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

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MILITARY LAW REVIEW

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WE'RE DOING THIS WRONG: THE DEPARTMENT OF DEFENSE'S APPLICATION OF THE GUN CONTROL ACT OF 1968 INFRINGES UPON SOME SERVICE MEMBERS' RIGHT TO PURCHASE AND POSSESS PERSONAL FIREARMS

MAJOR RYAN C. LIPTON[*]

I. Introduction

After the devastating 2017 shooting in Sutherland Springs, Texas, the Department of Defense (DoD) discovered gaps in its criminal reporting procedures that allowed the shooter to purchase the firearm he used to kill twenty-six individuals.[1] The Sutherland Springs shooter was a former active-duty Airman with a general court-martial conviction for domestic violence—a circumstance that precluded him from purchasing and possessing a firearm under Federal law.[2] While the Air Force received the

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[1] *See* INSPECTOR GEN., U.S. DEP'T OF DEF., REPORT NO. DODIG-2019-030, REPORT OF INVESTIGATION INTO THE UNITED STATES AIR FORCE'S FAILURE TO SUBMIT DEVIN KELLEY'S CRIMINAL HISTORY INFORMATION TO THE FEDERAL BUREAU OF INVESTIGATION (2018) [hereinafter DODIG-2019-030]. This investigation is redacted.

[2] 18 U.S.C. § 922(g), (n); *see* DODIG-2019-030, *supra* note 1, at 61.

brunt of the negative media publicity for the Sutherland Springs shooting, two DoD investigations revealed that every military service failed to report to the Department of Justice (DOJ) thousands of individuals who were prohibited from possessing or purchasing a firearm.[3] To close this reporting gap, each service has implemented policy measures designed to ensure Service members who are prohibited from possessing firearms are unable to purchase them from firearms dealers.[4]

The Sutherland Springs shooter fell into one of many categories of individuals who Congress, through 18 U.S.C. § 922(g), (n), prohibited from either possessing or receiving a firearm.[5] One category of prohibited persons is "unlawful users" of controlled substances.[6] In furtherance of that particular prohibition, each service's regulations aim to prevent Service members who have engaged in a single instance of drug use from both possessing and purchasing a firearm.[7] This article establishes that those policies are premised upon a legally deficient application of the unlawful-user prohibition and, consequently, infringe upon some Service members' Second Amendment rights. This article also provides recommendations for how the services should amend their practices to conform to the law.

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[3] *See* DoDIG-2019-030, *supra* note 1; INSPECTOR GEN., U.S. DEP'T OF DEF., REPORT NO. DODIG-2018-035, EVALUATION OF FINGERPRINT CARD AND FINAL DISPOSITION REPORT SUBMISSIONS BY MILITARY SERVICE LAW ENFORCEMENT ORGANIZATIONS (2017) [hereinafter DoDIG-2018-035]; *see also* Alex Horton, *The Air Force Failed to Report Dozens of Violent Service Members to FBI Gun Databases*, WASH. POST (Nov. 28, 2017, 6:03 PM), https://www.washingtonpost.com/news/checkpoint/wp/2017/11/28/the-air-force-failed-to-report-dozens-of-violent-service-members-to-fbi-gun-databases; Tom Vanden Brook, *Air Force Failed Four Times to Prevent Sutherland Springs Church Killer from Buying Guns*, USA TODAY (Dec. 7, 2018, 11:37 AM), https://www.usatoday.com/story/news/politics/2018/12/07/air-force-failed-four-times-prevent-sutherland-springs-shooter-gun-purchase/2237400002.

[4] *See* discussion *infra* Part IV.

[5] § 922(g), (n); *see* discussion *infra* Section II.A.

[6] § 922(g)(3). The text of § 922(g)(3) states:

> It shall be unlawful for any person . . . who is an *unlawful user* of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . to ship or transport in interstate or foreign commerce, or *possess* in or affecting commerce, any firearm or ammunition; or to *receive* any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id. (emphasis added). Note that the prohibition applies to both *unlawful users* of controlled substances and *addicts* of controlled substances. This article's scope is limited to an analysis of the military's application of the *unlawful-user* prohibition.

[7] *See* discussion *infra* Part IV.

Congress did not define the term "unlawful user" in § 922 or elsewhere in Title 18.[8] In the absence of a definition, the Federal circuit courts developed one. To be considered an unlawful user, one must use a controlled substance with regularity and over an extended period of time.[9] Additionally, the drug use must be contemporaneous with the purchase or possession of a firearm. The services, however, incorrectly enforce the unlawful-user prohibition against Service members through orders and regulations, which apply a different standard.[10] In contrast to the requirements outlined by the Federal courts, each service's policies prohibit Service members from possessing and purchasing firearms after a single occasion of drug use. Moreover, pursuant to those policies, to be considered an unlawful user, that single instance of drug use does not need to be substantiated by a court-martial conviction or a finding of guilt at nonjudicial punishment. In fact, some services declare that a mere positive result on a drug test renders a Service member an unlawful user under the statute.

Part II of this article discusses the framework of Federal firearms statutes and regulations by exploring the relationship between the Gun Control Act of 1968 (GCA), the Brady Handgun Violence Prevention Act (Brady Act), and Chapter 27 of the *Code of Federal Regulations* (C.F.R.). Part III examines the pertinent Federal cases, surveying how the circuits apply the unlawful-user prohibition in the absence of a definition from lawmakers. Part IV explores how each of the services implements the unlawful-user prohibition through policy, revealing a reliance on a definition that was created by the Bureau of Alcohol, Tobacco, and Firearms (ATF) and is in conflict with Federal case law. Part V addresses that conflict by applying the law to those policies while considering the most likely arguments for defending the policies in their current form. Part VI makes recommendations for the ways in which the services and the DoD should amend their practices to comply with the law. Finally, Part VII concludes that the services are incorrectly applying the unlawful-user prohibition without any legal justification, placing unnecessary risk on the services and commanders.

II. Federal Firearms Legislation and Regulations

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[8] *See* 18 U.S.C. §§ 921–927; *see also* discussion *infra* Part III. There is no dispute that Congress did not define this term.
[9] *See* discussion *infra* Part III.
[10] *See* discussion *infra* Part IV.

This part examines the interplay between (1) Congress' firearm prohibitions outlined in the GCA, now codified in 18 U.S.C. § 922(g), (n); (2) the Brady Act, which directs the Attorney General to establish and supervise a national background check system; and (3) the ATF's administrative regulations, which provide guidance for the enforcement of firearm prohibitions, to include the unlawful-user prohibition.

A. Legislation

Congress passed the GCA in 1968 "to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States."[11] To that end, the GCA criminalized the possession, receipt, transfer, and sale of firearms for categories of individuals that Congress deemed dangerous.[12] One of those prohibitions, the subject of this article, includes "any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."[13]

In its original form, the GCA included only four categories of prohibited persons.[14] Since its enactment, Congress has amended the GCA by expanding the scope of prohibited categories and by imposing strict requirements related to the sale of firearms.[15] In 1993, Congress passed the Brady Act, which accomplished two objectives: (1) mandating that the Attorney General create a comprehensive indexing system called the National Instant Criminal Background Check System (NICS), and (2) imposing a requirement on firearms dealers, commonly referred to as Federal firearms licensees (FFLs), to use the NICS to conduct background checks on prospective buyers prior to completing any firearm sale.[16]

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[11] S. REP. NO. 90-1097, at 2 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113–14.
[12] 18 U.S.C. § 922(g), (n).
[13] *Id.* § 922(g)(3).
[14] *See* Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 922(d), 82 Stat. 1213, 1220 (current version at 18 U.S.C. § 922(g)).
[15] 18 U.S.C. § 922(g), (n); *see, e.g.*, Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009-371 to -372 (1996) (codified as amended at 18 U.S.C. § 922(g)(9)) (criminalizing the possession of firearms by individuals convicted of misdemeanor crimes of domestic violence through legislation commonly referred to as the "Lautenberg Amendment").
[16] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1536–41 (1993) (codified as amended at 18 U.S.C. § 922(t)). Licensed dealers, commonly

Indeed, even prior to implementation of the Brady Act, the GCA prohibited FFLs from selling firearms to individuals whom an FFL had "reasonable cause" to believe fell within a prohibited category.[17] However, absent any specific knowledge of the buyer's personal or criminal history, it was difficult for an FFL to determine whether a prospective buyer was a prohibited person. Congress' mandate that the Attorney General establish the NICS was a significant step in tightening this gap. The Brady Act specifically directed the Attorney General to

> establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.[18]

To date, the GCA continues to prohibit FFLs from selling firearms to any individual whom an FFL has reasonable cause to believe fits into a prohibited category.[19] Effectively, the Brady Act requires firearms dealers to use the NICS to establish the absence of such reasonable cause prior to completing the sale.

B. The NICS Background Check Process

The NICS is an electronically-accessed system that FFLs use to determine the presence of any information that would prohibit a buyer from possessing a firearm. Using a buyer's personal information, the NICS scrubs three databases: (1) the National Crime Information Center (NCIC), (2) the Interstate Identification Index (III), and (3) the NICS Index.[20] The NCIC

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referred to as Federal firearms licensees (FFLs) are those who are engaged in the business of selling firearms. *See* 18 U.S.C. § 921(a)(11)(A), (a)(21)(C). Thus, often referred to as the "gun show loophole," the requirement to conduct background checks does not extend to individuals who engage in the *occasional* firearm transaction. *See id.* § 921(a)(21)(C).

[17] *See* Gun Control Act of 1968 § 102(d)(1)–(4).

[18] Brady Handgun Violence Prevention Act § 103(b) (codified as amended at 34 U.S.C. § 40901(b)). Notably, in directing the Attorney General to establish the National Instant Background Check System (NICS), Congress specifically chose to use the phrase "would violate," as opposed to "might violate" or "may violate." *See* discussion *infra* Part VI.

[19] 18 U.S.C. § 922(d)(1)–(9).

[20] *See National Instant Criminal Background Check System Posts NICS Index Data*, FED. BUREAU OF INVESTIGATION (Mar. 18, 2016), https://www.fbi.gov/news/pressrel/press-releases/national-instant-criminal-background-check-system-posts-nics-index-data; *see also* FED. BUREAU OF INVESTIGATION, DEP'T OF JUST., NATIONAL INSTANT CRIMINAL

holds records pertaining to individuals who are the subjects of protection orders, active criminal warrants, and immigration violations.[21] The III is a fingerprint-supported index that maintains state and Federal criminal arrest and disposition records.[22] The NICS Index (not to be confused with the overarching NICS background check system) is unique because the Attorney General created it to serve as a repository of information pertaining specifically to individuals prohibited from possessing or purchasing firearms under 18 U.S.C. § 922(g), (n).[23] It is to the NICS Index that military law enforcement agencies submit a Service member's personal information when that Service member's conduct triggers a firearm prohibition.[24]

C. The Administrative Regulation

As one might imagine, the Attorney General's implementation of the NICS was no easy task. Successful implementation called for a variety of state and Federal agencies to coordinate and required the system to be accurate and accessible to FFLs. To facilitate that coordination, the Brady Act authorized the Attorney General, as the head of the DOJ, to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code . . . ."[25] To that end, the ATF published regulatory guidance in 1997, now chaptered within 27 C.F.R. § 478.11, which was designed to ensure the relevance and accuracy of the information that Federal agencies would need to provide

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BACKGROUND CHECK SYSTEM (NICS) SECTION, 2018 OPERATIONS REPORT 1 (2018) [hereinafter 2018 NICS OPERATIONS REPORT].

[21] 2018 NICS OPERATIONS REPORT, *supra* note 20.

[22] *See* BUREAU OF JUST. STATS., DEP'T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2018 at vi, viii (2020).

[23] *See National Instant Criminal Background Check System Posts NICS Index Data*, *supra* note 20; *see also* 2018 NICS OPERATIONS REPORT, *supra* note 20.

[24] *See* 2018 NICS OPERATIONS REPORT, *supra* note 20; *see also* U.S. DEP'T OF AIR FORCE, POL'Y DIR. 71-1, CRIMINAL INVESTIGATIONS AND COUNTERINTELLIGENCE para. 2.9 (1 July 2019) [hereinafter AFPD 71-1]; U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 12-4 (27 Sept. 2016) [hereinafter AR 190-45]; Marine Administrative Message, 652/18, 091833Z Nov 18, Commandant, Marine Corps, subject: Implementation of Criminal Justice Information Reporting Requirements and Guidance para. 4.c.2.d [hereinafter MARADMIN Message 652/18]; Navy Administrative Message, 076/18, 291241Z Mar 18, Chief, Naval Operations, subject: Gun Control Act of 1968 Criminal Justice Information Reporting Requirements para. 1 [hereinafter NAVADMIN Message 076/18].

[25] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(e)(1), 107 Stat. 1536, 1542 (1993) (codified as amended at 34 U.S.C. § 40901(e)). Notably, in bestowing this authority upon the Attorney General, Congress used the phrase "would violate," as opposed to "might violate" or "may violate." *See* discussion *infra* Part VI.

to the Attorney General by way of submissions in the NICS Index.[26] That regulation defines each prohibition under 18 U.S.C. § 922(g), (n) by articulating the type of conduct that would render someone prohibited from receiving a firearm.[27] Included in that regulation is the ATF's definition of the unlawful-user prohibition, which reads as follows:

> A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. *For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or*

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[26] 27 C.F.R. § 478.11 (2019). The originating guidance for this regulation provided the following:

> In order to establish NICS in such a way that it incorporates the information needed for all the categories of prohibited persons mentioned above, records systems from both Federal and State agencies will be included in the national system. For example, records on fugitives are needed from State and Federal law enforcement agencies. To ensure that the information provided to the national system is *accurate*, the categories of prohibited persons must be defined in the regulations as clearly as possible.

Definitions for the Categories of Persons Prohibited from Receiving Firearms, 62 Fed. Reg. 34634, 34635 (emphasis added).

[27] 27 C.F.R. § 478.11; *see* discussion *infra* Section V.D.

> *other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.*[28]

As demonstrated by its lengthy definition, the ATF recognized that Congress' use of the phrase "unlawful user of a controlled substance" left significant room for interpretation. As a result, the ATF interpreted the statute as broadly as it could, presumably in an effort to prevent those who *might* be unlawful users from purchasing firearms. However, the U.S. Courts of Appeals also took note of the statute's lack of clarity. Through decades of case law, the courts have adopted and applied a much different definition—one that now conflicts with the ATF's 1997 definition.

III. The Federal Courts Grapple with Congress' Failure to Define "Unlawful User"

In the 1977 case of *United States v. Ocegueda*,[29] the Ninth Circuit became the first Federal court of appeals to address a challenge to the term "unlawful user" under the GCA. In that case, the trial court convicted Ocegueda of receiving firearms while being an unlawful user of a controlled substance.[30] Ocegueda had a significant history of heroin use, as evidenced by a combination of his own admissions, witness testimony, and drug use convictions that spanned several years before, during, and after the time in which he possessed firearms.[31] On appeal, he argued that the term "unlawful user" was unconstitutionally vague in violation of the Fifth Amendment's due process clause because the term failed to put him on notice as to what conduct the statute criminalized.[32] The Ninth Circuit rejected that argument and affirmed the conviction, holding that, as applied to Ocegueda, the term "unlawful user" was not unconstitutionally vague.[33]

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[28] 27 C.F.R. § 478.11 (emphasis added). The emphasized text depicts the additions the Bureau of Alcohol, Tobacco, and Firearms (ATF) added based specifically on Department of Defense (DoD) input. *Compare id.*, *with* Definitions for the Categories of Persons Prohibited from Receiving Firearms, 62 Fed. Reg. at 34636; *see* discussion *infra* Section V.D.
[29] United States v. Ocegueda, 564 F.2d 1363 (9th Cir. 1977).
[30] *Id.* at 1365. Notably, the challenge in this case was to 18 U.S.C. § 922(h)(3), not § 922(g)(3), because the statute was organized differently in 1977.
[31] *Id.* at 1366–67.
[32] *Id.* at 1366.
[33] *Id.* Notably, the Ninth Circuit considered *Ocegueda* less than two years after the Supreme Court narrowed the reach of most vagueness challenges. *See* United States v. Powell, 423 U.S. 87, 92 (1975) (holding that attacks based upon non-First Amendment principles may

Considering Ocegueda's prolonged use of heroin, which spanned several years, to include the period of time that he possessed a firearm, the Ninth Circuit reasoned that the term "unlawful user" unquestionably included his conduct.[34] In light of the factual background underlying Ocegueda's conviction, it is unsurprising that the Ninth Circuit found his conduct to be within the scope of the unlawful-user prohibition intended by Congress. However, the *Ocegueda* opinion is significant because it is the first from a Federal circuit to acknowledge that, although the appellant's conduct was clearly contemplated by the term "unlawful user," the phrase may nevertheless be unconstitutionally vague as applied to an individual with a less significant history of drug use or as applied to drug use that occurs outside the time period of an individual's firearm possession or purchase.[35]

The term "unlawful user" consists of two subcomponents: the *unlawful* component and the *user* component. Generally, use of a controlled substance will be considered unlawful if it occurs without a medical prescription or if it involves a controlled substance that cannot be prescribed.[36] For the Ninth Circuit in *Ocegueda*, addressing the unlawful nature of the appellant's use was straightforward, as heroin is a federally prohibited controlled substance for which no lawful use existed and a substance prohibited under California law when used without a prescription.[37] The *user* component of the phrase is the principal focus of both *Ocegueda* and this article.

A. What Makes Someone an Unlawful User?

Without a clear definition, the following four questions remain unanswered concerning the unlawful-user prohibition: (1) Does evidence of drug *possession* create an inference of drug *use*? (2) How frequently

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only be challenged when considering the facts of the case at hand or as applied); *see generally* United States v. Mazurie, 419 U.S. 544 (1975). As a result, no appellate court will ever consider whether the term "unlawful user" is unconstitutionally vague on its face.

[34] *Ocegueda*, 564 F.2d at 1366.

[35] *Id.* ("Had Ocegueda used a drug that may be used legally by laymen in some circumstances, or had his use of heroin been infrequent and in the distant past, we would be faced with an entirely different vagueness challenge to the term 'unlawful user' in § 922(h)(3). However, Ocegueda's prolonged use of heroin, occurring before, during and after the period of the gun purchases, presents a situation where the term cannot be considered vague under the due process clause of the Fifth Amendment.").

[36] *See* 18 U.S.C. § 922(g)(3) (prohibiting unlawful users of controlled substances from possessing and receiving firearms); 21 U.S.C. § 802(6) (defining the term "controlled substance"); 21 U.S.C. § 812(b)(1)(B) (establishing controlled substance schedules).

[37] *See* 21 U.S.C. § 812(b)(1)(B); *Ocegueda*, 564 F.2d at 1365–66.

must someone use a controlled substance to be considered an unlawful user? Is one-time drug use enough? How about ten times? (3) Whatever the frequency required, once an individual reaches that threshold, is the drug user prohibited from possessing or purchasing a firearm for life? If not, when can a former drug user regain the right to possess or purchase a firearm? (4) To be considered an unlawful user, what proximity of time is required between the drug use and the firearm purchase or possession? The cases discussed below address these four gaps by evaluating the chronological evolution of the statute's legal application in Federal court.

1. The Federal Circuits Fill the Gaps Left by Congress

In 1997, the Tenth Circuit turned its attention to the distinction between drug use and drug possession and considered the question of proximity between the drug use and firearm possession in *United States v. Reed*.[38] Prior to his appeal, the Government charged Reed with six counts of possessing a firearm while being an unlawful user of marijuana, in violation 18 U.S.C. § 922(g)(3).[39] In a pretrial motion, Reed sought to dismiss those charges, arguing that the term "unlawful user" was unconstitutionally vague on its face.[40]

Relying on the Government's proffer of anticipated evidence at trial, the district court granted that motion for some of the charges.[41] That ruling was based on the Government's lack of evidence establishing a temporal nexus between the drug use and firearm possession, as well as the Government's reliance on establishing Reed's marijuana use through an inference from his marijuana possession.[42] Importantly, the district court stated:

> The United States concedes that the statute covers only persons who used marijuana during the time period the person possessed a firearm, noting that the statute applies to any person who "*is* an unlawful user" and not "*was* an unlawful user." In fact, other circuits have held that under 18 U.S.C. § 922(g)(3), or its predecessor, 18 U.S.C. § 922(h)(3), the unlawful use must occur while the accused

[38] *See* United States v. Reed, 114 F.3d 1067 (10th Cir. 1997), *rev'g* 924 F. Supp. 1052 (D. Kan. 1996).
[39] *Id.* at 1068.
[40] *Id.*
[41] *Id.*
[42] *Reed*, 924 F. Supp. at 1056–57.

> is the possessor of the firearm, although not necessarily at the same moment.
>
> . . . [A] facial examination of the statute provides no time frame in which "use" must occur in order for someone to be an "unlawful user". In other words, the statute does not indicate that point in time when someone who *is* an unlawful user, and subject to the statute, becomes someone who *was* an unlawful user, and not subject to the statute.
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> . . . .
>
> . . . In enacting § 922(g)(3), Congress could have prohibited possession of a controlled substance while in possession of a firearm, but did not do so. . . . [T]he meaning of "user of" in § 922(g)(3) cannot be interpreted to support a violation based on possession alone; "use" of the controlled substance must be alleged.[43]

Following the Government's appeal, the Tenth Circuit reversed the district court's ruling on procedural grounds.[44] Despite the reversal, the Tenth Circuit acknowledged the validity of the district court's concerns related to properly interpreting the statute and confirmed that "there must be some proximity in time between drug use and weapon possession."[45] The court went on to validate the district court's analysis, explaining that "[t]he statute prohibits possession of a weapon by one who 'is' a user, not one who 'was' a user."[46]

Two years later, in *United States v. Edwards*, the Fifth Circuit addressed a similar vagueness challenge.[47] At trial, the district court convicted Edwards of possessing a firearm while being an unlawful user of a controlled substance, in violation 18 U.S.C. § 922(g)(3).[48] The Government's evidence at trial included numerous arrests and convictions for marijuana use over a seven-month period, as well as the appellant's admission that he used marijuana on a daily basis for "two to three years"

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[43] *Id.* at 1055–56.
[44] *Reed*, 114 F.3d at 1070–71 (holding that the district court erred by failing to consider the vagueness challenge as applied, since non-First Amendment vagueness challenges must be considered as applied to the defendant's conduct).
[45] *Id.* at 1069.
[46] *Id.*
[47] United States v. Edwards, 182 F.3d 333 (5th Cir. 1999).
[48] *Id.* at 335.

during a period of time that overlapped with his firearm possession.[49] Additionally, when the police discovered the firearm at issue, Edwards was in possession of both marijuana and cocaine.[50] Like the Ninth Circuit in *Ocegueda*, the Tenth Circuit held in *Edwards* that the term "unlawful user" was not unconstitutionally vague as applied to the appellant's conduct.[51] The court reasoned that an "ordinary person would understand" that persistent drug use occurring during a period of firearm possession makes one an unlawful user within the meaning of the statute.[52]

In the 2001 case of *United States v. Purdy*, the Ninth Circuit considered whether the appellant's regular use of marijuana, methamphetamine, and cocaine over a four-year period, which was contemporaneous with his firearm possession, placed him on notice that he was an unlawful user within the meaning of 18 U.S.C. § 922(g)(3).[53] Revisiting its analysis in *Ocegueda*, the court held that, as applied to the appellant, the term "unlawful user" was not unconstitutionally vague.[54] The Ninth Circuit reasoned that "Purdy's drug use was sufficiently consistent, 'prolonged,' and close in time to his gun possession" to adequately put him on notice that he fell within the meaning of the statue as intended by Congress.[55] As in *Ocegueda*, considering the extent of the appellant's drug use, this holding is not surprising. However, in *Purdy*, the Ninth Circuit also re-addressed its reservations previously articulated by the *Ocegueda* court: that "infrequent" drug use or drug use in the "distant past" gives rise to an "entirely different" vagueness challenge.[56] The Ninth Circuit took this one step further in *Purdy*, fashioning a definition to be applied to future prosecutions for violations of § 922(g)(3):

> We note, however, that the definition of an "unlawful user" is not without limits. Indeed, in *Ocegueda* we concluded our analysis by stating:
>
> > Had *Ocegueda* used a drug that may be used legally by laymen in some circumstances, or *had his use of heroin*

[49] *Id.* at 335–36.
[50] *Id.* at 336.
[51] *Id.* at 334–35.
[52] *Id.* at 336.
[53] United States v. Purdy, 264 F.3d 809, 811 (9th Cir. 2001).
[54] *Id.* at 813.
[55] *Id.*
[56] *Id.* at 813–14; United States v. Ocegueda, 564 F.2d 1363, 1367 (9th Cir. 1977).

> *been infrequent and in the distant past*, we would be faced with an entirely different vagueness challenge to the term "unlawful user" . . . .
>
> We think this language bears repeating. The facts of this case establish beyond doubt that Purdy's drug use, like that of Ocegueda, was sufficient to put him on notice that he fell within the statutory definition of "unlawful [drug] user." We emphasize, however, that to sustain a conviction under § 922(g)(3), the government must prove—as it did here—that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm.[57]

With that, the *Purdy* court became the first Federal court of appeals to comprehensively define the unlawful-user prohibition and to articulate the Government's burden when prosecuting an individual under § 922(g)(3).[58] Since then, each circuit to address the issue has adopted the Ninth Circuit's application, requiring the Government to establish that the defendant used drugs with regularity, over an extended period of time, and contemporaneously with the firearm purchase or possession.[59]

The *Purdy* court's definition accounts for three of the four ambiguities Congress inadvertently created. Specifically, it addresses (1) the

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[57] *Purdy*, 264 F.3d at 812–13 (quoting *Ocegueda*, 564 F.2d at 1366).

[58] *Id.*

[59] *See, e.g.*, United States v. Yancy, 621 F.3d 681, 687 (7th Cir. 2010) ("Every circuit to have considered the question has demanded that the habitual abuse be contemporaneous with the gun possession."); United States v. Marceau, 554 F.3d 24, 30 (1st Cir. 2009) ("In order to avoid unconstitutional vagueness, courts have held that the critical term 'unlawful user' requires a 'temporal nexus between the gun possession and regular drug use.' Refined further, an 'unlawful user' is one who engages in 'regular use over a long period of time proximate to or contemporaneous with the possession of the firearm.'" (first quoting United States v. Edwards, 540 F.3d 1156, 1162 (10th Cir. 2008); and then quoting United States v. McCowan, 469 F.3d 386, 392 n.4 (5th Cir. 2006))); United States v. Augustin, 376 F.3d 135, 138–39 (3d Cir. 2004) ("Those of our sister courts of appeals that have considered 18 U.S.C. § 922(g)(3) have concluded, as do we, that one must be an unlawful user at or about the time he or she possessed the firearm and that to be an unlawful user, one needed to have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm."); United States v. Turnbull, 349 F.3d 558, 561 (8th Cir. 2003), *vacated on other grounds*, 543 U.S. 1099 (2005) (finding *Booker* error); United States v. Jackson, 280 F.3d 403, 406 (4th Cir. 2002) (holding that the appellant's drug use was sufficiently contemporaneous with his firearm possession).

requirement to establish *use* of a controlled substance rather than mere *possession*, (2) the frequency of use, and (3) the temporal nexus between use of a controlled substance and possession of a firearm. However, the *Purdy* definition does not address the *duration* of the prohibition under 18 U.S.C. § 922(g)(3). In *United States v. Yancy*, the Seventh Circuit addressed that issue.[60]

In *Yancy*, the state arrested the appellant while in possession of both a firearm and a small amount of marijuana.[61] Additionally, he confessed that he smoked marijuana on a daily basis for the two years leading up to his arrest.[62] At trial, Yancy conceded that his conduct amounted to a violation of § 922(g)(3) but moved to dismiss the charge, arguing that the statute violated his Second Amendment right to possess a firearm for self-defense as established by the Supreme Court in *District of Columbia v. Heller*.[63] After the district court denied that motion, the appellant entered into a conditional plea of guilty, reserving the right to appeal the conviction on Second Amendment grounds.[64] On appeal, the Seventh Circuit held that the unlawful-user prohibition was a reasonable restriction on the appellant's Second Amendment rights.[65] That holding was premised, in part, on the notion that the unlawful-user prohibition is less onerous than some of the other prohibitions under § 922(g).[66] Specifically, the court noted that unlike the permanent firearm prohibition applicable to those convicted of a felony under § 922(g)(1), drug users under § 922(g)(3) are only subject to a temporary firearm prohibition and may regain the right to possess a firearm once their drug use ceases.[67] Making this distinction, the court recognized that once an individual stops using drugs, the individual can no longer be considered an unlawful user under § 922(g)(3).[68]

The facts of the cases discussed above involve individuals with a significant or consistent history of drug use. However, on the other end of the spectrum are individuals who use drugs infrequently or without any degree of consistency. As the *Ocegueda* and *Purdy* courts noted, it is far

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[60] *Yancy*, 621 F.3d at 686–87.
[61] *Id.* at 682.
[62] *Id.*
[63] *Id.*; *see* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).
[64] *Yancy*, 621 F.3d at 682–83.
[65] *Id.* at 687.
[66] *Id.* at 686–87.
[67] *Id.* The *Yancy* court deduced that the unlawful-user prohibition must necessarily be temporary because of the requirement of contemporaneous firearm possession and drug use. *Id.* at 687.
[68] *Id.* at 686–87.

more difficult to apply the unlawful-user prohibition to infrequent or irregular drug use.[69]

In *United States v. Augustin*, the Third Circuit considered whether a single instance of marijuana use, which occurred a mere six hours prior to appellant's firearm possession, qualified the appellant as an unlawful user.[70] Augustin smoked marijuana early one evening with two other individuals, one of whom possessed a handgun.[71] Later that evening, the appellant and his two accomplices committed an armed carjacking during which one of the accomplices pointed the gun at the car owner's head.[72] The trio then drove the stolen car for several hours until approximately one o'clock the following morning, when they decided to abandon that vehicle to steal another.[73] During the second carjacking, the appellant possessed the firearm for the first time, using it to point at the victim-motorist while stealing the car and to strike the victim-motorist in the head.[74]

At trial, the district court convicted the appellant under 18 U.S.C. § 922(g)(3).[75] He appealed, arguing that the evidence failed to establish that he was an unlawful user because the only evidence of drug use the Government offered was his single use of marijuana that occurred six hours prior to the time at which he physically possessed the firearm.[76] The Third Circuit agreed and overturned the conviction despite the close proximity of time between the use of marijuana and the firearm possession.[77] Adopting the *Purdy* test, the court reasoned that because the appellant's drug use neither occurred with regularity nor over an extended period of time, he was not an unlawful user under 18 U.S.C. § 922(g)(3).[78]

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[69] United States v. Purdy, 264 F.3d 809, 813–14 (9th Cir. 2001) (re-addressing the Ninth Circuit's reservations in *Ocegueda* that "infrequent" drug use or drug use in the "distant past" gives rise to an "entirely different" vagueness challenge); United States v. Ocegueda, 564 F.2d 1363, 1367 (9th Cir. 1977).
[70] *See* United States v. Augustin, 376 F.3d 135 (3d Cir. 2004).
[71] *Id.* at 137.
[72] *Id.* at 138.
[73] *Id.*
[74] *Id.* at 137.
[75] *Id.*
[76] *Id.* at 138.
[77] *Id.* at 139.
[78] *Id.* n.6 ("Even assuming that the [G]overnment established that Augustin's gun possession and his isolated use of marijuana were sufficiently close in time, use of drugs with some regularity is required to support a conviction under 18 U.S.C. § 922(g)(3). *See Jackson*, 280 F.3d at 406 ('Section 922(g)(3) does not forbid possession of a firearm *while unlawfully using*

If a single instance of drug use a mere six hours prior to possessing a firearm does not trigger the unlawful-user prohibition, is a Service member, who has been convicted of marijuana use at a special court-martial but who has no other history of drug use or drug possession, prohibited from possessing a firearm? Fortunately, the U.S. Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) has answered that question.

2. The U.S. Navy-Marine Corps Court of Criminal Appeals Adopts the Federal Circuits' Approach

In *United States v. Freitas*, the N.M.C.C.A. considered whether a Marine was an unlawful user pursuant to 18 U.S.C. § 922(g)(3) when he used marijuana during the period of time in which he also possessed a firearm.[79] Private Freitas acquired a personal firearm in February 2001 and stored it in the bedroom of his off-base residence.[80] He smoked marijuana at his home on 26 March 2001 and tested positive on a unit urinalysis on 4 April 2001.[81] One month later, on 4 May 2001, his friend, another Marine, visited the appellant and committed suicide using the appellant's personal firearm while at the appellant's home.[82] Law enforcement seized the firearm the same day, ending the appellant's firearm possession.[83] Following that seizure, the appellant used marijuana for a second time, which was detected on a 24 May 2001 urinalysis.[84] Thereafter, the appellant's commander referred two specifications of wrongful drug use in violation Article 112a, Uniform Code of Military Justice (UCMJ), to a special court-martial.[85]

On 7 November 2001, pursuant to a pretrial agreement, Private Freitas pleaded guilty to both specifications and did not receive a punitive discharge.[86] At a subsequent special court-martial, the Government charged him with a violation of 18 U.S.C. § 922(g)(3) for possessing a firearm while being an unlawful user of a controlled substance.[87] Pursuant to a second pretrial agreement, the appellant pleaded guilty to that offense.[88] During

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a controlled substance. Rather, the statute prohibits *unlawful users* of controlled substances (and those addicted to such substances) from possessing firearms.') (emphasis in original).").
[79] United States v. Freitas, 59 M.J. 755 (N-M. Ct. Crim. App. 2004).
[80] *Id.* at 756.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 756, 758–59.
[84] *Id.*
[85] *Id.* at 756.
[86] *Id.*
[87] *Id.*
[88] *Id.*

the providence inquiry and in the stipulation of fact, the appellant asserted that he was an unlawful user of a controlled substance, as established by his use of marijuana on 26 March 2001 and on or about 24 May 2001.[89] The military judge accepted his guilty pleas and determined that that appellant's marijuana use rendered him an unlawful user under 18 U.S.C. § 922(g)(3).[90]

On appeal to the N.M.C.C.A., Private Freitas argued that his use of marijuana did not qualify him as an unlawful user.[91] Consistent with the law established by the Federal courts, the N.M.C.C.A. agreed and set aside the conviction.[92] The court reasoned that his marijuana use was insufficiently consistent and prolonged to qualify him as an unlawful user.[93] Adopting Federal case law, the N.M.C.C.A. articulated that designation of an individual as an unlawful user requires that the drug use be sufficiently consistent, prolonged, and close in time to the firearm possession.[94] Moreover, like in *Augustin*, the *Freitas* court specifically noted that the appellant's use did not trigger the unlawful-user prohibition despite the fact that his use was contemporaneous with his firearm possession.[95] The N.M.C.C.A.'s analysis is critical because it establishes that even when an individual's single instance of drug use is contemporaneous with the firearm possession, that individual will not be considered an unlawful user if the use is not also sufficiently consistent and over a prolonged period of time.[96]

Freitas is the only military appellate opinion to tackle the unlawful-user analysis. Notably, the N.M.C.C.A. applied the unlawful-user definition adopted by the Federal courts, not the interpretation promulgated by the ATF. The N.M.C.C.A.'s adoption of the law applied in Article III courts is significant because it serves as persuasive authority that the unlawful-user prohibition should not apply differently to Service members.

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[89] *Id.*
[90] *Id.*
[91] *Id.* at 755.
[92] *Id.* at 759.
[93] *Id.*
[94] *Id.* at 757–59.
[95] *Id.* at 759. The court's analysis regarding the appellant's single use suggests that the second use, which occurred shortly after law enforcement seized the firearm, was not relevant to a determination of whether the appellant qualified as an unlawful user. That is because that second use occurred outside of the window within which the appellant possessed the firearm. *Id.*
[96] *Id.*

IV. The DoD Implements the DOJ's Guidance

The ATF's unlawful-user definition, found in 27 C.F.R. § 478.11, has remained fundamentally unchanged since 1997,[97] despite substantial evolution in the law.[98] However, the DOJ continues to rely on the outdated 27 C.F.R. § 478.11 definition through its enforcement of the GCA.[99] Moreover, in reliance on the DOJ's erroneous application, each of the military services applies the unlawful-user prohibition incorrectly and to the detriment of some Service members.

A. The DOJ and the ATF are Providing Incorrect Guidance to the DoD

On 16 January 2013, one month after the tragic shooting at Sandy Hook Elementary School in Newton, Connecticut, President Barack Obama issued a memorandum designed to strengthen the country's background check procedures for firearm purchases.[100] Among other things, that memorandum directed the DOJ to provide guidance to Federal agencies regarding the sharing of Federal records to ensure that individuals within the GCA's prohibited categories are unable to purchase a firearm from an FFL.[101] In furtherance of that directive, the DOJ provided written guidance in March 2013 to all Executive agencies to specifically address the GCA's application to Service members.[102] That document provided explanations and definitions for each of the ten categories of prohibited individuals under the GCA, to include unlawful users of controlled substances.[103] The publication also provided guidance to all Executive agencies regarding the types of records the DOJ views as relevant to determining whether an individual falls within one of those ten categories.[104]

Not surprisingly, the DOJ's guidance pertaining to the unlawful-user prohibition is a mirror image of the language found in 27 C.F.R. § 478.11.[105] In its guidance, the DOJ reinforces its regulation regarding the inference that

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[97] *See* discussion *supra* Section II.C.
[98] *See generally* discussion *supra* Part III (surveying case law developments in several Federal courts of appeals).
[99] *See* discussion *infra* Section IV.A.
[100] Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System, 78 Fed. Reg. 4297 (Jan. 16, 2013).
[101] *Id.*
[102] U.S. DEP'T OF JUST., GUIDANCE TO AGENCIES REGARDING SUBMISSION OF RELEVANT FEDERAL RECORDS TO THE NICS (2013).
[103] *Id.* at 2.
[104] *Id.* at 2–11.
[105] *Compare id.*, *with* 27 C.F.R. § 478.11 (2019).

may be drawn about a Service member's status as an unlawful user when there is evidence of recent use of a controlled substance, as established by a court-martial conviction, nonjudicial punishment, or an administrative discharge.[106] Additionally, the publication provides the following general guidance regarding submission of records relevant to the unlawful-user prohibition:

> *Records that are relevant to this prohibitor include drug-related convictions, drug-related arrests and disciplinary or other administrative actions in the Armed Forces based on confirmed drug use*. Therapeutic or medical records that are created in the course of treatment in hospitals, medical facilities or analogous contexts that demonstrate drug use or addiction should not be submitted to the NICS. *Likewise, at this time, we are not requesting records of drug testing results.* However, records of non-therapeutic admissions of drug use should be made available to the NICS to the extent your agency determines that doing so is appropriate. *If your agency currently submits records beyond what is required by this Guidance, we ask that you continue doing so without modification*.[107]

The DOJ further articulates that its guidance is "based on statutory and regulatory text *and court decisions* interpreting" the prohibitions under 18 U.S.C. § 922(g).[108] However, the guidance fails to cite to a single case that interprets the term "unlawful user." The only sources to which the DOJ refers are the Federal statute (which does not define the term "unlawful user") and the ATF definition (which, as established above, is inconsistent with the law).[109]

In addition to the March 2013 DOJ guidance, the ATF distributed its own supplemental DoD-specific guidance in a February 2018 presentation, *Federal Firearms Disabilities, NICS, and the U.S. Armed Forces*.[110] This presentation came on the heels of the shooting in Sutherland Springs, Texas, committed by a prior member of the Air Force with firearms he purchased

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[106] U.S. DEP'T OF JUST., *supra* note 102, at 4–5.
[107] *Id.* at 5.
[108] *Id.* at 2 (emphasis added).
[109] *Id.*
[110] Bureau of Alcohol, Tobacco, Firearms & Explosives, U.S. Dep't of Just., Federal Firearms Disabilities, NICS, and the U.S. Armed Forces (Feb. 6, 2018) (unpublished PowerPoint Presentation) (on file with author) [hereinafter ATF Presentation].

despite a general court-martial conviction for a domestic violence offense—a circumstance that legally prohibited him from possessing a firearm and that should have effectively prevented him from purchasing a firearm from an FFL.[111]

Within the text of its presentation, the ATF acknowledges the GCA's failure to define the term "unlawful user," but reinforces that 27 C.F.R. § 478.11 provides the correct definition.[112] It also contends that its guidance is supported by case law.[113] However, like the DOJ's March 2013 guidance, the ATF's presentation fails to reference any Federal case law defining the unlawful-user prohibition.[114] The presentation articulates that "[i]nferences of use include: conviction for use or possession within the past year; multiple arrests for such offenses in the past 5 years if most recent arrest was within past year; and drug test within past year of use."[115] Notably, the presentation identifies the following unlawful-user prohibition triggers that are specific to the DoD: "court-martial conviction, non-judicial punishment, or administrative discharge based on drug use or drug rehabilitation failure."[116] Additionally, it addresses how the DoD should treat Service members who fail an initial drug test but whose case has not yet been adjudicated (i.e., there is not yet a criminal record of drug use):

> Question: Is a 922(g)(3) disability dependent upon information contained in the NICS database?
>
> No. A person may be 922(g)(3) disabled despite the fact that no records appear in the NICS database (e.g. an active user with no criminal or administrative record). For example, a soldier who fails a random drug test recently given by his/her commanding officer would be prohibited from possessing or receiving firearms or ammunition under 922(g)(3).[117]

The failure of the DOJ and ATF to adopt the law as applied by Federal courts is problematic because the services, to the detriment of some Service

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[111] 18 U.S.C. § 922(g)(1); DoDIG-2019-030, *supra* note 1; DoDIG-2018-035, *supra* note 3.
[112] ATF Presentation, *supra* note 110, slide 15.
[113] *Id.*
[114] *Id.* It is unclear whether the Department of Justice (DOJ) disagrees with the definition adopted by the Federal courts or whether the DOJ is simply unaware that the law has evolved since the regulation's inception in 1997.
[115] *Id.* slide 16.
[116] *Id.* slide 17.
[117] *Id.* slide 18.

members, currently rely on that guidance through the implementation of their own policies.[118] Each of the services is enforcing regulations that are intended to prevent unlawful users in the military from possessing or purchasing firearms.[119] However, the services' policies are written in a manner that enforces the unlawful-user prohibition as defined by the ATF, and not as defined by the Federal courts. The section below is a brief survey of each service's policy.

B. Service-Specific Policy

1. Army Policy

On 30 November 2018, the Department of the Army published Execute Order (EXORD) 240-18, *Notification to Soldiers Affected by 18 USC 922, Firearms and Ammunition Possession Prohibition*.[120] The order provides explanations for each of the GCA's ten prohibited categories and articulates the circumstances that trigger a prohibition for Soldiers.[121] Importantly, the order asserts that its explanations for each of the prohibitions is based upon the DOJ's guidance.[122] Further, the order expressly forbids any additional interpretation of the categories beyond the guidance contained in the order.[123]

The EXORD declares that the unlawful-user prohibition is triggered in one of three ways: (1) when a Soldier tests positive for a controlled substance on a urinalysis; (2) when a Soldier receives nonjudicial punishment for a drug offense under Articles 112a or 92, UCMJ; or (3) when a Soldier is convicted at a court-martial for a drug offense under Articles 112a or 92, UCMJ.[124] The order also asserts that when the unlawful-user prohibition is triggered, the result is a "temporary disability that extends one (1) year from the later date of[] the date the drug offense was discovered (positive urinalysis) or the date of adjudication of the drug offense (non-judicial punishment or court-martial)."[125] Additionally, when a Soldier's conduct triggers the prohibition, the EXORD directs the responsible

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[118] *See* discussion *infra* Section IV.B. This also exposes the DoD to the potential for civil litigation. *See* discussion *infra* Part VI.
[119] *Id.*
[120] U.S. DEP'T OF ARMY, EXECUTE ORDER 240-18, NOTIFICATION TO SOLDIERS AFFECTED BY 18 USC 922, FIREARMS AND AMMUNITION POSSESSION PROHIBITION (30 Nov. 2018).
[121] *Id.* para. 1.A.
[122] *Id.*
[123] *Id.*
[124] *Id.* para. 1.A.3.
[125] *Id.*

commander to notify that Soldier by way of a counseling statement using the precise language included in the EXORD.[126] In the case of the unlawful-user prohibition, the commander must specifically instruct the Soldier that he or she is prohibited from possessing or purchasing firearms for one year and that the Soldier must divest himself or herself of any firearms he or she currently possesses for that one year.[127] Lastly, the EXORD proclaims that a commander's order to a Soldier to divest himself or herself of personally-owned firearms is a lawful and punitive order.[128]

Additionally, pursuant to Army Regulation (AR) 190-45, Army law enforcement personnel have an affirmative obligation to report all Soldiers with a positive urinalysis results in the NICS. [129] The regulation cites to 18 U.S.C. § 922(g)(3) and 27 C.F.R. § 478.11 as the authorities for this requirement.[130] This practice effectively prohibits a Soldier from purchasing a firearm for a one-year period; upon any attempt to purchase a firearm from an FLL within that period, the NICS submission made pursuant to AR 190-45 will alert the FFL that the Soldier is a prohibited person.[131]

2. Marine Corps Policy

On 12 November 2018, the Commandant of the Marine Corps released the service's GCA enforcement policy in Marine Corps Administrative Message 652/18, *Implementation of Criminal Justice Information Reporting Requirements and Guidance*.[132] That message incorporates by reference a Marine Corps Bulletin released on 30 August 2018, *Criminal Justice Information Reporting Requirements and Guidance*.[133] Together, these

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[126] *Id.* para. 2.
[127] *Id.*
[128] *Id.* para. 1.C.
[129] AR 190-45, *supra* note 24.
[130] *Id.* para. 12-4*a*(1)*(c)* ("Inference of current use may be drawn from evidence of recent use or possession of a controlled substance, or a pattern of use or possession that reasonably covers the present time such as . . . person found through a drug test to use a controlled substance unlawfully, provided test was administered within past year.").
[131] *Id.* para. 12-4*c–d* ("The entry requires that an expiration date be added. The expiration date will be 1 year from the positive urinalysis date. . . . The NICS database will automatically purge the information on the expiration date.").
[132] MARADMIN Message 652/18, *supra* note 24; *see* AR 190-45, *supra* note 24.
[133] Marine Corps Bulletin 5810, Commandant, Marine Corps, subject: Criminal Justice Information Reporting Requirements and Guidance (30 Aug. 2018) [hereinafter Marine Corps Bulletin 5810]. Although the published version reflects a cancellation date of August 2019, its active status has been extended through 31 August 2021. Marine Administrative Message, 644/20, 271902Z Oct 20, Commandant, Marine Corps, subject: Extension of MCBul 5810, "Criminal Justice Information Reporting Requirements and Guidance" para. 1.

publications memorialize the Marine Corps' guidance regarding what conduct triggers a prohibition under 18 U.S.C. § 922(g)(3) and a commander's responsibilities upon learning that a prohibition is triggered.[134]

Unlike the Army, the Marine Corps does not interpret the unlawful-user prohibition to be triggered upon a mere positive drug test result.[135] Instead, it is triggered when: (1) a Marine receives nonjudicial punishment for drug use; (2) an administrative separation board substantiates a Marine's alleged drug use; or (3) a Marine is convicted of drug use at a court-martial.[136] However, in a similar fashion to the Army, Marine Corps Administrative Message 652/18 requires Marine Corps commanders to issue written counseling statements to Marines whose conduct triggers the unlawful-user prohibition, informing the Marine that Federal law prohibits the Marine from receiving or possessing firearms and directing that they "make arrangements for lawful disposal" of those firearms.[137] Further, like the Army's policy, Marine Corps Bulletin 5810 explains that Marines who fall under the unlawful-user prohibition are subject to a "12[-]month prohibition on weapons possession from the date of adjudication."[138] Lastly, Marine Corps policies require commanders to report any conduct which triggers the unlawful-user prohibition to the servicing law enforcement agency, which is typically either the U.S. Marine Corps Criminal Investigative Division or the Naval Criminal Investigative Service.[139]

3. Navy Policy

On 29 March 2018, the Chief of Naval Operations (CNO) released Naval Administrative Message 076/18, *Gun Control Act of 1968 Criminal Justice Information Reporting Requirements*.[140] In that message, the CNO identified four circumstances that trigger the unlawful-user prohibition: (1) a court-martial conviction for wrongful *use* of a controlled substance; (2) a nonjudicial punishment finding of guilty for wrongful *use* of a controlled

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[134] MARADMIN Message 652/18, *supra* note 24; *see* Marine Corps Bulletin 5810, *supra* note 133.
[135] MARADMIN Message 652/18, *supra* note 24, para. 4.c.1.c; *see* Marine Corps Bulletin 5810, *supra* note 133, at 6-6.
[136] MARADMIN Message 652/18, *supra* note 24, para. 4.c.1.c; *see* Marine Corps Bulletin 5810, *supra* note 133, at 6-6.
[137] MARADMIN Message 652/18, *supra* note 24, para. 4.c.1.d.
[138] Marine Corps Bulletin 5810, *supra* note 133, at 2-2.
[139] MARADMIN Message 652/18, *supra* note 24, paras. 4.c.1.c, 5.b; Marine Corps Bulletin 5810, *supra* note 133, at 2-1 to -2, 6-6.
[140] NAVADMIN Message 076/18, *supra* note 24.

substance; (3) an enlisted administrative separation board's substantiation of an allegation of drug abuse; and (4) an officer board of inquiry's substantiation of an allegation of unlawful drug involvement.[141] Thus, similar to the Marine Corps, the Navy does not interpret the prohibition to be triggered upon a mere positive urinalysis result.[142] Additionally, similar to the policies of both the Marine Corps and the Army, the Navy's policy establishes that when a Sailor's conduct triggers the unlawful-user prohibition, the NICS submission should indicate that the Sailor remain in the NICS Index "for a period of one year per Department of Justice guidance."[143]

In contrast with Army and Marine Corps practice, the Navy's policy does not require its commanders to counsel or provide notice to Sailors who fall into any of the prohibited categories under 18 U.S.C. § 922(g), (n).[144] Navy commanders are similarly not required to order those Sailors to dispose of any personal firearms they already possess.[145] The Navy has also released practice guidance, by way of an instruction, to its judge advocates regarding how to apply these prohibitions during post-trial procedures.[146] That guidance directs trial counsel to include the following language in the statement of trial results when a Sailor is convicted at a special court-martial for wrongful use of a controlled substance: "The accused was found to be an unlawful user of a controlled substance. He/She is prohibited to receive, possess, ship, or transport firearms or ammunition for a period of 12 months following this conviction pursuant to 18 U.S.C. § 922(g)(3)."[147] The instruction also requires trial counsel to ensure that the statement of trial results is forwarded to the Naval Criminal Investigative Service or U.S.

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[141] *Id.* para. 3.a.1.
[142] *Id.*; *but see* U.S. DEP'T OF NAVY, USN/USMC COMMANDER'S QUICK REFERENCE LEGAL HANDBOOK (QUICKMAN): MJA16 CHANGE PAGES (2018) ("Under [18 U.S.C. § 922(g)(3)], it is unlawful for a person to receive, possess, ship, or transport firearms or ammunition if that person is . . . [a]n unlawful user of or addicted to any controlled substance. The Navy interprets this provision to apply at the earliest stage at which a commander has identified unlawful use of a controlled substance. This does not apply to tests administered incident to self-referral for treatment . . . ."). Because a positive urinalysis is typically the earliest stage at which a commander identifies unlawful drug use, this language appears to suggest that the prohibition is triggered at that point. Certainly, this interpretation conflicts with NAVADMIN 076/18, which promulgates an exhaustive list of the circumstances triggering the prohibition. It is unclear from where this contrary interpretation derives.
[143] NAVADMIN Message 076/18, *supra* note 24, para. 3.a.2.
[144] *Id.*
[145] *Id.*
[146] *See generally* U.S. DEP'T OF NAVY, JAG/CNLSCINT 5814.1D, POST-TRIAL PROCESSING (2019) (prescribing post-trial processing requirements).
[147] *Id.* enclosure 5, at 2.

Marine Corps Criminal Investigative Division, the convening authority, and the defense counsel.

4. Air Force Policy

The Air Force and Space Force's policy is included within Department of the Air Force Instruction 51-201, which was most recently updated on 5 January 2021.[148] Additional guidance is also promulgated through Air Force Manual 71-102, published on 21 July 2020.[149] Pursuant to those publications, the Air Force interprets the unlawful-user prohibition to be triggered by (1) any conviction or nonjudicial punishment for use or possession of a controlled substance within the last year; (2) an admission to drug use or possession; (3) a positive urinalysis result; or (4) an administrative discharge for drug use, drug rehabilitation failure, or drug possession.[150] The most notable of these four triggers is that the Air Force interprets the prohibition to apply when an Airman tests positive on a urinalysis. In that regard, the Air Force's approach is similar to the Army's but broader than the sea services' application. Like every other service, the Air Force also interprets the unlawful-user prohibition to be temporary in nature, lasting for one year from the date of the disqualifying condition.[151]

There are two other important distinctions in the Air Force policy. First, unlike every other service, the Air Force applies the unlawful-user prohibition to both *use* and *possession* of a controlled substance.[152] Second, unlike the other services, the Air Force has developed a standard form—AF Form 177—that must be used to notify an Airman or Guardian upon the triggering of any prohibition under the GCA.[153] Depending on the specific prohibition triggered, either the unit commander, the court-martial convening authority, the Staff Judge Advocate (SJA), or a law enforcement

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[148] U.S. DEP'T OF AIR FORCE, DEPARTMENT OF THE AIR FORCE GUIDANCE MEMORANDUM TO AFI 51-201, ADMINISTRATION OF MILITARY JUSTICE (2021) para. 15.28.4 [hereinafter DAFI 51-201] (amending U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (19 Jan. 2019)).

[149] U.S. DEP'T OF AIR FORCE, MANUAL 71-102, AIR FORCE CRIMINAL INDEXING (12 Jul. 2020) para. 4.4.5 [hereinafter AFMAN 71-102]; *see* U.S. Dep't of Air Force, AF Form 177, Notice of Qualification for Prohibition of Firearms, Ammunition, and Explosives (30 Jul. 2020) [hereinafter AF Form 177].

[150] DAFI 51-201, *supra* note 148, para. 15.28.4.2 (explaining that its list of triggers "is not intended to be exhaustive," suggesting that other conduct could trigger the prohibition); AFMAN 71-102, *supra* note 149.

[151] AFMAN 71-102, *supra* note 149, para. 4.3.3.1.

[152] DAFI 51-201, *supra* note 148, para. 15.28.4.2.

[153] AF Form 177, *supra* note 149; AFMAN 71-102, *supra* note 149, para. 4.6.

agent is required to issue this notification through AF Form 177.[154] In the case of an unlawful user, the form serves to notify the Airman or Guardian that he or she is prohibited from possessing and purchasing firearms for a one-year period.[155] Additionally, similar to the approach used by the Army and the Marine Corps, AF Form 177 orders the Airman or Guardian to divest all firearms in his or her possession at the time of the notification.[156] Following the Airman or Guardian's written acknowledgement, the form is provided to the Air Force's NICS Program Manager to ensure the disqualifying condition is reported to the NICS.[157]

V. Reconciling the Conflict Between Law and Policy

Together, Parts III and IV illustrate that the services' policies regarding the unlawful-user prohibition conflict with the law. By applying the prohibition in the manners outlined above, these regulations infringe upon some Service members' Second Amendment rights to possess and purchase firearms. This part explores whether such an infringement is permissible, paying particular attention to the strongest legal arguments for upholding the services' policies in their current forms.

Broadly, the policies outlined in Part IV are designed to enforce the unlawful-user prohibition by achieving two aims: (1) directing commanders to notify unlawful users that they are prohibited from purchasing and possessing personal firearms, and—in the Army, the Air Force, and the Marine Corps—instructing those Service members to dispose of any firearms they possess at the time of that notification; and (2) ensuring that triggering information is reported to the DOJ for inclusion in the NICS Index, effectively preventing the Service member from purchasing a firearm from an FFL. Applying those two aims, consider the following vignette.

Sergeant (SGT) Smith, U.S. Army, resides off post and owns a personal firearm that he acquired lawfully from a local FFL. Sergeant Smith tests positive for cocaine during a unit-wide, command-directed urinalysis. Pursuant to Army EXORD 240-18, SGT Smith's commander reports the positive urinalysis result to CID, which reports SGT Smith's prohibition to the NICS Index. Additionally, pursuant to the EXORD, the commander issues SGT Smith a written order to notify SGT Smith that he is an unlawful user and is therefore prohibited from purchasing or possessing

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[154] AFMAN 71-102, *supra* note 149, para. 4.6.
[155] AF Form 177, *supra* note 149.
[156] *Id.*
[157] *Id.*

firearms in accordance with 18 U.S.C. § 922(g)(3). The commander's written order further directs SGT Smith to dispose of any firearms that he currently possesses. A week later, prior to any administrative or criminal adjudication of the positive urinalysis result, SGT Smith's commander learns that SGT Smith was shooting his firearm at a local shooting range with some of his fellow Soldiers. As a result, SGT Smith's commander refers three charges to court-martial: (I) wrongful use of cocaine, in violation of Article 112a, UCMJ; (II) violating 18 U.S.C. § 922(g)(3), in violation of Article 134, UCMJ; and (III) disobeying the order to dispose of his firearm, in violation of Article 92, UCMJ. At trial, SGT Smith moves to dismiss Charge III, asserting that the commander's order amounts to an unlawful infringement of his Second Amendment rights. Additionally, SGT Smith hires a civilian attorney and files a lawsuit against the U.S. Army in Federal court. In the civil complaint, SGT Smith asserts that his commander's order prohibiting him from possessing and purchasing firearms, the order directing him to dispose of his personal firearm, and the Army's requirement under the EXORD for SGT Smith's inclusion in the NICS Index unconstitutionally infringe upon his Second Amendment right to possess and purchase a firearm, because he is not an unlawful user of a controlled substance.

A. Military Necessity

Considering the SGT Smith example within the context of the first aim of the services' policies, trial practitioners should expect to litigate whether the commander's order instructing SGT Smith that he is prohibited from possessing or purchasing a firearm and that he must dispose of any firearms he possesses is a lawful order or whether it constitutes an infringement of SGT Smith's Second Amendment rights. Generally, the Government's strongest argument for upholding military action that encroaches upon personal liberties is that Service members do not enjoy the same degree of constitutional freedoms as civilians. In *Parker v. Levy*, the Supreme Court expressed that the need for obedience and the imposition of discipline "may render permissible within the military that which would be constitutionally impermissible outside it."[158]

As identified by two DoD investigations, the Sutherland Springs, Texas, shooter's access to firearms revealed significant gaps in the DoD's

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[158] Parker v. Levy, 417 U.S. 733, 758 (1974) (holding that a commissioned officer's violation of Article 134, UCMJ, by "publicly urging enlisted personnel to refuse to obey orders which might send them into combat," was not protected under the First Amendment).

NICS reporting procedures.[159] Namely, DoD law enforcement agencies habitually failed to report to the NICS Index Service members whose conduct triggered a prohibition under 18 U.S.C. § 922(g), (n).[160] There is no doubt that this institutional failure needed to be addressed. The service secretaries and commanders have a shared responsibility to take appropriate measures within the scope of their authority to prevent Service members who fall into a prohibited category from purchasing firearms.[161] However, the critical question here is whether the DoD must enforce the unlawful-user prohibition consistent with Federal case law, or whether there exists a legally sufficient rationale for upholding the policies in their current form, despite the ensuing Second Amendment infringement.

Notwithstanding the importance of the principle of military necessity, the military's need to regulate a Service member's conduct is not without limit. Orders or policies that prohibit personal conduct must bear some relationship to military duty.[162] To be lawful, such policies must be "reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and [be] directly connected with the maintenance of good order in the Service."[163] Additionally, such orders "may not, without such a valid military purpose, interfere with the private rights" of a Service member, nor may orders "conflict with the statutory or constitutional rights" of the recipient of the order.[164] In sum, to be lawful, military orders which interfere with private rights must have a valid military purpose. Moreover, even when such orders have a valid military purpose, they must also be "clear, specific, and narrowly drawn."[165]

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[159] *See* DODIG-2019-030, *supra* note 1; DODIG-2018-035, *supra* note 3.
[160] DODIG-2019-030, *supra* note 1; DODIG-2018-035, *supra* note 3.
[161] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(e), 107 Stat. 1536, 1542 (1993) (codified as amended at 34 U.S.C. § 40901(e)) (authorizing the Attorney General to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code.").
[162] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16.c.2(a)(iv) (2019) [hereinafter MCM]; United States v. Pugh, 77 M.J. 1, 9 (C.A.A.F. 2017) (affirming the military judge's dismissal of the Government's charged violation of the Secretary of the Air Force's instruction prohibiting Airmen from consuming products containing hemp on grounds that it did not serve a valid military purpose).
[163] *See* MCM, *supra* note 162.
[164] *See id.* pt. IV, ¶ 16.c.2(a)(iv), (v).
[165] *Pugh*, 77 M.J. at 3 (citing United States v. Sterling, 75 M.J. 407, 414 (C.A.A.F. 2016)).

The Court of Appeal for the Armed Forces (C.A.A.F.) recently addressed the limits of this two-part test in *United States v. Pugh*.[166] In that case, Major Pugh was convicted of violating the Secretary of the Air Force's regulation prohibiting Airmen from consuming food products containing hemp, a product derived from marijuana.[167] At trial, the panel convicted the accused of violating this regulation through his consumption of STRONG and KIND food products, which contained hemp seeds.[168] The trial judge granted the accused's post-trial motion to dismiss the charge on the grounds that the Air Force's hemp ban was unlawful because it did not serve a valid military purpose.[169] On appeal, the Government argued that the regulation was necessary to protect the reliability and integrity of the drug testing program.[170] More pointedly, the Government asserted that because false positives for marijuana on urinalyses could occur if Service members consumed hemp, banning hemp was necessary to eliminate the risk of false positives.[171] Factually, the C.A.A.F. rejected that argument, citing the Government expert's trial testimony to support the contention that "commercially available food products containing hemp seeds do not have enough THC [tetrahydrocannabinol, marijuana's primary psychoactive ingredient,] detectable at levels proscribed by the Air Force Drug Testing Program."[172]

Additionally, the C.A.A.F. held that even though the ban *may* have a valid military purpose, it failed the second prong of the analysis because it was not clear, specific, and narrowly drawn.[173] The C.A.A.F. explained that the regulation too broadly prohibited Airmen from consuming an entire class of commercially available and otherwise legal food.[174] Addressing the two-part test, the court arrived at the following conclusion:

> True, the Air Force has a legitimate concern in prohibiting hemp food products that contain enough THC to trigger a positive drug test. However, banning legal, properly

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[166] *Id.* at 1.
[167] *Id.* at 2–3 n.1. The Air Force instruction maintained that "[s]tudies have shown that products made with hemp seed and hemp seed oil may contain varying levels of tetrahydrocannabinol (THC), an active ingredient of marijuana, which is detectable under the Air Force Drug Testing Program." *Id.*
[168] *Id.* at 2.
[169] *Id.* at 2–3.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 4.
[173] *Id.* at 3.
[174] *Id.* at 4.

> labeled food products well regulated by the United States government under the guise of protecting Airmen from unlabeled, unregulated, illegal food products is well beyond the Government's stated purpose for the ban.[175]

Applying the military necessity principles addressed above, let us consider the commander's order issued in the SGT Smith hypothetical. The issue is whether an order informing a Soldier that he or she is prohibited from possessing and purchasing firearms and directing that he or she dispose of any personal firearms (1) has a valid military purpose and (2) is not overly broad, when the order is premised on an inaccurate application of the unlawful-user prohibition. Addressing the first prong, the Government's best argument is that the order is necessary to ensure that the Soldier does not violate Federal law, thereby maintaining the readiness of the force.

Of course, the fundamental problem with this purpose is that SGT Smith's firearm possession would not violate 18 U.S.C. § 922(g)(3), despite his single instance of cocaine use. Sergeant Smith is not an unlawful user because, under Federal case law and consistent with the N.M.C.C.A.'s (non-binding but persuasive) opinion in *Freitas*, he has not engaged in regular drug use over an extended period of time. The only evidence of SGT Smith's use of a controlled substance is a single positive urinalysis. Thus, even assuming the positive drug test result is accurate (i.e., that SGT Smith did, in fact, use cocaine on a single occasion prior to the urinalysis) his one-time use fails to meet the unlawful-user threshold under Federal case law.[176]

This example highlights the difficulty of envisioning how a commander's firearm disposal order imposed upon a Service member who is a single-occasion drug user, has any valid military purpose. The services' incorrect application of the unlawful-user prohibition is a tough hurdle to overcome. For that reason, it is unlikely that practitioners even reach the second prong of the military purpose test, which considers whether the order is overly broad.

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[175] *Id.*

[176] It important to note that although the SGT Smith example involves a Soldier, this analysis is applicable to all services. While the Army is the only service to impose firearm disposal obligations against its Service members as early as a positive result on a drug test, the same principle applies to all single-occasion drug use cases, including those that result in a court-martial conviction for a violation of Article 112a, UCMJ.

Even if one considers the overarching purpose—a commander's responsibility to ensure the safety of his or her unit through individuals' compliance with 18 U.S.C. § 922(g)(3)—as sufficient to establish prong one of the valid military purpose test, the regulation will still fail the second prong. A commander's intent to ensure the safety of subordinates may be a valid military purpose, but practitioners must still consider whether the specific order at issue is narrowly drafted to achieve that purpose. An order is unlikely to be considered sufficiently narrow when it infringes upon a Service member's Second Amendment rights based upon an incorrect legal interpretation.

The C.A.A.F.'s rationale in *Pugh* provides support for this conclusion. Like the Air Force instruction in that case, which was overly broad because it was designed to prohibit Airmen from consuming *all* legal hemp products out of fear that consuming them *might* lead to a false-positive urinalysis, an Army commander's order to a single-occasion drug user that prohibits possession and purchase of firearms and requires the disposal of firearms, out of a misplaced concern that the unlawful-user prohibition applies to that Soldier, is similarly broad.[177] For those reasons, it is difficult to envision any court upholding such an order as lawful.

In the SGT Smith hypothetical, the Government also charged him with a "Clause 3" Article 134, UCMJ, offense for violating 18 U.S.C. § 922(g)(3).[178] Concerning that charge and applying the facts of the hypothetical to the persuasive Federal case law and the N.M.C.C.A.'s opinion in *Freitas*, practitioners should expect a military judge to enter a finding of not guilty pursuant to Rule for Courts-Martial 917,[179] or for the

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[177] *See* United States v. Sprague, No. NMCM 91 1266, 1991 CMR LEXIS 1435, at *3 (N-M. Ct. Crim. App. Nov. 21, 1991) ("'Good motives, i.e., to stop future offenses involving alcohol, is not enough,' to make an order legal. Orders given for the admirable, paternalistic reason of preventing future alcohol-related offenses or helping a serviceman battle an alcohol problem are not sufficiently related to military purposes to be valid. The legality of an order not to drink alcoholic beverages, then, must be determined by analyzing the particular circumstances surrounding each case." (citations omitted)).

[178] UCMJ art. 134 (1950) ("Though not specifically mentioned in this chapter . . . crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial . . . ."). Pursuant to this statute, the services retain jurisdiction over a Service member's violation of noncapital crimes prohibited under the United States Code. *See* MCM, *supra* note 162, pt. IV, ¶ 91.c.(4)(a)(1)(i).

[179] *See* MCM, *supra* note 162, R.C.M. 917 (requiring the military judge to enter a finding of not guilty if the "evidence is insufficient to sustain a conviction."). This verdict should be expected regardless of whether the accused elects trial by military judge or by members. If the accused elects a bench trial, the military judge will apply the law and not convict unless the Government establishes regular drug use that occurred over an extended period of time

court-martial to reach a not-guilty verdict. Illustrating this predictable outcome further displays the legal defect of an order that prohibits SGT Smith from purchasing and possessing a firearm and directs SGT Smith to dispose of any firearms he does possess. Specifically, since SGT Smith would never actually be found guilty of violating 18 U.S.C. § 922(g)(3), he should never be considered an unlawful user by his commander.

B. *Wilson v. Lynch*: The Ninth Circuit's Second Amendment Analysis

When considering the second aim of the services' regulations—inclusion in the NICS Index—the Ninth Circuit's 2016 opinion in *Wilson v. Lynch* may provide support for proponents of the ATF's interpretation of the unlawful-user prohibition. In *Wilson*, the appellant possessed a Nevada marijuana registration card, which permitted her to purchase and use marijuana under Nevada state law.[180] The appellant never actually used her registration card to purchase or use marijuana.[181] However, when she attempted to purchase a firearm from an FFL, the FFL refused to sell it to her based solely on her possession of the marijuana card.[182]

Section 922(d)(3) prohibits FFLs from selling a firearm to a purchaser who an FFL has "reasonable cause to believe" is an unlawful user of controlled substances.[183] Prior to Wilson's attempted purchase, the ATF released an "open letter" to all FFLs directing the nationwide denial of firearm sales to individuals carrying marijuana registration cards.[184] Specifically, the open letter directs FFLs to infer that marijuana registration cardholders are unlawful users and that any FFL's knowledge of a prospective buyer's carrying of a marijuana registration card necessarily constitutes reasonable cause to believe the prospective buyer to be an

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and contemporaneity with the accused's possession of a firearm. Alternatively, if the accused elects to be tried by members, the military judge will instruct them on the Government's requirement to meet that standard in order to reach a guilty verdict.

[180] Wilson v. Lynch, 835 F.3d 1083, 1088 (9th Cir. 2016).

[181] *Id.* at 1091 & n.1. The appellant only possessed a marijuana registration card as a means of exercising her First Amendment right to make a political statement. *Id.*

[182] *Id.* at 1088. The opinion fails to specify how the FFL knew the appellant held a marijuana card.

[183] In contrast with 18 U.S.C. § 922(g)(3), which prohibits possessing a firearm while being an unlawful user, § 922(d)(3) criminalizes the sale of firearms to someone who the seller has "reasonable cause to believe" is an unlawful user. *Compare* 18 U.S.C. § 922(g)(3), *with* § 922(d)(3).

[184] *Wilson*, 835 F.3d at 1080; Arthur Herbert, *Open Letter to All Federal Firearms Licensees*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Sept. 21, 2011), https://www.atf.gov/firearms/docs/open-letter/all-ffls-sept2011-open-letter-marijuana-medicinal-purposes/download.

unlawful user.[185] Relying upon that letter, the FFL refused to sell Wilson a firearm.[186] In response, Wilson filed a claim against the Government in Federal district court, asserting, among four other causes of action,[187] that the FFL's enforcement of the open letter, 27 C.F.R. § 478.11, and 18 U.S.C. § 922(d)(3) violated her Second Amendment rights.[188]

Addressing Wilson's Second Amendment challenge, the Ninth Circuit applied its two-step inquiry, which considers (1) whether the challenged law burdens conduct protected by the scope of the Second Amendment and (2) the appropriate level of scrutiny.[189] Addressing the first question, the court

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[185] Herbert, *supra* note 184.

> Federal law, 18 U.S.C. § 922(g)(3), prohibits any person who is an "unlawful user of . . . any controlled substance . . ." from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law. Further, Federal law, 18 U.S.C. § 922(d)(3), makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or **having reasonable cause to believe** that such person is an unlawful user of . . . a controlled substance. As provided by 27 C.F.R. § 478.11, "an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."
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> Therefore, any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of . . . a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition . . . . [Y]ou may not transfer firearms or ammunition to them. Further, if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have "reasonable cause to believe" that the person is an unlawful user of a controlled substance. As such, you may not transfer firearms or ammunition to the person . . . .

Id.

[186] *Wilson*, 835 F.3d at 1088.

[187] *Id.* at 1090–91 ("Wilson asserted five causes of action: (1) violation of the Second Amendment, (2) violation of the Equal Protection Clause of the Fifth Amendment, (3) violation of the procedural Due Process Clause of the Fifth Amendment, (4) violation of the substantive Due Process Clause of the Fifth Amendment, and (5) violation of the First Amendment.").

[188] Notably, Wilson asserted in her complaint that she was not an unlawful user of a controlled substance, which the Ninth Circuit accepted as true. This was critical to the Ninth Circuit's determination that it lacked standing to address Wilson's challenge to 18 U.S.C. § 922(g)(3). *Id.* at 1091.

[189] *Id.* at 1092 (citing United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013)).

concluded that because the open letter, in conjunction with 27 C.F.R. § 478.11 and 18 U.S.C. § 922(d)(3), prohibited Wilson from purchasing a firearm, they indeed "directly burden[ed] her core Second Amendment right to possess a firearm."[190] Turning to the second inquiry, the court focused on evaluating the *severity* of that Second Amendment burden.[191] Ultimately, the *Wilson* court determined that the burden was not severe because together, the open letter, 27 C.F.R. § 478.11, and 18 U.S.C. § 922(d)(3) only prevented her from *purchasing* firearms from an FFL but did not bar her from *possessing* firearms outright.[192]

Expanding on this distinction, the court explained that if Wilson purchased firearms prior to acquiring her marijuana registration card, the open letter, 27 C.F.R. § 478.11, and 18 U.S.C. § 922(d)(3) would not have prevented her from keeping those firearms.[193] Further, the court stressed that Wilson could regain the right to purchase firearms by surrendering her marijuana registration card, an act which would eliminate an FFL's "reasonable cause" to believe she is an unlawful user.[194] Because the court found the burden not severe, the court applied intermediate scrutiny and held that the Government's burden on Wilson had a reasonable fit and was therefore lawful.[195]

> Because the degree of fit between 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter and their purpose of preventing gun violence is reasonable but not airtight, these laws will sometimes burden—albeit minimally and only incidentally—the Second Amendment rights of individuals who are reasonably, but erroneously, suspected of being unlawful drug users. However, the Constitution tolerates these modest collateral burdens in various contexts, and does so here as well.[196]

Proponents of the DOJ's current application of the unlawful-user prohibition would likely cite to the above rationale for support by drawing a parallel between the ATF's open letter and the services' policies requiring law enforcement agencies to submit entries in the NICS Index for Service

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[190] *Id.*
[191] *Id.* (citing *Chovan*, 735 F.3d at 1138).
[192] *Id.* at 1093.
[193] *Id.*
[194] *Id.*
[195] *Id.* at 1094–95.
[196] *Id.*

members found or suspected to have used a controlled substance on a single occasion. The argument might be as follows: While some Service members—who may not technically be unlawful users under Federal law—will be included the NICS Index pursuant to service policy and therefore prevented from purchasing a firearm, the Constitution tolerates such a modest Second Amendment burden because there is a reasonable fit between the services' policies, 27 C.F.R. § 478.11, and the aim of preventing gun violence. On its face, this is a strong argument. After all, Congress and the President empowered the Attorney General to create the NICS to keep firearms out of the hands of those not legally permitted to possess them in an effort to prevent gun violence.[197]

Despite the seemingly persuasive nature of the above argument, there are some fundamental problems with relying on it as authority to support the services' adoption of the ATF's unlawful-user prohibition. First, *Wilson* represents only one circuit's conclusion that an individual's inability to purchase a firearm from an FFL is not a severe Second Amendment burden that is not subject to strict scrutiny. Not only is the analysis flawed, but it is also not a predictor of how other circuits would address the issue.

The two central tenets supporting the Ninth Circuit's conclusion that Wilson's inability to purchase a firearm from an FFL was not severe were that (1) Wilson could regain her right to purchase a firearm by forfeiting her state marijuana registration card and (2) the open letter and 27 C.F.R. § 478.11 did not impede her "right to keep her firearms or to use them to protect herself in her home."[198] The reasoning behind the first tenet is inherently flawed because it contemplates Wilson ridding herself of the very burden the open letter imposes upon her by affirmatively removing herself from the class of individuals the open letter burdens. However, doing so would have obviated her need to challenge the open letter in Federal court. Consequently, the court's reliance upon Wilson's hypothetical ability to

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[197] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993) (codified as amended at 34 U.S.C. § 40901(b)); *see also* Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System, 78 Fed. Reg. 4297 (Jan. 16, 2013). Supporters of the approach of the DOJ and DoD might also note that Congress fashioned a remedy for those Service members who are erroneously included in the NICS Index and therefore prevented from purchasing a firearm from an FFL. The Brady Act requires the Attorney General to correct and remove erroneous NICS Index records when petitioned by an individual who has been denied the purchase of a firearm. *See* Brady Handgun Violence Prevention Act § 103(g) (codified as amended at 34 U.S.C. § 40901(g)).

[198] *Wilson*, 835 F.3d at 1093.

turn in her marijuana registration card as indicative of the non-severe nature of the burden is misplaced.

The second tenet, which relies upon Wilson's ability to continue to possess the firearms she may already own despite her present inability to purchase a firearm, is also problematic. The Ninth Circuit is the only Federal circuit court to have addressed a Second Amendment challenge to the ATF's open letter. However, other circuits have addressed similar Government-imposed burdens on the right to purchase firearms. [199] Those opinions, based on the Supreme Court's holding in *District of Columbia v. Heller*, intimate that an outright prohibition on the ability to purchase a firearm, without any alternative means to acquire one, would be considered a severe burden subject to strict scrutiny.[200] It is important to emphasize that reasonable minds may disagree as to whether a restriction that prohibits someone from purchasing firearms, as opposed to possessing firearms, is severely burdensome so as to require strict scrutiny. The Ninth Circuit remains the only Federal court to have analyzed the open letter through this legal framework. However, for the reasons articulated above, one might expect other Federal circuits to apply strict scrutiny to the same set of facts.

To be clear, the appropriate level of scrutiny to apply to a particular prohibition on firearms purchases or possession is an unsettled area of law. This lack of clarity stems, at least in part, from the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*. Together, those cases affirm the Second Amendment's status as a fundamental right, yet the Supreme Court has declined to articulate a particular level of scrutiny for *all* types of Second Amendment burdens.[201] Therefore, it is a poor idea to rely upon the Ninth Circuit's application of intermediate scrutiny as a predictor

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[199] *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008); Mance v. Sessions, 896 F.3d 699, 716 (5th Cir. 2018) (Owen, J., concurring) ("[A] restriction on the commercial sale of a handgun could impinge on the right to possess and bear arms to such an extent that, though not an absolute 'ban' on the possession or use of a handgun, strict scrutiny would be applicable."); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 195 (5th Cir. 2012); *see also* United States v. Decastro, 682 F.3d 160, 168–67 (2d Cir. 2012) (applying intermediate scrutiny to law prohibiting out-of-state firearm sales because it did not amount to a substantial burden on the appellant due to his alternative means of acquiring a firearm—namely, by purchasing a firearm within his home state).

[200] *Heller*, 554 U.S. at 628–29.

[201] *Id.* at 634–35 ("Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt . . . . But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."); McDonald v. City of Chicago, 561 U.S. 742, 778–91 (2010) (holding that the Second Amendment is a fundamental right as applied to the states by the Fourteenth Amendment).

of the level of scrutiny which might be applied to a Service member challenging a service's policy enforcing the unlawful-user prohibition.

The other, and more obvious, problem with relying on *Wilson* for support of the services' policies is that there is a major distinction between the burden imposed by the ATF's open letter and the burden imposed by the services' policies. Specifically, as addressed above, unlike the ATF's open letter, the services' policies extend beyond prohibiting a single-occasion drug user from merely purchasing a firearm from an FFL. Instead, the policies also prohibit single-occasion users from *possessing* firearms and, with the exception of the Navy, require those Service members to *dispose of* any firearms they already possess. The *Wilson* court's conclusion that the Second Amendment burden in that case was not severe placed significant weight upon the fact that the ATF's open letter did not prohibit the appellant from retaining any firearms she owned at the time of her attempted purchase. Because the services' policies, in contrast to the ATF's open letter, direct commanders to order their single-occasion drug users that they are prohibited from both purchasing *and* possessing firearms, those policies likely amount to a severe Second Amendment burden. Consequently, it is a mistake for the DOJ and the services to rely upon *Wilson* for the continued implementation of its current policies.

C. Congressional Limitations

Even if proponents of the services' policies disagree with the analysis in Parts A and B of this part, there are additional legislative hurdles to consider. Before addressing them, it is important to recapitulate the analysis thus far. Federal case law and the N.M.C.C.A. define the unlawful-user prohibition as requiring regular drug use over an extended period of time and that the drug use be contemporaneous with the firearm possession. Conversely, the ATF's administrative regulation defines the prohibition in a less-restrictive manner, suggesting that one-time drug use within the past year creates an inference that the individual is an unlawful user. Presently, each of the military services enforces the unlawful-user prohibition in accordance with the ATF's interpretation and not in accordance with the case law defining the statute.

Practitioners cannot ignore the conflict between the ATF's interpretation and the Federal case law defining the prohibition. However, in an attempt to reconcile this, it is reasonable to expect some practitioners to defer to the services' policies under the rationale that the services have a statutory obligation to enforce the unlawful-user prohibition in accordance

with the Attorney General's guidance.[202] Those individuals might further assert that although continued enforcement may result in a Second Amendment infringement against those who are not actually unlawful users, *Wilson* should be interpreted to support the position that the Constitution tolerates such a modest Second Amendment burden. Based on a plain reading of Congress' legislation, there are two problems with accepting this *may-be-an-unlawful-user* approach.

First, the text of the Brady Act establishes that the unlawful-user prohibition was not intended to be interpreted in this manner. Specifically, the Act directed the Attorney General to establish a system designed to notify an FFL of "whether receipt of a firearm by a prospective transferee *would* violate section 922 of title 18, United States Code, or State law."[203] Additionally, the Attorney General's Brady Act authority to acquire information from other Federal agencies is not without limitation. The Brady Act permits the Attorney General to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm *would* violate subsection (g) or (n) of section 922 of title 18, United States Code."[204] Accordingly, the Attorney General may only promulgate regulations pursuant to a system designed to notify an FFL when the buyer's possession *would actually violate* 18 U.S.C. § 922(g)(3), not a system designed to prohibit a sale if the buyer's possession *may*, *might*, or even *probably would* violate 18 U.S.C. § 922(g)(3).

The second problem with the *may-be-an-unlawful-user* approach is that it fails to consider key legislation which specifically protects Service members from service-imposed regulations regarding personal firearms. Passed as section 1062(a) of the National Defense Authorization Act (NDAA) of 2011, Congress declared:

> The Secretary of Defense shall not prohibit . . . the otherwise lawful acquisition, possession, ownership, carrying, or other use of a privately owned firearm . . . by a member of the Armed Forces or civilian employee of the Department of Defense on property that is not (1) a military

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[202] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(e), 107 Stat. 1536, 1542 (1993) (codified as amended at 34 U.S.C. § 40901(e)) (authorizing the Attorney General to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code").
[203] *Id.* § 103(b) (codified in 34 U.S.C. § 40901(b)) (emphasis added).
[204] *Id.* § 103(g) (codified in 34 U.S.C. § 40901(g)) (emphasis added).

> installation; or (2) any other property that is owned or operated by the Department of Defense.[205]

The history of this legislation dates back to the 2009 shooting at Fort Hood, Texas, where a Soldier killed thirteen people and injured at least forty-three others.[206] In response to the Fort Hood tragedy, Defense Secretary Robert M. Gates directed an independent review of the incident to be jointly conducted by Togo D. West, a former Secretary of the Army, and Admiral Vernon E. Clark, a former CNO.[207] Their written report addressed a total of thirty-one findings and recommendations.[208] One of those findings was that the DoD did not have a department-wide policy governing privately owned firearms.[209] The report recommended that the DoD review the need for a DoD-wide personal firearm policy.[210] Subsequently, on 12 April 2010, Secretary Gates published a memorandum addressing all of the recommendations within the independent review.[211] In that memorandum, Secretary Gates directed the Under Secretary of Defense for Intelligence to prepare and coordinate a policy to address privately owned firearms.[212]

Due to the aforementioned congressional intervention, that policy never went into effect. In early 2010, some installation commanders implemented base regulations addressing Service members' personal firearms.[213] Fort Riley's regulation, in particular, drew significant attention from two U.S. Congressmen from Kansas. The Fort Riley regulation required Service members to register all privately owned firearms maintained off base,

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[205] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1062(a), 124 Stat. 4137, 4363.
[206] *See* FORT HOOD INDEP. REV. COMM., U.S. DEP'T OF DEF., PROTECTING THE FORCE: LESSONS FROM FORT HOOD 1 (2010); *see also* Lauren Cox, *Fort Hood Motive Terrorism or Mental Illness?*, ABC NEWS (Nov. 6 2009, 6:22 PM), https://abcnews.go.com/Health/MindMoodNews/fort-hood-shooters-intentions-mass-murder-terrorism/story?id=9019410.
[207] *See* FORT HOOD INDEP. REV. COMM., *supra* note 206, app. A, at A-1, 2.
[208] *Id.* at 11–53.
[209] *Id.* at 32.
[210] *Id.*
[211] Memorandum from Sec'y of Def. to Sec'ys of the Mil. Dep'ts et al., subject: Interim Recommendations of the Ft. Hood Follow-On Review (12 Apr. 2010).
[212] *Id.*
[213] *In Defense Spending Bill, a Map Around Congressional Gridlock*, WASH. POST (Jan. 4 2011), https://www.washingtonpost.com/wp-dyn/content/article/2011/01/03/AR2011010305667.html ("It seems that in the wake of the Fort Hood shooting . . . [c]ommanders of several bases, including Fort Campbell, Ky., and Fort Bliss, Tex., required registration of guns of personnel living off post. At Fort Riley, Kan., regulations required registration of guns owned not only by military personnel living off base but also by family members living in Kansas.").

prohibited Service members with carry permits from carrying firearms off base, and permitted commanders to limit the caliber of firearms and ammunition which a Service member could own.[214] In response, Kansas Representative Jerry Moran and Kansas Senator James M. Inhofe each introduced legislation to prohibit the DoD and commanders from promulgating regulations that interfere with a Service member's right to lawfully purchase or possess a personal firearm.[215]

Congress eventually passed the measure as part of the 2011 NDAA.[216] Notably, Congress later amended the legislation in 2013 to permit commanders and health providers to ask questions of Service members related to their personal firearms when there are "reasonable grounds to believe such member is at risk for suicide or causing harm to others."[217] However, even in that circumstance, the 2013 amendment does not permit commanders to regulate possession of at-risk Service member's firearms.[218] Instead, commanders may only encourage voluntarily disposal of the Service member's personal firearm.[219]

Ultimately, the pertinent legislation expressly forbids the services from "prohibit[ing] . . . the otherwise lawful acquisition, possession, ownership, carrying, or other use of a privately owned firearm."[220] Congress passed this legislation because it was specifically concerned with the risk that the services would impose policies that prohibit Service members' lawful

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[214] *Id.* ("The National Rifle Association responded with outrage, and Sen. James Inhofe (R-Okla.) added an amendment to the bill, calling for the destruction of registration records of guns held off bases created as a result of regulations instituted by local commanders. It did permit the Defense Department to continue to set rules for carrying weapons while on duty, in uniform or on a military installation."); *see also* TOM DIAZ, THE LAST GUN 8–11 (2013); *Political Report: Protecting The Rights of Those Who Protect Us*, INST. FOR LEGIS. ACTION (Apr. 19, 2011), https://www.nraila.org/articles/20110419/political-report-protecting-the-rights.

[215] S. 3388, 111th Cong. (2010); H.R. 5700, 111th Cong. (2010).

[216] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1062, 124 Stat. 4137, 4363.

[217] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, sec. 1057, § 1062(c)(3), 126 Stat. 1623, 1938.

[218] *Id.*

[219] *Id.*; *see* Memorandum from Under Sec'y of Def. for Pers. & Readiness for Sec'ys of the Mil. Dep'ts, Chairman of the Joint Chiefs of Staff & Chief of the Nat'l Guard Bureau, subject: Guidance for Commanders and Health Professionals in the Department of Defense on Reducing Access to Lethal Means Through the Voluntary Storage of Privately-Owned Firearms (28 Aug. 2014).

[220] Ike Skelton National Defense Authorization Act for Fiscal Year 2011 § 1062(a).

purchase or possession of firearms.[221] Necessarily, this legislation prohibits the services from relying on a good-faith rationale—that the DoD-wide implementation of the unlawful-user prohibition is otherwise permissible when done pursuant to a good-faith, yet incorrect, understanding of the law or pursuant to a belief that the single-occasion drug user *might* be an unlawful user who, out of an abundance of caution, *should* be prohibited from purchasing or possessing a firearm. Congress' measure also undercuts the military necessity argument for continued implementation of the unlawful-user prohibition in its current state. Effectively, through this legislation, Congress declared that there will never be a valid military purpose for a service policy which infringes upon a Service member's lawful purchase or possession of a personal firearm.

D. The Misunderstood Purpose of the ATF's Definition

Another concern with adopting the ATF's unlawful-user definition is that its application is limited in scope. It is important to remember that the ATF's definitions for each of the prohibited categories, found in 27 C.F.R. § 478.11, exist to facilitate the Attorney General's implementation and supervision of the NICS. The Brady Act directs the Attorney General to "establish a national instant criminal background check system that any *licensee* may contact . . . for information . . . on whether *receipt* of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law."[222] Additionally, the act authorizes the Attorney General to "secure directly from any department or agency of the United States such information on persons for whom *receipt* of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code."[223] Congress also gave the Attorney General limited authority to develop regulations to implement the NICS.[224] Considering all of this, it is clear that Congress charged the Attorney General with creating a system designed to facilitate background checks during firearms purchases from FFLs. However, Congress did not grant the Attorney General authority to redraft or interpret the criminal code.

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[221] *See In Defense Spending Bill, a Map Around Congressional Gridlock*, *supra* note 213; *see also* DIAZ, *supra* note 214.
[222] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993) (codified at 34 U.S.C. § 40901(b)) (emphasis added).
[223] *Id.* § 103(e) (codified at 34 U.S.C. § 40901(b)).
[224] 18 U.S.C. § 926(a) ("The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . .").

The ATF drafted its first definitions for each of the prohibited categories in 1996 when the bureau fell under the Department of the Treasury, not under the DOJ, as it currently sits.[225] Notably, the ATF titled its 1996 proposal and its 1997 final publication "*Definitions for the Categories of Persons Prohibited from* Receiving *Firearms*."[226] From the title alone, the ATF certainly understood that its role was to provide guidance to FFLs and law enforcement agencies to facilitate implementation of the NICS during firearm transactions. Additionally, in its 1996 proposal, the ATF explained that the definitions were designed to "facilitate the implementation of the national instant criminal background check system (NICS) required under the Brady Handgun Violence Prevention Act."[227]

Presently, the ATF's prohibited category definitions are chaptered within its "*Commerce in Firearms and Ammunition*" regulations, the applicability of which are expressly limited to commercial transactions involving firearms and ammunition.[228] Those regulations establish procedural and substantive guidelines for individuals and businesses who transact commercially in firearms and ammunition.[229] A subchapter of these regulations, titled "Definitions," is where the ATF's interpretations of the prohibited categories, to include the unlawful-user prohibition, exist.[230]

Additionally, although its unlawful-user definition currently conflicts with case law, there is reason to believe that ATF's original intent was for its definition to comply with the judiciary's interpretation of the prohibition. In its 1996 proposal to introduce the unlawful-user definition, the ATF acknowledged the ambiguity of the unlawful-user prohibition as drafted in the criminal code and cited to *United States v. Ocegueda* for support of its proposed definition.[231] As illustrated in Part III, the unlawful-user prohibition has evolved substantially since the Ninth Circuit decided *Ocegueda*. However, the ATF's definition has failed to evolve with the

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[225] Definitions for the Categories of Persons Prohibited from Receiving Firearms, 61 Fed. Reg. 47095 (proposed Sept. 6, 1996) (to be codified at 27 C.F.R. pt. 178).
[226] *See* Definitions for the Categories of Persons Prohibited from Receiving Firearms, 62 Fed. Reg. 34634 (June 27, 1997) (to be codified at 27 C.F.R. pt. 178) (emphasis added); Definitions for the Categories of Persons Prohibited from Receiving Firearms, 61 Fed. Reg. at 47095 (emphasis added).
[227] Definitions for the Categories of Persons Prohibited from Receiving Firearms, 61 Fed. Reg. at 47095.
[228] *See* 27 C.F.R. § 478.1(a), (b) (2019).
[229] *Id.* § 478.1(b).
[230] *See id.* § 478.11.
[231] *See* Definitions for the Categories of Persons Prohibited from Receiving Firearms, 61 Fed. Reg. at 47096.

law. For that reason, there is a strong argument that, even outside of the military, the DOJ is incorrectly applying the unlawful-user prohibition through its enforcement of the NICS.

Regardless of the incongruence between the ATF definition and the Federal case law definition, it is critical that practitioners not forget the limits of the ATF definition's applicability. Even if the ATF is within its authority to interpret the unlawful-user prohibition contrary to Federal case law, judge advocates must remember that the purpose and scope of that definition is to regulate firearm transactions in furtherance of the Attorney General's authority to implement the NICS, not to define the criminal code. Thus, it is a mistake for the services to adopt the ATF's unlawful-user definition for any other purpose, to include ordering single-occasion users that they are prohibited from purchasing or possessing a personal firearm or ordering single-occasion users to dispose of any personal firearms the Service member possesses.

VI. Recommendations

Nothing suggests that the services' incorrect application of 18 U.S.C. § 922(g)(3) is malicious or even intentional. Rather, the services appear to be misguided by legally deficient DOJ and ATF guidance that has not kept up with the law. Nevertheless, the DoD-wide adoption of the ATF's unlawful-user definition creates unnecessary risk for the services and their commanders. Continuing to enforce the ATF's definition increases the DoD's susceptibility to civil litigation and congressional complaints or inquiries. Inevitably, a Service member who uses an illicit drug on a single occasion and is erroneously included in the NICS Index, ordered that he or she is prohibited from purchasing or possessing firearms, or directed to dispose of the firearms he or she does possess, will file suit in Federal district court. When this happens, the services will be on the losing side of the argument. Such an outcome is especially likely when one considers Congress' particular aversion for service-imposed Second Amendment limitations, as evidenced by the protections it implemented though Section 1062 of the 2011 NDAA.[232]

The services' adoption of the ATF's unlawful-user definition also imposes unnecessary risk upon commanders who must maintain good order and discipline within their units. Pursuant to these policies, the services

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[232] *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1062(a), 124 Stat. 4137, 4363.

have provided commanders with legally deficient methods for handling single-occasion drug users. Generally, it is poor policy to arm commanders with regulations that they cannot actually enforce. As demonstrated through the SGT Smith example in Part V, when the single-occasion drug user refuses a commander's order to dispose of the firearms the individual possesses, the commander will be devoid of any legally sufficient mechanism to enforce that order. Consequently, and equally concerning, these policies leave SJAs in a difficult position. Commanders must comply with the service policies and SJAs must advise their commanders on how to enforce good order and discipline within the confines of the commander's authority. Despite the policies' conflict with the law, it is unreasonable to expect SJAs to advise their commanders to act contrary to service-level policy.

Similarly, the services' adoption of the ATF's unlawful-user prohibition has led to a confounded application of the duration of the firearm possession and purchase prohibition, once triggered. Notably, a convicted felon will always be prohibited from possessing a firearm under 18 U.S.C. § 922(g)(1).[233] However, such is not necessarily the case for those who fall within the unlawful-user prohibition. Importantly, 18 U.S.C § 922(g)(3) prohibits firearm possession for those who *are* unlawful users, not those who *were* unlawful users.[234] Thus, individuals who were once unlawful users, but later cease their drug use, may regain their right to possess a firearm.[235]

The services have dealt with this by imposing a one-year firearm prohibition for those determined to be unlawful users.[236] However, the rationale supporting the one-year ban is tenuous at best. This one-year prohibition is likely derived from the ATF's definition, which proclaims that "[a]n inference of current use may be drawn from evidence of a recent use or possession" and further explains that recent use includes "a conviction for use or possession of a controlled substance *within the past year* . . . or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered *within the past year*."[237] Much like the ATF's open letter in *Wilson*, this regulation serves to place the FFLs on notice that they may infer that a buyer is an unlawful user if the NICS

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[233] "It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).
[234] *See supra* notes 38–46 and accompanying text.
[235] *See supra* note 59 and accompanying text.
[236] *See* discussion *supra* Section IV.B.
[237] *See* 27 C.F.R. § 478.11 (2019).

establishes the buyer's drug use within the past year. However, through policy, the services reverse-engineered this inference by imposing a one-year prohibition against Service members determined to be unlawful users.[238]

Even more troubling is that the services do not apply this one-year prohibition from the date of the unlawful drug use. Instead, the one-year prohibition starts on the date of adjudication for that drug use, which can be several months later.[239] If the services desire to continue regulating personal firearm possession by applying the ATF's unlawful-user definition, they should review their implementation of the one-year prohibition. It appears to be derived from an oversimplification of the ATF's definition, but it is not supported by law. At a minimum, the one-year prohibition should commence on the date of drug use, as opposed to the date of adjudication.

Additionally, the services' policies are inconsistent with each other, and service leaders must address this. To illustrate, it should not be the case that a Soldier, Airman, or Guardian who tests positive for a controlled substance on a urinalysis be included in the NICS Index immediately, while a Marine or Sailor who tests positive not be included in the NICS Index until a follow-on adjudication. Inconsistent application between the services creates the potential for NICS reporting gaps. The overarching goal of the policies enforcing the prohibitions under 18 U.S.C. § 922(g), (n) is to create a system that accurately and adequately prevents a prohibited person from purchasing firearms. Putting aside the legal accuracy of any single service policy, the public would likely bristle at a firearm background check system applied inconsistently within the DoD. This risk is uniquely heightened when one considers the services' history of inconsistent criminal justice reporting, which served as the underlying impetus for the creation of these policies. For those reasons, the services must work together to promulgate identical policies, or, alternatively, the DoD should implement a department-wide policy addressing and defining all of the prohibited categories under 18 U.S.C. § 922(g), (n).

Moving forward, it is imperative that the services recognize the limited role of the Attorney General, the DOJ, and the ATF in this process. Those entities certainly have an interest in ensuring that the DoD's law enforcement agencies accurately and consistently report Service members to the NICS when they fall into a prohibited category under 18 U.S.C.

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[238] *See* Herbert, *supra* note 184.

[239] *See* discussion *supra* Section IV.B.

§ 922(g), (n). However, that is where DOJ and ATF involvement should end. Certainly, because the services are professions of arms, they must continue to identify Service members who may be prohibited from carrying Government-issued weapons. That is an area of regulation for which continued service policy may be justified. However, the services should reevaluate their perceived obligation to regulate Service members' *personal* firearm possession. Congress has already done so through the prohibitions articulated in 18 U.S.C. § 922(g), (n), and commanders are vested with the authority to refer charges to court-martial for violating that statute. Accordingly, the UCMJ provides a sufficient enforcement mechanism for maintaining good order and discipline.

VII. Conclusion

The Federal courts of appeals—the judicial bodies vested with the authority to interpret criminal statues—interpret Congress' unlawful-user prohibition in one way while the ATF—an administrative agency without authority to draft or interpret criminal statutes—interprets the prohibition in its own manner. Consequently, the services' reliance upon the ATF's unlawful-user definition as the basis for its policies is incorrect.

It is difficult to envision a legally defensible rationale for continued adoption of the ATF's interpretation. Principally, it is unlikely that any military appellate court would conclude that there is a valid military purpose for upholding the services' implementation of the ATF's unlawful-user definition when it contradicts Federal law. Additionally, because the policies prohibit single-occasion drug users from both purchasing a firearm from an FFL and possessing a firearm outright, the policies likely amount to a severe Second Amendment burden and are therefore unlawful. Moreover, by relying upon the ATF's definition, the policies run afoul of section 1062 of the 2011 NDAA, which specifically prevents the services from implementing regulations that prohibit a Service member's lawful possession or acquisition of a personal firearm.

Lastly, the services' dependence upon the ATF's unlawful-user definition to regulate a Service member's personal firearm possession is improper because the purpose of that definition—and every definition found within 27 C.F.R. § 478.11—is to regulate firearm transactions in furtherance of the Attorney General's limited authority to establish and supervise the operation of the NICS. Therefore, even if the ATF's legally deficient definition is acceptable for the limited purpose of submitting information

to the NICS, any application of the ATF's definition beyond that narrow purpose is inappropriate.

Accordingly, the services should cease the practice of adopting the ATF's definition as a trigger for ordering Service members that they are prohibited from purchasing and possessing firearms and that they must dispose of their personal firearms. Continued improper application of the unlawful-user prohibition creates unnecessary risk for the services and for individual commanders. Consistent with the recommendations offered above, the services should amend their policies or the DoD should promulgate a department-wide regulation to ensure the unlawful-user prohibition is implemented uniformly and in a manner that conforms to the law.

NOT HARMLESS: C.A.A.F.'S FLAWED APPROACH TO PLAIN ERROR REVIEW IN *UNITED STATES V. TOVARCHAVEZ*

MAJOR JEREMY S. WATFORD*

I. Introduction

In April 2015, a general court-martial tried Specialist (SPC) Juventino Tovarchavez for sexually assaulting the same victim on two separate occasions in September 2014.[1] During the trial for two specifications of sexual assault, the military judge instructed the panel that, pursuant to Military Rule of Evidence (MRE) 413, they could consider each charged offense as evidence of the accused's propensity to commit the other charged offense.[2] Defense counsel made no objection to the instruction.[3] After two

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[1] United States v. Tovarchavez, No. ARMY 20150250, 2017 CCA LEXIS 602, at *1–2 (A. Ct. Crim. App. Sept. 7, 2017), *aff'd*, No. ARMY 20150250, 2018 CCA LEXIS 371 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019); Joint App. at 39, United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019) (No. 18-0371).

[2] *Tovarchavez*, 2017 CCA LEXIS 602, at *15; MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413 (2012). In cases involving sexual assault, Military Rule of Evidence (MRE) 413 provides an exception to the ordinary prohibition against using uncharged misconduct or past convictions as evidence of an accused's propensity to commit the charged conduct, permitting the admission of evidence that the accused committed other acts of sexual assault "for its bearing on any manner to which it is relevant." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413(a) (2019) [hereinafter MCM].

[3] *Tovarchavez*, 2017 CCA LEXIS 602, at *15.

days of trial, the panel convicted SPC Tovarchavez of just one specification and sentenced him to two years' confinement and a dishonorable discharge.[4]

Subsequent to trial, the Court of Appeals for the Armed Forces (C.A.A.F.) held in *United States v. Hills* that charged misconduct could not be used as propensity evidence in support of other charged misconduct.[5] Giving the panel instruction in *United States v. Tovarchavez* was a "constitutional error"—one so serious that the conviction could only be upheld if the error was found to be "harmless beyond a reasonable doubt."[6] There could be no "reasonable possibility that the [error] . . . might have

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[4] *Id.* at *1–2; Joint App., *supra* note 1, at 36.

[5] United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016). In *Hills*, the Government used evidence of *charged* sexual misconduct as propensity evidence of *other* charged sexual misconduct. *Id.* at 353. The court found that, as drafted, MRE 413 did not apply to charged sexual misconduct and that the accompanying panel instruction violated the appellant's presumption of innocence and as such was constitutional error:

> A foundational tenet of the Due Process Clause is that an accused is presumed innocent until proven guilty.
>
> . . . .
>
> It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent.

Id. at 357 (citations omitted). The court later clarified that this use of MRE 413 is equally impermissible in judge-alone cases. United States v. Hukill, 76 M.J. 219, 222 (C.A.A.F. 2017). Prior to *Hills*, this use of MRE 413 was a fairly common and unchallenged practice in military trials, despite the court's admonition that its conclusion "seem[ed] obvious." *Hills*, 75 M.J. at 353; *see Hukill*, 76 M.J. at 222 (acknowledging that prior to *Hills*, "the common understanding of the law was that charged misconduct could be used as propensity evidence under M.R.E. 413"). The *Military Judges' Benchbook* in use at the time provided sample instructions for both scenarios, applying MRE 413 to both charged and uncharged sexual offenses. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-13-1, n.3.1, n.4.2 (10 Sept. 2014). Consequently, when *Hills* was decided, there were numerous cases pending review in which this error occurred without objection at trial. *E.g.*, United States v. Guardado, 75 M.J. 889 (A. Ct. Crim. App. Nov. 15, 2016), *aff'd in part and rev'd in part*, 77 M.J. 90 (C.A.A.F. 2017); United States v. Phillips, No. ACM 38771, 2019 CCA LEXIS 102 (A.F. Ct. Crim. App. Mar. 8, 2019), *rev'd*, 79 M.J. 300 (C.A.A.F. 2019); United States v. Long, No. ARMY 20150160, 2018 CCA LEXIS 512 (A. Ct. Crim. App. Oct. 26, 2018), *petition dismissed without prejudice*, 79 M.J. 99 (C.A.A.F. 2019); United States v. Berger, No. 201500024, 2018 CCA LEXIS 218 (N-M. Ct. Crim. App. May 3, 2018), *vacated*, 76 M.J. 128 (C.A.A.F. 2017); United States v. Hill, No. ARMY 20130331, 2018 CCA LEXIS 111 (A. Ct. Crim. App. Feb. 27, 2018); *Tovarchavez*, 2017 CCA LEXIS 602; United States v. Moore, No. ARMY 20140875, 2017 CCA LEXIS 191 (A. Ct. Crim. App. Mar. 23, 2017), *aff'd*, 77 M.J. 198 (C.A.A.F. 2018); United States v. Williams, No. ARMY 20130582, 2017 CCA LEXIS 24 (A. Ct. Crim. App. Jan. 12, 2017) *aff'd in part and rev'd in part*, 77 M.J. 459 (C.A.A.F. 2018); United States v. Harrison, No. ACM 38745, 2016 CCA LEXIS 431 (A.F. Ct. Crim. App. July 20, 2016), *aff'd*, 76 M.J. 127 (C.A.A.F. 2017).

[6] *Hills*, 75 M.J. at 357 (quoting United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006)).

contributed to the conviction"[7]—an extremely high burden falling on the Government to prove. Notably in *Hills*, the appellant objected to the MRE 413 instruction during trial, preserving the error for appeal.[8] *Tovarchavez* reached appellate review following the decision in *Hills*.[9]

The Army Court of Criminal Appeals (A.C.C.A.) issued its first opinion in *Tovarchavez* in September 2017, more than two years after SPC Tovarchavez's conviction.[10] Reviewing the erroneous panel instruction, A.C.C.A.'s decision hinged on one important distinction from *Hills*: the appellant's failure to object at trial.[11] The court stated:

> [O]ur analysis of prejudice for *Hills* violations is framed by the appellate posture of the issue on appeal. In cases of preserved error, the burden falls on the [G]overnment and the burden is harmlessness beyond a reasonable doubt. In cases of unpreserved error, the burden is on appellant to show material prejudice to a substantial right.[12]

Applying the more Government-friendly standard for unpreserved errors, A.C.C.A. held that the appellant's failure to establish prejudice merited no relief.[13]

Following an unrelated remand, *Tovarchavez* returned to A.C.C.A. over a year later, and the court agreed to revisit the *Hills* issue in light of new case law.[14] Ultimately, the court reached the same conclusion: where an

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[7] *Id.* (quoting United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007) (alteration in original)).
[8] *Id.* at 352.
[9] When there is a change in the law during the pendency of an appeal, as in *Tovarchavez*, the resulting error is deemed forfeited rather than waived. Johnson v. United States, 520 U.S. 461, 464–65 (1997); United States v. Humphries, 71 M.J. 209, 211 (C.A.A.F. 2012) ("Because the law at the time of trial was settled and clearly contrary, it is enough that the error is plain now, and the error was forfeited rather than waived." (citing United States v. Harcrow, 66 M.J. 154, 156–58 (C.A.A.F. 2008))). Multiple commentators have criticized this approach, arguing that the application of changes in the law to cases pending appeal should be divorced from procedural rules of preservation and forfeiture. *E.g.*, Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 212–14 (2011); Meir Katz, *Plainly Not "Error": Adjudicative Retroactivity on Direct Review*, 25 CARDOZO L. REV. 1979, 1999–2008 (2004).
[10] *Tovarchavez*, 2017 CCA LEXIS 602.
[11] *Id.* at *14.
[12] *Id.* at *19 (citations omitted).
[13] *Id.* at *19–20.
[14] United States v. Tovarchavez, No. ARMY 20150250, 2018 CCA LEXIS 371, at *2–3 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019). The parties' affidavits

error is not preserved at trial, even if the error is of "constitutional magnitude," it remained the appellant's burden to establish that the error materially prejudiced his substantial rights.[15] Conversely, only for preserved errors would the burden shift to the Government to establish that the error was harmless beyond a reasonable doubt.[16] The court again found that the appellant failed to meet his burden but explicitly noted that this conclusion turned on which test applied—the appellant could not establish material prejudice to his substantial rights, but, equally, the court found that the Government would have been unable to establish harmlessness beyond a reasonable doubt.[17]

Eventually, *Tovarchavez* reached C.A.A.F., where the court issued its decision on 31 May 2019, more than four years after the original trial.[18] In an opinion sharply criticizing A.C.C.A.'s reasoning and conclusion, the majority held that the nature of the error, not preservation at trial, controlled the analysis; for constitutional errors, the Government bears the burden of demonstrating that the error was harmless beyond a reasonable doubt, regardless of objection at trial.[19] Under this more stringent standard, C.A.A.F. found the Government unable to meet its burden and set aside the appellant's conviction.[20]

In the military, where many convictions are subject to automatic appellate review, the conclusion of trial is far from the end of litigation.[21] The procedural history of *Tovarchavez* illustrates that trial is often the first, and shortest, phase of a case's lifespan.[22] *Tovarchavez* also highlights the

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concerning a claim of ineffective assistance of counsel contained material differences of fact, necessitating remand for an additional factfinding hearing. *Tovarchavez*, 2017 CCA LEXIS 602, at *2, 11.

[15] *Tovarchavez*, 2018 CCA LEXIS 371, at *15.

[16] *Id.* at *14–15.

[17] *Id.* at *21–22.

[18] *Tovarchavez*, 78 M.J. 458.

[19] *Id.* at 462–63.

[20] *Id.* at 469.

[21] Under the recently revised Article 66, Uniform Code of Military Justice (UCMJ), the courts of criminal appeals conduct automatic review of all cases in which judgment includes a sentence of death, dismissal, punitive discharge, or confinement of two years or more. UCMJ art. 66(b)(3) (2017). Previously, automatic review extended to cases in which judgment included a sentence of confinement of one year or more, capturing an even broader proportion of total convictions. UCMJ art. 66(b)(1) (1983).

[22] Specialist Tovarchavez's court-martial concluded less than nine months after the alleged offenses, but appellate review (which resulted in authorization for a retrial) took an additional four years. *Tovarchavez*, 78 M.J. at 458; United States v. Tovarchavez, No. ARMY 20150250, 2017 CCA LEXIS 602, at *1–2 (A. Ct. Crim. App. Sept. 7, 2017), *aff'd*, 2018

different ways of evaluating potential trial errors on appeal. Depending on whether an error was properly preserved at trial and the nature of the error in question, an appellate court's standard of review will vary widely.

"Simply stated, the standard of review is the amount of deference an appellate court accords a trial judge's decision."[23] Standards of review are the key to appellate practice—they are the lens through which the higher court views the facts of the case, the decisions of the trial judge, and any alleged errors. As such, standards of review are often outcome determinative.[24] Given identical facts, an appellate court may be bound to uphold a case if review is limited to evaluating a trial judge's exercise of discretion; alternatively, that same appellate court may overturn the case if permitted to review the decision de novo, with the appellate judges substituting their own judgment for that of the lower court.[25] Assuming a court finds error, it may still uphold the result if an appellant cannot establish prejudice. Conversely, as in *Tovarchavez*, an identical error may not survive review if the Government is required to *disprove* the possibility of prejudice beyond a reasonable doubt.[26]

What standard of review is used to determine whether an error occurred at trial? Assuming an error did occur, how does an appellate court evaluate prejudice? The two principal factors that determine the appropriate standard of review are (1) preservation of the alleged error and (2) the nature or magnitude of the error. An appellate court will evaluate an alleged error

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CCA LEXIS 371 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019); Joint App., *supra* note 1, at 39.

[23] Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How*, ARMY LAW., Mar. 2003, at 10, 16.

[24] United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011) (stating standards of review can be "critical to the outcome" of a case). Given their foundational nature, appellate opinions almost universally begin their analysis by identifying the appropriate standard of review. *See, e.g.*, United States v. Gonzales, 78 M.J. 480, 483 (C.A.A.F. 2019); United States v. Armstrong, 77 M.J. 465, 468 (C.A.A.F. 2018); United States v. Guardado, 77 M.J. 90, 93 (C.A.A.F. 2017).

[25] *See* United States v. Cooper, 58 M.J. 54, 57–58 (C.A.A.F. 2003) (contrasting abuse of discretion with de novo review in the context speedy trial violations); United States v. Gaither, 41 M.J. 774, 777–79 (A.F. Ct. Crim. App. 1995) (contrasting abuse of discretion with de novo review in the context of a trial judge reviewing pretrial confinement). De novo review is defined as an "original appraisal of all the evidence." *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 n.31 (1984).

[26] United States v. Olano, 507 U.S. 725, 741 (1993) ("Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that the deviation . . . was prejudicial.").

differently depending on whether counsel objected at trial, counsel failed to object (i.e., forfeiture), or counsel affirmatively waived the issue.[27] Similarly, minor procedural errors are evaluated differently than those bearing on constitutional rights.[28]

Identifying the correct standard of review is relatively straightforward when evaluating either of these principles independently.[29] For preservation of error, appellate review is least deferential where an error is preserved and counsel provide a detailed basis for their objection on the record.[30] Conversely, deference to the lower court is at its highest where an error draws no objection at trial.[31] Similarly, appellate courts review minor errors most leniently and constitutional errors most critically.[32] However, the question is far more complex when these two axes intersect, such as where a constitutional error is not preserved at trial.[33] Forfeiture of error weighs in favor of more deference to the trial court's decision; constitutional error weighs toward less. How should an appellate court evaluate prejudice in such a circumstance? Which party bears the burden?

In *Tovarchavez*, C.A.A.F. held that the constitutional nature of the error is the dominant factor; thus, in all cases of constitutional error, the Government must disprove prejudice beyond a reasonable doubt, regardless of whether the error was preserved at trial.[34] A slim majority relied heavily on the Supreme Court's 1967 decision in *Chapman v. California* and drew

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[27] *See* Major Terri J. Erisman, *Defining the Obvious: Addressing the Use and Scope of Plain Error*, 61 A.F. L. REV. 41, 45–47 (2008); Ham, *supra* note 23, at 10.

[28] *See, e.g.*, United States v. Patton, No. ARMY 20150675, 2017 CCA LEXIS 237, at *2 (A. Ct. Crim. App. Apr. 7, 2017) ("[W]hether an error is constitutional or non-constitutional determines the level of scrutiny applied during our prejudice analysis."); *see also* Chapman v. California, 386 U.S. 18, 22–24 (1967) (distinguishing constitutional and nonconstitutional errors).

[29] United States v. Tovarchavez, 78 M.J. 458, 469–70 (C.A.A.F. 2019) (Maggs, J., dissenting).

[30] *See* Erisman, *supra* note 27; Ham, *supra* note 23, at 10. Preservation of error and the nature of the error each form a continuum, moving from more to less deference afforded to the trial court. Visually, each principle may be illustrated as a line moving from greater to lesser deference towards the trial court's decision. *See infra* apps. A, B.

[31] *See* Erisman, *supra* note 27; Ham, *supra* note 23, at 10. Waiver, which results in an appellate court's refusal to review the alleged error, represents the extreme end of the scale. *See infra* apps. A, B.

[32] *Patton*, 2017 CCA LEXIS 237, at *4–5 ("[W]hether an error is constitutional or non-constitutional determines the level of scrutiny applied during our prejudice analysis."); *see Chapman*, 386 U.S. at 22–24.

[33] United States v. Tovarchavez, No. ARMY 20150250, 2018 CCA Lexis 371, at *4–5 (A. Ct. Crim. App. July 19, 2019), *vacated*, 78 M.J. 458 (C.A.A.F. 2019). *See infra* apps. A, B.

[34] *Tovarchavez*, 78 M.J. at 462–63.

a distinction between the Federal and military rules governing review of unpreserved errors.[35] The two dissenting justices countered that the majority's decision incorrectly deviated from more recent Supreme Court and Federal decisions, with no distinguishing basis in military statute or practice to do so.[36]

The *Tovarchavez* decision treats preserved and unpreserved constitutional errors virtually the same on appeal. This, in turn, diminishes the importance of preserving and fully litigating potential errors at trial. The C.A.A.F.'s decision is incorrect, unjustified, and contrary to judicial policy. First, C.A.A.F.'s decision departs from the Supreme Court and Federal circuits, which consistently require appellants to affirmatively establish prejudice for unpreserved errors.[37] Second, nothing in the Uniform Code of Military Justice (UCMJ) justifies deviating from this precedent or applying a different standard of review in military practice.[38] Third, *Tovarchavez* conflicts with C.A.A.F.'s own recent decisions that identify unpreserved constitutional errors yet still require the appellant to establish prejudice.[39] Fourth, requiring timely preservation of error encourages thorough litigation at trial and promotes judicial efficiency.[40]

Practitioners and Supreme Court Justices alike have bemoaned the difficulty of evaluating prejudice on appeal. The task is even more challenging when an error is not litigated at trial, leaving the appellate court with an undeveloped record to review.[41] Hence, courts historically place a

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[35] *Id.*
[36] *Id.* at 469–72 (Maggs, J., dissenting).
[37] *See, e.g.*, United States v. Cotton, 535 U.S. 625, 629 (2002); Johnson v. United States, 520 U.S. 461 (1997). Federal civilian courts evaluate a preserved error for its effect on the outcome of the trial, with more serious errors requiring the Government to prove harmlessness beyond a reasonable doubt. FED. R. CRIM. P. 52(a); United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004). Conversely, errors that were unpreserved (or forfeited) at trial require an appellant to establish "plain error," a high bar which requires an appellant to establish prejudice regardless of the nature of the error, never shifting a higher burden back to the Government. *See* FED. R. CRIM. P. 52(b); United States v. Olano, 507 U.S. 725, 734 (1993) (discussing the "plain error" test); *see also Dominguez Benitez*, 542 U.S. at 82 (discussing the high bar for relief of unpreserved errors).
[38] *Tovarchavez*, 78 M.J. at 469 (Maggs, J., dissenting).
[39] *See* United States v. Armstrong, 77 M.J. 465 (C.A.A.F. 2018); United States v. Oliver, 76 M.J. 271 (C.A.A.F. 2017).
[40] Ham, *supra* note 23, at 15–16.
[41] "Substantial confusion . . . pervades these tests because of the way in which courts discuss and apply them. Cases purporting to apply the same test sometimes articulate the test differently. Even small shifts in language may ultimately impact the application of harm assessing tests, and they certainly blur the lines between the tests." Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 1015–16

higher burden on appellants seeking relief for unpreserved errors.[42] For these reasons, C.A.A.F. should mirror the approach of the Federal civilian courts, placing the emphasis on whether errors are preserved at trial.

Part II of this article provides an overview of how appellate courts apply standards of review to evaluate prejudice and highlights critical decisions that define prejudice analysis in the Federal civilian and military courts. Part III critically analyzes C.A.A.F.'s decision in *Tovarchavez*. Finally, Part IV proposes recommendations to bring the military into conformity with Federal practice.

II. The Evolution of Plain Error and Prejudice Analysis on Appeal

A. The General Structure of Appellate Review

Two fundamental questions drive appellate review: (1) was there an error, and (2) if so, was the error prejudicial?[43] Appellate courts must answer both questions affirmatively to grant relief; if there is an error but no prejudice, relief is not warranted.[44] The applicable standard of review dictates how a court approaches these questions, and preservation of error, in turn, impacts the standard of review and determines whether the court may even take notice of the claimed error.[45] Therefore, as a preliminary

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(2015). "Defining and distinguishing reversible error, harmless error, plain error, and structural error both theoretically and practically is currently an almost hopeless task." Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; A New Paradigm for Criminal Cases*, 43 CRIM. L. BULL. 955, 958 (2007). Regarding the different tests for prejudice, Justice Scalia complained:

> Such ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking. That is especially so when they are applied to the hypothesizing of events that never in fact occurred. Such an enterprise is not factfinding, but closer to divination.

Dominguez Benitez, 542 U.S. at 86–87 (Scalia, J., concurring).

[42] Ham, *supra* note 23, at 10, 15–16; *see also* Puckett v. United States, 556 U.S. 129, 135 (2009) (stating that when a defendant does not timely object to an error at trial, obtaining relief is "difficult, 'as it should be'" (quoting *Dominguez Benitez*, 542 U.S. at 83 n.9)); United States v. Young, 470 U.S. 1, 16 (1985) ("Reviewing courts are not to use the plain-error doctrine to consider trial court errors not meriting appellate review absent timely objection—a practice which we have criticized as 'extravagant protection.'" (quoting Henderson v. Kibbe, 431 U.S. 145, 154 n.12 (1977))).

[43] UCMJ art. 59(a) (1950); Ham, *supra* note 23, at 10, 17.

[44] MCM, *supra* note 2, MIL. R. EVID. 103; Ham, *supra* note 23, at 10, 16.

[45] *See* MCM, *supra* note 2, MIL. R. EVID. 103; *see also* Ham, *supra* note 23, at 10, 17. In this context, to "take notice of" a claimed error means whether the reviewing court is empowered

matter, a court must ask whether the claimed error was preserved, forfeited, or waived at trial.[46]

"[W]aiver is the 'intentional relinquishment or abandonment of a known right'"—essentially, an affirmative statement or action purposefully disclaiming any objection.[47] Waiver results in a nullity; where there has been a proper waiver, there is no error to correct on appeal.[48] "It extinguishes rights of an accused, forever banishing waived legal issues from the purview of any appellate court."[49] Hence, as a general rule, appellate courts will not review waived issues and will take notice only of errors that were properly preserved or, in some instances, forfeited at trial.[50]

1. Preservation of Error Versus Forfeiture of Error

Preservation of error requires a properly and timely lodged objection that sufficiently invokes a specific rule or principle of law.[51] An appellant's position is strongest when the claimed error is preserved at trial—an appellate court will move directly to analyzing the substantive question of whether an error occurred.[52] Depending on the error alleged, various

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to even consider and review the claim of error. United States v. Riley, 47 M.J. 276, 281 (C.A.A.F. 1997) ("[A] Court of Criminal Appeals may take notice of errors of law, whether or not they were preserved by timely objection; our Court is constrained by the rules of waiver and the doctrine of plain error.").

[46] United States v. Payne, 73 M.J. 19, 23 (C.A.A.F. 2014); United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005); Ham, *supra* note 23, at 10, 12.

[47] United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). See Ham, *supra* note 23, at 10, for a comprehensive examination of waiver. Though mere silence is generally not enough, affirmatively stating "no objection" may constitute waiver. *See, e.g.*, United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017).

[48] *Ahern*, 76 M.J. at 198 ("[A] valid waiver leaves no error for us to correct on appeal." (quoting United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009))).

[49] United States v. Hardy, 77 M.J. 438, 445 (C.A.A.F. 2018) (Ohlson, J., dissenting).

[50] With few exceptions, virtually all issues are subject to waiver. Issues not subject to waiver include jurisdiction and adjudicative unlawful command influence. MCM, *supra* note 2, R.C.M. 907(b)(1); *see* United States v. Douglas, 68 M.J. 349, 356 n.7 (C.A.A.F. 2010). The rights not subject to waiver are generally of the type considered "structural;" however, every "structural error" is not per se unwaivable. *See* Weaver v. Massachusetts, 137 S.Ct. 1899 (2017); United States v. Pasay, No. ARMY 20140930, 2017 CCA LEXIS 590, at *13 (A. Ct. Crim. App. Apr. 19, 2017).

[51] MCM, *supra* note 2, MIL. R. EVID. 103(a); *see also Payne*, 73 M.J. at 23 (requiring the "same level of specificity" for objections to panel instructions as is required for evidentiary objections); *Datz*, 61 M.J. at 42 ("On its face, M.R.E. 103 does not require the moving party to present every argument in support of an objection, but does require argument sufficient to make the military judge aware of the specific ground for objection, 'if the specific ground was not apparent from the context.'").

[52] MCM, *supra* note 2, MIL. R. EVID. 103; Ham, *supra* note 23, at 10, 16.

standards of review may apply to determine whether error actually exists. Generally, evidentiary rulings are tested for an "abuse of discretion,"[53] a trial court's findings of fact are reviewed under a "clearly erroneous standard,"[54] and questions of law are reviewed de novo.[55] Cases presenting mixed questions of law and fact require mixed standards of review, while a handful of issues carry other unique standards of review.[56] If a court finds there was error, it moves to the question of prejudice.[57] For preserved error, the

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[53] United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007).

> Normally, a military judge abuses his or her discretion (1) when the findings of fact upon which he or she predicates the ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his or her application of the correct legal principles to the facts is clearly unreasonable.

Colonel Jeremy Stone Weber, *The Abuse of Discretion Standard of Review in Military Justice Appeals*, 223 MIL. L. REV. 41, 49 (2015). This most deferential standard recognizes that reasonable minds, and reasonable attorneys, may disagree on certain points; so long as the military judge did not exceed the left and right limits of his or her discretion, an appellate court will let the decision stand rather than substituting its own judgment for that of the trial court. *See* United States v. Travers, 25 M.J. 61, 62–63 (C.M.A. 1987) ("[A]n abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged actions must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' . . . ." (quoting United States v. Glenn, 473 F.2d 191, 196 (D.C. Cir. 1972))). This standard applies to a variety of alleged errors, such as the admissibility of evidence, *e.g.*, *Brooks*, 64 M.J. at 328, or a military judge's decision to accept a guilty plea, *e.g.*, United States v. Inabinette, 66 M.J. 320, 321 (C.A.A.F. 2008).

[54] United States v. Jones, 73 M.J. 357, 360 (C.A.A.F. 2014). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. Martin, 56 M.J. 97, 106 (C.A.A.F. 2001) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). As with abuse of discretion, the "clearly erroneous" standard weighs heavily in favor of the trial court's finding and requires far more than a mere difference of opinion. United States v. French, 38 M.J. 420, 425 (C.A.A.F. 1993) (stating that the clearly erroneous standard requires "more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." (quoting Parts & Elec. Motors Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988))).

[55] Ham, *supra* note 23, at 10, 17. Questions of law triggering de novo review include jurisdiction, United States v. Davis, 63 M.J. 171, 173 (C.A.A.F. 2006), statutory interpretation, *id.*, and whether the military judge provided correct panel instructions, United States v. Hills, 75 M.J. 350, 357 (C.A.A.F. 2016). Logically, de novo review generally applies to questions of law because a trial court has no discretion to misapply or misinterpret the law.

[56] United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (reviewing panel challenges based on implied bias under a standard "less deferential than abuse of discretion, but more deferential than de novo review"); *Jones*, 73 M.J. at 360 (regarding mixed questions of law and fact); *see also* Weber, *supra* note 53, at 66.

[57] Further explanation and discussion of these standards of review is beyond the scope of this article. See Erisman, *supra* note 27; Ham, *supra* note 23, at 10; Weber, *supra* note 53,

Government generally bears the burden of showing that the error was harmless.[58]

Conversely, forfeiture is the "failure to make timely assertion of [a] right."[59] In practice, forfeiture usually appears as silence on the record—essentially, the absence of either a clear objection preserving the error or waiver disclaiming it.[60] Forfeiture may result from a counsel's oversight or failure to recognize a possible objection, or from a purposeful, strategic decision.[61] In either instance, forfeiture leaves an appellate court in a difficult position. Objection at trial leads to a more robust record: counsel articulate their position on the issue, further testimony and evidence may be presented, and the military judge often explains the ruling.[62] This provides ample material for an appellate court on review.[63] But where the error is forfeited, an appellate court is often reviewing a vacuum and is forced to speculate.[64] Thus, timely objections and preservation of error aid appellate review and promote judicial efficiency.

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for a detailed discussion regarding the different standards of review applicable to determining whether error exists.

[58] United States v. Olano, 507 U.S. 725, 732 (1993).

[59] *Id.* at 731 (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)).

[60] *Id.* at 733.

[61] *See* United States v. Williams, 50 M.J. 397, 401 (C.A.A.F. 1999) (recognizing an appellant may strategically not object to testimony); United States v. Grostefon, 12 M.J. 431, 436 (C.M.A. 1982) (recognizing "that even the most conscientious counsel and judges will occasionally overlook an error in the press of dealing with a load of cases"). The possibility of tactical non-objection complicates an appellate court's review of claims for ineffective assistance of counsel, as it requires the reviewing court to evaluate whether the failure to object to an evident error was a strategically sound decision. *See* United States v. Voorhees, 79 M.J. 5, 13 (C.A.A.F. 2019). Additionally, ineffective assistance of counsel claims "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." Weaver v. Massachusetts, 137 S.Ct. 1899, 1912 (2017) (quoting Harrington v. Richter, 562 U.S. 86, 105 (2011)).

[62] *See* United States v. Dominguez Benitez, 542 U.S. 74, 82–83 (2004) (holding that appellant's burden to establish entitlement to relief for plain error "should not be too easy for defendants" claiming it, so as to "encourage timely objections" and "reduce wasteful reversals"); *see also* United States v. Chapa, 57 M.J. 140, 145–46 (C.A.A.F. 2002) (Sullivan, J., concurring).

[63] United States v. McCarty, 45 M.J. 334, 335 n.2 (C.A.A.F. 1996) (stating that appellate review "requires a record that the appellate court can review"). This also underpins MRE 103's requirement that counsel make clear the specific grounds for their objection. MCM, *supra* note 2, MIL. R. EVID. 103(a)(1)(B).

[64] *McCarty*, 45 M.J. at 335 n.2 ("It is difficult, if not impossible, to second-guess the intent of the trial defense counsel if he or she does not make the specific objection known to the military judge.").

In order to encourage alert litigation at the trial level, appellate courts impose a higher burden, the "plain error" test, before granting relief for errors not preserved at trial.[65] To obtain relief for forfeited error, an appellant must show that there was (1) an error (2) that is "clear and obvious," which (3) resulted in prejudice.[66] This test differs from review of preserved errors in two respects. First, even if the court agrees that an error occurred at trial, the court will not move to the question of prejudice unless the unpreserved error was "clear" or "obvious."[67] Second, the appellant normally bears the burden of establishing prejudice for forfeited error.[68]

2. Establishing Prejudice

Having found error, an appellate court's second substantive question is whether the error prejudiced the appellant. Both the Federal and military rules explicitly prohibit overturning trial results on the basis of error that does not result in prejudice to the accused.[69] Federal Rule of Criminal Procedure Rule 52 (Rule 52) states: "(a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. (b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[70] Though Rule 52 codified the harmless error and plain error principles in Federal practice, it was intended as a "restatement of existing law."[71]

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[65] *See* Puckett v. United States, 556 U.S. 129, 134 (2009) (stating that the plain error test "serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them"); United States v. Frady, 456 U.S. 152, 163 (1982) (explaining that plain error review reflects the "need to encourage all trial participants to seek a fair and accurate trial the first time around").

[66] United States v. Olano, 507 U.S. 725, 734 (1993). These three prongs reflect the military interpretation of the plain error test; Federal civilian courts apply a fourth prong, discussed in more detail below. *See* United States v. Tovarchavez, 78 M.J. 458, 465 n.13 (C.A.A.F. 2019); United States v. Powell, 49 M.J. 460, 465 (C.A.A.F. 1998). Military and civilian courts articulate the specific measure for prejudice is articulated differently. *Compare* UCMJ art. 59(a) (1950) ("materially prejudices the substantial rights"), *with* FED. R. CRIM. P. 52 ("affects substantial rights").

[67] *Olano*, 507 U.S. at 734; *see also* MCM, *supra* note 2, MIL. R. EVID. 103(f).

[68] *Olano*, 507 U.S. at 734–35.

[69] UCMJ art. 59(a) (1950); FED. R. CRIM. P. 52.

[70] FED. R. CRIM. P. 52.

[71] *Id.* advisory committee's note. The Supreme Court previously recognized the doctrine of plain error as early as 1896. Wiborg v. United States, 163 U.S. 632, 658 (1896). Rule 52(b) originally included after "plain error" the words "or defect," which were removed by amendment in 2002 to alleviate any ambiguity or suggestion that the language could be read in the disjunctive. FED. R. CRIM. P. 52 advisory committee's note to 2002 amendment; *see Olano*, 507 U.S. at 732 (discussing the incorrect reading of Rule 52(b) in the disjunctive).

Article 59(a), UCMJ, similarly dictates that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[72] An error that does not materially prejudice the substantial rights of the accused is "harmless."[73] Article 59(a), UCMJ,[74] was adapted from the thirty-seventh Article of War (stating that a case would not be overturned unless an error "injuriously affected the substantial rights of an accused")[75] and section 472 of the U.S. Navy's *Naval Courts and Boards* publication (stating that a trial court's finding should not be set aside "[i]f there has been no miscarriage of justice").[76] Thus, the earlier military rules upon

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The Rule 52 revision was "the culmination of the criminal procedural reform project of the early twentieth century." Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 455 (2009). The American Bar Association first proposed an amendment to the Federal Judicial Code to codify the harmless error rule in 1917, which was adopted by statute in 1919. *Id.* at 443–44. However, the 1919 statute was limited in application, and lobbying for a stronger harmless error provision continued through the 1930's. *Id.* at 444–46. Following the implementation of Rule 52, Congress repealed the 1919 statute and passed a supplemental harmless error statute "to remove any lingering doubt about the status of the harmless error rule in American criminal practice." *Id.* at 454 n.130. See Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1173–85 (1995), and John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59, 66–76 (2016), for more detail on the development of the "harmless error" rule and its variants in the Federal civilian courts.

[72] UCMJ art. 59(a) (1950). Article 59, UCMJ, was part of the original Code, passed on 5 May 1950 and taking effect on 31 May 1951. Uniform Code of Military Justice, Pub. L. No. 81-506, art. 59, 64 Stat. 107, 127 (1950). The current language is identical to the 1950 act, with the exception of the word "may" substituted for the word "shall." *Compare* UCMJ art. 59(a) (1950), *with* Act of Aug. 10, 1956, Pub. L. No. 84-1028, ch. 47, § 859(a), 70A Stat. 1, 57.

[73] UCMJ art. 45(c) (2016).

[74] H.R. REP. NO. 81-491, at 28–29 (1949) ("This subdivision is an extremely important one and should be given full force and effect."). The Committee Report is silent on the question of why the specific language "material prejudice" was employed. *See* MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 553 (2015) (discussing the origins of Article 59, UCMJ).

[75] The thirty-seventh Article of War states:

> The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused . . . .

Articles of War, 41 Stat. 794 (1920) (art. 37).

[76] Section 472 fully states that "[if] there has been no miscarriage of justice, the finding of the court should not be set aside or a new trial granted because of technical errors or defects

which Article 59(a), UCMJ, is based closely mirror the language of Rule 52.

Though phrased slightly differently, Article 59(a), UCMJ, and Rule 52 are substantively analogous—under both rules, the appellate court may grant relief only if an error is prejudicial.[77] Neither rule, however, explains what it means to "materially prejudice" or "affect" substantial rights, nor which party bears the burden of proving it.

Historically, the appropriate standard for evaluating prejudice depended on both preservation of error and the nature of the error itself.[78] Where the error is preserved, the Government bears the burden of demonstrating harmlessness, but the specific test depends on the nature of the error in question.[79] The Supreme Court established the prejudice test for nonconstitutional errors in the 1946 decision of *Kotteakos v. United States*.[80] Defining and applying the test articulated in Rule 52(a), which was passed earlier that same year, the Court asked whether the error had a "substantial and injurious effect or influence in determining the jury's verdict."[81] Thus, preserved nonconstitutional error requires the Government to prove that the error did not substantially influence the court's findings.[82]

Conversely, the Supreme Court's 1967 decision in *Chapman v. California* established the prejudice test for constitutional errors.[83] The

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which do not affect the substantial rights of the accused." U.S. DEP'T OF NAVY, NAVAL COURTS AND BOARDS 244 (1944).

[77] *Compare* UCMJ art. 59(a) (1950) ("A finding or sentence of a court-martial may not be held incorrect . . . unless the error materially prejudices the substantial rights"), *with* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). The "harmless error" test of Rule 52(a) was established in *Kotteakos v. United States*. 328 U.S. 750, 776 (1946) (asking whether the error had a "substantial and injurious effect or influence in determining the jury's verdict"). Likewise, Rule 52(b) employs language similar to MRE 103(f), which states that "[a] military judge may take notice of a plain error that materially prejudices a substantial right, even if the claim of error was not properly preserved." MCM, *supra* note 2, MIL. R. EVID. 103(f).

[78] Ham, *supra* note 23, at 10, 18.

[79] United States v. Olano, 507 U.S. 725, 732 (1993).

[80] *Kotteakos*, 328 U.S. 750.

[81] *Id.* at 776.

[82] *See, e.g.*, United States v. Dominguez Benitez, 542 U.S. 74 (2004); United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019).

[83] Chapman v. California, 386 U.S. 18, 19–20 (1967). In *Chapman*, the prosecution used appellants' failure to testify as evidence of their guilt. *Id.* At the time of trial, California's constitution permitted the prosecution to make this argument to the jury, and the defendants made no objection. *Id.* at 19–20. Subsequent to trial, but prior to the case reaching the California Supreme Court, the U.S. Supreme Court's decision in *Griffin v. California*

Court's opinion focused on whether constitutional error could ever be "harmless" within the meaning of the Federal rules.[84] Rejecting the idea that such errors are per se prejudicial, the Court determined that some constitutional errors are "so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction."[85] However, rather than requiring a "substantial and injurious effect" on the verdict (as in *Kotteakos*), the Court in *Chapman* asked "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[86] For constitutional error, the Government must eliminate any such possibility and establish that the error "was harmless beyond a reasonable doubt."[87]

invalidated this California constitutional provision. *Id.*; Griffin v. California, 380 U.S. 609 (1965).

[84] *Chapman*, 386 U.S. at 20. Under modern practice, when there is a change in the law during the pendency of an appeal as there was in this case, the resulting error is deemed forfeited rather than waived. Johnson v. United States, 520 U.S. 461 (1997). However, the Supreme Court's opinion never discusses the issue of preservation of error. *Chapman*, 386 U.S. at 19–20. As the Supreme Court decision did not address preservation of error, the opinion similarly does not apply any version of plain error analysis. *Id.* at 21–24. Instead, the court moves directly into discussing the nature of the error in question and determining how the prejudice of the error should be evaluated. *Id.*

[85] *Chapman*, 386 U.S. at 22. Appellant's argument effectively sought to treat all constitutional errors in the same way appellate courts now treat "structural errors" (i.e., normal prejudice analysis is inapplicable because prejudice is essentially presumed). *See* Weaver v. Massachusetts, 137 S.Ct. 1899, 1907–08 (2017). In reaching its conclusion, the Court noted that Rule 52 fails to distinguish between constitutional and nonconstitutional errors. *Chapman*, 386 U.S. at 22. See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2037–40 (2008), for a thorough explanation of the division between structural error and constitutional error which is subject to harmless error analysis.

[86] *Chapman*, 386 U.S. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)). While acknowledging the existence of what we now call "structural errors" ("some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error") the Court emphasized that "this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal." *Id.*; *see Weaver*, 137 S. Ct. at 1907–08 (providing a current overview of "structural error"); Arizona v. Fulminante, 499 U.S. 279, 306–12 (1991) (discussing "structural defects" that by their nature defy analysis under a "harmless error" standard). The Court noted that the burden shift to the Government is consistent with the original common-law harmless error rule. *Chapman*, 386 U.S. at 24 n.9. See Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2142–51 (2018), for a detailed discussion of the legal basis for the standard articulated in *Chapman*.

[87] *Chapman*, 386 U.S. at 24. Professor Greabe argues that the *Chapman* framework "unduly privileges constitutional error vis-à-vis nonconstitutional error," and that a harmless error analysis should utilize a unitary standard. Greabe, *supra* note 71, at 64–65.

Conversely, forfeited errors traditionally require the appellant to prove prejudice, as part of the plain error test.[88] Historically, both Federal and military courts viewed plain error as an extreme remedy.[89] The Supreme Court cautioned that plain error should be corrected only when it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[90] The Court of Military Appeals similarly warned that plain error should "be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."[91] Practice in the two systems began to significantly diverge only after the Supreme Court's decision in *United States v. Olano* and the C.A.A.F.'s subsequent decision in *United States v. Powell*.[92]

B. Plain Error and Prejudice Analysis in Federal Courts

1. United States v. Olano *and Federal Plain Error Review*

The Supreme Court granted certiorari in *Olano* "to clarify the standard for 'plain error' review . . . under Rule 52(b)."[93] The Court held that to grant relief for unpreserved error (1) "[t]here must be an error or defect;"[94] (2) the error "must be clear or obvious;" (3) the error "must have affected the appellant's substantial rights;" and even if those thresholds are met, (4) the court should only act if the error "seriously affect[s] the fairness, integrity

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[88] United States v. Olano, 507 U.S. 725, 732 (1993); *see* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018) ("Has Appellant shown that the error caused him to suffer material prejudice?"); United States v. Oliver, 76 M.J. 271, 275 (C.A.A.F. 2017) ("Appellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice . . . .'" (quoting United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2015) (alteration in original))).

[89] *See Olano*, 507 U.S. at 735; United States v. Fisher, 21 M.J. 327, 328–29 (C.M.A. 1986); United States v. Gerald, 624 F.2d 1291, 1299 (5th Cir. 1980) ("The plain error rule is not a run-of-the-mill remedy. . . . [I]t is invoked 'only in exceptional circumstances [where necessary] to avoid a miscarriage of justice.'" (quoting Eaton v. United States, 398 F.2d 485, 486 (5th Cir. 1968) (alteration in original))); United States v. DiBenedetto, 542 F.2d 490, 494 (8th Cir. 1976) ("This court, along with courts in general, have applied the plain error rule sparingly and only in situations where it is necessary to do so to prevent a great miscarriage of justice.").

[90] *Olano*, 507 U.S. at 735.

[91] *Fisher*, 21 M.J. at 328–29.

[92] *Olano*, 507 U.S. 725; United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998).

[93] *Olano*, 507 U.S. at 731; FED. R. CRIM. P. 52(b).

[94] "Deviation from a legal rule is 'error' unless the rule has been waived." *Olano*, 507 U.S. at 732–33. "If a legal rule was violated . . . and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733–34.

or public reputation of judicial proceedings."[95] Regarding the third prong, to affect substantial rights "in most cases . . . means that the error must have been prejudicial: It must have affected the outcome of the [trial] proceedings."[96]

Rule 52(a), governing preserved error, and Rule 52(b), governing forfeited error, contain identical language that the error must "affect[] substantial rights."[97] Consequently, preserved and forfeited errors "require the same kind of inquiry" to determine whether the error was prejudicial, "with one important difference"—where the error is forfeited, "[i]t is *the defendant rather than the Government* who bears the burden of persuasion with respect to prejudice."[98] "Normally, although perhaps not in every case,

[95] *Id.* at 734. Treating forfeiture the same as waiver is too extreme. It would be contrary to "the rules of fundamental justice" if forfeited errors could never be noticed or corrected. *Id.* at 732. However, the Court's authority to correct plain error is "circumscribed" by Rule 52(b). *Id.* As discussed further below, C.A.A.F. has declined to apply the fourth prong of *Olano*. *See, e.g.*, United States v. Tovarchavez, 78 M.J. 458, 467 n.14 (C.A.A.F. 2019) ("This divergence from federal practice is regularly justified by the differences between Article 59, UCMJ, and [Rule] 52(b)."); *see also* United States v. Tunstall, 72 M.J. 191, 196 n.7, 196 (C.A.A.F. 2013); *Powell*, 49 M.J. at 463–65.

[96] *Olano*, 507 U.S. at 734. The Court left open the possibility that an error may "affect substantial rights" without actually being prejudicial. *Id.* at 737 ("Assuming *arguendo* that certain errors 'affec[t] substantial rights' independent of prejudice, the instant violation of Rule 24(c) is not such an error." (alteration in original)). Justice Stevens argued as much in his dissent, stating that "affects substantial rights" should not be synonymous with prejudice because some errors by their nature "undermin[e] the structural integrity of the criminal tribunal itself." *Id.* at 743 (Stevens, J., dissenting). Here, Justice Stevens appears not to be implying "structural error" per se, but rather arguing that the third and fourth prongs of the majority test should be viewed as separate and independent bases for relief (rather than reaching the fourth prong only if the third is met). Whether prejudicial or not, errors that "call into question the integrity of the jury's deliberations may harm the system as a whole" and thus "'seriously affect the fairness, integrity or public reputation of judicial proceedings' . . . making them candidates for reversal under Rule 52." *Id.* at 743–44 (Stevens, J., dissenting) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). However, later cases like *Cotton* and *Johnson* show that the Court has consistently defined the third prong to require prejudice. United States v. Cotton, 535 U.S. 625 (2002); United States v. Johnson, 520 U.S. 461 (1997); *see* Epps, *supra* note 86 (discussing the different ways to conceptualize "prejudice" and arguing for a rights-based framework, in the context of harmless error analysis under Rule 52(a)).

[97] *Olano*, 507 U.S. at 734.

[98] *Id.* (emphasis added). The Court ascribed this burden shift to a "subtle but important difference in language . . . . While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights', Rule 52(b) authorizes no remedy unless the error *does* 'affect substantial rights.'" *Id.* at 734–35. As discussed above, "affects substantial rights" could logically mean something different than prejudice, but case law has, over time, collapsed this term to be essentially synonymous with prejudice. *See supra* note 96. Though earlier Supreme Court decisions such as *Young*, *Frady*, and *Atkinson* do not explicitly discuss the

the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)."[99]

Though *Olano* concerned nonconstitutional error, the Court squarely rejected the idea that constitutional errors are exempt from the rules of forfeiture and plain error analysis: "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right . . . .'"[100] Preservation of error, rather than the nature of the right at issue, frames the Court's analysis: "Whether the Government could have met its burden of showing the absence of prejudice . . . if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that the deviation . . . was prejudicial."[101]

Olano's fourth prong, admonishing that courts should correct only errors "seriously affect[ing] the fairness, integrity, or public reputation of judicial proceedings," reflects the "established appellate practice" that noticing and correcting plain error is a matter of judicial discretion that courts should apply sparingly.[102] This principle is reflected in the language

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parties' burdens in establishing plain error, Rule 52 was itself merely a "restatement of existing law." United States v. Young, 470 U.S. 1 (1985); United States v. Frady, 456 U.S. 152 (1982); United States v. Atkinson, 297 U.S. 157 (1936); FED. R. CRIM. P. 52 advisory committee's note. The annotation to the early draft of Rule 52 explained that the Rule rejected, "as did Congress in [the 1919 harmless error statute], the older doctrine that prejudice should be presumed from the commission of error," suggesting that the party claiming the error would henceforth carry the burden of establishing prejudice. Fairfax, *supra* note 71, at 452. Though the military is not bound by the language of Rule 52, C.A.A.F. also places the burden for establishing plain error on the appellant. *Powell*, 49 M.J. at 464–65.

[99] *Olano*, 507 U.S. at 735 (emphasis added). The court hedges slightly, allowing for the possibility of "a special category of forfeited errors that can be corrected regardless of their effect on the outcome" and "errors that should be presumed prejudicial"—here, the Court essentially recognizes the notion of "structural error." *Id.* Notably however, the Court never references *Chapman*, even when discussing these theoretical exceptions to the defendant's burden.

[100] *Id.* at 731 (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)). In *Olano*, alternate jurors were present during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c). *Id.* at 728–29. Because there was no objection at trial, the error was forfeited and the Ninth Circuit reviewed for plain error. *Id.* at 730.

[101] *Id.* at 741.

[102] *Id.* at 736 (quoting *Atkinson*, 297 U.S. at 160). The Court emphasized that this fourth prong, invoking the reviewing court's discretion, is distinct from the third prong, requiring prejudice: an error may "affect the fairness, integrity or public reputation of judicial proceedings" without relation to any impact on the outcome of the trial, and conversely an effect on an accused's substantial rights does not independently satisfy the fourth prong—"otherwise the discretion afforded by Rule 52(b) would be illusory." *Id.* at 736–37. If the

of Rule 52(b) ("may be noticed") but is also rooted in the earliest case law discussing plain error, far predating the codification of plain error in the federal rules.[103]

2. The Federal Consensus Following Olano

Though *Olano* concerned nonconstitutional error, the Supreme Court's subsequent decisions have clearly established that *Olano*'s plain error test applies equally to cases of constitutional error. The Court's first two opportunities to apply *Olano* to constitutional error were in *United States v. Johnson*[104] and *United States v. Cotton*.[105] In both cases, petitioners argued that the alleged constitutional errors were "structural" in nature, essentially making the errors per se prejudicial and not subject to the usual burden required for plain error relief.[106]

The Supreme Court firmly rejected these arguments. In *Johnson*, the Court warned that:

> [A]ny unwarranted expansion of Rule 52(b) . . . "would skew the Rule's 'careful balancing of our need to

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first three prongs of the "plain error" test are met, a court "has authority to order correction, but is not required to do so." *Id.* at 735. "Rule 52(b) is permissive, not mandatory." *Id.*

[103] FED. R. CRIM. P. 52(b); *see Atkinson*, 297 U.S. at 160 ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."); *see also* Crawford v. United States, 212 U.S. 183, 194 (1909) (discussing the court's discretion in noticing unpreserved error); Wilborg v. United States, 163 U.S. 632, 658 (1896) (discussing the court's "liberty" to correct an unpreserved error).

[104] In *Johnson*, the trial judge, rather than the jury, decided whether a false statement to a grand jury was "material" for the purposes of a false material declaration charge—essentially making a finding as to an element of the offense rather than submitting that question to the jury. Johnson v. United States, 520 U.S. 461, 463–64 (1997). The petitioner successfully argued on appeal that this violated his constitutional right to have the jury determine his guilt as to each element of the charged offense. *Id.*; *see* United States v. Gaudin, 515 U.S. 506, 509–10 (1995) (holding that the Fifth Amendment's Due Process Clause and Sixth Amendment right to a jury trial require that a jury determine a defendant's guilt as to each element of the charged crime).

[105] In *Cotton*, the respondents' indictments failed to allege a fact that increased the statutory maximum sentence of the charge, a constitutional error not objected to at trial. United States v. Cotton, 535 U.S. 625, 627 (2002); *see* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (quoting United States v. Jones, 526 U.S. 227, 243 (1999)).

[106] *Cotton*, 535 U.S. at 633; *Johnson*, 520 U.S. at 466.

> encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make.[107]

Thus, forfeited error—even when constitutional—is directly subject to *Olano*'s plain error test.[108] In both cases, the Court skipped the prejudice analysis (*Olano*'s third prong) and decided the case on the fourth prong of the plain error test. In *Johnson*, because "the evidence . . . was 'overwhelming'" and "essentially uncontroverted," the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[109] The language and analysis in *Cotton* is virtually identical.[110] However, while the Court ostensibly sidestepped the prejudice analysis, deciding on other grounds, the Court notably identified prejudice as the respondent's burden and *did not* require the Government to prove that the forfeited constitutional error was harmless beyond a reasonable doubt.[111]

In both *Johnson* and *Cotton*, the Court did not shy away from the constitutional nature of the errors. The Court acknowledged that *Cotton*

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[107] *Johnson*, 520 U.S. at 466 (quoting United States v. Young, 470 U.S. 1, 15 (1985)). The Court further noted that no prior instances recognizing "structural error" involved a direct appeal from a Federal conviction; instead, "structural error" usually arose from an appeal of state courts, reviewing errors arising under state rules. *Id.* Because this case involved a purely Federal conviction, it fell firmly within the scope of Rule 52, and "the seriousness of the error claimed [did] not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Id.*

[108] *Id.* Though the Court's reasoning focuses on the restrictions of Rule 52, which is not independently applicable to the military, that rule is itself a restatement of existing law regarding plain error review. *See Atkinson*, 297 U.S. at 160.

[109] *Johnson*, 520 U.S. at 467–70. Regarding the fourth prong's requirement that the error "seriously affect the fairness, integrity, or public reputation of judicial proceedings," the Court emphasized that "it would be the reversal of a conviction such as this which would have that effect. 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule.'" *Id.* at 470 (quoting ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970)).

[110] *Cotton*, 535 U.S. at 633. Applying the plain error test and finding clear and obvious error, the Court concluded it "need not resolve whether respondents satisfy [the prejudice requirement] of plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" where the evidence supporting the conviction was "overwhelming" and "essentially uncontroverted." *Id.* at 633–34.

[111] *Id.* at 632–33.

concerns Fifth Amendment rights, just as *Johnson* concerned Sixth Amendment rights, but concluded in both cases that "the important role" of the rights at issue did not prevent the Court "from applying the longstanding rule 'that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . .'"[112] Neither opinion referenced or cited *Chapman* a single time, strongly suggesting that *Chapman* simply does not apply when testing for plain error.[113] In fact, the Court highlighted and discussed the constitutional nature of the errors for the explicit purpose of emphasizing that the usual rules of forfeiture and plain error apply *regardless* of the seriousness of the rights at issue.

The Court reiterated the distinction between preserved and unpreserved errors in *United States v. Dominguez Benitez*.[114] Whereas the Government bears the prejudicial burden for preserved error, the defendant must prove prejudice where the error is unpreserved, regardless of the constitutional nature of the error:

> [T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it, and for several reasons, we think that burden should not be too easy for defendants . . . . [T]he standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error.[115]

The *Dominguez Benitez* opinion went on to explicitly distinguish cases in which "the Government has the burden of addressing prejudice," which

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[112] *Id.* at 634 (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)).

[113] Though overruling by implication is generally disfavored, the omission of any reference to *Chapman* is conspicuous in light of *Chapman*'s dictate "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967); *see* Agostini v. Felton, 521 U.S. 203, 237 (1997) (discussing the dictate that overruling by implication is disfavored); United States v. Pack, 65 M.J. 381, 383 (C.A.A.F. 2007) (same); *see also* Greabe, *supra* note 71, at 79 (discussing plain error review as a separate and distinct category from constitutional errors challenged on direct review under *Chapman*). Conversely, *Chapman* remains the standard for evaluating preserved constitutional errors. United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004) ("When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case."); *see* Gamache v. California, 562 U.S. 1083 (2010) (discussing the continued applicability of *Chapman*'s burden shift in certain circumstances).

[114] *Dominguez Benitez*, 542 U.S. 74.

[115] *Id.* at 82.

are subject to *Chapman*, from those cases where "the burden is on a defendant to show prejudice."[116] As recently as 2016, the Court again affirmed the appellant's burden, stating that to obtain relief for plain error, "[the appellant] must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different."[117]

Though the error in *Chapman* was unpreserved, the Court's opinion and analysis ignored that fact and instead focused wholly on testing the potential harmlessness of constitutional errors—the opinion failed to mention the issue of forfeiture a single time and omitted any discussion of the lack of objection at trial.[118] However, it is clear that in the decades following *Chapman*, the Court clarified the delineation between testing for preserved error and testing forfeited error—in the latter case, the plain error test controls regardless of the constitutionality of the error.[119]

Consistent with the Supreme Court, the Federal circuits have explicitly distinguished the application of *Chapman* (to preserved errors) from *Olano*'s plain error test (for forfeited errors). In *United States v. Hastings*, the Fourth Circuit acknowledged that constitutional error would normally implicate *Chapman*, but "[b]ecause [appellant] failed to object in a timely fashion to the instruction . . . [the court] cannot simply review to determine whether the instructional error was harmless beyond a reasonable doubt."[120] Instead, the court "turn[s] to the manner in which that standard is to be applied on plain-error review, when the defendant rather than the Government bears the burden of proof."[121] Similarly, in *United States v.*

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[116] *Id.* at 81 n.7.

[117] Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016) (quoting *Dominguez Benitez*, 542 U.S. at 82).

[118] *Chapman*, 386 U.S. at 20–21.

[119] That *Chapman* itself addressed an unpreserved error seems, initially, at odds with the post-*Olano* direction of the Court. The *Chapman* decision has long drawn scrutiny as being unclear and perhaps even unnecessary—Justice Traynor criticized the decision for failing to cite or recognize either the Federal harmless-error statute or Rule 52(a), which seemingly apply to the question the *Chapman* court sought to answer. Graebe, *supra* note 71, at 80 (citing TRAYNOR, *supra* note 109, at 1). One possible explanation for *Chapman*'s distinct approach to a forfeited error is the fact that *Chapman* concerned Supreme Court review of an appeal from a state supreme court concerning a state court criminal conviction, whereas *Olano*, *Johnson*, and *Cotton* concerned reviews of convictions originating in Federal district court. United States v. Cotton, 535 U.S. 625, 628 (2002); Johnson v. United States, 520 U.S. 461, 463 (1997); United States v. Olano, 507 U.S. 725, 727 (1993); *Chapman*, 386 U.S. at 18.

[120] United States v. Hastings, 134 F.3d 235, 243 (4th Cir. 1998).

[121] *Id.* The court further elaborated:

Wihbey, the First Circuit conceded that a constitutional error normally requires the Government to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[122] However, "[a] very different standard is applied when a party forfeits an error by failing to make a contemporaneous objection"—in those instances, the court has the "discretion to reverse only for 'plain error' . . . that was 'prejudicial' to the defendant in that it 'affected the outcome of the [trial court] proceedings.'"[123]

Currently, every Federal appellate court subjects unpreserved constitutional error to the plain error test, imposing on the appellant the burden of establishing prejudice.[124] As the Seventh Circuit stated in *United States v. Cardena*:

> [E]ven a jury-instruction error of constitutional dimension is subject to the familiar requirement that the error have harmed the defendant. . . . [T]he plain error must have affected the defendant's substantial rights such that there is a reasonable probability that but for the error the outcome of the trial would have been different. The analysis "requires the same kind of inquiry" as [preserved error] review, except that the burden is on the defendant to show prejudice. Defendants have not satisfied their heavy

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> As the Supreme Court made clear in *Olano* . . . the two modes of analysis differ significantly. On review for plain error, the defendant bears the burden of establishing that he has been prejudiced by an unpreserved error; in contrast, harmless-error review requires the Government to demonstrate that a preserved error was harmless.

Id. at 243 n.8.

122 United States v. Wihbey, 75 F.3d 761, 769 (1st Cir. 1996) (quoting *Chapman*, 386 U.S. at 24).

123 *Id.*

124 *See* United States v. Tovarchavez, 78 M.J. 458, 471 n.4 (C.A.A.F. 2019) (Maggs, J., dissenting) (first citing United States v. Soto, 720 F.3d 51, 57 (1st Cir. 2013); then citing United States v. Bruno, 383 F.3d 65, 78 (2d Cir. 2004); then citing United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001); then citing United States v. Hughes, 401 F.3d 540, 547 (4th Cir. 2005); then citing United States v. Mudekunye, 646 F.3d 281, 289 (5th Cir. 2011); then citing United States v. Yancy, 725 F.3d 596, 600–01 (6th Cir. 2013); then citing United States v. Cardena, 842 F.3d 959, 979 (7th Cir. 2016); then citing United States v. Elmardoudi, 501 F.3d 935, 943–44 (8th Cir. 2007); then citing United States v. Moreland, 622 F.3d 1147, 1158 (9th Cir. 2010); then citing United States v. Turrietta, 696 F.3d 972, 976, 983–84 (10th Cir. 2012); then citing United States v. Margarita Garcia, 906 F.3d 1255, 1260 (11th Cir. 2018); and then citing United States v. McGill, 815 F.3d 846, 875 (D.C. Cir. 2016)).

> burden of showing that the error affected their substantial rights.[125]

Thus, even when the error is constitutional, the "heavy" burden of demonstrating prejudice remains on the appellant.[126] As one commentator noted, constitutional due process "does not guarantee a process that is entirely error-free. The interests in the finality of verdicts and in conserving resources encourage a Government-friendly approach to harm assessment."[127]

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[125] *Cardena*, 842 F.3d at 998 (citations omitted).

[126] *Id.*; *see* United States v. Benford, 875 F.3d 1007, 1017 (10th Cir. 2017) (explicitly acknowledging the constitutional dimension of the unpreserved error, but stating that "[appellant] has the burden to 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different" (quoting Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016))). The Tenth Circuit acknowledged that the plain error test is applied "less rigidly when reviewing a potential constitutional error," recognizing that it is naturally easier for an appellant to establish prejudice when the nature of the error is more significant. *Benford*, 875 F.3d at 1016–17.

[127] Poulin, *supra* note 41, at 1037 (citation omitted); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."). There are multiple specific exceptions where constitutional errors are evaluated differently in Federal courts: an appellant carries the burden of establishing prejudice when alleging Sixth Amendment violations involving competence of counsel, Due Process violations regarding *Brady* disclosures, or allegations of false testimony at trial. Poulin, *supra* note 41, at 1001–04. Claims of ineffective assistance of counsel require an appellant to show a reasonable probability that, but for their counsel's incompetence, they would have obtained a different outcome. Strickland v. Washington, 466 U.S. 668, 694 (1985). To obtain relief where the Government fails to turn over exculpatory evidence, an appellant must demonstrate that said evidence was "material," which is the case "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). The analysis of *Brady* violations is distinct because the "materiality" test is a preliminary question as to whether an error exists; "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. Ironically, these are all instances in which one would not expect a defendant to object because the error generally would only be discovered after trial, yet the Court's analysis seems to place a higher burden on appellants in these instances of constitutional error. This is because, rather than presupposing the existence of a trial error, "in these cases a defendant must make a showing of prejudice even to establish that there is a constitutional right to be asserted"—the question of prejudice is incorporated into the threshold determination of whether an error exists. Edwards, *supra* note 71, at 1178. Functionally, the effect is the same insofar as an appellant is required to bear the burden of prejudice where a constitutional right is implicated. These tests "reflect[] the judgment that certain government interests outweigh concerns with fairness to the defendant," much in the same way that the plain error test reflects the judgment that the policy interests favoring timely preservation of error may be properly weighed against fairness to the defendant.

C. Plain Error and Prejudice Analysis in Military Courts

Historically, the military interpretation of plain error was based entirely on Supreme Court precedent and mirrored Federal civilian practice. As discussed above, Article 59(a), UCMJ, restricts military courts from granting relief except where an error of law "materially prejudices the substantial rights of the accused."[128] Though Article 59, UCMJ, does not include an explicit plain error provision similar to Rule 52(b), plain error is codified in MRE 103, which requires that parties preserve errors through objections but permits "taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge."[129]

The concept of plain error has been a part of military jurisprudence since the original passage of the UCMJ. As early as 1951, in *United States v. Masusock*, the Court of Military Appeals—the predecessor to C.A.A.F.—recognized an exception to the general rule of waiver where "the alleged error would result in a manifest miscarriage of justice, or would 'seriously affect the fairness, integrity, or public reputation of judicial

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Poulin, *supra* note 41, at 1003. Similarly, Professor Greabe argues that the Supreme Court has historically (and correctly) drawn a distinction between correcting ongoing constitutional violations (for which remedy is constitutionally necessary) and providing post hoc substitutionary remedies for wholly completed constitutional wrongs, which are "contingent and subject to being withheld in circumstances where their negative effect on the public interest would be too great." Greabe, *supra* note 71, at 90–91.

[128] UCMJ art. 59(a) (1950). The courts of criminal appeals also conduct a full review of the record and may "affirm only such findings of guilty, and the sentence . . . as the Court[s] find[] correct in law and fact . . . ." UCMJ art. 66(d)(1) (2017). Consequently, the courts of criminal appeals are empowered to grant relief based on the factual sufficiency of a case, not merely for errors of law. *See, e.g.*, United States v. Whisenhunt, No. ARMY 20170274, 2019 CCA LEXIS 244 (A. Ct. Crim. App. June 3, 2019).

[129] MCM, *supra* note 2, MIL. R. EVID. 103; United States v. Masusock, 1 C.M.R. 32 (C.M.A. 1951). The MREs were adopted in 1980. Exec. Order No. 12198, 45 Fed. Reg. 16932 (Mar. 12, 1980). "[Military Rule of Evidence] 103(a) was adapted from the corresponding federal rule of evidence, with the exception that the military rule requires that the ruling 'materially prejudices a substantial right,' whereas the federal rule requires that the error 'affects a substantial right.'" MIL. JUST. REV. GRP., *supra* note 74, at 555 (quoting MCM, *supra* note 2, MIL. R. EVID. 103). The military rule parallels Federal Rule of Evidence (FRE) 103, which itself was based upon Federal Rule of Criminal Procedure 52(b). FED. R. CRIM. P. 52 advisory committee's note; *see* Lieutenant Colonel Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 13 (1990) (stating that, consistent with Article 36, UCMJ, the MREs were drafted from "a fundamental philosophical position: military evidentiary law should be as similar to civilian law as possible."). The only difference between MRE 103 and FRE 103 is a substitution of the language "material prejudice" to substantial rights in place of "affects substantial rights." *Compare* MCM, *supra* note 2, MIL. R. EVID. 103, *with* FED. R. EVID. 103.

proceedings.'"[130] "It should be apparent," the court continued, "that to hold otherwise would result in an inefficient appellate system, interminable delays in the final disposition of cases, and careless trial representation."[131]

In *United States v. Fisher*, C.A.A.F. provided the most thorough articulation (pre-*Olano*) of plain error review in the military.[132] Relying heavily on Supreme Court precedent, the Court of Military Appeals departed from an earlier view that certain errors were per se reversible, explaining:

> It has become clear . . . that "[a] *per se* approach to plain error review is flawed." . . . This approach permits counsel for the accused to remain silent, make no objections, and then raise an instructional error for the first time on appeal. This undermines "our need to encourage all trial participants to seek a fair and accurate trial the first time around." Moreover, without viewing the error in the context of the facts of the particular case, "[i]t is simply not possible for an appellate court to assess the seriousness of the claimed error."
>
> In order to constitute plain error, the error must not only be both obvious and substantial, it must also have "had an unfair prejudicial impact on the jury's deliberations." The plain error doctrine is invoked to rectify those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." As a consequence, it "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."[133]

Thus, prior to *Olano* and C.A.A.F.'s subsequent decision in *United States v. Powell*, military plain error was rooted in Supreme Court precedent,

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[130] *Masusock*, 1 C.M.R. at 34 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). The "miscarriage of justice" language was similarly reflected in section 472 of the U.S. Navy's *Naval Courts and Boards* publication, from which Article 59(a), UCMJ, was derived. *See supra* note 76.
[131] *Masusock*, 1 C.M.R. at 34.
[132] United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).
[133] *Id.* at 328–29 (first quoting United States v. Young, 470 U.S. 1, 16 n. 14 (1985); then quoting United States v. Frady, 456 U.S. 152, 163 (1982); then quoting *Young*, 470 U.S. at 16; then quoting *Young*, 470 U.S. at 16 n.14; then quoting *Atkinson*, 297 U.S. at 160; and then quoting *Frady*, 456 U.S. at 163 n.14).

followed Federal civilian practice, and placed no importance on perceived distinctions between Article 59, UCMJ, and Rule 52.

1. Powell *and Military Plain Error Review*

Powell, a case of unpreserved nonconstitutional error, marked the beginning of the military's unjustified departure from Federal civilian practice.[134] The Navy-Marine Corps Court of Criminal Appeals found plain and obvious error affecting substantial rights, but declined to grant relief under *Olano*'s fourth prong because the error "did not seriously affect the fairness, integrity, or public reputation of the court-martial."[135] The C.A.A.F. granted review to clarify the military's plain error analysis in light of *Olano*.[136] Unfortunately, rather than provide clarity, "[t]he majority opinion in [*Powell*] muddies the water."[137]

a. Powell *Incorrectly Distinguishes Military and Federal Practice*

In *Powell*, C.A.A.F. correctly recognized that the service courts of criminal appeals are not bound by the restriction of plain error review in the same manner as customary appellate courts.[138] Because Article 66(c), UCMJ, permits the courts of criminal appeals to affirm only those findings and sentence they find "correct in law and fact," they possess "plenary authority" to notice and correct any error that materially prejudices an appellant, regardless of preservation or forfeiture—the statutory authority granted by Article 66, UCMJ, overrides the customary common law restriction on correcting unpreserved error.[139] Conversely, C.A.A.F. is governed by Article 67, UCMJ, and functions primarily as a traditional court of discretionary review that is bound by the limitations of plain error.[140] However, while C.A.A.F. acknowledged that it was limited by plain error,

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[134] United States v. Powell, 49 M.J. 460, 461–62 (C.A.A.F. 1998). *Powell* concerned inappropriate evidence admitted during the sentencing phase of appellant's trial. *Id.*
[135] United States v. Powell, 45 M.J. 637, 641 (N-M. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 460.
[136] *Powell*, 49 M.J. at 461.
[137] *Id.* at 466 (Sullivan, J., concurring).
[138] *Id.* at 464–65 (majority opinion).
[139] UCMJ art. 66(c) (2017); *Powell*, 49 M.J. at 464–65. Thus, in this case, the Navy-Marine Corps Court of Criminal Appeals could have noticed and corrected the alleged error without applying *Olano*'s plain error test. *Powell*, 49 M.J. at 464; *see* United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991).
[140] UCMJ art. 67 (2016); *Powell*, 49 M.J. at 464; *Claxton*, 32 M.J. at 162. Additionally, C.A.A.F. conducts mandatory reviews of capital cases and cases specifically referred to the court by service Judge Advocates General. UCMJ art. 67(a)(1)–(2) (2016).

the court declared that plain error was *not* governed by *Olano*.[141] *Olano*, C.A.A.F. reasoned, solely concerns the plain error rule codified in Rule 52(b), whereas military plain error is independently based on "Article 59(a), Mil. R. Evid. 103, RCM 920(f), RCM 1005(f), and [the court's] decision in *Fisher*."[142]

The attempt by C.A.A.F. to distinguish itself from other Federal courts is flawed. Though *Olano* was written as an explanation of Rule 52(b), Rule 52 is simply a codification of existing Supreme Court precedent.[143] Indeed, C.A.A.F. bases its own plain error jurisprudence on that same Supreme Court precedent, which predates the codification of plain error in either the Federal or military rules.[144] To say that *Olano* is an interpretation of the Federal rules, and is thus inapplicable to the military, is a distinction without a difference—both the Federal and military rules regarding plain error derive from the same binding Supreme Court jurisprudence.[145]

This is particularly evident in C.A.A.F.'s curious attempt to distance itself from *Olano*'s fourth prong. In C.A.A.F.'s view, *Olano*'s first three prongs define "plain error," whereas the fourth prong limits and defines a court's "discretionary power" to provide relief.[146] The court reasoned that because Article 59(a), UCMJ, already limits military courts' authority to correct error, *Olano*'s fourth prong is unnecessary and inapplicable to the military.[147] But in *Fisher*, C.A.A.F. relied on the language of *Olano*'s fourth prong, quoting the Supreme Court's opinion in *Atkinson* that plain error should only be corrected when the error "seriously affect[s] the fairness,

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[141] *Powell*, 49 M.J. at 464.
[142] *Id.*
[143] *See* FED. R. CRIM. P. 52 advisory committee's note; United States v. Atkinson, 297 U.S. 157 (1936).
[144] *See* United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986) (citing *Atkinson*, 297 U.S. 157); United States v. Masusock, 1 C.M.R. 32, 34 (C.M.A. 1951) (same). In at least one instance, the highest military court directly cited Rule 52(b) as authority for the principle of plain error review in a military case. United States v. Stephen, 35 C.M.R. 286, 289 (C.M.A. 1965).
[145] *Powell*, 49 M.J. at 466 (Sullivan, J., concurring) ("In my view, our decision in *Fisher* was based on the Supreme Court's decision in *United States v. Young*. Our decision in this case, likewise, should be based on the more recent Supreme Court decisions in *United States v. Olano*, and *Johnson v. United States*." (citations omitted)).
[146] *Id.* at 465 (majority opinion).
[147] Article 59(a), UCMJ, limits the court to correcting errors that materially prejudice substantial rights. UCMJ art. 59(a) (1950). Following *Powell*, any reference to or application of *Olano*'s fourth prong disappeared from the court's analysis, though C.A.A.F. never explicitly disavowed it until its decision in *Tovarchavez*. United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019); *see* Erisman, *supra* note 27, at 63.

integrity or public reputation of judicial proceedings."[148] The discretionary language of *Olano*'s fourth prong is something that C.A.A.F. previously imposed on itself, and only after *Olano* did the court decide that this limiting language for some reason no longer applied.[149]

The *Powell* decision stated that military plain error analysis is not based on *Olano* because it interprets a Federal rule, but is instead based on military decisions like *Fisher*.[150] However, *Olano* and *Fisher* cite, quote, and rely on the exact same case law defining plain error.[151] The court's attempt to distinguish itself from Federal practice is circular at best.[152]

b. Powell *Confuses the Prejudice Analysis*

The *Powell* court's confusion reached a crescendo when the opinion attempted to explain prejudice. Seemingly uncertain of how to square *Olano*'s third prong with the prejudice requirement of Article 59(a), UCMJ, C.A.A.F. stated: "Under a plain error analysis, appellant had the burden of persuading the court below that there was plain error. Only after appellant met his burden of persuasion did the burden shift to the Government to show that the error was not prejudicial."[153] Thus, the court declared that

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[148] *Fisher*, 21 M.J. at 329 (quoting *Atkinson*, 297 U.S. at 160).

[149] More curious still, C.A.A.F. continued to reference with approval the policy values underlying *Olano*'s fourth prong, and the discretionary nature of plain error relief, long after the *Powell* decision. As recently as 2012, C.A.A.F. stated that it may notice forfeited error while "keeping in mind the need 'to encourage timely objections and reduce wasteful reversals;' and to 'respect the particular importance of the finality of guilty pleas.'" United States v. Humphries, 71 M.J. 209, 214 (C.A.A.F. 2012) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004)).

[150] *Powell*, 49 M.J. at 464.

[151] United States v. Olano, 507 U.S. 725, 732 (1993); *Fisher*, 21 M.J. at 329; *see Humphries*, 71 M.J. at 220 (Stucky, J., dissenting) ("We originally adopted the Supreme Court's plain error test.").

[152] The C.A.A.F.'s reasoning is also incorrect insofar as it states that the Article 59, UCMJ, requirement for prejudice makes any further restriction on the court's discretion unnecessary and redundant. If that were the case, *Olano*'s third and fourth prongs would also be redundant—instead, the Supreme Court emphasized that the third prong's requirement for prejudice and the fourth prong's limit on judicial discretion are separate and independent standards. *See supra* note 102.

[153] *Powell*, 49 M.J. at 464–65. The court also noted that, "[i]n cases involving constitutional error, the Government must convince an appellate court beyond a reasonable doubt that the error was not prejudicial." *Id.* at 465 n.*. Interestingly, C.A.A.F. observes that obtaining relief for plain error is more difficult in the military than in Federal courts because the requirement for prejudice is higher. *Id.* at 464–65. While *Olano* merely requires that an error "affects substantial rights," military courts face the additional restriction of Article 59(a), UCMJ, which requires that the error "materially prejudice substantial rights," a higher threshold. *Id.* In *Olano*, the Supreme Court acknowledged that plain error will usually have affected

an appellant must establish all three prongs of plain error (including the third, establishing material prejudice), which will then trigger a *fourth* step in which the Government may then disprove prejudice, a fundamentally illogical progression.[154]

The court has continued to struggle with this issue in subsequent cases. In *United States v. Carter* and *United States v. Paige*, C.A.A.F. stated that an appellant must meet all prongs of plain error (meaning the appellant must affirmatively establish that material prejudice exists), which then triggers a subsequent step in which the Government has the opportunity to prove that prejudice does *not* exist.[155] At times, the court appeared to confuse whether the burden shift occurs after appellant establishes plain error or is simply part of the third prong of the plain error analysis.[156]

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the outcome of a trial but declined to decide whether "affecting substantial rights is always synonymous with prejudice," leaving open the possibility for a plain error affecting substantial rights but not actually prejudicing an appellant. *Olano*, 507 U.S. at 735. However, the Court later clarified that "affects substantial rights" as used in Rule 52 means "a prejudicial effect on the outcome of a judicial proceeding." *Dominguez Benitez*, 542 U.S. at 81. Consequently, the terms are effectively synonymous.

[154] Under this language, this burden shift would occur in all cases, even in ones involving nonconstitutional error. In cases of constitutional error, the Government would simply have a higher burden of proof. *See, e.g.*, United States v. Carpenter, 51 M.J. 393, 396 (C.A.A.F. 1999) (stating that after an appellant establishes plain error, the burden shifts to the Government to show that the error was not prejudicial). This burden shift appears to originate in *Powell* and is not present in Federal civilian plain error review.

[155] United States v. Carter, 61 M.J. 30, 34 (C.A.A.F. 2005). In *Carter*, the trial counsel improperly commented on the appellant's constitutional right to remain silent during closing argument. *Id.* at 31–33. The court articulated the plain error test as: "Appellee must show that there was error, that the error was plain, and that the error materially prejudiced his substantial rights. Once Appellee meets his burden of establishing plain error, the burden shifts to the Government to convince us that this constitutional error was harmless beyond a reasonable doubt." *Id.* at 33 (citation omitted). In *Paige*, the court similarly stated:

> [Appellant] meets the plain error standard if he establishes that "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." "Once [appellant] meets his burden of establishing plain error, the burden shifts to the Government to convince us that this constitutional error was harmless beyond a reasonable doubt."

United States v. Paige, 67 M.J. 442, 450 (C.A.A.F. 2009) (first quoting United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008); and then quoting *Carter*, 61 M.J. at 33).

[156] "The third prong of [the plain error analysis] asks whether the error materially prejudiced Appellee's substantial rights. In the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt." *Carter*, 61 M.J. at 35 (citing *Powell*, 49 M.J. at 463–65).

As the court eventually acknowledged, this framework is fundamentally illogical, especially when applying the *Chapman* standard—if an appellant proves that an error resulted in material prejudice to substantial rights, meaning the error had an effect on the outcome of the trial, then it is impossible for the Government to then prove that such an error is harmless beyond a reasonable doubt.[157]

c. The C.A.A.F.'s Creeping Paternalism

Following *Powell*, C.A.A.F.'s rejection of *Olano*'s fourth prong paired with the burden shift to the Government fueled a steady expansion of plain error relief. By 2008, one commentator observed that the court had "so expanded its interpretation of the rule that it no longer represent[ed] a doctrine to be used in exceptional circumstance, but [was] instead employed as a matter-of-course analysis in run of the mill cases."[158]

This trend was controversial among C.A.A.F.'s own judges. In a lengthy dissent in *Paige*, Judge Stucky distanced himself from the court's liberal expansion of plain error, citing C.A.A.F.'s own precedent that plain error be "used sparingly" and referencing the Supreme Court's admonition that trial participants "seek a fair and accurate trial the first time around."[159] After comparing the military and Federal rules, he concluded:

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[157] If prejudice to substantial rights were defined differently than affecting the outcome of a case, C.A.A.F.'s burden shift might remain logically sound. *See Olano*, 507 U.S. at 743 (Stevens, J., dissenting) (discussing the potential difference between "affecting substantial rights" and prejudice to the outcome of the case). However, C.A.A.F.'s interpretation of material prejudice as requiring an effect on the outcome of the case renders the burden shift impossible. *See, e.g.*, United States v. Robinson, 77 M.J. 294, 297 (C.A.A.F. 2018) ("The third prong is satisfied if the appellant shows 'a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different.'" (quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (alteration in original))). In *Tovarchavez*, A.C.C.A. highlighted the illogical consequences of this burden-shifting analysis. United State v. Tovarchavez, No. ARMY 20150250, 2018 CCA LEXIS 371, at *9–10 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019). The C.A.A.F. eventually acknowledged the error in a footnote and explicitly disavowed this analysis. *Tovarchavez*, 78 M.J. at 465 n.13.

[158] Erisman, *supra* note 27, at 64. This undermines the very basis of the rule, as "the heart of plain error is that it places the burden of persuasion on the appellant to demonstrate that plain error exists." *Id.* at 65.

[159] *Paige*, 67 M.J. at 453 (Stucky, J., dissenting in part and concurring in the result) (quoting United States v. Frady, 456 U.S. 152, 163 (1982)). Judge Stucky specifically attacked the burden-shifting language of *Powell* as "dictum . . . that was based on *United States v. Adams*, a case in which neither the issue granted for review nor this Court's opinion discussed plain

> Although the Supreme Court has not spoken directly on this issue, it has suggested that the plain error test need not be changed to accommodate non-structural, constitutional errors. If the error alleged is constitutional, the standard is the same; it just becomes easier for the appellant to meet his burden of showing "a reasonable probability that, but for the error, the result of the proceeding would have been different."
>
> In a plain error case, as opposed to one in which the error is preserved, the burden of persuasion never shifts to the government; it remains with the appellant, although the government has the opportunity to argue why the error is not prejudicial. When a military appellant meets the heavy burden of establishing "material" (significant) prejudice—a reasonable probability that, but for the error the result would have been different—it is impossible for the government to show the error was harmless beyond a reasonable doubt. By conflating the third prong of the plain error standard with the harmless beyond a reasonable doubt test for constitutional error, the majority incorrectly shifts the burden of persuasion from Appellant to the Government.[160]

Nevertheless, within a few years, the court solidified its position that constitutional plain error required a burden shift to the Government.[161] The majority's rejection of the logical, precedential, and policy-based objections to broadening plain error review is characteristic of the court's increasingly

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error," and rejected the notion that *Olano*'s fourth prong is inapplicable to C.A.A.F. *Id.* at 453–54 (citation omitted).

[160] *Id.* at 454 (citations omitted).

[161] The court continued to muddle whether the burden shift followed an appellant first establishing prejudice or whether the third prong of prejudice itself contained the burden shift, exemplified by its opinion in *United States v. Sweeney*:

> Under plain error review, this Court will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused. Where, as here, the alleged error is constitutional, the prejudice prong is fulfilled where the Government cannot show that the error was harmless beyond a reasonable doubt.

United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011) (citing United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008)).

paternalistic approach.[162] One contemporary practitioner observed that C.A.A.F. had effectively eliminated any distinction between plain error and ordinary appellate review, to the point of "damag[ing] the stability and efficiency of the military justice system."[163]

2. Recent C.A.A.F. Decisions Applying Plain Error

The C.A.A.F.'s more recent cases, immediately prior to *Tovarchavez*, continued to vary widely in the application of plain error review. In some cases of constitutional error, the court applied *Chapman* and imposed a burden shift within the third prong of the plain error test, thereby requiring the Government to demonstrate harmlessness beyond a reasonable doubt as a predicate to determining whether plain error exists.[164] In other cases, the court expressed the plain error test in its traditional form, simply stating that the appellant bears the burden on all three prongs of the plain error test, to include establishing prejudice.[165]

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[162] In some instances, the court veered even further from conventional plain error analysis. In *United States v. Wolford*, C.A.A.F. reviewed a forfeited constitutional error regarding panel instructions. United States v. Wolford, 62 M.J. 418, 419 (C.A.A.F. 2006). Finding the error forfeited rather than waived, C.A.A.F. stated "[a]ccordingly, we review [appellant's] instructional claims de novo." *Id.* at 420. If constitutional error is found, it "must be tested for prejudice under the standard of harmless beyond a reasonable doubt." *Id.* The *Wolford* opinion makes no distinction between preserved and unpreserved constitutional errors, nor does it mention plain error review, further highlighting the confused and uneven approach of the court. The court eventually distanced itself from the *Wolford* opinion in favor of plain error review for forfeited instructional errors. *See* United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017).

[163] Erisman, *supra* note 27, at 64. Then-Major Erisman's observations are consistent with the broader view that C.A.A.F. has tended towards a paternalistic approach.

> The military justice system is often labeled "paternalistic," meaning appellate courts are more willing to protect the interests of the accused or a convicted [S]ervice[ ]member than their civilian counterparts might be in an effort to ensure that the discipline aspect of the military justice system does not come at the expense of justice.

Weber, *supra* note 53, at 77. In an early case analyzing forfeiture and waiver, Judge Crawford observed that "[t]he majority continues to swim in a sea of paternalism." United States v. Scalarone, 54 M.J. 114, 119 (C.A.A.F. 2000) (Crawford, J., dissenting).

[164] United States v. Jones, 78 M.J. 37, 44–45 (C.A.A.F. 2018) ("Plain error occurs 'where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused.' . . . When a constitutional issue is reviewed for plain error, the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." (quoting *Sweeney*, 70 M.J. at 304)); *see* United States v. Payne, 73 M.J. 19, 25–26 (C.A.A.F. 2014).

[165] United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018) ("[T]he appellant has the burden of demonstrating '(1) error that is (2) clear or obvious and (3) results in material

In reviewing unpreserved constitutional error in *United States v. Robinson*, C.A.A.F. stated that "[t]he third prong [of plain error] is satisfied if the appellant shows 'a reasonable probability that, but for the error claimed, the outcome of the proceeding would have been different.'"[166] The court concluded the appellant "failed to meet *his burden* of showing that 'but for [this error] the outcome of the proceeding would have been different.'"[167] Likewise, in *United States v. Williams*, C.A.A.F. stated that for an unpreserved constitutional error it was the appellant who "must demonstrate (1) error, (2) that is clear or obvious at the time of appeal, and (3) prejudicial."[168] In both instances, the court neither explicitly shifted the burden of showing prejudice nor asked whether the error was harmless beyond a reasonable doubt.[169]

The most perplexing examples of the court's confused approach are in *United States v. Riggins* and *United States v. Oliver*, two recent cases of

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prejudice to his substantial rights.'" (quoting United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014))); *see* United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007); United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005); United States v. Rodriguez, 60 M.J. 87, 88–89 (C.A.A.F. 2004).

[166] United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018) (quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017)). *Robinson* concerned an unpreserved instructional error alleging that the military judge omitted the necessary mens rea when instructing the panel on the elements of Article 92, UCMJ. *Id.* This implicated constitutional error by potentially lowering the burden of proof necessary to obtain a conviction. *See* Elonis v. United States, 575 U.S. 723 (2015) (discussing the necessity of a minimum mens rea in criminal statutes).

[167] *Robinson*, 77 M.J. at 300 (quoting *Lopez*, 76 M.J. at 154) (alteration in original) (emphasis added).

[168] United States v. Williams, 77 M.J. 459, 462 (C.A.A.F. 2018). *Williams* concerned an unpreserved *Hills* error, wherein the military judge instructed that evidence for Charge I could be considered as propensity evidence for Charge II but gave no explicit instruction that evidence of Charge II could be used in a similar fashion as propensity evidence for Charge I. *Id.* The A.C.C.A. relied on this distinction, where "the propensity instruction flowed in only one direction," to uphold the conviction and find Charge I untainted by improper propensity evidence. United States v. Williams, No. ARMY 20130582, 2017 CCA LEXIS 24, at *2 (A. Ct. Crim. App. Jan. 12, 2017). The C.A.A.F. ultimately disagreed, setting aside the conviction as to Charge I. *Williams*, 77 M.J. at 464.

[169] *Id.* at 463; *see* United States v. Guardado, 77 M.J. 90 (C.A.A.F. 2017). In *Guardado*, reviewing an unpreserved *Hills* error, the court articulated the test as follows: "This Court has repeatedly held that plain error occurs when: (1) there was error, (2) such error was clear or obvious, and (3) the error materially prejudiced a substantial right of the accused. The burden lies with Appellant to establish plain error." *Guardado*, 77 M.J. at 93 (citations omitted). The court never discussed a burden shift to the Government or explicitly stated that the applicable test for prejudice requires harmlessness beyond a reasonable doubt. In ultimately finding prejudice, C.A.A.F. merely stated that it was "not convinced that the erroneous propensity instruction played no role in Appellant's conviction." *Id.* at 94–95.

constitutional error concerning lesser-included offenses.[170] In *Riggins*, where the constitutional error was preserved, C.A.A.F. stated that for "preserved constitutional errors . . . the Government bears the burden of establishing that the error is harmless beyond a reasonable doubt."[171] But in *Oliver*, where the same error was unpreserved, the court stated that "[a]ppellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice,'" never mentioning the *Chapman* standard or any burden shift to the Government.[172] These cases, seemingly linking the application of *Chapman* to whether the error was preserved, appear to track exactly with Federal practice. It was in this unsettled landscape that the appellate courts reviewed *United States v. Tovarchavez*.[173]

III. Criticism of C.A.A.F.'s Decision in *Tovarchavez*

In *Tovarchavez*, A.C.C.A. effectively summarized the questions before the court and the confused state of the law:

> In this case of forfeited error, does this court determine whether the error was harmless under Article 59(a), UCMJ? Or, as the forfeited error is constitutional, do we determine whether the error was harmless beyond a reasonable doubt? Does appellant have the burden of establishing plain error? Or, to sustain the conviction, is the [G]overnment required to prove constitutional harmlessness?[174]

Concluding that C.A.A.F.'s language in recent opinions like *Riggins* and *Oliver* was purposeful, A.C.C.A. determined that for unpreserved errors,

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[170] United States v. Oliver, 76 M.J. 271 (C.A.A.F. 2017); United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016).

[171] *Riggins*, 75 M.J. at 85.

[172] *Oliver*, 76 M.J. at 275 (quoting United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2015)); *see* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018) (asking, of a constitutional error, "[h]as Appellant shown that the error caused him to suffer material prejudice?").

[173] United States v. Tovarchavez, No. ARMY 20150250, 2018 CCA LEXIS 371 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019). As previously discussed, this was the second time that A.C.C.A. reviewed *Tovarchavez*; the court previously reviewed the case and remanded it for a *Dubay* hearing concerning the performance of trial defense counsel. United States v. Tovarchavez, No. ARMY 20150250, 2017 CCA LEXIS 602, at *3–4 (A. Ct. Crim. App. Sept. 7, 2017), *aff'd*, No. ARMY 20150250, 2018 CCA LEXIS 371 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019).

[174] *Tovarchavez*, 2018 CCA LEXIS 371, at *4.

the appellant bears the burden of establishing prejudice, regardless of the constitutionality of the error.[175]

The C.A.A.F. roundly rejected A.C.C.A.'s analysis, ultimately holding that in all cases of constitutional error, the Government must prove harmlessness beyond a reasonable doubt, regardless of preservation of error.[176] The court further explained:

> The proper distinctions . . . are between preserved and forfeited error and constitutional and nonconstitutional rights. Forfeited errors are subject to plain error review, while preserved errors are not. Under Article 59, UCMJ, all errors of law—preserved or not—must have prejudiced an appellant's rights, and the test we employ to determine prejudice depends on the nature of the right.[177]

Prejudice, in C.A.A.F.'s view, is tested wholly upon the nature of the error, independent from preservation of error and the plain error test.[178] Consequently, when the error is constitutional, prejudice is evaluated the same whether the error is preserved or forfeited; the only difference in cases of forfeiture is the plain error requirement that the error be clear and obvious. "Clear and obvious" is a bar so low it rarely plays a role in judicial analysis.[179] The C.A.A.F. itself acknowledges that plain error review "in most cases, will turn on the question of prejudice."[180] Thus, in most cases of constitutional error, *Tovarchavez* renders preservation of error meaningless.

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[175] *Id.* at *14–16 ("If appellant meets his burden of establishing plain error, the inquiry ends and we are not required to reach the question of whether the error was harmless beyond a reasonable doubt."). The A.C.C.A.

> struggled to understand the burden shift articulated in *Paige*. As a matter of logic, if appellant has established material prejudice to a substantial right, how could the [G]overnment ever be able to show that the error was harmless beyond a reasonable doubt? On appeal, an error in a case cannot simultaneously: 1) materially prejudice appellant's rights; and 2) be harmless beyond a reasonable doubt.

Id. at *9.

[176] United States v. Tovarchavez, 78 M.J. 458, 462–63 (C.A.A.F. 2019).

[177] *Id.* at 469 n.18.

[178] *Id.*

[179] *See* Erisman, *supra* note 27, at 64 ("This part of the test is rarely an issue, as long as the record is sufficiently developed to support a conclusion that error actually occurred. The court does not even always expressly address this prong of the analysis.").

[180] United States v. Humphries, 71 M.J. 209, 213 (C.A.A.F. 2012).

Historically, the primary advantage to preserve error for appeal has been to secure more favorable appellate review.[181] Preserving an error not only brings it to the appellate court's attention but also shifts the burden to the Government to affirmatively disprove prejudice; otherwise, when the error is forfeited, it remains an appellant's uphill fight to prove that an error warrants relief.[182] But, following *Tovarchavez*, once a constitutional error is found to be "clear and obvious," military appellate courts apply the same test for prejudice that they would have applied had the error been properly preserved at trial. That standard, harmlessness beyond a reasonable doubt, is so high that it is difficult to overcome under the best of circumstances, even more so when an objection was not lodged at trial and the issue is not fully litigated on the record. Proving harmlessness beyond a reasonable doubt is so difficult that, in some cases, such as those involving *Hills* error, it begins to function like "structural error:" inherently prejudicial, always requiring reversal.[183]

In reaching this erroneous conclusion, C.A.A.F. has held that "the overwhelming weight" of the court's precedent favors applying the *Chapman* test to all constitutional errors, and that the unique language of Article 59(a), UCMJ, distinguishes military plain error from Federal practice under Rule 52.[184] The C.A.A.F.'s decision is flawed for four reasons: (1) it is contrary to Supreme Court precedent, (2) it is not justified by Article 59(a), UCMJ, (3) it is inconsistent with C.A.A.F.'s own jurisprudence, and (4) it is contrary to judicial policy.

A. *Olano*, not *Chapman*, Governs Review of Forfeited Errors

The C.A.A.F.'s paternalistic approach is directly contrary to Supreme Court precedent, which has clearly abandoned *Chapman* as applied to

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[181] *See* Ham, *supra* note 23, at 19.

[182] *Compare* United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019), *and* United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016), *with* United States v. Flores, 69 M.J. 366 (C.A.A.F. 2011).

[183] *See* Weaver v. Massachusetts, 137 S.Ct. 1899, 1907–08 (2017) (discussing structural error); TRAYNOR, *supra* note 109, at 43 (1970) (requiring that an error be harmless beyond a reasonable doubt "comes close to automatic reversal"). The C.A.A.F. has explicitly stated that a *Hills* error is not prejudicial per se. United States v. Guardado, 77 M.J. 90, 94 (C.A.A.F. 2017) ("There are circumstances where the evidence is overwhelming, so we can rest assured that an erroneous propensity instruction did not contribute to the verdict . . . ."). However, decisions actually finding no prejudice are rare. *See, e.g.*, *Tovarchavez*, 78 M.J. 458; United States v. Williams, 77 M.J. 459 (C.A.A.F. 2018); *Guardado*, 77 M.J. 90; United States v. Hukill, 76 M.J. 219, 222 (C.A.A.F. 2017); *but see* United States v. Moore, 77 M.J. 198 (C.A.A.F. 2018); United States v. Luna, 77 M.J. 198 (C.A.A.F. 2018).

[184] *Tovarchavez*, 78 M.J. at 463.

forfeited errors in favor of a strict application of *Olano*.[185] The Supreme Court's decision in *Olano*, its subsequent decisions in *Cotton* and *Johnson*, and the interpretive consensus among the Federal circuits demonstrate that preservation of error is the dominant consideration in determining the standard of review for prejudice on appeal. The C.A.A.F.'s attempt to distinguish itself from *Olano* and to cling to *Chapman* commits the very sin for which it condemned A.C.C.A.: "grasping at thin reeds" in support of its conclusion.[186]

Though *Chapman* concerned an unpreserved error, the issue of preservation or forfeiture was not material to the Supreme Court's analysis or holding.[187] *Chapman* focused on distinguishing structural errors ("some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error") from constitutional errors that may not be prejudicial ("errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless").[188] The C.A.A.F.'s analysis, however, was unconcerned with the Supreme Court's intent: "whatever the Supreme Court's primary concern," the majority states, "*Chapman* itself clearly involved forfeited constitutional error."[189] The C.A.A.F. latched on to this fact, ignoring over fifty years of intervening case law, as support for its conclusion that *Chapman* must continue to govern cases of unpreserved constitutional error.[190]

The C.A.A.F. similarly rejects the notion that *Olano* superseded *Chapman* because *Olano* concerned nonconstitutional error.[191] But, as

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[185] *See* United States v. Cotton, 535 U.S. 625 (2002); Johnson v. United States, 520 U.S. 461, 470 (1997).
[186] *Tovarchavez*, 78 M.J. at 464. The C.A.A.F.'s analysis reads into *Olano* an unwritten exception that it does not apply to forfeited constitutional errors. This exception is not stated by the Supreme Court and that has not been interpreted by any other affected circuit.
[187] Chapman v. California, 386 U.S. 18, 22–23 (1967).
[188] *Id.*
[189] *Tovarchavez*, 78 M.J. at 465.
[190] *Id.* at 466. *Chapman* itself was decided twenty-six years before the Supreme Court clarified the plain error test in *Olano*. United States v. Olano, 507 U.S. 725, 728–29 (1993); *Chapman*, 386 U.S. at 22–23.
[191] *Tovarchavez*, 78 M.J. at 467. The majority acknowledges that the Federal circuits have departed from this interpretation of *Chapman*'s reach and "regularly evaluate prejudice . . . from forfeited constitutional errors by requiring an appellant to establish that, 'had the error not occurred, there is a "reasonable probability" that' the outcome would have been different." *Id.* at 466 (quoting United States v. Guzman, 419 F.3d 27, 30 (1st Cir. 2005)). However, the majority declines to follow the universal interpretation of the Federal circuits because the majority does not find "a satisfactory rationale for the federal courts' side stepping of *Chapman*." *Id.*

with *Chapman*, C.A.A.F. ignores the main thrust of the Supreme Court's decision. *Olano* was decided on the basis of the forfeiture of error, not whether the right in question was constitutional, and the *Olano* Court went so far as to reiterate explicitly that constitutional errors are equally subject to the rules of forfeiture and plain error.[192]

The C.A.A.F.'s analysis in this regard misses the forest for the trees. The myopic focus on *Chapman* ignores the subsequent case law clarifying that constitutional errors are evaluated differently depending on preservation or forfeiture. Federal circuit courts have explicitly applied this interpretation to forfeited constitutional errors for over twenty years.[193] If the Federal courts' interpretation of *Olano* is misplaced, the Supreme Court has had ample opportunity to correct the issue. Instead, the Court has repeatedly denied certiorari in these cases.[194] "All of the other United States Courts of Appeals that hear criminal cases agree with this position; none of them applies the *Chapman* harmlessness beyond a reasonable doubt test when reviewing forfeited constitutional objections. Among all these [F]ederal courts, [C.A.A.F.] is the outlier, and [C.A.A.F.'s] position is incorrect."[195]

The majority's opinion in *Tovarchavez* briefly acknowledged *Johnson* and *Cotton* in a footnote, but promptly distinguished these cases because the Supreme Court "side stepped the issue of prejudice and resolved the case[s] on the fourth prong of *Olano*."[196] The court again misses the point. Faced with two instances of forfeited constitutional error, the Supreme Court applied the test from *Olano*, articulated that prejudice was the

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[192] *See Olano*, 507 U.S. at 731 ("'No procedural principle is more familiar to this Court, than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right . . . .'" (quoting Yakus v. United States, 321 U.S. 414, 444 (1944))).
[193] *See* United States v. Hastings, 134 F.3d 235, 243 (4th Cir. 1998); United States v. Wihbey, 75 F.3d 761 (1st Cir. 1996).
[194] *See, e.g.*, United States v. Garcia, 906 F.3d 1255, 1260 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2027 (2019); United States v. McGill, 815 F.3d 846, 875 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 58 (2017); United States v. Cardena, 842 F.3d 959, 998 (7th Cir. 2016), *cert. denied*, 138 S. Ct. 247 (2017); United States v. Soto, 720 F.3d 51, 57 (1st Cir.), *cert. denied*, 571 U.S. 930 (2013); United States v. Elmardoudi, 501 F.3d 935, 943–44 (8th Cir. 2007), *cert. denied*, 552 U.S. 1120 (2008); United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001), *cert. denied*, 536 U.S. 963 (2002). Similarly, the Supreme Court did not exercise the opportunity present in cases like *Johnson* and *Cotton*, involving plain error evaluation of forfeited constitutional error, to clarify any misunderstanding among the lower courts. United States v. Cotton, 535 U.S. 625 (2002); Johnson v. United States, 520 U.S. 461 (1997).
[195] *Tovarchavez*, 78 M.J. at 471 (Maggs, J., dissenting).
[196] *Id.* at 467 n.15 (majority opinion).

appellant's burden, and made no reference whatsoever to either *Chapman* or the harmless beyond a reasonable doubt standard.[197] As the Supreme Court further explained in *Dominguez Benitez*:

> When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case. *See Chapman v. California*, 386 U.S. 18, 24 . . . (1967) ("[T]he court must be able to declare a belief that [constitutional error] was harmless beyond a reasonable doubt"). When the Government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard. *Brecht v. Abrahamson*, 507 U.S. 619, 638 . . . (1993). If the burden is on a defendant to show prejudice in the first instance, of course, it would be easier to show a reasonable doubt that constitutional error affected a trial than to show a likely effect on the outcome or verdict.[198]

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[197] *Cotton*, 535 U.S. 625; *Johnson*, 520 U.S. 461; *Tovarchavez*, 78 M.J. at 469–70 (Maggs, J., dissenting) (noting that "the Supreme Court in subsequent cases has not applied *Chapman*'s test when reviewing forfeited constitutional objections"). Earlier in its opinion, C.A.A.F. compliments A.C.C.A. for noticing how the court abandoned its burden shift in *Paige* without having explicitly overruled it, yet C.A.A.F. is unwilling to read between the lines of its higher court in the same manner. *Tovarchavez*, 78 M.J. at 465 n.13 (majority opinion).

[198] United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004). In *Brecht v. Abrahamson*, the Court distinguished direct and collateral review of constitutional errors, specifically in the context of a habeas claim. Brecht v. Abrahamson, 507 U.S. 619, 635–36 (1993). The Court noted that "[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Id.* at 637. Ultimately, the Court found that "[t]he imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Id.* The correct test for the constitutional error was whether it "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* While *Brecht* concerned collateral review of habeas claims, it demonstrates a number of important principles equally applicable to direct review of forfeited constitutional errors. *Brecht* demonstrates that (1) *Chapman* is not universally applicable to all constitutional errors, regardless of how they are raised—the seriousness of the error is not the sole factor in determining what prejudicial standard applies; (2) the procedural posture of an error is at least as important as its constitutional magnitude; and (3) the interests of judicial efficiency and finality of judgments

The Court drew a clear dichotomy between those instances in which the Government has the burden of addressing prejudice (citing *Chapman*) and those instances in which "the burden is on a defendant to show prejudice in the first instance."[199] The Court went on to clarify that, based on *Olano*, the primary difference between review of preserved error and plain error "is that the burden of persuasion shifts from Government to defendant."[200]

In light of the Supreme Court's language in *Dominguez Benitez* and the Court's clear application of the plain error test in *Johnson* and *Cotton*, the Court's intent is clear: those cases where the Government must prove harmlessness beyond a reasonable doubt of a *preserved* constitutional error (*Chapman*) are separate and distinct from cases where an appellant must establish prejudice of *forfeited* error under plain error review (*Olano*).

B. The C.A.A.F. Incorrectly Distinguishes Military and Federal Practice

The limited differences between the military and Federal rules do not provide a legitimate military necessity or distinction to support C.A.A.F.'s deviation from *Olano*. Nevertheless, echoing the reasoning in *Powell*, C.A.A.F. seeks to distinguish Article 59(a), UCMJ, and characterize *Olano* as a case only applicable to Rule 52, rather than a case governing plain error review generally.[201] Ironically, the *Tovarchavez* majority explicitly invoked the principle that, "[a]bsent articulation of a legitimate military necessity or

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should be weighed against the seriousness of an error. Concerns over finality of judgments are equally applicable to military courts. *See, e.g.*, United States v. Paige, 67 M.J. 442, 452 (C.A.A.F. 2009) (Stucky, J., dissenting) (citing the "need to encourage all trial participants to seek a fair and accurate trial the first time around"); Loving v. United States, 64 M.J. 132, 156 (C.A.A.F. 2006) (discussing "the importance of finality and efficiency in the military justice system"). To the extent that additional precautions or review are merited in the military system, that need is satisfied by the de novo review of the service courts of criminal appeals. *See* UCMJ art. 66(c) (2017).

[199] *Dominguez Benitez*, 542 U.S. at 81 n.7.

[200] *Id.* at 82 n.8.

[201] United States v. Powell, 49 M.J. 460, 464 (C.A.A.F. 1998). The court distinguished Article 59(a), UCMJ, from the Federal rules' framework, where preserved and forfeited errors are addressed separately. *Id.* at 467; FED. R. CRIM. P. 52(a)–(b). This is flawed reasoning. Article 59(a), UCMJ, does not define prejudice, nor does it limit the court from considering additional factors. Rather Article 59(a), UCMJ, states the overall minimum bar for when a case may be overturned. UCMJ art. 59(a) (1950). By C.A.A.F.'s logic, since Article 59(a), UCMJ, does not distinguish between preserved and unpreserved errors, C.A.A.F. should make no distinction at all in how it evaluates such errors on appeal, whether they be constitutional versus nonconstitutional or preserved versus forfeited. But, of course, C.A.A.F. augments the requirements of Article 59(a), UCMJ, in other instances, such as when imposing the additional requirement that an unpreserved error be "clear or obvious" as part of plain error review.

distinction, . . . this Court has a duty to follow Supreme Court precedent."[202] At best, the court's references to military distinction appear to apply selectively, in the manner that most conveniently supports the majority's conclusion.

As discussed above, though Article 59(a), UCMJ, and Rule 52 differ slightly in structure and language, they are similar in substance and effect: both provide a baseline that must be met before a court can grant relief.[203] Rule 52(b) and MRE 103 both recognize the importance of preserving error but codify the courts' ability to notice unpreserved plain error.[204] Federal and military courts both cite and rely on the same common law basis for plain error, which predates the doctrine's codification in either system, and neither set of rules explicitly differentiates between constitutional and nonconstitutional error.[205]

In actuality, Article 59(a), UCMJ, is entirely compatible with the plain error test articulated in *Olano*. As C.A.A.F. acknowledged in *Powell*, the principal difference between the military and Federal rules is in the language used to describe prejudice—"material prejudice" versus "affects substantial rights."[206] However, the Supreme Court has clarified that

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[202] The majority stated that there is no "legitimate military justification" for the court to evaluate Article 59(a), UCMJ, "material prejudice" differently for preserved and unpreserved errors, nor is there any justification for the court to deviate from its own precedent regarding *Chapman*. *Tovarchavez*, 78 M.J. at 466 (quoting United States v. Cary, 62 M.J. 277, 280 (C.A.A.F. 2006)).

[203] UCMJ art. 59(a) (1950); FED. R. CRIM. P. 52. Article 59(a), UCMJ, is derived from the thirty-seventh Article of War, which largely mirrored the Federal language. *See* MIL. JUST. REV. GRP., *supra* note 74.

[204] UCMJ art. 59(a) (1950); FED. R. CRIM. P. 52. Furthermore, the Military Justice Review Group (MJRG) suggested that the *MCM* adopt additional plain error rules similar to Rule 52(b). *See* MIL. JUST. REV. GRP., *supra* note 74, at 556.

[205] *See* United States v. Olano, 507 U.S. 725, 736 (1993); United States v. Fisher, 21 M.J. 327 (C.M.A. 1986); United States v. Masusock, 1 C.M.R. 32 (C.M.A. 1951). *Chapman*'s standard remains applicable to preserved error in both systems. *Tovarchavez*, 78 M.J. at 468; *see Dominguez Benitez*, 542 U.S. 74; United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016). The C.A.A.F. stated that "federal courts regularly evaluate prejudice arising from preserved errors based on the nature of the right." *Tovarchavez*, 78 M.J. at 468 (citing United States v. Hasting, 461 U.S. 499 (1983); Kotteakos v. United States, 328 U.S. 750 (1946)). However, *Hasting* and *Kotteakos* both involved preserved error, in addition to predating *Olano*.

[206] It is for this reason that subsequent military decisions adopted the first three prongs of *Olano* almost verbatim, merely substituting the "material prejudice" language of Article 59, UCMJ, in place of "affects substantial rights." United States v. Powell, 49 M.J. 460, 464–65 (C.A.A.F. 1998); *see* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018); United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014); United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007); United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005); United States v. Rodriguez, 60 M.J. 87, 88–89 (C.A.A.F. 2004).

"affects substantial rights" as used in Rule 52 means "a prejudicial effect on the outcome of a judicial proceeding."[207] Thus, "material prejudice" as interpreted in the military and "affects substantial rights" as interpreted in Federal courts are now functionally identical.

Because Article 59(a), UCMJ, requires "material prejudice" but makes no explicit distinction between preserved and unpreserved errors, C.A.A.F. argues it is "settled practice" to "assess prejudice—whether an error is preserved or not—based on the nature of the right" (i.e., whether or not the error is constitutional).[208] But as the *Tovarchavez* dissent rightly noted, Article 59(a)

> establishes a test of material prejudice, not a test of harmlessness beyond a reasonable doubt. [The C.A.A.F.] must accept this "balance achieved by Congress" . . . unless [the UCMJ's] provisions are unconstitutional. Accordingly, . . . [C.A.A.F.] must review errors for material prejudice under Article 59(a), UCMJ, *unless the United States Constitution requires [C.A.A.F.] to apply a different test*.[209]

Put differently, the majority has no authority to sua sponte impose a *higher* standard of review than what is required by the plain language of Article 59(a), UCMJ, and by the Supreme Court.

The Federal consensus concerning plain error rightly recognizes that *Olano* and subsequent cases clearly place the emphasis on preservation of error rather than the nature of the error itself.[210] The C.A.A.F.'s attempt to distinguish Article 59(a), UCMJ, from Rule 52 fails to sufficiently articulate

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[207] *Dominguez Benitez*, 542 U.S. at 81.
[208] *Tovarchavez*, 78 M.J. at 466–67.
[209] *Id.* at 469 (Maggs, J., dissenting) (citations omitted) (emphasis in original); *see* Greabe, *supra* note 71, at 81 (arguing that "the remedy *Chapman* implicitly promises is not constitutionally compelled").
[210] The C.A.A.F. acknowledged the lengthy history of dissent within its own ranks on this very point but noted that the court has "repeatedly rejected the argument . . . [that C.A.A.F.] either should or must follow the plain error doctrine applied in the federal courts." *Id.* (citing United States v. Humphries, 71 M.J. 209, 220–22 (C.A.A.F. 2012) (Stucky, J., dissenting); United States v. Paige, 67 M.J. 442, 452–54 (C.A.A.F. 2009) (Stucky, J., dissenting in part and concurring in the result); United States v. Gilley, 56 M.J. 113, 127–30 (C.A.A.F. 2001) (Sullivan, J., concurring in part and dissenting in part); United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000) (Sullivan, J., concurring); United States v. Wilson, 54 M.J. 57, 60–62 (C.A.A.F. 2000) (Sullivan, J., concurring in part and dissenting in part); *Powell*, 49 M.J. at 466 (Sullivan, J., concurring in the result)).

"a legitimate military necessity or distinction" that would obviate the court's "duty to follow Supreme Court precedent."[211] The C.A.A.F.'s argument is particularly ironic because, as the *Powell* court explained, the plain language of Article 59(a), UCMJ, actually imposes a higher burden on an appellant than Rule 52.[212] Twenty years later, the *Tovarchavez* court used this distinction between Article 59(a), UCMJ, and Rule 52 to depart from Federal practice and justify a far *lower* burden for the appellant.

C. *Tovarchavez* Conflicts with C.A.A.F.'s Own Precedent

The C.A.A.F.'s opinion is inconsistent with its own jurisprudence. The majority claims a "long-standing and settled precedent" of applying *Chapman* to forfeited constitutional errors, further arguing that there is a "clear direction running through [the court's] case law."[213] As demonstrated, the court's past language and analysis is anything but clear or consistent; time after time, the court has failed to apply *Chapman* to constitutional errors and assigns the prejudicial burden to the appellant.[214]

Casually dismissing inconsistent prior decisions, the *Tovarchavez* court appears shockingly unconcerned with the lack of linguistic precision in prior opinions. The court acknowledged the omission of any "harmless beyond a reasonable doubt" language in past cases, but argued that "the overall structure and conclusion of those cases clearly embrace and apply *Chapman*."[215] As to those cases in which the court specifically stated it was the appellant's burden to show material prejudice, C.A.A.F. shrugged off this language as the "unremarkable incantation of a statutory requirement."[216] According to the majority, the court has always applied *Chapman*, even when the court's plain language stated something else—

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[211] *Powell*, 49 M.J. at 466 (quoting United States v. Cary, 62 M.J. 277, 280 (C.A.A.F. 2006)).
[212] *Id.* at 464 ("[T]he military rules have a higher threshold than the federal rules in that they require plain error to 'materially prejudice' substantial rights.").
[213] *Tovarchavez*, 78 M.J. at 463, 465; *see* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018) (discussing the court's failure to apply *Chapman* to constitutional errors); United States v. Oliver, 76 M.J. 271, 275 (C.A.A.F. 2017) (same); United States v. Riggins, 75 M.J. 78, 85 (C.A.A.F. 2016) (same).
[214] *See Armstrong*, 77 M.J. at 469; United States v. Robinson, 77 M.J. 294 (C.A.A.F. 2018); *Oliver*, 76 M.J. at 275; *Riggins*, 75 M.J. at 85.
[215] *Tovarchavez*, 78 M.J. at 463. The majority similarly rejected any suggestion that it was previously unclear in its decisions in *Guardado* and *Williams*. *Id.* at 464. Despite the imprecise language in those cases, the court stated that "the absence of the precise 'harmless beyond a reasonable doubt' articulation . . . notwithstanding, it is . . . clear that both decisions rely on the *Chapman* standard." *Id.* Notably, neither *Guardado* nor *Williams* cite to *Chapman* at any point.
[216] *Id.*

practitioners and lower courts should have simply read between the lines.[217] The court's analysis again seems to apply selectively—the court chastised A.C.C.A.'s decision for assuming too much and "overrul[ing] by implication," while simultaneously criticizing A.C.C.A. for *failing* to infer and read in the *Chapman* standard, even in those cases where it was never explicitly invoked by the court.[218]

The court's opinion provided no explanation for its differing approach in cases like *Riggins* and *Oliver*, failing to acknowledge those decisions at all.[219] Rather than providing an "unremarkable incantation of a statutory requirement," the court explicitly invoked harmlessness beyond a reasonable doubt where the error was preserved in *Riggins*,[220] but required that the "[a]ppellant . . . 'show that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right" where the same error was forfeited in *Oliver*.[221] The C.A.A.F.'s approach in *Riggins* and *Oliver* should not be viewed as an erroneous outlier; rather, it is an example of the correct approach, where the court acted consistently with Federal practice.

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[217] The court acknowledged its language could have been "more precise" but excused the different articulations by reference to *Fahy v. Connecticut*, a 1963 Supreme Court case requiring "a reasonable possibility that the evidence complained of might have contributed to the conviction," a description which *Chapman* stated was no different than the "harmless beyond a reasonable doubt" standard. *Id.* (citing Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)). Thus, C.A.A.F.'s somewhat loose language in *Guardado* and *Williams* was apparently an intentional reference to a 1963 case as interpreted by a 1967 decision.

[218] *Id.* at 463–65. Perplexingly, in the same section of the opinion in which the court accuses A.C.C.A. of seeking to "overul[e] by implication," the majority utilized a footnote to complement A.C.C.A. for that exact practice:

> For example, while the ACCA understood that it was bound by our decision setting forth the burden-shifting prejudice analysis in *United States v. Paige*, it noted that our recent cases reviewing forfeited constitutional error have omitted *Paige*'s burden shift, and it rightly emphasized the illogic of that burden-shifting standard. We agree this standard is illogical, because, of course, material prejudice in this context means that the constitutional error is not harmless beyond a reasonable doubt.

Id. at 465 n.13 (citations omitted). Thus, C.A.A.F. chastises A.C.C.A. for drawing inferences from C.A.A.F.'s omission of certain language ("harmless beyond a reasonable doubt") in recent decisions like *Guardado* and *Williams*, but congratulates it for drawing the correct inference from C.A.A.F.'s omission of other language in those same cases.

[219] *Oliver*, 76 M.J. at 273; *Riggins*, 75 M.J. at 85.

[220] *Riggins*, 75 M.J. at 85.

[221] *Oliver*, 76 M.J. at 273 (alteration in original) (quoting United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2012)).

D. Judicial Policy Favors a Strict Application of Plain Error Review

The court's decision, diminishing the value and impact of preserving errors at trial, is contrary to judicial policy. Nearly thirty years ago, the highest military appellate court recognized in *United States v. Fisher* that plain error should only be "invoked to rectify those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings'" and "be used sparingly, solely in circumstances in which a miscarriage of justice would otherwise result."[222] The court understood that liberal application of plain error relief "permits counsel for the accused to remain silent, make no objections, and then raise an . . . error for the first time on appeal[, which] undermines '[the court's] need to encourage all trial participants to seek a fair and accurate trial the first time around.'"[223] Preservation of error encourages alert and thorough litigation at the trial level, where facts and the record are best developed for later review on appeal. Incentivizing proper preservation of error in turn incentivizes competent performance by counsel and overall judicial efficiency.[224]

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[222] United States v. Fisher, 21 M.J. 327, 328–29 (C.M.A. 1986) (first quoting United States v. Atkinson, 297 U.S. 157, 160 (1936); and then quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)).
[223] *Id.* at 328 (quoting *Frady*, 456 U.S. at 163).
[224] *See* Ham, *supra* note 23, at 10, 15–16; *see also* United States v. Dominguez Benitez, 542 U.S. 74 (2004); see generally *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967), for a discussion of remands for factfinding hearings. Regarding the policy reasons in favor of timely objections, the Oregon Court of Appeals provided the following oft-quoted synopsis:

> There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal.

State v. Applegate, 591 P.2d 371, 373 (Or. Ct. App. 1979), *quoted in* United States v. Chapa, 57 M.J. 140, 145–46 (2002) (Sullivan, J., concurring in part and in the result); *see* United States v. Collins, 41 M.J. 428, 430 (C.A.A.F. 1995) ("It is important for the objection to be

The values described in *Fisher*—creating a fully developed record at trial and promoting judicial efficiency and finality—remain equally valid today. The C.A.A.F. acknowledged as recently as 2012 that plain error relief is discretionary and "preserves the 'careful balance . . . between judicial efficiency and the redress of injustice.'"[225] As the Supreme Court wrote in *Puckett v. United States*:

> [The plain error rule] serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "sandbagging" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.[226]

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made at the trial level so that it can be resolved there to avoid the expense of an appeal." (quoting United States v. Jones, 37 M.J. 321, 323 (C.M.A. 1993))).

[225] *Humphries*, 71 M.J. at 214 (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)); *see* Military Justice Act of 2016: Section-by-Section Analysis, JUD. PROC. PANEL 13, http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/13_MJRG_MilitaryJusticeAct_2016_SecAnalysis.pdf (last visited Mar. 11, 2021) (noting that the proposed amendments to Article 45, UCMJ, "aim to improve the efficiency and effectiveness of appellate review" and "the larger goal of encouraging error correction at the trial stage").

[226] *Puckett*, 556 U.S. at 134. In addition to the risk of unnecessary and costly reversals, the Court's reference to "sandbagging" is particularly interesting. Litigants at trial often choose not to object for a variety of strategic reasons. *E.g.*, United States v. Williams, 50 M.J. 397, 401 (C.A.A.F. 1999) (recognizing that an appellant may strategically not object to testimony). In light of C.A.A.F.'s decision, where the risks of an unpreserved objection to constitutional error are minimized, such "sandbagging" may only be further encouraged. *But see* Fairfax, *supra* note 85, at 2070–71 (arguing that appellate reversals incentivize the prosecution and judge to notice errors at trial, ultimately outweighing the risk of sandbagging). It is unclear at this stage what effect this may have on claims of ineffective assistance of counsel—failure to object to a plain and obvious constitutional error might often be deficient performance under the *Strickland* standard, but when there is less strategic risk to allowing the error to pass without objection, the analysis may change. *See* Strickland v. Washington, 466 U.S. 668, 694 (1985). Even if a lack of objection is seen as deficient under *Strickland*, it seems unlikely to be prejudicial when C.A.A.F. will still apply the strictest prejudicial review to the underlying error itself. *See id.* Thus, rather than encouraging competent litigation, C.A.A.F.'s decision is more likely to excuse poor performance.

Allowing an error to go uncorrected and a record undeveloped exacerbates the problem at the appellate level. Because C.A.A.F. lacks factfinding power, the court is generally stuck with the record it receives.[227] Hypothesizing about the prejudicial effect of an error is already a difficult task—one Justice Scalia likened to "divination"[228]—asking the court to do so when the record surrounding the issue is silent is magnitudes harder.

The Supreme Court has "repeatedly cautioned that '[a]ny unwarranted extension' of the [plain error rule] would disturb the careful balance it strikes between judicial efficiency and the redress of injustice; and that the creation of an unjustified exception to the Rule would be '[e]ven less appropriate.'"[229] Favoring finality of judgments, the Court has specifically declined to apply *Chapman* to forfeited constitutional error.[230] The C.A.A.F., in contrast, has embraced paternalism, virtually eliminating the distinction between preserved and unpreserved constitutional errors.[231] The C.A.A.F.'s position is incorrect. "[T]he standard should enforce the policies that underpin [plain error] generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error."[232] Preservation of error should take precedence, as it does in Federal civilian courts, with the *Chapman* standard applying only when the error is preserved.

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[227] United States v. Murphy, 50 M.J. 4, 13 (C.A.A.F. 1998).
[228] *Dominguez Benitez*, 542 U.S. at 86–87 (Scalia, J., concurring). This principle is apparent in C.A.A.F.'s requirement that the bases for certain objections or admissions of evidence be made clear at trial in order to trigger appellate review:

> [I]f evidence is excluded at trial because it is inadmissible for the purpose articulated by its proponent, the proponent cannot challenge the ruling on appeal on the ground that the evidence could have been admitted for another purpose. A purpose not identified at trial does not provide a basis for reversal on appeal.

United States v. Palmer, 55 M.J. 205, 208 (C.A.A.F. 2005); *see* United States v. McCarty, 45 M.J. 334, 335 n.2 (C.A.A.F. 1996) (stating that appellate review "requires a record that the appellate court can review").
[229] *Puckett*, 556 U.S. at 135–36 (first quoting United States v. Young, 470 U.S. 1, 15 (1985); and then quoting Johnson v. United States, 520 U.S. 461, 466 (1997)).
[230] *See* United States v. Cotton, 535 U.S. 625 (2002); *Johnson*, 520 U.S. 461; *see also* Edwards, *supra* note 71, at 1185 ("Supreme Court jurisprudence over the past three decades encompasses both a tightening of the standard for finding plain error and a broadening of the applicability of the doctrine of harmless error.").
[231] *See* Erisman, *supra* note 27, at 57–59.
[232] *Dominguez Benitez*, 542 U.S. at 82.

IV. Recommendations and Conclusion

In *Tovarchavez*, C.A.A.F.'s application of the incorrect standard led to the erroneous dismissal of a sound conviction, created confusion by departing from Supreme Court precedent, and undermined the systemic policy considerations that favor preservation of error at trial. Three changes would have avoided this misguided decision and, going forward, would correct military plain error review: (1) adoption of the Federal approach to plain error review; (2) application of *Olano*'s fourth prong; and (3) passage of an amended Article 59(b), UCMJ that mirrors Rule 52(b).

A. The C.A.A.F. Should Follow Federal Practice in Plain Error Review

Consistent with the universal practice in the Federal circuits, C.A.A.F. should apply plain error review without regard to the constitutional nature of the error. Discussing the problems with varying tests for prejudice in Federal courts, Professor Anne Poulin writes:

> [T]he courts should reduce the number of tests to a manageable number of meaningfully defined tests. In all cases in which the defendant bears the burden of establishing harm, the courts should apply the same test. When the issue is [preserved] error, the burden falls on the [G]overnment, and the test should be more demanding.[233]

Under plain error review, the appellant should fully bear the burden of establishing prejudice for both constitutional and nonconstitutional errors.[234] Preserved error, conversely, should be subject to the prejudice tests articulated in *Kotteakos* and *Chapman*, where the Government bears the burden of establishing the harmlessness of nonconstitutional and constitutional errors.[235]

First, there is no justification for military courts to differ from the Supreme Court's approach.[236] Second, this model encourages thorough

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[233] Poulin, *supra* note 41, at 1041.

[234] Professor Poulin argues that the variety phrasings for the appellant's burden should be unified into a single test that requires a showing of "a reasonable likelihood or significant possibility" of harm. *Id.* at 1044.

[235] *See id.* at 1041.

[236] United States v. Tovarchavez, 78 M.J. 458, 469 (C.A.A.F. 2019) (Maggs, J., dissenting). The MJRG suggested that the *Manual for Courts-Martial* adopt additional plain error rules similar to Rule 52(b); further detail on specific recommendations was to be included in the

litigation at trial, promotes judicial economy, and ensures finality of judgments. Third, to the extent constitutional errors should afford more protections to an appellant, that concern is already protected in a normal plain error analysis—where an appellant's constitutional rights are infringed, it is inherently easier for an appellant to demonstrate a reasonable possibility that the error had some effect on the trial.[237] By rejecting this approach in *Tovarchavez*, C.A.A.F. defied the Supreme Court's clear intent and undermined the foundational purpose of plain error.

In *Tovarchavez*, the question of which standard of review to apply was outcome determinative.[238] If the court had applied the correct, customary standard, requiring that the appellant establish material prejudice for unpreserved error, the appellant would not have been able to meet that burden.[239] Applying the correct standard would have properly preserved this conviction, in addition to bringing C.A.A.F. into proper conformity with Federal practice and binding precedent.

B. The C.A.A.F. Should Apply *Olano*'s Fourth Prong

Consistent with the Supreme Court and Federal practice, C.A.A.F. should apply *Olano*'s fourth prong when conducting plain error review, evaluating whether the alleged error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[240] The C.A.A.F.'s conclusion that *Olano*'s fourth prong is merely a product of the Federal rules that has no military application is misguided.[241] As discussed, both Federal and military plain error are rooted in the same common law, and relief for plain error has been directly tied to whether the error affects the

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second part of the MJRG's report, which was unfortunately never published. *See* MIL. JUST. REV. GRP., *supra* note 74, at 556.

[237] *See* United States v. Paige, 67 M.J. 442, 454 (C.A.A.F. 2009) (Stucky, J., dissenting in part and concurring in the result) ("If the error alleged is constitutional, the standard is the same; it just becomes easier for the appellant to meet his burden of showing 'a reasonable probability that, but for the error, the result of the proceeding would have been different.'" (quoting *Dominguez Benitez*, 542 U.S. at 81–82 n.7)); *but see* Webster v. Doe, 486 U.S. 592, 618 (Scalia, J., dissenting) (arguing that the deprivation of a statutory right may, in practice, be more valuable to a claimant than a constitutional right); Greabe, *supra* note 71, at 97 (arguing that the "assumption is unwarranted" that constitutional violations are more likely to compromise the accuracy of a verdict).

[238] United States v. Tovarchavez, No. ARMY 20150250, 2018 CCA LEXIS 371, at *21–22 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019).

[239] *Id.*

[240] United States v. Olano, 507 U.S. 725, 734 (1993).

[241] *See Tovarchavez*, 78 M.J. at 467 n.14; United States v. Tunstall, 72 M.J. 191, 196 n.7 (C.A.A.F. 2013).

"fairness, integrity or public reputation of judicial proceedings" from the earliest cases in both the military and Federal systems.

The language of *Olano*'s fourth prong originated in the Supreme Court's 1936 decision in *Atkinson*—predating both Article 59(a), UCMJ, and Rule 52—and was a facet of military jurisprudence for decades.[242] In *Masusock*, the Court of Military Appeals quoted *Atkinson*, agreeing that plain error relief is appropriate only when "the alleged error would result in a manifest miscarriage of justice, or would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'"[243] Again, in *Fisher*, C.A.A.F. approvingly quoted this same language.[244] Even in *Powell*, where C.A.A.F. ostensibly distanced itself from Federal practice, the court nevertheless referenced *Fisher* as the basis of military plain error jurisprudence.[245] Plain error is not a statutory creation; it is a creature of common law, found in both the military and Federal courts, which was subsequently codified in both sets of rules. The concept's codification in a Federal rule does not eliminate the continuing applicability of the common law doctrine to military cases.

As a policy matter, there is no justification for C.A.A.F. to give appellants additional protection by declining the discretion granted by *Olano*'s fourth prong. Military appellants already benefit from a complete appellate review of the record, as mandated by Article 66, UCMJ.[246] *Olano*'s fourth prong balances judicial economy and timely litigation at trial with the overriding need to avoid manifest injustice that would threaten the integrity of the entire system.[247] By granting relief absent *Olano*'s fourth prong, "the majority disturbs the careful balance the plain error doctrine was meant to strike between judicial efficiency and the redress of justice."[248] Furthermore, *Olano*'s fourth prong recognizes the importance of public perception to the criminal justice system, a factor on which military courts are typically especially focused.[249] In *Tovarchavez*, application of *Olano*'s

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[242] United States v. Atkinson, 297 U.S. 157, 160 (1936).
[243] United States v. Masusock, 1 C.M.R. 32, 34 (C.M.A. 1951) (quoting *Atkinson*, 297 U.S. at 160).
[244] United States v. Fisher, 21 M.J. 327, 328–29 (C.M.A. 1986) (quoting *Atkinson*, 297 U.S. at 160).
[245] United States v. Powell, 49 M.J. 460, 464 (C.A.A.F. 1998).
[246] *See id.* at 463–65.
[247] *See Atkinson*, 297 U.S. at 160.
[248] United States v. Humphries, 71 M.J. 209, 222 (C.A.A.F. 2012) (Stucky, J., dissenting).
[249] *See, e.g.*, United States v. Boyce, 76 M.J. 242, 248–50 (C.A.A.F. 2017) (stating that apparent unlawful command influence is measured by whether it places "'an intolerable strain' on the public's perception of the military justice system" such that "an objective,

fourth prong would have given the court the discretion to recognize that the error and the result did not undermine confidence in the military system such as to require reversal.

As *Powell* correctly notes, while the courts of criminal appeals are bound to conduct a full appellate review under Article 66, UCMJ, C.A.A.F. is a court of discretionary review bound only by Articles 59 and 67, UCMJ.[250] Article 59(a), UCMJ, establishes only a minimum threshold for relief, such that courts may not overturn a judgment absent material prejudice to an appellant's substantial rights.[251] There is neither a legal nor logical reason that binding Supreme Court precedent cannot impose *additional* restrictions on C.A.A.F.—namely, that even if an error materially prejudices an accused, C.A.A.F. should not reverse unless the matter "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[252]

C. Amend Article 59, UCMJ, to Reflect Rule 52

To avoid further confusion and correct the military's application of plain error, Congress should amend Article 59, UCMJ, to include a new section that adopts plain error language similar to Rule 52(b), as follows: "A plain error that materially prejudices the substantial rights of the accused may be considered even though it was not brought to the court's attention."[253] The Military Justice Review Group (MJRG) recommended

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disinterested observer, fully informed of all the facts and circumstances, would [*not*] harbor a significant doubt about the fairness of the proceeding." (quoting United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013) (alteration in original))); United States v. Toohey, 63 U.S. 353, 362 (C.A.A.F. 2006) (stating that, even absent actual prejudice, appellate courts may still provide relief for post-trial delay where "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system.").

[250] UCMJ art. 67(a)(3) (2016); *Powell*, 49 M.J. at 464; *see Humphries*, 71 M.J. at 221 (Stucky, J., dissenting) ("We asserted in *Powell* that the fourth prong of the Supreme Court's plain error test . . . applies only to courts exercising discretionary powers of review. In reviewing this case, this Court is exercising its discretionary powers of review." (citations omitted)).

[251] UCMJ art. 59(a) (1950).

[252] United States v. Olano, 507 U.S. 725, 734 (1993). Article 59(a), UCMJ, merely restrains military appellate courts from acting unless an error "materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (1950). It is a restriction on authority, not an affirmative requirement that the court act in any particular case.

[253] The current Article 59(b), UCMJ, concerning lesser-included offenses, would be restyled as Article 59(c), UCMJ. The MJRG suggested similar revisions to the *Manual for Courts-Martial*. *See supra* note 236.

this change in its 2015 report, presumably to avoid the kind of result C.A.A.F. reached in *Tovarchavez*.[254]

The C.A.A.F.'s decision in *Tovarchavez* is predicated entirely on distinguishing military practice under Article 59, UCMJ, from Federal practice under Rule 52. Congressional action aligning the structure and language of Article 59, UCMJ, to more closely match Rule 52 would demonstrate the legislative intent that military courts conform to Federal practice in this regard. Furthermore, it would completely eliminate C.A.A.F.'s basis for distinguishing military plain error and would compel the court to follow *Olano*, adopting the Federal approach to plain error review.

As military court rules and procedures were formalized and codified, they historically mirrored Federal practice.[255] Today, that trend continues with the most recent revisions to the *Manual for Courts-Martial*.[256] Amending Article 59, UCMJ, to mirror Rule 52 would be consistent with that trend and with the MJRG's recommendation, and it would compel C.A.A.F. to reverse the erroneous decision in *Tovarchavez*. Following the 1946 passage of Rule 52, Congress passed a harmless error statute "to remove any lingering doubt about the status of the harmless error rule in American criminal practice," and to guard against "the mistaken belief" that Rule 52 did not apply to all Federal appellate courts.[257] Congress can and should exercise its power to correct C.A.A.F.'s erosion of plain error review and similarly remove any doubt about the status of plain error in military criminal practice.

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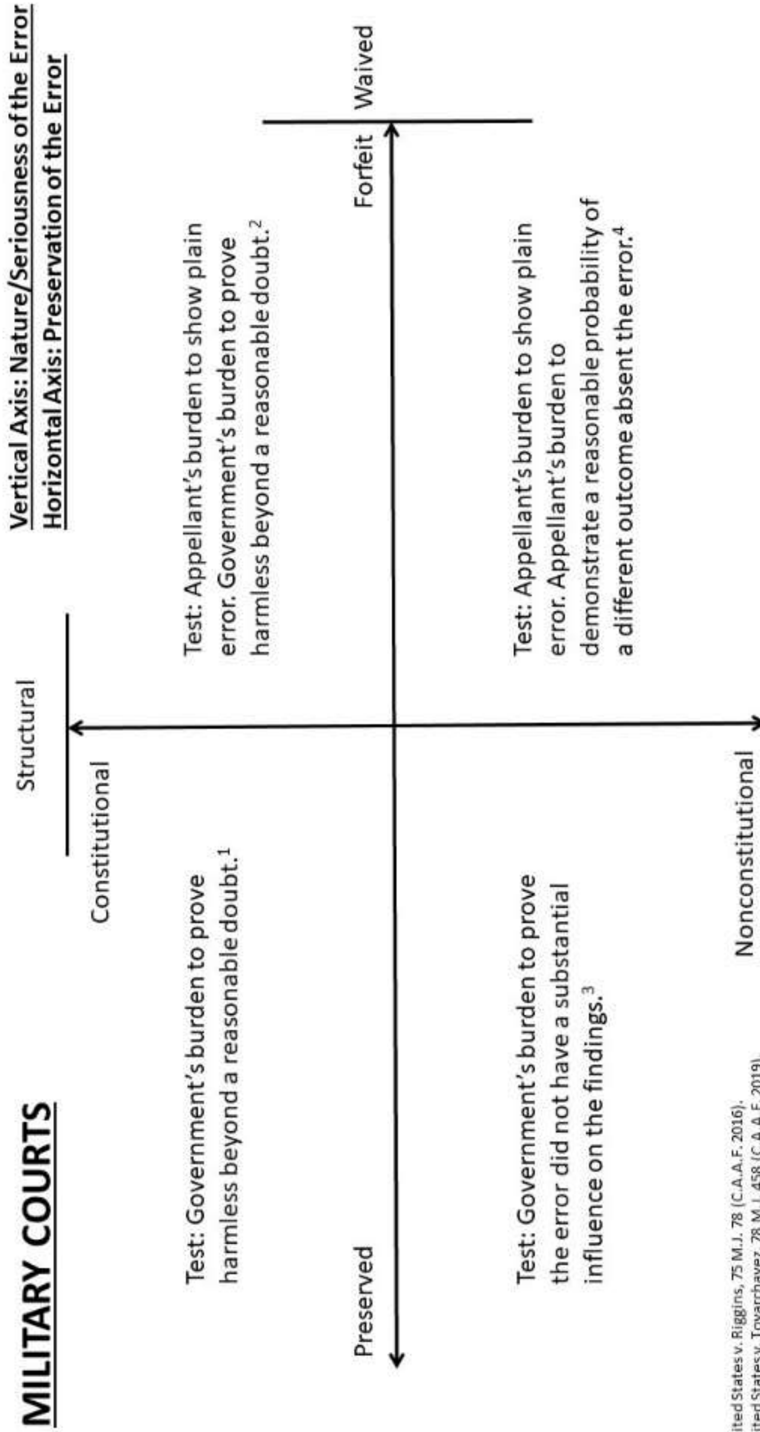
[254] *See* MIL. JUST. REV. GRP., *supra* note 74, at 556.

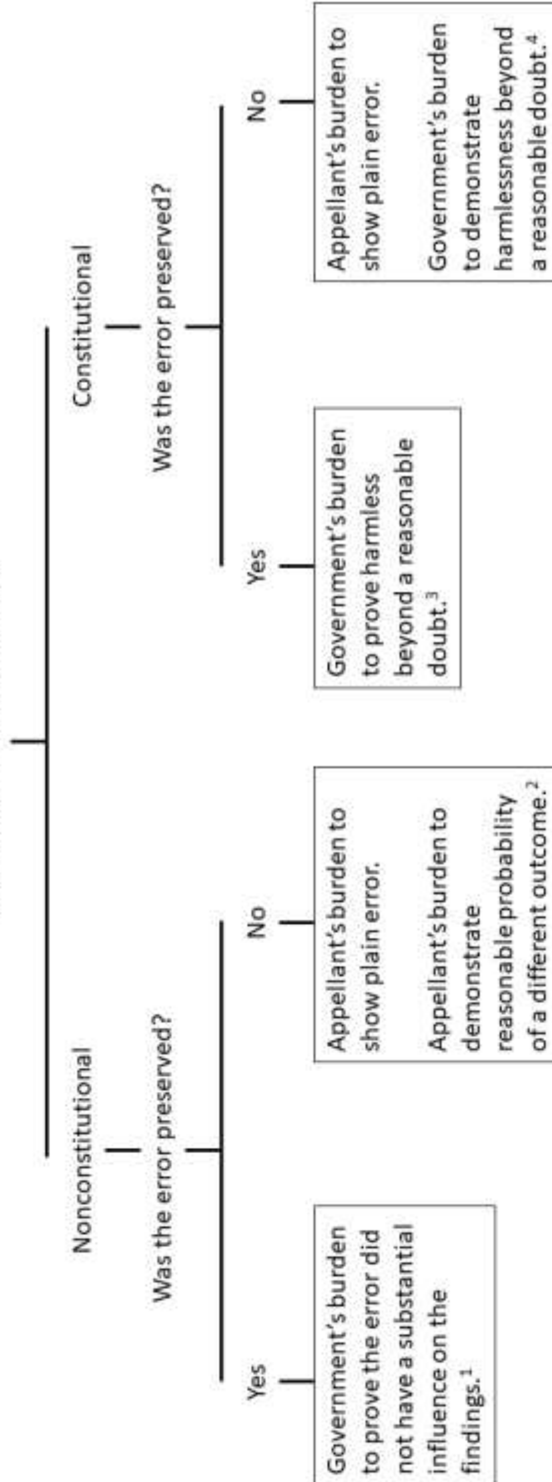
[255] *See generally* Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970). For example, MRE 103 parallels FRE 103, which itself was based on Rule 52(b). The only difference between MRE 103 and FRE 103 is a substitution of the language "material prejudice" to substantial rights with "affects substantial rights." *Compare* MCM, *supra* note 2, MIL. R. EVID. 103, *with* FED. R. EVID. 103 advisory committee's note; *see* Lederer, *supra* note 129, at 9–15 (discussing how the intent of the MRE was to adopt the existing FRE to the maximum extent practicable).

[256] *See* Frederic I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512 (2017); MIL. JUST. REV. GRP., *supra* note 74 (discussing the historical relationship between the military and Federal harmless error rules and recommending new rules analogous to Rule 52(b)).

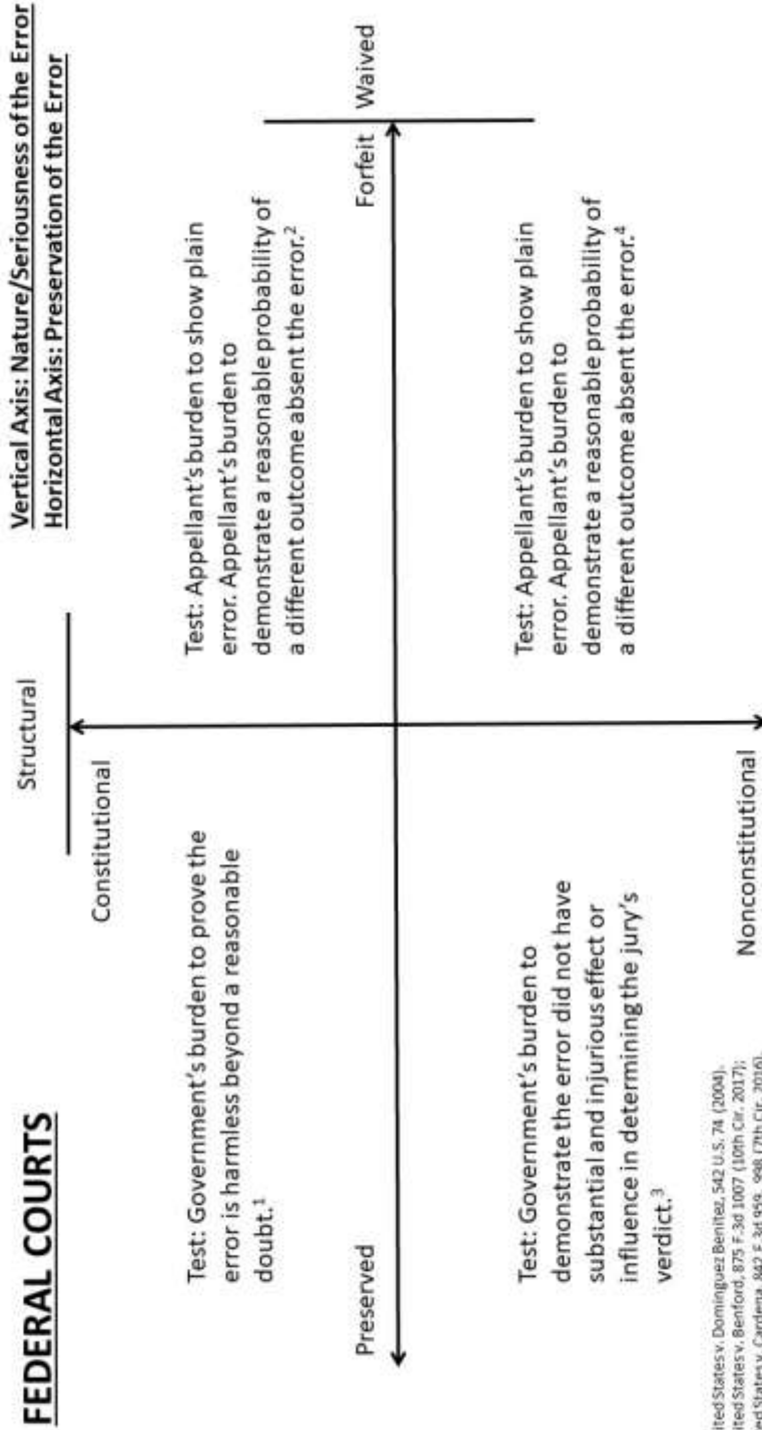
[257] Fairfax, *supra* note 71, at 454 n.130.

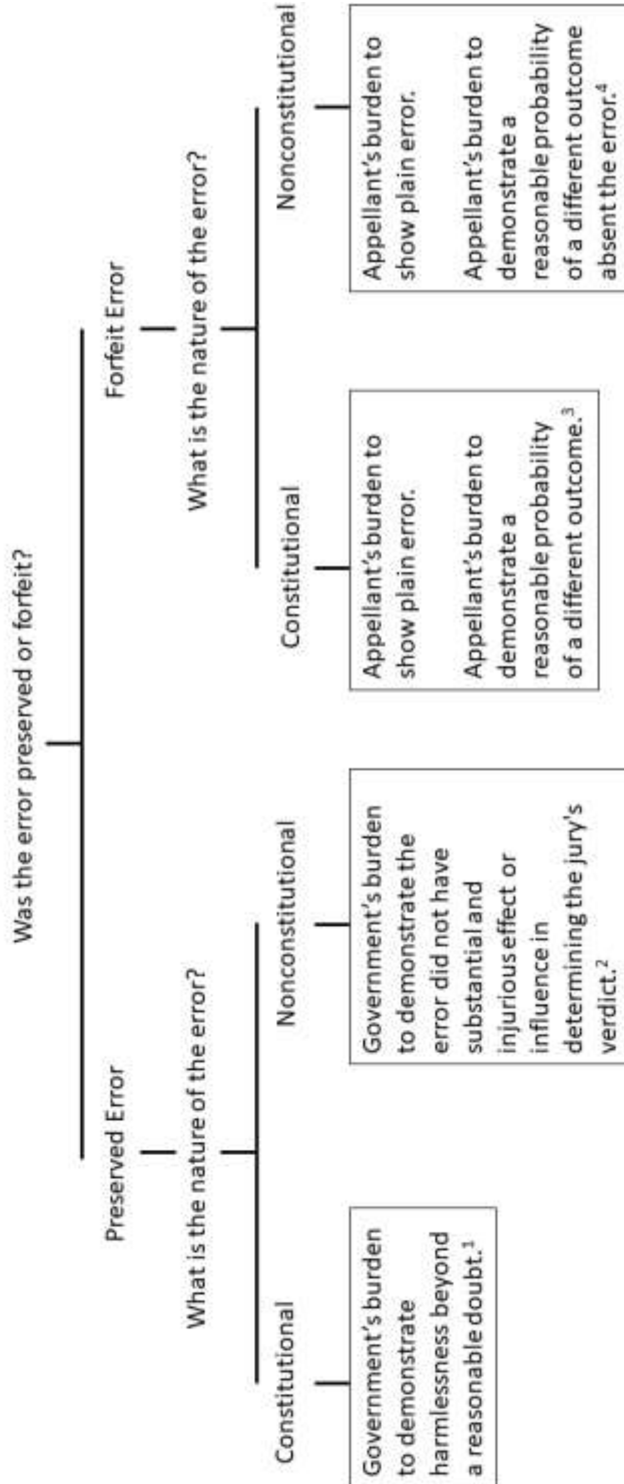
Appendix A. Prejudice Analysis in Military Courts




MILITARY COURTS
What is the nature of the error?
Nonconstitutional
Was the error preserved?
Yes
Government's burden to prove the error did not have a substantial influence on the findings.[1]
No
Appellant's burden to show plain error.
Appellant's burden to demonstrate reasonable probability of a different outcome.[2]
Constitutional
Was the error preserved?
Yes
Government's burden to prove harmless beyond a reasonable doubt.[3]
No
Appellant's burden to show plain error.
Government's burden to demonstrate harmlessness beyond a reasonable doubt.[4]
[1] United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019).
[2] United States v. Flores, 69 M.J. 366 (C.A.A.F. 2011).
[3] United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016).
[4] United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019).

Appendix B. Prejudice Analysis in Federal Courts




FEDERAL COURTS
Was the error preserved or forfeit?
Preserved Error
Forfeit Error
What is the nature of the error?
What is the nature of the error?
Constitutional
Nonconstitutional
Constitutional
Nonconstitutional
Government's burden to demonstrate harmlessness beyond a reasonable doubt.[1]
Government's burden to demonstrate the error did not have substantial and injurious effect or influence in determining the jury's verdict.[2]
Appellant's burden to show plain error.
Appellant's burden to demonstrate a reasonable probability of a different outcome.[3]
Appellant's burden to show plain error.
Appellant's burden to demonstrate a reasonable probability of a different outcome absent the error.[4]
1 United States v. Dominguez Benitez, 542 U.S. 74 (2004).
2 Id.
3 United States v. Benford, 875 F.3d 1007 (10th Cir. 2017); United States v. Cardena, 842 F.3d 959, 998 (7th Cir. 2016).
4 United States v. Olano, 507 U.S. 725 (1993).

ADDRESSING THE FOREIGN ISIS FIGHTER PROBLEM: DETENTION AND PROSECUTION BY THE SYRIAN DEMOCRATIC FORCES

MAJOR KEVIN S. COBLE[*]

Each of us also has an urgent responsibility to address the foreign fighter detainee problem. We all must ensure captured terrorists remain off the battlefield and off your streets by taking custody of detainees from our countries, or quickly coming up with other suitable options.[1]

I. Introduction

From the moment the Syrian Democratic Forces (SDF) swept through the last Islamic State in Iraq and Syria (ISIS) strongholds in Northeastern Syria, one problem has remained at the forefront for the international community: what should be done with the most radicalized and hardened foreign ISIS fighters who are confined in SDF detention facilities? Despite former Secretary of Defense James Mattis's encouragement,[2] nations have been reluctant to take custody of their citizens who have been captured on

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[1] *Remarks by Secretary Mattis and Secretary-General Stoltenberg to the Defeat ISIS Coalition, Brussels, Belgium*, U.S. DEP'T OF DEF. (June 8, 2018), https://dod.defense.gov/News/Transcripts/Transcript-View/Article/1545787/remarks-by-secretary-mattis-and-secretary-general-stoltenberg-to-the-defe%E2%80%A6.

[2] *Id.*

the battlefield in Syria, fighting for ISIS.[3] Therefore, these fighters, numbering roughly two thousand by current estimates, remain in SDF detention and in legal purgatory.[4]

Further complicating the situation, the SDF are a non-state armed group, comprised primarily of Kurds and Arabs, which are conducting military operations against ISIS[5] and holding Syrian territory without the consent of the Syrian government.[6] As such, the SDF and their civilian political arm, the Syrian Democratic Council (SDC),[7] are not an internationally recognized sovereign government and they are not an official state entity recognized by the Syrian government.[8] Therefore, as a collective non-state actor actively engaged in hostilities against other state and non-state actors, significant legal, political, and international issues are raised by the SDF's detention of foreign ISIS fighters.

Given these complications, this article analyzes the application of international law to the SDF and proposes a solution to address the foreign ISIS fighter problem highlighted by Secretary Mattis: that the SDF can detain and ultimately prosecute foreign ISIS fighters[9] in compliance with the law of armed conflict (LOAC). This article begins by classifying the

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[3] Charlie Savage, *As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away*, N.Y. TIMES (July 18, 2018), https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html.

[4] Michael R. Gordon & Benoit Faucon, *U.S., Europeans Clash Over How to Handle Islamic State Detainees*, WALL ST. J. (Dec. 1, 2019, 2:56 PM), https://www.wsj.com/articles/u-s-europeans-clash-over-how-to-handle-islamic-state-detainees-11575201600.

[5] Jim Garamone, *Iraqi, Syrian Democratic Forces Destroy ISIS' 'Caliphate,'* U.S. DEP'T OF DEF. (Dec. 11, 2017), https://dod.defense.gov/News/Article/Article/1393645/iraqi-syrian-democratic-forces-destroy-isis-caliphate/igphoto/2001888747/igphoto/2001773969.

[6] Tom Perry & Ellen Francis, *Syria's Kurds Reel from U.S. Move, Assad Seen Planning Next Step*, REUTERS (Dec. 20, 2018, 1:59 PM), https://www.reuters.com/article/us-mideast-crisis-syria-kurds-analysis/syrias-kurds-reel-from-us-move-assad-seen-planning-next-step-idUSKCN1OJ2IP.

[7] Lara Seligman, *Syrian Kurdish Leader Asks U.S. to Save Her People from 'Catastrophe,'* FOREIGN POL'Y (Feb. 5, 2019, 2:29 PM), https://foreignpolicy.com/2019/02/05/syrian-kurdish-leader-asks-u-s-to-save-her-people-from-catastrophe.

[8] Eric Schmitt, *Pentagon Wades Deeper into Detainee Operations in Syria*, N.Y. TIMES (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/world/middleeast/pentagon-detainees-syria-islamic-state.html.

[9] The term "foreign ISIS fighter" refers to those fighters whose country of origin is not Syria or Iraq. While the law of armed conflict (LOAC) would apply equally to the Syrian and Iraqi fighters, there are additional domestic considerations related to those individuals that are beyond the scope of this article. At the same time, the foreign ISIS fighter problem has gained the most attention from United States due to the unique challenges it presents. Thus, the focus of this article is the detention and prosecution of the foreign ISIS fighters rather than the local Syrian and Iraqi ISIS fighters.

type of conflict in which the SDF and ISIS are engaged to determine whether international law is applicable to the overall conflict. Next, it explains the theories that apply international law to non-state actors. Using these theories, this article then determines the relevant LOAC principles applicable to the SDF's detention and criminal prosecution of foreign ISIS fighters. Using these LOAC principles, it then analyzes the source of the SDF's authority to detain. Finally, this article describes how the SDF can prosecute foreign ISIS fighters in compliance with LOAC, ensuring long-term detention of those fighters not ultimately repatriated to their countries of origin.

II. Background

The events that led to the current conflict in Syria provide crucial context for evaluating which international legal principles are applicable to the SDF. The Syrian Civil War created an environment that ISIS was able to exploit, allowing it to take control of considerable territory stretching from areas east of the Euphrates River in Syria into Western Iraq.[10] ISIS' subsequent control of civilian population centers, coupled with its brutality and extremist ideology[11] created the catalyst for local Kurdish and Arab militias to band together under one organized group.[12] This group—the SDF—then took up arms against ISIS and began to liberate the ISIS-controlled territory in Syria.[13] These facts, further described below, provide the context to which the international legal framework can be applied.

In early 2011, a series of political and economic protests broke out across the Middle East.[14] The pro-democracy uprisings ultimately resulted in regime changes in Tunisia, Egypt, and Libya.[15] These events came to be known in the international community as the Arab Spring.[16] While the cause

[10] Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Twenty-Seventh Session, Rule of Terror: Living Under ISIS in Syria, at 2–3, U.N. Doc. A/HRC/27/CRP.3 (2014) [hereinafter 2014 UNHRC Report].
[11] *Id.*
[12] Garamone, *supra* note 5.
[13] Perry & Francis, *supra* note 6.
[14] *The Arab Spring: A Year of Revolution*, NAT'L PUB. RADIO (Dec. 17, 2011, 6:02 PM), https://www.npr.org/2011/12/17/143897126/the-arab-spring-a-year-of-revolution.
[15] *Id.*
[16] *Id.*

of the Syrian Civil War remains complex, the Arab Spring and the values it represented were a major trigger for the conflict.[17]

The unofficial start of the Syrian Civil War came in March 2011, when a group of school children were detained and tortured for writing anti-government graffiti on the walls of public buildings in Dar'a, Syria.[18] The children's detention, coupled with the Syrian government's violent suppression of the resulting peaceful protests, sparked outrage and demonstrations across the region.[19] The Syrian government, headed by Bashar al-Assad, brutally clamped down on the demonstrations by killing, detaining, and torturing thousands of protestors.[20] The international community called for Assad to resign,[21] but he refused.[22] This brutality sparked more demonstrations and outrage and, by 2012, the internal strife had turned into a full-fledged armed conflict between Syrian government forces and armed opposition groups across the country.[23] Further fueling the conflict was the international support for both sides of the fighting. The United States, Saudi Arabia, Qatar, Turkey, and other Western countries supported moderate Syrian government opposition groups, while Russia, Iran, and militant Iranian proxies, such as the Lebanese Hezbollah, supported the Syrian government.[24]

The resulting chaos and instability in Syria allowed radical Islamist groups to operate with impunity. In addition, the local population's discontent with the government provided these groups with a cooperative support base and an ideal population from which to recruit fighters.[25] These radical Islamist groups included al-Qaeda and affiliated groups such as Jabhat al-Nusra, also known as al-Nusra Front, and the Islamic State of Iraq

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[17] Max Fisher, *How Syria's Civil War Evolved, and Why It's So Complex*, N.Y. TIMES, Sept. 21, 2016, at A8.
[18] Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Seventeenth Session, at 8, U.N. Doc. A/HRC/S-17/2/Add.1 (2011).
[19] *Id.*
[20] *Id.* ("On 8 November, OHCHR estimated that at least 3,500 civilians had been killed by State forces since March 2011. Thousands are also reported to have been detained, tortured and ill-treated.").
[21] Scott Wilson & Joby Warrick, *Assad Must Go, Obama Says*, WASH. POST (Aug. 18, 2011), https://www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ_story.html.
[22] Anthony Shadid & Nada Bakri, *Assad Says He Rejects West's Calls to Resign*, N.Y. TIMES (Aug. 21, 2011), https://www.nytimes.com/2011/08/22/world/middleeast/22syria.html.
[23] Fisher, *supra* note 17.
[24] *Id.*
[25] 2014 UNHRC Report, *supra* note 10.

(ISI).[26] By April 2013, ISI had developed into a "well-organised, dominant armed force in control of large swathes of populated areas in Syria and Iraq, posing a significant threat to peace and stability in the region."[27]

The ISI was initially founded by Abu Mu'sab al-Zarqawi, who began conducting terrorist attacks against U.S., Coalition, and Iraqi military personnel and civilians in Iraq in 2003.[28] Based on Zarqawi's long-standing personal relationship with Osama bin Laden, he publically pledged allegiance to bin Laden and al-Qaeda in 2004 and renamed his terrorist organization al-Qaeda in Iraq (AQI).[29] Despite Zarqawi's death in 2006 by a U.S. airstrike[30] and the withdrawal of U.S. and Coalition forces from Iraq in 2011, AQI continued to plot and conduct deadly attacks on U.S. military forces, civilians, and interests in Iraq and Syria.[31]

In February 2014, after months of internal fighting, al-Qaeda disavowed AQI, then headed by Abu Bakr al-Baghdadi,[32] for being too brutal and for indiscriminately killing Muslim civilians and fellow jihadist.[33] Al-Qaeda in Iraq, in turn, appropriated most of al-Nusra Front's capabilities and manpower in Syria.[34] Now focused on creating its own "state" or "caliphate," AQI formally changed its name to ISIS.[35] By taking advantage of the chaos created by the Syrian Civil War and prioritizing the capture of physical terrain over fighting the Syrian government, ISIS was able to overwhelm local opposition and take control of large swaths of land throughout Iraq and Syria.[36] From the safety of its physical caliphate, ISIS was able to terrorize civilians under its form of sharia law,[37] gain revenue through the illicit sale of oil, and plan and execute attacks on Western countries.[38]

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[26] *Id.* at 2.
[27] *Id.*
[28] WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 5–6 (2016) [hereinafter U.S. REPORT ON THE USE OF FORCE].
[29] *Id.*
[30] Fisher, *supra* note 17.
[31] U.S. REPORT ON THE USE OF FORCE, *supra* note 28.
[32] Fisher, *supra* note 17.
[33] *Al-Qaeda Disavows ISIS Militants in Syria*, BBC NEWS (Feb. 3, 2014), https://www.bbc.com/news/world-middle-east-26016318.
[34] 2014 UNHRC Report, *supra* note 10, at 2.
[35] *Id.*
[36] *Id.*
[37] *See, e.g.*, *id.*
[38] U.S. REPORT ON THE USE OF FORCE, *supra* note 28, at 6, 24.

In 2015, Kurdish and Arab militia groups in Northeastern Syria formed a cohesive and coordinated fighting force, called the SDF, to stop ISIS' advance and counter its brutality.[39] The SDF, commanded by General Mazlum Kobane, began with approximately thirty fighters and grew to a fighting force of over sixty thousand.[40] Under General Kobane's leadership and with support from the United States and other counter-ISIS coalition partners, the SDF had liberated all of the ISIS-controlled territory in Northeastern Syria by March 2019.[41]

The SDF's civilian governmental and political wing is the SDC.[42] Like the SDF, the SDC is Kurdish-led but inclusive and representative of Arab and other ethnic minority populations.[43] Currently, the primary governing entity in the SDF-liberated territories of Northeastern Syria are local civil councils.[44] However, in order to gain autonomy from the Syrian government and establish a federal system that protects minority rights, the SDC is unifying the civil councils under one overarching administration.[45] To further these goals, the SDC has also engaged the international community for continued military and humanitarian assistance and for protection from potential post-conflict oppression.[46]

Due to the protracted hostilities and their internal security functions, the SDF have detained hundreds, if not thousands, of surrendered or captured ISIS members.[47] The most dangerous and ideologically ingrained ISIS members are the foreign fighters who have left their home countries and

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[39] Garamone, *supra* note 5.
[40] Holly Williams, *What Remains to be Done in the Final Phase of America's War on ISIS*, CBS NEWS (Oct. 28, 2018), https://www.cbsnews.com/news/what-remains-to-be-done-in-the-final-phase-of-america-war-on-isis-60-minutes.
[41] Rukmini Callimachi, *ISIS Caliphate Crumbles as Last Village in Syria Falls*, N.Y. TIMES (Mar. 23, 2019), https://www.nytimes.com/2019/03/23/world/middleeast/isis-syria-caliphate.html ("A four-year military operation to flush the Islamic State from its territory in Iraq and Syria ended on Saturday as the last village held by the terrorist group was retaken, erasing a militant theocracy that once spanned two countries").
[42] *Kurdish-Led Council Deepens Authority Across Syrian North and East*, REUTERS (Sept. 6, 2018, 10:54 AM), https://www.reuters.com/article/us-mideast-crisis-syria-council/kurdish-led-council-deepens-authority-across-syrian-north-and-east-idUSKCN1LM25I.
[43] *See id.*
[44] *Id.*
[45] *Id.*
[46] *See* Richard Hall, *'We Used to Trust the US': Syrian Kurds Fear Turkish Attack After Trump's Troop Withdrawal*, INDEPENDENT (Dec. 21, 2018, 6:48 PM), https://www.independent.co.uk/news/world/middle-east/syria-trump-kurdish-isis-turkey-us-troop-withdrawal-mattis-a8695151.html.
[47] Savage, *supra* note 3.

travelled to the conflict zone for the sole purpose of fighting for ISIS.[48] In fact, the core of the ISIS leadership structure is predominantly comprised of foreign fighters, despite the significant number of Syrian and Iraqi fighters whom ISIS has recruited.[49] At this time, the SDF have detained approximately two thousand foreign ISIS fighters[50] from forty-seven countries.[51] However, due to the differing judicial processes and political climates, the foreign fighters' countries of citizenship are unwilling to repatriate and prosecute them under domestic laws. Instead, these foreign fighters remain in SDF detention facilities with no clear path for long-term detention and adjudication.[52]

Therefore, as former Secretary of Defense Mattis stated, suitable alternative options for the detained foreign fighters must be identified to ensure "captured terrorists remain off the battlefield and off []our streets."[53] One possible option discussed by the SDF and the international community is for the SDF, rather than the countries of citizenship, to prosecute and incarcerate the foreign ISIS fighters.[54] However, the SDF's detention and prosecution raises a number of legal issues because they are a collective non-state actor that the Syrian government has granted no domestic military or law enforcement authority. Thus, in order to ascertain whether this option is viable, the applicability of LOAC to the SDF must first be established. Once this is done, the lawfulness of the SDF's detention and prosecution of the foreign ISIS fighters can then be evaluated under international law rather than domestic Syrian law.

III. Classifying the Belligerents and the Conflict

The first step in determining whether LOAC applies to the SDF is to classify the type of conflict in which the SDF are involved. This initial step establishes whether international law as a whole applies to the conflict and, if so, helps to refine the applicable bodies of law. For example, if the conflict between the SDF and ISIS is classified as banditry or criminal in nature

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[48] 2014 UNHRC Report, *supra* note 10, at 3.
[49] *Id.*
[50] Gordon & Faucon, *supra* note 4.
[51] Savage, *supra* note 3.
[52] *Id.*
[53] *Remarks by Secretary Mattis and Secretary-General Stoltenberg to the Defeat ISIS Coalition, Brussels, Belgium*, *supra* note 1.
[54] Schmitt, *supra* note 8; Wladimir van Wilgenburg, *Syrian Kurds Hold Hundreds of Foreign IS... and No One Wants Them Back*, MIDDLE E. EYE (Mar. 8, 2018, 3:08 PM), https://www.middleeasteye.net/news/us-backed-syrian-forces-urge-europe-take-back-foreign-fighters-56015630.

instead of as an armed conflict, international law, and consequently LOAC, may not be applicable at all.[55] Similarly, if one or more of the groups involved in the conflict is not organized enough to be considered a non-state armed group, then LOAC may not be applicable to that group or the conflict.[56] Therefore, the conflict must be analyzed and classified before determining whether LOAC is applicable. While this article primarily focuses on the conflict between the SDF and ISIS, the conflict between the SDF and the Syrian government is also relevant to the discussion. Therefore, both conflicts will be evaluated and classified.

A. The Conflict between the SDF and ISIS

While treaty law related to non-international armed conflicts (NIACs) generally contemplates situations in which state authorities engage in armed conflict against insurgent groups,[57] armed conflicts between two non-state actors can also be considered a NIAC. The appellate court in the *Prosecutor v. Tadić* interlocutory appeal decision held that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[58] The "or between such groups within a State" language clearly indicates that a NIAC can also arise out of sustained hostilities between non-state armed groups within a state's territory.

The *Tadić* appellate court also outlined criteria for determining whether hostilities internal to a state's territory rise to the level of a NIAC. The above-quoted text from *Tadić* identifies the two primary criteria on which the appellate court relied: (1) the intensity of the violence or the level

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[55] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I] ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ."); JEAN S. PICTET ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 50 (1952) ("The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.").

[56] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] ("This Protocol . . . shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups . . . .").

[57] *See id.*; PICTET ET AL., *supra* note 55.

[58] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

of "protracted violence" between the groups and (2) the organization of the groups.[59] The U.S. Department of Defense (DoD) *Law of War Manual* relies on the *Tadić* criteria for distinguishing between NIACs and internal disturbances[60] and provides additional sub-factors for consideration.[61]

Using the factors outline in *Tadić*, the conflict between the SDF and ISIS can be classified as a NIAC. Regarding the first *Tadić* factor, the level and intensity of the violence between the SDF and ISIS has been significant and sustained since it began in 2015, leaving an estimated twelve thousand SDF and over twenty thousand ISIS members dead.[62] Thus, the first factor is readily satisfied.

Regarding the second factor, while the *Tadić* decision does not elaborate on the meaning of "organized armed groups," other sources of international law provide additional factors which can be relied upon for this evaluation. First, Additional Protocol II to the 1949 Geneva Conventions defines "other organized armed groups" as those that are "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[63] The discussion of Article 3 common to the 1949 Geneva Conventions (Common Article 3) in the *Commentary on Geneva Convention I*, which the International Committee for the Red Cross (ICRC) published in 1952, outlines similar factors for the insurgent group when evaluating whether internal strife constitutes an armed conflict:

> (a) That the insurgents have an organization purporting to have the characteristics of a State.
> (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory.
> (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[64]

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[59] *Id.*
[60] OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 3.4.2.2 (2016) [hereinafter LAW OF WAR MANUAL].
[61] *Id.* at 84 n.76.
[62] Williams, *supra* note 40.
[63] Additional Protocol II, *supra* note 56.
[64] PICTET ET AL., *supra* note 55.

While these factors are specific to those bodies of law,[65] three common factors can be used to evaluate the groups in question are whether the group (1) is organized and under one common command, (2) exercises control over territory, and (3) is able to carry out sustained hostilities.[66]

Based on the factors identified above and specific to the ongoing hostilities in Syria, both the SDF and ISIS can be considered organized armed groups under *Tadić*'s second factor.[67] First, the SDF are organized under the command and control of General Mazlum Kobane, and they operate as one cohesive and organized entity comprised of approximately sixty thousand members.[68] Second, the SDF exercises control over significant portions of Northeastern Syria, which they liberated from ISIS[69] and continue to hold from the Syrian government.[70] Finally, the SDF have been conducting sustained military operations against ISIS since 2015.[71] Likewise, ISIS is organized under the command and control of a single individual,[72] with a leadership structure dominated by foreign fighters.[73] While ISIS recently lost its physical caliphate due to the SDF's successful military operations, it once controlled significant territory throughout

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[65] The factors outlined in Additional Protocol II must be met for the Protocol to apply to a conflict, notwithstanding its potential applicability as customary international law. On the other hand, the list of factors highlighted in the *Commentary to Geneva Convention I* is simply a guidepost, as Common Article 3 "should be applied as widely as possible." *Id.*

[66] *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (highlighting the requirement of "protracted armed violence" to determine that an armed conflict exists).

[67] Formal state recognition of the SDF or ISIS as belligerents to the conflict, and thus providing them with certain legal rights, is a separate and distinct decision. *See* LAW OF WAR MANUAL, *supra* note 60, § 3.3.3 ("For the purpose of applying humanitarian rules, recognition of the armed group as having belligerent rights is neither a prerequisite for nor a result of applying humanitarian rules.").

[68] Williams, *supra* note 40.

[69] Savage, *supra* note 3.

[70] Perry & Francis, *supra* note 6.

[71] Garamone, *supra* note 5.

[72] Rukmini Callimachi & Eric Schmitt, *ISIS Names New Leader and Confirms al-Baghdadi's Death*, N.Y. TIMES (Oct. 31, 2019), https://www.nytimes.com/2019/10/31/world/middleeast/isis-al-baghdadi-dead.html ("Days after the Islamic State's leader, Abu Bakr al-Baghdadi, and his heir apparent were killed in back-to-back attacks by United States forces in northern Syria, the group broke its silence on Thursday to confirm their deaths, announce a new leader and warn America: 'Do not be happy.'").

[73] 2014 UNHRC Report, *supra* note 10, at 3.

Northeastern Syria.[74] Finally, as previously mentioned, ISIS and the SDF have been engaged in sustained hostilities since 2015.[75]

Since the conflict between the SDF and ISIS in Syria involves sustained, intense violence between two organized armed groups, both *Tadić* factors are satisfied. Thus, the conflict can be classified as a NIAC.

B. The Conflict Between the SDF and the Syrian Government

In contrast, the conflict between the SDF and the Syrian government is more straightforward, as LOAC contemplates internal conflicts between states and insurgent groups.[76] Under the first *Tadić* factor, while the intensity of the violence between the SDF and Syrian government is lower than the violence between the SDF and ISIS, there has been "protracted armed violence between governmental authorities and organized armed groups"[77] in response to the SDF's continued control over thirty percent of Syria's territory.[78] Likewise, the Syrian government is a state entity and, as previously discussed, the SDF are a sufficiently organized armed group to satisfy *Tadić*'s second factor.[79] Thus, the conflict between the SDF and the Syrian government can also be considered a NIAC.

IV. The Application of LOAC to the SDF

Having established that the SDF and ISIS are engaged in a NIAC, the next issue to address is whether, and to what extent, international law is binding on non-state armed groups. The application of LOAC, a subset of international law that regulates the conduct of armed hostilities,[80] to the conflict between the SDF and ISIS is important for determining the legitimacy and lawfulness of the SDF's ability to detain and prosecute foreign ISIS fighters. Further, determining the specific bodies of LOAC that apply to the SDF will establish the baseline international legal standards to which the SDF's detention and prosecution operations must adhere.

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[74] Callimachi, *supra* note 41.
[75] Garamone, *supra* note 5.
[76] *See* Geneva Convention I, *supra* note 55; Additional Protocol II, *supra* note 56, art. 1.
[77] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
[78] Sarah El Deeb, *Syrian Kurds Say US Seeking Deal to Prevent Turkish Attack After Withdrawal*, ASSOCIATED PRESS (Jan. 29, 2019), https://www.militarytimes.com/flashpoints/2019/01/29/syrian-kurds-say-us-seeking-deal-with-turkey.
[79] *See* Williams, *supra* note 40; Garamone, *supra* note 5.
[80] LAW OF WAR MANUAL, *supra* note 60, § 1.3.

While domestic Syrian law would apply to the SDF even if LOAC applied, LOAC provides a more appropriate rubric for evaluating the SDF's detention and prosecution operations due to the classification of the conflict as a NIAC. If only domestic Syrian law were relied on to evaluate the lawfulness of the SDF's detention and prosecution of foreign ISIS fighters, the Syrian government, from which the SDF seeks to gain autonomy,[81] would be the final decision authority. While there has been no official declaration by the Syrian government on this matter,[82] it is likely the Syrian government considers all SDF military operations and self-governance unlawful, as the SDF are not operating under an official Syrian government grant of authority. As such, the SDF's detentions, according to the Syrian government, would likely amount to kidnapping, hostage-taking, or a similar offense under the Syrian Criminal Code.[83] However, since the SDF and ISIS are engaged in a NIAC, the analysis does not stop with domestic Syrian law. The SDF's detention and prosecution of foreign ISIS fighters can, and should, be evaluated under LOAC.

Nonetheless, the applicability of LOAC to non-state armed groups, such as the SDF, is not entirely obvious. The plain reading of international treaties, which are primary sources of LOAC, generally does not articulate their applicability to non-state armed groups. This is because international treaties are created, entered into, and signed by states rather than non-state actors. Fortunately, there are a number of legal theories that extend LOAC protections and obligations to a non-state armed group when they are a party to a NIAC.[84] The most relevant theories applicable to the specific factual circumstances of the conflict between the SDF and ISIS are the customary international law (CIL) theory, the third-party consent theory, and the prescriptive (legislative) jurisdiction theory.[85] Taken together, these theories help to identify the specific LOAC principles that apply to

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[81] Perry & Francis, *supra* note 6.
[82] As of this writing, none have been translated into English and formally published as a matter of official government action. *But see* Joost Hiltermann, *The Kurds Once Again Face American Abandonment*, ATLANTIC (Aug. 30, 2018), https://www.theatlantic.com/international/archive/2018/08/syria-kurds-assad-ypg-isis-iraq/569029 ("Bashar al-Assad . . . has repeatedly announced his intention to reclaim 'every inch' of Syrian territory. That includes the zone controlled by the YPG, an area that also comprises the majority-Kurdish region the Kurds call Rojava.").
[83] *See generally Syrian Arab Republic, Decree No. 20 of 2013 on the Crime of Kidnapping and Due Penalties*, INT'L LABOUR ORG., http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=96554 (last visited Feb. 9, 2021).
[84] *See* Daragh Murray, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, 20 J. CONFLICT & SEC. L. 101 (2015).
[85] *See id.* at 101–02.

this conflict and thus govern the SDF's detention and prosecution of foreign ISIS fighters.

A. Customary International Law Theory

The CIL theory provides strong support for the premise that LOAC applies to the conflict between the SDF and ISIS and is thus binding on both parties. However, reliance on this theory alone is not enough to identify all of the SDF's LOAC obligations. The CIL theory posits that "where international rights or obligations form part of customary international law, they bind armed opposition groups *qua* customary law, with or without their consent, and irrespective of any actions undertaken by the territorial state."[86] While it is generally accepted today that non-state armed groups can be bound by CIL, this has not always been the case.

States have historically been central to the development of CIL, which has presented problems when applying the CIL theory to non-state armed groups. Customary international law comes from a general acceptance of certain principles and consistent practice by states, which are followed out of a sense of legal obligation, also known as *opinio juris*.[87] This invariably puts state practice and state opinion at the center of creating CIL. The historic view of CIL provides that states are the only entities to which CIL applies, as they are the only entities involved in its creation.[88] Because the international community does not recognize the SDF or ISIS as independent sovereigns, neither is considered a state.[89] Consequently, under the historic view, this would mean that CIL is not applicable to either party.

A similar argument that stems from the historic view of CIL is that even if a non-state armed group could be bound by CIL, the binding law would likely be only those customary laws established by other non-state

[86] *Id.* at 105.
[87] LAW OF WAR MANUAL, *supra* note 60, § 1.8.
[88] Murray, *supra* note 84, at 106.
[89] According to the Montevideo Convention, a "State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States." Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934). While the SDF and the overarching semi-autonomous Kurdish regional government in Northern Syria have both a defined territory and a permanent population, they have neither a fully functioning and stable government across their entire territory nor the capacity to enter into relations with other states. Thus, the SDF and the Kurdish governing authorities would not be considered a state by the international community.

armed groups.[90] Further, "the historical conception of states as the exclusive subjects of international law . . . [means] it was assumed that the competence to create international law was a consequence of international legal personality."[91] Therefore, under this view, a non-state armed group may still need an international personality for international law to apply and, even then, the only binding laws would be those CILs established by other non-state actors.

Despite the historic, state-centric nature of the CIL theory, in the post-World War II era, certain baseline CIL principles have been extended to non-state armed groups due to their very nature and wide acceptance.[92] Common Article 3 is a component of LOAC that embodies those universally accepted minimum standards. By its terms, Common Article 3 specifically applies its minimum protections to "each Party to the conflict" when the armed conflict is "not of an international character occurring in the territory of one of the High Contracting Parties."[93] In addition, Common Article 3 has been held to be a "minimum yardstick" that reflects "elementary considerations of humanity"[94] that should be "applied as widely as possible."[95] As such, Common Article 3 is generally regarded as CIL, applicable to all parties involved in both international armed conflicts and NIACs.[96]

Since NIACs are, by their nature, internal to a state, they generally involve a state actor and at least one non-state armed group. Consequently, in most NIACs, it would be unlikely that a non-state armed group would have a recognized international personality, especially in the early stages of hostilities. Thus, it would stand to reason there is no requirement for a non-state armed group to have an international personality for Common Article 3 to be binding. To state otherwise would mean Common Article 3 is only applicable to the state entity in a NIAC, which would render its minimum protections wholly irrelevant.

Further, international case law supports the proposition that Common Article 3 applies to non-state armed groups even when those groups do not

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[90] Murray, *supra* note 84, at 107.
[91] *Id.*
[92] *Id.*
[93] Geneva Convention I, *supra* note 55.
[94] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 218 (June 27).
[95] PICTET ET AL., *supra* note 55.
[96] LAW OF WAR MANUAL, *supra* note 60, § 3.1.1.2.

have an international personality. In *Tadić*, the appellate court cited to Common Article 3 and the Hague Conventions in holding that "it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilians from hostilities . . . as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities."[97] The court went further by extending individual criminal liability to the non-state actors who committed LOAC violations in the territory of the former Yugoslavia.[98] Specifically, the court held that "[a]ll of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3 . . . and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."[99]

Further, the Appeals Chamber of the Special Court of Sierra Leone held in *Prosecutor v. Sam Hinga Norman* that non-state armed groups are bound by LOAC based on CIL.[100] In particular, the court stated that

> it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws.[101]

Therefore, it is well established in international case law that when non-state armed groups are a party to an armed conflict, they are bound by LOAC obligations that are considered CIL.

The United States also supports the view that CIL applies to non-state armed groups. The *Law of War Manual* explains that, "[a]s a consequence of the fewer treaty provisions applicable to non-international armed conflict, many of the rules applicable to non-international armed conflict are found

[97] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
[98] *Id.* ¶ 134.
[99] *Id.*
[100] Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 22 (May 31, 2004), http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72(E)-131.pdf.
[101] *Id.* (citations omitted).

in customary international law."[102] The *Manual* goes on to state that "customary law of war rules are binding on those parties to the armed conflict that intend to make war and to claim the rights of a belligerent, even if they are not States."[103]

United States domestic case law reinforces this position. In *Kadic v. Karadžić*, the Second Circuit Court of Appeals held that the "law of nations" was not confined only to state action.[104] Instead, the court found that certain conduct could violate the "law of nations" even if undertaken by private individuals.[105] The court ultimately reversed the trial court's dismissal of a civil suit against Radovan Karadžić, the leader of insurgent Bosnian-Serb Forces, which was brought by the victims of his war crimes under the Alien Tort Act.[106]

Even though neither ISIS nor the SDF have a recognized international personality, it is well settled that each is still bound by LOAC, specifically Common Article 3, given the classification of their conflict. The language of Common Article 3, coupled with international case law and the United States' official position, lends credibility to this proposition. Further, the case is strengthened by the factual circumstances of the conflict. Both parties are sufficiently organized and have, at various times, controlled significant territory in Northeastern Syria.[107] In addition, the SDF have established a semi-autonomous government within their territory and continue to maintain international relations with a multitude of foreign governments.[108] While still not rising to the level of an officially recognized state or having an international personality, these factual circumstances provide additional indicia that both the SDF and ISIS are parties to the NIAC to which Common Article 3 applies.[109]

B. Third-Party Consent Theory

The third-party consent theory also provides a strong, independent basis for binding the SDF to specific international treaties. This theory, as it applies to non-state armed groups, arises from the *pacta tertiis* principle[110]

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[102] LAW OF WAR MANUAL, *supra* note 60, § 17.2.2.
[103] *Id.* § 17.2.4.
[104] Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995).
[105] *Id.*
[106] *Id.* at 237, 251.
[107] Williams, *supra* note 40.
[108] *See* El Deeb, *supra* note 80.
[109] Geneva Convention I, *supra* note 55.
[110] Murray, *supra* note 84, at 109.

found in Section 4 of Part III of the Vienna Convention on the Law of Treaties.[111] Specifically, Article 36 states that "[a] right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right . . . to the third State . . . and the third State assents thereto."[112] Drawing from this language, the third-party consent theory applies this principle to non-state armed groups by binding them to international treaties "if two conditions are met: first, that the drafters intended to bind armed opposition groups and, second, that the armed groups consented to be bound."[113] By allowing non-state armed groups the freedom to choose the international treaties to which they are bound, based on the factual reality of the conflict and through their own consent, this theory ultimately encourages compliance with international law.[114] While this theory may not be applicable for all NIACs, the SDF, in an attempt to seek international support and legitimacy, have consented to be bound by certain international laws, making this theory particularly applicable.

The first requirement of *pacta tertiis* is that the drafters of the international treaty intended to bind non-state actors.[115] Since the conflict between the SDF and ISIS is a NIAC, the application of Common Article 3 to the SDF is of particular importance. As previously outlined, Common Article 3 specifically applies to "each Party to the conflict" in cases of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[116] Based on the plain reading of this language, the drafters of the Conventions clearly differentiated between the parties to the NIAC: the non-state actors and a state entity, which is described as the "High Contracting Part[y]."[117] When conflicts "arise between two or more . . . High Contracting Parties," according to Common Article 2 of the 1949 Geneva Conventions, the conflict is considered an international armed conflict.[118] Since every nation in the world is a High Contracting Party to the Geneva Conventions,[119] a NIAC, by the terms of

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[111] Vienna Convention on the Law of Treaties arts. 34–37, *opened for signature May 23, 1969*, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).
[112] *Id.* art. 36.
[113] Murray, *supra* note 84, at 110.
[114] *Id.*
[115] *Id.*
[116] Geneva Convention I, *supra* note 55.
[117] *Commentary of 2016: Article 3: Conflicts Not of an International Character*, INT'L COMM. OF THE RED CROSS para. 393, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC.
[118] Geneva Convention I, *supra* note 55, art. 2.
[119] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*, INT'L COMM. OF THE RED CROSS, https://ihl-

Common Article 3, must involve non-state actors and no more than one High Contracting Party.

Further, the *Commentary on Geneva Convention I* explains the drafter's intent to bind non-state armed groups to Common Article 3.

> The words "each Party" mark the great progress which the passage of a few years has sufficed to bring about in international law. For until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party—a Party, moreover, which was not yet in existence and which was not even required to represent a legal entity capable of undertaking international obligations.
>
> Each of the Parties will thus be required to apply Article 3 by the mere fact of that Party's existence and of the existence of an armed conflict between it and the other Party.[120]

As such, it is clear the intent of the drafters of the 1949 Geneva Conventions was to bind both states and non-state armed groups involved in a NIAC to the minimum standards set forth in Common Article 3.

Similarly, the drafters of Additional Protocol II intended the treaty to be applicable to both states and non-stated armed groups involved in a NIAC. Article 1 of Additional Protocol II provides "[t]his Protocol, which develops and supplements Article 3 . . . without modifying its existing conditions of application, shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups . . . ."[121] The *Commentary on the Additional Protocols* further explains that "Protocol II and [C]ommon Article 3 are based on the principle of equality of the parties to conflict . . . [that is, the] rules grant the same rights and impose the same duties on both the established government and the insurgent party."[122] Thus, as an

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databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties &xp_treatySelected=365 (last visited Feb. 9, 2021).

[120] PICTET ET AL., *supra* note 55, at 51.

[121] Additional Protocol II, *supra* note 56, art. 1.

[122] CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 4442 (Yves Sandoz et al. eds., 1987).

extension of Common Article 3, the drafters of Additional Protocol II also intended to bind non-state armed groups.

The second requirement of the *pacta tertiis* principle on which the third-party consent theory is based, is the non-state armed group must consent to be bound by the international treaties.[123] While the SDF have not made an affirmative, public statement consenting to the application of Common Article 3 or Additional Protocol II, they have provided commitments to the United States to respect human rights and the rule of law. In accordance with its constitutional authority to regulate the expenditure of government funds, Congress included in section 1209 of the National Defense Authorization Act for Fiscal Year 2015 the following prerequisite for the U.S. military to provide financial and logistical support to the SDF for their counter-ISIS operations: "a commitment [by the SDF] . . . promoting the respect for human rights and the rule of law."[124] Since the SDF are currently receiving financial and logistical support from the United States,[125] it is reasonable to conclude the SDF have provided the congressionally required commitments to U.S. Government officials.

Since the required commitments in section 1209 are not specific to a particular law or treaty, understanding the United States' interpretation of the phrase "respect for human rights and the rule of law"[126] is important. As a state-party to the 1949 Geneva Conventions and the previously discussed view of CIL, the United States regards Common Article 3 as the minimum standard of treatment in both international and NIACs.[127] Similarly, while the United States has not ratified Additional Protocol II, it views the protections and obligations afforded to the parties under Additional Protocol II as "no more than a restatement of the rules of conduct with which U.S. military forces . . . comply as a matter of national policy, constitutional and legal protections, and common decency."[128] Further, the United States

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[123] Murray, *supra* note 84, at 110.
[124] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(e)(1)(B), 128 Stat. 3292, 3543 (2014).
[125] Savage, *supra* note 3 ("Since then, the American military has helped the S.D.F. upgrade security, spending about $1.6 million.").
[126] § 1209(e)(1)(B), 128 Stat. at 3543.
[127] *See* LAW OF WAR MANUAL, *supra* note 60, § 3.1.1.2.
[128] Letter from George P. Shultz, U.S. Sec'y of State, to Ronald Reagan, President of the U.S., (Dec. 13, 1986), *in* S. TREATY DOC. NO. 100-2, at VII, VIII (1987) ("With the above caveats, the obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency."); LAW OF WAR MANUAL, *supra* note 60, at 1180 n.227 ("We have now completed a comprehensive interagency review of

views the applicability of Additional Protocol II more broadly than its stated scope; that is, the United States applies "the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international conflicts as traditionally defined."[129] Thus, the United States' acceptance of the SDF's commitments to promote respect for human rights and the rule of law means that those commitments will be viewed in light of those minimum standards set forth by both Common Article 3 and Additional Protocol II.

By providing these commitments, the SDF have consented to be bound by those international laws. This proposition is further supported by the SDF's cooperation with international humanitarian organizations such as the ICRC[130] and the Geneva Call,[131] both of which encourage and monitor adherence to those international laws.[132] Consequently, by voluntarily consenting to and complying with Common Article 3 and Additional Protocol II, the SDF have gained international support and legitimacy for their operations, which is consistent with the third-party consent theory's underlying purpose.

C. Prescriptive (Legislative) Jurisdiction Theory

The final theory that applies LOAC to the conflict between the SDF and ISIS is the prescriptive (legislative) jurisdiction theory. Legislative jurisdiction is an American legal principle that provides that "the federal state has jurisdiction to legislate with respect to a specific area and any entities therein; i.e. it has the authority to 'apply its law to create or affect legal interests.'"[133] In other words, a state may pass legislation and bind to it all persons and entities that are within that state's territory or under the state's control.

In international law, this principle is known as the prescriptive jurisdiction theory, which is "the right [of a state] to legislate vis-à-vis its

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Protocol II, and . . . assess it to be consistent with current military practice and beneficial to our national security and foreign policy interests." (quoting Letter from Hillary Rodham Clinton, U.S. Sec'y of State & Robert Gates, U.S. Sec'y of Def., to John Kerry, U.S. Sen. & Richard Lugar, U.S. Sen. (Mar. 7, 2011)).

[129] Letter from George P. Shultz to Richard Nixon, *supra* note 128, at VIII.

[130] Schmitt, *supra* note 8.

[131] U.S. DEP'T OF STATE, SYRIA 2017 HUMAN RIGHTS REPORT 25 (2017).

[132] *See The ICRC's Mandate and Mission*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/mandate-and-mission (last visited Feb. 9, 2021); *Mission*, GENEVA CALL, https://www.genevacall.org/mission (last visited Feb. 9, 2021).

[133] Murray, *supra* note 84, at 122 (citations omitted).

nationals, an authority derived from the fact of state sovereignty."[134] On an international scale, a state is regarded as a "continuous entity" where internal changes do not affect the state's international obligations.[135] Thus, the particular government or state agent who entered into the international agreement does not matter. Instead, once the international agreement is entered into, all persons and entities within that state are bound by the agreement, even if there is a subsequent transfer of state authority.[136]

The prescriptive jurisdiction theory's relevance to non-state armed groups has broad support. Specifically, when discussing the applicability of Additional Protocol II and Common Article 3 to non-state armed groups, the *Commentary on the Additional Protocols* provides:

> The question is often raised how the insurgent party can be bound by a treaty to which it is not a High Contracting Party. . . . [T]he commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State.[137]

Thus, the drafters of the Additional Protocols to the Geneva Conventions both embraced the prescriptive jurisdiction theory and used it to apply the rights and obligations of those treaties to non-state actors.

Similarly, the United States has adopted the prescriptive jurisdiction theory in applying international law to non-state armed groups. Under the heading "Binding Force of the Law of War on Insurgents and Other Non-State Armed Groups," the *Law of War Manual* explains that, "[a]s a practical matter, non-State armed groups would often be bound by their State's treaty obligations due to the very fact that the leaders of those non-State armed groups would claim to be the State's legitimate representatives."[138] Thus, a non-state armed group that claims to have a degree of official state

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[134] *Id.*
[135] *Id.* at 124.
[136] *Id.*
[137] PILLOUD ET AL., *supra* note 122, para. 4444 (citation omitted).
[138] LAW OF WAR MANUAL, *supra* note 60, § 17.2.4.

or governmental authority would be bound by the state's pre-existing treaty obligations.

However, the prescriptive jurisdiction theory would only bind the SDF and ISIS to Common Article 3. The Syrian Arab Republic is a signatory only to the 1949 Geneva Conventions and Additional Protocol I.[139] Syria is not a signatory to Additional Protocol II.[140] Therefore, under the prescriptive jurisdiction theory, only Common Article 3 would apply to the NIAC between the SDF and ISIS, since it is ongoing in the Syrian Arab Republic.

D. Law of Armed Conflict Principles Applicable to the SDF

Taken together, these three theories identify two specific bodies of LOAC that are applicable to the SDF's detention and prosecution of foreign ISIS fighters. First is Common Article 3, which applies to the conflict as a whole and is thus binding on both the SDF and ISIS. Second, the SDF may also be obligated to abide by Additional Protocol II. However, the extent to which Additional Protocol II applies varies based on the theory relied upon and how strongly the international community views those principles as CIL. How these bodies of law apply to the SDF and the extent to which they are binding is discussed further below.

1. Common Article 3

The first body of LOAC that is binding on the SDF and controlling during their detention and prosecution of foreign ISIS fighters is Common Article 3 of the 1949 Geneva Conventions. Since this position is supported by all three theories, Common Article 3 is the most clearly applicable body of law to the SDF.

First, under the CIL theory, as articulated in *Tadić*, Common Article 3 extends to non-state armed groups even if those groups do not have an international personality.[141] The United States also supports the position that Common Article 3 applies to non-state actors as a matter of CIL.[142] The *Law of War Manual* explains that "[t]reaty provisions that address non-

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[139] *Syrian Arab Republic*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY (last visited Feb. 9, 2021).
[140] *Id.*
[141] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 127, 134 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
[142] LAW OF WAR MANUAL, *supra* note 60, § 17.2.4.

international armed conflict provide that they apply not only to the State, but to each party to the conflict. In many cases, these treaty provisions would also be binding on non-State armed groups as a matter of customary international law."[143] To support this proposition, the *Manual* cites in a footnote to a decision of the Special Court for Sierra Leone Appeals Chamber, an international court established by the United Nations, which explained that "a convincing theory is that [insurgents] are bound as a matter of international customary law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity."[144] Therefore, both the United States and international courts view Common Article 3 as applicable to non-state armed groups as a matter of CIL.

Similarly, the third-party consent theory supports the application of Common Article 3 to the SDF. First, as previously discussed, the intent of the drafters of Common Article 3 was to apply its terms to non-state armed groups. Second, the SDF have consented to Common Article 3's applicability through their commitments to the United States to respect human rights and the rule of law. Separately, the SDF have allowed the ICRC to access and assess the conditions of their detention facilities[145] and the SDF have publically claimed that "conditions in the camps meet international standards."[146] These official actions by the SDF, coupled with their commitments to the United States, indicate the SDF's intent to voluntarily adhere to Common Article 3's minimum treatment standards. Thus, the SDF have satisfied both requirements under the third-party consent theory, binding them to Common Article 3.

Finally, under the prescriptive jurisdiction theory, the SDF are also bound by Common Article 3. Since the Syrian Arab Republic is a party to the 1949 Geneva Conventions,[147] the SDF, composed of Syrian nationals, are bound by the state's pre-existing treaty obligations. This is further strengthen by the SDF's apparent role, though not internationally accepted, as a semi-official state entity within the Syrian territory they control. The SDF and SDC have taken on both internal governing and international engagement functions.[148] Therefore, by holding themselves out as a semi-

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[143] *Id.* (citations omitted).
[144] Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 47 (Mar. 13, 2004), *quoted in* LAW OF WAR MANUAL, *supra* note 60, at 1039 n.64.
[145] Schmitt, *supra* note 8.
[146] *Id.*
[147] *Syrian Arab Republic*, *supra* note 139.
[148] *See* Seligman, *supra* note 7.

official state entity, the SDF would be bound by all treaty obligations contained in the 1949 Geneva Conventions, to include Common Article 3.

2. Additional Protocol II

Unlike Common Article 3, Additional Protocol II does not apply to the conflict between the SDF and ISIS; however, the SDF may still be required to comply with certain portions of Additional Protocol II. First, the prescriptive jurisdiction theory provides no support for applying Additional Protocol II to the conflict between the SDF and ISIS. Even though Additional Protocol II acts as an expansion of Common Article 3, it remains a separate treaty that requires separate ratification. And, importantly, the Syrian Arab Republic is not a signatory to Additional Protocol II.[149] According to the ICRC,

> Additional Protocol II is only applicable in armed conflicts taking place on the territory of a State that has ratified it. . . . In these non-international armed conflicts [that occur in states that have not ratified Additional Protocol II], common Article 3 of the four Geneva Conventions often remains the only applicable treaty provision.[150]

Thus, under the prescriptive jurisdiction theory, neither the SDF nor ISIS is bound by Additional Protocol II's protections and obligations.

Likewise, the CIL theory provides little support for applying Additional Protocol II to the conflict between the SDF and ISIS. While a state may view Additional Protocol II as CIL, that position is typically articulated in a manner that extends only to the state's own actions and operations.[151] Thus, the applicability of Additional Protocol II, as a matter of CIL, to non-state armed groups is not clearly defined when looking to official state positions. In addition, international case law does not support the position that Additional Protocol II is CIL applicable to NIACs. Therefore, the

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[149] *Syrian Arab Republic*, *supra* note 139.
[150] *Customary IHL: Introduction*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in (last visited Feb. 9, 2021).
[151] While the United States has not explicitly stated that it views Additional Protocol II as customary international law, it is the consistent practice of the United States to apply the same protections and obligations afforded by the Protocol to all military operations out of a sense of legal obligation. *E.g.*, Letter from George P. Shultz to Richard Nixon, *supra* 128, at VIII ("[T]he obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency.").

current state of CIL does not appear to extend Additional Protocol II to the NIAC between the SDF and ISIS.

The third-party consent theory, however, provides the most compelling argument for extending Additional Protocol II to the SDF. While the United States has not ratified Additional Protocol II, it does view its protections and obligations, subject to certain reservations, as "no more than a restatement of the rules of conduct with which" the United States abides.[152] Further, the United States views Additional Protocol II as applicable "to all conflicts covered by [Common] Article 3 . . . which will include all non-international armed conflicts as traditionally defined."[153] Therefore, the United States' standard for humane treatment in a NIAC is framed by the standards set forth in Common Article 3 and Additional Protocol II. Thus, under the third-party consent theory, when the SDF provided the United States "a commitment . . . to promoting the respect for human rights and the rule of law,"[154] the SDF consented to the applicability of both Common Article 3 and Additional Protocol II to their operations.

While the extent to which the SDF are bound by Additional Protocol II remains unclear, based primarily on the third-party consent theory, the SDF are likely bound, at a minimum, to Articles 4, 5, and 6. These Articles provide the primary minimum treatment standards for individuals not taking part in hostilities and those no longer taking part in hostilities.[155] These Articles are also the most relevant to the SDF's military operations and the detention and prosecution of ISIS fighters for which the SDF are receiving financial and logistical support from the United States.[156] Therefore, the United States will likely view the SDF's commitments through the lens of Articles 4, 5, and 6, making those Articles the most likely to be binding on the SDF.

3. Article 75 of Additional Protocol I

Article 75 of Additional Protocol I may also be applicable to the SDF's detention and prosecution of foreign ISIS fighters, though this position does not have strong support. Additional Protocol I, by its terms, applies to international armed conflicts and those "situations referred to in Article 2

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[152] *Id.*
[153] *Id.*
[154] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(e)(1)(B), 128 Stat. 3292, 3543 (2014).
[155] Additional Protocol II, *supra* note 56, arts. 4–6.
[156] § 1209(e)(1)(B), 128 Stat. at 3543.

common to [the Geneva Conventions of 12 August 1949]."[157] Unlike Additional Protocol II, the Syrian Arab Republic is a signatory to Additional Protocol I.[158] Therefore, under the prescriptive jurisdiction theory, Syrian parties to an international armed conflict would be bound by Article 75. However, since the conflict between the SDF and ISIS is a NIAC, Additional Protocol I is not applicable under this theory.

Despite Additional Protocol I's specific applicability, the U.S. Supreme Court held in *Hamdan v. Rumsfeld* that Article 75 of Additional Protocol I was "indisputably part of the customary international law."[159] The Court then used the protections afforded by Article 75 as the standard for determining whether the United States' use of military commissions to prosecute captured al-Qaeda members complied with Common Article 3's humane treatment obligation.[160] While Article 6 of Additional Protocol II provides similar fundamental guarantees that are specifically tailored to NIACs,[161] the Court instead chose to apply the protections afforded by Article 75 of Additional Protocol I to the United States' NIAC with al-Qaeda.[162]

Despite the Supreme Court's statement that Article 75 of Additional Protocol I is CIL applicable to both international and NIACs, this position is not shared across the U.S. Government. The DoD, through the *Law of War Manual*, specifically states, "the fundamental guarantees reflected in Article 75 of AP I [are the] minimum standards for the humane treatment of all persons detained *during international armed conflict*."[163] Similarly, a White House fact sheet that accompanied former President Barack Obama's issuance of Executive Order 13567 stated that "[t]he U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains *in an international armed conflict*, and expects all other nations to adhere to these

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[157] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].
[158] *Syrian Arab Republic*, *supra* note 139.
[159] Hamdan v. Rumsfeld, 548 U.S. 557, 634 (2006).
[160] *Id.* at 633; Geoffrey S. Corn, *Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 2.
[161] Additional Protocol II, *supra* note 56, art. 6.
[162] *Hamdan*, 548 U.S. at 634.
[163] LAW OF WAR MANUAL, *supra* note 60, § 4.19.3.1 (emphasis added); *see id.* §§ 3.1.1.2, 8.1.4.2.

principles as well."[164] The fact sheet further provides that "Additional Protocol II . . . contains detailed humane treatment standards and fair trial guarantees *that apply in the context of non-international armed conflicts*" and "that United States military practice is already consistent with the Protocol's provisions."[165] Therefore, even though the Supreme Court has extended Article 75 of Additional Protocol I to NIACs as a matter of CIL, the Executive Branch, "as the sole organ of the federal government in the field of international relations,"[166] has declined such a broad application of Article 75.

However, despite internal disagreement within the U.S. Government on the applicability of Article 75, the SDF may still be obligated to abide by the general principles outlined by Article 75 under the third-party consent theory. Since there is precedence in U.S. jurisprudence to extend Article 75 of Additional Protocol I to NIACs as a matter of CIL, the United States may, in certain circumstances, evaluate adherence to Common Article 3's humane treatment obligation through the lens of Article 75's treatment standards. As such, when the SDF provided the United States "a commitment . . . to promoting the respect for human rights and the rule of law," in accordance with the § 1209(e)(1)(B) of the National Defense Authorization Act for Fiscal Year 2015,[167] the SDF consented to be bound by those fundamental minimum treatment standards the United States views as applicable in NIACs, regardless of whether those standards are codified in Common Article 3; Article 75 of Additional Protocol I; or Articles 4, 5, and 6 of Additional Protocol II.

Nevertheless, due to the ambiguity of Article 75's applicability to NIACs, this article relies on Common Article 3 and Additional Protocol II as the primary sources of LOAC applicable to the SDF's detention and prosecution of foreign ISIS fighters.

V. The SDF's Legal Authority to Detain Foreign ISIS Fighters

Having established that the SDF and ISIS are non-state armed groups engaged in a NIAC to which LOAC applies, the next step is to evaluate the SDF's legal authority to detain foreign ISIS fighters. This evaluation

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[164] OFF. OF THE PRESS SEC'Y, THE WHITE HOUSE, FACT SHEET: NEW ACTIONS ON GUANTÁNAMO AND DETAINEE POLICY (2011) (emphasis added).
[165] *Id.* (emphasis added).
[166] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).
[167] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(e)(1)(B), 128 Stat. 3292, 3543 (2014).

becomes especially important when states, such as the United States, seek to provide the SDF with logistical and financial support for their detention operations.[168] If the SDF's detention operations are deemed illegitimate or unlawful, foreign support to the SDF may become legally or politically untenable.[169] In addition, if the SDF do not have a proper legal basis to detain, the Syrian government or the international community may force them to release detained ISIS fighters. Either situation would be counter-productive to the fight against ISIS.

The analysis to determine the SDF's legal authority to detain presents an additional complexity because, unlike a state, they do not have domestic detention authority. For a state, once there is a proper *jus ad bellum* international legal justification to enter into an armed conflict, the authority to detain individuals on the battlefield is derived from both LOAC[170] and domestic law.[171] However, a state "would only authorize its own agents ([e.g.,] police/military forces) to carry out [detention operations]. Therefore, at least *prima facia*, [non-state armed groups] could never detain individuals *legally* in a NIAC."[172] Unsurprisingly, under domestic Syrian law, the SDF are not considered official state agents. Rather, the SDF are a militia force that holds territory without the consent of the Syrian government.[173] Therefore, under Syrian law, any detention by the SDF would likely be considered an unlawful criminal act, such as kidnapping or hostage taking.[174]

As such, the SDF's ability to conduct detention operations turns solely on whether LOAC provides detention authority to non-state armed groups.

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[168] Savage, *supra* note 3.
[169] *See, e.g.*, 10 U.S.C. § 362 (prohibiting the use of DoD funds for training, equipping, or assisting a unit of a foreign security force if there is credible information that the unit has committed gross violations of human rights).
[170] *E.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] ("The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.").
[171] *See, e.g.*, U.S. DEP'T OF DEF., DIR. 2310.01E, DOD DETAINEE PROGRAM 12 (19 Aug. 2014) (C2, 18 Sept. 2020) ("In addition to the responsibilities in section 8 of this enclosure, the Combatant Commanders: a. Plan, execute, and oversee Combatant Command detainee operations in accordance with this directive and implementing issuances.").
[172] Ezequiel Heffes, *Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law*, 20 J. CONFLICT & SEC. L. 229, 230 (2015).
[173] Perry & Francis, *supra* note 6.
[174] *See generally Syrian Arab Republic, Decree No. 20 of 2013 on the Crime of Kidnapping and Due Penalties*, *supra* note 83.

However, LOAC does not explicitly provide detention authority to parties in NIACs as it does for parties in international armed conflicts.[175] While both Common Article 3 and Additional Protocol II discuss protections for detained persons, there is no specific language authorizing a non-state armed group to detain individuals in contravention of the governing domestic law. In fact, Common Article 3 states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict."[176] This caveat has been viewed as an explicit statement that LOAC does not provide a non-state armed group with any additional authorities beyond their domestic legal authorities and any action beyond what is provided by domestic law is per se illegal.[177]

Alternatively, there are two different, but complementary, premises under which the SDF may properly detain foreign ISIS fighters under LOAC. The first premise is that LOAC does not prohibit the SDF from detaining individuals captured on the battlefield.[178] The second is that, while not explicitly stated, LOAC provides inherent detention authority to non-state armed groups.[179] As explained below, these two premises provide the SDF with the requisite international legal authority to properly detain foreign ISIS fighters despite not having been granted the domestic legal authority by the Syrian government.

A. The Law of Armed Conflict Does Not Prohibit SDF Detention Operations

The first premise that allows the SDF to lawfully detain foreign ISIS fighters is simply that detention by non-state armed groups is not prohibited by LOAC. Neither Common Article 3 nor Additional Protocol II explicitly prohibit the parties to a NIAC from detaining individuals encountered on the battlefield. Instead, both authorities recognize that detention occurs during armed conflict and provide protections for those persons whose

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[175] Heffes, *supra* note 172, at 231–33.
[176] Geneva Convention I, *supra* note 55, art. 3(2).
[177] Mohammed v. Ministry of Defence [2014] EWHC (QB) 1369 [243] (Eng.), *quoted in* Heffes, *supra* note 172, at 233 ("Such detention may be lawful under the law of the state on whose territory the armed conflict is taking place, or under some other applicable law; or it may be entirely unlawful. There is nothing in the language of CA3 or AP2 to suggest that those provisions are intended to authorise or themselves confer legality on any such detentions.").
[178] Heffes, *supra* note 172, at 238–39.
[179] *Id.* at 239–40.

liberties have been restricted.[180] In addition, both bodies of law apply to both state and non-state actors,[181] yet neither body of law prohibits a non-state actor from detaining.[182] Therefore, regardless of the legality under domestic Syrian law, SDF detention of foreign ISIS fighters would not violate LOAC.

However, since the application of LOAC to an armed conflict does "not affect the legal status of the Parties to the conflict,"[183] the Syrian government may still prosecute members of the SDF under domestic law for conducting unlawful detentions. This means that while a non-state armed group may detain individuals without violating LOAC, they are not afforded any greater legal status under domestic law or special legal protections, such as combatant immunity. Therefore, "a State may use not only its war powers to combat non-State armed groups, but it may also use its domestic law, including its ordinary criminal law, to combat non-State armed groups."[184]

Even though the SDF may not be violating LOAC by detaining foreign ISIS fighters, the ability to derive from LOAC a positive authority to detain would provide the SDF with greater legitimacy. Further, having a legitimate legal authority to detain would increase the likelihood that the international community would recognize and support the SDF's detention operations.

B. The Law of Armed Conflict Authorizes SDF Detention Operations

While Common Article 3 and Additional Protocol II do not explicitly authorize detention, it can be argued that the authority to detain in a NIAC is inherent in both legal authorities.[185] Due to this inherent authority, non-state armed groups would not need a domestic legal basis to lawfully detain enemy belligerents. Thus, regardless of the Syrian government's stance on the domestic legal status of the SDF, the SDF could rely on the inherent authority provided by LOAC to detain foreign ISIS fighters.

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[180] *See* Geneva Convention I, *supra* note 55; Additional Protocol II, *supra* note 56, art. 5; PILLOUD ET AL., *supra* note 122, para. 4567 ("Taken together, these rules—Article *4 (Fundamental guarantees)* and Article 5, paragraph 1—express the basic standard to which anyone whose liberty has been restricted for reasons related to the conflict is entitled, i.e., combatants who have fallen into the power of the adverse party as well as civilians.").
[181] *See* discussion *supra* Part IV.
[182] *See* Geneva Convention I, *supra* note 55; Additional Protocol II, *supra* note 56, arts. 4–6.
[183] Geneva Convention I, *supra* note 55.
[184] LAW OF WAR MANUAL, *supra* note 60, § 17.4.1.
[185] Heffes, *supra* note 172, at 239–40.

The recognition of the inherent authority to detain in a NIAC stems from the enumerated detention authority provided by the Geneva Conventions in international armed conflicts. Specifically, Geneva Convention III of the 1949 Geneva Conventions authorizes the taking of prisoners of war during hostilities.[186] Based on this explicit authorization,

> [i]t is generally uncontroversial that the Third Geneva Convention provides a sufficient legal basis for POW internment and that an additional domestic law basis is not required. The detaining State is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing because POWs are considered to pose a security threat *ipso facto*.[187]

Similarly, Geneva Convention IV provides authority for states to intern foreign civilians who are in the territory of a Party to the conflict.[188] Therefore, in international armed conflicts, states are afforded significant authority under LOAC to detain various groups of individuals on the battlefield and do not require a domestic legal basis to do so.

Likewise, parties to a NIAC are afforded many of the same detention authorities under LOAC. When the law pertaining to NIACs is silent to a specific issue, the law of international armed conflicts can be used to provide further insight.[189] For example, in analyzing the Common Article 3 requirement to prosecute captured al-Qaeda members in a "regularly constituted court," the U.S. Supreme Court in *Hamdan* looked to Geneva Convention IV and Additional Protocol I, which are applicable only to international armed conflicts.[190] Neither Common Article 3 nor Additional Protocol II enumerate the detention authority applicable in NIACs. However, both authorities provide specific protections for individuals who are detained by parties to the conflict.[191] Considering the enumerated detention authority provided to states in an international armed conflict and

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[186] Geneva Convention Relative to the Treatment of Prisoners of War art. 21, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
[187] INT'L COMM. OF THE RED CROSS, INTERNMENT IN ARMED CONFLICT: BASIC RULES AND CHALLENGES 4 (2014).
[188] Geneva Convention IV, *supra* note 170, art. 43.
[189] Heffes, *supra* note 172, at 232 ("Indeed, some commentators have explained that when the law of NIACs does not provide an answer in certain situation, the law of IACs may be applied by analogy, but this has to be permitted by the nature of the provision.").
[190] Hamdan v. Rumsfeld, 548 U.S. 557, 631–35 (2006).
[191] *See* Geneva Convention I, *supra* note 55; Additional Protocol II, *supra* note 56, arts. 4–5.

the fact that both Common Article 3 and Additional Protocol II contemplate detentions, the parties to a NIAC may therefore have inherent detention authority.

Inherent detention authority in a NIAC is further supported by the *Commentary on the Additional Protocols* and by the international legal community. The *Commentary* identifies a clear distinction between individuals being detained as a result of the armed conflict and those being detained under domestic law, a circumstance not covered by Additional Protocol II.[192] Through this distinction, the *Commentary* acknowledges that individuals may be detained for security purposes pursuant to LOAC during a NIAC, which then triggers Common Article 3 and Additional Protocol II protections.[193] On the other hand, a state's domestic law would authorize and regulate criminal law detentions that are unrelated to the armed conflict.

Similarly, the ICRC recognizes the inherent detention authority that Common Article 3 and Additional Protocol II provide. In an opinion paper on internments in armed conflicts, the ICRC explained "that both customary and treaty [international humanitarian law] contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC."[194] Likewise, after acknowledging the opposing viewpoint, the ICRC's commentary on Common Article 3 states, "another view, shared by the ICRC, is that both customary and international humanitarian treaty law contain an inherent power to detain in non-international armed conflict."[195] Therefore, as an impartial advocate of the Geneva Conventions and their Additional Protocols,[196] the ICRC also supports the position that LOAC provides inherent detention authority to non-state armed groups in a NIAC.

Finally, based on the restrictions in the Hague Conventions, Common Article 3, and Additional Protocol II, LOAC must provide inherent

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[192] *See* PILLOUD ET AL., *supra* note 122, para. 4568 ("The term 'deprived of their liberty for reasons related to the armed conflict' is taken from Article 2 . . . . It covers both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law. However, there must be a link between the situation of conflict and the deprivation of liberty; consequently prisoners held under normal rules of criminal law are not covered by this provision." (citation omitted)).

[193] Heffes, *supra* note 172, at 240.

[194] INT'L COMM. OF THE RED CROSS, *supra* note 187, at 7.

[195] *Commentary of 2016: Article 3: Conflicts Not of an International Character*, *supra* note 117, para. 728.

[196] LAW OF WAR MANUAL, *supra* note 60, § 4.26.3; PICTET ET AL., *supra* note 55, at 11.

detention authority to all parties to a NIAC.[197] The Hague Conventions and Regulations, which regulate the means and methods of warfare, are considered CIL and are equally applicable to non-state armed groups in a NIAC.[198] The Fourth Hague Regulation makes it "especially forbidden . . . [t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion; . . . [and to] declare that no quarter will be given."[199] This prohibition is also contained in Additional Protocol II which states that "[i]t is prohibited to order that there shall be no survivors."[200] In other words, based on the CILs governing the means and methods of warfare, the enemy must be allowed to surrender. If a non-state armed group does not have the authority to detain under LOAC, those same laws only provide two options for dealing with surrendering combatants: release them or kill them. One option is unrealistic and the other is illegal. Therefore, in order to comply with the laws and customs of war as articulated by The Hague, LOAC must be read to inherently authorize detention.

Based on this inherent, affirmative detention authority provided by LOAC, the SDF may lawfully detain foreign ISIS fighters captured on the battlefield, including those who surrender. This authority is provided purely by LOAC and is based solely on the SDF's status as a party to a NIAC. As such, this authority would exist regardless of the SDF's domestic detention authority or the SDF's legal status in the eyes of the Syrian government.

C. Recognition of Inherent Detention Authority

While there is persuasive support for the position that LOAC provides inherent detention authority to parties in a NIAC, this area of international law is far from settled. The ICRC has noted that "[t]he question of whether [LOAC] provides inherent authority or power to detain is, however, still

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[197] Heffes, *supra* note 172, at 246–48.
[198] *E.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 118 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). ("[T]there exist general principles governing the conduct of hostilities (the so-called 'Hague Law') applicable to international and internal armed conflicts"); *id.* ¶ 127 ("Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as . . . prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.").
[199] Regulations Respecting the Laws and Customs of War on Land art. 23(c)–(d), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force Jan. 26, 1910) [hereinafter Hague IV Regulations].
[200] Additional Protocol II, *supra* note 56, art. 4(1).

subject to debate."[201] An *International Review of the Red Cross* report recounting a meeting of experts further drew attention to this debate, stating, "as treaty [LOAC] does not offer an explicit legal basis for any of the parties to a NIAC, the question as to how a non-State actor can exercise the inherent right to intern under [LOAC] remains unanswered."[202] While the experts recognized "that non-State actors party to a NIAC . . . have an inherent 'qualified *right* to intern' under [LOAC], it remains unclear how this right could be translated into an actual *legal basis* to intern."[203]

The debate on the inherent LOAC authority to detain is further highlighted in the United Kingdom case of *Serdar Mohammed v. Secretary of State for Defence*. The *Mohammed* court rejected the U.K. government's argument that the United Kingdom had the inherent authority to detain enemy combatants in Afghanistan during a NIAC on three grounds.[204] First, the court rejected the "outdated" position that the absence of a prohibition in international law equates to a positive authority.[205] Second, the court determined the current development of CIL does not provide the "authority to detain in a non-international armed conflict."[206] Finally, the court rejected the premise that Common Article 3 and Additional Protocol II provide positive detention authority since they do not expressly authorize detention.[207] While the U.K. Supreme Court ultimately overruled the Court of Appeals in this case, the Supreme Court derived the United Kingdom's positive detention authority from a United Nations Security Council Resolution, leaving the inherent LOAC detention authority debate unresolved.[208]

Therefore, despite support for the premise that LOAC provides inherent detention authority to all parties involved to a NIAC, this view has not been

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[201] *Commentary of 2016: Article 3: Conflicts Not of an International Character*, *supra* note 117, para. 727

[202] Els Debuf, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict: Chatham House and International Committee of the Red Cross, London, 22–23 September 2008*, 91 INT'L REV. RED CROSS 859, 870 (2009).

[203] *Id.* (emphasis added).

[204] Mohammed v. Ministry of Defence [2015] EWCA (Civ) 843 [246] (Eng.).

[205] *Id.* para. 197.

[206] *Id.* para. 242.

[207] *Id.* para. 219.

[208] Mohammed v. Ministry of Defence [2017] UKSC 2 [14] (Eng.) ("Lord Reed has dealt fully in his judgment with the question whether the detention of members of the opposing armed forces is sanctioned by customary international law in a non-international armed conflict. He concludes that as matters stand it is not, and I am inclined to agree with him about that. But for reasons which will become clear, I regard it as unnecessary to express a concluded view on the point.").

fully recognized or accepted by the international community. However, even if their inherent detention authority is not universally recognized, the SDF may still rely on the premise that international law does not prohibit detention in a NIAC and thus remain on firm legal ground when detaining foreign ISIS fighters.

VI. The Law of Armed Conflict Authorizes SDF Prosecutions of Foreign ISIS Fighters

Having established that LOAC applies to the SDF and that the SDF may detain enemy combatants in compliance with LOAC, the crux of the problem facing the SDF must now be addressed: how to adjudicate detained foreign ISIS fighters. While the SDF and the United States are encouraging countries to take custody of their citizens for adjudication, many of these countries face significant legal and political hurdles to do so.[209] Further, the establishment of an international criminal court in Syria to prosecute detained fighters would undoubtedly present its own complexities, including logistical difficulties, international resistance, and the current inability of the United Nations to effectively address any aspect of the Syrian Civil War.[210] Consequently, the SDF are left detaining two thousand foreign ISIS fighters under LOAC with no viable option for post-conflict adjudication by the international community.[211]

Long-term LOAC detention creates two problems for the SDF and, ultimately, the international community. First, there is a significant logistical burden placed on the SDF due to the enduring security and life support requirements for the detainees, which cannot fall below the humane treatment standards provided by Common Article 3 and Additional Protocol II. Second, once the armed conflict ceases, the SDF's ability to indefinitely detain foreign ISIS fighters under LOAC (and without due process) becomes much more difficult.[212] This is because security detentions are

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[209] Fisher, *supra* note 17.

[210] *See generally* Simon Tisdall, *The Epic Failure of Our Age: How the West Let Down Syria*, GUARDIAN (Feb. 10, 2018, 5:00 PM), https://www.theguardian.com/world/2018/feb/10/epic-failure-of-our-age-how-west-failed-syria.

[211] Gordon & Faucon, *supra* note 4.

[212] "In general, law of war rules for the conduct of hostilities cease to apply when hostilities have ended." LAW OF WAR MANUAL, *supra* note 60, § 3.8; *see* PILLOUD ET AL., *supra* note 122, para. 4492 ("Logically this means that the rules relating to armed confrontation are no longer applicable after the end of hostilities . . . ."). This means the SDF's authority under LOAC to continue to detain foreign ISIS fighters without due process may cease at some point in the future. Therefore, indefinite detention under LOAC is likely not a viable long-term solution.

"conceived and implemented as a preventative measure and therefore may not be used to punish a person for earlier criminal acts."[213] Thus, once the armed conflict ceases, it is much more difficult to articulate permissible grounds for continued security detentions, which would then require the release of those detainees.

The establishment of an SDF venue to prosecute foreign ISIS fighters could solve both problems. Syrian Democratic Forces criminal trials could provide the ISIS detainees with due process and provide the SDF with the requisite legal grounds for long-term, post-conflict detention. Further, foreign governments would not have to expend domestic political capital trying to repatriate ISIS fighters for prosecution. Instead, those governments could simply provide the SDF with funding, training, and logistical support for the prosecution and detention of those ISIS fighters. In turn, this option could provide the SDF with enduring funding and support and greater international legitimacy and engagement. However, the viability of this option turns on whether LOAC permits a non-state armed group to prosecute individuals captured on the battlefield.

A. The SDF's Authority to Prosecute Enemy Combatants

In order to determine the appropriate venue to adjudicate foreign ISIS fighters, the SDF's authority to prosecute enemy combatants under LOAC must first be established. Unsurprisingly, the Syrian government has not afforded the SDF any domestic law enforcement or prosecutorial authority. However, like the authority to detain, the SDF can also derive their authority to prosecute from LOAC.

Both Common Article 3 and Additional Protocol II recognize that parties to a NIAC can prosecute enemy combatants for crimes related to the armed conflict. Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court . . . ."[214] Similarly, Article 6 of Additional Protocol II "applies to the prosecution and punishment of criminal offences related to the armed conflict."[215] Therefore, the plain reading of both sources of law indicates that prosecution of combatants by the parties to a NIAC are authorized, so long as certain conditions are met.

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[213] Debuf, *supra* note 202, at 865.
[214] Geneva Convention I, *supra* note 55, art. 3(1)(d).
[215] Additional Protocol II, *supra* note 56, art. 6(1).

The authority to prosecute equally applies to state and non-state actors involved in a NIAC. The *Commentary on the Additional Protocols* supports this view by specifying that "like common Article 3, [Additional] Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict . . . ."[216] The *Commentary* further explains that Article 6 of Additional Protocol II expands upon the Common Article 3 protections with "principles of universal application which every responsibly organized body must, and can, respect."[217] It specifically identifies that "every responsibly organized body"[218] includes "[d]issident armed forces and organized armed groups . . . which are opposed to the government in power . . . ."[219] Thus, Common Article 3 and Additional Protocol II provide both states and non-state armed groups with the authority to prosecute civilians and combatants[220] who have committed crimes related to the armed conflict,[221] provided that the prosecutions comply with the minimum standards set forth in those sources of law.

B. Potential Issues with SDF Prosecutions of Foreign ISIS Fighters

While LOAC permits the SDF to prosecute detained foreign ISIS fighters, there are a number of issues that need to be addressed in order to comply with Common Article 3 and Additional Protocol II. First, SDF prosecutions would need to be conducted in a "regularly constituted court."[222] Second, the SDF would need to rely on criminal laws that were in effect prior to the commission of the alleged offense.[223] Both of these

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[216] PILLOUD ET AL., *supra* note 122, para. 4597
[217] *Id.*
[218] *Id.*
[219] *Id.* at 1397 n.3.
[220] *Id.* para. 4599 ("This paragraph lays down the scope of application of the article by confining it to offences related to the armed conflict . . . . Article 6 is quite open and applies equally to civilians and combatants who have fallen in the power of the adverse party and who may be subject to penal prosecutions.").
[221] Specifically, those crimes that are "serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife." Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
[222] Geneva Convention I, *supra* note 55, art. 3(1)(d).
[223] Additional Protocol II, *supra* note 56, art. 6(2)(c).

protections present potential hurdles the SDF would need to overcome in order to lawfully prosecute the foreign ISIS fighters.

1. Regularly Constituted Court

The first issue the SDF will face by prosecuting foreign ISIS fighters is the Common Article 3 requirement for an individual to be tried in a "regularly constituted court."[224] Specifically, Common Article 3 prohibits "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[225] Article 6 of Additional Protocol II expands on Common Article 3 by requiring that "a conviction [be] pronounced by a court offering the essential guarantees of independence and impartiality."[226] While Additional Protocol II further articulates the "essential guarantees,"[227] there is no further explanation of the "regularly constituted court" requirement.[228]

This is where the problem for the SDF resides. Even if the SDF were to establish a court that provides the "essential guarantees," the requirement for a "regularly constituted court" could present a problem for a non-state actor who, presumably, did not have the authority to establish their own courts prior to the armed conflict. This conundrum is acknowledged by the *Commentary on the Additional Protocols*, which ultimately resulted in the removal of the "regularly constituted court" requirement during the drafting of Additional Protocol II.[229] However, the Common Article 3 requirement, which the United States views as CIL applicable to non-state actors,[230] still

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[224] Geneva Convention I, *supra* note 55, art. 3(1)(d).
[225] *Id.*
[226] Additional Protocol II, *supra* note 56, art. 6(2).
[227] *See id.* art. 6(2).
[228] Geneva Convention I, *supra* note 55, art. 3(1)(d).
[229] PILLOUD ET AL., *supra* note 122, para. 4600 ("The term 'regularly constituted court' is replaced by 'a court offering the essential guarantees of independence and impartiality.' In fact, some experts argued that it was unlikely that a court could be 'regularly constituted' under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention, which was accepted without opposition." (citation omitted)).
[230] *E.g.*, LAW OF WAR MANUAL, *supra* note 60, § 17.2.4 ("Similarly, customary law of war rules are binding on those parties to the armed conflict that intend to make war and to claim the rights of a belligerent, even if they are not States. . . . In many cases, these treaty provisions would also be binding on non-State armed groups as a matter of customary international law." (citations omitted)).

exists and thus must be addressed to ensure SDF prosecutions are lawful under LOAC.

The often-cited definition of "regularly constituted court" is derived from *Hamdan*, in which the U.S. Supreme Court addressed the "regularly constituted court" question in relation to the U.S. military commissions prosecutions of al-Qaeda members.[231] Since Common Article 3 and the *Commentary on Geneva Convention I* are silent as to the meaning of this requirement, the Supreme Court looked to the *Commentary on Geneva Convention IV* for insight.[232] Specifically, Article 66 of Geneva Convention IV requires an Occupying Power to prosecute those accused of criminal offenses in "properly constituted, non-political military courts."[233] In defining "properly constituted," the *Commentary on Geneva Convention IV* states, "[t]he courts are to be 'regularly constituted.' This wording definitely excludes all special tribunals. . . . Such courts will, of course, be set up in accordance with the recognized principles governing the administration of justice."[234] Based on this definition and a further explanation provided by an ICRC treatise,[235] the Supreme Court held the "regularly constituted court" requirement means the court is "established and organized in accordance with the laws and procedures already in force in a country."[236]

While the Supreme Court's definition of a "regularly constituted court" is consistent with the ICRC's, it is not the only viewpoint. Using *Hamdan*'s definition as a starting point, yet approaching the analysis from a different perspective, "it has been suggested that whether a court of an armed group is regularly constituted should not be 'construed too literally' . . . . Rather, the test should be one of appropriateness, 'whether the appropriate authorities, acting under appropriate powers, created the court according to

[231] Hamdan v. Rumsfeld, 548 U.S. 557, 631–32 (2006).
[232] *Id.* at 632.
[233] Geneva Convention IV, *supra* note 170, art. 66.
[234] JEAN S. PICTET ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 340 (1958).
[235] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 355 (2009) ("Whereas common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I require a 'regularly constituted' court, human rights treaties require a 'competent' tribunal, and/or a tribunal 'established by law.' A court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country." (citations omitted)).
[236] *Hamdan*, 548 U.S. at 632 (quoting HENCKAERTS & DOSWALD-BECK, *supra* note 235).

appropriate standards.'"[237] This approach is consistent with the intent of the drafters of Additional Protocol II, who specifically removed the "regularly constituted court" requirement in favor of the universally applicable "essential guarantees" language due to the complications the former caused when applied to insurgent groups.[238]

Using the appropriateness test, a less state-centric view of *Hamdan*'s "laws and procedures already in force in a country"[239] requirement is taken. In other words, a non-state actor would be allowed to establish courts in accordance with its own "laws and procedures already in force."[240] Thus, Common Article 3 would not require that the court itself be established prior to the start of hostilities or that the court be established by a state entity but rather the court could established in accordance with the non-state actor's appropriately promulgated laws and procedures.

Accordingly, in order for the SDF to prosecute foreign ISIS fighters, appropriate criminal courts would need to be established in accordance with the SDF or Kurdish "laws and procedures already in force" within their territory. The current judicial system in operation in SDF-liberated territory was formed out of the Peace and Consensus Committees, which are quasi-judicial councils that settle civil and criminal cases.[241] Some of these Committees were originally formed in the 1990s and were operating underground until the Syrian Civil War began in 2012.[242] As the SDF liberated territory from ISIS and kept the Syrian government out, these Peace and Consensus Committees were used in place of the rejected Syrian government's justice system.[243]

As more territory was liberated, regional Justice Councils were established to implement a broader and more organized justice system.[244] At the lowest, communal level, the Peace and Justice Committees still adjudicate minor criminal offenses.[245] The Justice Councils then established

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[237] Sandesh Sivakumaran, *Courts of Armed Opposition Groups: Fair Trials or Summary Justice?*, 7 J. INT'L CRIM. JUST. 489, 499 (2009) (citing James E. Bond, *Application of the Law of War to Internal Conflicts*, 3 GA. J. INT'L & COMP. L. 345, 372 (1973)).
[238] PILLOUD ET AL., *supra* note 122, para. 4600.
[239] *Hamdan*, 548 U.S. at 632 (quoting HENCKAERTS & DOSWALD-BECK, *supra* note 235).
[240] *See* Sivakumaran, *supra* note 237, at 499–500.
[241] Ercan Ayboğa, *Consensus is Key: The New Justice System in Rojava*, NEW COMPASS (Oct. 13, 2014), http://new-compass.net/articles/consensus-key-new-justice-system-rojava.
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*

people's courts for larger population centers, regional courts for higher-level cases, appellate courts, and a constitutional court that acts as an appellate review for judicial and governmental decisions.[246]

Using this appropriateness test in conjunction with the *Hamdan* definition, the SDF could comply with the "regularly constituted court" requirement by prosecuting foreign ISIS fighter in courts established under the current Kurdish judicial system. While much of Northeastern Syria is newly liberated, the Kurdish justice system has been operational in some capacity since the 1990s.[247] These Peace and Consensus Committees ultimately formed the foundation for the current Kurdish justice system in Northeastern Syria.[248] In addition, the Justice Councils have been empowered to establish higher-level courts since July 2012.[249] As such, the Kurdish criminal courts appear to be established in accordance with appropriately promulgated laws and procedures that have been in force for some time. Therefore, these courts can be considered "regularly constituted" for the purposes of Common Article 3.[250] Thus, in compliance with LOAC, the SDF can prosecute foreign ISIS fighters in an existing Kurdish criminal court or in a separate court established by the Justice Council, if the Council is empowered to do so under current Kurdish laws.

While the Common Article 3 requirement may be met, the courts used by the SDF may also have to provide the "essential guarantees" outlined in Additional Protocol II,[251] to the extent that it applies under the third-party consent or CIL theories. The "essential guarantees" ensure a fair and impartial trial for an individual accused of committing a crime.[252] Likewise, Article 75 of Additional Protocol I, to the extent that it is considered CIL, also provides similar fair trial and due process rights to those deprived of their liberty in armed conflicts.

Further, the prevailing view of many nations is that international human rights law (IHRL), which provides additional law-enforcement type

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[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Commentary of 2016: Article 3: Conflicts Not of an International Character*, *supra* note 119, para. 692 ("[T]o give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group. Alternatively, armed groups could continue to operate existing courts applying existing legislation." (citation omitted)).
[251] Additional Protocol II, *supra* note 56, art. 6.
[252] *Id.*

protections, continues to apply during NIACs.[253] These nations generally look to IHRL rules when LOAC is silent or lacks specificity, which usually occurs in the areas of detention and prosecution.[254] Even though IHRL "in the current state of international law—can only be said to be binding directly on States,"[255] this premise is rapidly changing. The ICRC has noted that, "[a]t a minimum, it seems accepted that armed groups that exercise territorial control and fulfil[l] government-like functions thereby incur responsibilities under human rights law."[256] While the United States' view is that LOAC supplants IHRL during armed conflict,[257] LOAC obligations, which are binding on all parties to the conflict, are "similar in some of their purposes and on many points of substance" to many IHRL obligations.[258] As such, it would be incumbent on the international community to provide the SDF with assistance and oversight to help ensure any criminal trials of foreign ISIS fighters provide the requisite due process rights to comply with LOAC and any other potential IHRL obligations.

2. Law Used to Prosecute Foreign ISIS Fighters

The second issue that SDF prosecution of foreign ISIS fighters could raise is the specific law used to charge the accused ISIS members. One of the "essential guarantees" provided by Article 6(2)(c) of Additional Protocol II is the principle of non-retroactivity,[259] which states that

> no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.[260]

Practically speaking, this means the criminal law used to charge foreign fighters would need be in effect prior to the date of the alleged crime. Since

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[253] Debuf, *supra* note 202, at 861.
[254] *Id.* at 863.
[255] *Id.* at 861.
[256] *Commentary of 2016: Article 3: Conflicts Not of an International Character*, *supra* note 117, para. 517.
[257] LAW OF WAR MANUAL, *supra* note 60, § 1.6.3.1.
[258] Debuf, *supra* note 202, at 861.
[259] PILLOUD ET AL., *supra* note 122, para. 4604.
[260] Additional Protocol II, *supra* note 56, art. 6(2)(c).

the SDF only began to liberate territory in 2012, at which time it began to independently govern outside of Syrian governmental control, there is a very real possibility that ISIS fighters will be charged with crimes that were promulgated after the alleged crime occurred. For a non-state armed group who has captured hundreds of foreign ISIS fighters on the battlefield over the last seven years, ensuring that the date of the alleged offense occurred after the newly enacted law may present an impossible task. Thus, the use of alternative, legally permissible laws to criminally charge the foreign fighters may be required.

The first option would be for the SDF to charge the foreign ISIS fighters with crimes under the Syrian Criminal Code and use Kurdish criminal courts and sentencing rules. The use of Syrian laws is not new or novel for the newly autonomous Kurdish judicial system.[261] As the Justice Councils implement the new justice system throughout the SDF-liberated territory, the courts continue to use and "refer to existing Syrian laws, since the new laws don't yet cover everything."[262] While the Syrian judicial system has been scrutinized for its inconsistency with human rights,[263] the SDF have taken measures to correct these deficiencies.[264] These measures include the abolishment of the death penalty, a focus on rehabilitation instead of punishment, and the inclusion of women's councils in the justice system to ensure that women are treated equally.[265] Thus, the use of existing Syrian criminal laws to charge foreign ISIS fighters while applying the protections afforded by the current Kurdish justice system would likely comply with LOAC.

A second option for the SDF would be to charge the foreign ISIS fighters with violations of LOAC. The ability to charge violations of LOAC in domestic criminal trials has been upheld by the U.S. Supreme Court and was encouraged by the drafters of the Additional Protocols. Similarly, the *Tadić* appellate court held that violations of LOAC, specifically Common Article 3 and the Hague Conventions, can impose individual criminal liability.[266] Since Common Article 3 and the Hague Conventions have been

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[261] Ayboğa, *supra* note 241.
[262] *Id.*
[263] *See generally*, JOSEPH WILLIAMS & STELLA YARBROUGH, VANDERBILT UNIV. L. SCH. JUSTICE FOR SYRIA: A HUMAN RIGHTS REVIEW OF THE SYRIAN PENAL CODE (2013).
[264] Ayboğa, *supra* note 241.
[265] *Id.*
[266] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 129 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

in effect for the duration of ISIS' existence, charging individual foreign ISIS fighters with war crimes for violating LOAC would be permissible.

The U.S. Supreme Court addressed the use of LOAC as a basis for domestic prosecutions of enemy combatants in *Ex parte Quirin*.[267] This case stemmed from the capture of eight German saboteurs who were found in the United States, disguised as civilians, during the height of World War II.[268] The eight Germans were ultimately prosecuted by a military tribunal for spying, corresponding and giving intelligence to the enemy, violating the law of war, and conspiracy to commit the aforementioned offenses.[269]

In upholding the convictions, the Supreme Court first found that under the law of war, "[u]nlawful combatants are . . . subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[270] The Supreme Court then held that the act of sneaking into the United States and discarding their uniforms with the intent to commit hostile acts rendered the eight German saboteurs unlawful combatants who were thus punishable under the law of war.[271] Finally, the Court stated,

> [t]his precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war by this Government by its enactment of the Fifteenth Article of War.[272]

Therefore, while Congress had not specifically promulgated criminal laws codifying LOAC into U.S. domestic law, the military commissions were nonetheless able to use LOAC as a basis for domestic criminal prosecutions of enemy combatants.

Further, the *Commentary on the Additional Protocols* encourages charging violations of LOAC in domestic criminal prosecutions. The *Commentary* notes that during the drafting of Additional Protocol II, the words "under national and international law" were proposed to be included

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[267] *Ex parte* Quirin, 317 U.S. 1 (1942).
[268] *Id.* at 23.
[269] *Id.*
[270] *Id.* at 31.
[271] *Id.* at 35.
[272] *Id.* at 35–36.

in the principle of non-retroactivity.[273] But, due to the ambiguity of "national law" as it pertains to insurgent groups, the more general phrase "under the law" was chosen.[274] Despite choosing to use more vague language, the *Commentary* clarifies the drafters' intent by explaining that "[a] breach of international law should not go unpunished on the basis of the fact that the act or omission (failure to act) concerned was not an offence under the national law at the time it was committed."[275] Thus, the drafters of Additional Protocol II made it clear that even if violations of LOAC cannot be charged under domestic law, LOAC can still be used as a basis for domestic criminal prosecutions.

Finally, the appellate court in *Tadić* held that violations of LOAC, even if committed in a NIAC, can establish individual criminal liability.[276] Neither Common Article 3 nor Additional Protocol II contain an "explicit reference to criminal liability for violations of [their] provisions."[277] Despite the lack of an explicit reference, the international appellate court nonetheless determined that violations of "[p]rinciples and rules of humanitarian law [that] reflect 'elementary considerations of humanity' [which are] widely recognized as the mandatory minimum for conduct in armed conflicts of any kind" can impose individual criminal responsibility "regardless of whether they [were] committed in internal or international armed conflicts."[278] Therefore, the SDF can hold individual ISIS members criminally liable for violations of Common Article 3, the Hague Regulations, and other CIL.

While there are many suitable options for dealing with the detained foreign ISIS fighters,[279] the international community has been slow to address the issue.[280] Thus, the SDF may be left with little choice but to prosecute those foreign fighters themselves. Therefore, having a viable and legally permissible venue for criminal prosecutions becomes imperative for the SDF. Fortunately, the SDF have the authority to prosecute foreign ISIS fighters under LOAC. And, provided the SDF comply with the protections outlined in Common Article 3 and Additional Protocol II, those criminal

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[273] PILLOUD ET AL., *supra* note 122, para. 4604.
[274] *Id.* paras. 4604–4607.
[275] *Id.* para. 4607.
[276] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
[277] *Id.* ¶ 128.
[278] *Id.* ¶ 129.
[279] These options could include repatriating the foreign ISIS fighters to their countries of citizenship for follow-on domestic prosecutions or the establishment of an International Criminal Tribunal.
[280] Savage, *supra* note 3.

trials would be legally permissible, despite the SDF being a non-state actor with no domestically recognized law enforcement or prosecutorial authority.

VII. Conclusion

The Syrian Civil War and the resulting establishment of ISIS' physical caliphate across Iraq and Syria has created a multitude of problems for the international community. From combating terrorism to state-on-state aggression and humanitarian and refugee crises, the Syrian Civil War continues to challenge the world's powers. Despite the number of issues facing the international community, the SDF's detention of approximately two thousand foreign ISIS fighters has garnered significant attention from the highest levels of the U.S. Government. While two thousand detained individuals may not appear to be a major concern in the grand scheme of the conflict, these fighters represent the most hardcore, ideologically driven ISIS members.[281] Thus, their release, without adjudication, would present a clear danger to the international community.

As attention is drawn to the SDF's detention of foreign ISIS fighters and options for prosecuting those fighters are explored, understanding the legal framework that applies to the SDF becomes important. This framework provides a lens through which the SDF can be evaluated by the international community and ultimately highlights a potentially viable option for prosecuting the detained fighters. While there are a number of possible ways for the international community to address the foreign ISIS fighter problem, every option presents significant hurdles that may be difficult or impossible to overcome. Thus, the ability for the SDF to detain and prosecute foreign ISIS fighters themselves becomes a realistic and feasible solution, provided they have the authority and international support to do so.

Consequently, the only way for the SDF to legally detain and prosecute foreign ISIS fighters is if LOAC applies the armed conflict between the SDF and ISIS. As a non-state armed groups operating inside a sovereign state's territory, a potential view would be that only domestic Syrian law applies to the this conflict.[282] Reliance on this view would likely mean that all SDF operations are considered unlawful since the SDF have not been granted domestic law enforcement or military authority by the Syrian government. Fortunately, LOAC does apply to the SDF's armed conflict with ISIS,

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[281] 2014 UNHRC Report, *supra* note 10, at 3.
[282] Heffes, *supra* note 172, at 230, 233.

which ultimately allows the SDF to detain and prosecute foreign ISIS fighters.

The three separate but related legal theories that bind non-state armed groups to international law identify the specific bodies of law that are applicable to the SDF. All three theories support the position that Common Article 3 applies to the conflict between the SDF and ISIS, thus establishing a minimum set of standards applicable to the SDF's detention and prosecution operations. In addition, the third-party consent theory establishes that Additional Protocol II is applicable to the SDF, further expanding their LOAC obligations.

Since both Common Article 3 and Additional Protocol II apply to the SDF, their authority to detain foreign ISIS fighters can be derived from LOAC rather than domestic law. Since neither of these sources of law explicitly prohibits detention by a non-state armed group, the SDF may detain the foreign ISIS fighters without violating LOAC.

Going a step further, international law may actually provide the SDF the affirmative authority to detain enemy combatants. While Common Article 3 and Additional Protocol II do not explicitly authorize detention, based on the prohibitions set forth by the Hague Regulations, LOAC implicitly authorizes detention by non-state armed groups. This LOAC detention authority persists and prevails even if the non-state armed group does not have the domestic legal authority to detain. Thus, the SDF are permitted and are ultimately authorized by Common Article 3, Additional Protocol II, and the Hague Regulations to detain the foreign ISIS fighters despite not having been granted any domestic legal authority from the Syrian government.

In the same manner that the SDF are authorized to detain foreign ISIS fighters, they are authorized to prosecute them. Both Common Article 3 and Additional Protocol II authorize the prosecution of enemy combatants for crimes related to the armed conflict, subject to certain protections and "essential guarantees." However, despite having the authority, prosecutions conducted by a non-state actor raise additional legal issues.

First, in order for the SDF to comply with the Common Article 3 requirement for the prosecutions to occur in a "regularly constituted court" the SDF would need to ensure the court adjudicating the cases is properly established under current Kurdish law. Second, the SDF must ensure the criminal law used for the prosecutions is not retroactively applied to acts

that occurred before the criminal law was enacted.[283] Thus, the SDF should either use the Syrian Criminal Code, which was in effect prior to the SDF's conflict with ISIS, or charge foreign ISIS fighters with war crimes for violations of LOAC. Use of either set of laws would be permissible under Common Article 3 and Additional Protocol II.

While the best option for dealing with foreign ISIS fighters is to heed former Secretary of Defense Mattis's advice to have countries take custody of their citizens for further disposition, there is another suitable option the international community can support. The SDF are on solid legal ground if they are required to continue to detain, and ultimately prosecute, foreign fighters. However, due to the logistical requirements associated with long-term detention and the potential legal minefield of prosecuting ISIS members in compliance with LOAC, the SDF will require significant and continued support from the international community. If properly implemented and appropriately supported by coalition partners, SDF detention and prosecution of foreign ISIS fighters could serve as a realistic and legally supportable option to ensure violent terrorists remain off the battlefield and off our streets.

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[283] Additional Protocol II, *supra* note 56, art. 6(2)(c).