not all have combat experience but they are indeed part of military life and culture and that knowledge is utterly essential.

If justice is the goal, what should be the role of commanders for it is both discipline and justice that we need. It is my view that the current military criminal legal system is increasingly failing in its discipline function. We have obviated the argument that for military reasons we must have speedy trials and appeals and eliminated the general deterrent effect of rapid punishment known to our personnel. Our trial rate has plummeted, but largely because of the use of administrative discharges. At present, although the economy is growing, civilian work is frequently competitive for many of our personnel. Should the economy boom, removing the economic discouragement, will commanders have reasonable and useful disciplinary punishment options?

We should adopt a two-tier system—a largely civilianized court-martial system and a rapid limited due-process disciplinary system for minor offenses. Non-judicial punishment under Article 15, "mast punishment" in the Navy and Coast Guard, was intended as a fairly minor, attention-getting informal sanction. Unfortunately, its authors likely never took into account the military personnel managers using Article 15 as a personnel management—and elimination—tool. Commanders frequently won't use Article 15 not only because that process is itself increasingly legalistic and complicated, but also has unduly harsh career results. When I was an Army War College student, a survey that I conducted, concededly now quite dated, showed large numbers of commanders avoiding Article 15 in favor of other, quasi legal, informal procedures.[92]

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[91] Although it must be conceded that most judge advocates try so few contested cases that the criminal law and trial expertise that military counsel had is increasingly absent.

[92] 1992-93 C&GSC class former company commanders' responses to non-judicial punishment alternatives. See 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 8-21.20 (4TH ED. 2015). The question was the degree to which commanders used either extra-military instruction or other, unofficial means, to punish persons otherwise subject to Article 15. My confirmed assumption was that many commanders would do so either to avoid the effort involved in Article 15 or to avoid adverse administrative consequences to the service member. See table 1 for a summary of alternative punishment usage.

	EMI AS PUNISHMENT	%OF TOTAL	UNOFFICIAL PUNISHMENT	% OF TOTAL
Never	185	29.3	265	42.9
Sometimes	378	59.8	319	51.6
Often	69	10.9	34	5.5

Table 1. Use of non-judicial punishment alternatives

If we are to provide commanders the disciplinary power they need, I believe that we should increase Article 15 punishments and remove most procedural protections in return for elimination of their use for administrative personnel management. The United Kingdom system provides for detention for 28 days with an extension to 90 days if approved by higher authority.[93] I would also recommend the actual and public use of Article 15 for at least junior officers in order to eliminate the belief by enlisted personnel that officers receive no punishment for offenses commonly punished if committed by enlisted personnel.[94] At the same time, in addition to permitting a service member to demand trial by court-martial as an alternative, we should restrict the use of Article 15 so that an individual can only receive NJP a limited number of times so that it cannot be used as a subterfuge alternative to court-martial.

We would do well to recognize that the vast majority of junior enlisted personnel—and officers—are young. Many serve in positions in which we are training them for demanding combat duty. Logically, those people are far more likely to commit minor offenses than older personnel or those working in more peaceful pursuits. The soldier trained to and prepared to use violence against the enemy is going to take some time to fully internalize applicable societal limits, especially in garrison. If we are both to ensure discipline and at the same time not over-punish those who go in harm's way, we need a way to firmly get their "attention" but not penalize them for the rest of what might otherwise be a very short

[93] Military Jurisdiction, COURTS AND TRIBUNALS JUDICIARY, https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/jurisdictions/ military-jurisdiction/ (last visited May 22, 2017).

[94] Generally, power to use Article 15 against officers is restricted to highly senior commanders. Officer "punishments" often take the form of bad efficiency or fitness reports, consequences, even when career-ending, that are invisible to enlisted personnel who then believer there are two separate justice standards.

service career.[95] Interestingly, Congress, following the Proposed Act made clear in the Enacted Act that summary courts-martial are not "criminal convictions."[96] This increases the possibility for use of summary courts without civilian collateral consequence, but does not address the military administrative sanction.

VII. In Conclusion

Rome, whether the Republic or the Empire, is long gone. The history of its legions suggest that they were not much concerned about justice, and we can be certain that Americans would reject unmerited punishment for the sake of military discipline. But, the Romans certainly understood discipline, as did General Washington and many of our founders. American military law has evolved and will continue to evolve. It is legalized to an extent that is unprecedented. One that accords with our Bill of Rights and the expectations of our citizens. We have worked hard to achieve just proceedings and largely have succeeded in doing so. But our model in the pursuit of justice has been our civilian legal system, based on a desire and expectation for due process. That system's goals and requirements have nothing to do with marshalling, deploying, and fighting an effective armed force. We can and must do better.

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[95] To say nothing of saving the cost of expensive recruiting and training of replacement. The reader might reasonably ask, "Why not simply change personnel regulations to eliminate use of Article 15's for promotion and retention decisions?" As I learned to my disbelief when I was on active duty in the Office of The Judge Advocate General of the Army, it is sometimes easier to amend the UCMJ than to change personnel regulations, especially if we're in a time of reduction in force.

[96] NDAA 2017, at § 5164.

By Order of the Secretary of the Army:

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