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The *Military Law Review* has been published quarterly at The Judge Advocate General's School, United States Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

The Editorial Board dedicates this volume of the *Military Law Review* to Ms. Eva F. Skinner upon her retirement after thirty-five years of federal service. Ms. Skinner was the Editorial Assistant in the Developments, Doctrine, and Literature Office for the past fifteen years, assisting with the publication of over sixty-five volumes of the *Military Law Review* and over 200 issues of *The Army Lawyer*. The Editorial Board congratulates Ms. Skinner on her outstanding achievements, expresses its gratitude for her excellent work, and wishes her many happy retirement years.

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THE LAST LINE OF DEFENSE: FEDERAL HABEAS REVIEW OF MILITARY DEATH PENALTY CASES

CAPTAIN DWIGHT H. SULLIVAN*

I. Introduction

The United States military's last execution occurred on April 13, 1961. In the United States Disciplinary Barrack's (USDB) boiler room,[1] Army Private First Class John A. Bennett "waited calmly as Col. Weldon W. Cox, USDB commandant, read the orders of execution and the sentence."[2] When Colonel Cox asked the condemned soldier if he wanted to make a final statement, Bennett answered, "Yes. I wish to take this last opportunity to thank you and each

* United States Marine Corps. Currently assigned as Instructor, Evidence Division, Naval Justice School, Newport, Rhode Island. B.A., 1982, University of Maryland; M.A., 1987, University of Maryland; J.D., 1986, University of Virginia; LL.M., 1994, The Judge Advocate General's School, United States Army. Former assignments include Appellate Defense Counsel, Navy-Marine Corps Appellate Review Activity, 1988-93. Member of the bars of Maryland, the District of Columbia, the Navy-Marine Corps Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, and the United States Supreme Court. Author of *The Congressional Response to* Goldman v. Weinberger, 121 MIL. L. REV. 125 (1988); *Novel Scientific Evidence's Admissibility at Courts-Martial*, ARMY LAW., Oct. 1986, at 24; *Legal Restrictions on the Right to Use Force Against International Terrorism*, 10 ASILS INT'L L.J. 169 (1986); and *Sacrificial Limb*, WASH. POST MAG., Jan. 27, 1991, at 10. This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements for the 42d Judge Advocate Officer Graduate Course. The author thanks Major Robert A. Burrell for his guidance and support. The author also thanks Janine Cox, Pro Se Clerk for the United States District Court for the District of Kansas, for her generous and invaluable assistance in surveying that court's military habeas practice.

[1] James J. Fisher, *A Soldier Is Hanged*, KAN. CITY STAR, Apr. 13, 1961, at 7.

[2] *Bennett Hanged After Appeal to President Is Denied*, LEAVENWORTH TIMES, Apr. 13, 1961, at 1 [hereinafter LEAVENWORTH TIMES].

member of the staff for all you have done in my behalf." Colonel Cox replied, "May God have mercy on your soul."[3]

> Bennett paused at the head of the 15-foot ramp leading to the gallows and asked the chaplain to pray for him.
>
> The guards walked Bennett quickly down the ramp. He was turned around to face the witnesses. A black hood was placed over his head, and the noose adjusted. The trap was sprung at 5 minutes and 17 seconds after midnight by an Army sergeant.
>
> Pronouncement of death came 16 minutes later by the senior medical officer present. The officer saluted Colonel Cox, indicating the execution had been carried out according to instructions.[4]

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[3] This account of Bennett's last words and Colonel Cox's reply was taken from *id.* The account in the official after-action report differs somewhat. The after-action report relates:

> When given an opportunity to make a last statement by the Commandant, Bennett stated substantially as follows: "I wish to make a last statement. Colonel Cox I want to take this last opportunity to thank you and all of your staff, whoever they may be, for all your help and all you have done for me and all the things you have tried to do for me. May God have mercy on your soul."

Memorandum, Captain David J. Anderson, to Office of the Provost Marshal General at 2 (13 Apr. 1961) (filed in Record, United States v. Bennett, 7 C.M.A. 97, 21 C.M.R. 223 (1956) (No. 7709) (on file at Federal Records Center, Suitland, Md.) [hereinafter Bennett Record]).

Bennett's final sentence as related by the after-action report probably was delivered by Colonel Cox, as reported by the *Leavenworth Times*. (The after-action report indicates that Patrick Prosser of the *Leavenworth Times* attended the execution. *Id.*) The USDB's records on the execution include the "Execution order as read to Bennett." Index to File of Prisoner John A. Bennett at 2 (on file at USDB, Fort Leavenworth, Kansas). At the bottom of the execution order is a script for the Commandant to read. The script provided that the Commandant was to ask, "Prisoner Bennett, you have heard the orders directing your execution. Have you any last statement to make?" The script then called for the Commandant to state, "May the Lord have mercy on your soul[.]" Order of Execution (20 Mar. 1961) (on file at USDB, Fort Leavenworth, Kansas).

[4] LEAVENWORTH TIMES, *supra* note 2. *See generally* Richard A. Serrano, *Last Soldier to Die at Leavenworth Hanged in an April Storm*, L.A. TIMES, July 12, 1994, at A14. Bennett had been convicted of rape and attempted premeditated murder of an 11-year-old Austrian girl. Bennett, 7 C.M.A. at 99, 21 C.M.R. at 225. *The Navy Times* reports that Bennett "was the only military prisoner hanged for rape during peacetime." Charles H. Bogino, *Way Clear for First Executions Since 1961*, NAVY TIMES, July 25, 1988, at 10.

Whether imposing the death penalty for rape remains constitutionally permissible is questionable. Sixteen years after Bennett's execution, the United States Supreme Court ruled that the Eighth Amendment prohibits a death sentence for raping an adult woman. Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion).

Bennett is distinguishable from *Coker* in that Bennett's victim was an 11-year-old girl. One commentary notes, however, that "[a]lthough [*Coker*] states the issue in the context of the rape of an adult woman, *id.* at 592, the opinion at no point seeks to

Bennett's execution ended more than six years of litigation. After the Army Board of Review and the United States Court of Appeals for the Armed Forces affirmed the death penalty,[5] Bennett twice unsuccessfully sought habeas relief from the United States District Court for the District of Kansas (Kansas District Court), twice unsuccessfully appealed the denial of habeas relief to the United States Court of Appeals for the Tenth Circuit (Tenth Circuit),[6] and unsuccessfully petitioned the CAAF for a writ of error coram nobis.[7]

The United States military executed 160 service members from 1930 to 1961.[8] Since 1957, however, when President Eisenhower authorized Bennett's execution,[9] no military death sentence has

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distinguish between adults and children." CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1402 n.18 (Johnny H. Killian & Leland E. Beck, eds., 1987) [hereinafter CONGRESSIONAL RESEARCH SERVICE]. The Florida Supreme Court has held that *Coker* precludes imposing the death penalty for the rape of a child under 12. Buford v. State, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982); *accord*, Collins v. State, 236 S.E.2d 759, 761-62 (Ga. 1977) (Jordan, J., concurring). The Mississippi Supreme Court reached the opposite conclusion. Upshaw v. State, 350 So. 2d 1358 (Miss. 1977); *but see* Leatherwood v. State, 548 So. 2d 389, 403-06 (Miss. 1989) (Robertson, J., concurring). One commentator has maintained that "homicide may be the only crime for which death may be imposed under the eighth amendment." Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 3 n.4 (1982).

[5] Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the United States Court of Military Appeals (COMA) as the United States Court of Appeals for the Armed Forces (CAAF). *See* Nat'l. Def. Auth. for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941). This article will refer to the court by its new name.

The Army Board of Review's decision was unreported. The CAAF's decision is reported at 7 C.M.A. 97, 21 C.M.R. 223 (1956).

[6] *See generally* Bennett v. Davis, 267 F.2d 15 (10th Cir. 1959); Bennett v. Cox, 287 F.2d 883 (10th Cir. 1961). The court dismissed the second appeal due to counsel's failure to file a brief.

[7] United States v. Bennett, 11 C.M.A. 799 (1960) (orders denying petition for *writ of error coram nobis and petition for stay of execution*).

[8] NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1977 at 8 (1978). Including Bennett's execution, 53 were for rape without murder, 106 were for murder (21 of which also involved rape), and one was for desertion. *Id.*

[9] Article 71(a) of the Uniform Code of Military Justice (UCMJ) requires presidential approval before a death sentence can be executed. UCMJ art. 71(a), 10 U.S.C.A. § 871(a) (West Supp. 1994).

President Eisenhower personally approved Bennett's death sentence on July 2, 1957. Bennett Record, *supra* note 3. On April 12, 1961, Bennett sent a plea for clemency to President Kennedy. Bennett's telegram stated in part, "Because I haven't kill [sic] anyone therefore I should not be killed. The old testament only asks for an 'eye for an eye.' Will you please in the name of God and mercy spare my life." *Id.* The same day, the White House answered:

> Your telegram to the President has been received and he has asked me to reply. The points raised in your message were carefully considered by the President. His decision to accept the sentence imposed by the court-

received presidential approval.[10] This thirty-seven-year hiatus may soon end. On November 10, 1994, the CAAF affirmed a death sentence for the first time since 1960.[11] If the United States Supreme

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> martial, approved by all military courts, approved by President Eisenhower, and sustained by civilian courts remains unchanged. Signed: Lee C. White[,] Assistant Special Counsel to the President[.]

Id. Interestingly, the father of Bennett's victim had written in support of commuting the death sentence to confinement for life. *Id.*

Lee C. White, the Assistant Special Counsel to the President who handled the *Bennett* case, notes, "President Kennedy was very personally involved in the decision process since it is one thing to regard such an issue in an academic or theoretical manner and quite another to have the awesome responsibility of determining whether an individual is to live or be executed." Letter from Lee C. White, to the author (Nov 15, 1993) (on file with the author).

[10] Only one subsequent military death penalty case has reached the President for action. In that case, President Kennedy commuted the death sentence to confinement for life. Action by the President of the United States, in Record, United States v. Henderson, 11 C.M.A. 556, 29 C.M.R. 372 (1960) (on file at Federal Records Center, Suitland, Md.) [hereinafter Henderson Record]. While the Judge Advocate General of the Navy had recommended that Henderson's death sentence be approved, the Secretary of the Navy recommended commuting the sentence due to "a reasonable possibility that his mentality is impaired." Memorandum, Secretary of the Navy W.B. Franke, to Secretary of Defense (5 Dec. 1960), in Henderson Record, *supra*. Secretary of Defense Gates and Attorney General Rogers concurred in the Secretary of the Navy's recommendation. Memorandum, Paul B. Fay, Jr., Under Secretary of the Navy, to Byron R. White, Deputy Attorney General (21 July 1961), in Henderson Record, *supra*.

Article 71(a)'s requirement for presidential approval of death sentences was based on Article of War 48(a), which required presidential confirmation before a death sentence could be carried out. H.R. REP. No. 491, 81st Cong., 1st Sess. 33 (1949); 62 Stat. 627, 635 (1948). The 1948 revision of the Articles of War eliminated a long-standing wartime exception to the presidential confirmation requirement. *See* Article of War 65, 2 Stat. 359, 367 (1806); *see also* Article of War 105, 18 Stat. 228, 239 (1873); Article of War 48, 39 Stat. 650, 658 (1916); Article of War 48, 41 Stat. 787, 796–97 (1920). Under the pre-1948 Articles of War

> commanding generals of armies in the field in time of war were empowered to order death sentences carried out. The Articles for the Government of the Navy, on the other hand, required approval by the President of the United States of any sentence to death, except in very limited situations.

Lieutenant Colonel Gary D. Solis, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 8 (1989). *Compare* Article of War 48, 41 Stat. 787, 796–97 (1920) *with* Article for the Government of the Navy 19, 12 Stat. 600, 605 (1862).

[11] United States v. Loving, 41 M.J. 213 (1994). Including Private Loving, eight service members are under adjudged death sentences. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A. 686 (1994) [hereinafter DEATH ROW, U.S.A.]. Four of their death sentences have been affirmed by the Courts of Criminal Appeals: United States v. Curtis, 38 M.J. 530 (N.M.C.M.R. 1993) (en banc); United States v. Loving, 34 M.J. 956 (A.C.M.R.), *reconsideration denied*, 34 M.J. 1065 (A.C.M.R. 1992), *aff'd*, 41 M.J. 213 (1994); United States v. Murphy, 36 M.J. 1137 (A.C.M.R. 1993) (en banc); and United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992), *aff'd upon further consideration*, 37 M.J. 751 (A.C.M.R. 1993).

Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995. The Act redesignated the United States Courts of Military Review for each separate service a United States Court of Criminal Appeals. Thus, the United States Army Court of Military Review (ACMR) is now the United States Court of Criminal Appeals (ACCA). *See* Nat'l Def. Auth. Act for

Court either denies certiorari or affirms the CAAF's holding,[12] the President will decide whether to approve the death sentence.

Once a military death sentence receives presidential approval, the case will enter the federal habeas corpus arena.[13] The threshold question then will be how to provide the condemned service member with counsel. That question is of critical importance. As one group of researchers studying federal habeas review concluded, "[T]he availability of professional representation is the single most important predictor of success in federal habeas corpus."[14]

This article first presents an overview of federal habeas corpus review of courts-martial and considers whether habeas is a meaningful forum for vindicating condemned service members' constitu-

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Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831, (to be codified at 10 U.S.C. § 866). This article will refer to these courts by their new names.

From 1961 to 1989, the CAAF heard only four death penalty cases. The four cases heard during that period were United States v. Kemp, 13 C.M.A. 89, 32 C.M.R. 89 (1962); United States v. Matthews, 16 M.J. 354 (C.M.A. 1983); United States v. Rojas, 17 M.J. 154 (C.M.A. 1984); and United States v. Hutchinson, 18 M.J. 281 (C.M.A.) (summary disposition), *cert. denied*, 469 U.S. 981 (1984). The CAAF set aside Kemp's death sentence due to a violation of his right against self-incrimination. 13 C.M.A. at 97-100, 32 C.M.R. at 97-100. In *Matthews*, the CAAF ruled that the military death penalty system then in effect was unconstitutional under Furman v. Georgia, 408 U.S. 238 (1972). *See generally* Major Gregory F. Intoccia, *Constitutionality of the Death Penalty Under the Uniform Code of Military Justice*, 32 A.F. L. REV. 395 (1990); Kevin K. Spradling & Kevin K. Murphy, *Capital Punishment, the Constitution, and the Uniform Code of Military Justice*, 32 A.F. L. REV. 415 (1990); Captain Annamary Sullivan, *The President's Power to Promulgate Death Penalty Standards*, 125 MIL. L. REV. 143, 147-49 (1989). Following *Matthews*, the CAAF set aside the death sentence in *Hutchinson*. The court remanded *Rojas* to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) due to irregularities during that court's previous consideration of the case. As required by the CAAF's *Matthews* decision, the Navy-Marine Corps Court set aside Rojas's death sentence on remand. United States v. Rojas, No. 81-2019 (N.M.C.M.R. Aug. 23, 1984) (LEXIS, Miltry library, Courts file).

[12] *See infra* notes 25-26 and accompanying text.

[13] "[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted." Schlesinger v. Councilman, 420 U.S. 738, 758 (1975); *see also* Gusik v. Schilder, 340 U.S. 128 (1950); *see generally* 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 26-33.00 (1991) [hereinafter GILLIGAN & LEDERER]; Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 67-76 (1985); John E. Thurman, Annotation, *Review by Federal Civil Courts of Court-Martial Convictions-Modern Status*, 95 A.L.R. FED. 472, 490-505 (1989) [hereinafter Annotation]. Any habeas corpus petition challenging a military death sentence filed before presidential approval likely would be deemed premature. Because death row inmates have an obvious interest in delay of any kind, *see* Mercer v. Armantrout, 864 F.2d 1429, 1433 (8th Cir. 1988), no service member under a military death sentence would have an incentive to seek habeas relief before presidential action on the sentence.

[14] Richard Faust, et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 707 (1990-1991) [hereinafter *Empirical Light*]. Clarence Darrow made a similar point more colloquially: "I will guarantee that every man waiting for death in Sing Sing is there without the aid of a good lawyer." CLARENCE DARROW, ATTORNEY FOR THE DAMNED 100 (Arthur Weinberg ed. 1957).

tional rights. In keeping with Justice Holmes's admonition that "[t]he life of the law has not been logic; it has been experience,"[15] this section surveys the Kansas District Court's habeas practice during 1992 and 1993.

The article then analyzes the current state of law concerning appointment of counsel for service members under death sentences who are seeking federal habeas relief. This analysis will necessarily be speculative. Since Bennett's 1961 execution, the law governing appointment of counsel for indigent habeas petitioners has evolved dramatically; no case has yet arisen to test the resulting law's impact on federal habeas corpus review of capital courts-martial.

After examining the current state of the law, the article considers the law as it should exist. This section argues that indigent service members on death row should receive appointed counsel during habeas review. The article then considers three options for providing habeas counsel to military death row inmates. Finally, the article proposes legislation designed to promote more meaningful habeas review than condemned service members would receive under current law.

II. Habeas Corpus Review of Courts-Martial: An Overview

> *The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom.*
>
> *United States Supreme Court*[16]

A. The Right to Collaterally Attack a Capital Court-Martial Through Habeas Corpus

"The statutory authority for habeas corpus relief for military accused is 28 U.S.C. § 2241."[17] That statute allows "the Supreme

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[15] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

[16] Ex parte Yerger, 75 U.S. (8 Wall.) 85, 95 (1868).

[17] GILLIGAN & LEDERER, *supra* note 13, § 26-31.00. For a history of federal habeas corpus review of courts-martial, see Rosen, *supra* note 13, at 18-38, 44-64; Thomas M. Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 MIL. L. REV. 1, 9-21, 25-30 (1974); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1209-16 (1970) [hereinafter *Developments*].

The CAAF and the Courts of Criminal Appeals also have the power to issue writs of habeas corpus. *See generally* Noyd v. Bond, 395 U.S. 683 (1969) (expressly recognizing the CAAF's power to issue writs under the All Writs Act, currently codified at 28 U.S.C. § 1651(a) (1988)); *Developments*, *supra*, at 1234 (discussing early CAAF extraordinary relief cases); Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979)

Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction" to issue writs of habeas corpus to prisoners "in custody under or by color of the authority of the United States."[18] Because prisoners confined while pending a military death sentence[19] are "in custody under or by color of the authority of the United States," they fall under 28 U.S.C. § 2241. The Supreme Court has expressly noted that 28 U.S.C. § 2241 provides the "federal civil courts" with habeas corpus jurisdiction over military death penalty cases.[20]

On its face, Article 76 of the Uniform Code of Military Justice (UCMJ) may appear to preclude habeas corpus review of court-martial convictions. That article provides, in part, "Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for new trial," remission or suspension by the Secretary concerned, and presidential actions.[21] The Supreme Court has concluded, however, that Congress did not intend Article 76's predecessor under the Articles of War[22] to deprive the federal judiciary of habeas corpus jurisdiction over courts-martial.[23] Additionally, the UCMJ's legislative history is replete with assertions that Congress did not intend Article 76 to preclude federal habeas review of courts-martial.[24]

Condemned service members' ability to collaterally attack their death sentences continues unabated in the wake of the Military Jus-

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(recognizing that the Courts of Criminal Appeals possess authority to issue writs). However, the habeas practice of the CAAF and Courts of Criminal Appeals is beyond the scope of this article.

[18] 28 U.S.C. § 2241 (1988).

[19] "Confinement is a necessary incident of a sentence of death, but not a part of it." MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1004(e) (1984) [hereinafter MCM].

[20] Burns v. Wilson, 346 U.S. 137, 139 & n.1 (1953) (plurality opinion).

[21] 10 U.S.C. § 876 (1988).

[22] Article of War 53, ch. 625, § 230, 62 Stat. 604, 639 (current version at UCMJ art. 76, 10 U.S.C. § 876 (1988)).

[23] Gusik v. Schilder, 340 U.S. 128, 132 (1950); *see generally* Strassburg, *supra* note 17, at 31–32; Donald T. Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1, 16 (1971). Because of its interpretation of the statute, the Court did not reach the issue of whether the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, would preclude Congress from eliminating habeas corpus review of courts-martial. *Gusik*, 340 U.S. at 132–33. *See infra* notes 204–06 and accompanying text.

[24] S. REP. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. REP. No. 491, 81st Cong., 1st Sess. 35 (1949) (excepting "a petition for a writ of habeas corpus in federal court" from Article 76's finality provision); 96 CONG. REC. 1414 (1950) (statements of Senators McCarran and Kefauver). *See generally* Schlesinger v. Councilman, 420 U.S. 738, 750–51 (1975) (discussing Article 76's legislative history).

tice Act of 1983,[25] which extended the Supreme Court's certiorari jurisdiction to include decisions of the CAAF.[26] Logically, this discretionary Supreme Court jurisdiction should no more limit service members from seeking a writ of habeas corpus under 28 U.S.C. § 2241 than the Supreme Court's similar certiorari jurisdiction over state cases[27] limits state prisoners from seeking a writ of habeas corpus under 28 U.S.C. § 2254.[28] The Supreme Court's role is not to scrutinize individual records for constitutional error;[29] rather, it will grant certiorari only for "special and important reasons."[30] Because "denials of certiorari are not decisions on the merits and have no

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[25] Pub. L. No. 98-209, 97 Stat. 1393.

[26] The relevant portions of the Military Justice Act of 1983 are codified as amended at UCMJ art. 67a, 10 U.S.C.A. § 867a, and 28 U.S.C.A. § 1259 (West Supp. 1994). This extension of the Supreme Court's certiorari jurisdiction represented the first time that courts-martial were directly reviewable by an Article III court. 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.52 (2d ed. 1993). *See generally* Scott A. Hancock, *Keeping a Perspective*, ARMY LAW., Nov. 1988, at 24; Eugene R. Fidell, *Review of Decisions of the United States Court of Military Appeals by the Supreme Court of the United States*, 16 Mil. L. Rep. (Pub. L. Educ. Inst.) 6001 (1988); James P. Pottorff, *The Court of Military Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?*, ARMY LAW., May 1985, at 1; Andrew S. Effron, *Supreme Court Review of Decisions by the Court of Military Appeals: The Legislative Background*, ARMY LAW., Jan. 1985, at 59; Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction Over Military Appeals*, 102 F.R.D. 329 (1984).

Only cases actually decided by the CAAF fall within the Supreme Court's certiorari jurisdiction: "[t]he Supreme Court may not review by a writ of certiorari . . . any action of the Court of Military Appeals [CAAF] in refusing to grant a petition for review." UCMJ art. 67a(1), 10 U.S.C.A. § 867a(a). Because cases in which a Court of Criminal Appeals affirms a death sentence fall within the CAAF's mandatory jurisdiction, UCMJ art. 67(a)(1), 10 U.S.C. § 867(a)(1), all such cases will fall within the Supreme Court's certiorari jurisdiction.

[27] 28 U.S.C. § 1257 (1988).

[28] Before seeking federal habeas review, a state inmate may have filed two certiorari petitions at the United States Supreme Court—one on the completion of direct appeals within the state system and one on the completion of state postconviction proceedings. *See* American Bar Ass'n Task Force on Death Penalty Habeas Corpus, Background Report on Death Penalty Habeas Corpus Issues, *reprinted in Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 9, 55 (1990) [hereinafter ABA Background Report].

[29] "[T]he Supreme Court is not primarily concerned with the correction of errors in lower court decisions. . . . The Court's aim, rather, is to resolve the conflicts among the lower courts and to determine questions of importance." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 193 (7th ed. 1993) [hereinafter SUPREME COURT PRACTICE].

[30] SUP. CT. R. 10.1. Since the Supreme Court acquired certiorari jurisdiction over military cases in 1984, the Court has received more than 200 certiorari petitions. SUPREME COURT PRACTICE, *supra* note 29, at 84. Through the end of its 1993 Term, the Court had granted only five: Davis v. United States, 114 S. Ct. 2350 (1994); Weiss v. United States, 114 S. Ct. 752 (1994); Jordan v. United States, 498 U.S. 1009 (1990); Solorio v. United States, 483 U.S. 435 (1987); and Goodson v. United States, 471 U.S. 1063 (1985). In *Jordan* and *Goodson*, the Court granted the petition, vacated the CAAF's judgment, and remanded the case for further consideration in light of another newly-announced Supreme Court ruling.

precedential value,"[31] they indicate nothing about the Supreme Court's view of the case. Rather, a denial of certiorari indicates only that the Supreme Court does not want to resolve the issues presented in the petition at that time. Consequently, certiorari is not an adequate substitute for habeas review in a federal district court.

Nevertheless, in litigation before the United States Claims Court (Claims Court),[32] the United States argued that "the availability of *certiorari* to the United States Supreme Court now forecloses further civil court collateral attacks on court-martial convictions."[33] In *United States v. Matias*, the Claims Court rejected that argument, relying heavily on the legislative history of the Military Justice Act of 1983.[34] The Claims Court concluded:

> In view of the statutory language and the extensive testimony throughout the hearings, this Court finds that the narrow window of collateral attack review given to this Court remains open, but only for those issues that address the fundamental fairness in military proceedings and the constitutional guarantees of due process. . . . If Congress did, in fact, intend to eliminate all collateral attacks, despite its failure to specifically state such an intent in the

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[31] J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 919 (1983). *See generally* SUPREME COURT PRACTICE, *supra* note 29, at 239–43.

[32] The Claims Court has since been renamed the United States Court of Federal Claims. Court of Federal Claims Technical and Procedural Improvement Act of 1992, Pub. L. No. 102–572, 106 Stat. 4506; *see generally* Loren A. Smith, *The Renovation of an Old Court*, 40 FED. B. NEWS & J. 530 (1993). For a discussion of that court's authority to collaterally review court-martial convictions, *see* GILLIGAN & LEDERER, *supra* note 13, § 26–20.00.

[33] Matias v. United States, 19 Cl. Ct. 635, 639, *aff'd*, 923 F.2d 821 (Fed. Cir. 1990) (referring to the government's argument advanced in a motion to dismiss). *Matias* did not involve a petition for a writ of habeas corpus; rather, Matias brought suit in the Claims Court seeking back pay and correction of his military records by voiding his court-martial conviction. *Id.* at 637.

[34] The court noted that during his statement to the Senate Armed Services Committee, Chief Judge Everett addressed whether the CAAF would "favor a system whereby the accused would not have a right of collateral attack if Supreme Court Review could be sought." *Matias*, 19 Cl. Ct. at 641 (quoting *The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 136 (1982) [hereinafter *Hearings*]). Chief Judge Everett indicated, "We do not believe that the right of an accused to undertake collateral attack should be cut off simply because certiorari to the Supreme Court is authorized. Indeed, to attempt such a curtailment might be unconstitutional * * *." *Matias*, 19 Cl. Ct. at 641 (quoting *Hearings*, *supra*, at 169–70) (alteration in original). The constitutional issue arises from Article I, section 9, clause 2, which provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *See generally infra* notes 204–06 and accompanying text.

> statute, then the statute must be remedied by Congress and not by this Court.[35]

On appeal, the United States Court of Appeals for the Federal Circuit (Federal Circuit) also reviewed the Military Justice Act's legislative history and "conclude[d] that the Claims Court properly exercised its jurisdiction to hear Matias' collateral attack on his court-martial."[36]

The case for Article III courts' continued power to issue writs of habeas corpus is even stronger than the case for continued collateral review by the Claims Court.[37] The Senate Armed Services Committee's report on the Military Justice Act of 1983 states:

> [T]he authority for review of the decisions of the Court of Military Appeals by the Supreme Court . . . does not affect existing law governing collateral review in the Article III courts of cases in which the Court of Military Appeals has granted review. The Committee intends that the availability of collateral review of such cases be governed by whatever standards might be applicable to the availability of collateral review of civilian criminal convictions subject to direct Supreme Court review.[38]

Consistent with the Senate Armed Services Committee's view, the United States Court of Appeals for the Second Circuit (Second

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[35] *Matias*, 19 Cl. Ct at 641; *see* GILLIGAN & LEDERER, *supra* note 13, § 26-11.00 (noting that the Claims Court's decision in *Matias* "seems clearly correct"). While the Claims Court denied the motion to dismiss, it granted summary judgment in favor of the United States. *Matias*, 19 Cl. Ct. at 642-50.

[36] Matias v. United States, 923 F.2d 821, 825 (Fed. Cir. 1990). The Federal Circuit also affirmed the Claims Court's judgment for the United States. *Id.* at 826.

[37] The Claims Court was "established under article I of the Constitution of the United States." 28 U.S.C. § 171(a) (1988).

[38] S. REP. No. 98-53, 98th Cong., 1st Sess. 35 (1983) [hereinafter SENATE REPORT]. The report was submitted by Senator Jepsen (R-Iowa), who was then the Chairman of the Senate Armed Services Committee's Subcommittee on Manpower and Personnel. *Id.* at 1; *Hearings*, *supra* note 34, at II.

Neither the Claims Court's nor the Federal Circuit's *Matias* decision cited this passage, which explicitly refers to "collateral review in the Article III courts." SENATE REPORT, *supra*, at 35.

A passage from the congressional debate on the Military Justice Act of 1983 provides still more support for the conclusion that the expansion of the Supreme Court's certiorari jurisdiction did not limit habeas review of courts-martial. While urging the Act's adoption, Senator Kennedy (D-Massachusetts) commented:

> [A]lthough certiorari review of COMA [CAAF] should help alleviate the need for collateral review of military cases, this legislation itself does not modify the general law relating to collateral remedies, and the military defendant should have the same access to collateral remedies as is currently enjoyed by any Federal or State criminal defendant.

129 CONG. REC. 34,312-13 (1983).

Circuit) has suggested that the Military Justice Act of 1983 did not limit federal district courts' habeas power over military prisoners.[39] No reported case has reached the opposite conclusion. Perhaps the strongest indication that the Military Justice Act did not affect collateral review of courts-martial is Article III courts' continued, although infrequent, practice of issuing writs of habeas corpus in military justice cases.[40] Accordingly, a petition for a writ of habeas corpus remains a viable means to challenge a military death sentence.

B. The Scope of Federal Habeas Review of Courts-Martial

Although Article III courts retain the statutory power to review military capital cases through habeas proceedings, the value of this habeas review is suspect. The scope of Article III courts' review of

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[39] Machado v. Commanding Officer, *860 F.2d 542, 545-46 (2d Cir. 1988)*. The Second Circuit noted that while litigating the case, which involved an appeal from a federal district court's denial of habeas relief, the Air Force retreated from the position that the Military Justice Act of 1983 "limited the availability of habeas in the federal district courts." *Id.* The Court added, "[W]e think that such retreat was wise." *Id.* at 546.

Lieutenant Colonel Rosen (who was a Major in the Judge Advocate General's Corps, United States Army, and an instructor at The Judge Advocate General's School, United States Army, when he wrote his highly-praised article on collateral review of courts-martial; *see* GILLIGAN & LEDERER, *supra* note 13, § 26-12.00), similarly concluded that "[a]s a matter of law," the Military Justice Act of 1983 "should have little effect" on collateral review of courts-martial. Rosen, *supra* note 13, at 82. However, he cautioned that the Military Justice Act of 1983 might have practical effects:

> The most immediate and possibly significant manifestation of the certiorari provision may be its effect on the federal courts' perception of the military justice system. On the one hand, federal courts may see the certiorari provision as an indication of congressional intent to reduce the independence of the military courts and thereby feel even less constrained in their review of military convictions. Such a view, however, is not justified. In subjecting [the] Court of Military Appeals' [CAAF] decisions to Supreme Court review, Congress did not provide the lower federal courts with any power of oversight over military tribunals. More importantly, it at least tacitly elevated the stature of the Court of Military Appeals [CAAF] beyond a mere quasi-judicial, administrative body to a tribunal entitled to the deference of other courts whose judgments are only directly reviewable by the United States Supreme Court.

Id. (footnotes omitted).

[40] *See, e.g.*, Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990) (ordering petitioner's release due to constitutionally-deficient reasonable doubt instruction); Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990) (finding a due process violation where the military judge's sentencing instructions did not require the members to reach a three-fourths majority vote in order to impose life imprisonment). In *Monk*, the CAAF rendered its decision before Congress enacted the Military Justice Act of 1983. United States v. Martin, 13 M.J. 66 (C.M.A. 1982) (at the time of his court-martial and direct appeal, Monk was named David L. Martin; *see Monk*, 901 F.2d at 886). Dodson, on the other hand, unsuccessfully sought certiorari. *See* Dodson v. United States, 479 U.S. 1006 (1986). The issue on which the Tenth Circuit ruled for Dodson was not raised in his certiorari petition. *See* Petition for a Writ of Certiorari, Dodson v. United States, 479 U.S. 1006 (1986) (No. 86-407).

military justice cases determines whether the writ of habeas corpus will provide meaningful protection for condemned service members' constitutional rights.[41]

1. The Full and Fair Consideration Standard—Until the Korean War, Supreme Court precedent limited federal habeas review of military justice cases to resolving whether "the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers."[42] "The Supreme Court's break with tradition came in 1953 with its decision in *Burns v. Wilson*,"[43] in which "at least seven Justices appeared to reject the traditional view and adopt the position that civil courts on *habeas corpus* could

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[41] An unsuccessful certiorari petition recently contended that "the Tenth Circuit so restricts federal court review of constitutional issues raised in military habeas corpus petitions that the right to file a petition for habeas corpus in the Tenth Circuit is rendered meaningless." Petition for Writ of Certiorari at 22-23, Lips v. Commandant, 114 S. Ct. 920 (1994) (No. 93-503) (order denying petition for writ of certiorari). *See infra* notes 95-99 and accompanying text.

[42] Hiatt v. Brown, 339 U.S. 103, 111 (1950). *See generally* Rosen, *supra* note 13, at 20-24, 28-38, 44-50; *see also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 52-53 (2d ed. 1920). The Supreme Court originally articulated this scope of review in *Ex parte Reed*, 100 U.S. 13, 23 (1879), which was the first habeas corpus case involving a court-martial conviction to reach the Supreme Court. Rosen, *supra* note 13, at 29. Reed was a Navy paymaster's clerk. *See generally* 100 U.S. at 13-15. He was court-martialed off the coast of Brazil for malfeasance in the discharge of official duties. After he was originally sentenced, the convening authority found the sentence inadequate and remanded the case for resentencing. The resulting second sentence included confinement for two years. At the time of the habeas litigation, Reed was confined aboard a ship at the Boston Navy Yard. Reed challenged both his susceptibility to trial by court-martial and the resentencing procedure; the Supreme Court rejected both challenges. *Id.* at 21-23. During the habeas litigation, George S. Boutwell represented Reed. *Id.* at 13. Boutwell—a prominent Massachusetts attorney who had been a governor, representative, senator, and Secretary of the Treasury—briefly discusses the case in his autobiography. 2 GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 287-88 (Greenwood Press 1968) (1902).

Beginning in 1943, several federal courts expanded habeas review of courts-martial to encompass constitutional claims. *See generally* Rosen, *supra* note 13, at 45-48; Robert S. Pasley, Jr., *The Federal Courts Look at the Court-Martial*, 12 U. PITT. L. REV. 7 (1950). However, in *Hiatt v. Brown*, the Supreme Court held that the Fifth Circuit erred by

> extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel.

339 U.S. at 110. *See generally* Rosen, *supra* note 13, at 48-49.

Lieutenant Colonel Rosen notes that later in the same term in which it decided *Brown*, the Court issued its opinion in *Whelchel v. McDonald*, 340 U.S. 122 (1951), "which implicitly recognized that review would extend beyond questions of jurisdiction." Rosen, *supra* note 13, at 50. However, Professor Bishop cautioned, "It has been said that *Whelchel* expanded the concept of 'jurisdiction' in habeas corpus review of courts-martial, but the expansion is measurable with a micrometer." Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 48 (1961) (footnote omitted).

[43] Rosen, *supra* note 13, at 50 (citing Burns v. Wilson, 346 U.S. 137 (1953)).

review claims of denials of due process rights to which the military had not given full and fair consideration."[44]

Burns v. Wilson arose from the rape and murder of a civilian in Guam. A court-martial convicted three Air Force enlisted men, Staff Sergeant Robert W. Burns, Private Herman P. Dennis, Jr., and Private Calvin Dennis, and sentenced them to death.[45] The appellate bodies within the Office of The Judge Advocate General of the Air Force found the proceedings to be legally sufficient.[46] At The Judge Advocate General's recommendation, President Truman confirmed Staff Sergeant Burns's and Private Herman Dennis's sentences and ordered that they be hanged.[47] Also at The Judge Advocate General's recommendation, President Truman commuted Private Calvin Dennis's sentence to life imprisonment.[48]

The two condemned service members sought habeas relief from the United States District Court for the District of Columbia (D.C. District Court).[49] Finding that it had no power beyond "determin[ing] whether or not the court martial before which a petitioner is tried was lawfully constituted, had jurisdiction of the person and offense, and imposed a sentence authorized by law," the district court dismissed the habeas petitions.[50]

On appeal,[51] the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) adopted a less restrictive scope of review:

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[44] CONGRESSIONAL RESEARCH SERVICE, *supra* note 4, at 347.

[45] United States v. Dennis, 4 C.M.R.(A.F.) 872 (1950); United States v. Burns, 4 C.M.R.(A.F.) 907 (1950); United States v. Dennis, 4 C.M.R.(A.F.) 930 (1950).

[46] *See Dennis*, 4 C.M.R.(A.F.) at 872; *Burns*, 4 C.M.R.(A.F.) at 907; *Dennis*, 4 C.M.R.(A.F.) at 930. The cases were handled under the Elston Act's appellate procedures. *See generally* Article of War 50 (enacted at ch. 625, § 226, 62 Stat. 604, 635 (1948) (repealed by the UCMJ)).

[47] *Dennis*, 4 C.M.R.(A.F.) at 907 (ordering that Private Dennis "be hanged by the neck until dead"); *Burns*, 4 C.M.R.(A.F.) at 930 (ordering that Staff Sergeant Burns "be hanged by the neck until dead").

[48] *Dennis*, 4 C.M.R.(A.F.) at 956.

[49] Burns v. Lovett, 104 F. Supp. 312 (D.D.C. 1952); Dennis v. Lovett, 104 F. Supp. 310 (D.D.C. 1952). That court's jurisdiction arose as the result of Burns and Dennis being confined in Japan. *See Burns*, 346 U.S. at 851.

Interestingly, one of Burns's and Dennis's counsel on brief before the United States District Court and the Supreme Court was Thurgood Marshall, who was then the Director-Counsel of the NAACP Legal Defense and Educational Fund. *Burns*, 104 F. Supp. at 313; *Dennis*, 104 F. Supp. at 311; Burns v. Lovett, 344 U.S. 903 (1952) (order granting certiorari); *Burns*, 346 U.S. at 137. *See generally* ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 116-18 (1992).

[50] *Dennis*, 104 F. Supp. at 311; *Burns*, 104 F. Supp. at 313 (quoting *Dennis*, 104 F. Supp. at 311). The district court cited *Hiatt v. Brown*, 339 U.S. 103 (1950), in support of this proposition.

[51] Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952). The two cases were consolidated on appeal.

> (1) An accused before a court-martial is entitled to a fair trial within due process of law concepts. (2) The responsibility for insuring such fairness and for determining debatable points is upon the military authorities, and their determinations are not reviewable by the courts, except (3) that, in the exceptional case when a denial of a constitutional right is so flagrant as to affect the "jurisdiction" (*i.e.*, the basic power) of the tribunal to render judgment, the courts will review upon petition for *habeas corpus*. To support issuance of a writ of habeas corpus the circumstances shown by the papers before the court must so seriously affect the fundamental fairness of the trial and the validity of the appellate and later determinations as to deprive the military authorities of jurisdiction, *i.e.*, of power to act.[52]

The D.C. Circuit then discussed and rejected the petitioners' claims.[53]

The Supreme Court granted certiorari[54] and, in a sharply fragmented decision, affirmed the denial of habeas relief.[55] In an opinion written by Chief Justice Vinson, a four-Justice plurality addressed the appropriate scope of review and concluded that "[i]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of [the petitioner's] claims."[56] However, where military courts have "manifestly refused to consider [a habeas petitioner's] claims," federal district courts may review such claims *de novo*.[57]

Justice Jackson simply concurred in the result without comment.[58] Justice Minton also concurred in the judgment, but applied a

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[52] *Id.* at 341–42. In dissent, Judge Bazelon criticized this scope of review as too narrow. He argued that a "violation of constitutional safeguards designed to assure a fair trial" would "constitute a jurisdictional defect," thus authorizing habeas relief under prevailing Supreme Court standards. *Id.* at 348–49 (Bazelon, J., dissenting).

[53] *Id.* at 343–47. Judge Bazelon indicated that he "would remand to the District Court for a hearing on the allegations in the petition." *Id.* at 353 (Bazelon, J., dissenting).

[54] Burns v. Lovett, 344 U.S. 903 (1952).

[55] Burns v. Wilson, 346 U.S. 137 (1953) (plurality opinion).

[56] *Id.* at 144.

[57] *Id.* at 142. The plurality reasoned:

> [T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

Id. at 142–43.

[58] *Id.* at 146 (Jackson, J., concurring).

scope of review more restrictive than the plurality's. He contended that in reviewing courts-martial, "[w]e have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction."[59]

In an unusual opinion, Justice Frankfurter neither concurred nor dissented, but called for the case to be reargued.[60] He opined that federal courts' power in reviewing court-martial convictions is not as broad as their power in reviewing state court convictions, but is broader than a simple determination of whether the court-martial had jurisdiction.[61]

Justice Douglas, joined by Justice Black, dissented.[62] The dissent observed that "it is clear from our decisions that habeas corpus may be used to review some aspects of a military trial," and that this "review is not limited to questions of 'jurisdiction' in the historic sense."[63] After concluding that the Fifth Amendment's ban on coerced confessions applies to "military trials," the dissent contended that "like the accused in a criminal case," a "soldier or sailor" convicted through the use of a coerced confession "should have relief by way of habeas corpus."[64]

No rationale won the support of more than four Justices.[65] While the lack of a majority opinion muddled the decision's implications for the proper scope of review, its implications for Burns and Dennis were clear; they were hanged at Northwest Military Air Field, Guam, on January 28, 1954.[66]

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[59] *Id.* at 147 (Minton, J., concurring).

[60] *Id.* at 148–50 (opinion of Frankfurter, J.).

[61] *Id.* at 149; *see also* Burns v. Wilson, 346 U.S. 844 (1953) (Frankfurter, J., dissenting from denial of rehearing).

[62] 346 U.S. at 150 (Douglas, J., dissenting).

[63] *Id.* at 152.

[64] *Id.* at 153–54. Finding that the petitioners made a *prima facie* case that their confessions had been coerced, *id.* at 154, the dissent called for "a judicial hearing on the circumstances surrounding their confessions." *Id.* at 152.

[65] One prominent commentator on the military justice system opined that because there was no opinion of the Court in *Burns*, the decision has no precedential value. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* II, 72 HARV. L. REV. 266, 297 (1958) (citing Hartz v. Woodman, 218 U.S. 205, 212–14 (1910); United States v. Pink, 315 U.S. 203, 216 (1942)). However, the current rule for construing plurality opinions provides that where no single rationale wins majority support, the Court's holding is "that position taken by those Members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). *See generally* Note, Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992).

[66] *Airmen Hanged in Guam*, N.Y. TIMES, Jan. 28, 1954, at 7; *Reporter Tells How Men Died*, PITT. COURIER, Feb. 6, 1954, at 1; *see generally* Herbert Aptheker, *Two Hangings on Guam*, MASSES & MAINSTREAM, Feb. 1955, at 1 (arguing that Burns and Dennis were innocent).

2. The Tenth Circuit's Approach—Since *Burns*, federal courts have taken "diverse approaches to constitutional challenges to military convictions, ranging from strict refusal to review issues considered by the military courts to *de novo* review of constitutional claims."[67] Federal courts' approaches have been so diverse that "it is sometimes difficult to reconcile the various standards applied within individual courts."[68] Thus, it is "virtually impossible to predict with any degree of confidence the scope of review most federal courts will apply in any particular" habeas review of a court-martial.[69] Nowhere has this uncertainty been greater than in the Tenth Circuit.[70]

The Tenth Circuit's approach to habeas corpus review of courts-martial is crucial in military death penalty cases. "[A] prisoner may apply for a writ of habeas corpus either in the district where he is incarcerated" or the district in which the prisoner's "immediate" custodian is located.[71] For inmates on the military's death row, which is housed in the USDB at Fort Leavenworth, Kansas,[72] both

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[67] Rosen, *supra* note 13, at 7 (footnotes omitted). "[M]ost courts now have either developed their own standard for collateral review of constitutional claims or simply review such claims without any apparent qualification." *Id.* at 58; *see also* William J. Wolverton, Note, *Federal Habeas Corpus Jurisdiction over Court-Martial Proceedings*, 20 WAYNE L. REV. 919, 924-28 (1974). The Solicitor General recently argued that while "courts have at times encountered difficulties in determining how [the *Burns* full and fair consideration] standard should be applied in a particular case, . . . there has been no significant divergence of views as to whether that standard is the appropriate test for habeas review of military convictions." Brief for the United States in Opposition at 8-9, Lips v. Commandant, USDB, 114 S. Ct. 920 (1994) (No. 93-503).

[68] Rosen, *supra* note 13, at 57. *See also* Annotation, *supra* note 13, at 484 (noting that "the case law has been sharply divided on the application and even the validity of the *Burns* rule, not only between Circuits but, in many cases, even among different decisions from the same Circuits.").

[69] Rosen, *supra* note 13, at 64.

[70] The Tenth Circuit itself conceded that its precedent concerning the scope of review in military habeas cases is in a "confusing state." Dodson v. Zelez, 917 F.2d 1250, 1252 (10th Cir. 1990).

[71] Monk v. Secretary of the Navy, 793 F.2d 364, 368-69 (D.C. Cir. 1986); *accord* Scott v. United States, 586 F. Supp. 66, 68 (E.D. Va. 1984) (holding that "the warden or superintendent of the Disciplinary Barracks in which the military prisoner is incarcerated is the legal custodian under federal habeas corpus principles."). The *Monk* opinion, which Judge Bork authored, held that the United States District Court for the District of Columbia did not have habeas jurisdiction over a USDB inmate. Monk subsequently sought a writ of habeas corpus from the Kansas District Court. Monk v. Zelez, No. 88-3022-O, 1989 U.S. Dist. LEXIS 3296 (D. Kan. Mar. 31, 1989). After that court denied Monk's petition, *id.*, the Tenth Circuit reversed and ordered Monk's immediate release. Monk v. Zelez, 901 F.2d 885, 894 (10th Cir. 1990). *See also Monk*, 793 F.2d at 371 (Mikva, J., concurring) (noting that "[a] careful review of the record leaves me firmly convinced that there are crucial questions about Monk's guilt that have never been adequately addressed.").

[72] Richard A. Serrano, *A Grim Life on Military Death Row*, L.A. TIMES, July 12, 1994, at A1; *see also* DEP'T OF ARMY, REG. 190-56, U.S. ARMY CORRECTIONAL SYSTEM:

they and their immediate custodians are located in the District of Kansas. Therefore, the Tenth Circuit's case law will govern habeas corpus review of military capital cases.[73]

Until recently, most Tenth Circuit military habeas decisions "strictly adhere[d] to . . . *Burns*' 'full and fair' consideration test."[74] In its 1959 rejection of Bennett's habeas challenge to his death sentence, for example, the Tenth Circuit noted that "we inquire only to determine whether competent military tribunals gave full and fair consideration to all of the procedural safeguards deemed essential to a fair trial under military law."[75]

In 1986, the Tenth Circuit began to expand the scope of review. *Mendrano v. Smith*[76] reached the merits of a military habeas petitioner's constitutional claim that already had been rejected by the military courts. The court of appeals reasoned that it would review the claim "since the Constitutional issues raised are substantial and largely free of factual questions, and since the Government does not argue that full and fair consideration by the military courts makes judicial review inappropriate."[77]

In 1990, two Tenth Circuit decisions further developed the scope of review. In the first of these cases, *Monk v. Zelez*,[78] the Tenth Circuit noted that while it followed the *Burns* "deferential" scope

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PROCEDURES FOR MILITARY EXECUTIONS, para. 3-1 (27 Oct. 1986) ("The United States Disciplinary Barracks (USDB) is the only Army confinement facility authorized to confine prisoners under the sentence to death during peacetime.").

[73] The importance of the Tenth Circuit's military habeas case law is magnified even in nondeath cases because most military habeas petitions are filed in the Tenth Circuit. Rosen, *supra* note 13, at 60 n.345.

[74] *Id.* Lieutenant Colonel Rosen noted, however, that the Tenth Circuit's cases were "not entirely consistent." *Id.*; *see also id.* at 57 n.332.

[75] Bennett v. Davis, 267 F.2d 15, 17 (10th Cir. 1959). *See also* Day v. Davis, 235 F.2d 379 (10th Cir.), *cert. denied*, 352 U.S. 881 (1956) (military death penalty case); Thomas v. Davis, 249 F.2d 232 (10th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958) (military death penalty case); Suttles v. Davis, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954) (military death penalty case involving three petitioners). Like Bennett, all of the petitioners in *Day*, *Thomas*, and *Suttles* were hanged. *Soldier Dies on Gallows at Army Prison*, LEAVENWORTH TIMES, Sept. 23, 1959, at 1; *Convicted Soldier is Hanged at Fort*, LEAVENWORTH TIMES, July 23, 1958, at 1; *Soldiers to Death on Gallows*, LEAVENWORTH TIMES, Mar. 1, 1955, at 1.

[76] 797 F.2d 1538 (10th Cir. 1986).

[77] *Id.* at 1542 n.6. While reaching the issue's merits, the Tenth Circuit rejected the petitioner's claim that his Fifth Amendment due process right and Sixth Amendment trial by jury right were violated because he was convicted by a two-thirds vote of a court-martial panel consisting of six members. *See generally* Howard C. Cohen, *The Two Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 CAL. W. L. REV. 9 (1983).

Earlier in the same year, the court had applied the full and fair consideration test and refused to review claims raised in a military habeas petition. Watson v. McCotter, 782 F.2d 143, 144-45 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986).

[78] 901 F.2d 885 (10th Cir. 1990).

of review, "[i]n appropriate cases" the court would "consider and decide constitutional issues that were also considered by the military courts."[79] Even though the CAAF already had rejected an appeal challenging the constitutionality of the reasonable doubt instruction at Monk's court-martial,[80] the Tenth Circuit held that the issue was "subject to our further review because it is both 'substantial and largely free of factual question.'"[81]

Later that same year, the Tenth Circuit's opinion in *Dodson v. Zelez*[82] considered the scope of review in even greater detail. *Dodson* expressly adopted the United States Court of Appeals for the Fifth Circuit's (Fifth Circuit) standard from *Calley v. Callaway*.[83] In *Calley*, the Fifth Circuit reversed a federal district court's grant of habeas relief to First Lieutenant William Calley, who was then confined at the USDB as a result of his court-martial conviction stemming from the My Lai massacre.[84] The Fifth Circuit's en banc opinion adopted four factors to determine whether a federal habeas court should review a constitutional challenge to a court-martial convic-

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[79] *Id.* at 888.

[80] *Id.*; *see* United States v. Martin, 13 M.J. 66 (C.M.A. 1982) (at the time of his court-martial and direct appeal, Monk was named David L. Martin; *see supra* note 40). The CAAF's *Martin* decision was sharply divided. Judge Fletcher concluded that although the reasonable doubt instruction delivered at trial was "improper and prejudicial," the issue had not been preserved. 13 M.J. at 67. Judge Cooke concurred on the basis that the invalidation of the reasonable doubt instruction should apply only prospectively. *Id.* at 68 (Cooke, J., concurring in the result). Chief Judge Everett dissented, contending that the military judge's reasonable doubt instruction was erroneous, the defense made "a suitable objection," and the error was not harmless beyond a reasonable doubt. *Id.* at 69 (Everett, C.J., dissenting). Chief Judge Everett also found that Monk was prejudiced by an erroneous denial of testimonial immunity to an alternative suspect. *Id.* at 69–70. The fractious nature of the CAAF's decision likely increased the Tenth Circuit's willingness to order Monk's release. *See* 901 F.2d at 892 (noting that a majority of the CAAF's judges, "although not the same majority, agreed that the reasonable doubt instruction given at Monk's court-martial violated his constitutional right to be convicted only on proof beyond a reasonable doubt, that Monk had properly objected to this instruction at trial, and that the instruction as given prejudiced Monk.").

[81] *Monk*, 901 F.2d at 888 (quoting *Mendrano*, 797 F.2d at 1542 n.6). The opinion also quoted the Fifth Circuit's opinion in Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976). *Monk*, 901 F.2d at 888. *See also* Lundy v. Zelez, 908 F.2d 593 (10th Cir. 1990) (applying same scope of review).

[82] 917 F.2d 1250 (10th Cir. 1990).

[83] 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976).

[84] The district court's opinion granting the writ has been characterized as "an extraordinary display of judicial eccentricity." MICHAEL BILTON & KEVIN SIM, FOUR HOURS IN MY LAI 356 (1992). The opinion's most unusual passage quotes a portion of the Bible's Book of Joshua and notes, "Joshua did not have charges brought against him for the slaughter of the civilian population of Jericho. But then 'the Lord was with Joshua' we are told." Calley v. Callaway, 382 F. Supp. 650, 711 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976). *See generally* Gerard Hannon, Note, *Civilian Review of Military Habeas Corpus Petitions: Is Justice Being Served?*, 44 FORDHAM L. REV. 1228, 1238–44 (1976).

tion: (1) "The asserted error must be of substantial constitutional dimension;"[85] (2) "The issue must be one of law rather than of disputed fact already determined by the military tribunals;"[86] (3) "Military considerations may warrant different treatment of constitutional claims;"[87] and (4) "The military courts must give adequate consideration to the issues involved and apply proper legal standards."[88]

In 1991, the Tenth Circuit further refined the four-part *Calley/Dodson* test. *Khan v. Hart*[89] considered a habeas petitioner's argument that Article 56 of the UCMJ,[90] which gives the President the power to prescribe maximum punishments for court-martial offenses, unconstitutionally delegated legislative power.[91] Using the

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[85] *Calley*, 519 F.2d at 199.

[86] *Id.* at 200.

[87] *Id.*

[88] *Id.* at 203. The *Calley* opinion includes the following summary of the scope of review:

> Military court-martial convictions are subject to collateral review by federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice. Consideration by the military of such issues will not preclude judicial review for the military must accord to its personnel the protection of basic constitutional rights essential to a fair trial and the guarantee of due process of law. The scope of review for violations of constitutional rights, however, is more narrow than in civil cases. Thus federal courts should differentiate between questions of fact and law and review only questions of law which present substantial constitutional issues. Accordingly, they may not retry the facts or reevaluate the evidence, their function in this regard being limited to determining whether the military has fully and fairly considered contested factual issues. Moreover, military law is a jurisprudence which exists separate and apart from the law governing civilian society so that what is permissible within the military may be constitutionally impermissible outside it. Therefore, when the military courts have determined that factors peculiar to the military require a different application of constitutional standards, federal courts are reluctant to set aside such decisions.

Id. Judge Anderson dissented, maintaining that the scope of review adopted by the majority "is too broad." *Id.* at 1263 (Anderson, J., dissenting).

Lieutenant Colonel Rosen advocated adoption of the Fifth Circuit's *Calley* standard. Rosen, *supra* note 13, at 63, 88. The Solicitor General recently called the Fifth Circuit's *Calley* opinion "the leading articulation of the *Burns* test." Brief for the United States in Opposition at 9, Lips v. Commandant, USDB, 114 S. Ct. 920 (1994) (No. 93-503); *see also id.* at 9-10 n.5.

[89] 943 F.2d 1261 (10th Cir. 1991).

[90] 10 U.S.C. § 856.

[91] For a discussion of the doctrine of nondelegability, see CONGRESSIONAL RESEARCH SERVICE, *supra* note 4, at 69-80. *See also* Mistretta v. United States, 488 U.S. 361, 371-79 (1989) (holding that Congress's use of the United States Sentencing Commission to promulgate sentencing guidelines was not an impermissible delegation of legislative authority).

four *Calley/Dodson* criteria to guide its inquiry, the court weighed several factors supporting review against one countervailing factor[92] and concluded, "[W]e strike the balance in favor of review."[93] Consequently, *Khan* "applied *Dodson* as a balancing test to determine whether federal review of the issues was appropriate."[94]

However, in 1993, the Tenth Circuit used a different approach in applying the four *Calley/Dodson* criteria. *Lips v. Commandant, U.S. Disciplinary Barracks*[95] involved the United States appeal of a district court decision granting habeas relief to a military prisoner.[96] The Tenth Circuit held:

> [A]lthough the federal district court had jurisdiction to entertain Lips' petition, its scope of review was initially limited to determining whether the claims Lips raised in his federal habeas corpus petition were given full and fair consideration by the military courts. If they were given full and fair consideration, the district court should have denied the petition.[97]

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[92] The court noted the following factors supporting review:

> (1) a substantial constitutional question has been raised concerning the nondelegation doctrine as applied to art. 56, UCMJ;
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> (2) the question is one of law, which has not been addressed by the Court of Military Appeals [CAAF], although it has been rejected by other military courts for varying reasons;
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> (3) the question does not turn on disputed facts;
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> (4) the formulary order of the Court of Military Appeals [CAAF] denying relief does not indicate the consideration given to petitioner's claims or admit of review;
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> (5) petitioner attempted to exhaust his military remedies; and
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> (6) the government does not argue that review is inappropriate but rather has defended on the merits.

Khan, 943 F.2d at 1263 (citations omitted). "On the other hand," the court found "the potential for a different constitutional norm would counsel against review." *Id.*

[93] *Id.* The court ruled against the petitioner on the merits. *Id.* at 1263–65.

[94] Castillo v. Hart, No. 91-3215-AJS, 1993 U.S. Dist. LEXIS 18609, at *4 (D. Kan. Dec. 17, 1993).

[95] 997 F.2d 808 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

[96] The district court granted habeas relief on the ground that the government counsel violated Lips's right against self-incrimination by referring to Lips's postarrest silence. Lips v. Commandant, USDB, No. 88-3396-R, 1992 U.S. Dist. LEXIS 12018, at *5–16 (D. Kan. July 31, 1992). The Air Force Court of Criminal Appeals [formerly AFCMR] previously had rejected an appeal based in part on this same ground, ruling that any error had been waived by the trial defense counsel's failure to object. United States v. Lips, 22 M.J. 679, 683 (A.F.C.M.R. 1986), *petition denied*, 24 M.J. 45 (C.M.A. 1987).

The district court rejected Lips's argument that he was entitled to relief due to an allegedly erroneous evidentiary ruling; the district court reasoned that Lips "failed to show that the trial judge's ruling resulted in a fundamentally unfair trial." *Id.* at *4; *see also Lips*, 24 M.J. at 681–82 (upholding the military judge's evidentiary ruling). The Tenth Circuit denied Lips's cross-appeal on this evidentiary ground. 997 F.2d at 812.

[97] 997 F.2d at 810.

Lips cited the *Calley/Dodson* criteria and maintained that "review by a federal district court of a military conviction is appropriate only if the . . . four conditions are met[.]"[98] The opinion indicated that where military courts have "fully and fairly considered, and then rejected, [the petitioner's] claim, . . . the federal district court should not [undertake] further inquiry."[99]

In sharp contrast to *Khan*'s balancing approach, *Lips* appears to hold that an issue is reviewable only if *all four Calley/Dodson* factors support review.[100] The *Lips* scope of review is remarkably narrow, essentially reinstating the Tenth Circuit's strict adherence to the *Burns* full and fair consideration test. In the Tenth Circuit, an issue that is raised before a military court is deemed "fully and fairly considered" even if the military court rejects the claim without explanation.[101] On the other hand, if a claim has not been presented

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[98] *Id.* at 811. *See also* Reed v. Hart, No. 93-3154, 1994 U.S. App. LEXIS 3562, at *5 (10th Cir. Mar. 1, 1994) (citing *Lips* and noting that "we have held that if the issue was raised before the military courts, four conditions must be met before a district court's habeas review of a military decision is appropriate.").

[99] 997 F.2d at 812.

[100] In light of the apparent conflict between *Khan* and *Lips*, it is interesting to note that Judge Baldock, who wrote the *Khan* opinion, 943 F.2d at 1262, was part of the *Lips* panel. *Lips*, 997 F.2d at 809.

An unpublished Tenth Circuit order and judgment issued one week before *Lips* adds further uncertainty to the circuit's scope of review for military habeas cases. In Spindle v. Berrong, No. 93-3056, 1993 U.S. App. LEXIS 15362 (10th Cir. June 24, 1993), "the Tenth Circuit stated its scope of review as that articulated in *Dodson*, employed neither the *Khan* balancing test nor the *Lips* adequate consideration only test, reached the substantive [Confrontation Clause issue], and decided the issue on the merits." Travis v. Hart, No. 92-3011-RDR, 1993 U.S. Dist. LEXIS 10911, at *7 n.1 (D. Kan. July 13, 1993), *aff'd*, 16 F.3d 417 (10th Cir. 1994) (table). However, a Tenth Circuit rule in effect at the time *Spindle* was decided provided that an unpublished order and judgment "ha[s] no precedential value." 10th Cir. R. 36.3. *See also* In re Citation of Unpublished Opinions/Order and Judgments, 151 F.R.D. 470 (10th Cir. 1993) (modifying Rule 36.3).

[101] Watson v. McCotter, 782 F.2d 143 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986); *Lips*, 997 F.2d at 812 n.2. This rule appears to contradict the fourth *Calley/Dodson* standard, which provides that "military courts must give adequate consideration to the issue involved." Calley v. Callaway, 519 F.2d 184, 203 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976); Dodson v. Zelez, 917 F. 2d 1250, 1253 (10th Cir. 1990) (quoting *Calley*).

Despite the CAAF's own view that a denial of a petition for grant of review "is of *no precedential* value," United States v. Mahan, 1 M.J. 303, 307 n.9 (C.M.A. 1976), both the Tenth Circuit and the Kansas District Court have contended that these denials satisfy the full and fair consideration standard. *See, e.g.*, King v. Berrong, No. 93-3103, 1994 U.S. App. LEXIS 9486, at *5 (10th Cir. May 2, 1994) (holding that the CAAF's denial of the petition for grant of review "satisfies the minimum condition for fair consideration"); Goff v. Hart, No. 91-3103-AJS, 1993 U.S. Dist. LEXIS 14032, at *9 (D. Kan. Sept. 29, 1993) (indicating that by denying the petition for grant of review, the CAAF "considered" the issue and "decided against petitioner"). *But see Khan*, 943 F.2d at 1262 (declining to hold that CAAF's denial of petition for grant of review precludes federal habeas review); *accord* Jefferson v. Berrong, 783 F. Supp.

before a military tribunal, absent "cause excusing the procedural default and prejudice resulting from the error," the claim has been waived for federal habeas purposes.[102] Accordingly, a claim not raised before the military courts will not be reviewed, but a claim that was raised before the military courts cannot be the basis for relief. The only escape from this "Catch-22" is if the military courts *expressly* refused to consider an issue.[103] In the one instance where federal habeas courts apply the full and fair consideration standard to state courts' constitutional rulings,[104] relief will not be granted even if "the state courts employed an incorrect legal standard, misapplied the correct standard, or erred in finding the underlying facts."[105] It would be a rare case, indeed, that would qualify for review under this standard.

In a series of military habeas opinions announced after the Tenth Circuit's decision in *Lips*, the Kansas District Court argued that the Tenth Circuit's scope of review precedent is in conflict with itself.[106] The district court maintained that "[t]he balancing test sug-

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1304, 1308 (D. Kan. 1992), *appeal dismissed sub nom.* Amen-Ra v. Berrong, 992 F.2d 1222 (10th Cir. 1993) (table).

[102] *Lips*, 997 F.2d at 812; *Watson*, 782 F.2d at 145; Wolff v. United States, 737 F.2d 877, 879 (10th Cir.), *cert. denied*, 469 U.S. 1076 (1984); *see generally* Rosen, *supra* note 13, at 76-80.

The "cause and prejudice" exception to the waiver rule is extremely narrow, *see* Wainwright v. Sykes, 433 U.S. 72, 87 (1977), and the Supreme Court "has been extraordinarily demanding in its application of adequate 'cause' for failing to raise an issue at trial." GILLIGAN & LEDERER, *supra* note 13, at 202. The Supreme Court has held that even where the cause and prejudice standard is not met, a habeas court can reach a defaulted issue to prevent a "fundamental miscarriage of justice." *See* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1721 (1992). In death penalty cases, a miscarriage of justice occurs where "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Sawyer v. Whitley, 112 S. Ct. 2514, 2517 (1992).

[103] *See Watson*, 782 F.2d. at 145 (noting that "we will entertain military prisoners' claims if they were raised in the military courts and those courts refused to consider them.").

[104] *See* Stone v. Powell, 428 U.S. 465 (1976) (adopting full and fair consideration test for federal habeas review of state courts' search and seizure exclusionary rule decisions); *see generally* Philip Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule after* Stone v. Powell, 82 COLUM. L. REV. 1, 17-18 (1982).

[105] Halpern, *supra* note 104, at 17-18; *but see* Gamble v. Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978) (allowing habeas review if the state court does not provide "colorable application of the correct Fourth Amendment constitutional standards.").

[106] Smith v. Commandant, USDB, No. 89-3298-RDR, 1994 U.S. Dist. LEXIS 4209, at *6-7 (D. Kan. Mar. 3, 1994); Castillo v. Hart, No. 91-3215-AJS, 1993 U.S. Dist. LEXIS 18609, at *6 (D. Kan. Dec. 20, 1993); Bramel v. Hart, No. 91-3186-AJS 1993 U.S. Dist. LEXIS 18600, at *5-7 (D. Kan. Nov. 30, 1993); DuBose v. Hart, No. 91-3149-AJS, 1993 U.S. Dist. LEXIS 17204, at *4-5 (D. Kan. 1993); Futcher v. Hart, No. 91-3137-AJS, 1993 U.S. Dist. LEXIS 17205, at *5-7 (D. Kan. Nov. 9, 1993); Boos v. USDB Commandant, No. 93-3132-RDR, 1993 U.S. Dist. LEXIS 15607, at *4-7 (Oct. 29, 1993); Goff v. Hart, No. 91-3130-AJS, 1993 U.S. Dist. LEXIS 14032, at *5-8 (D. Kan. Sept. 29, 1993); Haughton v. Hart, No. 91-3060-AJS, slip op. at 4-6 (D. Kan.

gested in *Khan* and the adequate consideration only test suggested in *Lips* create an incongruence not easily resolved. While in some cases analysis under either test would lead to the same result, in others, the outcome clearly would be different depending on which test was utilized."[107] Nevertheless, the Supreme Court denied Lips's certiorari petition.[108]

One panel of the Tenth Circuit ostensibly "cannot overrule the judgment of another panel"; rather, a panel is "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."[109] The Tenth Circuit sitting en banc therefore should resolve the conflict in its scope of review precedent.[110] Until the court resolves this issue en banc, the scope of review will remain mired in uncertainty, apparently more influenced by the particular panel's composition than by adherence to a common principle.

While the Supreme Court denied certiorari in *Lips*, the Court

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July 29, 1993), *aff'd*, 25 F.3d 1057 (10th Cir. 1994) (table); Travis v. Hart, No. 92-3011-RDR, 1993 U.S. Dist. LEXIS 10911, at *6-7 (D. Kan. July 13, 1993), *aff'd*, 16 F.3d 417 (10th Cir. 1994) (table).

Only two of the Kansas District Court's ten 1993 military habeas opinions announced after the Tenth Circuit's *Lips* decision omitted an assertion of a discrepancy between *Lips* and *Khan*. Goltz v. Commandant, USDB, No. 92-3051-RDR, 1993 U.S. Dist. LEXIS 15576 (D. Kan. Oct. 29, 1993); Bartos v. USDB, No. 91-3135-AJS, 1993 U.S. Dist. LEXIS 15593 (D. Kan. Oct. 18, 1993). In both of those cases, the court's decision to dismiss the habeas petition rested entirely on the waiver doctrine. *Goltz*, 1993 U.S. Dist. LEXIS 15576, at *3; *Bartos*, 1993 U.S. Dist. LEXIS 15593, at *3. Thus, in neither case was there any need to establish the appropriate scope of review.

[107] Travis v. Hart, No. 92-3011-RDR, 1993 U.S. Dist. LEXIS 10911 at *6-7 (D. Kan. July 13, 1993) (footnote omitted), *aff'd*, 16 F.3d 417 (10th Cir. 1994) (table). The Tenth Circuit conceded that "the district court's observation may be correct." Travis v. Hart, No. 93-3291, 1994 U.S. App. LEXIS 2643, at *4 (10th Cir. Feb. 16, 1994).

[108] 114 S. Ct. 920 (1994). Lips asked the Supreme Court to resolve three issues, including whether the Kansas District Court "erred in granting the writ because a military court 'fully and fairly considered' the constitutional issue and found no error." Petition for a Writ of Certiorari at i, Lips v. Commandant, USDB, 114 S. Ct. 920 (1994). None of the briefs before the Court cited any of the Kansas District Court's opinions expressing concern over the Tenth Circuit's scope of review decisions. Nor were any of those district court opinions published. Accordingly, the Supreme Court may have denied Lips's certiorari petition without knowing of the district court judges' concerns is quite possible. Even had the Court been aware of the district court judges' frustration with the Tenth Circuit's inconsistent case law, the result might have been no different; "[o]rdinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari." SUPREME COURT PRACTICE, *supra* note 29, at 176.

[109] In re Smith, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam), *cert. denied*, 115 S. Ct. 53 (1994); *see also* Mendrano v. Smith, 797 F.2d 1538, 1543-44 (10th Cir. 1986).

[110] *See* 10TH CIR. R. 35.1 (suggesting that en banc proceedings are intended, in part, to resolve conflicts between a panel decision and the Tenth Circuit's precedent). *See also* FED. R. APP. P. 35(a) (noting that en banc hearings will not ordinarily be used "except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.").

may become more receptive if the issue continues to arise, particularly if federal district judges continue to express uncertainty concerning the proper scope of review. The probability of obtaining either en banc consideration or certiorari to resolve the issue may be greatest in a death penalty case,[111] where the consequences of refusing to even consider a potentially meritorious issue can be so great.[112]

3. The Scope of Federal Habeas Review of State Cases—Even the comparatively liberal *Khan* balancing approach to the *Calley/Dodson* criteria is drastically narrower than the standard federal courts use when collaterally reviewing state convictions. Despite several Rehnquist Court opinions constricting habeas,[113] federal courts may continue to conduct *de novo* review of alleged constitutional errors.[114] During its 1992 Term, the Court specifically declined to limit habeas review of *Miranda*[115] issues to a determination of whether the state court provided a full and fair opportunity to litigate the claim.[116] Application of the search and seizure exclusionary

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[111] *Burns* was a death penalty case. While *Burns* has spawned considerable uncertainty, "[t]hat *Burns* expanded the scope of collateral review of military convictions is readily apparent." Rosen, *supra* note 13, at 54.

[112] *But see* Graham v. Collins, 113 S. Ct. 892, 897 (1993) (noting that *Teague v. Lane*'s restriction on retroactive application of new rules "applies to capital cases as it does to those not involving the death sentence."); *see infra* note 113.

[113] *See generally* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2376-415 (1993); J. Thomas Sullivan, *Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 ARIZ. ST. L.J. 317 (1993); McFarland v. Scott, 114 S. Ct. 2785, 2790 (1994) (Blackmun, J., dissenting from denial of certiorari) (referring to the "accumulating and often byzantine restrictions this Court has imposed on federal habeas corpus review."). The most significant of the Rehnquist Court's decisions limiting habeas review is *Teague v. Lane*, 489 U.S. 288 (1989), which provides that, with two narrow exceptions, a federal habeas court cannot grant relief based on a new rule of constitutional law. *See generally* Marshall J. Hartman, *To Be or Not to Be a "New Rule:" The Non-Retroactivity of Newly Recognized Constitutional Rights After Conviction*, 29 CAL. W. L. REV. 53 (1992); Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371 (1991); David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991); James S. Liebman, *More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91). The Court also has made it more difficult for habeas petitioners to raise claims that had not been raised before the state courts, Keeney v. Tamayo-Reyes, 112 S. Ct. 2514 (1992), or in an earlier federal habeas petition. McCleskey v. Zant, 499 U.S. 467 (1991). During its 1992 Term, the Court further diminished a habeas petitioner's opportunity to obtain relief by adopting a harmless-error standard for habeas review lower than that applied on direct review. Brecht v. Abrahamson, 113 S. Ct. 1710 (1993). During its 1994 Term, the Supreme Court will resolve whether the *Brecht* harmless-error standard applies in capital cases. Kyles v. Whitley, 114 S. Ct. 1610 (1994) (order granting certiorari).

[114] *See generally* Wright v. West, 112 S. Ct. 2482 (1992).

[115] Miranda v. Arizona, 384 U.S. 406 (1966).

[116] Winthrow v. Williams, 113 S. Ct. 1745 (1993).

rule remains the only legal issue reviewed under the "full and fair" consideration standard.[117]

In contrast to the *de novo* standard of review for legal questions, federal habeas courts generally must presume that the state courts' factual findings are correct.[118] The Supreme Court recently declined to resolve the proper standard for federal habeas courts' review of state courts' decisions regarding mixed questions of law and fact.[119] This leaves in place the Tenth Circuit's rule that "mixed questions of law and fact," like pure legal questions, are "reviewed de novo."[120] Thus, many claims that would succeed on federal habeas review of a state conviction would be rejected under either the *Khan* or *Lips* test for reviewing courts-martial.

C. An Empirical Assessment of Habeas Review of Courts-Martial

A survey of the United States District Court for the District of Kansas's (Kansas District Court) military habeas practice demonstrates the effect of the narrow standard for federal habeas review of military cases. In 1992 and 1993, the Kansas District Court issued opinions in thirty-three habeas cases where the petitioner challenged a court-martial conviction, sentence, convening authority's action, or direct appeal.[121] *Lips v. Commandant, U.S. Disciplinary*

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[117] Stone v. Powell, 428 U.S. 465 (1976).

[118] 28 U.S.C. § 2254(d) (1988).

[119] *Wright*, 112 S. Ct. at 2482. *See generally* Yackle, *supra* note 113, at 2380–81; Sullivan, *supra* note 113, at 344–45; Vivian Berger, *Ax Poised Over Habeas*, NAT'L L.J., Aug. 31, 1992, at S10.

[120] Scott v. Roberts, 975 F.2d 1473, 1475 (10th Cir. 1992). *See also* Case v. Mondragon, 887 F.2d 1388, 1393 (10th Cir.), *cert. denied*, 494 U.S. 1035 (1990) ("No presumption of correctness attaches to legal conclusions or determinations on mixed questions of law and fact. Those are reviewed *de novo* on federal habeas review.").

[121] *See infra*, Appendix B (complete list of the 33 cases). Ten of the 33 opinions were issued after the Tenth Circuit announced *Lips*. Two of the ten decisions were based solely on waiver, but the remainder of the district court's post-*Lips* opinions noted that the decision would have been the same under either the *Lips* test or the *Khan* balancing test. *See supra* note 106.

In addition to the 33 cases listed in Appendix B, the Kansas District Court issued opinions in five habeas cases filed by USDB prisoners who were not challenging the results of their courts-martial. Jefferson v. Hart, No. 91-3232-RDR, 1993 U.S. Dist. LEXIS 10907 (D. Kan. July 29, 1993) (granting habeas corpus petition and ordering that petitioner be given a parole hearing); Smoot v. Hart, No. 90-3315-RDR, 1993 U.S. Dist. LEXIS 1549 (D. Kan. Jan. 28, 1993) (dismissing as moot habeas corpus petition seeking sentence credit for time spent on parole); Jackson v. Berrong, No. 90-3161-R, 1992 U.S. Dist. LEXIS 17300 (D. Kan. Oct. 7, 1992) (dismissing as moot habeas corpus petition challenging parole revocation); Little v. Hart, No. 92-3134-R, 1992 U.S. Dist. LEXIS 14103 (D. Kan. Aug. 10, 1992) (dismissing habeas corpus petition challenging parole revocation and forfeiture of good time credit); Jelks v. United States Army Clemency and Parole Board, No. 89-3425-R, 1992 U.S. Dist. LEXIS 12023 (D. Kan. July 28, 1992) (granting habeas corpus petition seeking sentence credit for time spent on parole).

The Kansas District Court also issued opinions in the cases of five USDB pris-

Barracks was the only case in which the Kansas District Court granted relief.[122] As discussed above, the Tenth Circuit reversed the Kansas District Court and denied Lips any relief.[123] The Kansas District Court exercises habeas jurisdiction over more than 1300 prisoners confined at the USDB.[124] Yet during a two-year span, no prisoner within that district court's jurisdiction benefited from habeas review of a court-martial.[125]

Civilian habeas petitioners' success rate also is low. Two empirical studies of federal habeas corpus practice in the 1970s and early 1980s found that the petitioner succeeded in three to four percent of the cases surveyed.[126] In the wake of recent Supreme Court decisions limiting habeas petitioners' ability to obtain relief,[127] the success rate today may be even lower. Nevertheless, the *de novo* standard of review provides a meaningful opportunity to collaterally attack a state conviction. That standard's effectiveness is clear in the capital arena. In death penalty cases, federal habeas petitioners had a success rate of "60-75% as of 1982, 70% as of 1983, and 60% as of 1986."[128] *While no post-Furman*[129] *federal habeas review of a*

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oners who sought relief through means other than a habeas petition. Goff v. Lowe, No. 93-3112-RDR, 1993 U.S. Dist. LEXIS 14028 (D. Kan. Sept. 16, 1993) (granting summary judgment for the government in case challenging the results of an administrative disciplinary proceeding); Mansfield v. Hart, No. 91-3155-RDR, 1993 U.S. Dist. LEXIS 4787 (D. Kan. Mar. 8, 1993) (denying claim for damages, injunctive relief, and declaratory judgment arising from USDB disciplinary proceeding); Leardorf v. Berrong, No. 89-3444-RDR, 1992 U.S. Dist. LEXIS 20423 (D. Kan. Dec. 31, 1992) (dismissing petition for writ of mandamus challenging court-martial conviction); Strain v. Long, 92-3239-RDR, 1992 U.S. Dist. LEXIS 20429 (D. Kan. Dec. 8, 1992) (granting summary judgment for the United States in a constitutional tort action challenging use of "intractable status" as an internal control mechanism); McPhaul v. Reppert, 86-3251-R, 1992 U.S. Dist. LEXIS 10283 (D. Kan. June 26, 1992) (dismissing constitutional tort action brought by former USDB prisoner). These cases are beyond the scope of this survey of the district court's practice.

[122] Lips v. Commandant, USDB, No. 88-3396-R, 1992 U.S. Dist. LEXIS 12018, (D. Kan. July 31, 1992). Lips was the only one of the 33 petitioners who was represented by counsel before the Kansas District Court. *See infra* notes 264-66 and accompanying text.

[123] 997 F.2d 808 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994); *see supra* notes 95-99 and accompanying text.

[124] Michael Kirkland, *Supreme Court Hears Challenge to Military Justice System*, UPI, Nov. 3, 1993, *available in* LEXIS, News Library, UPI File (indicating that the inmate population was then 1363).

[125] However, one USDB prisoner did win a parole hearing and another won credit against his sentence as a result of habeas petitions. Jefferson v. Hart, No. 91-3232-RDR, 1993 U.S. Dist. LEXIS 10907 (D. Kan. July 29, 1993); Jelks v. United States Army Clemency and Parole Board, No. 89-3425-R, 1992 U.S. Dist. LEXIS 12023 (D. Kan. July 28, 1992). *See supra* note 121.

[126] *Empirical Light*, supra note 14, at 681; PAUL H. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 4(c) (1979).

[127] *See supra* note 113.

[128] Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520-21 (1988) (footnotes omitted). Again, those

military death penalty case has occurred, the wide gulf between *de novo* review and even the most liberal permutation of the *Burns v. Wilson* full and fair consideration test suggests that condemned service members will not fare as well.

D. Conclusion

Service members have a right to seek habeas relief from the Article III judiciary. In the Tenth Circuit, however, recent case law has virtually foreclosed a service member's opportunity to obtain relief through the exercise of that right. Absent a significant expansion of the scope of review, federal habeas proceedings will be incapable of safeguarding condemned service members' constitutional rights.

III. Appointment of Counsel: The Status Quo

> *Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.*
>
> *Judge Walter V. Shaefer*[130]

The scope of review is tremendously important to a condemned service member seeking federal habeas relief; it establishes the framework under which the courts will examine all other issues. Yet even more fundamental than the scope of review is the condemned habeas petitioner's ability to obtain counsel. As Judge Shaefer indi-

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figures likely would be lower today due to cases such as *Teague*. Also, these habeas success rates were inflated to some degree by successful systemic attacks. ABA Background Report, *supra* note 28, at 55 n.113.

Professor Mello reports that "[b]etween 1976 and 1988 federal appellate courts ruled in favor of the condemned inmate in 73.2% of the capital habeas appeals heard, compared to only 6.5% of the decisions in non-capital habeas cases." Mello, *supra*, at 521 (footnote omitted). *See also* McFarland v. Scott, 114 S. Ct. at 2789-90 (Blackmun, J., dissenting from denial of certiorari); Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1044-45 n.166 (1993); Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After* Furman, 24 COLUM. HUM. RTS. L. REV. 395, 411 (1993); Geraldine Szott Moohr, Note, Murray v. Giarratano: *A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 794 n.229 (1990). *But see* VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 86-88 (1994) (arguing that previous studies overstated the success rate of federal habeas petitions in death penalty cases, but conceding that the success rate is higher in capital cases than in noncapital cases).

[129] Furman v. Georgia, 408 U.S. 238 (1972). *See supra* note 11.

[130] *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

cated, representation by counsel affects every aspect of the case.[131] Counsel even may influence the court's choice of which scope of review to apply.

A. The Problem of Indigency

By the time a military death penalty case reaches federal habeas review, the petitioner almost surely will not have sufficient funds to retain counsel. Even those condemned service members with substantial financial resources are likely to become impoverished during the lengthy period of direct appeal.[132] The cost of privately retaining a federal habeas counsel would be prohibitive. A 1988 study of 175 attorneys in 25 states found that in capital collateral attacks, attorneys devoted an average of 665 hours during state postconviction review[133] and 805 hours during federal habeas review.[134] The first stage of state postconviction review alone "consume[s] somewhere between one-fifth and one-fourth" of the average attorney's total yearly hours of practice.[135]

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[131] *See id.* and accompanying text. *See also* American Bar Association Criminal Justice Section, Report Supporting American Bar Association Recommendations on Death Penalty Habeas Corpus, *reprinted in Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 9, 17 (1990) [hereinafter Criminal Justice Section Report] (noting, "Competent and adequately compensated counsel from trial through collateral review is . . . the *sine qua non* of a just, effective, and efficient death penalty system.").

[132] Of the four military death penalty cases that have been affirmed at the Court of Criminal Appeals level, two have been on appeal since 1987, a third since 1988, and the fourth since 1989. *See* cases cited *supra*, note 11.

[133] Professor Millemann explains:

> At present, 49 of 50 states provide by statute or rule that, after a criminal conviction is finally affirmed on direct appeal, the convicted defendant may file in state court a "collateral" proceeding challenging the legality of the conviction. This proceeding is commonly called a "post-conviction" proceeding, but also is called "habeas corpus" or "coram nobis."

Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455, 457 (1989).

[134] Richard J. Wilson & Robert L. Spangenberg, *State Post-conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336 (1989). *See also* Mercer v. Armontrout, 864 F.2d 1429, 1433 (8th Cir. 1988); Millemann, *supra* note 133, at 485-86 (discussing time demands of capital postconviction representation).

[135] Wilson & Spangenberg, *supra* note 134, at 337. The average amount of time spent in postconviction practice was 400 hours before the state trial court, 200 hours before the state supreme court, 65 hours before the United States Supreme Court in connection with the state postconviction proceeding, 305 hours before the federal district court, 320 hours before the court of appeals, and 180 hours before the United States Supreme Court in connection with the federal habeas proceeding.

Because the military has nothing directly analogous to a state postconviction proceeding, *see* United States v. Polk, 32 M.J. 150, 152 (C.M.A. 1991), counsel initially will be formulating the petitioner's arguments during the federal district court habeas proceeding. Therefore, in a military case, the time demands of the district court's

In addition to making it practically impossible for a death row inmate to privately retain counsel, these extensive demands deter attorneys from handling these cases pro bono. The United States District Court for the Eastern District of Virginia (Eastern Virginia District Court) noted:

> In the past, Virginia had no need to take affirmative action to provide counsel to inmates pursuing post-conviction relief. Attorneys volunteered their services or were recruited to provide *pro bono* assistance and representation to death row inmates. Those days are gone. The evidence conclusively establishes that today few—very few—attorneys are willing to voluntarily represent death row inmates in postconviction efforts. One lawyer who did accept such a case testified that he expended in excess of five hundred hours in the preparation and handling of it. He expressed the emotional drain to be such as to preclude his willing acceptance of another such assignment.[136]

While some individual death row inmates may be able to secure representation from volunteer attorneys or public interest organizations, the 2802 inmates on death row nationwide[137] overtax these resources.[138] In Texas, which relies on volunteer attorneys, "death-sentenced prisoners are not routinely represented in state post-conviction proceedings."[139] Quite simply, "[T]he demand for lawyers on

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habeas proceeding will likely approximate those at the state trial court postconviction stage.

Judge Cox recently suggested that "[p]erhaps the Joint-Service Committee on Military Justice might consider how collateral attacks on courts-martial should be litigated." United States v. Dykes, 38 M.J. 270, 274 (C.M.A. 1993) (Cox, J., concurring).

[136] Giarratano v. Murray, 668 F. Supp. 511, 515 (E.D. Va. 1986), *rev'd*, 836 F.2d 1421 (4th Cir.), *aff'd on reh'g*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989). *See also* Mercer, 864 F.2d at 1433.

[137] DEATH ROW, U.S.A., *supra* note 11, at 561.

[138] Judge Godbold has cautioned that "[t]he demands on these volunteers became so heavy and the pressure of cases so intense that these traditional sources seriously diminished." John C. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. ASS'N B. CITY N.Y. 859, 866 (1987).

[139] The Spangenberg Group, An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases 3 (Dec. 1993) (unpub. report) (on file with the ABA Postconviction Death Penalty Representation Project); *see also id.* at 70 (noting that "execution warrants are now routinely filed in Texas including many following affirmance in which no counsel is available."); McFarland v. Scott, 114 S. Ct. 2785, 2788-89 (1994) (Blackmun, J., dissenting from denial of certiorari). Justice Powell has noted that Florida provided state-funded counsel for death row inmates pursuing postconviction relief "because of the inadequacy of using volunteer lawyers." Justice Lewis F. Powell, Remarks at the Eleventh Circuit Judicial Conference (May 12, 1986) (quoted in ABA Background Report, *supra* note 28, at 73 n.188).

death row far outstrips the availability of lawyers willing or able to represent condemned inmates."[140] Absent appointed counsel, condemned service members may be unable to obtain legal representation during federal habeas review of their death sentences.

B. The Constitutional Framework

1. The Emerging Right to Counsel—During this century, constitutional case law concerning a criminal defendant's right to counsel has developed erratically. In its 1930 *Powell v. Alabama*[141] decision, the Supreme Court first recognized a criminal defendant's constitutional right to appointed counsel.[142] This right applied, however, only in capital cases where the defendant was indigent and "incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like."[143] In 1938, the Court held that the Sixth Amendment requires the appointment of counsel for indigent defendants in all federal criminal proceedings.[144] However, in 1942, the Court refused to require the appointment of counsel in state noncapital criminal proceedings.[145]

The Warren Court dramatically expanded the right to counsel. In 1961, the Supreme Court abandoned *Powell*'s requirement that capital defendants demonstrate special circumstances to be entitled to appointed counsel; instead, the Court held that all indigent capital defendants have a right to appointed counsel.[146] The right to counsel's most celebrated advance came two years later, when *Gideon v. Wainwright*[147] held that the Fourteenth Amendment's Due Process Clause applies the Sixth Amendment counsel right to the states. Accordingly, indigent defendants have a constitutional right to

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[140] Michael A. Mello, *Is There A Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065, 1066 (1989).

[141] 287 U.S. 45 (1932). *See generally* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 149–57 (1955).

[142] ANTHONY LEWIS, GIDEON'S TRUMPET 113 (1964). *Powell* based the right to appointed counsel on the Fourteenth Amendment's Due Process Clause. 287 U.S. at 71. For a discussion of the *Powell* defendants' retrials, see LEWIS, *supra*, at 257–58.

[143] *Powell*, 287 U.S. at 71.

[144] Johnson v. Zerbst, 304 U.S. 458 (1938). *See generally* BEANEY, *supra* note 141, at 33–44. In 1790, Congress created a statutory right to appointed counsel for criminal defendants in capital cases tried in federal district courts. Federal Crimes Act of 1790, ch. 9, § 29, 1 Stat. 112, 118 (codified as amended at 18 U.S.C. § 3005 (1988)).

[145] Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963). *See generally* LEWIS, *supra* note 142, at 115–18; Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 43–56 (1962); BEANEY, *supra* note 141, at 160–64.

[146] Hamilton v. Alabama, 368 U.S. 52 (1961).

[147] 372 U.S. 335 (1963). *See generally* LEWIS, *supra* note 142.

appointed counsel in any state felony proceeding.[148] On the same day that it announced *Gideon*, the Court addressed the right to counsel in appellate courts, holding that the Equal Protection Clause mandates appointment of counsel for indigent defendants during their first appeal as of right.[149]

2. The Right to Counsel in Postconviction Proceedings—By 1974, the Burger Court had fully risen over the Warren Court's vestiges.[150] That year, the Court refused to recognize a constitutional right to counsel during discretionary appeals before state courts or when seeking a writ of certiorari from the United States Supreme Court.[151] This established a line of demarcation: an indigent criminal defendant has a constitutional right to appointed counsel up to the first appeal as of right, but not thereafter.[152]

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[148] The Warren Court later held that the right to counsel attaches in juvenile proceedings as well. In re Gault, 387 U.S. 1 (1967).

[149] Douglas v. California, 372 U.S. 353 (1963). The Court reasoned:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.

Id. at 357-58. Justice Clark, who was one of three dissenting justices, criticized the Court's "new fetish for indigency." *Id.* at 359 (Clark, J., dissenting).

On its face, the Fourteenth Amendment's Equal Protection Clause, on which *Douglas* relied, does not extend to the federal government. The Supreme Court has held, however, that the Fifth Amendment's Due Process Clause includes an equal protection guarantee. Bolling v. Sharpe, 347 U.S. 497 (1954) (applying Brown v. Board of Education, 347 U.S. 483 (1954), to the District of Columbia school system). The CAAF relied on the Fifth Amendment's equal protection component to apply Batson v. Kentucky, 476 U.S. 79 (1986), to the military justice system. United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988); *see also* United States v. Tuggle, 34 M.J. 89 (C.M.A. 1992) (recognizing that it would be an equal protection violation to imprison a service member due solely to inability to pay a fine).

[150] *Cf.* Herman Schwartz, *Introduction* to THE BURGER YEARS xi, xvi (Herman Schwartz ed., 1987) ("Between 1964 and June 1974, prisoners rarely lost a [prisoners' rights] case in the Supreme Court. From June 1974 on, however, it became almost impossible for a prisoner to win one . . . .").

[151] Ross v. Moffitt, 417 U.S. 600 (1974). An earlier Burger Court opinion had extended the right to counsel into some state misdemeanor proceedings. Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that representation by counsel (or a valid waiver of that right) is a prerequisite to imprisonment for any offense, including misdemeanors). In Scott v. Illinois, 440 U.S. 367 (1979), the Court held that a defendant who was convicted of a misdemeanor for which confinement is an authorized punishment was not entitled to the appointment of counsel where the court actually imposed a fine and no confinement.

[152] Does a criminal defendant have a constitutional right to counsel where more than one appeal is mandated by statute, such as for capital appellants in the military justice system? *See* UCMJ art. 67(a)(1), 10 U.S.C. § 867(a)(1). *Douglas* did not reach the issue of whether the right to counsel extends to "mandatory review beyond" the first level. 372 U.S. at 356. Subsequent Supreme Court opinions suggest that the right to counsel does not reach mandatory second-level appeals. Pennsylvania v. Finley, 481

The Rehnquist Court reinforced this line of demarcation. In *Pennsylvania v. Finley*,[153] a 1987 opinion authored by Chief Justice Rehnquist, the Court indicated that neither the Fourteenth Amendment's Due Process Clause nor its Equal Protection Clause gives prisoners a right to appointed counsel during state postconviction proceedings.[154] The Court reasoned, "[S]ince a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no right when attacking a conviction that has long since become final upon exhaustion of the appellate process."[155]

U.S. 551, 555 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."); *accord* Coleman v. Thompson, 111 S. Ct. 2546, 2568 (1991).

Although a capital appellant has a statutory right to counsel before the CAAF, UCMJ art. 70, 10 U.S.C. § 870, the issue is not merely academic. A criminal defendant has a constitutional right to the effective assistance of counsel only where there is an underlying constitutional right to counsel. *Coleman*, 111 S. Ct. at 2566. Under the Supreme Court's *dicta* suggesting no right to counsel in second-level mandatory appeals, deficient representation of a condemned appellant before the CAAF would not support a constitutional claim of ineffective assistance of appellate counsel. *Cf.* Evitts v. Lucey, 469 U.S. 387 (1985) (holding that criminal appellants have a due process right to effective assistance of counsel on their first appeal as of right).

[153] 481 U.S. 551 (1987).

[154] *Id.* at 557. The central issue in *Finley* was whether a postconviction counsel who sought to withdraw because the case included no potentially meritorious claims had to follow the procedures that Anders v. California, 386 U.S. 738 (1967), established for counsel seeking to withdraw from appellate representation. The Court concluded, "Since respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, she has no constitutional right to insist on the *Anders* procedures which were designed solely to protect that underlying constitutional right." *Finley*, 481 U.S. at 557.

Justice Blackmun concurred in the judgment, but indicated that on remand the state courts "should be able to consider whether appointed counsel's review of respondent's case was adequate under Pennsylvania law or the Pennsylvania Supreme Court's remand order." *Id.* at 559 (Blackmun, J., concurring in the judgment).

Joined by Justice Marshall, Justice Brennan dissented on three grounds: (1) the Pennsylvania Superior Court's opinion rested on an independent state ground; (2) the issue decided by the majority was not ripe for review; and (3) Finley had a due process and equal protection right to the procedures the Pennsylvania Superior Court had required her counsel to follow. *Id.* at 559–70 (Brennan, J., dissenting). Justice Stevens reasoned that because it was impossible to tell whether the Pennsylvania Superior Court's opinion rested on state or federal law, he would apply a presumption in favor of a state basis and therefore dismiss the grant of certiorari for want of jurisdiction. *Id.* at 570–72 (Steven, J., dissenting).

On remand, the Pennsylvania Superior Court held that the withdrawal by Finley's counsel satisfied state law. Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. Ct. 1988).

Professor Liebman notes, "*Dictum* aside, *Finley* did not present the question whether there is a constitutional right to appointment of counsel in some or all state postconviction proceedings." 1 JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 75 (1988).

[155] *Finley*, 481 U.S. at 555.

3. The Right to Counsel in Capital Postconviction Proceedings—Finley was not a death penalty case,[156] thus raising the question of whether a death row inmate has a constitutional right to postconviction counsel even if an inmate serving a life sentence does not. *Murray v. Giarratano*[157] resolved this issue.

Five months before the Supreme Court announced *Finley*, the Eastern Virginia District Court, in *Giarratano*, ruled on a class-action suit asserting that Virginia's death row inmates had a constitutional right to assistance of counsel during postconviction proceedings.[158] Rather than resolving the case on the basis of right to counsel case law, the district court relied primarily on *Bounds v. Smith*,[159] where the Supreme Court noted that states must "shoulder affirmative obligations to assure all prisoners meaningful access to the courts."[160] *Bounds* indicated that states could ensure "meaningful access" by providing inmates with "adequate law libraries or adequate assistance from persons trained in the law."[161] In *Giarratano*, the district court ruled that because death row inmates "are incapable of effectively using law books to raise their claims,"[162] Virginia must appoint counsel for these inmates.[163] However, the district court found that this constitutional right to appointed counsel applied only to state postconviction proceedings; the court ruled that the state need not provide this assistance to inmates seeking either review by the United States Supreme Court or federal habeas relief.[164]

On appeal, a divided panel of the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) reversed the portion

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[156] Finley was serving a life sentence for second-degree murder. *Id.* at 553.

[157] 492 U.S. 1 (1989).

[158] Giarratano v. Murray, 668 F. Supp. 511 (E.D. Va. 1986), *rev'd*, 836 F.2d 1421 (4th Cir.), *aff'd on rehear'g*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989).

[159] 430 U.S. 817 (1977).

[160] *Id.* at 824.

[161] *Id.* at 828.

[162] *Giarratano*, 668 F. Supp. at 513. Judge Merhige based this conclusion on three factors: (1) "the limited amount of time death row inmates may have to prepare and present their petitions to the courts;" (2) "the complexity and difficulty of the legal work itself;" and (3) "at the time the inmate is required to rapidly perform the complex and difficult work necessary to file a timely petition, he is the least capable of doing so" because he is "preparing himself and his family for impending death." *Id.*

[163] *Id.* at 515, 517. Virginia already had a statute under which counsel were appointed for state habeas petitioners who presented a nonfrivolous claim, but Judge Merhige found this to be insufficient. He reasoned that "the timing of the appointment is a fatal defect with respect to the requirement of *Bounds*. Because an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing his claims." Judge Merhige therefore required Virginia to appoint counsel *before* the inmate filed a state habeas petition. *Id.* at 515.

[164] *Id.* at 516.

of the district court's ruling that required Virginia to appoint counsel for death row inmates seeking state postconviction relief.[165] The panel reasoned that Virginia's prison libraries, as well as the availability of attorneys to advise prisoners in preparing postconviction petitions[166] and a state statute under which counsel were appointed for postconviction petitioners who raise nonfrivolous claims,[167] satisfied *Bounds's* "meaningful access" requirement.[168] The panel's majority also rejected the notion that a "separate panoply of additional constitutional standards only applicable to collateral challenges in death penalty cases" exists.[169]

The Fourth Circuit ordered a rehearing en banc and, in a six-to-four ruling, affirmed the district court.[170] Unlike the panel decision, the en banc opinion found *Finley* inapposite because it did not

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[165] Giarratano v. Murray, 836 F.2d 1421 (4th Cir.), *rev'd on rehear'g*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989). The panel affirmed the district court's ruling that the death row inmates did not have a right to appointment of counsel for assistance in preparing federal habeas petitions. *Id.* at 1427.

[166] The district court provided this analysis of the assistance available from the institutional attorneys:

> Currently there are seven institutional attorneys attempting to meet the needs of over 2,000 prisoners. No pretense is made by the defendants in this case that these few attorneys could handle the needs of death row prisoners in addition to providing assistance to other inmates. Although no institutional attorney has helped to prepare the habeas petition of a single death row inmate, the testimony at trial indicated that each attorney could not adequately handle more than one capital case at a time. Moreover, they are not hired to work full time; they split time between their private practice and their institutional work.
>
> Even if Virginia appointed additional institutional attorneys to service death row inmates, its duty under *Bounds* would not be fulfilled. The scope of assistance these attorneys provide is simply too limited. The evidence indicated that they do not perform factual inquiries of the kind necessitated by death penalty issues. They act only as legal advisors or, to borrow the phrase of one such attorney, as "talking lawbooks." Additionally, they do not sign pleadings or make court appearances.
>
> For death row inmates, more than the sporadic assistance of a "talking lawbook" is required to enable them to file meaningful legal papers. With respect to these plaintiffs, the Court concludes that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution.

668 F. Supp. at 514.

[167] *See supra* note 163.

[168] *Giarratano*, 836 F.2d at 1423.

[169] *Id.* at 1425. The panel majority also rejected the district court's grounds for concluding that mere access to a law library was insufficient to provide death row inmates with meaningful access to the courts. *Id.* at 1426–27.

[170] Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989). The en banc opinion was written by Judge Hall, who had dissented from the panel's reversal of the district court. *Giarratano*, 836 F.2d at 1428 (Hall, J., dissenting).

involve the *Bounds* requirement of meaningful access to courts.[171] "Most significantly," the opinion continued, "Finley did not involve the death penalty."[172] The Fourth Circuit reasoned that "[b]ecause of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney."[173]

The Supreme Court granted the state's certiorari petition[174] and reversed the Fourth Circuit's en banc ruling.[175] In an opinion written by Chief Justice Rehnquist, who also authored *Finley*, a four-Justice plurality rejected the proposition that death row inmates are constitutionally entitled to heightened postconviction procedural protections. While recognizing "that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death,"[176] the Court found that these constraints were unnecessary during collateral review.[177] Therefore, the plurality concluded, "*Finley* applies to those inmates under sentence of death as well as to other inmates, and that holding necessarily imposes limits on *Bounds*."[178]

Justice O'Connor joined in the plurality opinion and in Justice Kennedy's separate concurrence, as well as authoring her own concurring opinion that emphasized legislatures' roles in determining how to provide inmates with meaningful access to the courts.[179]

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[171] 847 F.2d at 1122. The panel majority had followed *Finley*, noting, "We are concerned here with the identical type of proceeding addressed in *Finley*, state habeas corpus, on the heels of a clear and recent statement by the Supreme Court that there is no previously established constitutional right to counsel in state habeas corpus proceedings." 836 F.2d at 1424.

[172] 847 F.2d at 1122.

[173] *Id.* at 1122 n.8.

[174] Murray v. Giarratano, 488 U.S. 923 (1988) (order granting certiorari).

[175] Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion).

[176] *Id.* at 8.

[177] *Id.* at 9–10. The plurality concluded:

> State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.

Id. at 10 (footnote omitted).

[178] *Id.* at 12.

[179] Justice O'Connor's concurring opinion noted:

> [*Bounds*] allows the States considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process.

Justice Kennedy did not join the plurality opinion, but provided the fifth vote for reversing the Fourth Circuit's en banc decision.[180] He posited that "collateral relief proceedings are a central part of the review process for prisoners sentenced to death," and observed that "a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings."[181] He also recognized that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[182] However, he found that *Bounds's* "meaningful access" requirement "can be satisfied in various ways," and that "state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions."[183] After noting that "Congress has stated its intention to give" habeas review of capital cases "serious consideration," Justice Kennedy concluded:

> Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us. While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.[184]

Justice Stevens authored a dissenting opinion that Justices Brennan, Marshall, and Blackmun joined.[185] The dissent concluded that "even if it is permissible to leave an ordinary prisoner to his own resources in collateral proceedings, it is fundamentally unfair to require an indigent death row inmate to initiate collateral review without counsel's guiding hand."[186]

> Beyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources. Our decision today rightly leaves these issues to resolution by Congress and the state legislatures.

Id. at 13 (O'Connor, J., concurring).

[180] *Id.* at 14 (Kennedy, J., concurring in the judgment).

[181] *Id.*

[182] *Id.*

[183] *Id.* (quoting Bounds v. Smith, 430 U.S. 817, 833 (1977)).

[184] 492 U.S. at 14-15. For an analysis of Justice Kennedy's concurrence, see Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 53-54 n.189 (1990).

[185] 492 U.S. at 15 (Stevens, J., dissenting).

[186] *Id.* at 19-20. Justice Stevens pointed to the 60-70% success rate for federal

While six Justices agreed that it is at least "unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law,"[187] five Justices agreed that an actual appointment of counsel to represent the death row inmates was not constitutionally required.

A report of the American Bar Association's Criminal Justice Section emphasized that the *Giarratano* plurality's view of the right to counsel "is *not a holding of the Court*."[188] The Court has treated it as if it were. Two years after *Giarratano*, in *Coleman v. Thompson*,[189] a six-Justice majority observed that "[t]here is no constitutional right to an attorney in state post-conviction proceedings," and parenthetically noted that *Giarratano* "appl[ies] the rule to capital cases."[190] The *Coleman* majority also commented that "*Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings."[191]

The *Coleman* majority left open a possibility that, in some cases, a constitutional right to counsel in state postconviction pro-

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habeas petitioners in capital cases and opined, "Such a high incidence of uncorrected error demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate process." *Id.* at 24 (citing Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520–21 (1988); John C. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. ASS'N B. CITY N.Y. 859, 873 (1987) (estimating that within the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit), federal habeas petitioners succeed in one-third to one-half of all capital cases)). Justice Stevens also noted that in Virginia, postconviction proceedings were the first opportunity for the defendant to raise some issues, such as ineffective assistance of counsel. *Id.* at 24. These postconviction proceedings "are the cornerstone for all subsequent attempts to obtain collateral review," he argued, because once a state court "determines that a claim is procedurally barred, a federal court may not review it unless the defendant can make one of two difficult showings: that there was both cause for the default and resultant prejudice, or that failure to review will cause a fundamental miscarriage of justice." *Id.* at 26.

The dissent also relied on the district court's finding that death row inmates are incapable of obtaining meaningful access to the courts through access to a prison law library. *Id.* at 27–28.

[187] *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the result).

[188] ABA Background Report, *supra* note 28, at 90.

[189] 111 S. Ct. 2546 (1991). Like Giarratano, Coleman was a Virginia death row inmate. Amid continuing controversy concerning his guilt or innocence, Coleman was electrocuted on May 20, 1992. Peter Applebome, *Virginia Execution Highlighted Politics of Death*, N.Y. TIMES, May 29, 1992, at B9. Giarratano, on the other hand, received a conditional pardon. *See generally* John F. Harris, *Terry Rules Out New Trial for Pardoned Killer*, WASH. POST, Feb. 21, 1991, at B3. The other two death row inmates named as parties in *Giarratano* were electrocuted. *259th Electrocution Could Be Last One in Virginia History*, N.Y. TIMES, Mar. 5, 1994, at 6 (reporting Johnny Watkins' execution); *Virginia Executes Man for Murder*, N.Y. TIMES, July 21, 1990, at 9 (reporting Richard T. Boggs's execution).

[190] 111 S. Ct. at 2566. *Coleman*'s citation to *Giarratano* failed to note that *Giarratano* was a plurality opinion. *Id.*

[191] *Id.* at 2567.

ceedings might exist. "For Coleman to prevail," the Court opined "there must be an exception to the rule in *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."[192] The Court felt it unnecessary, however, to resolve that issue in *Coleman*.

Under this *dicta*, a confined service member may enjoy a constitutional right to counsel to present a claim that was not raised during direct appeal and that falls within the cause and prejudice exception to the waiver rule.[193] Even where cause for failure to raise an issue during direct review exists,[194] however, the Supreme Court's decision in *Noyd v. Bond*[195] indicates that the federal district court should apply the exhaustion requirement to mandate that the petitioner seek extraordinary relief within the military justice system before turning to the Article III judiciary. While the Kansas District Court has not always followed this rule,[196] unless the gov-

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[192] *Id.*

[193] *See supra* note 102 and accompanying text.

[194] Despite the cause and prejudice standard's general narrowness, the Supreme Court has recognized that "[a]ttorney error that constitutes ineffective assistance of counsel is cause." *Coleman*, 111 S. Ct. at 2567; *accord* Murray v. Carrier, 477 U.S. 478, 488 (1986).

[195] 395 U.S. 683 (1969). *Noyd* held that to apply for habeas relief from the Article III judiciary, an incarcerated service member first must seek extraordinary relief from the CAAF. *Id.* at 695-98. In an intriguing footnote, the Court commented that the service member need not seek extraordinary relief from the Air Force Board of Review because there had been no showing that the Boards of Review had power to issue writs. *Id.* at 698 n.11. The Boards' successors, the Courts of Military Review (now the Courts of Criminal Appeals), do have this power. Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979). The exhaustion requirement may now mandate a request for extraordinary relief from the appropriate Court of Criminal Appeals as well.

[196] The Kansas District Court has considered, for example, allegations of ineffective assistance of counsel that never were raised before any military court in any context. One recent example is Kennett v. Hart, No. 90-3459-RDR, 1993 U.S. Dist. LEXIS 9648 (D. Kan. June 18, 1993), in which the district court reasoned:

> Although petitioner did not raise the issue of ineffective assistance of appellate counsel in the military courts, the court notes that collateral review is frequently the only means through which an accused can effectuate the right to counsel. Kimmelman v. Morrison, 477 U.S. 365, 378 (1986). A criminal defendant may be unaware that he has been incompetently represented until after trial or appeal. *Id.* The court, consequently will address petitioner's claim of ineffective assistance of appellate counsel.

Id. at *5. *But see* Bramel v. Hart, No. 91-3186-AJS, 1993 U.S. Dist. LEXIS 18600, at *7 (D. Kan. Nov. 30, 1993) (refusing to review military petitioner's ineffective assistance of counsel claim raised for the first time on federal habeas).

In *Kimmelman*, however, before entering federal court, the petitioner sought postconviction relief from the New Jersey Superior Court. 477 U.S. at 371. Of course, no postconviction procedure exists in the military justice system. *See* United States v. Polk, 32 M.J. 150, 152 (C.M.A. 1991). Nevertheless, the CAAF has fashioned an alternative to the postconviction procedure. United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967) (allowing appellate military courts to order evidentiary hear-

ernment waives the exhaustion requirement,[197] no military petitioner's claim should ever arise for the first time before a federal habeas court. Therefore, while *Coleman* may have left open the possibility of a constitutional right to counsel in a small class of collateral proceedings, for the condemned service member that right would apply to extraordinary relief litigation within the military justice system rather than to federal habeas corpus proceedings.

4. The Constitutional Recognition of Habeas Review for Those Under Federal Custody–The Supreme Court's opinions in *Finley*, *Giarratano*, and *Coleman* all deal with the right to counsel in state postconviction proceedings.[198] Case law from the federal courts of appeals has rejected a constitutional right to counsel during federal habeas proceedings as well.[199] This conclusion finds support in Supreme Court *dicta*. In *McCleskey v. Zant*,[200] the Court noted that "[a]pplication of the cause and prejudice standard in the abuse of the writ context does not . . . imply that there is a constitutional right to counsel in federal habeas corpus"[201] and repeated that "the right to appointed counsel extends to the first appeal of right, and no further."[202]

Those cases are distinguishable, however, from a federal habeas corpus action challenging federal proceedings, including courts-martial. In addition to holding that state postconviction proceedings are not constitutionally required,[203] the Supreme Court has

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ings). In accordance with *Noyd*, the exhaustion requirement would appear to mandate that an incarcerated service member seek extraordinary relief from a military appellate court, which then could order a *DuBay* hearing if appropriate, before the service member seeks habeas relief in a federal district court.

[197] The government may waive the exhaustion requirement. Granberry v. Greer, 481 U.S. 129, 134 (1987). However, the court can refuse to accept this waiver. *Id.* at 134–35. The ABA "encourages the states to have a publicly stated policy of waiving exhaustion in capital cases and encourages a willingness on the part of the federal courts generally to honor such waivers." Criminal Justice Section Report, *supra* note 131, at 37 (footnotes omitted).

[198] The district court and circuit court opinions in *Giarratano* also considered the right to counsel in federal habeas proceedings. *See supra* notes 164–65 and accompanying text.

[199] *See, e.g.*, Brown v. Vasquez, 952 F.2d 1164, 1168 (9th Cir., 1991), *cert. denied*, 112 S. Ct. 1778 (1992); Hooks v. Wainwright, 775 F.2d 1433, 1438 (11th Cir. 1985); Williams v. Missouri, 640 F.2d 140, 143 (8th Cir.), *cert. denied*, 451 U.S. 990 (1981); Ardister v. Hopper, 500 F.2d 229, 233 (5th Cir. 1974); Hopkins v. Anderson, 507 F.2d 530, 533 (10th Cir. 1974). In *Giarratano*, both the district court and the Fourth Circuit en banc rejected a constitutional right to federal habeas counsel while finding a constitutional right to counsel during state postconviction proceedings. *Giarratano*, 847 F.2d at 1122; *Giarratano*, 668 F. Supp. at 516–17.

[200] 499 U.S. 467 (1991).

[201] *Id.* at 495.

[202] *Id.* (quoting Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)).

[203] *Finley*, 481 U.S. at 557; *see also* United States v. MacCollom, 426 U.S. 317, 323 (1976) (plurality opinion).

held that the Constitution does not mandate federal habeas corpus review of state criminal proceedings at all.[204] Habeas review of federal proceedings, on the other hand, receives constitutional recognition from the Suspension Clause, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[205] The Supreme Court has recognized that this clause provides constitutional protection to habeas corpus review of military tribunals.[206]

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[204] Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917) (ruling that "Section 9 of Article I, as has long been settled, is not restrictive of state, but only of national, action."); *accord* Geach v. Olsen, 211 F.2d 682 (7th Cir. 1954); Giarratano v. Murray, 492 U.S. 1, 10 (1989) (noting that "[s]tate collateral proceedings are not constitutionally required"). *See also* Harvey v. South Carolina, 310 F. Supp. 83, 85 (D.S.C. 1970) (citing *Gasquet* and *Geach* for the proposition that Article I, Section 9 of the United States Constitution does not apply to the states, but deciding the case on other grounds). The Department of Justice's Office of Legal Policy argued:

> [T]he right to habeas corpus set out in the Constitution was only intended as a check on abuses of authority by the federal government, and was not meant to provide a judicial remedy for unlawful detention by state authorities. This point is evident, to begin with, from the placement of the Suspension Clause in Section 9 of Article I of the Constitution, which is an enumeration of limitations on the power of the federal government. The corresponding enumeration of restrictions on state authority in Section 10 of Article I contains no right to habeas corpus.
>
> The same understanding was evident in the debate over the Suspension Clause at the constitutional convention. There was no dissent from the desirability of protecting the right to habeas corpus from federal interference, but the convention divided on whether a proviso should be stated to this general principle that would enable the federal government to suspend the writ in emergency situations. It was assumed in the debate at the convention that the states would remain free to suspend the writ even if the Suspension Clause were adopted in an unqualified form, and it was argued unsuccessfully that this made federal suspension power unnecessary. Shortly after the ratification of the Constitution, the First Congress in 1789 made the restriction of the federal habeas corpus right to federal prisoners explicit . . . in the First Judiciary Act (ch. 14, § 20, 1 Stat. 81–82) . . . .

OFFICE OF LEGAL POLICY, DEP'T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS 5 (1988). *See also* AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT ON HABEAS CORPUS IN CAPITAL CASES, *reprinted in* 45 Crim. L. Rep. (BNA) 3239, 3240 n.2 (Sept. 27, 1989) ("[T]he Constitution does not provide for federal habeas review of state court decisions. The writ of habeas corpus available to state prisoners is not that mentioned in the Constitution. It has evolved from a statute enacted by Congress in 1867, now codified at 28 U.S.C. § 2254.").

Justice Douglas noted that in spite of *Gasquet*, he "incline[d] to the view that this prohibition applies to the States as well as to the Federal Government." California v. Alcorcha, 86 S. Ct. 1359, 1361 (Douglas, Circuit Justice 1966).

[205] U.S. CONST. art. I, § 9, cl. 2. This provision "is the only place in the Constitution in which the Great Writ is mentioned." CONGRESSIONAL RESEARCH SERVICE, *supra* note 4, at 376.

[206] In re Yamashita, 327 U.S. 1, 9 (1946). *See also* Scaggs v. Larsen, 396 U.S. 1206, 1208 (Douglas, Circuit Justice 1969).

In rejecting the asserted constitutional right to appointed counsel, both the *Finley* majority[207] and the *Giarratano* plurality[208] relied on the lack of a constitutional requirement for state postconviction proceedings. Justice O'Connor's *Giarratano* concurring opinion also emphasized that "[n]othing in the Constitution requires the States to provide such proceedings."[209] Because the Suspension Clause implicitly requires habeas corpus review of federal convictions, that portion of the *Finley* majority and *Giarratano* plurality rationale is inapposite to a service member seeking habeas relief. A confined service member, therefore, has a stronger argument for a constitutional right to counsel than did Finley and a service member on death row has a stronger argument than did Giarratano. The *Giarratano* plurality's conclusion that the Eighth Amendment does not require heightened protections during collateral review of death penalty cases[210] did not carry a majority of the Justices; Justice Kennedy's separate concurrence actually appears to conflict with that conclusion.[211] Accordingly, a military capital habeas petitioner can advance an unresolved constitutional argument supporting the appointment of counsel.

While not considering the Suspension Clause, the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) recently declined to find a constitutional right to counsel during collateral review of federal convictions.[212] Holding that no constitutional right to counsel exists when federal inmates attack their sentence under 28 U.S.C. § 2255, the Seventh Circuit reasoned that a § 2255 action "is not part of the original criminal proceeding; it is an independent civil suit. Because it is civil in nature, a petitioner under § 2255 does not have a constitutional right to counsel."[213] The Seventh Circuit

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[207] 481 U.S. at 557.

[208] 492 U.S. at 103.

[209] *Id.* at 13 (O'Connor, J., concurring).

[210] *Id.* at 9.

[211] *Id.* at 14 (Kennedy, J., concurring in the result). Justice Kennedy's opinion began, "It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Id.* He noted Justice Stevens's observation that "a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings" and added, "The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id.*

[212] Oliver v. United States, 961 F.2d 1339, 1343 (7th Cir.), *cert. denied*, 113 S. Ct. 469 (1992) (holding that an action under 28 U.S.C. § 2255 "is an independent civil suit for which there is no constitutional right to appointment of counsel"); Rauter v. United States, 871 F.2d 693, 695 (7th Cir. 1989). *See also* United States v. Barnes, 662 F.2d 777, 780 (D.C. Cir. 1980) (noting that "the Sixth Amendment does not apply to section 2255 proceedings, which are civil in nature.").

[213] *Rauter*, 871 U.S. at 695.

added parenthetically, "There is little doubt that there is no constitutional right to appointed counsel in a civil case."[214]

However, the Seventh Circuit's reasoning is flawed. The Supreme Court has specifically rejected the proposition that the constitutional right to appointed counsel turns on a distinction between civil and criminal proceedings: "[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel . . . even though proceedings may be styled 'civil' and not 'criminal.'"[215] Consequently, even apart from questions about whether a postconviction proceeding is characterized properly as a civil matter,[216] the right to appointed counsel cannot be ruled out on this ground alone.

Nevertheless, any attempt to use the Suspension Clause to establish a constitutional right to appointed counsel would likely fall prey to the Supreme Court's oft-repeated *dicta* that "the right to appointed counsel extends to the first appeal of right, and no further."[217] While no Supreme Court holding on the right to habeas counsel for a prisoner under federal custody exists, the handwriting is on the wall.

C. Statutory Authority for a Right to Appointed Counsel During Federal Habeas Review of Capital Cases

In the absence of a constitutional right to appointed counsel during habeas review of death penalty cases, the focus turns to statutory protections. While the UCMJ provides a right to counsel at

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[214] *Id.* (quoting Caruth v. Pinkney, 683 F.2d 1044, 1048 (7th Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1214 (1983)).

[215] Lassiter v. Department of Social Services, 452 U.S. 18, 25 (1981).

[216] *See infra* notes 344-45 and accompanying text. Interestingly, the Rules Governing Section 2255 Proceedings provide:

> If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

R. GOV. § 2255 CASES IN U.S. DIST. CTS. 12. The Rules Governing Section 2254 Proceedings, on the other hand, provide: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." R. GOV. § 2254 CASES IN U.S. DIST. CTS. 11; *see also* FED. R. CIV. P. 81(a)(2) (noting that the Federal Rules of Civil Procedure "are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.").

[217] McCleskey v. Zant, 499 U.S. 467, 495 (1991) (quoting Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)).

trial,[218] on appeal,[219] and before the Supreme Court,[220] the UCMJ is silent on the question of counsel during habeas review by Article III courts. Because no military-specific statutory right to counsel exists, the condemned service member must look for this right in statutes of general applicability.

1. The Anti-Drug Abuse Act of 1988—Nine days before the Supreme Court granted certiorari in *Murray v. Giarratano*, Congress passed a statute that included a right to counsel during federal habeas corpus review of capital cases.[221] In addition to authorizing the death penalty for certain drug-related murders,[222] the Anti-Drug Abuse Act of 1988 provides:

> [(q)](4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either–
>
> (i) before judgment; or
> (ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;
>
> shall be entitled to the appointment of one or more attorneys and the furnishing of other services in accordance with [specified requirements concerning the attorneys' experience and procedures for obtaining expert assistance]. [(q)(4)](B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in

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[218] UCMJ art. 27, 10 U.S.C. § 827.

[219] UCMJ art. 70(c), 10 U.S.C. § 870(c).

[220] *Id.*

[221] The Senate's final passage of the Anti-Drug Abuse Act of 1988 occurred early in the morning of October 22, 1988. 134 CONG. REC. 32,678. The bill's passage was literally the last action before the 100st Congress adjourned *sine die*. *Id.* The rush to enact the legislation was so great that the bill "was not in print until after it had been approved." Marcia Coyle, *The Drug Bill's Secret Provision*, NAT'L L.J., Feb. 20, 1989, at 3, 22. President Reagan signed the bill into law on November 18, 1988. Remarks on Signing the Anti-Drug Abuse Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1521 (Nov. 18, 1988). The Supreme Court granted certiorari in *Giarratano* on October 31, 1988. 488 U.S. 923 (1988).

[222] 21 U.S.C.A. § 848(e) (West Supp. 1994).

> accordance with [specified requirements concerning the attorneys' experience and procedures for obtaining expert assistance].[223]

Counsel appointed under this provision are specifically exempted from the normal maximum compensation rates and limits on expert and investigative assistance; appointing courts have discretion to set appropriate fees.[224] The Judicial Conference has recommended that attorneys appointed under this provision receive an hourly rate between $75 and $125.[225] The Anti-Drug Abuse Act also sets minimum qualifications for appointed counsel.[226]

Subsection 848(q)(4)(B) of the Anti-Drug Abuse Act, which applies to collateral review under 28 U.S.C. §§ 2254 and 2255, does not establish a right to appointed counsel for a condemned service member seeking federal habeas review.[227] Under 28 U.S.C. § 2254, federal courts are authorized to issue writs of habeas corpus to prisoners under state convictions. A petitioner confined as a result of a military death sentence clearly does not fall under that provision.

Title 28, section 2255 establishes the right to a federal postconviction proceeding for prisoners sentenced by "a court established by Act of Congress."[228] Federal prisoners seek postconviction relief under this provision "in lieu of a petition for the writ of habeas corpus."[229] If a court-martial is "a court established by Act of Con-

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[223] 21 U.S.C.A. § 848(q).

[224] 21 U.S.C.A. § 848(q)(10).

[225] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL DEFENDER SERVICES: A STATUS REPORT 2 (1993) [hereinafter ADMINISTRATIVE OFFICE OF U.S. COURTS].

[226] 21 U.S.C.A. § 848(q)(5), (6).

[227] On the final day of its 1993 Term, the Supreme Court broadly construed subsection 848(q)(4)(B) to permit the appointment of counsel before an inmate files a habeas corpus petition, thus enabling the appointed counsel to assist in drafting the petition. McFarland v. Scott, 114 S. Ct. 2568, 2572-73 (1994); *see also id.* at 2574 (O'Connor, J., concurring/dissenting). *McFarland* also held that federal courts have the power to issue stays of execution on the condemned inmate's request for counsel. 114 S. Ct. at 2573.

[228] 28 U.S.C. § 2255 (1988); *cf.* 28 U.S.C. § 451 (1988) (defining "court of the United States" to include "any court created by Act of Congress the judges of which are entitled to hold office during good behavior").

[229] LARRY W. YACKLE, POSTCONVICTION REMEDIES 154 (1981). Before 1948, 28 U.S.C. § 2241 served as federal prisoners' avenue for postconviction proceedings. That system proved undesirable, however, because prisoners filed their petitions in the district court having jurisdiction over their confinement facility.

> That, of course, meant the court nearest the institution where the prisoner was confined. In rather short order, district courts sitting next to large federal penitentiaries were swamped with applications. At the same time, district courts sitting elsewhere rarely heard from a prisoner after sentencing. Not only did courts near institutions receive more than their share of cases, but the fair disposition of those cases was often difficult. At a minimum, the federal habeas court had to obtain the files

gress," as *dicta* in one CAAF decision indicates,[230] then this section would appear to provide a military prisoner with a potential postconviction remedy. This appearance, however, would be deceiving. Postconviction proceedings under 28 U.S.C. § 2255 are brought in "the court which imposed the sentence."[231] Accordingly, the section would not provide convicted service members with a vehicle for entering federal district court to attack their convictions. Nor would this section actually enable a service member to launch a collateral attack at the court-martial level because "no proceeding in revision may be held when any part of the sentence has been ordered executed."[232] A condemned service member cannot rely on subsection 848(q)(4)(B) of the Anti-Drug Abuse Act.

What of subsection 848(q)(4)(A), which mandates the appointment of counsel for indigent defendants "in every criminal action in which a defendant is charged with a crime which may be punishable

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and records of the cases from the trial court. When evidentiary hearings were necessary, witnesses, perhaps including the trial judge, were often forced to travel great distances in order to testify.

YACKLE, *supra*, at 153. "[T]he motion under section 2255 has essentially displaced habeas corpus as a collateral remedy for constitutional error in federal criminal prosecutions." *Id.* at 154. *See generally* LIEBMAN, *supra* note 154, at ch. 36.

[230] United States v. Soriano, 20 M.J. 337, 341 (C.M.A. 1985) ("A court-martial is not the personal feifdom of the trial judge but is a court established by Act of Congress."); *but see* Newsome v. McKenzie, 22 C.M.A. 92, 93, 46 C.M.R. 92, 93 (1973) (Duncan, J., dissenting) ("Inasmuch as courts-martial, while authorized by legislative enactment, are established by order of military commanders, it may be argued that these courts are not courts established by act of Congress . . . ."); Burke v. United States, 103 A.2d 347, 349–50 (D.C. 1954) (holding that because District of Columbia Juvenile Court judges do not enjoy life tenure, the Juvenile Court does not qualify as a "court established by Act of Congress" for purposes of 28 U.S.C. § 2265); Ingols v. District of Columbia, 103 A.2d 879, 880 (D.C. 1954) (applying *Burke* to hold that the District of Columbia Municipal Court is not a "court established by Act of Congress" for purposes of 28 U.S.C. § 2255).

18 U.S.C. § 3568 supports the proposition that a court-martial is a court established by Act of Congress. That statute includes this definition: "As used in this section, the term 'offense' means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress." 18 U.S.C. § 3568 (1988). If Congress did not include courts-martial within the class of courts established by Act of Congress, then to specifically exclude military tribunals from the statute's scope would have been unnecessary. *See also* Krause v. United States, 7 M.J. 427, 429 (C.M.A. 1979) (Perry, J., dissenting) (opining that 28 U.S.C. § 2255 provides the CAAF with authority to order postconviction relief); United States v. Armes, 42 C.M.R. 438 (A.C.M.R. 1970) (holding that 28 U.S.C. § 2255 does not give the Army Court of Criminal Appeals jurisdiction to order relief including a medical discharge and a determination of a service-connected disability).

[231] 28 U.S.C. § 2255 (1988); *see also* Chatman v. Hernandez, 805 F.2d 453, 455 (1st Cir. 1986) (concluding that Article 76 of the UCMJ deprives Article III courts of "jurisdiction to entertain an action under Section 2255 which challenges a military conviction").

[232] MCM, *supra* note 19, R.C.M. 1102(d).

by death''? This provision is enigmatic.[233] It could be read broadly to apply to every federal, state, and military capital prosecution, or it could be read more narrowly to apply to only federal death penalty proceedings, or it could be read more narrowly still to apply to only death penalty cases tried in federal district courts.

Resolving the uncertainty over the subsection's scope is difficult because the Anti-Drug Abuse Act's counsel provisions have scant legislative history. ''No Senate or House Report was submitted with'' the Anti-Drug Abuse Act.[234] The subsection's entire legislative history consists of one brief debate in the House of Representatives. Representative Conyers (D-Michigan) proposed what would become subsection 848(q)(4)(A) as an amendment to H.R. 5210, which would become the Anti-Drug Abuse Act of 1988.[235] He and Representative Gekas (R-Pennsylvania) discussed the proposal on the House floor, but focused their remarks on the counsel qualification provision and the ''good cause'' exception to those qualifications.[236] Following that brief exchange, the House adopted Representative Conyers's amendment without further discussion.[237] The Representatives' comments shed no light on Congress's view of subsection 848(q)(4)(A)'s breadth.

In addition to a lack of legislative history, ''[T]here is a paucity of cases concerning application of this statute.''[238] Only one published opinion has addressed subsection 848(q)(4)(A)'s limits.[239] In *Wainwright v. Norris*,[240] two lawyers represented an Arkansas

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[233] *See* Millemann, *supra* note 133, at 503 (noting, ''The Act also provides, somewhat enigmatically, that 'in *every criminal action in which a defendant is charged with a crime which may be punishable by death*,' an indigent defendant is entitled to the appointment of counsel whether the need arises before or after judgment.'').

[234] 1988 U.S.C.C.A.N. 5937 (1988). *See also* Coyle, *supra* note 221 (describing the development of the Anti-Drug Abuse Act's counsel provisions).

[235] 134 CONG. REC. 22,995 (1988).

[236] *Id.* at 22,996-97.

[237] *Id.* at 22,997.

[238] Wainwright v. Norris, 836 F. Supp. 619, 621 (E.D. Ark. 1993).

[239] Other cases have rejected state death row inmates' attempts to secure federally-funded counsel during state postconviction review through 21 U.S.C. § 848(q)(4)(B). *See, e.g.*, Hill v. Lockhart, 992 F.2d 801 (9th Cir. 1993); In re Lindsey, 875 F.2d 1502 (11th Cir. 1989). In a recent dissenting opinion, Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) quoted § 848(q)(4)(A), but altered the subsection's language to read, ''An indigent defendant 'charged with a [federal] crime which may be punishable by death' may obtain 'representation [and] investigative, expert, or other reasonably necessary services' both 'before judgment' and 'after the entry of a judgment imposing a sentence of death but before the execution of that judgment.''' McFarland v. Scott, 114 S. Ct. 2568, 2578 (1994) (Thomas, J., dissenting) (alterations in original). The opinion provides no justification for reading the limitation ''federal'' into subsection (q)(4)(A).

[240] 836 F. Supp. 619 (E.D. Ark. 1993).

death row inmate in a state postconviction proceeding. After the Arkansas Supreme Court denied their motion for attorney fees, the lawyers petitioned the United States District Court for the Eastern District of Arkansas for attorney fees resulting from both federal habeas litigation and the state postconviction proceeding. The district court reviewed the Anti-Drug Abuse Act's counsel appointment provisions and noted:

> Paragraph (4)(a) does not limit itself to potential capital cases arising under federal law, but instead broadly declares itself applicable to "every criminal action arising in which a defendant is charged with a crime which may be punishable by death . . ." "(n)otwithstanding any other provision of law to the contrary." This would seem on its face to apply to state capital cases as well as federal. However, the provisions for appointment of counsel were enacted as part of a new statute providing for the death penalty under federal law and it seems clear that Congress intended the quoted language to apply to federal capital crimes. Issues of federalism would prevent Congress from regulating state procedures by enacting a federal statute and this Court does not believe that Congress intended to so attempt here.[241]

Similarly, the Administrative Office of the United States Courts has rejected a broad reading of subsection 848(q)(4)(A) of the Anti-Drug Abuse Act, concluding that the subsection authorizes compensation from Criminal Justice Act (CJA) funds for "representation provided only in connection with proceedings in Federal court."[242]

A familiar rule of statutory construction lends additional support to the narrow interpretation of subsection 848(q)(4)(A). The Supreme Court has expressed "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment."[243] If subsection 848(q)(4)(A) were construed to

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[241] *Id.* at 621 (alterations in original). After expressing great concern over Arkansas's failure to ensure appointment of counsel for death row inmates during postconviction review and praising the two counsel involved for their performance, the Arkansas District Court ruled that it did "not have the authority to provide a monetary remedy for the state's omission by providing federal funding for state procedures." *Id.* at 623-24. The court did, however, "authorize payment for all the work conducted for the federal habeas petition." *Id.* at 624.

[242] Memorandum from Administrative Office of the United States Courts to All Judges & Clerks (Apr. 14, 1989) (quoted in Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 318 n.141 (1991)).

[243] Pennsylvania Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990). *See generally* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992) [hereinafter SUTHERLAND'S STATUTORY CONSTRUCTION].

apply to all death penalty cases, including state cases, then it would entirely subsume subsection 848(q)(4)(B). Both of the procedures described in subsection (q)(4)(B)—habeas petitions under 28 U.S.C. § 2254 and postconviction proceedings under 28 U.S.C. § 2255—would be included in subsection (q)(4)(A)(ii)'s provision for counsel "after the entry of a judgment imposing a sentence of death but before the execution of that judgment." On the other hand, under the *Norris* construction, the two subsections overlap somewhat,[244] but not entirely; neither provision is wholly superfluous. Consequently, the *Norris* construction is preferable to the broader construction.

The federalism concerns in *Norris* are absent when determining subsection 848(q)(4)(A)'s applicability to collateral attacks against capital courts-martial; indeed, Congress has express constitutional authority over the military justice system.[245] However, if *Norris* and the Administrative Office of United States Courts are correct in determining that the provision does not apply to death penalties imposed by state courts, then the question becomes whether Congress intended subsection 848(q)(4)(A) to apply to all federal proceedings or only those in federal district courts.

Subsection 848(q)(4)(A) is part of a larger section that establishes a new death penalty offense triable in federal district courts. "A statute is passed in whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole."[246] The statutory section that enacted subsection 848(q)(4)(A), entitled, "Death Penalty for Drug-Related Killings," contained thirteen subsections.[247] The ten subsections immediately preceding subsection (q) prescribe the procedures for implementing the death penalty established by that section.[248] Subsection (q)(1) expressly refers to death sentences "imposed under this section."[249] While subsection (q)(4)(A) contains no similar words of limitation, its context suggests that the subsection applies to all death sentences *imposed by federal district courts*. Nothing in the section indicates that Congress contemplated that any of its provisions would apply to death sentences imposed by courts-martial. Indeed, by referring to the statutory

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[244] Under the *Norris* court's interpretation, both subsections would provide for the appointment of counsel for a federal death row inmate pursuing a 28 U.S.C. § 2255 postconviction proceeding.

[245] U.S. CONST. art. I, § 8, cl. 14.

[246] SUTHERLAND'S STATUTORY CONSTRUCTION, *supra* note 243, at 103.

[247] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4395 (codified at 21 U.S.C.A. § 848).

[248] *Id.* (codified at 21 U.S.C.A. § 848(g)-(p)).

[249] *Id.* (codified at 21 U.S.C.A. § 848(q)(1)).

basis for collaterally attacking state and federal convictions but not to the statutory basis for collaterally attacking a court-martial conviction,[250] subsection 848(q)(4)(B) strongly suggests that Congress did not intend the section to apply to military capital cases.

While the issue certainly is not free from doubt, federal courts are unlikely to hold that the Anti-Drug Abuse Act created a statutory right to counsel during federal habeas review of a military death sentence. The Act's sparse legislative history provides no suggestion of why Congress would have denied the Act's protections to military death row inmates. Regardless of the reason for this statutory gap, however, the indigent military death row inmate must look elsewhere for a right to appointed counsel during federal habeas review.

2. The Criminal Justice Act–Before Congress adopted the Anti-Drug Abuse Act of 1988, the CJA was the main vehicle for appointment of federal habeas counsel.[251] Unlike the Anti-Drug Abuse Act, the Criminal Justice Act specifically authorizes appointment of counsel for indigent petitioners "seeking relief under [28 U.S.C.] section 2241,"[252] thus covering incarcerated service members. However, this appointment is discretionary. The Act provides for appointment on a determination "that the interests of justice so require."[253] "[E]ven for a death row inmate," appointment "is not mandatory or automatic."[254]

Courts must appoint counsel for indigent habeas petitioners in two situations: (1) "If necessary for effective utilization of discovery procedures;"[255] or (2) "If an evidentiary hearing is required . . . ."[256] Like subsection 848(q)(4)(B) of the Anti-Drug Abuse Act, however, these congressionally-enacted requirements apply only to actions under 28 U.S.C. §§ 2254 and 2255; in proceedings under 28 U.S.C. § 2241, the requirements "may be applied at the discretion of the United States district court."[257]

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[250] *See supra* notes 228–32 and accompanying text.

[251] 18 U.S.C. § 3006A (1988). *See* Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1678 (1990); *see generally* Arthur W. Ruthenbeck, *You Don't Have to Lose Your Shirt on Death Penalty Cases*, CRIM. JUST., Spring 1988, at 10. The Tenth Circuit has held that habeas counsel cannot be appointed under the Equal Access to Justice Act, 28 U.S.C. § 2412(b). Ewing v. Rodgers, 826 F.2d 967 (10th Cir. 1987).

[252] 18 U.S.C. § 3006A(a)(2)(B).

[253] *Id.* § 3006A(2).

[254] Ruthenbeck, *supra* note 251, at 42.

[255] R. Gov. § 2254 CASES IN U.S. DIST. CTS. 6(a); R. GOV. § 2255 CASES IN U.S. DIST. CTS. 6(a).

[256] R. Gov. § 2254 CASES IN U.S. DIST. CTS. 8(c); R. GOV. § 2255 CASES IN U.S. DIST. CTS. 8(c).

[257] R. Gov. § 2254 CASES IN U.S. DIST. CTS. 1(b).

Before the Anti-Drug Abuse Act mandated appointment of counsel in federal habeas review of state death penalty cases, courts generally "endorsed the appointment of counsel to represent indigent" state death row inmates.[258] Federal district courts sometimes declined, however, to appoint counsel for death row inmates seeking habeas relief.[259]

The CJA includes provisions governing appointed counsel's compensation and reimbursement of expenses.[260] The compensation level, however, is quite low. The Act's current maximum hourly remuneration rate is sixty dollars for in-court time and forty dollars for out-of-court time, although the Judicial Conference can set a higher hourly rate of up to seventy-five dollars for a particular district or circuit.[261] The Act also establishes a cap on the total amount that can be paid to an appointed counsel.[262]

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[258] LIEBMAN, *supra* note 154, at 170.

[259] *See, e.g.*, Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987) (holding that a federal district court did not abuse its discretion in denying a state death row inmate's request for appointed counsel for federal habeas review, but ordering appointment of counsel on remand in view of the increased "complexities of the issues with which the district court must deal on remand" and "the fact that this is a death penalty case"). In one case, the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) ruled that the denial of counsel in a habeas review of a capital case constituted an abuse of discretion. Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990).

[260] 18 U.S.C.A. § 3006A(d)(1) (West Supp. 1994).

[261] *Id.* The Administrative Office of United States Courts notes, "Because of insufficient funds in the judiciary's Defender Services appropriation, alternative rates (above the $60/$40 rate) are being paid in only 16 districts, and increases based on federal cost-of-living increases have not been implemented at all." ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 225, at 2.

[262] Courts have differed over whether habeas cases are governed by the cap for "representation of a defendant before the United States . . . district court," (currently $3500 per attorney per case), 18 U.S.C.A. § 3006A(d)(2), or the cap for "any other representation required or authorized by" the Criminal Justice Act (currently $750 per proceeding), *Id.* The Eighth Circuit favors the former interpretation of the statutory maximum. *See* Hill v. Lockhart, 992 F.2d 801, 802 n.2 (8th Cir. 1993) ("attorneys appointed in death cases were subject to a $2500 statutory fee maximum under the Criminal Justice Act of 1964."); *see also* Simmons v. Lockhart, 931 F.2d 1226, 1227 (8th Cir. 1991) (per Arnold, J., sitting as single circuit judge) ("The old law, the Criminal Justice Act of 1984, fixed hourly rates and a statutory maximum of $2500 (waivable in certain circumstances), as well as allowing reimbursement for certain 'expenses reasonably incurred' in certain federal criminal cases, including capital cases.").

The more widely followed view holds that the $750 rate applies to habeas corpus proceedings. *See* Martin v. Dugger, 708 F. Supp. 1265, 1266 (S.D. Fla. 1989) ("Section 3006A(d)(2) provides that each attorney may not recover more than $750 for representation in the collateral proceeding, but the court may waive that amount for extended or complex representation, *see* 18 U.S.C. § 3006a(D)(3)."); *accord* United States ex rel. Kubat v. Thieret, 690 F. Supp. 725, 725 (N.D. Ill. 1988) (noting that "compensation for representation in a habeas case may not exceed $750 per attorney unless certain prerequisites are met."). *See also* LIEBMAN, *supra* note 154, at 174–75 (indicating that the $750 maximum applies). Because the $750 cap applies per pro-

Because Kansas did not enact a post-*Furman* death penalty until 1994,[263] no recent case law exists concerning the Kansas District Court's appointment of counsel for death row inmates seeking habeas review. The district court has, however, considered requests for appointment of counsel from service members in noncapital habeas cases. From 1991 through 1993, five service members requested appointment of counsel to represent them during federal habeas proceedings.[264] The district court denied all five requests.[265] During that three-year span, counsel represented only one military habeas petitioner before the federal district court;[266] the remainder proceeded without counsel. While federal district courts have sometimes appointed counsel for service members during habeas review of courts-martial,[267] the norm in the District of Kansas is *pro se* representation. Whether the court will exercise its discretion to break from this norm in capital cases remains to be seen.

D. Conclusion

While a federal district court can appoint counsel under the CJA, the court has the discretion to decline to make this appointment. The most reasonable interpretation of the Anti-Drug Abuse Act, which mandates appointment of counsel for capital habeas peti-

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ceeding, under this interpretation a counsel could receive $750 for representing a habeas petitioner before the district court and another $750 for appealing the same petitioner's case. *Id.* at 175.

Under either interpretation, the cap can be waived "for extended or complex representation." 18 U.S.C. § 3006A(d)(3). This waiver requires the court's certification "that the amount of the excess payment is necessary to provide fair compensation." *Id.* The waiver also must receive approval from the chief judge of the circuit. *Id.*

[263] During its 1994 session, the Kansas legislature passed a death penalty bill. H.B. 2578, 75th Leg., 2d Reg. Sess. (1994), *available in* WESTLAW, KS LEGIS H.B. 2578, at (1994); *see Kansas Legislators OK Bill to Restore Death Penalty*, ORLANDO SENTINEL, Apr. 10, 1994, at A22. On April 22, 1994, the bill became law without the governor's signature. WESTLAW, KS LEGIS, H.B. 2578, at *46; *see Across the USA: News from Every State*, USA TODAY, Apr. 25, 1994, at 7A.

[264] Letter from Janine Cox, pro se clerk, United States District Court, District of Kansas, to author (Dec. 19, 1993) (on file with author); Letter from Janine Cox, pro se clerk, United States District Court, District of Kansas, to author (Jan. 25, 1994) (on file with author).

The district received 14 petitions from USDB prisoners during calendar year 1991, 19 during calendar year 1992, and 20 during calendar year 1993.

[265] *Id.*; *see also* Jefferson v. Berrong, 783 F. Supp. 1304, 1305 n.1 (D. Kan. 1992), *appeal dismissed sub nom. Amen-Ra v. Berrong*, 992 F.2d 1222 (1993) (denying petitioner's request for counsel); Mendoza v. Lowe, No. 93-3448-RDR, 1994 U.S. Dist. LEXIS 8974 (D. Kan. June 21, 1994) (order denying petitioner's request for counsel).

[266] The one case in which the petitioner was represented by counsel was *Lips v. Commandant, USDB*. *See supra* notes 95-99, 123 and accompanying text.

[267] *See, e.g.*, Wolff v. United States, 737 F.2d 877, 877 (10th Cir. 1984) (referring to Colorado District Court's appointment of counsel for petitioner).

tioners, excludes military death row inmates from its coverage. Accordingly, a military death row inmate has no absolute right to appointed counsel during federal habeas review.

IV. Should Habeas Counsel Be Appointed for Military Death Row Inmates?

> *It is essential to remember that counsel is appointed to ensure the preservation of the defendant's constitutional rights and to make certain that unlawful executions do not occur.*
>
> *United States Court of Appeals for the Eighth Circuit*[268]

This section considers whether, as a matter of policy,[269] the government should give military death row inmates a right to appointed counsel during federal habeas corpus proceedings. The crux of the policy question is whether the government always will appoint counsel for indigent military habeas petitioners or sometimes force them to proceed *pro se*.

A. Factors Supporting a Right to Appointed Counsel

1. Equity—The Anti-Drug Abuse Act provides all state and federal death row inmates with a right to appointed counsel when collaterally attacking their death sentences in federal court. Congress determined that all capital habeas petitioners should be protected by legal representation. The Act failed to extend this right of representation, however, to military death row inmates. No principled basis exists for denying condemned service members this protection. In the absence of any justification for the distinction, service members should not be relegated to the status of second-class litigants.[270]

The military justice system has won praise for providing a right to counsel superior to that enjoyed by civilian criminal defendants.[271] One commentary noted, "The right to counsel afforded

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[268] Mercer v. Armontrout, 864 F.2d 1429, 1433 (8th Cir. 1988).

[269] This section assumes that a policy decision to appoint counsel would be carried out by statute or court rule, not by a revision of current Supreme Court case law. The mechanism used to implement the policy is important because a constitutional right to appointed counsel would create a right to effective assistance of such counsel. Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991). *See supra* note 152.

[270] *Cf.* Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976) ("the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule.").

[271] *See, e.g.*, Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 26 (1987); Homer E. Moyer, Jr., *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 ME. L. REV. 105, 120–23 (1970).

service members is far broader than that afforded most civilians, as all members of the armed forces have a right to free military counsel, regardless of indigency—or lack thereof."[272] For the government to provide counsel to a nonindigent accused at a special court-martial, while failing to provide habeas counsel to an indigent service member on death row, would be the ultimate irony.[273]

2. Ensuring Accuracy of the Death Sentence—A second factor supporting a right to appointed counsel is that legal representation promotes the very purpose of habeas review: "Courts appoint lawyers to serve these prisoners to assure that no condemned person shall die by reason of an unconstitutional process."[274] Appointed counsel is vitally important to meaningful habeas review. Without counsel, "*pro se* litigants simply cannot manage" the broad "range of complex investigative, legal research, and litigation tasks" that capital federal habeas cases require.[275]

Two empirical studies verify what common sense would suggest: habeas claims litigated by lawyers are more successful than habeas claims litigated by petitioners *pro se*. The Department of Justice conducted a study of approximately one-eighth of all habeas corpus petitions filed nationwide from 1975 to 1977. This study found that "only 3.2% of the petitions resulted in any relief."[276] Cases handled by lawyers fared markedly better than the average. "Petitioners represented by counsel were successful in 13.7% of their cases while the success rate for persons filing *pro se* was

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[272] Francis A. Gilligan & Michael D. Wims, *Civilian Justice v. Military Justice*, CRIM. JUST., Summer 1990, at 2, 34.

[273] A special court-martial can adjudge no more than six months of confinement, forfeiture of two-thirds pay per month for six months, and—in the case on an enlisted accused—a bad-conduct discharge and reduction in rank. UCMJ art. 19, 10 U.S.C. § 819. Yet, absent military exigencies, the accused at a special court-martial is entitled to free representation by a military lawyer. UCMJ art. 27(c), 10 U.S.C. § 827(c). Unless a military lawyer is detailed to represent the accused, a special court-martial cannot impose a punitive discharge. UCMJ art. 819, 10 U.S.C. § 819. In all general courts-martial, a military lawyer must be appointed as trial defense counsel. UCMJ art. 27(b), 10 U.S.C. § 827(b). Furthermore, in any case that qualifies for appellate review, the accused is entitled to free representation by a military appellate defense counsel. UCMJ art. 70(a), (c), 10 U.S.C. § 870(a), (c). *Cf.* Millemann, *supra* note 133, at 482 ("In the vast majority of criminal appeals, resolution of issues will not have life and death consequences. It *always* will have life and death consequences in capital postconviction proceedings. Yet a constitutional right to counsel exists in *all* direct appeals from criminal convictions in noncapital as well as capital cases.").

[274] Mercer v. Armontrout, 864 F.2d 1429, 1433 (8th Cir. 1988).

[275] Millemann, *supra* note 133, at 479. Professor Millemann made this comment in the context of state capital postconviction proceedings. Nevertheless, it is equally applicable to federal habeas reviews of military capital cases.

[276] ROBINSON, *supra* note 126, at 4(c). The same data are analyzed in Karen M. Allen, et al., *Federal Habeas Corpus and its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675 (1982).

0.9%."[277] The study's author concluded, "Counsel considerably enhances the probability of success."[278]

Another group of researchers conducted an in-depth empirical study of the habeas practice in one federal district court and similarly found that "prisoners' chances of success" increase when they are represented by counsel.[279] The discrepancy in results might be even greater in the capital arena; as Justice Kennedy succinctly stated, "The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[280]

The researchers' empirical findings suggest that *pro se* habeas petitioners are unable to prevail in some circumstances where lawyers acting on their behalf would. In the death penalty context, this means that some petitioners will be executed due solely to lack of counsel. The benefit of counsel to the petitioner is obvious—but society benefits as well. Counsel will help to vindicate society's "compelling interest[] in the enforcement of constitutional guarantees."[281]

Even more importantly, habeas counsel sometimes demonstrate that their clients actually are innocent.[282] In these cases,

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[277] ROBINSON, *supra* note 126, at 4(c). Professor Robinson found that court-appointed counsel

> were successful in 17.5% of their cases compared to 7.9% for retained counsel and 8.3% for clinic or prison project counsel. The higher success rate for court appointed counsel may reflect the fact that the court appoints counsel only for the more meritorious petitions. However, even in the group of cases in which counsel was privately retained or was provided by a clinic or prison project, the success rate was dramatically higher than for *pro se* filers.

Id. The greater success rate for petitioners represented by counsel also may result in part from counsel performing a "screening function." *Id.* at 62.

[278] *Id.* at 58. Professor Robinson noted that "[i]n all types of districts and for all types of filers, those with counsel were more likely to have a favorable disposition than those without representation." *Id.* at 59. The study also revealed that "[i]n addition to a greater likelihood of ultimate success, petitioners with counsel are more likely than the average petitioner to get a hearing of some sort in the district court, to have an opinion written by the district court, to have the court of appeals hear argument on appeal, write an opinion on appeal, and dispose of the case faster." *Id.* at 60.

[279] *Empirical Light*, *supra* note 14, at 707. The researchers studied half of all habeas cases filed in the United States District Court for the Southern District of New York from 1973 through 1975 and 1979 through 1981. *Id.* at 669–70.

[280] Giarratano v. Murray, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the result).

[281] Millemann, *supra* note 133, at 483. *See also id.* at 500–05 (discussing the state interest in providing counsel).

[282] *See Giarratano*, 492 U.S. at 24–25 (Stevens, J., dissenting). Justice Stevens notes postconviction proceedings may reveal new evidence that suggests "the defen-

counsel spares society the horror of executing an innocent person. As Professor Mello argues, "A second look is not a guarantee of absolute truth, nor is a seventh look. Redundancy, however, increases the probability that the ultimate result will be more accurate [p]rovided that the post-conviction process is not an arid ritual of pathetic *pro se* claims . . . ."[283]

3. The Lack of Qualification Standards for Military Defense Counsel in Death Penalty Cases—Redundancy is particularly important when reviewing military death penalty cases because the post-conviction counsel may be far more expert in death penalty matters than were either the trial or appellate defense counsel. Representative Edwards (D-California), then-Chairman of the House Subcommittee on Civil and Constitutional Rights, wrote to the Secretary of Defense in 1993 questioning the adequacy of counsel provided to service members in death penalty cases. Representative Edwards specifically noted his concerns that military defense counsel in death penalty cases are not required to meet the Anti-Drug Abuse Act's qualification standards, that no procedures are in place to ensure continuity of counsel in death penalty cases, and that the military justice system may have failed to provide the defense with sufficient expert and investigative assistance in capital cases.[284] An experienced postconviction counsel could evaluate whether any of these perceived shortcomings adversely affected the condemned service member.

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dant is innocent." As examples, he cites *Ex parte Adams*, No. 70,787 (Tex. Cr. App., Mar. 1, 1989) (the case that *The Thin Blue Line* documented) and *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989), where the Fourth Circuit granted habeas relief in a death penalty case due to the prosecutor's failure to disclose exculpatory evidence. In that case, the prosecution did not reveal that the sole eyewitness to the murder initially indicated that the killer was a white male, when the accused was a black male.

See generally MICHAEL L. RADELET, ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59 (1989); Hugo A. Bedau & Michael L. Radalet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (concluding that from 1900 to 1986, at least 139 innocent defendants were sentenced to death, 23 of whom were actually executed). *See also* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radalet Study*, 41 STAN. L. REV. 121 (1988); Hugo A. Bedau & Michael L. Radalet, *The Myth of Infallibility: A Reply to Markman & Cassell*, 41 STAN. L. REV. 161 (1988).

[283] Michael A. Mello, *Is There A Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065, 1081 (1989) (emphasis omitted).

[284] Letter from Representative Don Edwards to Secretary of Defense Les Aspin (Nov. 23, 1993), *reprinted in* United States v. Loving, 41 M.J. 213, 334 (1994) (Wiss, J., dissenting) [hereinafter Edwards Letter]. *See also Military Lawyers*, NAT'L L.J., Feb. 28, 1994, at 24; McFarland v. Scott, 114 S. Ct. 2785, 2786 (1994) (noting that in many states, "[t]he absence of standards governing court-appointed capital-defense counsel means that unqualified lawyers often are appointed.").

4. The Heightened Importance of the First Federal Habeas Petition—In *McCleskey v. Zant*,[285] the Supreme Court held that ordinarily, federal courts will review a second or subsequent federal habeas petition only if the petitioner shows cause for failing to raise the claim earlier and prejudice from the court's failure to consider the new claim. Under this rule, a poorly prepared *pro se* petition may foreclose a death row inmate from ever raising meritorious issues.[286] Providing the death row inmate with counsel would increase the likelihood that the first petition raises all possible issues, thus reducing the chance of forfeiting a legitimate constitutional claim.

B. The Countervailing Concern

The only apparent countervailing concern is cost. To provide counsel, the government must either pay an appointed attorney or divert a government-employed attorney from other tasks. Viewed in context, however, the added cost of military death penalty cases would be infinitesimal. In 1992, more than 80,000 representations occurred under the CJA.[287] While the federal courts have faced a CJA funding shortage in each of the last three fiscal years,[288] a trickle of military death penalty cases would not add an appreciable—or even noticeable—financial burden. Even if all eight military death penalty cases were to go into federal habeas review at once, they would increase the CJA caseload by less than one one-hundredth of a percent.

Additional delay does not appear to be a countervailing factor. On the contrary, the Department of Justice's habeas corpus study indicated that appointing counsel to represent a petitioner resulted in the case being resolved more quickly.[289]

C. Conclusion

Establishing a right to counsel during habeas review of capital courts-martial would promote the goal of accuracy in the death penalty's imposition. Compared to this compelling interest is a minute increase in cost. Accordingly, condemned service members should have a right to appointed counsel during federal habeas review.

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[285] 499 U.S. 467 (1991).

[286] The Supreme Court recognizes a narrow exception to the cause and prejudice standard where barring the subsequent petition would create a fundamental miscarriage of justice. *Id.* at 494.

[287] ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 225, at 3.

[288] *Id.* at 2.

[289] ROBINSON, *supra* note 126, at 60.

V. Providing Counsel

> *Just as soldiers who are asked to lay down their lives in battle deserve the very best training, weapons, and support, those facing the death penalty deserve no less than the very best quality of representation available under our legal system.*
>
> *United States Army Court of Military Review [ACCA]*[290]

The conclusion that condemned service members should receive counsel during federal habeas review begs the question of how to provide this representation. The American Bar Association (ABA) has recommended that "[t]o avoid the delay occasioned by the appointment of new counsel for post-conviction proceedings and to assure continued competent representation, state appellate counsel who represented a death-sentenced inmate should continue representation through all subsequent state, federal, and United States Supreme Court proceedings."[291] By analogy, the ABA's recommendation suggests that military appellate defense counsel should represent the condemned service member during federal habeas review.

A. Military Counsel

The UCMJ would allow appellate defense counsel to continue representing a service member whose case is before a federal district court for habeas review under 28 U.S.C. § 2241. Article 70 provides, in part, "Military appellate counsel shall also perform such other functions in connection with the review of court-martial cases as the Judge Advocate General directs."[292] Because of this specific statutory provision, a military counsel detailed to represent a habeas petitioner could do so without violating 18 U.S.C. § 205,[293] which precludes government officers and employees from acting as an attorney to prosecute a claim against the United States "other than in the proper discharge of official duties."[294]

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[290] United States v. Gray, 32 M.J. 730, 735-36 (A.C.M.R.), *writ appeal petition denied*, 34 M.J. 164 (C.M.A. 1991).

[291] Criminal Justice Section Report, *supra* note 131, at 10. The Criminal Justice Section reported this recommendation to the House of Delegates, which adopted it as ABA policy. *See id.* at 9 n.*.

[292] UCMJ art. 70(e), 10 U.S.C. § 870(e).

[293] 18 U.S.C.A. § 205 (West Supp. 1994). *See generally* Carolyn Elefant, *Section 205's Restriction on Pro Bono Representation by Federal Attorneys*, 37 FED. B. NEWS. & J. 407, 407-08 (1990); Roswell B. Perkins, *The New Federal Conflict of Interest Law*, 76 HARV. L. REV. 1113 (1963).

[294] 18 U.S.C.A. § 205(a). *See* 1 Op. Off. Legal Counsel 110, 111 (1977) (concluding that temporarily assigning an Assistant United States Attorney as an assistant

Army Regulation 27-10, the Army's military justice regulation,[295] provides "Attorney-Client Guidelines"[296] that discuss "[c]ollateral civil court proceedings."[297] The guidelines state a general rule that "[m]ilitary defense counsel's ability to act in such matters is regulated by Army policy in AR 27-40,"[298] the litigation regulation. *Army Regulation 27-10* continues, "The military defense counsel is not required to prepare a habeas corpus petition pursuant to 28 U.S.C. § [2241] and is prohibited from doing so unless the provisions of AR 27-40 are followed. However, nothing prohibits the military counsel from explaining" to the accused the rights to proceed *pro se* or to hire a civilian counsel to file the petition.[299]

The Army's litigation regulation, in turn, provides that as a general rule, "[M]ilitary personnel on active duty and DA civilian personnel are prohibited from appearing as counsel before any civilian court in litigation in which the United States has an interest, without the prior written approval of TJAG."[300]

Precedent exists for assigning military counsel to assist in post-appellate representation of a condemned service member. After the Tenth Circuit dismissed Bennett's appeal of his second unsuccessful habeas petition,[301] his civilian defense counsel wrote to The Judge Advocate General of the Army:

I feel that I am in need of Military Defense to aid in the

Federal Public Defender under an exchange program falls within the section's "official duties" exception); 4B Op. Off. Legal Counsel 498, 503-05 (1980) (concluding that detailing Environmental Protection Agency employees to positions in state agencies that "have frequent substantive contacts [with EPA] of an adversary sort" falls within the section's "official duty" exception); 16 Op. Att'y Gen. 478 (1880) (concluding that 18 U.S.C. § 205's predecessor prohibited an officer in the bureau of military justice from acting as counsel for another Army officer before the Court of Claims).

[295] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE App. C (8 Aug. 1994).

[296] The regulation notes, "These guidelines have been approved by TJAG. Military personnel who act in courts-martial, including all Army attorneys, will apply these principles insofar as practicable." *Id.*

[297] *Id.* at *c*.

[298] *Id.* at *c*(1).

[299] *Id.* at *c*(2) (the regulation incorrectly cites section 2242 of Title 28—the correct section is 2241). However, the Guidelines add:

> Military counsel would be acting contrary to the spirit of AR 27-40 if he or she acted through civilian counsel to perform a service for the client that military counsel could not perform on his or her own (e.g., preparation of pleadings in habeas corpus proceedings) and should not do so.

Id. at *c*(3).

[300] DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION, para. 1-6 (2 Dec. 1987). The regulation provides an exception to this policy if: "(1) The appearance is specifically authorized herein[;] (2) The individual is a party to the action or proceeding[; or] (3) The appearance is authorized under an Expanded Legal Assistance Program (AR 27-3)." *Id.* at para. 1-6*a*.

[301] Bennett v. Cox, 287 F.2d 883 (10th Cir. 1961). *See supra* note 6.

> defense of John A. Bennett. I expect to be heard on a Clemency Petition in the very near future and need and desire aid of Military Defense Counsel, someone who is familiar with the defense of military personnel and who has had more experience in this field than I have had.
>
> I respectfully request your office to appoint such person or persons to work in this man's behalf.[302]

In a memorandum for record, Major General Decker noted that after discussing the request with the Under Secretary of the Army, he made an appellate defense counsel "available to Mr. Williams without delay."[303] Consequently, historical support exists for expanding appellate defense counsel's role in death penalty cases.

Although assigning appellate defense counsel to federal habeas review duties is permissible, it also is problematic. The ABA's recommendation calling for state appellate counsel to continue representation during postconviction review was motivated by a desire for continuity of counsel.[304] Unless the services alter their assignment

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[302] Letter from J. L. Williams to The Judge Advocate General of the Army (Mar. 16, 1961) in Bennett Record, *supra* note 3. Mr. Williams was an attorney from Danville, Virginia, near Bennett's home town. Memorandum, Chief, Litigation Division, to Chief, Military Justice Division (6 Apr. 1960), in Bennett Record, *supra* note 3. During habeas review, Bennett also was represented by Elisha Scott, a prominent civil rights attorney who had filed the original suit in *Brown v. Board of Education*. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 154 (1994). Mr. Scott also represented three other condemned service members in a habeas action. Suttles v. Davis, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954). The habeas action was unsuccessful and the three were hanged. *Soldiers to Death on Gallows*, LEAVENWORTH TIMES, Mar. 1, 1955, at 1.

[303] Memorandum for Record, Major General Charles L. Decker (Mar. 24, 1961) in Precedent File Copies of DA General Court-Martial Orders, etc., Death Cases (on file at the law library, The Judge Advocate General's School, United States Army) [hereinafter Precedent File]. The memorandum for record explained the reasons for this decision:

> Although President Eisenhower approved the death sentence for Bennett in 1957, the new President may now consider the case and exercise clemency, if he so desires, in behalf of Bennett. The case is, therefore, closely associated with the appellate processes provided in Article 71, UCMJ. Based upon this special situation wherein President Kennedy may review the action of his predecessor, I decided that the services of a judge advocate officer for Bennett and his civilian attorney are appropriate.

Id. The detailed appellate defense counsel had not represented Bennett on direct appeal, which had concluded five years earlier. United States v. Bennett, 7 C.M.A. 97, 21 C.M.R. 223 (1956).

A White House Fact Sheet dated March 23, 1961 indicated that an appellate defense counsel had been assigned and "is now collaborating with Mr. Williams in the preparation of a clemency petition in behalf of Bennett." White House Fact Sheet signed by Brigadier General Alan B. Todd (23 Mar. 1961) in Precedent File, *supra*. President Kennedy denied the request for clemency. *See supra* note 3.

[304] Criminal Justice Section Report, *supra* note 131, at 25. Another recommendation provides that "[n]ew counsel should be appointed to represent the death-

processes dramatically, however, continuity of counsel would not result from military appellate defense counsel's representation of condemned service members during habeas review. Chief Judge Everett has warned:

> Even during the appellate process the counsel who were representing the accuseds may leave the service or be reassigned, in which event the lawyers who prepare the supplements to the petitions for review[305] may not be the same lawyers who previously represented the accuseds at the court of military review [CCA]. Due to the lack of continuity, a risk exists that the appellate defense counsel who submit the supplements in the Court of Military Appeals [CAAF] may, because of lack of familiarity with the earlier proceedings, overlook significant issues of law that should be raised.[306]

This lack of continuity infects capital appeals as well. In his dissent from the CAAF's affirmance of Private Loving's death sentence, Judge Wiss expressed his "growing concern over the failure of the pattern of assignment of appellate counsel to provide continuity in death-penalty cases—continuity that assures the client competent representation and that assures the system of appellate judicial review that it can proceed with some modicum of efficiency and effectiveness."[307] Judge Wiss's dissenting opinion proceeded to describe the "chaos" that arose as appellate counsel repeatedly entered appearances and withdrew from the case.[308] The dissent

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sentenced inmate for the state direct appeal unless the appellant requests the continuation of trial counsel after having been fully advised of the consequences of his or her decision, and the appellant waives the right to new counsel on the record." *Id.* at 9–10. This recommendation seeks to ensure that someone other than the trial defense counsel is "appointed before the commencement of post-conviction litigation, so that any claims of ineffectiveness will be presented in the first petition." *Id.* at 24. In the military, because appellate defense counsel must be assigned to the Office of the Judge Advocate General, UCMJ art. 70(a), 10 U.S.C. § 870(a), the trial defense counsel almost never represents the accused on appeal. GILLIGAN & LEDERER, *supra* note 13, § 25-41.00.

[305] A supplement to the petition for review is a brief asking the CAAF to exercise its discretionary jurisdiction to hear a case. *See* U.S.C.M.A. R. 21; *see generally* Eugene R. Fidell, *Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals*, 131 MIL. L. REV. 169, 253–65 (1991). It functions much like a petition for certiorari.

[306] Robinson O. Everett, *Specified Issues in the United States Court of Military Appeals: A Rationale*, 123 MIL. L. REV. 1, 4 (1989).

[307] United States v. Loving, 41 M.J. 213, 326 (1994) (Wiss, J., dissenting); *see also id.* at 299 (majority opinion's rejection of appellant's argument that he was prejudiced by the lack of continuity of appellate counsel).

[308] *Id.* at 328. (Wiss, J., dissenting).

also pointed to similar continuity of counsel problems in other military death penalty cases.[309]

The Chairman of the CAAF's Rules Advisory Committee, Eugene R. Fidell, has noted "the continuing problem of personnel turbulence in the appellate divisions of the Offices of the Judge Advocates General."[310] This personnel turbulence creates a culture of insensitivity to continuity concerns. In his letter to the Secretary of Defense, Representative Edwards called attention to the lack of procedures to ensure continuity of counsel in military death penalty cases.[311] While the military certainly could manage its attorneys differently to promote continuity, major reforms would be necessary for the appellate defense divisions to produce the kind of continuity that the ABA's recommendations seek to achieve.

The ABA's concern for continuity centered on ensuring a thorough knowledge of the record.[312] The military appellate defense divisions' lack of continuity would have an effect far worse than unfamiliarity with the record: counsel may be entirely unfamiliar with the postconviction process. Capital habeas cases are likely to arise so infrequently that none of the four autonomous appellate defense divisions will develop any expertise—or even retain any institutional memory—concerning this litigation. The ABA's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* recommend that counsel in a capital postconviction case have "prior experience as postconviction counsel in at least three cases in state or federal court."[313] Because of the general ban on representation of service members in habeas cases,[314] however, military lawyers will be inexperienced in seeking habeas relief. As Judge Godbold has quipped, "[T]he average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than

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[309] *Id.* 329-30. *See also* United States v. Gray, 39 M.J. 351 (C.M.A. 1993) (order) (expressing the court's "concern[] about the management and continuity of appellate representation in this case."); United States v. Murphy, 39 M.J. 437 (C.M.A. 1994) (order); United States v. Gray, 39 M.J. 437 (C.M.A. 1994) (order); United States v. Murphy, 40 M.J. 14 (C.M.A. 1994) (order); United States v. Gray, 40 M.J. 14 (C.M.A. 1994) (order); United States v. Gray, 40 M.J. 25, 27 (C.M.A. 1994) (order) (Wiss, J., concurring in the result); United States v. Murphy, 40 M.J. 288 (C.M.A. 1994) (order).

[310] Fidell, *supra* note 305, at 225.

[311] Edwards Letter, *supra* note 284.

[312] Criminal Justice Section Report, *supra* note 131, at 25.

[313] AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES at Guideline 5.1(III)(iii) (1989) [hereinafter ABA GUIDELINES]. The ABA House of Delegates recommended adoption of the Guidelines subject to those exceptions as may be appropriate in the military. *Id.* at ii. In *Loving*, the CAAF refused to mandate that the military comply with the ABA Guidelines. 41 M.J. at 300.

[314] *See supra* notes 295-300.

he does about atomic energy."[315] A capital habeas case is an inappropriate place for on-the-job training.[316]

Military appellate defense counsel are not the optimal solution for providing condemned service members with habeas counsel. Nevertheless, to the condemned service member even an inexperienced counsel is better than no counsel.[317] Accordingly, once a military death penalty case enters federal habeas proceedings, the relevant Judge Advocate General should monitor the case closely. If the petitioner cannot obtain counsel by other means, The Judge Advocate General should act under Article 70(e) to appoint military appellate defense counsel to represent the petitioner.

B. The Criminal Justice Act

The Kansas District Court also has the power to appoint counsel for military capital habeas petitioners. The CJA provides that each federal district court, with the approval of the circuit's judicial council, shall adopt a plan for providing representation for those unable to obtain adequate representation in specified criminal matters.[318] When a court determines that "the interests of justice so require, representation may be provided for any financially eligible person who . . . is seeking relief under section 2241, 2254, or 2255 of title 28."[319]

The representation plan for the Kansas District Court provides that judges may choose to provide representation through either the district's federal public defender organization[320] or the district's CJA Panel, which consists of private attorneys "who are eligible and willing to be appointed to provide representation under the Criminal

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[315] *You Don't Have to Be a Bleeding Heart*, HUM. RTS., Winter 1987, at 22, 24 (quoting Judge John C. Godbold). *See also* John C. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 ASS'N B. CITY N.Y. 859, 863 (1987) (noting, "Habeas corpus is as unfamiliar to a lot of lawyers as atomic physics.").

[316] *See* Criminal Justice Section Report, *supra* note 131, at 21 n.16 ("On-the-job training in the individual case . . . should not be the type of experience that the law contemplates.").

[317] *Cf. Still a Crisis: Lawyers Needed in Capital Cases*, A.B.A. J., Apr. 1989, at 23 (quoting Denver lawyer David Lane stating that having civil lawyers handle death penalty cases is like "asking a podiatrist to do brain surgery. . . . But if we don't do it, who will?" (alteration in original)).

[318] 18 U.S.C.A. § 3006A.

[319] *Id.* § 3006A(a)(2).

[320] "The Federal Public Defender Organization for the District of Kansas was established in 1973 . . . . The Federal Public Defender Organization is to be headquartered in Wichita, Kansas, with branch offices in Topeka, and Kansas City, Kansas, and capable of rendering defense services on appointment throughout the district." U.S. DIST. CT. DIST. OF KAN. R. 301. *See generally* 18 U.S.C.A. § 3006A(g)(2)(A).

Justice Act."[321] Not surprisingly, considering that Kansas only recently enacted a post-*Furman* death penalty,[322] the district's plan does not have any provisions concerning appointment in death penalty cases. The plan does not make any provision for military habeas cases beyond a general statement that the plan applies to "any person . . . [w]ho is seeking collateral relief, as provided in subsection (b) of the [Criminal Justice] Act."[323]

While the plan currently authorizes a judge to appoint counsel in a military death penalty case, nothing in the plan requires this appointment. The CJA allows district courts to "modify the plan at any time with the approval of the judicial council of the circuit."[324] The district court should modify its plan to expressly state, "Representation shall be provided for any financially eligible person proceeding under 28 U.S.C. § 2241 seeking to vacate or set aside a death sentence imposed by a court-martial."

The district court's CJA plan provides that "[a]ttorneys who serve on the CJA panel must be members in good standing of the federal bar of this district."[325] To be admitted to the district court's bar, an attorney must be a member of the Kansas state bar.[326] For purposes of appointment to a military death penalty habeas case, this rule is too restrictive. No nexus exists between admission to the Kansas bar and effective representation before the federal district court in a military habeas case. The ideal counsel would be one familiar with state death penalty postconviction proceedings, federal habeas review of capital cases, and the military justice system.[327]

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[321] U.S. DIST. CT. DIST. OF KAN. R. 301(b), (d)(1). The rule provides that "[i]nsofar as practicable, panel attorney appointments will be made in at least 25 percent of the cases." *Id.* The Criminal Justice Act requires that private attorneys "be appointed in a substantial proportion of the cases." 18 U.S.C.A. § 3006A(a)(3). To be part of the CJA Panel, attorneys must apply to a Panel Selection Committee, which will "approve for membership those attorneys who appear best qualified." U.S. DIST. CT. DIST. OF KAN. R. 301(e)(2).

[322] *See supra* note 263.

[323] U.S. DIST. CT. DIST. OF KAN. R. 301(a). Subsection (b) of the CJA applies to those seeking habeas relief under 28 U.S.C. § 2241.

[324] 18 U.S.C. § 3006A(a)(3).

[325] U.S. DIST. CT. DIST. OF KAN. R. 301(d)(2). Panel attorneys also must "have demonstrated experience in, and knowledge of, the *Federal Criminal Law*, *Federal Rules of Criminal Procedure* and the *Federal Rules of Evidence*." *Id.*

[326] U.S. DIST. CT. DIST. OF KAN. R. 402(a). Additionally, "Persons who are holders of a temporary permit to practice law granted by the Supreme Court of Kansas may apply for a temporary permit to practice in this court." *Id.* at (d).

[327] In addition to having a general familiarity with the military justice system, counsel should be familiar with the military's extraordinary relief procedures, as counsel may have to use these procedures to exhaust remedies before bringing some claims in a federal habeas action. *See generally supra* notes 195–97 and accompanying text.

Despite the requirement that CJA panel attorneys be members of the court's bar, the plan also provides, "Nothing in this rule is intended to impinge upon the authority of a presiding judge . . . to appoint an attorney who is not next in sequence [on the CJA Panel roster] or who is not a member of the CJA Panel, in appropriate cases, to insure adequate representation."[328] This rule would allow the judge to appoint an attorney who is not a member of the court's bar to represent a military capital habeas petitioner *pro hac vice*.[329] While Kansas does not have a death penalty resource center,[330] the judge should consult with the Federal Death Penalty Resource Counsel Project[331] to assist in identifying the best counsel to appoint.

A judge may have difficulty, however, finding a counsel willing to accept the case. While the CJA's cap on total compensation can be waived for complex litigation such as a capital habeas case, the maximum hourly rates of sixty dollars for in-court time and forty dollars for out-of-court time remain in effect. While the district could apply to the Judicial Conference of the United States for a seventy-five dollar hourly rate for counsel handling military capital cases, even that level of funding might be insufficient to attract qualified counsel. Before the Anti-Drug Abuse Act eliminated the CJA's hourly-rate provisions for habeas review of state capital cases, the United States District Court for the Northern District of Georgia found that "it has become increasingly difficult to find counsel willing to take appointments in death penalty cases."[332] The Administrative Office of United States Courts has similarly warned:

> Compensation for attorneys under the Criminal Justice Act has been, and remains, substantially below prevailing market rates. In many locations it does not even cover basic office overhead costs. Many lawyers have declined

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[328] U.S. DIST. CT. DIST. OF KAN. R. 301(f)(2). The plan provides that normally "[a]ppointments from the CJA Panel rosters are to be made on a rotational basis, subject to the court's discretion to make exceptions due to the nature and complexity of the case, the attorney's experience, and language and geographical considerations." *Id.*

[329] *See generally id.* at R. 404.

[330] "Death-penalty resource centers are specialized community defender organizations that provide direct representation in some death-penalty cases and encourage private attorneys to accept assignments in others by offering them training and expert advice." ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 225, at 2. As of August 1993, there were 19 death penalty resource centers serving 47 districts. *Id.*

[331] "The project advises federal public defenders on capital-punishment issues." Eva M. Rodriguez, *Reno's Death-Penalty Record*, LEGAL TIMES, Feb. 28, 1994, at 6.

[332] Dobbs v. Kemp, No. 4:80-cv-247-HLM, 1989 U.S. Dist. LEXIS 10674, at *3 (N.D. Ga. April 26, 1989). The court set a $95 hourly rate for compensation under the Anti-Drug Abuse Act. *Id.* at *10.

> appointments or resigned as panel attorneys due to the economic pressure associated with the rates of compensation authorized under the Criminal Justice Act.[333]

An alternative available to the judge is to appoint the Federal Public Defender Organization to represent the petitioner. Despite the fact that Kansas only recently re-enacted a death penalty,[334] that organization likely will be familiar with capital issues because of the federal death penalty that the Anti-Drug Abuse Act itself established.[335] On the other hand, that organization almost surely would not have the mix of military justice and death penalty experience that the optimal counsel would have. Thus, the CJA's "bargain-basement rates"[336] may reduce significantly the quality of counsel available to a military habeas petitioner.

C. The Anti-Drug Abuse Act

The Anti-Drug Abuse Act provides capital habeas petitioners with significant benefits compared to the CJA's provisions. In addition to making appointment mandatory in death penalty cases, the Anti-Drug Abuse Act authorizes whatever compensation is "reasonably necessary" to ensure competent representation.[337] The CJA, on the other hand, imposes a cap on compensation unless the counsel goes through a two-step waiver process.[338] The Anti-Drug Abuse Act also waives the CJA's cap on fees for nonlegal services and maximum hourly rate.[339]

The Anti-Drug Abuse Act guarantees continuity of counsel—or replacement by a similarly qualified counsel—through "every subsequent stage of available judicial proceedings," postconviction proceedings, and applications for clemency.[340] The CJA has no similar provision.

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[333] ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 225, at 3.

[334] *See supra* note 263.

[335] 21 U.S.C.A. § 848(e). However, as of March 1994, no death penalty cases had been brought in the District of Kansas. House Subcommittee on Civil and Constitutional Rights, Racial Disparities in Federal Death Penalty Prosecutions 1988-1994, at App. (Mar. 1994) (unpublished report) (on file with House Subcommittee on Civil and Constitutional Rights). The Violent Crime and Law Enforcement Act of 1994 authorized the imposition of the death sentence for an additional 58 offenses. Pub. L. No. 103-322, §§ 60001-26, 108 Stat. 1796.

[336] United States v. Cooper, 746 F. Supp. 1352 (N.D. Ill. 1990).

[337] 21 U.S.C.A. § 848(q)(10).

[338] *See supra* note 262.

[339] *Compare* 21 U.S.C.A. § 848(q)(10) *with* 18 U.S.C.A. § 3006A(e)(3) (establishing a $1000 maximum on fees to be paid to one individual for nonlegal services). The CJA's maximum amount can be waived, however, on certification by the court and approval by the chief judge of the circuit.

[340] 21 U.S.C.A. § 848(q)(8).

Another difference between the Anti-Drug Abuse Act and the CJA is the former's inclusion of minimum qualifications for appointed counsel.[341] The qualification standards provide no real benefit, however, to a death row inmate seeking habeas relief. Under the standards, "If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases."[342] "[F]or good cause," the court instead may appoint "another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant . . . ."[343]

These standards are poorly tailored for ensuring habeas counsel's quality. The Supreme Court has "consistently recognized that habeas corpus proceedings are civil in nature,"[344] and the Federal Rules of Civil Procedure generally govern federal habeas corpus proceedings.[345] Experience as a criminal appellate counsel does little to ensure that lawyers appointed to handle federal habeas reviews are proficient in this litigation. The ABA's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* provide that postconviction counsel should be a "*trial* practitioner[]" with experience in litigating "serious and complex" cases.[346] The Anti-Drug Abuse Act's qualification standards do not differentiate between appellate and postconviction counsel; rather, the Act includes one standard for all counsel appointed after judgment.[347] This failure to differentiate between two very different functions produces a qualification standard unsuited to the appointment of habeas counsel.

Even without a meaningful qualification standard for postconviction counsel, however, the Anti-Drug Abuse Act provides capital

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[341] *Id.* § 848(q)(5), (6).

[342] *Id.* § 848(q)(6).

[343] *Id.* § 848(q)(7). The Eleventh Circuit rejected an argument that the phrase "appoint another attorney" meant only that the court could appoint a second attorney, rather than that the court could appoint such an attorney instead of one qualified under the standards. In re Lindsey, 875 F.2d 1502, 1507 n.3 (11th Cir. 1989) (construing subsection (q)(7)). The provision's legislative history supports the Eleventh Circuit's interpretation. *See* 134 CONG. REC. 22,995-97 (1988); *see supra* notes 235-36 and accompanying text.

[344] Hilton v. Braunskill, 481 U.S. 770, 775 (1987). *But see* Harris v. Nelson, 394 U.S. 286, 293-94 (1969) (contending that while "habeas corpus proceedings are characterized as 'civil,'" that "label is gross and inexact.").

[345] FED. R. CIV. P. 81(a)(2). *But see supra* note 216.

[346] ABA GUIDELINES, *supra* note 313, at Guideline 5.1(III) (emphasis added). *See also* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES at Standard 5.1 (1988).

[347] 21 U.S.C.A. § 848(q)(6).

habeas petitioners with far greater protections than does the CJA. The only death row inmates in the country who do not receive the Anti-Drug Abuse Act's benefits are those at the USDB.

VI. A Legislative Proposal

> *When we assumed the soldier, we did not lay aside the citizen.*
>
> *George Washington*[348]

A. A Call for Congressional Action

"Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[349] Congress should discharge that responsibility by ensuring that Article III courts have the ability to assess and vindicate condemned service members' rights through meaningful habeas review of capital courts-martial. Two essential ingredients of meaningful habeas review are the right to appointed counsel and *de novo* review of constitutional issues.

The optimal means of providing counsel for military death row habeas petitioners would be to bring these petitioners under the appointment system established by the Anti-Drug Abuse Act. Absent new legislation, a court would have no authority to extend the Anti-Drug Abuse Act's more beneficial terms to a military capital habeas petitioner. Consequently, any statutory reform should include an expansion of the Anti-Drug Abuse Act's counsel provision to encompass military death row habeas petitioners.

While guaranteeing representation by counsel is a necessary condition for meaningful habeas review of military capital cases, it is not a sufficient condition. Habeas review cannot meaningfully protect condemned service members' constitutional rights absent a wider scope of review. Expanding the scope of review is within the judiciary's power,[350] but the Supreme Court already has rejected one invitation to do so.[351] Rather than waiting for judicial action that may never come, Congress should implement reform.

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[348] 3 THE WRITINGS OF GEORGE WASHINGTON 13 (ed. Jared Sparks 1834) (from Answer to an Address of the New York Provincial Congress, 26 June 1775).

[349] Solorio v. United States, 483 U.S. 435, 447 (1987).

[350] Indeed, in *Burns v. Wilson*, the Supreme Court expanded the scope of review. *See generally supra* notes 43-65 and accompanying text.

[351] Lips v. Commandant, USDB, 114 S. Ct. 920 (1994) (order denying certiorari). The Court subsequently rejected a pro se certiorari petition attacking the Tenth Circuit's standard of review in military habeas cases. Tornowski v. Hart, 114 S. Ct. 1574 (1994) (order denying certiorari).

The Supreme Court has noted that implicit within the UCMJ "is the view that the military court system generally is adequate to and responsibly will perform its assigned task."[352] A more exacting standard of review draws the criticism that the heightened scrutiny from federal courts "might well emasculate the role of the military courts in balancing the rights of service members against the needs of the service."[353]

In practice, meaningful habeas review of capital cases would not displace the CAAF from its proper place atop the military justice system.[354] Regardless of the federal district court's decision on habeas review of a capital court-martial, the losing party likely will appeal the case. If the Tenth Circuit rules against the petitioner, then no tension exists between the CAAF and the Article III judiciary and no diminution of the CAAF's role has occurred. If, on the other hand, the Tenth Circuit disagrees with the CAAF and rules for the petitioner, then the United States can seek certiorari. The Supreme Court quite likely would grant certiorari in this case, as it would present a split between two federal appellate courts on an issue with literally life or death consequences.[355] In practice, expanding the

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[352] Schlesinger v. Councilman, 420 U.S. 738, 758 (1975).

[353] Rosen, *supra* note 13, at 9. Lieutenant Colonel Rosen continued, "On the other hand, federal judges are the final arbiters of federal constitutional law. They should be afforded a role in the resolution of constitutional claims raised in collateral attacks on courts-martial beyond merely ascertaining whether the military courts considered the claims." *Id.*

[354] Noyd v. Bond, 395 U.S. 683, 695 (1969) (observing that the "primary responsibility for the supervision of military justice in this country and abroad" rests with the CAAF). Interestingly, the House Armed Services Committee's report on the UCMJ noted that the CAAF would serve as "the court of last resort for court-martial cases, except for the constitutional right of habeas corpus." H.R. REP. No. 491, 81st Cong., 1st Sess. 7 (1949).

[355] The Supreme Court's rules suggest that certiorari is appropriate where "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." SUP. CT. R. 10.1. After listing several other bases for certiorari, the rule adds, "The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals [CAAF]." *Id.* at R. 10.2. The leading treatise on Supreme Court practice notes, "When there is a direct conflict between a decision of one of the 12 regional courts of appeals and a decision of either the Court of Appeals for the Federal Circuit or the Court of Military Appeals [CAAF], there is a basis for Supreme Court review of either decision by way of certiorari." SUPREME COURT PRACTICE, *supra* note 29, at 206. The treatise also advises:

> The Supreme Court often, *but not necessarily*, will grant certiorari where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of *federal* law or on the same matter of *general* law as to which federal courts can exercise independent judgments. . . . [A] square and irreconcilable conflict of this nature *ordinarily* should be enough to secure review.

Id. at 168. In *Davis v. United States*, the Supreme Court granted certiorari in a military case to resolve a split among the lower courts concerning the Fifth Amendment's

scope of review in death penalty cases would not subordinate the CAAF to the Tenth Circuit.[356] Rather, the two courts would operate in tandem to identify controversial issues for the Supreme Court to resolve.[357]

One additional concern applies to both the proposed broader scope of review and the proposed statutory right to counsel. Once death penalty habeas petitioners receive these protections, service members confined as the result of noncapital courts-martial may attempt to win the new procedures' benefits as well. The courts almost surely would rebuff any such attempt.

Any statute affecting habeas review of courts-martial would enjoy the heightened deference the Supreme Court accords to congressional action in military matters.[358] As the Court noted in 1994, "Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, *and remedies related to military discipline*.'"[359] Additionally, because a system of heightened protection for capital cases advances the governmental interest in ensuring accuracy in the death penalty's imposition, any attempt to rely on the Fifth Amendment's Equal Protection component[360] to extend these protections into the noncapital arena would fail. The CAAF has rejected an equal protection challenge to two provisions in the

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requirements when a suspect makes an ambiguous request for counsel during a custodial interrogation. 114 S. Ct. 2350, 2354 (1994).

[356] Rejecting an argument that it was required to follow the Tenth Circuit's case law, the CAAF reasoned:

> This appellate court of the United States is as capable as is a Court of Appeals of the United States of analyzing and resolving issues of Constitutional and statutory interpretation. In fact, to the extent that an issue involves interpretation and application of the Uniform Code of Military Justice and the Manual for Courts-Martial in the sometimes unique context of the military environment, this Court may be better suited to the task.

Garrett v. Lowe, 39 M.J. 293, 296 n.4 (C.M.A. 1994).

[357] *Cf.* Robert M. Cover & T. Alexander Aleinkoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (arguing that federal habeas review of state criminal cases serves as a dialogue between the federal and state judiciaries).

[358] The Supreme Court has emphasized that "judicial deference" to "congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

[359] Weiss v. United States, 114 S. Ct. 752, 760 (1994) (quoting Chappell v. Wallace, 462 U.S. 296, 301 (1983)) (emphasis added).

[360] The Supreme Court has explained that while an unequal distribution of state benefits is subject to equal protection scrutiny, "[g]enerally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose." Zobel v. Williams, 457 U.S. 55, 60 (1982).

UCMJ that extend added protections during review of death sentences.[361]

Accordingly, in deciding whether to provide additional protections during federal habeas review of military capital cases, Congress need not fear that it is starting down a slippery slope toward a right to counsel in every federal habeas review of a court-martial,[362] and a total abandonment of the full and fair consideration standard.

B. A Legislative Strategy

Appendix A proposes a bill, the Military Capital Habeas Corpus Equality Act, designed to provide condemned service members with both a right to counsel and a meaningful scope of review. The bill would apply retroactively to cover military death row inmates sentenced prior to the bill's enactment.[363]

Since 1989, attempts to reform the habeas corpus process have been among the most contentious issues before Congress.[364] A proposal to amend either 28 U.S.C. § 2241 or 21 U.S.C. § 848(q)(4)(b) likely would fall victim to the legislative infighting that characterizes this area. The Military Capital Habeas Corpus Equality Act seeks to escape this congressional gridlock by avoiding a specific scope of

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[361] United States v. Gallagher, 15 C.M.A. 391, 398, 35 C.M.R. 363, 370 (1965). UCMJ, art. 67(a), 10 U.S.C. § 867, provides:

> The Court of Military Appeals [CAAF] shall review the record in—
>
> (1) all cases in which the sentence, as affirmed by a Court of Military Review [CCA], extends to death;
>
> (2) all cases reviewed by a Court of Military Review [CCA] which the Judge Advocate General orders sent to the Court of Military Appeals [CAAF] for review; and
>
> (3) all cases reviewed by a Court of Military Review [CCA] in which, upon petition of the accused and on good cause shown, the Court of Military Appeals [CAAF] has granted a review.

UCMJ art. 71(a), 10 U.S.C.A. § 871, provides, "If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President." When originally enacted, the UCMJ also provided mandatory CAAF jurisdiction over, and required presidential approval of the sentence in, cases where the accused is a general or flag officer. While *Gallagher* upheld these added protections for general and flag officers, the Military Justice Act of 1983 eliminated them from the Code. Pub. L. No. 98-209, §§ 5(e), 7(c), 97 Stat. 1399, 1402; *see* SENATE REPORT, *supra* note 38, at 28.

[362] Justice Stevens has noted, "Legislatures conferred greater access to counsel on capital defendants than on persons facing lesser punishment even in colonial times." Giarratano v. Murray, 492 U.S. 1, 20 (Stevens, J., dissenting).

[363] The Supreme Court recently reiterated that statutes are presumed not to be retroactive. Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994). Thus, absent a specific provision making the legislation retroactive, this bill may not extend to those service members already on death row.

[364] *See generally* 140 CONG. REC. H2416-27 (daily ed. Apr. 19, 1994) (rejecting habeas corpus reform proposals); Marcia Coyle, *Crime Bill Faces Old Barriers*, NAT'L L.J., Aug. 30, 1993, at 10; *Habeas Redux*, NAT'L L.J., May 20, 1991, at 31; *Congress Wraps It Up*, NAT'L L.J. Nov. 12, 1990, at 1.

review or establishing a rigid right to counsel. Instead, the bill merely calls for a military capital habeas case to be treated in the same manner as would a state capital case on federal habeas review. The precise details are left to the on-going legislative consideration of how state cases should be handled on habeas. The bill advances only one principle: equality of treatment for military death row habeas petitioners. Quite simply, the bill would give death row inmates at the USDB the same opportunity to challenge their sentences before the Article III courts that death row inmates at San Quentin or the Virginia State Penitentiary already have.

The principle of equality likely would be far less controversial than precise formulations concerning retroactivity or procedural default have proved to be. A 1982 Senate Armed Services Committee report supported the concept of equality between federal habeas review of military and civilian cases.[365] One crucial development since 1982 makes equality even more important: *Solorio v. United States*.[366] The military justice system now can try service members for any offense under the UCMJ without regard to whether the alleged offense was connected to military service. A service member should not forfeit meaningful access to federal habeas review if the military, rather than a state, exercises jurisdiction over the case—a decision entirely beyond the service member's control.

Absent the adoption of a habeas reform bill, the Military Capital Habeas Corpus Equality Act would require the Kansas District Court to appoint counsel for a military capital habeas petitioner. The court would have the choice to appoint either a private attorney or the Kansas Federal Public Defender Organization to represent the petitioner. If the court chose to appoint a private attorney, that lawyer would be paid with CJA funds, but the Act's hourly rate, cap on total compensation, and limitations on funding for expert assistance would not apply. Courts would review legal issues and mixed questions of fact and law under a *de novo* standard, but generally would presume the military courts' findings of fact to be correct.

Because the bill is an amendment to the UCMJ, it could be passed through the expedient means of attaching it to a Department of Defense authorization act.[367] Consequently, the proposed legisla-

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[365] SENATE REPORT, *supra* note 38, at 35.

[366] 483 U.S. 435 (1987).

[367] Defense authorization acts have become the primary vehicle for amending the UCMJ. *See, e.g.*, National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1569 (1989); National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, §§ 801-08, 100 Stat. 3816, 3905 (1986). In 1985, Congress used a defense authorization act to create a new UCMJ article making espionage a capital offense. Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 583, 634 (1985).

tion is a viable mechanism to remove the two major impediments to meaningful habeas review of military death penalty cases: the lack of a right to counsel and the constricted scope of review.

VII. Conclusion

Under current law, federal habeas review does not provide a meaningful assessment of whether constitutional error tainted a court-martial conviction. Two factors combine to rob federal habeas review of its importance: a lack of counsel for the petitioners and an extremely narrow scope of review. While a hollow habeas review may be acceptable in most military cases, death penalty cases are different. Because of its enormity and irrevocability, the death penalty is a punishment apart from all others. Just as Congress recognized that difference in 1950, when it gave condemned service members preferred access to the CAAF, Congress should recognize that difference now and establish heightened protections for condemned service members during federal habeas review.

Chief Justice Warren observed that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[368] Without a meaningful opportunity to challenge their sentences through the federal habeas review process, military death row inmates are stripped of a potent device for protecting their most basic right of all.

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[368] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

APPENDIX A

A BILL

To amend Chapter 47 of Title 10, United States Code
(the Uniform Code of Military Justice), to
establish parity between habeas corpus review of
state and military capital cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the ''Military Capital Habeas Corpus Equality Act.''

SECTION 2. PROVISION OF COUNSEL; SCOPE OF REVIEW

(a) *In General*—Chapter 47 of Title 10, United States Code, is amended by adding the following new section:

''§ 871a. Art. 71a. Habeas corpus review of capital courts-martial.

''(a) In any case where the President, acting under section 871(a) of this title (article 71(a)), approves the sentence of a court-martial extending to death, an accused who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services in any proceeding under section 2241 of Title 28, United States Code, seeking to vacate or set aside the death sentence shall be entitled to appointment of counsel and the furnishing of other services to the same extent as would a defendant in any post conviction proceeding under section 2254 of Title 28, United States Code, seeking to vacate or set aside a death sentence.

''(b) In any case where the President, acting under section 871(a) of this title (article 71(a)), approves the sentence of a court-martial extending to death, the federal courts, in reviewing an application under section 2241 of Title 28, United States Code, shall apply the same scope of review as would be used to review an application under section 2254 of Title 28, United States Code, seeking to vacate or set aside a death sentence.''

(b) *Technical Amendment*—The table of sections at the beginning of subchapter IX of Chapter 47 of Title 10, United States Code, is amended by inserting after the item relating to section 871 (article 71) the following new item:

"871a. 71a. Habeas corpus review of capital courts-martial."

SECTION 3. EFFECTIVE DATE.

This Act shall apply to military capital habeas corpus cases pending on or commenced on or after the date of the enactment of this Act.

APPENDIX B

During 1992 and 1993, the Kansas District Court decided the following cases in which habeas corpus petitioners challenged their court-martial conviction, sentence, convening authority's action, and/or appeal:

1. Castillo v. Hart, No. 91-3215-AJS, 1993 U.S. Dist. LEXIS 18609 (D. Kan. Dec. 17, 1993).

2. Bramel v. Hart, No. 91-3186-AJS, 1993 U.S. Dist. LEXIS 18600 (D. Kan. Nov. 30, 1993).

3. Futcher v. Hart, No. 91-3137-AJS, 1993 U.S. Dist. LEXIS 17205 (D. Kan. Nov. 9, 1993).

4. DuBose v. Hart,No. 91-3149-AJS, 1993 U.S. Dist LEXIS 17204 (D. Kan. Nov. 9, 1993).

5. Boos v. U.S. Disciplinary Barracks Commandant, No. 93-3132-RDR, 1993 U.S. Dist. LEXIS 15607 (D. Kan. Oct. 29, 1993).

6. Goltz v. Commandant, U.S.D.B., No. 92-3051-RDR, 1993 U.S. Dist. LEXIS 15576 (D. Kan. Oct. 29, 1993).

7. Bartos v. U.S. Disciplinary Barracks, No. 91-3135-AJS, 1993 U.S. Dist. LEXIS 15593 (D. Kan. Oct. 18, 1993).

8. Goff v. Hart, No. 91-3130-AJS, 1993 U.S. Dist. LEXIS 14032 (D. Kan. Sept. 29, 1993).

9. Haughton v. Hart, No. 91-3060-AJS (D. Kan. July 29, 1993), *aff'd*, 25 F.3d 1057 (10th Cir. 1994) (table).

10. Travis v. Hart, No. 92-3011-RDR, 1993 U.S. Dist. LEXIS 10911 (D. Kan. July 13, 1993), *aff'd*, 16 F.3d. 417 (10th Cir. 1994) (table).

11. Kennett v. Hart, No. 90-3459-RDR, 1993 U.S. Dist. LEXIS 9648 (D. Kan. June 18, 1993).

12. Smith v. Hart,No. 90-3361-RDR, 1993 U.S. Dist. LEXIS 7254 (D. Kan. May 14, 1993).

13. Reed v. Hart, No. 90-3428-RDR, 1993 U.S. Dist. LEXIS 7395 (D. Kan. May 10, 1993), *aff'd*, 17 F.3d 1437 (10th Cir. 1994) (table).

14. Lomax v. Hart, No. 90-3333-RDR, 1993 U.S. Dist. LEXIS 6370 (D. Kan. Apr. 12, 1993).

15. Gary v. Hart, No. 90-3321-RDR, 1993 U.S. Dist. LEXIS 6372 (D. Kan. Apr. 9, 1993).

16. Tornowski v. Hart, No. 90-3293-RDR, 1993 U.S. Dist. LEXIS 4779 (D. Kan. Mar. 26, 1993), *aff'd*, 10 F.3d 810 (10th Cir. 1993) (table), *cert. denied*, 114 S. Ct. 1574 (1994).

17. Chambers v. Berrong, No. 90-3202-RDR, 1993 U.S. Dist. LEXIS 4778 (D. Kan. Mar. 8, 1993).

18. Hubbard v. Berrong, No. 90-3120-RDR, 1993 U.S. Dist. LEXIS 2819 (D. Kan. Feb. 18, 1993), *aff'd*, 7 F.3d 1045 (10th Cir. 1993) (table).

19. Spindle v. Berrong, No. 90-3026-RDR, 1993 U.S. Dist. LEXIS 2821 (D. Kan. Feb. 4, 1993), *aff'd*, 996 F.2d 311 (10th Cir.) (table), *cert. denied*, 114 S. Ct. 478 (1993).

20. Booth v. Hart,No. 90-3524-RDR, 1993 U.S. Dist. LEXIS 2820 (D. Kan. Feb. 4, 1993), *aff'd*, 5 F.3d 545 (10th Cir. 1993) (table).

21. King v. Berrong, No. 89-3494-RDR, 1993 U.S. Dist. LEXIS 1552 (D. Kan. Jan. 25, 1993), *aff'd*, 25 F.3d 1057 (10th Cir. 1994).

22. Stottlemire v. United States,No. 89-3465-RDR, 1993 U.S. Dist. LEXIS 1553 (D. Kan. Jan. 12, 1993).

23. Fosnaugh v. Berrong, No. 89-3253-RDR, 1992 U.S. Dist. LEXIS 20427 (D. Kan. Dec. 16, 1992).

24. Rath v. Berrong, No. 89-3440-RDR, 1992 U.S. Dist. LEXIS 20428 (D. Kan. Dec. 14, 1992).

25. Singleton v. Berrong, No. 89-3293-RDR, 1992 U.S. Dist. LEXIS 18916 (D. Kan. Nov. 24, 1992).

26. Erbach v. Berrong, No. 89-3082-RDR, 1992 U.S. Dist. LEXIS 18917 (D. Kan. Nov. 24, 1992).

27. Richardson v. Berrong, No. 89-3146-R, 1992 U.S. Dist. LEXIS 15755 (D. Kan. Sept. 29, 1992).

28. Maracle v. Commandant, No. 88-3482-R, 1992 U.S. Dist. LEXIS 14117 (D. Kan. Aug. 21, 1992).

29. Lips v. Commandant, U.S. Disciplinary Barracks, No. 88-3396-R, 1992 U.S. Dist. LEXIS 12018 (D. Kan. July 31, 1992), *rev'd*, 997 F.2d 808 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

30. Shanks v. Zelez, No. 88-3400-R, 1992 U.S. Dist. LEXIS 10268 (D. Kan. June 24, 1992), *aff'd*, 982 F.2d 529 (10th Cir. 1992) (table).

31. Williams v. Commandant, U.S.D.B., No. 90-3427-R, 1992 U.S. Dist. LEXIS 3272 (D. Kan. Feb. 12, 1992).

32. Carr v. Berrong, No. 89-3355-R, 1992 U.S. Dist. LEXIS 2667 (D. Kan. Feb. 4, 1992).

33. Jefferson v. Berrong, 783 F. Supp. 1304 (D. Kan. 1992), *appeal dismissed sub nom.* Amen-Ra v. Berrong, 992 F.2d 1222 (10th Cir. 1993) (table).

COURTS-MARTIAL IN THE LEGION ARMY: AMERICAN MILITARY LAW IN THE EARLY REPUBLIC, 1792–1796

BRADLEY J. NICHOLSON*

I. Introduction

From 1792 until his death in 1796, Major General Anthony Wayne was Commander-in-Chief of the Legion Army. The Legion was the major force of the United States Army, assembled to attack and defeat the Indian tribes along the northwestern frontier of the United States—a region that ultimately would become the states of Indiana, Ohio, and Michigan. Two previous campaigns had ended in disaster, and it was left to General Wayne, a Revolutionary War hero, to drive back the Indians and to make the frontier safe for further expansion. The campaign began in Pittsburgh, Pennsylvania, where General Wayne assumed command in 1792. He trained the soldiers in his tactics, led them down the Ohio River to Cincinnati, Ohio, and then north toward Detroit, Michigan, then a British outpost. The four-year campaign culminated in victory at the Battle of Fallen Timbers, just south of Detroit. This article reviews the nature of early American military law as reflected in the court-martial records of that campaign.

Military law in the Legion reflected the need for discipline in an Army that twice had failed to subdue the Indian presence on the northwestern border of the young nation. "Another conflict with the savages with raw recruits is to be avoided at all means," Secretary of War Knox wrote to General Wayne.[1] General Wayne's orders were to whip the Army into shape, quite literally if necessary, and to

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[1] Letter from Knox to Wayne (Aug. 7, 1792), *in* ANTHONY WAYNE, A NAME IN ARMS: THE WAYNE-KNOX-PICKERING-MCHENRY CORRESPONDENCE 61 (Richard C. Knopf ed., 1960) [hereinafter ANTHONY WAYNE: A NAME IN ARMS]. A report on the failure of the prior campaign under Major General Arthur St. Clair listed the want of discipline and experience in the troops as one of the causes. 1 AMERICAN STATE PAPERS MILITARY AFFAIRS 38–39 (Walter Lowrie & Matthew St.C. Clarke eds., 1832) [hereinafter 1 AMERICAN STATE PAPERS].

create an effective and disciplined fighting force out of inexperienced young soldiers. Military law was the means to this end.

Additionally, this article will examine the sources of early American military law. Military law in the Legion borrowed from two traditions. Many rules and legal customs were based on the traditions of the British Army. The American statute—the Rules and Articles of War—was borrowed wholesale from the British statute.[2] In addition, certain books on British military law were available and almost certainly read by the Legion's officers, including General Wayne. Many of the officers of the Legion had served in the Continental Army during the Revolutionary War under General Washington and others who had themselves served under the British in colonial militias. Treatises, experience, and memory made up the military's "common law." The officer's honor code, in particular, closely followed British Army practice. The substantive rules were a simple framework, however, the interstices of which often were filled in or influenced by civilian custom.

Military law in the Legion Army was in some ways similar to contemporary Anglo-American civilian criminal law. Douglas Hay argues that eighteenth-century British civilian criminal law was composed of three salient characteristics: majesty, justice, and mercy (although in one place he says justice, terror, and mercy).[3] Majesty consisted of the solemn rituals of the court calculated to inspire awe. Terror, a large component of majesty, was played out in the drama of the decision, sentencing, and execution. Mercy was the prerogative of the crown to pardon any prisoner up to the time of execution. Related to the patronage system in the ability of the gentleman to write a letter to the judge recommending leniency, it was supposed to ensure the loyalty of the commoner to the system in general and the gentleman in particular. Justice was the disembodied, lofty ideal of the law, above any single man or interest. It purported to apply equally to rich and poor alike.[4] The legal customs of the Legion Army conformed to these categories. The terror of judgment was acted out in the same kinds of rituals in sentencing

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[2] This article will often refer to the Rules and Articles of War as the "Code."

[3] DOUGLAS HAY, *Property, Authority and the Criminal Law*, *in* DOUGLAS HAY, ET AL., ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND (1975). Douglas Greenberg suggests that these characteristics also apply to early American criminal law. *See* Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293, 321-23 (1982).

[4] *See generally* HAY, *supra* note 3. This article uses Hay's categories without accepting his main thesis that 18th century civilian criminal law was a tool of class hegemony. Hay's thesis has been greeted skeptically. *See* John H. Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96 (1983). It is more likely that majesty, justice, and mercy merely reflect the attempt of civilian judges to achieve greater influence in their own courts, and have nothing to do with upper class "conspiracies."

and punishment that one finds in contemporary civilian criminal law. The power of the court-martial panel or the Commander-in-Chief to show leniency to avoid extreme punishments was the direct counterpart of the mercy of the civilian court. The judge and gentleman were combined in the persona of the Army officer who could try the prisoner and sentence him to death, or recommend mercy and spare his life.

By contrast, justice in the Legion Army was a reflection of military legal culture, and significantly different from the civilian concept of justice. Military justice was embodied in the Articles of War and the Commander-in-Chief's repeated demands for adherence to the Code, discipline in the army, and obedience to his orders. Unlike Hay's concept of civilian justice, military justice was not only purposefully but perceptibly unequal. While enlisted men were regulated by specific restrictions set forth in the Articles of War, officers were explicitly judged by a different, more vague and potentially lenient code of honor. Justice in the military under the Articles of War was a useful tool, and not an end in itself. Military legal culture emphasized using the Code and the court-martial to prepare soldiers to obey and fight, to condition officers to trust and cooperate, and to punish and remove those who could not live by the standards of the military community. Military legal culture reflected tradition as well as the necessities of the difficult task at hand.

II. The British Military Tradition

The military law of the Legion consisted of the Articles of War, which the Continental Congress adopted from Great Britain during the Revolution. While the founding fathers may have considered creating a new military code, they did not do so; rather, the former colonies adopted British military law wholesale. Earlier, in 1775, the Provisional Congress of Massachusetts Bay Colony adopted the 1774 British Articles of War, and passed its own version of the British Mutiny Act.[5] Other colonies similarly adopted the British code.[6] A committee including John Adams was essential to the successful passage of the Articles of War on September 20, 1776.[7] Adams in

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[5] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS *12-13, *1470-77 (2d ed. 1896 *repr.* 1920).

[6] *See id.* at *12 n.32.

[7] 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 788-807 (1906), *reprinted in* WINTHROP, *supra* note 5, at *1489-1503. The Code governed the army in essentially its original form until the first substantial revision in 1806, which in turn was not substantially revised until 1916. *See* Frederick B. Wiener, *Court-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 19 (1958) [hereinafter Wiener, *The Original Practice I*].

particular took great interest in the adoption of a military code, but perhaps this is not surprising, given Adams's fascination with the military.[8] Adams justified—actually, sanctified—the adoption of the British military code by reference to ancient, and therefore virtuous, roots.[9] While Adams may have alluded to the allegedly classical origins of the new law to downplay the adoption of the enemy's system of military justice, it also is likely that this was a rhetorical appeal to the forefathers' sense of tradition.

> There was extant one system of Articles of War which had carried two empires to the head of mankind, the Roman and the British; for the British Articles of War were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. It was an observation founded in undoubted facts, that the prosperity of nations had been in proportion to the discipline of their forces by sea and land; I was, therefore, for reporting the British Articles of War *totidem verbis*.[10]

No evidence exists that the British system of military justice was based directly on the Roman system in the manner Adams suggests, but the British articles probably were influenced by continental codes, which may have developed in some part from Roman influences. Adams might have been as impressed by the stern discipline of the British system as he was with its ancient origins. Adams stressed the need for tough discipline in the Continental Army to attain victory over the British Army.[11] Civilian legislators chose to

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[8] *See generally* John E. Ferling, *"Oh That I Was a Soldier": John Adams and the Anguish of War*, 36 AM. Q. 258 (1984).

[9] Colonial revolutionaries admired ancient, especially Roman, political and legal models for their "virtue." *See* GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 48–53 (1969). For example, the United States Army in the 1790s was called the "Legion," and Major General Anthony Wayne was called the "Legionary General." 1 AMERICAN STATE PAPERS, *supra* note 1, at 40–41. Coming full circle, some commentators have suggested that the emphasis on classical republicanism and virtue was in reaction to the endemic warfare of the 18th century. *See* E. Wayne Carp, *Early American Military History: A Review of Recent Work*, 94 VA. MAG. HIST. & BIOG. 259, 282 (1986).

[10] 3 JOHN ADAMS, WORKS OF JOHN ADAMS 68–69 (1851). Adams also remarked: "This was another measure that I constantly urged on with all the zeal and industry possible, convinced that nothing short of the Roman and British discipline could possibly save us." *Id.* at 83.

[11] *See* 7 *id.* at 290; 9 *id.* at 403, 451. Adams wrote to his wife that

> if I were an officer, I am convinced I should be the most decisive disciplinarian in the army. . . . Discipline in an army is like the laws in a civil society. There can be no liberty in a commonwealth where the laws are not revered and most sacredly observed, nor can there be happiness or safety in an army for a single hour when discipline is not observed.

1 PAGE SMITH, JOHN ADAMS 289 (1962).

Adams also based his reasoning for adopting the Code on tradition. Yet the most

keep the British Code, which was consistent with the wishes of the then-Commander-in-Chief of the Army, George Washington. However, for Washington the new American Code was not "British" enough. The Continental Congress reduced the number of lashes that could be applied (1000 to 100). Washington wanted at least 500, and unsuccessfully petitioned the Continental Congress to raise the number. General Wayne expressed no dissatisfaction with the borrowed Code. In his General Orders—read to the troops daily—he exhorted everyone to study the Code carefully.

Military treatises must have influenced the law in the Legion Army. These books were easily obtained and widely read.[12] Under General Washington, strict discipline and formal training—including reading European military literature—was expected of his officers.[13] These treatises were written mostly by British officers, including judge advocates. They included books such as the *Norfolk Militia Discipline* and the *British Manual of 1764*, commonly known as the "Sixty-Fourth."[14] The most important treatise was Stephen Payne Adye's *A Treatise on Courts Martial*. Adye was a British officer who had been stationed in North America. His book was first published not only in London, but also in New York in 1769, and again in Philadelphia in 1779.[15] Adye's book is quite comprehensive, cover-

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important tradition was not that the Code was British and part of the cultural heritage of the colonies (nor that many colonials had experience with this code from the Seven-Years War). It was important to Adams that this was not only a British, but a Roman Code. Adams had studied Roman law as a lawyer, and admired the Roman system. Adams thus emphasized the pedigree of the law rather than the excellence of the individual rules. It also was easier to adopt a complete code rather than develop the necessary rules piecemeal ("it would be in vain for us to seek in our own inventions . . . for a more complete system of military discipline").

[12] JAMES R. JACOBS, THE BEGINNING OF THE U.S. ARMY, 1783-1812, at 5 (1947). Wayne was an avid reader of European military treatises. *See* PAUL NELSON, ANTHONY WAYNE: SOLDIER OF THE EARLY REPUBLIC 15, 38 (1985). Indeed, he gave his officers in the Legion copies of the "Blue Book," a drill manual that the German officer Frederick von Steuben had prepared for the Continental Army during the Revolutionary War. *See* FRIEDRICH WILHELM LUDOLF GERHARD AUGUSTIN, BARON VON STEUBEN, REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES (1779); EDWARD M. COFFMAN, THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784-1898, at 20 (1986). Wayne's letter of September 13, 1792 to Secretary Knox requested more copies of the Blue Book and the Articles of War. ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1, at 94; *see also* Letter from Wayne to Knox (Jan. 4, 1793), *in id.* at 164 (again requesting copies of the "Blue Book").

[13] Don Higginbotham, *The Early American Way of War: Reconnaissance and Appraisal*, 44 WM. & MARY Q. 230, 236 (3d Ser. 1987).

[14] JACOBS, *supra* note 12, at 6.

[15] Other important treatises appearing around the time of the Legion include JOHN WILLIAMSON, ELEMENTS OF MILITARY ARRANGEMENT (1st ed. 1782); ALEXANDER TYTLER, AN ESSAY ON MILITARY LAW, AND THE PRACTICE OF COURTS-MARTIAL (1st ed. 1800); E. SAMUEL, AN HISTORICAL ACCOUNT OF THE BRITISH ARMY, AND OF THE LAW MILITARY (1816). The first American text closely followed the British treatises. Indeed, ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW, AND COURTS-MARTIAL; AS PRACTISED IN THE UNITED

ing such useful subjects as the power and authority of the court-martial, courts of inquiry, the distinctions between regimental and garrison courts-martial, the duties of a judge advocate, arraignments and pleas, challenges of members of the panel, evidence and witnesses, and punishments.

In addition, President Washington and others in the elite circle of military leaders at the end of the eighteenth century had been exposed to the British Army and had learned its system of justice firsthand.[16] These men fought in colonial militias alongside the British Army during the Seven-Years War, and later fought against the British during the Revolution. Senior officers in the Legion, including Wayne, served under these officers during the Revolution.[17] Military justice during the Seven-Years War, the Revolution, and the Legion had much in common, because each of those armies shared virtually the same rules and customs, passed down in part through the common experience of the officer corps. These officers had learned not only the rules, but also the informal and unwritten customs of the British Army. Their experience contributed to the essence of the administration of justice in the Legion.

These informal and unwritten customs were useful, because the Articles of War provided only a skeletal judicial system. The Code served two main purposes: to inform soldiers of what behavior was expected of them and to guide courts-martial in applying the law. The Articles of War were to be read to each soldier within six days of enlistment, and were to be read every two months at the head of every regiment, troop, or company. The soldier was informed that he was not to use blasphemous or profane language. He was not to utter traitorous or disrespectful words against the United States Congress or state legislatures. Nor could he begin, excite, cause, or join in any mutiny or sedition. He was not to disobey any lawful command. He was enjoined from striking his superiors, nor could he challenge another soldier to a duel. He was not to desert, reenlist in another regiment (usually for an enlistment bounty), be drunk, or sleep on guard duty. Enlisted men could be corporally punished, or, if the Code explicitly provided, executed.

Officers also were subject to many requirements in the Code, but not as many as enlisted men. Not the least of the requirements applying to officers was the vague proscription to avoid behaving "in a scandalous and infamous manner, such as is unbecoming an

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STATES OF AMERICA (1st ed. 1809), copies TYTLER, *supra*, for the most part. *See* Wiener, *The Original Practice I*, *supra* note 7, at 23-25.

[16] Higginbotham, *supra* note 13, at 236.

[17] *See generally* ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1 (footnotes detailing the prior experience of many of the officers of the Legion).

officer and a gentleman." But there were many others: officers could be charged with being absent without leave (AWOL) (rather than desertion), dueling, making a false report, embezzlement, or drunkenness. Officers, who as gentlemen honored and valued their respected status, had an additional incentive to obey the Code, because instances of cowardice or fraud could "be published in the newspapers, in and about Camp, and of the particular State from which the offender came, or usually resides; after which it shall be deemed scandalous for any Officer to associate with him." Officers' punishments were fairly limited. For any offense short of treason—which was punishable by death—officers could be dismissed from the service, cashiered, forced to apologize, reprimanded, or suspended without pay.[18]

The Code set forth the procedural essentials for the administration of justice in the Army. A general court-martial (one that could impose a death sentence or try an officer) could consist of anywhere from five to thirteen officers, but should not consist of less than thirteen "where that number can be convened without manifest injury to the service."[19] Proceedings of all general courts-martial had to be reviewed by the Commander-in-Chief (in the Legion, General Wayne) before execution of sentence. Regimental courts-martial could consist of three commissioned officers, for the "trial of offenses, not Capital." The judge advocate "shall prosecute in the name of the United States of America; but shall so far consider himself as Council for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself." The Articles of War provided oaths for the members of the court, witnesses, and the judge advocate. Members of a court-martial were required "to behave with decency and calmness, and in giving their votes, are to begin with the youngest in Commission." Trials could take place only between eight in the morning and three in the afternoon, except in cases which "require immediate example." A simple majority could convict, but a two-thirds vote was necessary for a sentence of death. The Code provided for taking depositions of witnesses, away from camp

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[18] Cashiering was a dishonorable discharge, which included the stigma of being unable to hold any employment in the service of the United States. GEORGE DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 166–67 & n.3 (1898).

[19] This was a change from the earlier rules, which required 13 officers at every general court-martial. Art. 1, § XIV of the 1786 Amendments, *reprinted in* WINTHROP, *supra* note 5, at *1504. The number 13 derived from the supposed analogy of a common law criminal trial before a judge and 12 jurymen. Frederick B. Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 82 (1989) [hereinafter Wiener, *First Mutiny Act Tricentennial*]. The change was made in light of the Army's diminished size after the Revolution. *See id.*

before a justice of the peace, for use as evidence at trial.[20] Eight days was the maximum term of confinement awaiting trial. No prisoner would be forced to face the firing squad unless the Code specifically provided for the death penalty. Whippings were limited to one hundred lashes.[21] The Commander-in-Chief had the power to pardon or mitigate punishments, but could not add to the court's sentence.

The Code thus provided merely an outline for military justice: what to do, but little on how to do it. It had almost nothing to say about, for example, challenges to the panel, evidence, forms of punishment, or many other important matters. In the absence of statutory detail, both military tradition and civilian practices provided much-needed guidance. Like civilian law, military law was both written and unwritten.[22] The unwritten law came from "customs which arising out of necessity have prevailed and became its common . . . law."[23] Courts-martial used civilian practices to fill the gaps in military law and practice. "In all cases, where neither the statutory nor common law of the army will suffice, the deficiency must naturally be supplied from the parental source, the common law of England; and most especially its forms from which indeed military courts ought never unnecessarily to deviate."[24] Although military tradition played a role that is difficult to separate from civilian practices—practices that almost certainly influenced the military—some civilian practices and customs can be identified. The following sections will discuss the influence of both military tradition and civilian custom in the Legion Army as they relate to majesty and terror, mercy, and justice.[25]

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[20] Wayne once granted an officer additional time to obtain certain testimony, adding "altho this appears to be, only putting the evil day at a distance . . . ." Letter from Wayne to Secretary of War Pickering (Sept. 2, 1795), *in* ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1, at 451.

[21] In 1781, Congress rejected a proposal to raise the limit to 500, and the limit of 100 again was confirmed in 1786. Wiener, *The Original Practice I*, *supra* note 7, at 286. The limit was lowered to 50 in 1806, removed altogether in 1812, but reinstated in 1833 for deserters. Flogging finally was abolished in 1861. *Id.* at 21 & n.158; Frederick B. Wiener, *Court-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 290 (1958) [hereinafter Wiener, *The Original Practice II*].

[22] J.D. Droddy, *King Richard to Solorio: The Historical Bases for Court-Martial Jurisdiction in Criminal Cases*, 30 A.F. L. REV. 91, 95 (1989) (quoting ROBERT B. SCOTT, THE MILITARY LAW OF ENGLAND 4 (1810)).

[23] *Id.*

[24] *Id.* (quoting SCOTT, *supra* note 22, at 8).

[25] While military law in the Legion was very much like military law during the Revolutionary War, *see generally* JAMES C. NEAGLES, SUMMER SOLDIERS (1986), the Legion's records, unlike the scattered and incomplete records of the Revolutionary War, provide a relatively comprehensive glimpse of the state of military law in the early Republic.

III. Majesty and Terror

Majesty and terror represented customs that civilian courts used to impress and intimidate prisoners, as well as the general public. These customs included the costume of the judges and the impressiveness of the courthouse; the rhetorical flourishes in the charge of the grand jury and in the sentencing of the condemned prisoner; the drama of execution including the prisoner's speech to the crowd counseling the public—and especially its youth—not to emulate the prisoner's wretched and foreshortened life; and the potential last-moment pardon. These touches were calculated for the greatest public deterrent effect.[26]

The Army, and General Wayne in particular, also used majesty and terror in the hope that by making examples out of a few prisoners, it would make better soldiers out of the rest. The military court's sentence, the affirmation of that sentence by General Wayne, and ultimately the execution of that sentence were ritualistic and rhetorical opportunities intended to convey the majesty of military justice. General Wayne loved the pomp and circumstance of military display and had a personal flair for the dramatic.[27] Before an execution, General Wayne would issue an order that the "whole Army will parade with their Arms and accoutrements in the most Soldierly order to attend the Execution."[28] At other times, General Wayne would approve a death sentence by stating that all the men were to watch the execution, and parade in a "most Military Manner."[29] At the execution, the General Order, written in General Wayne's sternly dramatic style, would be read to the troops, and would comment on the proper behavior of a soldier. It would stress the necessity for discipline in the Army and how only the most awesome and exemplary punishment would suffice in that particular case. In one instance, General Wayne said that he was "deeply impressed with the heinousness of the crimes . . . being fully convinced that nothing short of the most exemplary punishment can put a stop to crimes of this Nature," and that a swift execution was necessary

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[26] For the use of these rituals in civilian life, *see generally* HAY, *supra* note 3; LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865, ch. 2 (1989).

[27] *See* NELSON, *supra* note 12, at ix, 3.

[28] 49 WAYNE PAPERS 23 (Aug. 9, 1792), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 360 (1905). The original Wayne Papers are available at the Historical Society of Pennsylvania, located in Philadelphia, Pennsylvania. Some of the original Wayne Papers are reprinted elsewhere as indicated.

[29] Civilian punishments at this time usually were public too. *See* Kathryn Preyer, *Penal Measures in the American Colonies*, 26 AM. J. LEGAL HIST. 326, 348–50 (1982). Beginning in the 1830s, executions became private, as civilian officials lost faith in the efficacy of public executions. MASUR, *supra* note 26, ch. 5.

> in order to produce a conviction in the mind of every soldier, that *Desertion*, shall no longer pass with impunity. It is a Crime, which at once discovers a *base* mind, and a *Cravenly* heart, nor ought such wretches and impostors be permitted, to associate or *exist* among brave and worthy soldiers.[30]

The prisoner might have had an opportunity to speak and, more specifically, confess the nature and extent of his wrongs.[31] But even if the prisoner did not speak, General Wayne's orders served to instruct the troops in the moral object lesson. During the punishment, the drum would be played (hence the phrase "drumhead justice"), or the band might be assembled to play the "Rogue's March." Consequently, the execution of sentence was a ritualistic opportunity to reinforce military values and the need for discipline.

Terror was founded in part on the arbitrariness of punishment. The Articles of War did not set forth specific punishments for specific crimes. They merely specified what the maximum penalty might be—generally, whether or not the death penalty applied. If the death penalty applied, a soldier might be sentenced to death perhaps not so much because his particular crime deserved it, but because it was time to make an example. General Wayne often approved death sentences by justifying the need to make an example out of someone convicted of a crime that currently was problematic:

> After the most Mature and deliberate consideration and strongly impressed with the indispensable necessity of putting an effect check to the *Cowardly and heinous, crime of Desertion*, The Commander in Chief hereby solemnly confirms the sentence of *Death* . . . and Orders that the said Thomas Means be shot to Death in front of the Manoeuvering parade tomorrow Morning . . . The Legion will parade & attend the Execution, in the most Military Order . . . .[32]

If a soldier was caught sleeping at his post and found guilty, he could be whipped up to 100 times, forced to walk the gauntlet, or shot. The indeterminate, almost whimsical nature of sentencing in the Legion was a rational combination of terror reinforced by unpredic-

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[30] 49 WAYNE PAPERS 23 (Aug. 9, 1792), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 360 (1905).

[31] For civilian examples, *see generally* DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776, ch. 4 (1974).

[32] 50 WAYNE PAPERS 16 (June 21, 1793). Exemplary punishment also appeared in contemporary civilian law. *See* MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 109 (1980).

tability.[33] The military court thus selectively singled out certain men for exemplary punishment and hoped to frighten the rest into proper behavior.

A soldier's punishment could depend as much on the Army's location as on the crime itself. For example, proximity to the enemy could make the character of justice far more strict. In the march north to Fallen Timbers, many men fell quite ill as various diseases afflicted the soldiers in camp.[34] Standing sentry duty all night after a march when one was sick was a burden, and men often pleaded at trial that they were assigned to sentry duty while they were quite ill, and that they informed the assigning officer of this fact. Sometimes it helped spare a soldier's life, even though an ill soldier rarely could escape the lash.[35] This leniency could meet with protests from General Wayne.[36] But once the troops were far into enemy territory, the Army was not impressed with pleas of being unwell and unfit for guard duty.[37]

Terror depended on punishments, which, by and large, were little different from civilian practices. The death penalty often was meted out in the Legion's courts-martial, as it was in civilian courts.[38] Flogging was the most frequently prescribed corporal pun-

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[33] Civilian punishments often were similarly arbitrary. HINDUS, *supra* note 32, at 109–13.

[34] The Journal of Joseph Gardner Andrews offers a medical perspective on the history of the Legion. Andrews was a well-educated Surgeon's Mate who spent the campaign at Fort Defiance, Ohio. Andrews's Journal also is interesting for his comments on the soldiers' diet and other aspects of daily life, including military law [hereinafter Andrews's Journal]. *See* 66 OHIO HIST. Q. 57 (pt. 1), 159 (pt. 2), 239 (pt. 3) (Richard C. Knopf ed., 1957); *see also* Norman W. Caldwell, *The Frontier Army Officer, 1794–1814*, 37 MID-AMERICA 101, 120–22 (1955) (describing extent of disease in the early American army).

[35] 50 WAYNE PAPERS 10 (June 5, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 431 (1905) ("in consideration of his present sickness and former good character as a soldier . . . only . . . 100 lashes").

[36] *Id.* at 13 (June 12, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 437 (1905).

[37] *See id.* at 47 (Oct. 19, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 494 (1905).

[38] One difference between military and civilian law, however, was that some civilian offenses automatically mandated the death penalty, while it always was discretionary in the Army. *See* HINDUS, *supra* note 32, at 104. Knox was concerned, however, that the Legion imposed the death penalty too often, even if the sentences seemed "absolutely necessary." *See* Letter from Knox to Wayne (Sept. 14, 1792), *in* ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1, at 96. One of the few changes in military law during the Legion's time occurred in 1796, when Congress required that the record of proceedings of a general court-martial, which pronounced the sentence of death, or which dismissed a commissioned officer, be sent to the President of the United States for approval. Act of May 30, 1796, ch. 39, § 18, 1 Stat. 483. Wayne complained to Knox at this change in the law, noting that the desertions of late, however serious and alarming, could not be effectually checked so long as the above act "forbids exemplary & prompt punishments." Letter from Wayne to Knox (Aug. 28, 1796), *in* ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1, at 513.

ishment in the Legion, and its use was common in civilian law at that time as well.[39] Some frustration arose in the Army because no intermediate level of punishment between death and 100 lashes existed. General Wilkinson told Secretary of War Knox:

> The heaviest penalties of the law short of death, to which the soldier is now subject, are one hundred lashes, and a month's fatigue; the disproportion, between this degree of corporal punishment, and a violent death, appears to me to border on the extremes, and I am induced to believe the chasm may be occupied by some wholesome regulation, tending to cherish the claims of humanity, to foster the public interests, and to enforce due discipline. The terrors of a sudden death are generally buried with the victim and forgotten; whilst public, durable, hard labor, by a very natural concatenation of causes and effects, operates all the consequences of incessant admonition.[40]

An exasperated officer lamented to General Wayne: "I have flogged them till I am tired. The economic allowance of one hundred lashes, allowed by government, does not appear a sufficient inducement for a rascal to act the part of an honest man."[41] The challenge, therefore, as Army officers saw it, was to find ways to make the punishment go as far as possible—including whipping the prisoner 100 times; twenty-five times each day for four days; fifty times over two days;[42] or applying the lashes one per minute, or one per half minute.[43] The ordinary instrument was a leather cat-o-nine-tails, but a variation was "wire cats." One or more drummers—who were probably in their teens—whipped the prisoners.[44] All of these practices were common in the British Army.

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[39] *See* Preyer, *supra* note 29, at 348–49; WINTHROP, *supra* note 5, at *668–69.

[40] Letter from General Wilkinson to Secretary of War Knox (Apr. 14, 1792), *in* 1 JAMES WILKINSON, MEMOIRS 60 (1810) *quoted in* Wiener, *The Original Practice II*, *supra* note 21, at 287 n.485.

[41] Letter from Colonel John Hamtramck to General Wayne (Dec. 5, 1794), *in* 34 MICH. PIONEER & HIST. COLL. 734 (1905).

[42] Whipping, as now practised, being a refinement, as it were, on the formal mode of corporal chastisements, increasing the rigor of punishment by prolonging the duration of it, if not the intensity of pain, would not seem to have been introduced until a later era; and then, it may be supposed, reluctantly and of necessity, from the change which had taken place in the condition of persons, of whom our armies were subsequently composed.

SAMUEL, *supra* note 15, at 99.

[43] *See, e.g.*, 50 WAYNE PAPERS 22 (July 26, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 456–57 (1905).

[44] *See, e.g.*, *id.* at 90 (Mar. 19, 1793). Drummers might have been required to administer the whippings to make an impression on these young men. These teenagers may have been subject to intimidation from the older privates, however, and may not have used the force of which they might have been capable.

Consistent with contemporary civilian punishments, branding the letter of the crime or shaving the head and eyebrows on the prisoner's forehead sometimes were prescribed in conjunction with other punishments.[45] Both of these also were consistent with British Army practice.[46] In August 1792, Wayne proposed "a Brand with the Word *Coward*, to stamp upon the forehead of one or two of the greatest Caitiffs."[47] But Secretary of War Knox was concerned that "Branding . . . is a punishment upon which some doubts may be entertained as to its legality. Uncommon Punishments not sanctioned by Law should be admitted with caution although less severe than those authorized by the articles of War."[48] Despite Knox's concern, possibly for the requirements of the Eighth Amendment, the sentence of branding was routine in the Legion.

A uniquely military punishment was the gauntlet, a tradition of the British Army also practiced by the Continental Army during the Revolutionary War.[49] Sometimes a prisoner was sentenced to walk the gauntlet twice, or naked, or at a slow step.[50] In these cases a guard with a fixed bayonet would walk in front of the prisoner to make sure that he did not move too quickly.[51] The gauntlet was not

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[45] Branding the letter of the crime was used in 17th and 18th century civilian practice. *See, e.g.*, RAPHAEL SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 35 (1970); HINDUS, *supra* note 32, at 102.

[46] "Shaving of the head, and degradation from the honorable ranks of soldiers . . . was a punishment adapted to petty pilferings, and dastardly and cowardly behavior in the face of the army." SAMUEL, *supra* note 15, at 97.

[47] Letter from Wayne to Knox (Aug. 10, 1792), *in* ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1, at 64. The term "caitiffs" is defined as "a base, cowardly, or despicable person." WEBSTER'S NEW COLLEGIATE DICTIONARY (9th ed. 1983).

[48] Letter from Knox to Wayne (Sept. 14, 1792), *in* ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1, at 96. Knox briefly noted in 1789 that "the change in the Government of the United States will require that the articles of war be revised and adopted to the Constitution." 1 AMERICAN STATE PAPERS, *supra* note 1, at 6. Little action was taken until 1806, however, and even then the changes were minor.

[49] "Running the *gantelope* was another penal infliction, of a highly painful nature, hardly ever adjudged, except in extraordinary cases, disgraceful or discreditable to the character of the corps to which the offender belonged." SAMUEL, *supra* note 15, at 97–98. The gauntlet was administered as follows: soldiers in the Legion would take sticks or musket ramrods and form two lines facing each other, and the prisoner would have to run between the lines while the soldiers in line hit him with the sticks. General Washington believed that the gauntlet was illegal, not only because the Rules and Articles of War did not specifically provide for it, but also because it specifically violated the spirit of the restriction against more than 100 lashes. *See* NEAGLES, *supra* note 25, at 37.

[50] The severity of the punishment probably depended on the popularity of the prisoner. The gauntlet, and other punishments, would appear to be a military analog to certain shaming punishments—such as the stocks—that occasionally were used in civilian law. *See* Preyer, *supra* note 29, at 349–50.

[51] *See, e.g.*, 49 WAYNE PAPERS 44 (Oct. 29, 1792), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 401 (1905).

only painful and humiliating, but potentially fatal.[52] Some punishments were imposed in conjunction with drumming the prisoner out of camp with a noose around his neck.[53] This was a sign that leniency had been shown, relatively speaking. The man's life could have been taken, but he merely was ostracized instead. In General Wayne's words, the man was "unworthy any longer to bear the name of a soldier."[54]

Other punishments in the Legion were conventional for the time, although barbaric by today's standards. One deserter was sentenced to carry out the execution of four other deserters who were to be shot to death; however, punishing a felon by making him the hangman certainly was not unheard of in civilian criminal law.[55] Other punishments merely seem to be odd shaming devices, but were relatively harmless embarrassments, like having to wear one's coat inside-out for a period of days, or to be sentenced to "drudgery of camp" for several weeks.[56] Confinement was not used except in awaiting trial, and the means of confinement were leg irons.[57]

How effective were majesty and terror in meeting the goals of order and discipline? Even with the execution of prisoners for desertion at morning parade, desertion continued seemingly unabated. Soldiers witnessed weekly whippings, beatings, and runnings of the gauntlet, punctuated by a few monthly executions. The regularity of this punishment must have created a norm of its own, relatively unimpressive to the men. During the Revolutionary War, Washington wanted to raise the number of lashes to 500, because men could take 100 and remain defiant.[58] The men in the Legion were no less defiant. Surgeon's Mate Andrews noted in his journal that "[Lewis] Troutman, while a soldier at Post Vincennes, was, from his fortitude in perseverance in the wars of Bacchus, admitted as a member of the

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[52] JOHN ROBERT SHAW, A NARRATIVE OF THE LIFE AND TRAVELS OF JOHN ROBERT SHAW, THE WELL-DIGGER, NOW RESIDENT IN LEXINGTON, KENTUCKY 117 (1807, *repr.* 1930).

[53] *See id.* at 119.

[54] 50 WAYNE PAPERS 18 (July 3, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 401 (1905).

[55] *Compare* 49 WAYNE PAPERS 26 (Aug. 24, 1792) *with* SEMMES, *supra* note 42, at 35.

[56] *See, e.g.*, 50 WAYNE PAPERS 22 (July 26, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 457 (1905); 49 WAYNE PAPERS 26 (Aug. 24, 1792), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 369–70 (1905). Wearing clothing inside out was analogous to the wearing of letters or labels on clothing in civilian punishment. *See* Preyer, *supra* note 29, at 349–50.

[57] Compare the civilian practice in GREENBERG, *supra* note 31, at 125: "Jails had a different function than they do today. They were devoted, almost exclusively, to holding prisoners awaiting trial. It was rare for an individual to receive a prison term as punishment for the commission of a crime."

[58] CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775–1785, at 78 (1979).

'Damnation Club;' where an essential requisite was to be ever ready to receive 100 lashes if it might be the means of procuring a pint of whisky for the good of said society: He informed me that he had absolutely received seven hundred lashes in that *noble pursuit*.''[59]

IV. Mercy

Civilian mercy had a direct military counterpart: the power of a civilian gentleman to influence the judge corresponded to the power of an officer to attest to one's soldierly character before the court, or damn one as ''villainous.''[60] A word from an officer could save a military prisoner from a severe thrashing, or even death. In many cases, the court noted that a commanding officer came forth as a witness to comment on the prisoner's character. The court itself was composed of gentlemen who could be moved to leniency. Often the court would state cryptically: ''The Court finds a variety of reasons to operate in favor of a slight punishment.''[61] In these cases the court would emphasize its beneficent leanings by recording that death was a potential punishment, but that the court was moved not to touch the prisoner's life.

Under the Articles of War, the ultimate pardon power resided in the Commander-in-Chief, General Wayne. The court was not allowed to forgo punishment if it found the prisoner guilty, but could, when it wanted to recommend a mild sentence after it found the prisoner guilty, state that the prisoner had suffered enough in his confinement while awaiting trial.[62] The court could sentence a prisoner, yet recommend that the Commander-in-Chief grant a pardon. General Wayne usually would follow the court's recommendation. Once, when the court effectively attempted to pardon—by ''acquitting''—a prisoner the court had just found guilty, General Wayne vented his anger at the court's usurpation of his pardon power, but, characteristically, upheld the court's decision.[63]

That soldiers were sentenced to the gallows or firing squad did

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[59] Andrews's Journal, *supra* note 34, at 72. Shaw observes that several soldiers were tried for theft of civilian goods, and received 100 lashes each, and that ''so hardened were these villains in wickedness, that they bore it with a fortitude worthy of a better cause.'' SHAW, *supra* note 52, at 120.

[60] 49 WAYNE PAPERS 26 (Aug. 24, 1792), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 370 (1905); *id.* at 82 (Mar. 3, 1793).

[61] *See, e.g.*, *id.* at 26 (Aug. 24, 1792), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 369 (1905).

[62] *See, e.g.*, *id.* at 44 (Oct. 29, 1792), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 401 (1905).

[63] 50 WAYNE PAPERS 19 (July 6, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 446 (1905).

not mean that they necessarily met their fate there. Both civilian and military executions in the eighteenth century were often a form of public dramatic performance where no one died. Civilian executions were designed to act as a moral lesson to the public in which the condemned person was marched to the place of execution, the crowd prayed for his soul, the chaplain said a few words, and the condemned made a passionate speech from the scaffold in which he confessed to a life of terrible crimes and warned the crowd, especially its youth, not to commit his mistakes.[64] Often, just when it appeared that the condemned man would die, a pardon would be read, the prisoner would break down and cry in gratitude for forgiveness shown, and the crowd would cheer. The practice was similar in the United States Army.[65] In particular, the Army also indulged in the practice of pardoning men at the last moment.[66] Terror and mercy thereby worked together.

Mercy had an especially practical side in the Army. The need for manpower was in conflict with the need for discipline. The most draconian maximum punishments could not be imposed and carried out in every circumstance.[67] Otherwise, the Army would be debilitated to the extent that its soldiers could not do the back-breaking routine work: not just fighting, but also marching through the wilderness and building forts and roads.[68] This is one reason why hard labor never was imposed: it would not have differed significantly from everyday life in the Legion. The solution was to sentence many

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[64] *See generally* GREENBERG, *supra* note 31, ch. 4; HAY, *supra* note 3.

[65] *See, e.g.*, JACOBS, *supra* note 12, at 201-02; SHAW, *supra* note 52, at 86-87, 102; Norman W. Caldwell, *The Enlisted Soldier at the Frontier Post, 1790–1814*, 37 MID-AMERICA 195, 200 (1955) [hereinafter Caldwell, *The Enlisted Soldier*].

[66] The following is a particularly dramatic example. In a confrontation with a band of Indians, several dragoons fled the fighting and were arrested.

> After we had paraded the General came out and ordered the Dragoons who had deserted their officer and were then under guard, to be brought out and at the same time ordered a court-martial to try the one who lead the retreat and his grave to be dug while the court was trying him. The court found him guilty and ordered him to be shot to death. The General after haranguing the troops for half an hour pardoned the prisoner and forgave the others.

John H. Buell, *A Fragment from the Diary of Major John Hutchinson Buell, U.S.A.*, 41 J. MIL. SERV. INST. 102, 105 (1907). Furthermore, the digging of the grave before the verdict was in clearly suggests command influence on the panel.

[67] In civilian law, "pardons provided an indispensable safety valve to guard against indiscriminate slaughter." HINDUS, *supra* note 32, at 106.

[68] In a comparative study of British civilian and military justice, Professor Gilbert observes: "The army could not afford another civilian luxury—the capital punishment of large numbers of its charges. Both the army and navy, in spite of an impressive variety of capital offenses, were forced to use the firing squad and the gallows sparingly." Arthur N. Gilbert, *Military and Civilian Justice in Eighteenth-Century England: An Assessment*, 17 J. BRIT. STUD. 41, 55 (1978) [hereinafter Gilbert, *Military and Civilian Justice*].

more men to death than the Army could stand to lose, march them to the gallows, put the blindfold on, let the drums roll, and then read a pardon at the last minute. The problem with creating examples and letting others off with lesser sentences was that the soldiers knew they could gamble with the odds of being punished severely.

Soldiers tried all manner of creative excuses to benefit from a court's potentially merciful leanings. Excuses usually went to the issue of degree of punishment, rather than guilt. Drunkenness, for example, was an oft-used but ineffective excuse. Soldiers used being drunk as an excuse for virtually every crime, including desertion, sleeping on guard duty, being AWOL, mutinous language, assaulting a superior, and rioting in camp. But drunkenness rarely succeeded as an excuse.[69]

Youth was a more successful excuse for lessening or avoiding punishment. Many of the recruits were in their late teens, and this often impressed the officers of the court-martial. One young soldier left his post, broke into a public house, and stole several articles of clothing. Normally a soldier guilty of this combination of offenses would receive the death penalty, or at least drumming out of camp. He was given 100 lashes because of "youth and inexperience."[70] Later cases merely refer to the "young soldier" excuse.[71] In some cases, whether the soldier was characterized as inexperienced because of youth, or because he did not know the Articles of War, or both, is unclear.[72]

Other excuses existed. There seems to have been something akin to a stupidity defense, often combined with a defense of not knowing the rules. Private Nathaniel Hawkins, for example, was found sleeping on his post in enemy country—an act that often received the death penalty.

> But in consideration of his natural stupidity and imbecility of mind, of his not having heard the Rules and Articles of

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[69] *Cf.* GREENBERG, *supra* note 31, at 127 ("A common defense for [civilian] criminal behavior was that the alleged act was committed under the influence of alcohol"). Heavy consumption of alcohol was common in early America. *See generally* MARK E. LENDER & JAMES K. MARTIN, DRINKING IN AMERICA (1982); W.J. RORABAUGH, THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION (1979); IAN TYRRELL, SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800-1860 (1979).

[70] 50 WAYNE PAPERS 54 (Jan. 28, 1794).

[71] *Id.* at 82 (June 7, 1795), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 616 (1905); *id.* at 89 (Aug. 30, 1795), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 642 (1905); *id.* at 90 (Sept. 10, 1795), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 647 (1905).

[72] 49 WAYNE PAPERS 66 (Dec. 20, 1792); *id.* at 73 (Dec. 28, 1792); *cf.* GREENBERG, *supra* note 31, at 128 ("grounds upon which defendants requested pardon were that the defendant was too young to understand the consequences of his act, that he was ignorant of the law . . . .").

> War read to him, of his youth and incapacity to do the duties of a sentinel—Altho' the Court are sensible of the enormity of the Crime of which he is found guilty, they only sentence him to receive One Hundred Lashes.[73]

General Wayne approved the order but showed great displeasure at the lapse in educating men about the rules. The case of Private Hawkins demonstrated neglect of, or inattention to, his orders—namely, to have the rules read to the troops at regular intervals. General Wayne promised that the "Commander in Chief will enforce a due obedience to all his orders."[74]

The behavior of the prisoner's commanding officer also could be used as an excuse. For example, ill treatment by the officer could be a mitigating factor. Private Joshua Eggins was charged with desertion. He pleaded guilty, but said that he applied for pay from his lieutenant, who refused to pay him and then beat him severely. Only after he was beaten did he run away. He claimed that he would not have run away had his captain or ensign been there, for he liked them. The captain testified that he believed this and gave an excellent character reference. The court found the treatment by the lieutenant "intolerable" and returned the private to duty without any punishment.[75]

Another case in which the accused pleaded the actions of his commanding officer occurred when James Scott, a musician, was charged with being drunk, rioting in quarters, and striking a sergeant. He plead guilty, but said that he had "reenlisted on the morning of that day, and that his officer had granted him permission to frolic, and that in his frolic he did what he is charged with, not knowing whether it was right or wrong." The court sentenced him to 100 lashes, but recommended clemency to the Commander-in-Chief.[76] Scott's reenlistment probably played a large role in the court's recommending leniency. In another case, a civilian armorer attached to the Legion stole some public clothing. He plead guilty, and said that he had just enlisted with the Legion on condition of being liberated from confinement and pardoned for the crime. The court sentenced him to 100 lashes, but recommended a pardon because of his enlistment.[77]

The most novel excuse worked for Bartholemew Haffee, who was charged with drunkenness, rioting in camp, mutiny, and threat-

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[73] 50 WAYNE PAPERS 53 (Jan. 16, 1794).

[74] *Id.*

[75] 49 WAYNE PAPERS 44 (Oct. 29, 1792).

[76] 50 WAYNE PAPERS 73 (Mar. 20, 1795).

[77] *Id.* Enlistment could be the basis for a pardon in civilian courts as well. *See* GREENBERG, *supra* note 31, at 129, 131.

ening his "hut-mates." He was found guilty of the first two charges, which usually merited between 50 and 100 lashes, but "in consideration of its being a Day of General Festivity amoung his Countrymen," the court only sentenced him to 25 lashes.[78] General Wayne gave what amounted to a pardon. "The Commander in Chief confirms the foregoing sentence of the Court Martial but is induced to remit the Corporal Punishment ordered to be inflicted upon Haffee on account of St. Patrick, but the Saint will never interfere again to save him from punishment, should he merit it upon any occasion hereafter."[79]

Some soldiers calculated the payoff of freedom against the prospective pain that might be inflicted. One deserter, who participated in a plot to desert with weapons to the British, testified that he "did not intend to stand sentinel much longer here—as he had seen several soldiers whiped only 50 lashes for desertion lately, and finding that they endured it so well—he believed he should Risk and try it himself." When one soldier told the deserter that he would be hanged if caught, the deserter said, "I don't care, for if I go down the River with the Army, I shall be killed, and I may as well die one way as another."[80] He was captured, tried, and sentenced to be shot; in all likelihood, the sentence was carried out. Other soldiers were more successful in escaping their fates, however, by the operation of mercy.

V. Justice

Hay argues that the appearance of equality in applying the law to both rich and poor was the characteristic of eighteenth century justice. Justice deliberately was unequal in the Legion, however, for enlisted men and officers were judged by a different set of standards reflecting the Army's insistence on discipline, command, and subordination. The Legion's concept of justice was but a reflection of its own legal culture, which emphasized the discipline necessary to succeed in the enterprise of war.

A. Enlisted Men

The law's purpose in the Legion was discipline and education, to make an effective fighting force out of the men. Civilian and

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[78] 49 WAYNE PAPERS 90 (Mar. 19, 1793).

[79] *Id.* at 93 (Mar. 24, 1793).

[80] *Id.* at 110 (Apr. 12, 1793). Wayne responded, in confirming the sentence, that he no longer would pardon any soldier for desertion, to "put an Efectual Stop to the atrocious Crime and to Undeceive Such Soldiers who may Entertain an Idea of Escaping with Impunity." *Id.* at 115 (Apr. 15, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 408 (1905).

military justice have completely different ends, as General William Tecumseh Sherman noted:

> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men as to be capable of exercising the largest measure of force at the will of the nation. These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs [this] principle weakens the army, impairs its value, and defeats the very object of its existence.[81]

The Legion's officers believed that swift and sure punishment was necessary to maintain discipline. Disreputable civilian lawyers and civilian ideas of justice were not welcome in the military, because they were a hinderance to efficient command. Brigadier General James Wilkinson, disapproving the sentence of a soldier who had enjoyed the services of a civilian lawyer, stated: "Shall Counsel be admitted on behalf of a Prisoner to appear before a general Court Martial, to interrogate, to except, to plead, to teaze, perplex & embarrass by legal subtilties & abstract sophistical Distinctions?"[82] The appearance of equal justice, important to Hay's argument, does not appear in the Army, because, as General Wayne stated, soldiers should not have "too high an idea of *Equality*—those ideas are well enough in Civil Life—but dangerous in an army."[83]

Creating an effective Army was a matter of education. Teaching the men to shoot, to bayonet (Wayne's favorite tactic), to advance against enemy fire, not to retreat unless ordered, and to exercise the diligence necessary to avoid surprise attacks was a matter of training, discipline, and education. The law and punishment were the means to military discipline. One contemporary British authority said "that punishment is essential, in order to keep up good order and military discipline in an army, must be evident to every military man; and that military discipline is more conducive to victory than numbers, is as apparent."[84]

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[81] Walter T. Cox, III, *The Army, the Courts and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 17 n.81 (1987) (quoting WILLIAM T. SHERMAN, MILITARY LAWS (1880).

[82] Wiener, *The Original Practice I*, *supra* note 7, at 27–28 (citing 2 PROCEEDINGS OF COURTS-MARTIAL, WAR OFFICE 142–43 (mss. in National Archives Group 153, Entry 14)).

[83] NELSON, *supra* note 12, at 281.

[84] STEPHEN PAYNE ADYE, A TREATISE ON COURTS MARTIAL 213–14 (8th ed. 1810).

So it was in the Legion Army. The military object of the Legion courts-martial was education in the pursuit of discipline. The soldiers made a pact with the Army to be soldiers, and being a Legionary soldier was a difficult job. The only tonic to the harsh norms of eighteenth century military punishment was the potential mercy of the commander. General Wayne's approach to punishment and discipline was rigorous, tempered mainly by a desire to avoid debilitating or losing the men though punishment so strenuous that they could not carry out the normal backbreaking tasks of a soldier. Military historians and biographers have noted that General Wayne was not known as a martinet without good reason.[85] Earlier in his career, Wayne defended his concept of military justice by quoting Marshal Saxe, a military author:

> He says—*and he says well*—"that it is a false notion, that subordination, and a passive obedience to Superiors [debases a man's impulse to liberty or courage]—*so far from it*, that it is a General remark—that those Armies that have been subject to the Severest Discipline *have always* performed the greatest things."[86]

General Wayne's statements to the troops and commentary in the form of his review of courts-martial outlined the necessity of military law in the Legion. He emphasized to his troops that obeying the Articles of War would make the Army a disciplined and success-

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[85] FRANCIS PRUCHA, THE SWORD OF THE REPUBLIC: THE UNITED STATES ARMY ON THE FRONTIER, 1783–1846, at 32 (1969); NELSON, *supra* note 12, at 2, 232; Richard C. Knopf, *Crime and Punishment in the Legion, 1792–1793*, 14 BULL. HIST. & PHIL. SOC'Y OHIO 232, 234–35 (1956).

[86] NELSON, *supra* note 12, at 38. In the 18th century civilian lawyers deplored military law, viewing it as, at best, a bastard relative of civilian law. It was caricatured by no less than William Blackstone:

> [M]artial law . . . is built upon no settled principles, but is entirely arbitrary in its decisions and is, as Sir Matthew Hale observes, in truth and reality, no law, but something indulged rather than allowed as law. The necessity of order and discipline in an army, is the only thing which can give it countenance.

1 WILLIAM BLACKSTONE, COMMENTARIES *413. The passage to which Blackstone refers may be found in SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 26 (3d ed. 1739, *repr.* 1971). Tytler retorted that Blackstone's jibe was "penned in an unguarded moment," and vigorously defended military law as "certain, determinate, and immutable." TYTLER, AN ESSAY ON MILITARY LAW 14–15 (3d ed. 1814). Blackstone's characterization of military law as something other than law fails to account for the trying circumstances under which military justice labored; courts-martial were convened, not in ornate, majestic courthouses, but in tents pitched under the enemy's eyes. It also could be that Blackstone thought that military law was not law because no lawyers were involved, and thus it was a matter entirely outside the guild. Most importantly, Blackstone failed to accord respect to the different principles under which military-legal culture operated. Blackstone conveniently ignored the virtues of military law, including its accessibility, simplicity, and efficiency. *See* TYTLER, *supra*, at 26; GILBERT, *Military and Civilian Justice*, *supra* note 64, at 48–49, 63.

ful fighting force. Military crimes—such as desertion, sleeping on duty, and drunkenness—comprised most of the offenses tried in the Legion.[87]

For each of these offenses, the conviction rates were high. If the sentence included a lashing, the number usually was 100. Desertion or intention to desert made up over half of all the crimes committed in the Legion.[88] Men deserted the Legion for many reasons,[89] and ran the risk of the very high penalties for desertion. Repeated desertion was a special crime, and courts usually sentenced offenders to death. Courts-martial tried soldiers for falling asleep on sentry duty nearly as often as desertion. The duty of a sentry was an important one. In friendly country, he kept the peace of the camp by refusing entry to whisky sellers, prostitutes, and other disturbers of

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[87] A statistical breakdown of three major offenses for the period between July 1792 and August 1793 follows:

	Desertion	Sleeping	Drunkenness
Number tried:	112	18	13
Convictions:	93	16	13
Acquittals:	19	2	0
Death:	19	5	NA
Average Lashes:	91	87.5	95
Conviction Rate:	92%	88%	100%
Acquittal Rate:	8%	12%	0%
Capital Crime per Convictions:	18%	11%	NA

The high conviction rate may reflect the ease of conviction for such simple crimes as much as the diligence the Army exercised in policing and prosecuting them. In addition, the category "capital crime per convictions" does not reflect last minute pardons which did not make the records. For perspective, there were 2843 enlisted men in the Legion in early 1794. 1 AMERICAN STATE PAPERS, *supra* note 1, at 67.

[88] One might think that this might be an unusually high rate, but desertion was high during previous American wars as well. FRED ANDERSON, A PEOPLE'S ARMY: MASSACHUSETTS SOLDIERS AND SOCIETY IN THE SEVEN-YEARS' WAR 187–94 (1984) (French and Indian War); ROYSTER, *supra* note 54, at 71–72 (Revolutionary War). *See generally* NEAGLES, *supra* note 25.

[89] The reasons included: pay, which was low and usually late; unsanitary living conditions; lack of opportunity for advancement; and isolation. *See* Knopf, *supra* note 85, at 235. Another reason was that many soldiers were seduced into joining the service by clever and wily recruiters. They would get young men drunk in taverns, promise (or even slip unnoticed to) them a bounty for signing up, and the men became soldiers before the effects of drink wore off. *Id.*; Caldwell, *The Enlisted Soldier*, *supra* note 65, 196–97. One former soldier from the 1780s reminisced:

> I have enlisted many a man, but I always despised the dishonest methods practised by some of trepanning a man when he is intoxicated, and enlisting him by slipping a piece of money into his pocket, or his boots, and then swearing that he is enlisted fairly. If the Devil does not get such diabolical practices, I will give up that there is no occasion for a Devil at all.

SHAW, *supra* note 52, at 89. Alternatively, General Wayne was not only a disciplinarian, but also was sensitive to keeping the troops well-housed and provided with proper rations, clothing, and regular pay. NELSON, *supra* note 12, at 28, 232.

the peace. But in enemy country he kept the men safe while they slept; his duty was to sound the alarm if he observed any signs of attack. Sleeping on sentry duty in enemy territory was an "unsoldierly, dangerous and impardonable crime" that, Wayne repeatedly warned, would be punished with death.[90]

Alcohol was a threat to discipline, and was an accomplice to many of the crimes that the soldiers committed.[91] General Wayne was aware of the threat that alcohol abuse posed in all ranks and that both enlisted men and officers constantly connived to import liquor into camp, even though the Army supplied a liquor ration.[92] One gets a sense of exasperation from General Wayne's pleas to his troops to avoid liquor:

> The Commander in Chief finds himself—under the indispensable necessity of sternly forbidding the officers commanding guards, suffering their men to go into town for water, as plenty may be had from the river, also for whisky, any permits being given by Officers to the soldiers for the purpose of purchasing *whisky*, [a] practice, that has most certainly led to all the Crimes and punishments that have recently taken place in the Legion; for he is well persuaded, that were it not for the effects of that baneful poison, a punishment wou'd scarcely even be known in the army, he therefore Once more earnestly prays the soldiers to have compassion for his feelings—and afford him the heartfelt pleasure he experienced yesterday in the approbation [regarding] their Military Conduct.[93]

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[90] 50 WAYNE PAPERS 11 (June 6, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 433 (1905).

[91] Heavy consumption of alcohol was common in early America. *See generally supra* note 69.

[92] Knox agreed with Wayne that alcohol abuse was a problem in the Army, and greeted with approval the news of the resignation of an officer accused of drunkeness: "The crime of drunkeness is so undignified and so unsuitable to the character of an Officer that it is much to be desired that it should be expelled from the army entirely." Letter from Knox to Wayne (July 20, 1792), *in* ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1, at 43-44.

[93] 50 WAYNE PAPERS 26 (July 29, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 459 (1905). Lieutenant Colonel Zebulon Pike, once a member of the Legion Army (who later gained fame for exploring the West), believed that drunkenness among the troops in both the American and British armies was at that time "a national disgrace" responsible for "half the diseases and deaths of the army." Caldwell, *The Enlisted Soldier*, *supra* note 65, at 201. But another contemporary gave a more sympathetic explanation of why soldiers turned to alcohol so often:

> One has the gout, and stimulating potions will drive it away. A second is cold, and they will warm him. A third is warm, and they will cool him. A fourth is disturbed in his mind, and they will obliterate his cares. A fifth complains of the foulness of the water, and they will purify it. A sixth,

Of course, General Wayne's speech was to no avail—one subsequent court-martial consisted entirely of prosecutions for stealing whisky.[94]

When a sergeant violated the Code, it was a serious matter. Before courts punished noncommissioned officers, it reduced them in rank to private, because it was the custom that no one over the rank of private could be whipped or executed (except for treason). Sergeants had a great deal of responsibility, and when a sergeant deserted, Wayne was particularly appalled, because when an

> officer of such high trust and confidence as a Sergeant of the Legion of the United States, shows so horrid, so dangerous & so pernicious an example; The principles of Humanity, as well as Military discipline, requiring the most Exemplary & prompt punishment, in order to produce a conviction to the mind of every individual of the Army that such a crime of so great [a] magnitude as that of Sergeant Trotter was found Guilty can never pass with impunity.[95]

At this sergeant's execution an officer remarked that it was a good example to the soldiers—better, in fact, than shooting privates who were repeat deserters.[96] A flavor of civilian justice existed here, of which Douglas Hay speaks: someone of a higher rank paid the same price as a private. Hay's concept of the appearance of justice as impartial and equal, however, was generally not reflected in the Legion's almost singleminded pursuit of discipline, for officers were judged by an explicitly different standard than privates.

B. Officers

The officer's code of honor was another aspect of eighteenth century military-legal culture, and was also very much in the British military tradition. The code of honor sought not simply discipline, but a gentlemanly self-discipline based on honor and trust. This elite group of men, through means of the court-martial and court of inquiry, collectively reinforced their gentlemanly ethos of duty, edu-

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> from long habit, has become habituated to them, and they alone will steady his nerves, and keep him in an equilibrious state.

Id. at n.35 (quoting AMOS STODDARD, SKETCHES, HISTORICAL AND DESCRIPTIVE OF LOUISIANA 305-06 (1812)).

[94] 50 WAYNE PAPERS 70 (Jan. 30, 1795), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 583-84 (1905).

[95] 49 WAYNE PAPERS 49 (Nov. 11, 1792), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 404 (1905).

[96] *Id.* at 51 (Nov. 13, 1792).

cation, manliness, fraternity, and honor.[97] Officers rarely were tried for specific crimes, but they often were tried for violation of the officers' honor code. "Behavior unbecoming an officer and gentleman" served as a vague catch-all for undesired behavior by officers. An outline of the code of honor would include allegiance to the officer corps as a cohesive fraternity, avoidance of fraternization with enlisted men, courage, maintenance of one's personal honor, the honor of the Army and one's regiment and prosecuting any disrespect thereto, and never lying or slandering other officers or the Army and its individual regiments.[98] To behave honorably meant that "fealty to the military commander was personal," and that officers were "members of a cohesive brotherhood which claimed the right to extensive self-regulation."[99] The Articles of War never defined conduct unbecoming an officer,[100] but by keeping this term of art undefined, first the British and later the American civilian government effectively left regulation of officers' behavior up to self-definition and self-enforcement.[101]

Social reinforcement and conscious self-definition within the officer corps was an Army tradition thought necessary to promote the subordination and discipline of the troops. For example, fraternization with the privates was a serious offense.[102] In the Legion, an officer was accused of conduct unbecoming an officer and a gentleman by attending a public house

> and for mixing with and Puting yourself on a footing with several private soldiers, officers' servants or waiters, one of which was your own, or attended on you . . . which conduct only tends to destroy your own reputation and consequence as an officer, but is subversive of good order [and] highly injurious to the public service.[103]

He was found guilty and dismissed from the service. Subordination

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[97] Arthur N. Gilbert, *Law and Honour Among Eighteenth-Century British Army Officers*, 19 HIST. J. 75, 75 (1976) [hereinafter Gilbert, *Law and Honour*].

[98] *Id.*

[99] *Id.*

[100] Conduct unbecoming an officer and a gentleman emerged as an offense between 1700 and 1765, but was not incorporated as a phrase into the British Rules and Articles of War until 1765. D.B. Nichols, *The Devil's Article*, 22 MIL. L. REV. 111, 116-17 (1963).

[101] "There can be little doubt that it was designed to permit the enforcement of officer standards independently of the general article [that is, conduct to the prejudice of good order and military discipline]." *Id.* at 117.

[102] In the British Army "the seriousness with which this breach of behavior was treated shows how great the gap between officers and men really was in the eighteenth-century army." Gilbert, *Law and Honour*, *supra* note 84, at 85. British officers could be tried for briefly sitting with soldiers or drinking with them. *Id.* at 85-86.

[103] 50 WAYNE PAPERS 57 (Feb. 9, 1794).

and unity within the officer class also was promoted and reinforced by charges for refusing duty or insubordinate language, which were spiced with the judicially weighty factor that this misconduct was committed in the presence of "the soldiery."

Aside from fraternization, officers usually were accused of two forms of wrongdoing in violation of the honor code: incompetence and insubordination. A disastrous surprise attack could lead to an officer's court-martial.[104] Charges of incompetence were relatively common, usually involving repeated drunkenness and, as a result, neglect of duty. Some officers were accused of "repeated drunkenness" as the first count, among other lesser charges of odd behavior seemingly related to the frequent consumption of alcohol, and were acquitted, perhaps merely as a warning that their drinking was interfering with duty.[105] Captain Armstrong was accused of repeated drunkenness among several charges of odd behavior, but found guilty only of ordering his men to beat the drums and to march around camp at a late hour, thus disturbing the peace of the camp. For this he was reprimanded mildly. Captain Sullivan was accused of "being so far under the influence of spirituous liquor" that he was incapable of command. The court heard equivocal testimony, and the accused presented a successful defense that alluded to folksy proverbs and the lives of various Roman emperors, and included a recitation of Shakespeare.[106]

Insubordination was the other recurring officers' crime. Young lieutenants, whose aggressive spirit got the better of them, were prone to perceived disrespectful and contentious behavior toward superior officers. For example, lieutenants were not shy about accusing superior officers of wrongdoing or lying. This behavior was looked on, however, as subversive of discipline—and the charges usually were declared unfounded. In one instance, the Legion made an example of two young lieutenants. One was charged with refusal of duty and unofficerly and ungentlemanly conduct in treating a captain with contempt in front of the soldiers. The other was charged with

> ungentlemanly and unofficerlike conduct in falsely and maliciously asserting that Lieutenant Glenn [was] a damned rascal and a Coward in the presence of four Ser-

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[104] *See id.* (Mar. 7, 1794). During the Revolution, General Wayne's command was surprised and his troops massacred at Paoli. When Wayne was accused of receiving, and recklessly ignoring, advance notice of the attack, Wayne demanded a court-martial to clear his record, and was acquitted "with the highest honor." *See* NELSON, *supra* note 12, at 63–64.

[105] Andrews's Journal, *supra* note 34, at 78.

[106] 50 WAYNE PAPERS 68 (Dec. 21, 1794).

> geants from the Rifle Corps, and otherwise vilifying and traducing the Character of said Lieutenant Glenn his Superior Officer—and likewise speaking disrespectfully of Captain DeButts [General Wayne's Aide-de-Camp], in the presence of officers, and then to deny it by letter, contrary to the principles of *truth* and *honor*.[107]

Although in these cases an apology before the Legion usually would have been appropriate, both lieutenants were dismissed from the service. General Wayne used the opportunity to pontificate on the proper role and place in the chain of command of rambunctious but privileged young men. He commented that it had been founded on long experience that "military discipline is the soul of all armies, and unless it is established amoung [the officer corps] with great prudence and supported with *Unshaken* resolution, they are no better than so many contemptible heaps of rabble." He continued that it "is a false notion, that subordinate and prompt obedience to superiors, is any debasement of a man's Courage, or a reflection upon his honor or understanding—but the *reverse* and therefore he must dismiss "two young ['Gentlemen' crossed out] men, neither of them deficient in point of Education or Abilities." He concluded that he hoped that these examples would produce a conviction that subordination and discipline and a due respect to the character of officers must be observed in the Legion.[108]

General Wayne abhorred use of the court martial for personal disputes. Many bitter rivalries existed in the officer corps, however, and one suspects that many trials of officers, whatever the charge, arose out of the personal animosity of the accuser.[109] For example, two officers accused each other of impugning the other's personal honor over the course of three courts-martial. Each time the court acquitted the accused officer.[110] After the third trial between these two officers, General Wayne had had enough of groundless charges.

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[107] *Id.* at 39 (Sept. 10, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 476 (1905).

[108] *Id.*

[109] Even Wayne was the subject of allegations by his arch-rival General Wilkinson that his conduct as Commander-in-Chief of the Legion merited a court-martial. *See, e.g.*, Letter from Secretary of War James McHenry to Wayne (July 9, 1796), *in* ANTHONY WAYNE, A NAME IN ARMS, *supra* note 1, at 498.

In light of the cliques and rivalries, it was an intelligent practice to allow the accused and the judge advocate to challenge individual officers who might be chosen to sit on the tribunal. *See, e.g.*, 50 WAYNE PAPERS 88 (Aug. 11, 1795); *id.* at 91 (Nov. 6, 1795). But the code of honor even had procedural implications for the court-martial. As Adye remarked on the subject of challenges to the panel: "I have heard it said, that the objecting to an officer, as a member of a court martial, without assigning any cause, is a reflection upon his character as a man of honor." ADYE, *supra* note 76, at 107.

[110] *See, e.g.*, 49 WAYNE PAPERS 69 (Dec. 26–29, 1792); 50 WAYNE PAPERS 71 (Jan. 2,

> This is the third instance (in the course of eight months) in which Lieutenant Diven has (alternately) been either *plaintiff* or *defendant* upon charges founded in personal malice and resentment—and without any regard to the benefit of the service, or to the Honor of the Legion, Which investigation has proved *idle* and disgraceful to the parties . . . After the General Order of the 6th of June last the Commander in Chief had kindly asked that Gentlemen wou'd have adopted *some other mode* of settling their private disputes (and which are only personal) than by that of Courts Martial—he however trusts, that this will be the last instance in which Charges, such as have now been recorded, will be exhibited by One Officer against another—unless they are better grounded and can be better supported.[111]

This was the final instance in the records of formally adjudicated disputes between these two officers, but it was hardly the last instance of personal disputes adjudicated by courts-martial in the Legion Army.[112] Although duelling also represented a means of settling these disputes,[113] the traditional British Army institution of

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1793). Generally, acquittals were higher for officers than for enlisted men, perhaps reflecting the contentious and often baseless nature of the accusations made against officers.

[111] 50 WAYNE PAPERS 38 (Sept. 6, 1793).

[112] Another contentious dispute between young officers was heard when Ensign Meriwether Lewis (who later gained fame for his exploits with George Rogers Clark) was accused of conduct unbecoming an officer for drunkenly bursting into a social gathering, insulting another officer, and challenging him to a duel. The court found him not guilty. *Id.* at 91 (Nov. 6, 1795), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 651–52 (1905). Even as late as October 10, 1796, General Wayne observed (again) that he regretted "that Gentlemen cannot, *devise*, some other mode to accommodate their private disputes, than that of a general court-martial." *Id.* at 103.

[113] While the court-martial records of the Legion do not detail any prosecutions for duelling, it was a method of self-help dispute resolution well into the 19th century. Both Stephen Decatur and Alexander Hamilton died in duels after the period in question. Duels between officers were common in the Legion. William Henry Harrison, later President of the United States, who was once a young lieutenant in the Legion, observed that "[t]here were more duels in the Northwestern Army between 1791 and 1795, than ever took place in the same length of time and among so small a body of men." FREEMAN CLEAVES, OLD TIPPECANOE: WILLIAM HENRY HARRISON AND HIS TIME 15 (1939). Major Buell noted a number of duels in his diary. Buell, *supra* note 62, at 107–08, 111.

In all likelihood, there were no courts-martial for duelling because General Wayne tacitly approved duelling as an outlet for personal animosity that avoided use of official power. Major Buell's thoughts on one particular duel are revealing:

> I heard it observed by several old officers that they were glad that both were killed. This is clearly my opinion, for this was the fifteenth duel which has been fought within one year and all by young officers. Lieut. Casaway was the only one killed before these, but a number have been wounded. Lieutenants Cains and Imsbey who were the seconds.

court of inquiry was useful in resolving these disputes short of a court-martial.[114]

VI. Conclusion

Military law in the Legion is not remarkable for the legal changes that occurred during its existence or because of the Legion-

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> appeared to be in great trouble, some officers are for prosecuting them, but others are not. The General said nothing about it.

Id. at 107-08. General Wayne's silence spoke volumes, for he was not reticent about condemning any behavior that he did not like. Duelling probably was the "other mode to accomodate their private disputes" to which Wayne referred. *See supra* note 112.

[114] The court of inquiry was closer to a board of investigation than a court-martial, and while it had official functions, it often was used to clear slanderous rumors about certain officers and to mediate private disputes. Although used in both the British and American armies, the origins of the court of inquiry are unclear, and were so even in the late 18th century. ADYE, *supra* note 84, at 62. The court of inquiry seems to have been established initially by custom, rather than by legislation or decree. *The court of inquiry was given a legislative basis in the 1786 revisions to the* Articles of War. *See* WINTHROP, *supra* note 5, at *795-96. Before 1786, commanders sometimes would order courts of inquiry under their general authority or by resolution of Congress. *See id.* at *795 n.1. Convening such a court of inquiry without statutory authorization only could have been based on British military tradition. The court of inquiry seems to have been used for examination of events which might require a court-martial, and when used this way, it was much like a civilian grand jury. ADYE, *supra* note 84, at 74-75. Adye wrote:

> Courts of inquiry need not call upon the suspected officer or give an opinion or point out what were or were not the causes of the supposed ill conduct which occasioned the sitting of that court, but be simply, *whether there does or does not appear a sufficiency of cause to render a court martial necessary*; for though there may be *matter apparently sufficient* to make a farther investigation on oath proper, it does not follow that the individual or individuals who may be called to answer to an accusation are consequently culpable. No witness at a court of inquiry is sworn as at a court martial, nor is one obliged *legally* either to give his testimony, or plead before a court of inquiry.

Id. at 74. But courts of inquiry also were assembled to settle private disputes between officers "and in short, finally to reconcile all differences that may arise in the course of service." *Id.* at 76-77.

In the Legion, the court of inquiry primarily was a means for clearing one's name of camp rumors. Slander, or its perception, was common in the Legion. *See, e.g.*, 50 WAYNE PAPERS 30-36 (Aug. 9, 1793), *reprinted in* 34 MICH. PIONEER & HIST. COLL. 462 (1905); *id.* at 11 (June 6, 1793). The Commander-in-Chief might have called a court of inquiry to substantiate certain rumors for the purpose of proceeding with a court-martial. The aggrieved officer himself might request a court of inquiry to clear his name of the taint of certain rumors. The court of inquiry consisted of only three officers and the officer in question, who questioned various witnesses as to the truth of the accusations. For example, one officer had been rumored to have been drunk during a skirmish, and used the court of inquiry to bring forth men to say that he was sober that day and thus clear his record. *Id.* at 51 (Jan. 4, 1794). Surprisingly, however, the court of inquiry does not seem to have been used in the Legion to the extent and with the flexibility that contemporary commentators such as Adye suggested. Certainly a need existed for a flexible dispute resolution system to settle the spats that often occurred between officers, and the American Army's adoption of the British court of inquiry served in part to fill this need.

ary campaign. Military law is more remarkable because of the lack of change that took place at the end of the eighteenth century. The Rules and Articles of War represented continuity; they were a borrowing from British military-legal jurisprudence that remained only slightly modified into the twentieth century.[115] Military law in the Legion was little different from the military law during the Revolution, despite intervening events of enormous importance—the adoption of the United States Constitution and the Bill of Rights. That military law did not change during this time is not surprising, however, because the guiding principles of military-legal culture did not change, and civilians exerted little influence on the military to change.

The role of borrowing in legal development was highly significant in the military law of the early American republic. Early American military law was a mixture of a codified system of law, longstanding military traditions, and contemporary civilian influences, but the British military tradition was of paramount importance. The Code was familiar to many officers in the early American Army because they had served under its strictures when they served in the British Army during the Seven-Years War, the Revolutionary Army, or in the Legion. The Code was chosen as the military law of the United States because it represented a familiar and prestigious borrowing from the mother country, the dominant military power of the time. Moreover, the Articles of War had a purportedly Roman heritage, and thus possessed the virtue that some of the founding fathers, especially John Adams, admired. For all of these reasons, the American government adopted the Articles of War. Military law in the Legion Army also was guided by the leading British military law treatises of the time. These treatises discussed military customs in detail, argued the rationale for the rigor of military discipline, and

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[115] America's first military code was not unique for having been borrowed. Alan Watson has cogently argued that borrowing historically has dominated legal development. *See, e.g.*, ROMAN LAW AND COMPARATIVE LAW (1991); SLAVE LAW IN THE AMERICAS (1990); FAILURES OF THE LEGAL IMAGINATION (1988); EVOLUTION OF LAW (1985); SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY (1984); THE MAKING OF THE CIVIL LAW (1981); LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974). Watsonian theory postulates that government traditionally is uninterested in the precise nature of legal rules, and therefore is not interested in writing laws from scratch. This lack of interest in content, combined with the peculiar trait of the legal mind that worships tradition and precedent, explains legal borrowing and outlines the characteristics of legal culture. Historically, legal rules often have been borrowed either from another part of that society's legal system or from another society's legal system altogether. *See generally* WATSON, SLAVE LAW IN THE AMERICAS, *supra*, ch. 1. In addition, codification facilitates legal borrowing. For example, the *Institutes* of Justinian, an elementary textbook, but nonetheless a handy compilation of rules, was instrumental in spreading Roman Law throughout Europe. *See generally* WATSON, ROMAN LAW AND COMPARATIVE LAW, *supra*, ch. 17. Legal systems often have developed through borrowing from an esteemed outside system, or through borrowing rules within the system, rather than through pure invention.

defended it against the criticisms of civilian lawyers. The Articles of War and the treatises represented the written British military tradition. An unwritten British military tradition also influenced the military law of the Legion through the men who had originally served alongside the British Army, and who imparted its unwritten traditions to the new American Army.

Military law borrowed unwritten customs from civilian law, but the influence of civilian law on the military was somewhat limited. While borrowing unwritten civilian customs was a common practice, and a practice which the military-legal treatises endorsed (for example, the practices represented by majesty, mercy, and terror), at most these practices merely indicate that military and civilian law shared a certain outlook on administrative efficiency, and used common forms and conventions that were assumed to make law enforcement most effective with the least effort. But the concept of justice followed traditional British military concepts. The concept of discipline as the embodiment of military justice was the lodestar of military-legal culture, and the various civilian practices did not interfere with this concept. They were not central to the purpose of military law, but part of the means of enforcement of that law.

The lack of civilian influence on the concept of military justice during the time of the Legion also may be seen in the lack of change between the Revolution and the end of the eighteenth century, despite the intervening adoption of the United States Constitution, and in particular, the Bill of Rights. Whether the Founding Fathers intended that the Bill of Rights apply fully to the military is a question that, despite its having been fully debated, is still debatable.[116] The courts-martial records of the Legion reveal a preoccupation with the requirements of the Articles of War, not with the Constitution. Congress undertook no action to revise the Code in light of the change in government. Conversely, the periodic acts of Congress reconfirming the Articles of War in 1790, 1795, and 1796 simply stated that the existing Articles of War were reenacted "so far as the same . . . are applicable to the Constitution of the United States."[117]

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[116] *See* Gordon Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (arguing that the Bill of Rights was intended to apply to the armed forces); Wiener, *The Original Practice I*, *supra* note 7; *The Original Practice II*, *supra* note 21 (controverting Henderson's conclusion); Droddy, *supra* note 22, at 122–24 (noting that both Henderson and Wiener tend to make "even the smallest grain of evidence [of intent] over-probative," and concluding that the original intent of the applicability of the Bill of Rights is a complicated issue, and one that is not likely ever to be settled conclusively); *see also* Lederer & Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 144 MIL. L. REV. 110 (1994) (arguing that the issue of application is uncertain and open to debate).

[117] Act of April 30, 1790, ch. 10, § 13, 1 Stat. 121, *repealed by* Act of March 3, 1795, ch. 44, § 18, 1 Stat. 121; Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432, *repealed*

While Secretary of War Knox expressed doubts about customs such as branding, which concerns appear consistent with constitutional concerns, his anxieties were ignored.[118] The military-legal culture of the old Army, and its emphasis on stern punishments, summary procedures, and swift exemplary punishment, persisted into the nineteenth century in the absence of civilian or military reformers to change the statute in any radical manner.[119] Reform influences on military law had limited effect until the performance of military justice in each of the twentieth century's world wars could be viewed in retrospective, and until Congress perceived some need for reform.[120]

Since the adoption of the British Articles of War in 1776, the historical development of American military law has been a slow but steady drift away from the British origins of that Code, and toward an American military law. Before World War I, the inherited British military-legal culture, as embodied in the Articles of War and the treatises that explained them, was the predominant—even if permanently and slowly waning—influence in American military law.[121] During the nineteenth century, American judge advocates wrote treatises, relying increasingly less on British practice and more on the American military-legal experience.[122] The War Department rewrote, and Congress passed, new Articles of War in 1916 and in 1920.[123] Congress initially enacted the current military criminal law statute—which brought the previously independent military-legal systems under one law known as the UCMJ—in 1950.[124] With the

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by Act of May 30, 1796, ch. 39, § 22, 1 Stat. 486; Act of May 30, 1796, ch. 39, § 20, 1 Stat. 486, *superseded by* Act of March 2, 1799, ch. 31, § 4, 1 Stat. 725–26.

[118] *See supra* note 47 and accompanying text.

[119] The relative autonomy of military-legal culture has been noted before. Military law is a separate system of justice, recognized by the Supreme Court as legitimately unique. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 2–3 (1982) (citing *Middendorf v. Henry*, 425 U.S. 25 (1976)). Critics of military law—such as S.T. Ansell and others—ignore the role of traditions in legal culture even when they recognize the role of borrowing: "the existing system of Military Justice is un-American, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable . . . ." Samuel T. Ansell, *Military Justice*, 5 CORNELL L. REV. 1, 1 (1919).

[120] *See generally* 1 JONATHAN LURIE, ARMING MILITARY JUSTICE (1992).

[121] In the preface of his book on military law, first published in the mid-19th century, Captain William C. DeHart, acting Judge Advocate, deplored the reliance of American military officers on British military justice manuals. WILLIAM C. DEHART, OBSERVATIONS ON MILITARY LAW iii (1846).

[122] *See, e.g.*, MACOMB, *supra* note 15 (first published in 1809 and relying on British treatises); DEHART, *supra* note 121 (first published in 1846 and distinguishing itself from British treatises); WINTHROP, *supra* note 5 (a detailed and authoritative treatise first published in 1886).

[123] *See* Wiener, *First Mutiny Act Tricentennial*, *supra* note 19, at 16–24.

[124] LURIE, *supra* note 120, at 255; *see also* UCMJ arts. 1–146.

significant developments in military law in the twentieth century, culminating in the UCMJ and its revisions, military law—like the common law—may have its origins in the British legal system, but it is two hundred years later a product of American experience. Yet, because of both tradition and the timelessness of a soldier's duty, some of the UCMJ's articles still echo those of the original Articles of War.

DOES THE FOURTH AMENDMENT APPLY TO THE ARMED FORCES?*

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I. Introduction

> *It is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.*[1]

With this statement, the United States Court of Appeals for the Armed Forces[2] (CAAF) recognized the applicability of the Bill of Rights to the armed forces. Ironically, despite the importance of this matter, the United States Supreme Court never has confirmed this holding. Insofar as the Fourth Amendment is concerned, this situation was highlighted recently by an unusual exchange among four members of the CAAF in *United States v. Lopez*.[3] In the process of extending to commanders[4] a "good faith exception" to the Fourth Amendment exclusionary rule, four of the five judges discussed—and potentially disagreed about—the applicability, or the nature of the applicability, of the Fourth Amendment to the armed forces.

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[1] United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

[2] Formerly the United States Court of Military Appeals (COMA). Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the COMA as the United States Court of Appeals for the Armed Forces (CAAF). *See* Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941).

[3] 35 M.J. 35 (C.M.A. 1992).

[4] In the area of search and seizure, commanders have magisterial powers to grant the military equivalent of search warrants—"search authorizations." MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 315(b)(1) (1984) [hereinafter MCM].

Lopez thus poses a fundamental question of constitutional law: *Does* the Fourth Amendment apply to the military, and, if so, how?[5]

In her lead opinion in *Lopez*, Judge Crawford wrote that the *Manual for Courts-Martial's*[6] adoption of the good faith exception was "an implicit recognition that the Supreme Court has never expressly applied the Bill of Rights to the military, but has assumed they applied."[7] In support of that proposition, Judge Crawford's footnote contained the following quotation:

> Scholars have differed as to whether the Bill of Rights does apply to the armed forces. Strangely enough, in one sense the question remains open. Although the Supreme Court has *assumed* that most of the Bill of Rights does apply, it has yet to squarely hold it applicable.[8]

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[5] One might loosely divide searches and seizures in the armed forces into two categories: traditional law enforcement type activities and inspections. In the former case, military law is very similar to that applied daily in the nation's civilian courts with perhaps the unique element that otherwise "impartial" military commanders may grant search authorizations—that is, warrants—on a showing of probable cause. *Id.* MIL. R. EVID. 315; *see also id.* MIL. R. EVID. 314 (nonprobable cause searches). Military inspections, as one might expect, are numerous. In addition to inspections for personnel accountability, condition of personal equipment, and health and welfare generally, military inspections can extend to searches for weapons and drugs. Although the location and removal of drugs often is justified on the grounds of the health and welfare of all personnel affected—to say nothing of mission accomplishment—Lederer & Lederer, *Marijuana Dog Searches After United States v. Unrue*, ARMY LAW., Dec. 1973, at 6, the resulting scope is far broader than ordinarily would be countenanced in civilian society. In large measure, this article will concentrate on military inspections, for even if the Fourth Amendment applies to military searches and seizures for traditional, nonmission essential, law enforcement purposes, it is highly likely that inspections are either outside the ambit of the Fourth Amendment or "reasonable" searches within its meaning.

[6] The *Manual for Courts-Martial* is an executive order issued by the President pursuant to both the President's constitutional authority as Commander-in-Chief and Article 36(a) of the Uniform Code of Military Justice (UCMJ), which provides:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

UCMJ art. 36(a) (1988). In 1980 the President promulgated the Military Rules of Evidence (MRE). The traditional evidentiary provisions are nearly identical to the Federal Rules of Evidence, albeit with a privilege codification. However, the MRE also contain a unique codification of the law of search and seizure, interrogation, and eyewitness identification. Binding rather than expository, the search and seizure rules were designed in particular to supply certainty and predictability in those areas routinely affecting law enforcement activities.

[7] *Lopez*, 35 M.J. at 41.

[8] 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 26 (1991) (citing Parker v. Levy, 417 U.S. 733 (1974)), *quoted in Lopez*, 35 M.J. at 41 n.2. The treatise continues:

Chief Judge Sullivan, although concurring in the result in *Lopez*, disagreed with Judge Crawford's comments about the Fourth Amendment and the Bill of Rights. The Chief Judge wrote:

> I reject the suggestion or even the unintended implication of the opinion that Manual rules provide the exclusive protection to service members from unreasonable searches and seizures. Consequently, I could not find the purportedly less demanding Manual rules dispositive of the accused's Fourth Amendment claims. Instead, it is only where these Manual rules fully satisfy the demands of the Constitution and the Bill of Rights as applied in the military context that resolution of the accused's claims on this basis would be appropriate.[9]

Despite the Chief Judge's strong language, his position has, at most, limited support. He cites only a plurality opinion in *Burns v. Wilson*[10] and two Supreme Court remands to the CAAF ordering that court to reconsider those cases "in light of" specified Fourth Amendment cases.[11] Consequently, his conclusion that "the Supreme Court's express direction to consider those cases on the basis of its decisions applying the Bill of Rights contradicts the implication of Judge Crawford's opinion that these most precious and fundamental rights might not at all be available to American service members"[12] *may* be accurate, but it need not be.

As Chief Justice Rehnquist noted in *United States v. Verdugo-Urquidez*,[13] in determining whether the Fourth Amendment applied to a search and seizure of a nonresident alien outside the United States

> The Court of Appeals found some support for its holding in our decision in *INS v. Lopez-Mendoza*, where a majority of Justices assumed that the Fourth Amendment applied to

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> Although disturbing, the Court's silence is only of academic interest, given that the Court of Military Appeals held in 1960 in *United States v. Jacoby* that "the protections of the Bill of Rights, except those which are expressly, or by necessary implication inapplicable, are available to members of the armed forces."

Id. (citation omitted). To say that the issue is only of academic interest is misleading. *Lopez* demonstrates that the state of the Supreme Court's decisional law may now be of practical importance.

[9] *Lopez*, 35 M.J. at 48 (Sullivan, C.J., concurring).

[10] 346 U.S. 137 (1953), *cited in Lopez*, 35 M.J. at 48 (holding that federal civil courts may review due process claims of military personnel).

[11] *Lopez*, 35 M.J. at 48 (citing Goodson v. United States, 471 U.S. 1063 (1985); Jordan v. United States, 498 U.S. 1009 (1990)).

[12] *Id.* at 49.

[13] 494 U.S. 259 (1990).

> illegal aliens in the United States. We cannot fault the Court of Appeals for placing some reliance on the case, but our decision did not expressly address the proposition gleaned by the court below . . . . The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions . . . and such assumptions . . . are not binding in future cases that directly raise the questions.[14]

These comments from the Chief Justice illustrate that remands "in light of" propositions and assumptions hardly constitute express holdings. Consequently, while Chief Judge Sullivan may rely on these remands in support of his view, the issue of whether the Fourth Amendment applies to the military may be considered an open question. As Judge Wiss noted in *Lopez*, the CAAF "quite clearly has applied the pertinent portions of the Bill of Rights."[15] His statement that, "I must reject the implication that this *assumed* application of the Bill of Rights has somehow left the question open"[16] is unjustified, however, as demonstrated above. Further, as Judge Wiss conceded, notwithstanding the CAAF's demonstrated dedication, ability, and specialized knowledge, whether the Fourth Amendment—or any part of the Bill of Rights—applies to the armed forces is ultimately the decision of the Supreme Court.[17] Consequently, although the CAAF may be unwilling to reconsider its precedents, the Supreme Court has yet to resolve the issue for the first time.

The Supreme Court's recent decision in *Davis v. United States*[18] demonstrated the accuracy of this conclusion. Addressing the impact of a service member's ambiguous assertion of the right to counsel, the Court first declared by way of a footnote:

> We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here. The President, exercising his authority to prescribe procedures for military criminal proceedings, has decreed that statements obtained in violation of the Self-Incrimination Clause are generally not admissible at trials

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[14] *Id.* at 272 (citations omitted).

[15] *Lopez*, 35 M.J. at 49.

[16] *Id.*

[17] Judge Wiss recognized this when he wrote, "Unless and until the Supreme Court of the United States hold[s] otherwise, the law of this Court *closes* this question." *Id.*

[18] 114 S. Ct. 2350 (1994).

> by court-martial. Because the Court of Military Appeals [CAAF] has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial, and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions.[19]

II. The Need for Supreme Court Resolution

A thoughtful commentator might argue that the Supreme Court need not decide how, and to what extent, the Fourth Amendment applies to the armed forces. Cannot history and lower court decisions—particularly those of the CAAF—serve as controlling precedent until the issue is otherwise decided by the Supreme Court? To some extent this question can be answered simply from a pragmatic policy position. The armed forces may prefer a far broader scope to search than now permitted. From a jurisprudential view, the authors reply with the argument that the Founding Fathers intended for the Supreme Court to be the final arbiter of constitutional questions.[20] The Supreme Court has the responsibility to answer ultimate questions about the extent to which the Bill of Rights—and particularly the Fourth Amendment—apply to those in uniform. Courts of inferior jurisdiction may properly decide questions of constitutional importance, but the ultimate decision *should* come from the one and only court specifically established by the Framers.

Additionally, the majority of opinions expressly applying the Fourth Amendment to the armed forces come not from an Article III court, but from a lower court created by Congress under Article I. Again, the CAAF and the courts of criminal appeals[21] may properly address constitutional questions, but these questions ultimately must be resolved by the Supreme Court.

One might also argue, however, that even if the applicability of

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[19] *Id.* at 2354 n.* (citations omitted).

[20] Or at least the first members of the Supreme Court decided that the Founding Fathers so intended when they established the legitimacy of judicial review in Marbury v. Madison, 5 U.S. 137 (1803).

[21] Formerly known as Courts of Military Review. Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995. The Act redesignated the United States Court of Military Review for each separate service a United States Court of Criminal Appeals. Thus, the United States Army Court of Military Review (ACMR) is now the United States Army Court of Criminal Appeals (ACCA). *See* Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 866).

the Fourth Amendment to those in uniform remains an open question, the issue really is purely academic. Certainly, Congress has codified most aspects of the Bill of Rights in the Uniform Code of Military Justice[22] (UCMJ), or, via Executive Order, the Military Rules of Evidence or the Rules for Courts-Martial, and they are presumably noncontroversial.[23] No one seriously contends that freedom of religion, due process of law, or the right against self-incrimination—all guaranteed by the Bill of Rights—could be completely taken away from those in uniform by an Act of Congress or an Executive Order. The lack of judicial decisions specifically guaranteeing these rights to service members does not mean that their existence is an open question. Yet, one cannot ignore the implications of the Supreme Court's most recent analysis of the interrelation between the Constitution and criminal law.

In *Weiss v. United States*,[24] the Supreme Court held that the absence of fixed terms of judicial office by military judges who are rated by military superiors did not violate due process. In holding that the congressional "balance between independence and accountability" did not violate due process, the Court emphasized the deference it accords Congress insofar as the rights of service personnel are concerned:

> . . . [W]e have recognized in past cases that "the tests and limitations of [due process] may differ because of the military context." The difference arises from the fact that the Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." Judicial deference thus "is at its apogee" when reviewing Congressional decisionmaking in this area. Our deference extends to rules relating to the rights of service members: "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against

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[22] *E.g.*, the right against self-incrimination, UCMJ art. 31(a) (1988); the right to rights warnings, UCMJ art. 31(b) (1988); and the right against double jeopardy, UCMJ art. 44 (1988).

[23] Congress could amend the UCMJ if it chose to do so. Conversely, the right against self-incrimination was codified in the Articles of War at a time when the Bill of Rights was thought not to apply to the armed forces, and the military rights warnings predate *Miranda* by 18 years. *See generally* Lederer, *Rights Warnings in the Armed Services* 72 MIL. L. REV. 1, 1–6 (1976) (discussing rights warnings in the military). No reason exists to believe that freed of constitutional requirement, Congress would abrogate those basic protections as a matter of policy.

[24] 114 S. Ct. 752 (1994). The decision in *Weiss* addressed two cases: *Weiss*, which concerned the legality of the appointment of the military judiciary under the Constitution's Appointments Clause; and *Hernandez v. United States*, which held that the lack of a fixed tenure by the military judiciary did not violate due process.

> the needs of the military . . . . [W]e have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated."[25]

The due process test that the Court applied in *Weiss* was "whether the factors militating in favor [of a right] . . . are so extraordinarily weighty as to overcome the balance struck by Congress."[26] At the very least, *Weiss* suggests that Congress may well have the authority to enact military search and seizure legislation that would be unconstitutional were it applied to civilians.[27]

If the Fourth Amendment either does not apply to the armed forces, or it applies in some minimal fashion, MRE 311–317 could be rewritten to provide commanders with vastly increased search powers and greater flexibility,[28] even absent congressional action. Litigation of search and seizure issues presumably would drop sharply. Senior commanders might even show greater interest in treating inappropriate privacy intrusions as command and leadership failures [29] rather than regarding them as "lawyer matters."

III. The Fourth Amendment Likely Does Not Apply to the Armed Forces in Full

When debating the application of the Fourth Amendment to the military, the clearest issue is how it applies to inspections. Military Rule of Evidence 313 controls the admissibility of evidence or contraband found during a military inspection. A military inspection is considered a "search," because individuals and their property are examined involuntarily. Yet—whether viewed historically or as a matter of social policy—that a military inspection is considered a "search" within the meaning of the Fourth Amendment is by no means clear.

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[25] *Id.* at 760–61 (citations omitted).

[26] *Id.* at 761 (quoting Middendorf v. Henry, 425 U.S. 25, 44 (1976)) (holding that personnel appearing before a summary court-martial did not have a right to counsel).

[27] As discussed *infra* part III, authorization of wide-ranging military inspections might be an appropriate subject for such legislation. Military law permits inspections to uncover unlawful weapons and drugs, *see* MCM, *supra* note 4, MIL. R. EVID. 313(b), but conditions the right of commanders to conduct these inspections. Congress might wish to provide for unconstrained inspections.

[28] Whether this is desirable is a matter of policy. Judge Cox's oft-expressed interest in this outcome, *see, e.g.*, United States v. Morris, 28 M.J. 8, 14, 17–19 (C.M.A. 1989), demonstrates that this position can be and is held by responsible individuals who cannot be criticized as either unaware of Fourth Amendment law or insensitive to the position's implications.

[29] *See infra* note 61.

> The intent of the Framers, the language of the amendment itself, and the nature of military life render the application of the Fourth Amendment to a normal inspection questionable. As the Supreme Court has often recognized, the "military is, 'by necessity, a specialized society separate from civilian society.'" . . . As the Supreme Court noted . . . "Military personnel must be ready to perform their duty whenever the occasion arises. To ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'" . . . An effective armed force without inspections is impossible—a fact amply illustrated by the unfettered right to inspect vested in commanders throughout the armed forces of the world.[30]

Professor Lederer, the author of that statement, could have added that if one applied a purely historical (*i.e.*, original intent) theory of constitutional interpretation—not uncommon in the area of Fourth Amendment case law—[31] inspections, at least, would not be regulated by the Fourth Amendment as either the Fourth Amendment generally was not intended to apply to the armed forces, or because military "inspections" would not have been within its ambit. The authors have not conducted research into the operation of the colonial militia and the Army of the 1770s and 1780s. Edward M. Coffman's *The Old Army*, an authoritative secondary source on the American Army between 1784 and 1898, indicates, however, that the Fourth Amendment had little or no importance in early court-martial practice.[32] Additionally, Frederick B. Wiener, a retired judge advocate and perhaps the nation's preeminent military legal scholar, writes that the "actualities of military life in the decade or so after the adoption of the Constitution utterly negative any notion that the first American soldiers were shielded against searches of any kind."[33] Because the Supreme Court did not give content to the

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[30] MCM, *supra* note 4, MIL. R. EVID. 313 analysis, app. 22, at A22-19, A22-20 (citations omitted).

[31] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) ("[T]he Fourth Amendment [does not apply] to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."); United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (alternative holding that because the "lineal ancestor" of the instant statute [permitting the Coast Guard to search vessels] was enacted by the same Congress that "promulgated the Bill of Rights," Congress clearly did not regard this type of search as unreasonable); United States v. Watson, 423 U.S. 411 (1975) (holding that warrants not necessary for arrests).

[32] EDWARD M. COFFMAN, THE OLD ARMY 21-25 (1986).

[33] Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 272 (1958).

Fourth Amendment in civilian criminal law until 1886,[34] and the concept of excluding evidence obtained through an illegal search first appeared in 1914,[35] that the Framers intended the Fourth Amendment to apply to the armed forces is not at all certain. Rather, it is likely that the historical record will show that at the time the Bill of Rights was written and ratified, military commanders had unfettered authority to search their personnel for military-related purposes. If this is true, a theory of original intent would yield the inescapable conclusion that the Fourth Amendment does not affect ordinary military practice.

Application of the contemporary emphasis on the "reasonableness" of a search or seizure[36] likely would yield a similar result, at least insofar as military inspections are concerned. A *Katz*[37]—related policy analysis would reinforce this conclusion. The often smaller, if not sometimes *de minimis*, expectation of privacy held by military personnel, coupled with the substantial social policy justification for privacy intrusions in the military framework, would at least justify a sharply different manner of Fourth Amendment application to the military when compared to its civilian application.[38]

Ironically, in its 1993 decision in *United States v. McCarthy*,[39] the CAAF, holding that the Fourth Amendment did not require the equivalent of arrest warrants for apprehensions in barracks,[40] determined that military personnel do not have a reasonable expectation of privacy in military barracks.[41] In large measure the CAAF determined that any expectation of privacy would be unreasonable given the unique nature and needs of military life.[42] Although *McCarthy* is

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[34] Boyd v. United States, 116 U.S. 616 (1886) (holding that compulsory production of private books and papers for use against the owner violated Fourth and Fifth Amendments).

[35] Weeks v. United States, 232 U.S. 383 (1914) (finding that improperly seized papers may not be held or used at trial).

[36] *See, e.g*, Soldal v. Cook County, Ill., 113 S. Ct. 538, 548 (1992) ("'[R]easonableness is still the ultimate standard . . . .'").

[37] Katz v. United States, 389 U.S. 347 (1967) (finding that the use of an electronic listening device in a telephone booth without a warrant was an unconstitutional search and seizure).

[38] The nature of our armed forces might well play a significant role in the outcome. A small volunteer professional force might implicate different values than a large drafted force. On the other hand, a large group of conscripts may require more pervasive command presence and scrutiny, increasing the need for unfettered searches and seizures. In a related vein, a "downsized" voluntary professional military may be sufficiently distinguishable from the expansive drafted forces of yesteryear to permit a knowing and voluntary waiver of any applicable Fourth Amendment rights on entry.

[39] 38 M.J. 398 (C.M.A. 1993).

[40] *Id.* at 400–01 (construing Payton v. New York, 445 U.S. 573 (1980)).

[41] *Id.* at 403.

[42] *Id.* at 402.

limited to whether a reasonable expectation of privacy exists in a barracks for purposes of apprehensions, the CAAF's reasoning is consistent with a potential holding that no reasonable expectation of privacy exists in a barracks for purposes of other searches and seizures.[43] Indeed, Judge Wiss, concurring in the result in *McCarthy*, voiced his concern that the majority had held that there is "*no* reasonable expectation of privacy" rather than "a *reduced* or *different* expectation."[44] Consequently, in the limited area of barracks inspections, the CAAF may well be prepared to find the Fourth Amendment inapplicable.

Accordingly, insofar as MRE 313 is concerned, depending on the applicability of the Fourth Amendment to the armed forces, the President might choose to delete this provision altogether, because its existence might not be constitutionally required. A similar analysis might apply to other provisions of the MREs governing searches and seizures of persons and property.

IV. The Cox View of Search and Seizure in the Armed Forces

As a member of the CAAF, Judge Cox's view of search and seizure in the armed forces is instructive. Although Judge Cox has accepted that the Fourth Amendment applies to the armed forces, he believes that its application to the military should differ radically from its civilian application. In his concurring opinion in *Lopez*, he criticizes the manner in which the CAAF has applied the Fourth Amendment. "For some time now, I have been 'urging a fresh look at the proper application of the Fourth Amendment to . . . [military] society.'"[45] Judge Cox would apply the Fourth Amendment to the armed forces, but he would apply it in a unique fashion:

> The Fourth Amendment only protects military members against unreasonable searches within the context of the military society . . . . Something as drastic as a "shakedown inspection" can only be justified in the military because of the overriding need to maintain an effective force. Likewise, preemptive strikes on drugs and other dangers can only be reasonable because of their impact on the mission . . . . The United States Court of Military Appeals has the obligation to ensure that inspections,

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[43] An arrest or apprehension is, of course, a Fourth Amendment seizure. *See, e.g.*, United States v. Watson, 423 U.S. 411, 428 (1975) (Powell, J., concurring).

[44] *McCarthy*, 38 M.J. at 407. Judge Cox's opinion concludes, "The repercussions of such a broad holding are enormous." *Id.*

[45] United States v. Lopez, 35 M.J. 35, 42 (quoting United States v. Morris, 28 M.J. 8, 14 (C.M.A. 1989) (Cox, J., concurring in part and dissenting in part)).

> searches, and seizures in the military society are reasonable in their inception and in their conduct. This means that commanders must have rules which are honest, simple, forthright, and easy for both the commander and the commanded to understand.[46]

Whether Judge Cox is correct as a matter of policy is subject to reasonable disagreement, and indeed the authors of this article may differ between themselves on the point. Judge Cox's view demonstrates, however, that the nature of the applicability of the Fourth Amendment to the armed forces is subject to serious debate. Moreover, although Judge Cox applies the Fourth Amendment to the armed forces, his focus on unit "mission" and a commander's "reasonableness" as the benchmarks for deciding the legality of a search or seizure means that he reaches the same result that would be reached by a judge who ruled that the Fourth Amendment did not apply to the armed forces.

A look at how Judge Cox applies the Fourth Amendment to command-directed military inspections illustrates this point. In his concurring opinion in *United States v. Alexander*,[47] he writes that:

> [A]ny threat to combat effectiveness or mission preparedness provides a legitimate basis for inspection . . . . [Furthermore,] any time a commander's probing actions relate directly to the ability of an individual or organization to perform the military mission . . . we have a *presumptively* valid military inspection. It does not matter whether the commander has reason to suspect that the individual or unit will fail the inspection.[48]

Judge Cox further writes that if a commander suspects that a soldier is a drug user, she may order a urinalysis of only that soldier, and that would be a lawful inspection if done "to protect the safety and readiness of [her] personnel."[49] This example illustrates that although Judge Cox applies the Fourth Amendment in measuring the legality of command-directed military inspections, the *practical* effect of this application rarely will differ from the practical effect resulting from not applying the Fourth Amendment to the armed forces.

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[46] *Id.* at 45; *see also* United States v. Holloway, 36 M.J. 1078, 1091-94 (N.M.C.M.R. 1993) (en banc) (Lawrence and Orr, JJ. dissenting).

[47] 34 M.J. 121 (C.M.A. 1992).

[48] *Id.* at 127 (Cox, J. concurring); *see also* TJAGSA Practice Note, *Can the Government Ever Satisfy the Clear and Convincing Evidence Standard Under Military Rule of Evidence 313(b)?*, ARMY LAW., June 1992, at 33.

[49] *Alexander*, 34 M.J. at 128.

Accordingly, an ongoing need to clarify a fundamental question exists: *Does* the Fourth Amendment apply to the armed forces and, if so, *how* and *to what extent*?

V. Obtaining Supreme Court Review

Presenting this issue to the Supreme Court for resolution has appeared hopeless because of a single insurmountable obstacle—the Military Rules of Evidence. Given the Section III codification of the law of search and seizure in the MREs,[50] any attempt to appeal a defense-oriented Fourth Amendment decision to the Supreme Court almost certainly would be resolved on the grounds that the MREs present an adequate and independent grounds for decision. The President surely can provide service members with rights beyond those minimally guaranteed by the Constitution. To invalidate the MREs is highly undesirable, however, from a policy and efficiency perspective. Notwithstanding Judge Cox's attempt to promote the use of MRE 314(k) (basically a provision permitting the use of any new type of nonprobable cause search declared constitutional by the Supreme Court, as a blanket escape clause to the MREs[51]), MRE 314(k) ordinarily is of no avail.[52]

However, a mechanism to present this issue to the Supreme Court does exist—a mechanism that depends somewhat ironically on

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[50] *See generally* Fredric I. Lederer, *The Military Rules of Evidence, Origin and Judicial Interpretation*, 130 MIL. L. REV. 5-39 (1990) (discussing the MREs, their drafting, and their implementation).

[51] Indeed, MRE 314(k) itself contains the exception that swallows these "rules," stating, "A search of a type not otherwise included in this rule and not requiring probable cause under MRE 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces." United States v. Lopez, 35 M.J. 35, 45 n.3 (C.M.A. 1992).

[52] Contrary to Judge Cox's assertion that MRE 314(k) provides what might be called a "near miss" exception to the rules, MRE 314(k)'s emphasis is on the word "type." If a nonprobable cause search of a *type* not codified is involved, MRE 314(k) permits an otherwise constitutional search. *See* MCM, *supra* note 4, MIL. R. EVID. 314(k) analysis, app. 22, at A22-26. Most normal types of search are codified, and MRE 313 expressly contemplates inspections and inventories. It follows that Judge Cox's conclusion that "the results of constitutional searches are not subject to exclusion under the Military Rules of Evidence," *Lopez*, 35 M.J. at 46, is simply wrong. If the Supreme Court were to determine, for example, that vehicle searches did not require probable cause, a new *type* of search would be born and MRE 314(k) would apply. A pro-prosecution change, however, in searches incident to a lawful apprehension, *see* MCM, *supra* note 4, MIL. R. EVID. 314(g), would not be adopted via MRE 314(k). That *type* of search has been codified. The authors concede that Professor Lederer's status as the provision's drafter may affect his interpretation of the provision, but believe that the plain meaning, framework, and intent behind MRE 314, *see id.* MIL. R. EVID. 314 analysis, app. 22, at A22-24, and its provisions substantiate our plain meaning and "legislative intent" interpretation.

the very same MRE 314(k) that Judge Cox has placed great emphasis on. Military Rule of Evidence 315 codifies the law pertaining to probable cause searches. Military Rule of Evidence 315(a) declares, "Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules."[53] Military Rule of Evidence 311(a) declares as inadmissible only the results of an "unlawful search or seizure,"[54] and "unlawful" is defined for searches conducted by military personnel and their agents as a search "in violation of the Constitution . . . as applied to members of the armed forces . . . or Military Rules of Evidence 312-317."[55] If a military search, of a type that would require probable cause when conducted in civilian life, is executed, and the Fourth Amendment does not apply to the armed forces, that search will not require probable cause.[56] It follows that MRE 315 no longer is part of the equation and the search is lawful under the MRE 314(k) escape clause. Consequently, the Supreme Court can consider a fundamental constitutional issue which would not be rendered moot by the MREs.[57]

Constitutional clarification of this matter necessarily requires Supreme Court decision. Accordingly, the authors of this article recommend that the government seek writs of certiorari from the CAAF in an inspection case requiring probable cause in a civilian setting and in which that probable cause clearly is lacking. The Supreme Court's willingness to grant certiorari in appropriate military cases is illustrated by its having heard three military cases in its October 1993 term.

The authors do *not* recommend that Staff Judge Advocates or prosecutors intentionally advise commanders or law enforcement personnel to conduct searches that are undoubtedly unlawful under current law so as to establish test cases. This conduct may be ethical. Rule 3.1 of both the American Bar Association's Model Rules and the Army's Rules of Professional Conduct for Lawyers, for example,

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[53] MCM, *supra* note 4, MIL. R. EVID. 315(a).

[54] *Id.* MIL. R. EVID. 311(a).

[55] *Id.* MIL. R. EVID. 311(c)(1).

[56] One possible example would be the United States search of a foreign dwelling inhabited by an American service member. *Cf.* United States v. Chapple, 36 M.J. 410 (C.M.A. 1993) (extending a good faith exception to a commander's authorization to search a foreign civilian dwelling outside his control). *See generally* TJAGSA Practice Note, *COMA Further Extends the Good Faith Exception:* United States v. Chapple, ARMY LAW., July 1993, at 39.

[57] Interestingly, the CAAF's recent decision in United States v. McCarthy, 38 M.J. 398 (C.M.A. 1993), holding that the military equivalents of arrest warrants are not required for apprehension in barracks, *see supra* text accompanying notes 39-44, would be an adequate vehicle if appealed by the defense.

permit bringing a proceeding or asserting an issue "which includes a good faith argument for . . . reversal of existing law."[58] The intentional creation of a test case, however, by giving advice to military law enforcement officials which clearly contradicts not only the consistent holdings of the CAAF but also the MREs is at the least troubling. Perhaps more importantly, the MREs are in one sense an order of the President, the Commander-in-Chief, and to intentionally violate this directive would be improper.[59] In any event, a test case is unnecessary; sufficient erroneous searches exist as it is to provide an appropriate vehicle.[60]

VI. Conclusion

It is incredible that in the late twentieth century it is not absolutely known whether the Fourth Amendment applies to those sworn to defend it. If the Fourth Amendment does not apply, then either the President or Congress should act to protect the rights and interests of our soldiers in a way that adequately balances their interests and those of national security.[61] Conversely, if the Fourth Amendment does apply, but in a fashion far more flexible than previ-

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[58] DEP'T OF ARMY, REG. 27-26, Rules of Professional Conduct for Lawyers, rule 3.1 (1 May 1992).

[59] This does suggest that the President could set the stage for an appropriate challenge simply by amending the MREs, which is possible. However, given the time lag between the effective date of a rules amendment and resolution of an appropriate case by the Supreme Court, an invalid amendment to the MREs would adversely, and unnecessarily, affect the rights of numerous personnel and mandate the reversal of what potentially might be a large number of courts-martial convictions.

[60] *See supra* note 56 for an example of the type of case suitable for appeal to the Supreme Court. A case in which evidence is admitted on an inevitable discovery theory also might be suitable for appeal. For example, assume a military police (MP) officer searches an accused's motor vehicle for contraband. The car is parked legally on post, in the unit parking lot. The MP lacks probable cause to search, however, because it is only rumored that the accused's car contains contraband. At trial the contraband discovered and seized from the accused's vehicle is admitted under an inevitable discovery theory. The ACCA affirms on this basis. The CAAF reverses, holding that as a matter of law the facts developed at trial are inadequate to make inevitable discovery applicable. In this example, the search of a civilian car requires probable cause, and absent the application of inevitable discovery, the search is unlawful. If the Fourth Amendment does not apply to the armed forces, however, MREs 311, 314, and 315 will operate to make the search lawful and the contraband admissible.

[61] Although we think that some type of search and seizure regulation is necessary, we note then-Chief Judge Everett's remarks that:

> In promulgating paragraph 152 of the [1951 & 1969] Manual the President may also have recognized that inherent in the command structure are some safeguards against a commander's indiscriminate invasion of the privacy of his subordinates. For one thing, combat readiness of troops depends in large part upon their motivation, but discipline and punishment cannot alone develop the necessary motivation. Leadership

ously thought,[62] the President's representatives ought to have that knowledge to fashion the most flexible search and seizure rules consistent with public policy and the needs of our military personnel.

VII. Addendum

Since publishing an earlier version of our article, we have been asked to set forth in greater detail our views as to whether the Fourth Amendment applies to the armed forces. This is inherently difficult because the ultimate answer to the question of application depends on the theory of constitutional application chosen. Furthermore, even though we believe that the Framers never intended the Fourth Amendment to apply to the armed forces, the current size, structure, and working and living circumstances commonplace to military life reasonably can be said to differ so radically from the Framers' notions of military life that their intent may not apply to contemporary conditions. Our fundamental premise is that the issue of application is uncertain and open to debate, and that the Supreme Court ought to resolve the matter. But, if obliged to answer the question ourselves, we think that the following resolution might adequately address the various constitutional theories as applied to current reality.

Given both the Framers' probable original intent; the overriding critical nature of the military mission—which the Framers under-

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> is also required, and one aspect of successful leadership is concern for the welfare of subordinates. Loyalty in a military unit, as in other organizations, is a two-way street. A commander who approves—or even tolerates—arbitrary invasions of the privacy of his subordinates is not demonstrating the brand of leadership likely to command the loyalty or produce the high morale associated with a combat-ready organization. Accordingly, a commander has some incentive to act reasonably and with sound judgment in acting on requests for searches and seizures which involve his personnel. Moreover, repeated failures by a commander to respect the Fourth Amendment rights of his troops might become a basis for a "complaint of wrongs" under Article 138 of the Uniform Code . . . or, in the extreme case, even for a prosecution for dereliction of duties as a commander.

United States v. Lopez, 35 M.J. 35, 44-45 (Cox, J. concurring) (quoting United States v. Stuckey, 110 M.J. 347, 359-60 (C.M.A. 1981) (Everett, C.J.).

In promulgating the MREs, the President clearly has assumed that the Fourth Amendment in particular, and the Bill of Rights generally, apply to the armed forces. It also may be argued that the MREs generally reflect a proper balance between the needs of the armed forces and the needs of their soldier citizenry. However, the President may change the MREs at any time. If the Fourth Amendment does not apply to the armed forces, no constitutional check on any such change exists.

[62] The Supreme Court need not resolve the Fourth Amendment question on a "yes or no" basis. It could well decide that mission-related searches and seizures—"examinations"—are not within the scope of the Fourth Amendment while pure searches for evidence of crime are.

stood and which has not changed significantly since their day; and the inherent nature of armies once in being, which also has not changed substantially since their day, we would conclude that the Fourth Amendment does not apply to military personnel when an intended search or seizure is to be conducted directly incident to the armed forces' legitimate *military* needs. Thus, the Fourth Amendment would not apply, in the words of MRE 313, to a search (or seizure) "conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization . . . ." Thus, inspections or searches intended to locate or deter unauthorized weapons or debilitating drugs, or to locate missing military equipment, for example, are not within the Fourth Amendment.[63] Searches that have no direct impact on a proper military concern, however, would be within the Fourth Amendment. Accordingly, simple theft of a stereo,[64] for example, or a search for evidence for a murder prosecution of a nonmilitary family member would be covered by the Fourth Amendment.

Our conclusion, if accurate, would not only substantially expand command authority, it also would create a large gray area of legal uncertainty and thus litigation--unless the MREs dealing with search and seizures were both retained and altered to cope with the change in constitutional interpretation. After all, our conclusion yields a result akin to the infamous *O'Callahan* service connection test, and that case's progeny proves the need for clarity and certainty. That the Constitution permits a given governmental course is not the same as saying that course ought to be taken. We believe that the law should be clarified and that once the ultimate result is known the President should amend the MREs so as to adequately balance our personnel's privacy needs and command's legitimate readiness requirements. Whether a substantial change in current *practice* is either appropriate or even desirable is another matter entirely.

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[63] However, the method of search and seizure may be governed by due process standards.

[64] However, if the theft of the radio occurred in the classic "barracks thief" context, it would have a direct impact on morale, trust, and readiness.

CREATING CONFUSION: THE TENTH CIRCUIT'S *ROCKY MOUNTAIN ARSENAL* DECISION

ENSIGN JASON H. EATON*

In United States v. Colorado, *the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) recognized states' authority to enforce their hazardous waste laws at Superfund sites. In doing so, the Tenth Circuit refused to follow unanimous precedent from the other circuit courts, which steadfastly had refused to hear claims dealing with Superfund sites because the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) precludes pre-enforcement review of "challenges" to cleanups. The Tenth Circuit's analysis opens the courthouse doors, however, to more than just states. Under the Tenth Circuit's reasoning, any private party would be able to assert state law claims impacting Superfund sites owned by both the federal government and private parties. The decision also draws attention to the ill-defined roles that federal and state governments have assumed regarding hazardous waste cleanups. Unfortunately, the Tenth Circuit's decision will not lead to speedier, more productive cleanups. Instead,* United States v. Colorado *appears to add yet another delay mechanism into Superfund cleanups. This article advocates amending the CERCLA to restore its role as the nation's leading waste remedial statute.*

> Vagueness, contradiction, and dissembling are familiar features of environmental statutes, but CERCLA is secure in its reputation as the worst drafted of the lot.[1]
>
> Even the child psychologists tell us that uncertainty about rules is not always good for us and that it does not improve our temperaments, our character, or our ability to get along with others.[2]

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[1] WILLIAM H. RODGERS, ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES 514 (1988).

[2] Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 608 (1988).

I. Introduction

Closing United States military bases[3] involves more than locking the gates and collecting a "peace dividend" on the way out. Once the military has left town, local governments must confront large worker displacements and burgeoning gaps in their economies. The one thing the military cannot take with it—the bases themselves—often become toxic headaches. The military has responded to this dilemma with an aggressive cleanup program. The Cold War's demise, along with heightening environmental awareness, has spurred cleanup efforts at more than 20,000 contaminated sites situated on about 2000 military bases and Department of Energy (DOE) plants.[4] The Pentagon's allocation for environmental cleanup projects at operating and closed bases grew from $500 million in 1989 to $2.2 billion in 1993.[5] The total amount budgeted for federal facility cleanup in 1993 is nearly $10 billion—almost $3 billion more than the Environmental Protection Agency's (EPA) entire budget.[6]

Even with this monumental spending, much remains to be done. The Department of Defense (DOD) has completed cleanups at slightly more than two percent of the 17,000 sites it has assessed thus far.[7] Faced with prolonged cleanups at federal facilities,[8] states eagerly seek involvement in the remedial process through the application of state hazardous waste laws. "It is important for states to protect their right to exercise independent authority to get the cleanup work accomplished effectively," according to Colorado Governor Roy Romer (D).[9] He should know. Colorado possesses two of the nation's worst hazardous waste sites: the DOE's Rocky Flats

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[3] William E. Clayton, Jr., *Sword and an Olive Branch: Clinton Accepts Bases List; but Offers Affected Areas Federal Aid to Ease the Pain*, HOUSTON CHRON., July 3, 1993, at A10.

[4] *Cleaning Up Federal Facilities: Controversy Over an Environmental Peace Dividend*, 23 Env't Rep. (BNA) 2659, 2560 (Feb. 5, 1993).

[5] *Id.* When the Department of Defense's environmental compliance budget is included, the fiscal 1993 environmental budget rises to $4.4 billion, including $1 billion Congress approved in 1992 for spending throughout fiscal 1993. A smaller rate of increase in the environmental restoration budget was seen in the DOE for the same period. In 1989, the DOE spent $1.7 billion. By 1993, that amount had grown to $5.5 billion, out of an entire DOE budget of $17 million. *Id.* at 2660–61.

[6] *Id.* at 2660.

[7] *Id.* at 2659, 2662. *See also Hazardous Waste: Much Work Remains to Accelerate Facility Cleanups*, G.A.O./R.C.E.D.-93-15 (General Accounting Office, Jan. 1993).

[8] Federal agencies are forbidden from suing other federal agencies or issuing one another unilateral orders under the Department of Justice's "unitary policy theory." Maine v. Department of Navy, 702 F. Supp. 322 n.8 (D. Me. 1988).

[9] *Colorado Governor Asks States to Urge U.S. Against Appeal*, Envtl. Pol'y Alert, Oct. 13, 1993, at 9.

nuclear weapons plant and the United States Army's Rocky Mountain Arsenal.

These two sites illustrate contrasting approaches to state involvement in federal facility cleanups. The Rocky Flats cleanup represents the typical federal-state arrangement, manifested by an Interagency Agreement between the EPA, the DOE (the federal agency responsible for the site), and the state.[10] This approach symbolizes the "uneasy truce" that states have with the federal government at federal sites.[11] "In the past, we have had disagreements with the federal government over whether state laws apply at federal facilities," said Ohio Assistant Attorney General Jack Van Kley, "but it has never come to open warfare."[12]

Colorado, having encountered the traditional approach, opted for "open warfare" over the Rocky Mountain Arsenal. The state dragged the Army into court, seeking a declaration that Colorado had authority to enforce its hazardous waste laws at the Superfund site.[13] The state won the first round because the United States had not placed the Rocky Mountain Arsenal on the list of the most hazardous sites eligible for Superfund cleanup.[14] The EPA then put the Rocky Mountain Arsenal on the list of Superfund "worst" sites,[15] and sued the state in the United States District Court for the District of Colorado (Colorado District Court). The United States sought, and received, a declaration that Colorado had no authority to impose its laws on the federal facility.[16] The Tenth Circuit, in a watershed decision, reversed the Colorado District Court and found for the state.[17]

This article examines Colorado's victory. Part II examines America's hazardous waste laws and the substance of the *United States v. Colorado* decision. Part III analyzes the case's unfortunate impact on Superfund sites. Finally, Part IV recommends that Con-

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[10] *Federal Facilities: Appeals Court Grants Colorado Authority to Regulate Day-to-Day Waste Management*, 23 Env't Rep. (BNA) 3161, 3162 (Apr. 16, 1993) [hereinafter *Federal Facilities*].

[11] *States, Federal Government Cooperate on Federal Facility Cleanups, States Say*, 24 Env't Rep. (BNA) 45 (May 14, 1993).

[12] *Id.*

[13] Colorado v. Department of Army, 707 F. Supp. 1562 (D. Colo. 1989). Superfund also is known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1988).

[14] *Colorado v. Department of Army*, 707 F. Supp. at 1562. The CERCLA, in section 120(a)(4), limits its own application to cites that are listed on the NPL.

[15] 54 Fed. Reg. 10,512 (1989).

[16] United States v. Colorado, 1991 WL 193,519 (D. Colo. 1991), *rev'd in part*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 U.S. 922 (1994).

[17] United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993).

gress amend the CERCLA to ensure that the act retains its role as the nation's principal hazardous waste remediation statute.

II. The Rocky Mountain Arsenal

A. America's Hazardous Waste Laws

America's hazardous waste management laws revolve around two key statutes. The first to appear was the Resource Conservation and Recovery Act[18] (RCRA), which established a "cradle-to-grave" regulatory scheme.[19] The RCRA's scope includes the identification of hazardous wastes,[20] a manifest system to track waste movement,[21] and a permit structure[22] to enforce standards for operators of waste storage facilities.[23] The EPA may order facilities treating, storing, or disposing hazardous wastes to clean up releases.[24] The law allows the EPA to authorize states to implement their hazardous waste programs in lieu of the RCRA.[25] State programs must meet certain minimum federal standards before the EPA may authorize their use,[26] but these programs may adopt more stringent standards for the disposal, treatment, and storage of hazardous wastes.[27] Authorized state programs "have the same force and effect as action taken by the [federal government]."[28] The federal government must comply with the RCRA "to the same extent as any person. . . ."[29]

Not long after it passed the RCRA, Congress was confronted with the act's shortcomings. The Love Canal disaster of 1978[30]

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[18] Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1988).

[19] H.R. REP. No. 1016(I), 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

[20] 42 U.S.C. § 6921 (1988).

[21] *Id.* §§ 6922-6923.

[22] *Id.* § 6924.

[23] *Id.*

[24] *Id.* §§ 6924(u), (v); 6928(h).

[25] *Id.* § 6926.

[26] *Id.* § 6926(b).

[27] *Id.* § 6929.

[28] *Id.* § 6926(d).

[29] *Id.* § 6961(a). The United States Supreme Court has held that federal agencies are immune from state civil penalties under the RCRA. Department of Energy v. Ohio, 112 S. Ct. 1627, 1639-40 (1992).

[30] Residents of the Love Canal area built their homes on top of a chemical dump, which resulted in their basements filling with "chemical soup" during rains. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 288 (1992).

spurred Congress to enact the CERCLA of 1980.[31] "The statute was passed hastily by Congress as compromise legislation [between three bills] after very limited debate under a suspension of the rules."[32] Congress's rush led to "vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."[33]

The CERCLA employs a scheme of strict liability[34] to respond to hazardous waste contamination. When there is "a release or a threatened release"[35] into the environment, the act assigns liability to:

(1) The owner and operator of a vessel or facility;[36]

(2) Any person who owned or operated the facility when the hazardous waste was disposed;[37]

(3) Any person who arranged for the transport of their hazardous waste at a facility;[38] and

(4) Any person who accepts hazardous waste.[39]

Once a release has occurred, or a threat of release exists, the CERCLA authorizes the EPA to clean the site[40] and obtain reimbursement from the responsible parties.[41] The CERCLA requires the President to create a National Priorities List (NPL) identifying "priorities among releases or threatened releases throughout the United States."[42] To qualify for Superfund money,[43] a site must be listed on the NPL.[44] "Inclusion on the List normally leads to remedial action,

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[31] 42 U.S.C. §§ 9601–9675 (1988).

[32] United States v. Mottolo, 605 F. Supp. 898, 902 (D. N.H. 1985).

[33] *Id.*

[34] *See* 42 U.S.C. § 9601(32) (stating that "liability" shall be the same as the meaning of "liability" under section 311 of the Clean Water Act, 33 U.S.C. § 1321 (1988). *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983).

[35] 42 U.S.C. § 9607 (1988).

[36] *Id. See* New York v. North Shore Realty, 759 F.2d 1032 (2d Cir. 1985).

[37] *Id.* § 9607(2).

[38] *Id.* § 9607(3).

[39] *Id.* § 9607(4).

[40] *Id.* § 9604(a)(1).

[41] *Id.* § 9607.

[42] *Id.* § 9605(a)(8). The NPL is published at 40 C.F.R. pt. 300, app. B. The EPA uses the Hazardous Ranking System (HRS) to formulate the NPL. 42 U.S.C. § 9605(a)(8)(B). "Under the HRS, sites receiving a score of 28.5 or above go on the list." Apache Powder Co. v. United States, 968 F.2d 66 (D.C. Cir. 1992).

[43] 42 U.S.C. § 9611. The Superfund cannot be used to pay for remedial actions at federally-owned sites. *Id.* § 9611(e)(3).

[44] 40 C.F.R. § 300.425(b)(1) (1992).

although not automatically; EPA could back off in light of difficulties and other higher priorities."[45]

Section 113(h) of the CERCLA deprives federal courts of jurisdiction to "review any challenges to removal or remedial action" except in the following five narrow circumstances:

> (1) Contribution and cleanup cost recovery actions;
>
> (2) Actions to enforce a CERCLA cleanup order or recover penalties for a violation of that order;
>
> (3) Actions for reimbursement of costs for a cleanup order;
>
> (4) A citizen's suit alleging that the removal or remedial action violates CERCLA unless the suit seeks to challenge a removal action where a remedial action is slated; and
>
> (5) An action where the United States seeks to force remedial action under a CERCLA cleanup order.[46]

Courts generally have held that section 113(h) of the CERCLA precludes judicial review of cleanups until they are complete.[47] The denial of pre-enforcement review does not deny citizens or potentially responsible parties (PRPs) their right to due process.[48] Additionally, courts generally have held that the denial of pre-enforcement review applies to claims brought under other state or federal statutes.[49]

Both the RCRA and the CERCLA are aimed at reducing and eliminating toxic waste hazards. However, the statutes attempt to accomplish this joint purpose differently. The RCRA uses a regulatory scheme to affect behavior. The CERCLA assesses strict liability on those who release hazardous waste into the environment. Thus, "RCRA is preventative; CERCLA is curative."[50]

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[45] *Apache Powder*, 968 F.2d at 68.

[46] 42 U.S.C. § 9613(h).

[47] *See* Alabama v. Environmental Protection Agency, 871 F.2d 1548, 1557-59 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989); Schalk v. Reilly, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990).

[48] *Schalk*, 900 F.2d at 1097-98 (citizens); J.V. Peters & Co. v. Environmental Protection Agency, 767 F.2d 263, 264-65 (6th Cir. 1985) (PRPs).

[49] *Schalk*, 900 F.2d at 1097 (denying review of claim based on the Administrative Procedure Act); Werlein v. United States, 746 F. Supp. 887, 892-94 (D. Minn. 1990), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992) (refusing review of Clean Water Act and RCRA claims). *But see* United States v. Colorado, 990 F.2d 1565, 1578-79 (10th Cir. 1993).

[50] B.F. Goodrich v. Murtha, 958 F.2d 1192, 1202 (2d Cir. 1992).

B. Historical Background

The Rocky Mountain Arsenal lies roughly ten miles from downtown Denver. The twenty-seven square-mile site is set to become one of the largest national wildlife refuges in the country.[51] All that remains is the cleanup.

Once the site of incendiary and chemical weapons manufacturing, the Rocky Mountain Arsenal has been described as "one of the worst hazardous waste pollution sites in the country."[52] Environmental concerns surrounding the Rocky Mountain Arsenal have a long history. After nearby farmers complained in the early 1950s that it had contaminated their wells,[53] the Army built Basin F—a ninety-three acre surface impoundment designed to keep toxins from entering the earth.[54] But by the 1960s, the Army discovered that Basin F's liner had been leaking.[55] Colorado's Department of Health (CDH) found contaminated ground and surface waters north of the Rocky Mountain Arsenal in 1975.[56] Forty years of production ended in the 1980s when the Army changed the Rocky Mountain Arsenal's mission to cleaning the hazardous waste that remained.[57]

In addition to the waste in Basin F, millions of gallons of liquid waste are stored in three tanks.[58] The Army began incinerating ten million gallons of liquid waste in early 1994.[59] The fight over the cleanup at the Rocky Mountain Arsenal began in 1975, when the CDH issued three cease and desist orders.[60] The conflict has yet to be settled.

C. The Court Battles

In 1984, the EPA approved implementation of Colorado's Hazardous Waste Management Act (CHWMA) in lieu of the RCRA.[61] The Army responded by submitting a closure plan to Colorado that the state and the EPA had rejected once before. In 1986, Colorado

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[51] *President Bush Signs Law Creating Rocky Mountain Arsenal National Wildlife Refuge*, 1992 WL 295,291 (Dep't of Interior Press Release, Oct. 9, 1992).

[52] Daigle v. Shell Oil Co., 972 F.2d 1527, 1531 (10th Cir. 1992).

[53] *Id.*

[54] *Id.*

[55] Vicky L. Peters, *Can States Enforce RCRA at Superfund Sites? The Rocky Mountain Arsenal Decision*, 23 Envtl. L. Rep. 10,419 (July 1993).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Federal Facilities*, *supra* note 10, at 3162.

[60] Peters, *supra* note 55, at 10,420.

[61] 40 Fed. Reg. 41,036 (Oct. 19, 1984). *See* COLO. REV. STAT. §§ 25-15-303—25-15-310 (1993).

released its own Basin F closure plan. After the Army indicated that it would not comply with Colorado's plan, but instead would begin a Superfund remedial action, Colorado sued the Army under the CHWMA for alleged groundwater violations.[62]

In *Colorado v. Department of the Army*,[63] the Colorado District Court held that Colorado was in the best position to ensure a thorough cleanup because the federal agencies involved had conflicting interests.[64] The Colorado District Court relied on section 120(a)(4) of the CERCLA, which ensures that state law will control at federal facilities not on the NPL.[65] After the EPA subsequently listed Basin F on the NPL, the United States asked the Colorado District Court to reconsider its decision in light of the listing.[66] The district court never ruled on the government's request, and the Army continued to defy Colorado as the state issued another Basin F compliance order.

Once Basin F appeared on the NPL, the federal government filed a new suit against Colorado in the Colorado District Court, seeking a declaration that Colorado had no authority to enforce the CHWMA at a CERCLA site.[67] The district court agreed with the government's contention that the restriction on pre-enforcement review found in section 113(h) of the CERCLA barred Colorado from enforcing its hazardous waste laws at the Rocky Mountain Arsenal.[68]

On appeal, the Tenth Circuit disagreed with the district court.[69] Crucial to the circuit court's holding was its belief that if it found for the Army, such a decision would effectively eviscerate the RCRA, in favor of the CERCLA, where no evidence existed that this was Con-

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[62] Colorado v. Department of Army, 707 F. Supp. 1562 (D. Colo. 1989).

[63] *Id.*

[64] *Id.* at 1570.

> Since it is the EPA's job to achieve a cleanup as quickly and thoroughly as possible, and since the Army's obvious financial interest is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney [from the Justice Department] can vigorously and wholeheartedly advocate both positions . . . . Having the State actively involved as a party would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a more thorough cleanup.

Id.

[65] 42 U.S.C. § 9620(a)(4).

[66] 54 Fed. Reg. 10,512, 10,515-10,516 (Mar. 13, 1989).

[67] United States v. Colorado, 1991 WL 193,519.

[68] *Id.* Section 113(h) of the CERCLA states that "[n]o federal court shall have jurisdiction under Federal Law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title . . . ." 42 U.S.C. § 9613(h).

[69] United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993).

gress's intent. "'Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is [our] duty . . . absent clearly expressed congressional intention to the contrary, to regard each as effective.'"[70] Because the circuit court read the CERCLA's pre-enforcement review section as implicitly repealing the RCRA, it attempted to construe the CERCLA in a manner that would not sacrifice the RCRA.[71]

D. The Tenth Circuit's Decision

1. Colorado's RCRA Suit Not a "Challenge"—The Tenth Circuit initially held that Colorado's efforts to enforce the CHWMA did not constitute a "challenge" under section 113(h) of the CERCLA.[72] The CERCLA does not define the term "challenge."[73] Absent a congressional definition of "challenge," the circuit court turned to other sections of the CERCLA for interpretive guidance.

The Tenth Circuit focused on section 302(d) of the CERCLA, which states that "[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law. . . ."[74] The circuit court read this "savings provision" as Congress's clear intent that the CERCLA was designed to work with, and not repeal, other hazardous waste laws.[75] Bolstering this interpretation, the circuit court pointed to section 114(a) of the CERCLA, which states that "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."[76] The circuit court held that proscribing Colorado's law under the CERCLA's pre-enforcement review restrictions would violate section 114(a) of the CERCLA because it would prevent Colorado from imposing additional liability on the government.[77] Consequently, the Tenth Circuit found that Colorado had RCRA authority over the Basin F cleanup.[78]

Turning to its own jurisdiction, the Tenth Circuit returned to the limitations on federal court jurisdiction found in section 113(h)

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[70] *United States v. Colorado*, 990 F.2d at 1575 (quoting County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 112 S. Ct. 683, 692 (1992)).

[71] *Id.* "When Congress has enacted two statutes which appear to conflict, we must attempt to construe their provisions harmoniously." *Id.* (citing Negonsott v. Samuels, 933 F.2d 818, 819 (10th Cir. 1991), *aff'd* 113 S. Ct. 1119 (1993).

[72] *Id.*

[73] 42 U.S.C. §§ 9601-9675.

[74] *Id.* § 9652(d).

[75] United States v. Colorado, 990 F.2d 1565, 1575 (10th Cir. 1993).

[76] 42 U.S.C. § 9614(a).

[77] *United States v. Colorado*, 990 F.2d at 1576.

[78] *Id.*

of the CERCLA. The circuit court examined the legislative history of the section that indicated that Congress intended to "prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities."[79] The circuit court concluded that a state's efforts to enforce its own hazardous waste laws at a Superfund site were not necessarily a "challenge" precluding pre-enforcement review.[80] Because Colorado did not want to delay or halt the cleanup, but "merely [sought] to ensure that the cleanup [was] in accordance with state laws," its RCRA enforcement action was not a "challenge."[81] The circuit court found that sections 114(a) and 302(d) of the CERCLA expressly preserved the state's ability to enforce its laws not amounting to a "challenge."[82]

In reaching its conclusion, the Tenth Circuit distinguished the two leading cases interpreting section 113(h) of the CERCLA. The circuit court found *Schalk v. Reilly*[83] distinguishable because the plaintiffs sued under the CERCLA's citizen suit provision[84] to force compliance with the National Environmental Policy Act of 1969 (NEPA).[85] It also reasoned that *Schalk* did not apply to *United States v. Colorado* because Colorado had not sought to enforce its laws via a CERCLA citizen suit, which is barred "where a remedial action is to be undertaken at the site."[86]

The circuit court also distinguished *Boarhead Corp. v. Erickson*,[87] in which a responsible party sued under the National Historic Preservation Act[88] to stay a CERCLA cleanup.[89] The Tenth Circuit reasoned that *Boarhead* did not apply to *United States v. Colorado* because the plaintiff in *Boarhead* sought to delay the cleanup contrary to Congress's intent in enacting section 113(h) of the CERCLA.[90] Additionally, the Tenth Circuit found that *Boarhead* did not present a situation where proscribing pre-enforcement review would have prevented the state from imposing additional

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[79] *Id.* (quoting H.R. REP. No. 253(I), 99th Cong., 2d Sess. 266 (1985), *reprinted in* 1986 U.S.S.C.A.N. 2835, 2941).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Schalk v. Reilly, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990).

[84] 42 U.S.C. § 9659.

[85] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370d (1988).

[86] 42 U.S.C. § 9613(h)(4).

[87] Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991).

[88] National Historic Preservation Act, 16 U.S.C. § 470 (1988).

[89] *Boarhead*, 923 F.2d at 1021.

[90] United States v. Colorado, 990 F.2d 1565, 1577 (10th Cir. 1993).

liability for the release of hazardous substances[91] or "affect or modify in any way the obligations or liabilities of any person under other Federal or State law" dealing with hazardous substances.[92] Accordingly, the Tenth Circuit did not apply the reasoning employed by the United States Court of Appeals for the Third Circuit (Third Circuit) in *Boarhead*.

Once the Tenth Circuit held that the CERCLA contemplates a situation where both it and other hazardous waste laws such as the RCRA apply at the same time, the circuit court found that section 113(h) of the CERCLA did not bar the circuit court from exercising jurisdiction. Even though it answered the questions of whether the CHWMA applied at the Basin F cleanup and whether the court had proper jurisdiction, the Tenth Circuit examined RCRA citizen suits.

2. RCRA Citizen Suits at Superfund Cleanups—The Tenth Circuit also held that section 113(h) of the CERCLA did not conflict with the RCRA citizen suit provision.[93] The RCRA allows citizen suits in two circumstances: (1) to enforce the requirements of the RCRA; and (2) to force action when an imminent hazard exists.[94] Imminent hazard suits brought under the RCRA are barred where a CERCLA response action is underway.[95]

The Tenth Circuit reasoned that because Congress expressly prohibited RCRA imminent hazard citizens suits at CERCLA sites, but did not bar citizen suits to enforce RCRA requirements, Congress intended to allow RCRA citizen enforcement suits at Superfund cleanups.[96] Therefore, Colorado could have chosen to sue the Army under the RCRA's citizen enforcement suit.[97] The circuit court recognized this as dicta, but stated that "our discussion of this provision is relevant to our determination that the Congress did not intend a CERCLA response action to bar a RCRA enforcement action. . . ."[98]

3. State Court Jurisdiction—In addition to ruling on the state's ability to force the Army to comply with state hazardous waste laws, the Tenth Circuit, again in dictum, indicated that the state could enforce its compliance orders in state court.[99] The circuit court first

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[91] 42 U.S.C. § 9614(a).

[92] *Id.* § 9652(d). *United States v. Colorado*, 990 F.2d at 1577.

[93] *United States v. Colorado*, 990 F.2d at 1578. *See* 42 U.S.C. § 6972.

[94] *Id.* § 6972.

[95] *Id.* § 6972(b)(2)(B).

[96] *United States v. Colorado*, 990 F.2d at 1578.

[97] *Id.* The RCRA's definition of a "person" includes a state; therefore, states can file RCRA citizen suits. *Id. See* 42 U.S.C. § 6903(15).

[98] *United States v. Colorado*, 990 F.2d at 1578.

[99] *Id.* at 1579. "Colorado can seek enforcement of the final amended compliance order in state court." *Id. See also* Peters, *supra* note 55, at 10,421.

examined the CHWMA, which allows the CDH to issue compliance orders.[100] Suits to enforce the CHWMA must be brought in the state district court encompassing the area where the site is located.[101] Because the RCRA mandates that the Army must comply with the CHWMA,[102] Colorado can enforce its hazardous waste laws at Superfund sites in state court.[103] The Tenth Circuit reasoned that because section 113(h) of the CERCLA only prevents federal courts from exercising jurisdiction, state courts are unaffected by the pre-enforcement review restriction.[104]

4. States Not Limited to the Applicable or Relevant Appropriate Requirements (ARARs) Process—During the CERCLA process, states have the ability to participate in the formulation of a remedial plan through the ARARs process.[105] The federal government argued that the proper role for states during a CERCLA cleanup is limited to the ARARs.[106] The Tenth Circuit disagreed, stating that although the ARARs process was meant to involve states in hazardous waste cleanup decisions, nothing in the CERCLA suggests that states are limited to that process.[107] The circuit court noted that the ARARs process did not exist until 1986, and that Congress therefore could not have intended for the ARARs to be the sole means of state involvement when it left the "savings provision" and section 114 of the CERCLA alone when it added the ARARs process.[108] The Tenth

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[100] COLO. REV. STAT. § 25-15-308(2)(a) (Supp. 1993).

[101] *Id.* §§ 25-15-305(2)(b) (Supp. 1993).

[102] 42 U.S.C. § 6961(a). "Each department, agency, and instrumentality of the . . . Federal Government . . . engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements. . . ." *Id. United States v. Colorado*, 990 F.2d at 1579.

[103] *United States v. Colorado*, 990 F.2d at 1579.

[104] *Id.*

[105] With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if . . . any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than that of any Federal standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute . . . is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release . . . shall require at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard . . . .

42 U.S.C. § 9621(d)(2)(a). The District of Columbia Circuit found reasonable an EPA definition of the ARARs excluding "procedural" requirements such as recordkeeping. Ohio v. Environmental Protection Agency, 997 F.2d 1520, 1527 (D.C. Cir. 1993).

[106] *United States v. Colorado*, 990 F.2d at 1580.

[107] *Id.* at 1581.

[108] *Id.*

Circuit also returned to the notion that sections 114 and 302 of the CERCLA illustrate Congress's intent that the CERCLA was meant to work with other laws.[109] Therefore, the ARARs could not be the sole means of state input.[110]

5. The Permit Dilemma—Finally, the Tenth Circuit addressed the government's contention that Colorado required a permit for the Rocky Mountain Arsenal cleanup in contravention of the CERCLA.[111] The law prohibits federal, state, and local governments from requiring permits for CERCLA cleanups.[112] The Tenth Circuit held that Colorado did not require the Army to obtain a permit, but instead required it to update its existing RCRA permit.[113] Because the state was not requiring a CERCLA permit, it did not violate the CERCLA's permit ban.[114]

In *United States v. Colorado*, the Tenth Circuit attempts to harmonize the RCRA and the CERCLA. In doing so, the circuit court has created several problem areas destined to increase until Congress makes some fundamental changes to the CERCLA. Until then, the decision at best interjects more uncertainty into an already confusing statutory scheme.

III. The Impact of *United States v. Colorado*

Until the Tenth Circuit rendered its decision in *United States v. Colorado*, the issue of CERCLA pre-enforcement review had been clear. Courts lacked the ability to review any claims that citizens or PRPs raised that affected Superfund cleanups. The language of section 113(h) of the CERCLA appeared unambiguous—"any challenge" seemed to cover any claim that anyone could raise. In any event, courts could point to legislative history indicating that Congress knew what it was doing when it chose to bar the courthouse door to speed hazardous waste cleanups.[115] Two key legislative pointmen on the issue of review timing both gave nearly identical

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[109] *Id.*

[110] *Id.*

[111] *Id.* at 1582.

[112] 42 U.S.C. § 9621(e). "No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with [CERCLA]." *Id.*

[113] *United States v. Colorado*, 990 F.2d at 1582.

[114] *Id.*

[115] Werlein v. United States, 746 F. Supp. 887, 893–94 (D. Minn. 1990). "Statements by members of both the House and Senate conference committees that drafted [the CERCLA amendment adding the bar to pre-enforcement review] reflect the intent that [the section] apply broadly." *Id.*

statements indicating that section 113(h) was meant to cover all lawsuits, under any authority.[116]

United States v. Colorado trades the formerly clear language and congressional intent for uncertainty in review timing. First, the Tenth Circuit's holding apparently extends to private parties seeking to enforce the RCRA at Superfund sites. Second, the application of the circuit court's reasoning is not limited to the RCRA, but applies to state laws as well. Third, the circuit court did not limit itself to federal facilities. Finally, *United States v. Colorado* avoids the most important issue—who is going to manage hazardous waste cleanups. Congress should flex its legislative muscle to ensure that everyone's role in hazardous waste cleanups is better defined. Congress should begin this task by clarifying the scope of section 113(h) of the CERCLA.

A. Private Party Enforcement

In *United States v. Colorado*, a state was attempting to compel the Army to comply with state laws. However, the Tenth Circuit's holding that section 113(h) of the CERCLA does not bar federal court jurisdiction over a RCRA-based claim concerning a CERCLA site is not limited to lawsuits that states may bring. Instead, the decision appears to allow anyone with standing under another statute to bring a lawsuit. The circuit court states that "RCRA citizen suits to enforce its provisions at a site in which a CERCLA response action is underway can be brought prior to the completion of the CERCLA response action."[117] Thus, private parties eligible to sue under the RCRA apparently are free to seek enforcement of state RCRA laws at Superfund sites. No language in the opinion suggests that the court would have decided differently had the plaintiff been a private party.

Accordingly, that the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) has rushed to distinguish *United States v. Colorado* on the grounds that it is limited to a state-brought

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[116] Senator Thurmond stated that the section was

> intended to be comprehensive. It covers all lawsuits, under any authority, concerning the response actions that are performed by the EPA. . . . The section also covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section. . . .

132 CONG. REC. S14,929 (daily ed. Oct. 3, 1986). *Compare* Representative Glickman's statements that "[t]he timing review section covers all lawsuits, under any authority, concerning the response actions that are performed by the EPA. . . ." 132 CONG. REC. H9,582 (daily ed. Oct. 8, 1986).

[117] *United States v. Colorado*, 990 F.2d at 1577.

RCRA suit is puzzling.[118] In *Arkansas Peace Center v. Arkansas Department of Pollution Control and Ecology*, the plaintiffs sued under the RCRA to prevent the incineration of waste at a Superfund site.[119] The Eighth Circuit refused to exercise jurisdiction in accordance with the Tenth Circuit's reasoning because "[i]n spite of *United States v. Colorado*, Arkansas Peace Center is met with the plain wording of section 113(h)."[120] In interpreting the restriction on pre-enforcement review, the Eighth Circuit quoted with approval the language of *Schalk v. Reilly* stating that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute."[121] The Eighth Circuit's opinion focused on preventing interference with CERCLA cleanups; it did not find who brought the suit dispositive in determining whether it had jurisdiction under the CERCLA.

Does the CERCLA bar actions interfering with CERCLA cleanups? The answer is "no." Courts have honed-in on the word "challenge," although the CERCLA does not define the term. To properly define "challenge," courts have looked to the stated aim of CERCLA—to promptly clean hazardous waste sites.[122] Accordingly, courts have refused to grant pre-enforcement review where the review would delay cleanups.[123] The Third Circuit recently refused to create a broad rule allowing judicial review when faced with challenges under CERCLA section 113(h)(1)'s exception to the general pre-enforcement review bar.[124] Instead, the circuit court looked to CERCLA section 113(h)(4)'s citizen suit exception to determine what constitutes a "challenge."[125] The court found that even where a cleanup is ongoing, courts may issue an injunction under the citizen's suit exception where "irreparable harm to public health or the environment is threatened."[126] Additionally, the Third Circuit fur-

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[118] Arkansas Peace Center v. Arkansas Dep't of Pollution Control and Ecology, 999 F.2d 1212, 1217 (8th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (Jan. 7, 1994).

[119] *Id.*

[120] *Id.* at 1218.

[121] *Id.* at 1217 (quoting Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990).

[122] Dickerson v. Administrator, EPA, 834 F.2d 974, 978 (11th Cir. 1987).

[123] *United States v. Colorado*, 990 F.2d at 1576. *See also* Reardon v. United States, 947 F.2d 1509, 1513 (1st Cir. 1991).

[124] United States v. Princeton-Gamma Tech., 31 F.3d 138 (3d Cir. 1994).

[125] *Id.*

[126] *Id.* at 148. The Third Circuit distinguished *Schalk v. Reilly*, *Alabama v. EPA*, and *Arkansas Peace Center v. Arkansas Dep't of Pollution Control and Ecology* on the basis that those cases did not deal with situations of irreparable harm. *Id.*

ther limited preimplementation review to substantial claims.[127] The United States Court of Appeals for the First and Fifth Circuits also reasoned that Congress intended to avoid other dilemmas by creating a pre-enforcement review restriction:

> Although review in the case at hand would not delay actual cleanup of hazardous wastes, it would force the EPA—against the wishes of Congress—to engage in "piecemeal" litigation and use its resources to protect its rights to recover from any [potentially responsible party] filing such a[n] action . . . . Moreover, the crazy-quilt litigation that could result . . . could force the EPA to confront inconsistent results.[128]

When the courts speak of delay and inconsistency, they are talking about interfering with the CERCLA process. A "challenge" then can be thought of as an action interfering with a CERCLA cleanup—an action the pre-enforcement review restriction sought to minimize. By "shooting first and asking questions later," Congress intended the EPA to have "full reign to conduct or mandate uninterrupted cleanups for the benefit of the environment and populous."[129] That Congress chose to bar "any challenge" demonstrates that it decided to focus on cleaning sites first and then litigating. While this approach could lead to multiple cleanups where the first remedial action is found inadequate, it ensures that sites will be made less hazardous. The legislative history does not speak of any concerns about the costs to the responsible parties (including the federal government), but instead focuses on quick cleanups.

The Tenth Circuit's decision emphasizes litigating first, cleaning later. The Tenth Circuit's decision likely will lead to piecemeal litigation and inconsistent results. Instead of handling issues surrounding a CERCLA cleanup at one time, courts will face a series of separate suits from varying interest groups concerning the same cleanup. Because anyone with standing under another statute will be able to sue, the number of suits is likely to be considerable as interest groups press for stricter state cleanup standards at Superfund sites. These suits will require government attention and resources, and delay cleanup until the matters are resolved. Given the limited amount of personnel that the government has to devote to these cases, and, in a

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[127] *Id.* at 147. "Our holding does not mean that frivolous litigation will be permitted to delay critical cleanup efforts. Courts must be wary of dilatory tactics . . . ." *Id.*

[128] *Reardon*, 947 F.2d at 1513 (quoting Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1390 (5th Cir. 1989)).

[129] *Voluntary Purchasing Groups*, 889 F.2d at 1386–87 (quoting B.R. MacKay & Sons, Inc. v. United States, 633 F. Supp. 1290, 1292 (D. Utah 1986).

lesser sense, the government's limited budget, the cost of allowing interference with CERCLA cleanups outweighs any benefits.

B. State Hazardous Waste Laws

Private parties are not limited to suing under the RCRA to impact a Superfund cleanup under the Tenth Circuit's analysis.[130] These parties also can use state hazardous waste laws to the same end. Where a state statute provides for citizen suits, private parties with standing will have the means to enforce state law concerning a CERCLA site without relying on state government. A CERCLA action—even a cleanup undertaken cooperatively between the federal government, a state, and PRPs—could face interference from private parties asserting state hazardous waste law claims in state court. This stems from the CERCLA's failure to distinguish a state-brought action from one brought under state law.

Additionally, states have different hazardous waste schemes. Texas, for example, puts additional restrictions on injection wells[131] and haulers of waste from oil and gas drilling.[132] States often have varying definitions of what qualifies as a hazardous waste. Montana excludes materials subject to its strip mining reclamation law from its hazardous waste law.[133] New Mexico exempts substances covered by several federal pollution control laws.[134] These laws often vary from the federal hazardous substances laws. Under *United States v. Colorado*, private parties would be able to sue in state court to enforce these laws. This creates a situation where CERCLA responsible parties face the prospect of being brought into federal court on federal claims—that is, the CERCLA and the RCRA--and an entirely separate battle over state hazardous waste laws in state courts. Transaction costs multiply each time responsible parties are required to appear in court to determine cleanup standards. Both the government and private parties pay for such a complex scheme.

> Administrators and subjects of such law must invest more in order to learn what it means, when and how it applies, and whether the cost of complying with it are worth incurring. Other costs . . . include those related to bargain-

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[130] *United States v. Colorado*, 990 F.2d at 1579.

[131] Injection Well Act, TEX. CODE ANN. title 2, §§ 27.001-27.105 (1988 & 1994).

[132] Oil and Gas Waste Haulers Act, TEX. CODE ANN. title 2, §§ 29.001-29.053 (1994).

[133] Montana Hazardous Waste and Underground Storage Tank Act, MONT. CODE ANN. §§ 75-10-401 to 75-10-451 (1993). *See also* Montana Strip and Underground Mine Reclamation Act, MONT. CODE ANN. §§ 82-4-201 to 84-4-254 (1993).

[134] Hazardous Waste Act, N.M. STAT. ANN. §§ 74-4-1—74-4-14 (1993).

> ing about and around the system's rules and litigating over them.[135]

These costs are not worth the return of slower cleanups. No evidence exists that the sites will become any cleaner. And taxpayers would end up paying for more of the cleanup as responsible parties go bankrupt from litigation expense.

Bringing the federal government into state court presents procedural problems as well. The federal government would be unable to petition for removal to federal court. In *International Primate Protection League v. Administrators of Tulane Educational Fund*,[136] the Supreme Court held that the National Institutes of Health, a federal agency, could not remove the case to federal court because agencies are not within the scope of the federal removal statute.[137] The Supreme Court held that despite any assertions of sovereign immunity that a federal agency may make, state courts are competent to determine jurisdiction.[138] Determining whether a federal agency could be brought before a state court was sufficiently straightforward that a state court—even if hostile to federal interests—would be unlikely to disregard the law.[139] Therefore, federal agencies face no undue prejudice from being brought into state court.

Under the Tenth Circuit's approach, private parties and the federal government would be forced to slug it out in both venues—an inefficient allocation of judicial resources that could lead to lengthy delays in CERCLA cleanups. Congress should amend the CERCLA's "savings provision" and section 114(a) to define states' roles better. This could be done by amending the CERCLA to clarify which state substantive and procedural requirements must be satisfied. Failure to abide by these requirements would allow citizens or states to bring an action within one of the five exemptions to section

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[135] Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 18 (Oct. 1992).

[136] International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700 (1991).

[137] 28 U.S.C. § 1442(a)(1) (1988) dictates when an action against federal officers may be removed:

> A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Any officer of the United States or any agency thereof, or persons acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress . . . .

Id.

[138] *International Primate Protection League*, 111 S. Ct. at 1708.

[139] *Id.*

113(h) of the CERCLA.[140] Because the lead agency would have violated one of the requirements of the CERCLA, suits brought under the CERCLA citizens suit provision would not be barred unless the suit concerned a removal activity where the government was undertaking a more extensive remedial action. This would speed the cleanup by reducing interference and clarifying how state laws mesh with the CERCLA cleanup process.

C. Site Ownership

The Tenth Circuit also fails to distinguish between sites owned by the federal government and those owned by private parties. For owners of RCRA sites also undergoing a Superfund cleanup, the Tenth Circuit's decision allows for the prospect of state actions to enforce the RCRA or other state laws, and the possibility that private parties will sue to enforce state laws. Under the *United States v. Colorado* scheme, owners could be brought into federal and state courts and forced to defend several lawsuits. As their resources dwindle from litigation expenses, Superfund will have to pick up a larger portion of the remediation tab. The end result is likely to be judgments for massive liability against responsible parties, but little or no funds to pay for delayed cleanups. In the end, taxpayers will be forced to pay for the legal squabbling. However, the practical impact is likely to be much smaller because most hazardous waste cleanups are handled under either the RCRA or the CERCLA, but not both.[141]

The federal government would like, as it argued before the Tenth Circuit, for all involved parties to be forced to the table during the ARARs process.[142] This would consolidate the medley of federal, state, and local standards into a single standard to be applied at the site. Again, this could be done by amending the CERCLA to set forth the state standards that must be followed. Subsequent violations of these requirements would allow "any person" to sue to enforce

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[140] 42 U.S.C. § 9613(h)(4). "An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken . . . was in violation of any requirement of this chapter." *Id.* Section 310 of the CERCLA grants "any person" the right to commence a civil suit against any person in violation of "any standard, regulation, condition, requirement, or order" under the CERCLA. *Id.* § 9659(a).

[141] The EPA's policy is to defer listing contaminated sites on the NPL if the sites can be cleaned under the RCRA to "avoid duplicative actions, maximize the number of cleanups and help preserve [Superfund]." 54 Fed. Reg. 41,000, 41,004-08 (Oct. 4, 1989). *See also* Apache Powder Co. v. United States, 968 F.2d 66, 69 (D.C. Cir. 1992) (decision whether to use RCRA or CERCLA is a policy question appropriate for EPA to determine.)

[142] United States v. Colorado, 990 F.2d 1565, 1580–81 (10th Cir. 1993).

them and not be barred by section 113(h) of the CERCLA.[143] Clarifying how state hazardous substance laws work with CERCLA cleanups would insure that state concerns are met while preventing dilatory lawsuits from impeding remediation.

D. Reconciling State and Federal Roles

The last issue raised in *United States v. Colorado* deals squarely with the roles of the states and the federal government in hazardous waste management. In the case of the Rocky Mountain Arsenal, Colorado was the first government to insist on cleanup.[144] The CERCLA cleanup came twelve years later.[145] In *United States v. Colorado*, the conflict over who came first surfaced in the federal government's assertion that Colorado was requiring a permit for cleanup in contravention of the CERCLA.[146] The state argued that it was only requiring the Army to update an existing RCRA permit to include "all units currently containing Basin F hazardous waste."[147] The Tenth Circuit pointed out the conflict between the CERCLA's ban on permits and sections 114(a) and 302(d) of the CERCLA.[148] However, rather than attempt to read the three sections harmoniously, the circuit court found that the state was not requiring the Army to obtain a new permit, but instead update its existing one.[149]

This is a way of recognizing Colorado's prior interest and efforts in the Rocky Mountain Arsenal. The circuit court could not reconcile the CERCLA's permit restriction with the savings provision[150] and section 302(d) of the CERCLA[151] because the CERCLA is hopelessly ambiguous on the subject. The law purports to preserve state rights in the savings provision[152] and section 302(d) of the CERCLA[153] while at the same time hobbling state actions in the form of section 113(h)'s restriction on pre-enforcement review[154] and section

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[143] 42 U.S.C. §§ 9613(h)(4); 9659(a).

[144] Colorado issued three cease and desist orders in 1975. Peters, *supra* note 55, at 10,420.

[145] *United States v. Colorado*, 990 F.2d at 1572.

[146] *Id.* at 1582. *See* 42 U.S.C. § 9621(e)(1), which states: "No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section."

[147] *United States v. Colorado*, 990 F.2d at 1582.

[148] *Id.*

[149] *Id.*

[150] 42 U.S.C. § 9614(a).

[151] *Id.* § 9652(d).

[152] *Id.* § 9614(a).

[153] *Id.* § 9652(d).

[154] *Id.* § 9613(h).

121(e)(1)'s ban on permit requirements.[155] Consequently, the exact roles of the federal and state governments are unclear.

If *United States v. Colorado* has a redeeming quality, it is that it points out this conflict in the most severe way. The Tenth Circuit tiptoed through the CERCLA and the RCRA in an effort to preserve state rights in hazardous waste cleanup. In the process, it left some large divots. It may have done so contrary to the intent of the lawmakers who created the CERCLA. And then again, it may not have. The CERCLA and its legislative history offer little help. One of the CERCLA's cosponsors stated that it "establishes an admittedly complex, and very probably confusing, mechanism which allows for the preservation of these [state] laws and prevents unilateral action to override them."[156] The statement suggests that state laws have a proper role in CERCLA cleanups, but that some action—other than "unilateral action"—may be taken to trump them. As such, the statement is of little value. Except for the Tenth Circuit, courts that have wrestled with this dilemma reluctantly have allowed the CERCLA to have the upper hand. "By applying [section 113(h) of the CERCLA to other laws] the Court is frustrating, to a certain extent, the purposes underlying those statutes. . . . These statutes simply do not fit together neatly."[157] Allowing the other laws to control as the Tenth Circuit did, however, practically eviscerates section 113(h) of the CERCLA.[158] The result either way is unacceptable. To remedy this, Congress should return to the notion that the RCRA is preventative, and the CERCLA is curative. "We should view the RCRA as the means to avoid the necessity of the CERCLA in the future—not as a hobble on the legs of CERCLA's progress."[159] This would do much to clarify the roles of states and the federal government while ensuring consistent cleanup results.

IV. Conclusion

The Tenth Circuit's analysis offers more than the opportunity for states to enforce their hazardous waste laws. *United States v. Colorado* creates the means by which any private party can assert state law claims against owners of Superfund sites, whether they are the federal government, private parties, or states. The result of such expanded opportunity for litigation will be higher transaction costs

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[155] *Id.* § 9621(e)(1).

[156] 132 CONG. REC. S17,136 (daily ed. Oct. 17, 1986).

[157] Werlein v. United States, 746 F. Supp. 887, 894 (D. Minn. 1990).

[158] *Id.*

[159] Major William D. Turkula, *Determining Cleanup Standards for Hazardous Waste Sites*, 135 MIL. L. REV. 167, 193 (1992).

for everyone involved without the benefit of speedier cleanups or consistent standards. Additionally, the case illustrates the muddled roles of states and the federal government in Superfund cleanups. Until Congress restores order to this situation, taxpayers can expect to continue to pay billions for cleanups proceeding at snail's paces.

To remedy the situation, Congress should do the following:

1. Amend the CERCLA's pre-enforcement review section to provide that claims under state and federal laws may not be reviewed during cleanups.

2. Amend the CERCLA's savings provision and section 302(d) so that they are inapplicable to state hazardous waste laws.

3. Replace the ARARs with better articulated rules as to which state laws apply to Superfund cleanups.

These changes would restore the CERCLA's role as the nation's top hazardous waste remedial statute. The RCRA would continue to serve its role of preventing hazardous waste nightmares. More importantly, emphasis would again be placed on completing cleanups as quickly and efficiently as possible. Although the DOD is allocating large amounts of money to clean up bases, the quantity of funds is limited. The Superfund and the amount private parties possess to pay for cleanups is limited as well. Ensuring that each dollar is used to buy the maximum resource restoration feasible requires changes in the present RCRA-CERCLA relationship. Unfortunately, *United States v. Colorado's* state-law focused approach is the wrong way to achieve these goals.

UNDER THE BLACK FLAG: EXECUTION AND RETALIATION IN MOSBY'S CONFEDERACY

MAJOR WILLIAM E. BOYLE, JR.*

I. Introduction

Near the northern Virginia village of Rectortown, the twenty-seven Union soldiers stood in stunned disbelief as the lottery began. The winners would live; the losers would die at the end of a rope. Each soldier was required to draw a slip of paper from a brown felt hat. Seven were marked; the rest were blank. Aware that this autumn Sunday morning of November 6, 1864, might be their last, some wept openly. Others begged to be spared. Still others seemed unable to comprehend the reality of impending execution. Almost all prayed, fervently imploring God that He allow this cup to pass.[1]

The Confederate leader, Lieutenant Colonel John Singleton Mosby, having ordered the drawing, left the immediate scene. The selection process began. A southern soldier stopped in front of each Union prisoner and, holding the hat above eye level, requested that he draw a slip. Those pulling a marked slip were ordered to the side and placed under close guard. A lieutenant, J.C. Disoway of New York, and six privates drew marked slips. Of the privates, one was a newsboy—his soldier's task was to vend newspapers to the Army. Informed of his having drawn a marked slip, Lieutenant Colonel Mosby ordered the boy released and a second drawing conducted to fill the now vacant seventh slot. Again the hat moved down the line, and this time an older prisoner drew the final death warrant.[2]

The seven condemned men were led on horseback in the direction of the Union lines, because Mosby wanted them hanged where

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[1] KEVIN H. SIEPEL, REBEL: THE LIFE AND TIMES OF JOHN SINGLETON MOSBY 129 (1983).

[2] JOHN H. ALEXANDER, MOSBY'S MEN 147 (1907).

the sight of their dangling corpses would create the greatest possible effect on the Union soldiers.[3]

En route to the Berryville Pike, near the northern Virginia headquarters of Union commanders Major General Philip H. Sheridan and Brigadier General George A. Custer, the condemned and captors met a Confederate raiding party, laden with Yankee prisoners, led by one of Mosby's officers, Captain R.P. Montjoy. Recognizing the doomed Union officer as a fellow Mason, Montjoy ordered the execution party to exchange him with one of Montjoy's prisoners.[4] The exchange accomplished, the prisoners resumed their journey through a rainy night, toward the Union camps. At some point during the trek one of the prisoners, Private George Soule, escaped.[5]

Arriving near Rectortown, the Confederate soldiers decided not to risk moving closer to the enemy. The executions now began. Union Sergeant Charles Marvin, who also escaped, described the event as follows:

> The first man was gotten up, his hands tied behind him, a bedcord doubled and tied around his neck; he was marched to a large tree beside the road, from which a limb projected. He was lifted in the air, the rope taken by one of the men on horseback and tied to the limb, and there he was left dangling. Two more were treated in the same manner.[6]

However, the Confederate soldiers, finding hanging to be an intolerably slow method of execution, sought to speed the process. The three remaining prisoners were lined up to be shot in the head. Sergeant Marvin's executioner's pistol would not fire, and Marvin struck his captor and escaped. The other two, both shot in the head and left for dead, survived.[7] The grim business finished, Mosby's men melted back into the Virginia countryside, leaving this note pinned to the one of the hanging bodies:

> These men have been hung in retaliation for an equal number of Colonel Mosby's men, hung by order of General Custer at Front Royal. Measure for measure.[8]

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[3] VIRGIL C. JONES, RANGER MOSBY 227 (1944).

[4] Mosby did not approve of this exchange. ALEXANDER, *supra* note 2, at 148 (indicating that Mosby reprimanded Montjoy, declaring the command "was no Masonic lodge").

[5] VIRGIL C. JONES, GRAY GHOSTS AND REBEL RAIDERS 155 (1956).

[6] SIEPEL, *supra* note 1, at 129.

[7] *Id.* at 130.

[8] JONES, *supra* note 3, at 227.

Although Confederate partisan leader John Singleton Mosby ordered the execution, without trial, of Union prisoners of war, he did so in a proportionate retaliation for the similar execution on September 22, 1864, of seven members of his command by members of the Union Army. What led to this ugly incident on the Berryville Pike? Was Mosby, in ordering the executions, guilty of a war crime?

II. School, Jail, and the Law

While the Civil War offers any number of interesting and colorful figures, perhaps none rivals that of John S. Mosby, and certainly none arrived to prominence by a more curious route. Born in 1833 in Powhatan County, Virginia, Mosby grew up near Charlottesville, Virginia, where he enrolled at the University of Virginia in 1850. Even as a college student, he gave an indication of the aggressiveness which would characterize his years as a Confederate raider.

While a student, Mosby got into an altercation with George Turpin, a University of Virginia medical student with a reputation as a bully. Turpin apparently had made insulting remarks about some of the guests at a social affair hosted by Mosby. When Mosby sought (in writing) an explanation of the perceived slight, Turpin responded rudely. The two then met—possibly by chance—at a local house where Mosby boarded. During the course of the confrontation that ensued Mosby shot Turpin in the jaw. Mosby was quickly arrested and jailed. Five feet and seven inches tall, and weighing no more than 125 pounds, Mosby had confronted—or been confronted by[9]—the considerably taller and heavier Turpin. Apparently, however, the self-defense issue was greatly disputed, and at a trial held in Charlottesville, the court convicted Mosby of "unlawful shooting" while acquitting him of the more serious charge of "malicious shooting."[10]

The court sentenced Mosby to twelve months in the Charlottesville jail. While a prisoner, he became friends with William Robertson, the attorney who had prosecuted Mosby on behalf of the Commonwealth of Virginia. Mosby borrowed legal materials from Robertson and began to study law. Following his release after seven months in jail, Mosby continued to study under the tutelage of Robertson,[11] and was admitted to the bar in 1854. He opened his

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[9] *Id.* at 23–24 (noting that testimony at trial conflicted on this point).

[10] *Id.* at 10–11.

[11] The University of Virginia expelled Mosby over the shooting incident. However, in 1915, the University bestowed on Mosby a medal and a certificate that stated, in part, "YOUR ALMA MATER has pride in your scholarly application in the days of your prepossessing youth . . ." *See* THE LETTERS OF JOHN MOSBY 261 (A. Mitchell ed., 1986).

practice in the southern Albemarle County village of Howardsville, where he met Pauline Clarke, whom he married in 1857.

III. From Lawyer to Warrior

In 1858, Mosby moved his practice to Bristol, Virginia. As the secessionist storm gathered fury in 1860, Mosby argued, occasionally publicly, against disunion. President Lincoln's call on April 15, 1861, for 75,000 volunteers to suppress the "insurrection" in South Carolina and Virginia's consequent secession on April 17th altered Mosby's thinking.

Enlisting as a private in a local militia company known as the Washington Mounted Rifles, commanded by Captain William E. "Grumble" Jones, Mosby later became a member of a regiment commanded by Colonel James Ewell Brown (Jeb) Stuart. Following Stuart's promotion to higher command, Captain Jones took command of the regiment. Mosby, now a first lieutenant, served as adjutant. After Jones was replaced as commander, Mosby, who as adjutant frequently had provided scouting services for Stuart, now joined the cavalier's staff. Stuart, now a brigadier general, found the intelligence provided by Mosby to be consistently accurate, and recognized the initiative and audacity often required to obtain it. Perhaps nothing did more to enhance Mosby's worth in Stuart's eyes than the former's prominent role in Stuart's famous encirclement of Union General George B. McClellan's army in June, 1862.

In the spring of 1862 part of McClellan's army lay in a line extending from a point several miles north of Richmond to near Williamsburg on the Peninsula. General Robert E. Lee, in charge of the defense of Richmond, desired to strike McClellan at several points simultaneously, but needed more precise information on the Union commander's positions to effect his plan.[12] Stuart relayed this need to Mosby, who, after scouting McClellan's right, informed Stuart that it would be possible for cavalry, riding clockwise from Ashland to the southeast, to ride completely around the federals. Stuart agreed, and, with Mosby present and acting as scout, Stuart and 1200 troopers made a three-day raid around McClellan, losing but one man while capturing over 150 Yankee prisoners and destroying Union supplies. Stuart, the acclaimed hero of this bold venture, did not forget the role that Mosby had played.

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[12] *See* STEPHEN W. SEARS, TO THE GATES OF RICHMOND (1992).

IV. Raiding in Virginia

Mosby continued to serve as a scout for Stuart throughout the remainder of 1862, but in late December asked for, and received, Stuart's permission to remain behind the enemy lines in northern Virginia to conduct raiding operations. Mosby began his partisan career with but a handful of men. Mosby's command, based in the Loudon and Fauquier counties in the foothills of the Blue Ridge mountains, soon grew to, but never exceeded, about 800 men.[13]

Mosby began attacking Union outposts, intent on capturing prisoners, horses, supplies, and causing as much damage as possible. In February, 1863, at Aldie, Virginia, Mosby attacked a federal cavalry detachment sent to capture him. Surprised while dismounted and resting, the detachment lost nineteen taken prisoner.[14]

Promoted to captain in March, 1863, Mosby, together with thirty men, attacked at Bristow Station, Virginia, along a railroad line used by Union forces for supplies and the movement of troops. Mosby's men captured twenty-five federals.[15] Rail lines used by northern forces were to remain a favorite target. Mosby frequently tore up rail and attacked the trains themselves.[16] In the "Greenback Raid" of October 13–14, 1864, Mosby captured and burned a federal train that carried a Union payroll. General Lee succinctly described the results of the raid in a report to the Confederate Secretary of War:

> On the 14th instant Colonel Mosby struck the Baltimore and Ohio Railroad at Duffield Station, destroyed a United States mail-train, consisting of locomotive and ten cars, and secured twenty prisoners and fifteen horses. Among the prisoners are two paymasters, with one hundred and sixty-eight thousand dollars government funds.[17]

The federal government held the paymasters, Ruggles and Moore, personally liable for the loss of the money (which actually totalled $173,000), and relief from liability came only after postwar suits in the United States Court of Claims.[18] After the war, Mosby

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[13] JAMES MCPHERSON, BATTLE CRY OF FREEDOM 737-38 (1988).

[14] SIEPEL, *supra* note 1, at 73.

[15] J. MARSHALL CRAWFORD, MOSBY AND HIS MEN 76 (1867).

[16] JONES, *supra* note 5, at 68.

[17] ALEXANDER, *supra* note 2, at 272 (citing Report of Lee, 16 Oct. 1864).

[18] Ruggles v. United States, 2 Ct. Cl. 520 (1966) (brought by the then-deceased's Ruggles' estate); Moore v. United States, 2 Ct. Cl. 527 (1866), *cited in* Nagle, *Role of Certifying and Disbursing Officers in Government Contracts*, 95 MIL. L. REV. 1 (1982).

provided to Moore, at his request, a certificate acknowledging Mosby's capture of the money.[19]

Perhaps his most famous exploit occurred on March 9, 1863, when he captured Union General Edwin H. Stoughton. Mosby, as a result of his operations, had attracted considerable attention from the Union commanders. A particular annoyance for Mosby at this time was Colonel Sir Percy Wyndham, an Englishman and member of the First New Jersey Cavalry, who had made numerous mounted efforts to destroy or capture Mosby's command. Learning that Wyndham and Stoughton, a cavalry brigade commander, were both present at Fairfax Court House, Mosby resolved to capture them. Entering the town in the dead of night, with "melting snow on the ground, a mist, and . . . a drizzling rain,"[20] Mosby discovered that Wyndham had that evening gone to nearby Washington, but managed to capture Stoughton as the unfortunate commander slept. Mosby and the twenty-nine soldiers accompanying him escaped—with prisoners and a number of captured horses—without loss.[21]

Stoughton's capture, and Mosby's incessant interdiction of Union supply efforts and lines of communications, brought attention from the highest levels.[22] The Union Army intensified efforts to make the northern Virginia counties of Loudon and Fauquier, and the area surrounding them—now widely known as "Mosby's Confederacy"—safe for the occupying federal forces. On March 31, 1863, at Miskel's farm north of Leesburg, a federal cavalry detachment—in excess of 150 troopers—sent to capture Mosby surprised him and about seventy of his men. Counterattacking desperately, Mosby not only managed to save his command, but killed nine Union soldiers and captured eighty-two, while suffering only one killed and three wounded.[23] Mosby was undeterred. He continued to raid effectively, and over the course of the next several months was to command and participate in numerous strikes against Union communications and rail and wagon supply lines. He was to suffer two serious wounds, the latter so serious that it resulted in reports of his death in both northern and southern papers.[24]

In August, 1864, Major General Philip Sheridan assumed com-

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[19] JOHN A. MOSBY, THE MEMOIRS OF COLONEL JOHN S. MOSBY 251-52 (C.W. Russell ed., 1992) [hereinafter MOSBY'S MEMOIRS].

[20] *Id.* at 132.

[21] *Id.* at 134.

[22] Lincoln, on being apprised of the Fairfax Court House raid, is reputed to have said, "Well, I am sorry for that—for I can make brigadier-generals, but I can't make horses." JONES, *supra* note 5, at 172.

[23] MOSBY'S MEMOIRS, *supra* note 19, at 149 (citing Mosby's report to General Stuart, Apr. 7, 1863).

[24] MOSBY'S MEMOIRS, *supra* note 19, at 269-75.

mand of Union forces in the Shenandoah Valley. Mosby's operations now necessarily interfered with Sheridan's communications and supply. Sheridan had to devote substantial resources to protecting himself from Mosby, resources that he no doubt would have otherwise sent to General Ulysses S. Grant. Grant presently was besieging General Robert E. Lee's army at Petersburg, Virginia. Mosby ultimately may have tied down upwards of 30,000 of Sheridan's soldiers, or nearly one-third of his army.[25] Sheridan himself said after the war, "During the entire campaign I had been annoyed by guerilla bands under such partisan chiefs as Mosby . . . and this had considerably depleted my line of battle strength, necessitating as it did large escorts for my supply-trains."[26]

V. Hang Them Without Trial

That the Union command was concerned about the situation existing behind the federal lines in northern Virginia is not surprising. The Union command was uncertain, however, as to how to combat such a threat. Grant told Sheridan: "When any of Mosby's men are caught, hang them without trial."[27] This order most likely set in motion the events that culminated in the executions along the Berryville Pike.

Among those pursuing Mosby were Generals George A. Custer and Alfred T.A. Torbert, both cavalry commanders. On September 22, 1864, while Mosby was absent from his unit recuperating from a wound, Union soldiers captured six of his men in a sharp fight with Union cavalry near Front Royal, Virginia. The federal troopers suffered a number of casualties in the fight. Among those killed was a Union officer, Lieutenant McMaster. McMaster had been shot, according to Mosby's men, as he attempted to stop the southerners from escaping the superior federal force. Some Union soldiers contended that Confederate soldiers shot McMaster after he had surrendered or while he was attempting to surrender. The actual circumstances surrounding McMaster's death are unclear.[28] Regardless of how he died, the Yankee troopers, long and often the victims of Mosby's raiders, were bent on vengeance. Four of the captured men were immediately shot; the surviving two were questioned by Torbert about Mosby's whereabouts, and, refusing to provide any infor-

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[25] JONES, *supra* note 5, at 164.

[26] 2 PHILIP H. SHERIDAN, THE PERSONAL MEMOIRS OF PHILIP H. SHERIDAN 99 (1888).

[27] JONES, *supra* note 3, at 200 (citing the official records of the Union Army, ser. I, vol. XLIII, pt. I, at 798).

[28] *See* JONES, *supra* note 3, at 208; SIEPEL, *supra* note 1, at 120.

mation, were hanged.[29] A sign attached to one of the bodies read, "This shall be the fate of all Mosby's men."[30] As Union soldiers were transporting the men to be executed, General Custer rode by on horseback,[31] and presumably was at least aware of what was taking place. Mosby, informed of the hangings and now sufficiently recovered to resume active command, was enraged. He reported the incident to Lee and the Confederacy's Secretary of War, James A. Seddon, along with a statement of his intent to retaliate: "It is my purpose to hang an equal number of Custer's men whenever I capture them."[32] Lee approved of Mosby's plan, as subsequently did Seddon. The men hanged near Rectortown were of Custer's command, although Custer's actual involvement in the execution of Mosby's men is unclear. Mosby was convinced, however, that Custer had ordered the deaths.[33]

VI. Mosby's Operations and the Law of War

Did Mosby's retaliation represent a violation of the law of war as it had been developed at that time? Were Mosby's men entitled to treatment as prisoners of war and thus protection from summary execution? The law of the time arguably supports a negative answer to the first question and an affirmative answer to the second.

Mosby operated pursuant to a statute, the Partisan Ranger Act, enacted by the Confederate Congress on April 21, 1862. His command officially was designated as the 43rd Battalion, Virginia Cavalry, and was but one of a number of such organizations. Others included: Hounshell's Battalion, Virginia Cavalry Partisan Rangers; Morris's Independent Battalion, Virginia Cavalry Partisan Rangers; Trigg's Battalion, Virginia Partisan Rangers'; and Baldwin's Squadron, Virginia Partisan Rangers.[34] The Partisan Ranger Act, published as Confederate Army General Order 30, provided, in part, "That such Partisan Rangers, after being regularly received into the service, shall be entitled to the same pay, rations, and quarters during their service, and be subject to the same regulations as other soldiers."[35]

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[29] JEFFREY WERT, MOSBY'S RANGERS 215–18 (1990).

[30] ALEXANDER, *supra* note 2, at 141.

[31] SIEPEL, *supra* note 1, at 121.

[32] ALEXANDER, *supra* note 2, at 140.

[33] Mosby, in a letter dated March 29, 1912 to a former member of his command, refers to the "atrocities . . . perpetrated by Custer at Front Royal." *See* THE LETTERS OF JOHN S. MOSBY, *supra* note 11, at 179.

[34] LEE A. WALLACE, JR., A GUIDE TO VIRGINIA MILITARY ORGANIZATIONS 1861–1865 (1964).

[35] Headquarters, Confederate States Army, Gen. Orders No. 30 (Apr. 28, 1862).

In a commission signed by the Confederacy's Secretary of War, James A. Seddon, Mosby received notice that "the President has appointed [you] Captain of Partizan Rangers under Act appr'vd April 21, 1862 in the Provisional Army in the Service of the Confederate States."[36] Mosby was thus a "regular" in the Confederate Army. Although Mosby's operations—in contrast to the "usual" military operations of the war—were highly unconventional, his operations were not novel in American history. Lee's father, "Lighthorse Harry" Lee, had been a commander of partisans in the American Revolution.[37] Francis Marion, the "Swamp Fox," also achieved fame in the Revolution as a partisan leader.[38] In 1861, the Confederate Congress expressly adopted, for the governance of its forces, "The Rules and Articles of War established by the United States of America . . . except that wherever the words 'United States' occur the words 'Confederate States' shall be substituted therefor . . ."[39] These rules not only described partisans as members of the armed forces, but described their function:

> The purpose of these isolated corps is to reconnoitre at a distance on the flanks of the army, to protect its operations, to deceive the enemy, to interrupt his communications, to intercept his couriers and his correspondence, to threaten or destroy his magazines, to carry off his posts and convoys, or, at all events, to make him retard his march by making him detach largely for their protection.[40]

Mosby's operations fit well within this description, and thus were sanctioned by Confederate statute and Confederate Army regulation. Furthermore, partisan operations were recognized by the United States as a legitimate means of warfare.

The United States government also addressed the issue of partisan warfare in 1863 when it published as a part of General Orders Number 100 its "Instructions for Armies in the Field."[41] The principal author was a former Columbia University law professor, Francis Lieber,[42] and General Orders Number 100 became known as the

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[36] *See* THE LETTERS OF JOHN S. MOSBY, *supra* note 11, at 250 (for a reproduction of Captain John S. Mosby's commission).

[37] RICHARD HARWELL, LEE, AN ABRIDGEMENT OF DOUGLAS SOUTHALL FREEMAN'S R.E. LEE 4 (1961).

[38] *See* ROBERT D. BASS, SWAMP FOX (1959).

[39] 1 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES IV 131 (1900).

[40] REVISED REGULATIONS FOR THE ARMY OF THE UNITED STATES (1861) (rules 664-76).

[41] Headquarters, U.S. Army, Gen. Orders No. 100 (Apr. 24, 1863).

[42] After the war, Francis Lieber continued his professorship at Columbia University, and also worked for the War Department analyzing the Confederate Archives. His three sons all fought in the Civil War. Hamilton and Norman Lieber both served in

"Lieber Code." Article 81 defined partisans as "soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for purposes of making inroads into territory occupied by the enemy." More importantly, the same provision also stated: "If captured, they are entitled to all the privileges of the prisoner of war."[43] Accordingly, if Mosby's 43rd Battalion was a partisan unit, any raiders captured were to be accorded prisoner of war status and treatment. The question then becomes, what did this "treatment" entail?

The same instructions specifically addressed this issue: "A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace . . . by death, or any other barbarity."[44] Article 75 stated that "[p]risoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subject to no other intentional suffering or indignity."[45] Characterization as a partisan thus was to result in the humane treatment afforded a prisoner of war.

While Mosby's operations fit easily into those operations described above as partisan in nature, the type of operations engaged in by behind-the lines forces did not alone answer the question of whether those forces were "partisans." In an interpretation of Article 81 perhaps inspired by and aimed at Mosby, Article 82 of the same instructions states:

> Men, or squads of men, who commit hostilities, whether by fighting . . . or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character and appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of

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the Union Army, Hamilton suffering the loss of an arm at Fort Donelson. Oscar Lieber fought for the Confederacy and died from wounds suffered at the battle of Williamsburg. Among his opponents in that fight was his brother Norman. Norman, also a lawyer, served from 1878–1882 as Professor of Law at the United States Military Academy (USMA) at West Point, and from 1895–1901 as The Judge Advocate General of the United States Army. *See* RICHARD S. HARTIGAN, LEIBER'S CODE AND THE LAW OF WAR (1983); *see also* records of the Department of Law, USMA.

[43] Gen. Orders No. 100, *supra* note 41, art. 81.

[44] *Id.* art. 66.

[45] *Id.* art. 75.

> war, but shall be treated summarily as highway robbers or pirates.[46]

Also falling outside the protection due a prisoner of war were:

> armed prowlers . . . who steal within the lines . . . for the purpose of robbing, killing, destroying bridges, roads . . . or of robbing or destroying the mail, or of cutting the telegraph wires . . . [47]

Apparently, the Union's own regulations blurred the line between legitimate partisan warfare and the illegitimate martial activities of "armed prowlers" or "bandits." The distinction is obviously an important one: a partisan received the protection of a prisoner of war; a different characterization could result in treatment as a criminal. What was Mosby—partisan or "armed prowler"?

In the southern view, those commands operating pursuant to the Partisan Ranger Act were partisans and not outlaws. The Union commanders seemed to avoid use of that term, however, at least during the war. Union General Henry Halleck, Grant's predecessor as commander of Union armies, referred to the 43rd Battalion as "Mosby's gang of robbers."[48] Sheridan and many others used the term "guerrilla."[49]

While "guerrilla" seems to have been a catchall term for any individual participating in behind-the-lines operations, to Lieber the term was synonymous with illegality. Lieber defined "guerrilla parties" as "self constituted sets of armed men in times of war, who form no integrant part of the organized army . . . and carry on petty war . . . chiefly by raids, extortion, destruction, massacre, and who . . . will . . . generally give no quarter."[50]

Similarly, in his 1886 treatise on military law,[51] Lieutenant Colonel William Winthrop used the term to describe a class of "parties" who during the "late civil war" took life or property "unlawfully." He also cites a number of courts-martial that sentenced "guerrillas" who committed these acts to death. In one of these cases, involving Thomas K. Young, the first charge was styled as a "violation of the laws of war" and the "notorious rebel" was specifically accused,

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[46] *Id.* art. 82.

[47] *Id.* art. 84.

[48] MOSBY'S MEMOIRS, *supra* note 19, at 241 (citing Mosby's letter of October 4, 1864 to General Grant).

[49] *See* JONES, *supra* note 5, at 170; *see also* MOSBY'S MEMOIRS, *supra* note 19, at 242 (citing General Sherman's letter of September 29, 1864 to General Halleck).

[50] HARTIGAN, *supra* note 42, at 11 (citing 2 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES III 308).

[51] 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 10-11 (1886).

among other things, of "plundering, jayhawking,[52] and robbing . . . loyal citizens" and unlawfully belonging to "a guerilla band."[53] Mosby himself did not view the term "guerrilla" as an accusation of illegal conduct:

> In common with all northern and many southern people, [he] called us guerrillas. The word "guerrilla" is a diminutive of the Spanish word "guerra" (war) and simply means one engaged in the minor operations of war. Although I have never adopted it, I have never resented as an insult the term "guerrilla" when applied to me.[54]

Whatever term people used to refer to Mosby, he and his command apparently fit more within the Union's own definition of "partisan" than outside of it. The 43rd Cavalry Battalion was a part of the Confederate Army. Mosby reported to, and received guidance from, the Confederate high command, to include General Lee and the Secretary of War. Mosby and his officers held commissions, and wore at least some uniform items.[55] The Confederate Army never was renowned for its uniformity of dress, a problem exacerbated as the war progressed and southern supply capabilities became increasingly diminished.[56] Perhaps more telling, even Sheridan and Grant used the term partisan when referring to Mosby. Sheridan observed that, "During the entire campaign I had been annoyed by guerrilla bands under such partisan chiefs as Mosby . . . ." Grant, in his memoirs, stated that, "Colonel John S. Mosby had for a long time been commanding a partisan corps, or regiment, which operated in the rear of the Army of the Potomac . . . ."[57] For Lieber the primary test seems to have been whether the partisan "corps," while "detached" from the main Army, was nevertheless officially a part of the corps. Richard Hartigan, author of *Lieber's Code and the Law of War*,[58] concludes that it was "likely Mosby . . . would have satisfied Lieber's criteria as a partisan . . ."[59]

Even if legally no more than bandits, Mosby's men were enti-

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[52] "Jayhawking" referred to the notorious activities of "border ruffians" during the Kansas-Missouri border disputes of the late 1850s. The term came to refer to criminal depredations committed on a noncombatant population.

[53] Headquarters, U.S. Army, Gen. Orders No. 267 (Aug. 3, 1863).

[54] MOSBY'S MEMOIRS, *supra* note 19, at 291.

[55] Mosby's hat and uniform are on display at the Smithsonian Institute; THE LETTERS OF JOHN S. MOSBY, *supra* note 11, contain a photograph of the items.

[56] *See* BRUCE CATTON, THE CIVIL WAR 393–416 (1982) (chapter entitled, *Two Economies at War*).

[57] SHERIDAN, *supra*, note 26, at 99; 2 U.S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT 141–42 (1886).

[58] HARTIGAN, *supra* note 42.

[59] *Id.* at 11.

tled to more due process than that afforded by the rope or bullet. Although Winthrop indicates that summary execution of "guerrillas" was legally permissible where "their guilt is clear," he cites "numerous instances" of courts-martial of "bushwhackers" and "jayhawkers."[60] That the Union Army executed Mosby's men at Front Royal only after a bloody altercation in which federal forces suffered casualties and, in the case of the two hanged, only after refusing to answer Yankee General Torbert's questions about Mosby's location, is significant.[61] The execution of the raiders resulted from Union frustration over the inability to capture Mosby and a desire for revenge, compounded in the latter two instances by the refusal of the captured Confederates to admit to Mosby's whereabouts.[62]

VII. The Legality of "Retaliation"

What about Mosby's retaliation? Did his actions meet one wrong with another? The Union's own Instructions to its Armies provided that, "The law of war can no more wholly dispense with retaliation than can the law of nations . . . . Yet civilized nations acknowledge retaliation as the sternest feature of war . . . . Retaliation will . . . never be resorted to as a measure of mere revenge, but only as a means of protective retribution."[63] The Instructions did not exempt prisoners. "All prisoners of war are liable to the infliction of retaliatory measures."[64] Article 28 of General Orders Number 100 provided for retaliation only after "careful inquiry" into the "misdeeds" demanding "retribution." Revenge was an improper motive for retaliation.[65]

Winthrop notes that the existence of a right of "retaliation" for the execution of a prisoner extended from the Revolutionary War.[66] General George Washington warned the British that his treatment of British prisoners would be determined by the treatment captured colonists received.[67] Article 66 of Lieber's Instructions provides for the execution of a prisoner on discovery, within three days of a battle, that the prisoner "belonged to a corps which gives no quar-

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[60] WINTHROP, *supra* note 51, at 11.

[61] WERT, *supra* note 29, at 217.

[62] *See* JONES, *supra* note 3, at 208; WERT, *supra* note 29, at 200–19; SIEPEL, *supra* note 1, at 120.

[63] Gen. Orders No. 100, *supra* note 41, arts. 27 & 28.

[64] *Id.* art. 59.

[65] *Id.* art. 28.

[66] WINTHROP, *supra* note 51, at 15–16.

[67] Burrus M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 MIL. L. REV. 83, 91 (1993).

ter."[68] Mere membership in the military organization perpetrating an outrage was sufficient qualification to subject the member to retaliatory measures. Interestingly, the United States Army's Rules of Land Warfare of 1914 contained the identical language of Article 59—"All prisoners of war are liable to the infliction of retaliatory measures"—but added this clarifying sentence: "Persons guilty of no offense whatever may be punished as retaliation for the guilty acts of others."[69] This did not represent a change in the law; retaliation against prisoners was, historically, and certainly at the time of the American Civil War, accepted as a means of forcing an opponent to comply with the customs of war. "The right to inflict reprisals—to retaliate—must entail the right to execute in very extreme cases. Otherwise there would be no effective means of checking the enemy's very worst excesses."[70] While the execution of Mosby's men at Front Royal represented a violation of Article 28's prohibition on killing in revenge, and of the mandate for "careful inquiry," Mosby's retaliation, approved by both Lee and Seddon, appears to have been permissible.

VIII. Aftermath

On November 11, 1864, following his retaliation, Mosby sent the following communication[71] to Sheridan:

Major General P.H. Sheridan
Commanding U.S. Forces in the Valley

General:

Some time in the month of September, during my absence from my command, six of my men who had been captured by your forces, were hung and shot in the streets of Front Royal, by order and in the immediate presence of Brigadier-General Custer. Since then another (captured by a Colonel Powell on a plundering expedition into Rappahannock) shared a similiar fate. A label affixed to the coat of one of the murdered men declared "that this would be the fate of Mosby and all his men."

Since the murder of my men, not less than seven hundred prisoners, including many officers of high rank, captured from your

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[68] Gen. Orders No. 100, *supra* note 41, art. 66.

[69] U.S. ARMY RULES OF LAND WARFARE (1914) (rule 383).

[70] J.M. SPAIGHT, WAR RIGHTS ON LAND 465 (1911). Professor Spaight cites the American War of Secession as an example of a conflict in which prisoners were subjected to retaliation. He uses the terms "reprisal" and retaliation as synonyms.

[71] JONES, *supra* note 3, at 227–28 (containing a reprint of the letter sent by Mosby to General Sheridan).

army by this command have been forwarded to Richmond; but the execution of my purpose of retaliation was deferred, in order . . . to confine its operation to the men of Custer and Powell. Accordingly, on the 6th instant, seven of your men were, by my order, executed on the Valley Pike—your highway of travel.

Hereafter, any prisoners falling into my hands will be treated with the kindness due to their condition, unless some new act of barbarity shall compel me, reluctantly, to adopt a line of policy repugnant to humanity.

Very respectfully
your obedient servant

John S. Mosby
Lieut. Colonel

No further executions occurred. Many years after the war Mosby wrote that his object in retaliating had been "to prevent the war from degenerating into a massacre."[72] "I wanted Sheridan's soldiers to know that, if they desired to fight under the black flag, I would meet them."[73] Apparently he achieved that object.

Today the law regarding partisan warfare is different and more clear. Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War includes in its definition of prisoners of war captured "members of militias and members of other volunteer corps, including those of organized resistance movements belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied . . ." However, these members, to qualify for prisoner of war status, also must be commanded by a person responsible for the actions of his subordinates, employ a "fixed distinctive sign," carry arms openly, and themselves abide by the law of war.[74] Article 13 of the same convention requires the humane treatment of all prisoners of war, and specifically mandates the protection of prisoners against "acts of violence" and "reprisal."[75] Additionally, no prisoner may be punished for any offense without trial.[76] Even participants in a "conflict not of an international character," who do not qualify for treatment as a prisoner of war, nevertheless remain protected against summary execution.

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[72] SIEPEL, *supra* note 1, at 130 (quoting the letter from Mosby to Landon Mason, dated March 29, 1912).

[73] *Id.* A "black flag" announced the bearer as an outlaw, and one who gave no quarter.

[74] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter Geneva Convention III).

[75] *Id.* art. 13.

[76] *Id.* pt. III, sec. VI, ch. III.

Article 3 of this convention—an article common to other conventions dealing with treatment of noncombatants and treatment of sick or wounded combatants—precludes the passing of sentences and the carrying out of executions "without previous judgment pronounced by a regularly constituted court . . ."[77] Accordingly, neither the executions of Mosby's men nor those of Custer's would be lawful today. Both acts would constitute war crimes.

Although no further executions of this type occurred in Mosby's Confederacy, the Confederate Congress, in the spring of 1864, in response to a recommendation from Lee,[78] repealed the Partisan Ranger Act. The Congress excepted Mosby's command, however, from the repeal. Mosby continued to operate until the end of the war. On April 21, 1865, rather than surrender, Mosby disbanded his command, bringing to a close an extraordinary chapter of Civil War history. Initially excluded from the surrender terms offered to Lee's forces,[79] Mosby, through the personal intervention of Grant,[80] eventually was allowed to go home.

He ultimately settled in Warrenton, Virginia, and returned to the practice of law. Mosby became a friend of Grant, supporting him in his political ambitions. President Rutherford B. Hayes subsequently appointed Mosby as the United States consul to Hong Kong. In 1879, during Grant's world tour, Mosby, as the official representative of the United States government, greeted the former commander, now a private citizen, at dockside in Hong Kong. Upon Grant's death several years later Mosby remarked, "I felt that I had lost my best friend."[81]

John S. Mosby died on May 30th, 1916. It was Memorial Day.

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[77] *See* Geneva Convention III, *supra* note 74, at art. 3; Geneva Convention for the Amelioration of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[78] Lee had come to the following conclusion concerning partisan commands: "The evils resulting from their organization more than counterbalance the good they accomplish." He apparently arrived at this conclusion after receiving complaints of partisan depredations against Virginia citizens and of their serving as a magnet for Confederate soldiers dissatisfied with regular service. *See* JONES, *supra* note 3, at 171–75.

[79] General W.S. Hancock's proclamation to the citizens of northern Virginia announced that "[a]ll detachments and Stragglers from the Army of Northern Virginia, will upon complying with the . . . conditions . . . be paroled . . . . The Guerrilla Chief Mosby is not included in the parole." THE LETTERS OF JOHN MOSBY, *supra* note 11, at 251 (quoting General Hancock's order).

[80] MOSBY'S MEMOIRS, *supra* note 19, at 285.

[81] *Id.* at 312–13.

BOOK REVIEWS

GOEBBELS*

REVIEWED BY H. WAYNE ELLIOTT**

The Soviet artillery shells could be heard deep inside the Berlin bunker. At any moment Soviet troops would make their way into the last sanctum of the Nazi elite. Few of the elite remained in the bunker. Most, realizing the hopelessness of the situation, had left to make their way to the American lines to surrender or attempt to escape capture.

Inside the bunker, a Nazi doctor administered morphine shots to six children. Once sedated, their mother broke a cyanide capsule inside each child's mouth. All died quickly. Her husband, chain smoking cigarettes, limped around the room. Finally, with no hope for escape, he and his wife also took cyanide. At his direction his adjutant poured gasoline on the bodies and set them on fire. The next day the Soviets found the charred remains. The official autopsy described the man as "small, the foot of the right leg was half-bent (clubfoot) in a blackened metal prosthesis." Thus ended the life of Hitler's Minister of Propaganda.

Paul Joseph Goebbels is an enigma to most historians. How did this man of small stature, crippled by osteomylitis early in his childhood, possessing none of the mythic Aryan qualities that the Nazi Party sought, rise to the highest echelons of the Nazi Party? How could a man who held a doctorate from the University of Heidelberg, a would-be poet, novelist, and playwright, become the chief spokesman for an ideology built on hate?

Ralf Georg Reuth's book, *Goebbels*, provides some answers. The first biography of Goebbels in over twenty years, it is set apart from other biographies because the author gained access to the diaries and personal papers of Goebbels and, with the collapse of East Germany, the once secret archival files of the communist regime. As a result, the reader gains insight into the mind of a true Nazi fanatic. Originally published in German, the translation, by Krishna Winston, is excellent and avoids the sometimes stilted prose found in most translations.

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* RALF GEORG REUTH, GOEBBELS (New York: Harcourt Brace & Co.) (Eng. Trans. 1993); 471 pages; $27.95 (hardcover).

** Lieutenant Colonel, United States Army (Ret.). Former Chief, International Law Division, The Judge Advocate General's School, United States Army. Currently an S.J.D. candidate, University of Virginia Law School.

Perhaps Goebbels's story is explained by the circumstances of his birth. He was born into a close-knit German family in 1897 in Rheydt. His deformed foot limited his ability to play with other children and he focused on his academic studies, eventually rising to the top of his classes. He had a special flair for the theatre where his ability to emote might have led to a stage career but for his physical problems.

When World War I began, Goebbels remained on the sidelines as his friends left for the war. He first attended the University of Bonn, then Freiberg, then Wurzberg, then Munich, and, finally, Heidelberg. His diaries reveal a dreamy student, in love with a succession of attractive women students. When Germany unexpectedly surrendered in November 1918, his dreams turned to despair. The collapsing economy made life difficult for Joseph Goebbels. His current love interest, a rather wealthy student, terminated their relationship. Goebbels began to write that the blame for Germany's troubles lay with the aristocrats who had been responsible for the war and its loss. After receiving his degree in 1921, the new "Herr Doktor" Goebbels turned to writing articles for newspapers.

At about the time Goebbels began to believe Jews to be engaged in an international conspiracy to subjugate the German economy, Germany was trying Adolph Hitler for treason in Munich. The trial provided a soapbox for the future Fuhrer and Goebbels gradually began to see the newly formed Nazi Party as the best expression of the "German soul." Goebbels fell under Hitler's spell and later wrote that Hitler "formulated our torment in redemptive words, formed statements of confidence in the coming miracle." Shortly thereafter, Goebbels formally would join the "coming miracle."

Goebbels became the editor of various newspapers, each touting the Nazi line. After a succession of Nazi Party posts of increasing importance, he was appointed Nazi *Gauleiter* (area leader) of Berlin. He became the editor of Berlin's major Party newspaper, *Der Angriff* (The Attack) and was elected to the Reichstag in 1928.

Contrary to the usual image of the Nazi Party as one of iron discipline with every member obedient to the Fuhrer, the book portrays a splintered organization with members engaged in frantic—and often violent—competition for the attention of Hitler. Goebbels and his wife fell completely under the spell of Hitler: "[T]hose big blue eyes. Like stars . . . . This man has everything it takes to become king." Hitler would become much more powerful than a mere king.

When the Nazis consolidated their power, Goebbels enhanced his position in the Nazi Party and in the government. As Reich Minis-

ter of Propaganda he had the power to inject the Nazi ideology into every facet of German life. He was fascinated with the use of film to convey the Party's message and had every Party rally filmed to impress the masses. He also used popular films to more subtly influence public opinion. He required that scripts be screened for compliance with the Party's idea of an Aryan nation. Production studios either followed his "guidance" or were closed. A *bon vivant*, he had love affairs with several of the leading ladies of German film. When his wife informed Hitler about Goebbels's extramarital activities, the Fuhrer was incensed and directed that Goebbels terminate the affairs. The Fuhrer denied permission for a divorce. Like the Fuhrer, the top echelon of the Party had to be seen by the public as consumed only by what was good for Germany. The Reich Propaganda Minister could not possibly have time for trysts with starlets.

The war brought Goebbels his greatest propaganda challenges. At first, German successes made it easy to report positive news. As the war dragged on and German defeat became likely, however, Goebbels found it harder to report positive events. His focus changed. The embattled German soldier was still the proper Aryan, but Goebbels presented the enemy—especially the Russian soldier—as something less than human. After the assassination attempt on the Fuhrer's life in July 1944, Hitler became increasingly withdrawn from the public eye. Goebbels readily took his place, continuing to make speeches, organize rallies, and urge the people to fight to the death. As the end approached, Goebbels still ventured out among the people even though the shrinking defenses of Berlin made any trip above ground dangerous. Goebbels vainly attempted to bolster the morale of the people and the newly formed defense units. It was too late. Mere devotion to the Fuhrer could not stall the advancing allied armies.

World War II forms the historical backdrop for the modern law of war. The top leaders of the Nazi regime were tried for their war crimes at Nuremberg. Every judge advocate must have a sound foundation in the law of war and its development as a result of the Nuremberg trials. *Goebbels* provides the reader with an insight into the workings of the regime. As the Allies closed in on the Reich, Goebbels pressed Hitler to adopt a "total war" strategy. Goebbels advocated destroying every bridge and road, razing every factory, and asking every German to die for the Fuhrer. For him total war also included the renunciation of the Geneva Conventions and the use of poison gas. In response to the bombing of Dresden, he demanded permission to shoot 10,000 American and British prisoners of war. Goebbels even began work on a book entitled, *The Law of War*, which set out his views. Others persuaded Hitler that these policies would be a mistake that would only result in even greater

destruction of the remaining military forces. Hitler, while always pushing the German soldier to die in place, did not adopt Goebbels's proposals for total war.

The law in Nazi Germany was just another tool to promote the Nazi Party's ideology. Before the war, Goebbels's ministry would claim that every infringement on the rights of the people was completely legal. If the law was questioned, it simply could be changed. Goebbels realized that the law can be a powerful propaganda weapon in war. Consequently, during the war, he radicalized the propaganda. Alleged enemy atrocities took center stage. He coined a propaganda slogan, "Hatred our duty—revenge our virtue." This powerful slogan, while perhaps helpful at home, was not likely to make the inhabitants of territory occupied by the German forces feel secure in their treatment at the hands of the occupiers. Instilling hate in one's own people also can result in increased hatred by the enemy population.

However, the law remains a powerful psychological weapon in war. No country will freely admit to a military policy that violates the law. Every warring country will proclaim its respect for, and compliance with, the law of war and, at the same time, will accuse the enemy of ignoring its legal obligations. The law is the only weapon in the commander's arsenal that essentially is controlled by the judge advocate. This book provides a glimpse of how the Nazi leadership made use of that weapon.

Those who seek an in-depth psychoanalysis of Joseph Goebbels will not find it here. Reuth's biographical style is straightforward. The author's primary sources are Goebbels's personal diaries and everyday notes. As a result, the book is a chronological review of his rise to power. The author spares us any psychological commentary blaming outside influences for Goebbels's actions—the reader can draw his or her own conclusions. In the final analysis, perhaps some people simply are evil. If so, Joseph Goebbels surely must be in their front ranks.

Because *Goebbels* originally was published in German, the endnotes cite to reference materials that are not always available in English. This limits the utility of the book for American readers looking for an in-depth treatment of the period. Like Albert Speer's memoirs, *Inside the Third Reich*, Goebbels's diaries take the reader inside a mad house. Reuth puts the mad house in perspective. What emerges is a picture of a cultured, well-educated man who becomes a fanatic. There is probably no way for the layman (or even the professional) to ever understand how a group of sociopaths could successfully rise to the top in Germany. However it was done, Paul Joseph Goebbels played a starring role. Through his propaganda

efforts, many of the German people perceived Hitler as someone with a divine mission; someone sent from above to save Germany from itself and the world. What actually occurred plunged Germany into a hell from which it is only now recovering.

PICKETT'S CHARGE! EYEWITNESS ACCOUNTS*

REVIEWED BY MAJOR DOUGLAS S. ANDERSON**

Many things cannot be described by pen or pencil, — such a fight is one.[1]

Pickett's Charge! Eyewitness Accounts, edited by Richard Rollins, is a collection of first-hand accounts by the participants at Gettysburg who watched history unfold before their eyes. Some historians have described Pickett's Charge as the climax of the Civil War's greatest battle. Two days of intense fighting between Union and Confederate troops had settled nothing. As morning dawned on July 3, 1863, the two armies faced each other on opposite ridges with nearly a mile of open field between them. Soldiers on both sides were keenly aware that the outcome of the battle of Gettysburg, and of the war itself, hung in the balance of what would happen on that day. What was going through the minds of these soldiers who would have to harness their nerves once more to face the onslaught of shot and shell? Were they afraid? Did they expect to be victorious? Were they even aware of the momentous historical feat that they were to engage in? These are the questions that most history books do not answer. *Pickett's Charge! Eyewitness Accounts* answers each of these questions, however, and brings life to the dry bones of history. It is one of few books capable of propelling the reader back in time into the midst of the sights and sounds of battle.

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* PICKETT'S CHARGE! EYEWITNESS ACCOUNTS (Richard Rollins ed., Rank and File Publications, 1994); 376 pages; $18.00 (soft cover).

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[1] PICKETT'S CHARGE! EYEWITNESS ACCOUNTS 310 (Richard Rollins ed., Rank and File Pub., 1994). This observation is from the account of Lieutenant Frank Haskell, one of the Union soldiers who defended Cemetery Ridge. Ironically, after stating that the battle could not be described by "pen or pencil," he later wrote a book about it called, simply, *Gettysburg*.

Given its monumental place in American history, surprisingly scant literature exists on this segment of the epoch struggle at Gettysburg. Richard Rollins seeks to fill this void and adds a different twist—the perspective of the fighting soldier. Military engagements are not detached moves on a tactical chessboard; they are human ordeals, played out by men in various states of emotion, fatigue, and pain. This compilation of eyewitness accounts recognizes that human element of battle and includes all facets of individual experiences; from the rank and file soldier, to the commanders themselves. Without attempting to draw conclusions or make judgments, Mr. Rollins allows the story to be told by the participants. His presentation of the human element of battle is a valuable addition to our present inventory of historical literature.

Richard Rollins has gathered an impressive array of eyewitness accounts of Pickett's Charge. Given the large numbers of documents he presents, it is imperative that he present them in an understandable order. Mr. Rollins is able to do that with a meticulously organized book. To avoid unnecessary repetition, he divides individual accounts into nine sections that correspond to when the events transpired: planning of the charge; preparing for the charge; the cannonade; the charge of Pickett's Division; fighting by the federal left flank; the charge of Pettigrew's and Trimble's divisions; fighting by the federal right flank; fighting at the Angle, and some postbattle comments.

With few exceptions, he presents the documents by order of rank (from highest to lowest) starting with the Confederates. Mr. Rollins intentionally refrained from correcting spelling or grammatical errors, or modernizing the language. Ordinarily, this restraint would prove distracting. But in this case, it actually provides the reader with a further sense of history and a taste of nineteenth century prose. The author extracts the accounts from a variety of sources: letters, regimental histories, memoirs, and various historical collections or books. The editor prefaces each one to explain who the writer was, his part in the fray, and some anecdotal comments about the account. While many accounts were written within days or months of the battle, several others are dated.

Therein lies a potential drawback in reading some of the documents. To know what amount of credibility to give some accounts that were written several years later is difficult. Memories tend to fade even when recalling significant events. Moreover, descriptions of comrades' bravery may be exaggerated when seen through the subjective eyes of soldier loyalty. Individual bravado also can slant accuracy. One particular account describes in detail the writer's superhuman fighting heroics at "the angle" in a manner that seems

to stretch reality. Therefore, the reader must exercise caution before accepting each account as true in all details.

However, in many respects, the various eyewitnesses provide a greater understanding of the battle. For instance, many people have wondered why General Lee sent his men across a field nearly a mile wide into a torrent of enemy artillery and rifle fire. Several eyewitness accounts allude to that question, and nearly all indicate the fault was not in the plan, but in its execution.

One part of Lee's plan that went awry was the Confederate artillery fire that was intended to subdue the Union artillery and weaken the enemy infantry prior to the charge across the open field. According to Major Thomas Osborn, one of the Union artillery commanders, had the aim of the Confederate artillery been accurate, the outcome of the charge would have been different.

> As a rule, the fire of the enemy on all our front against Cemetery Hill was a little high. Their range or direction was perfect, but the elevation carried a very large proportion of their shells about twenty feet above our heads. The air just above us was full of shells and the fragments of shells. Indeed, if the enemy had been as successful in securing our elevation as they did the range there would not have been a live thing on the hill fifteen minutes after they opened fire.[2]

A second aspect of Lee's plan was to have some artillery batteries move forward to support the infantry assault and keep the Union artillery silent while the Confederates were vulnerable in the open field. That phase of the plan, according to one of the Confederate artillery officers, was thwarted by depleted ammunition supplies. Finally, General Lee had ordered several divisions to follow the main assault and provide support to the breach of the federal lines on the front, while General J. E. B. Stuart's cavalry would hit the federal line from the rear. Confederate soldiers commented on how that support never materialized. Thus, at the critical "high water mark" of Pickett's Charge, when the battle's outcome hung in the balance, there were no support troops to reinforce the decimated Confederate line. This is just one example of how the editor has effectively weaved the numerous snapshots of individual observation into a clearer overall picture of what occurred.

Those same snapshots also provide an ample supply of fascinating human interest stories. One memorable story is told by a Confederate doctor who describes the heart-rending account of a young,

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[2] *Id.* at 105.

mortally wounded Confederate soldier, whose lower abdomen was torn open by a cannon ball. As life was painfully ebbing from his body, he took the time to write one last letter to his mother, explaining why she would never see her son again. The editor includes that letter in the account with a reminder to the reader that "it was written amid the roar and horror of battle: written by a youth who knew he had only a few hours to live: written as he was supported in the doctor's arms, with a knapsack as desk: written in mortal agony."[3] This is no ordinary historical account. For the not-so-squeamish readers (some accounts include gruesome detail) who like the human elements of war, there is much in this book you will enjoy.

For those who like the thrill of the fight, there is plenty of battle-action as well. Commencing with the two-hour artillery dual preceding the charge, the reader immediately gets a sense for the enormity of this event, as well as the terror and chaos it brought forth. Sergeant David Johnston, of the 7th Virginia Regiment, had the misfortune of being within range of the Union artillery fire during the cannonade. His description is typical of what the soldiers on both sides endured.

> . . . down upon our faces we lay; and immediately belched forth the roar of more than an hundred guns from the Confederate batteries, . . . to which the enemy, with a greater number, promptly replied. . . . The very atmosphere seemed broken by the rush and crash of projectiles, solid shot, shrieking, bursting shells. The sun, but a moment before so brilliant, was now almost darkened by smoke and mist enveloping and shadowing the earth, and through which came hissing and shrieking, fiery fuses and messengers of death, sweeping, plunging, cutting, ploughing through our ranks, carrying mutilation, destruction, pain, suffering and death in every direction. Turn your eyes whithersoever you would, and there was to be seen at almost every moment of time, guns, swords, haversacks, human flesh and bone, flying and dangling in the air, or bouncing above the earth, which now trembled beneath us as if shaken by an earthquake.[4]

While accounts of the artillery dual will capture the reader's attention, descriptions of the infantry charge will keep that attention. It must have been difficult for the federal soldiers, knowing that they were about to be the brunt of a major enemy attack, to watch and wait. Charles Page of the 14th Connecticut Regiment was

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[3] *Id.* at 95.

[4] *Id.* at 91.

one of those watching and waiting in the federal lines. A portion of his account sets the scene.

> All eyes were turned upon the front to catch the first sight of the advancing foe. Slowly it emerged from the woods, and such a column! . . . There were three lines, and a portion of a fourth line, extending a mile or more. It was, indeed, a scene of unsurpassed grandeur and majesty. . . . As far as eye could reach could be seen the advancing troops, their gay war flags fluttering in the gentle summer breeze, while their sabers and bayonets flashed and glistened in the midday sun. Step by step they came . . . . Every movement expressed determination and resolute defiance, the line moving forward like a victorious giant, confident of power and victory. . . . The advance seems as resistless as the incoming tide. It was the last throw of the dice in this supreme moment of the great game of war. On, on, they come and slowly approach the fence that skirts the Emmettsburg Road. Watchful eyes are peering through the loosely built stone wall. Anxious hearts are crouched behind this rude redoubt. Hardly can the men be restrained from firing although positive orders had been given that not a gun should be fired until the enemy reached the Emmettsburg Road. It was, indeed, an anxious moment.[5]

These are just samples of the high drama brought forth in *Pickett's Charge! Eyewitness Accounts*. Equally stirring is the struggle that occurs when the two enemy lines clash at the rock wall in the federal lines. This is where the fiercest fighting occurred. By this point in the charge, the Confederate line had been greatly shattered by the heavy fire they endured across the open field. But now, having made it to the enemy lines, the Confederates fight on with determination. Some are even able to cross over the rock wall that marked the federal line. One of those fortunate few was Lieutenant John Lewis of the 11th Virginia. The following is a portion of his account.

> There are shouts, fire, smoke, clashing of arms. Death is holding high carnival. Pickett has carried the line. Garnett and Kemper are both down. Armistead dashes through the line, and, mounting the wall of stone, commanding 'follow me,' advances fifty paces within the federal lines, and is shot down. The few that followed him and had not been killed fall back over the wall, and the fight goes on.

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[5] *Id.* at 273–74.

> Death lurks in every foot of space. Men fall in heaps, still fighting, bleeding, dying. The remnant of the division, with scarce any officers, look back over the field for the assistance that should have been there; but there are no troops in sight; they had vanished from the field, and Pickett's division, or what is left of it, is fighting the whole federal center alone. We see ourselves being surrounded. The fire is already from both flanks and front but yet they fight on and die. This cannot last. The end must come; and soon there is no help at hand. All the officers are down, with few exceptions, either killed or wounded. Soon a few of the remnant of the division started to the rear, followed by shot, shell, and musketballs.[6]

The reader gets a true sense for the intensity of the struggle at that rock wall. Vivid scenes are painted on the imagination of the reader as the participants tell of the hand-to-hand fighting, the swinging of sabres, and the plunging of bayonets. All this amidst the heavy smoke from withering volleys of close-range musket fire. Equally clear from these accounts is the frustration of the Confederate soldiers, so close to victory, yet fighting for their lives as they see that reinforcements are not coming. Indeed, as the fighting began to wane and the outcome became clear, one can imagine the strong emotions that flowed in both armies. The eyewitnesses in this book describe those feelings of victory and defeat in a way that a nonparticipant cannot.

Some closing reflections by those same participants are provided in the last section of the book. Given the bitter fighting that occurred that day, it is especially interesting to read the praise given by the Union soldiers toward their enemy for the gallantry the Confederates displayed in charging across the open field. One Union officer described his feelings by comparing the charge to all the other brave charges exhibited during the Civil War:

> Taking it all in all, Pickett's charge, although a failure, was the grandest of them all. Although they were our enemies at the time, those men were Americans, of our own blood and our own kindred. It was the American spirit which carried them to the front and held them there to be slaughtered. Phenomenal bravery is admired by everyone, and that Pickett's men possessed.[7]

This book has an irresistible appeal, but I realize it is not for everyone. Readers looking for an overview or summary of the battle

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[6] *Id.* at 166–67.

[7] *Id.* at 267.

would be better served looking elsewhere. Furthermore, it is best to have a solid understanding of the battle and some of the leaders who fought in it before reading this book. Otherwise, many of the references will not have as much meaning. Instead, this book is primarily for those who want the details of the battle, or who have a strong interest in the Civil War. It also may appeal to those who are not necessarily "history buffs," but who appreciate the human interest angle of battle.

Richard Rollins's compilation, *Pickett's Charge! Eyewitness Accounts*, is a unique addition to the current assortment of historical writings. It enables us to read the thoughts of the soldiers as they confronted the sights and sounds of battle. Human drama spills out of each account, and the reader gains an unparalleled glimpse of the courage and bravery displayed by the soldiers on both sides of that great struggle known as Pickett's Charge. There is much truth in that sage advice by the eyewitness who said that such a fight "cannot be described by pen or pencil." Nonetheless, I enjoyed Richard Rollins's effort to do so.

SHE WENT TO WAR: THE RHONDA CORNUM STORY*

REVIEWED BY MAJOR JACKIE SCOTT**

In 1978, Rhonda Cornum joined the United States Army because she liked the idea of working in a laboratory as a scientist and the Army offered her this opportunity. In 1991, MAJ Rhonda Cornum found herself far from a laboratory—instead, she was injured seriously in a helicopter crash, captured by Iraqi military forces, and confined as a prisoner of war. *She Went to War: The Rhonda Cornum Story* is the autobiography of a courageous woman whose experiences in the Persian Gulf War attest to women's capabilities in combat. One of two female soldiers captured by Iraq during Operation Desert Storm, Major Cornum suffered painful injuries and personal indignities. Her strength of spirit flows through her personal account of the Gulf War. Not just a fast-paced action-adven-

* RHONDA CORNUM, AS TOLD TO PETER COPELAND, SHE WENT TO WAR: THE RHONDA CORNUM STORY (Novato, California: Presidio Press, 1992); 203 pages; $9.95 (hardcover).

** Judge Advocate General's Corps, United States Army. Currently assigned as a Student, 43d Judge Advocate Officer's Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

ture, this book is a testimony to the strength of the human spirit through adversity during war.

Although labeled an autobiography, *She Went to War: The Rhonda Cornum Story* is actually Major Cornum's story as told to Peter Copeland, a professional writer. Their combined efforts produced an extremely readable, conversational chronicle with Major Cornum's adventure, not the writing itself, as the primary focus.

The book opens on the fourth day of the ground war, with Major Cornum on board a Black Hawk helicopter en route to rescue a downed Apache pilot. After the first chapter ends with her capture in Iraq, the second chapter flashes back to her deployment to the Persian Gulf. This narrative technique of alternating chapters about her experiences while captured with earlier moments of her life serves as an effective "brake" to the fast-paced action. It also allows the reader to learn more about the character of the woman—through brief returns to her past—without getting bogged down in extraneous details of her earlier life. Extremely easy to read, this book recounts her experiences as if Major Cornum was personally speaking to the reader, over dinner or a drink, about her war experiences. More than forty photographs—from her private life as well as from the Persian Gulf—give the book a personalized feel, as if Major Cornum was sharing her photo album with you.

Although the author's stated main purpose is to tell the story of her prisoner of war (POW) captivity, what lies below the surface is Major Cornum's assertion that women can be warriors capable of enduring the harshest conditions of modern warfare. However, readers should not dismiss this book as mere feminist propaganda disguised as Persian Gulf War literature. What happened to Major Cornum would test any soldier, male or female. Her POW experience makes for a great adventure. That she is a woman enhances and personalizes her account. The contention that women should be allowed in combat is overshadowed by the proof, as documented in her book, that Major Cornum is not a typical soldier, regardless of her gender. She is an individual of tremendous courage, tougher than the average man or woman would be.

She Went to War: The Rhonda Cornum Story is literature that professional military readers or the lay public can equally enjoy. Throughout the book, she explains common military terms in a manner that does not insult the military reader. An example: "The soldiers joke that 'Meals, Ready-to-Eat' is really three lies in one." No one needs a military background to understand this.

Because the writing is so clear and conversational, the reader is drawn into her story. The authors are able to turn the smallest details

into a significant part of the story. One example is Major Cornum's use of the bathroom while in captivity. With both arms broken in the helicopter crash, Major Cornum could not get out of her flight suit or steady herself to use the latrine without assistance. She repeatedly recounts the different ordeals that she had to endure just to perform this mundane, taken-for-granted function. This is the type of personalization rarely found in POW biographies.

Another unique attribute of this autobiography is Major Cornum's perspective as a noncombat arms officer. As a doctor and Medical Corps officer, Major Cornum focuses on nontraditional aspects of life in the combat zone. She discusses the necessity of handing out condoms and birth control pills, and sanitation problems around latrines that caused soldier illnesses, a problem that became so acute that she had to brief the latrine status every night at the brigade staff meeting. Some of the "field surgery" she performed before the war began included, curiously enough, several vasectomies. The motto posted inside her field medical station, "Suffering is Stupid, but Whining is Worse," was personified in her stoic actions after capture. Because she is a doctor, she diagnosed her own injuries and discussed her medical treatment with the Iraqi medical personnel who later operated on her arms.

Judge advocates also could find Major Cornum's combat observations interesting. Specifically, she discusses some law of war and operational law concerns. Amazingly, her aviation battalion did not receive any law of war training prior to deployment. Major Cornum, too, had questions on whether her medics could legally stand guard around the battalion area (she fought against it), and whether they should be trained on automatic weapons. On a mission before her own capture, she helped guard some Iraqi prisoners and treated one who had been injured ("It was the first blood I had seen from an actual war injury, and it was the blood of an enemy soldier.").

Although her instincts were good, Major Cornum needed training in the law of war as well.

> [T]o tell the truth, most of what I knew about being a prisoner of war came from old war movies; give only your name, rank and serial number . . . . all I could remember was that I shouldn't accept favors from the enemy and shouldn't do anything to hurt my fellow prisoners or the mission.

She intentionally left her military identification card and the Geneva Convention card identifying her as a doctor in the rear before flying on missions. Her rationale? "I figured that if I was going on these kinds of missions, I had given up my protected status

as a doctor." Questioned several times by her captors, Major Cornum chose to intentionally lie on what she knew about her mission and about her personal life. She indicated that, "I had heard stories about the POWs in Vietnam who said that their captors had tried to collect personal information to use against them as an emotional weapon." However, she reevaluated her technique after she overheard the Iraqi interrogation of Air Force Captain Bill Andrews, the pilot that her mission had set out to rescue. When asked questions such as, "What was your mission?", CPT Andrews responded, "The Geneva Conventions say I am only required to give you name, rank, and service number." After hearing him answer this way repeatedly, Major Cornum "suddenly felt guilty that I had not done the same thing . . . . I hadn't given him any useful information, but the way Andrews handled himself seemed more professional."

Major Cornum does not discuss, until the end of the book, what she considered her greatest challenge while a prisoner of war—the loss of control. She summarizes the experience as follows: "Being a POW is the rape of your entire life." However, she drew her strength and consolation from the power of her mind. She convinced herself while in captivity that as long as her mind was functioning, she was fine. She kept her worries and concerns about her family stored away in what she called her "family drawer," trying not to ruminate needlessly over what she could not change, or worry about her husband, parents, or daughter.

The term "hero" is perhaps overused in our society today, but Major Cornum displayed all the requisite characteristics—courage, determination, professionalism, bravery, and toughness. Her autobiography is a compelling story that will remind soldiers, as well as the public, why we serve.

BORN AT REVEILLE*

REVIEWED BY LIEUTENANT COLONEL FRED L. BORCH**

When it was first published in 1966, General of the Army Omar Bradley called *Born at Reveille* "a fascinating story of the life of one of our outstanding leaders." Long out-of-print, this superb autobiography has just been revised and republished in a new edition by its author, Colonel Russell P. "Red" Reeder, United States Army (retired). Judge advocates should read this new book, not only because Red Reeder's life story is a well-written, informative, and engaging tale, but because it proves that a soldier of character can single-handedly shape the Army.

Born at Fort Leavenworth, Kansas, on March 4, 1902, "right after the salutin' gun was fired," Red Reeder spent his childhood "in the Army." His father, a career officer and coast artilleryman, had graduated from the University of Michigan, where he played football and earned an M.D. degree. Yet the senior Reeder did not practice medicine. Instead, he "became a soldier in the best sense of the word"—and the junior Reeder spent his childhood in the company of soldiers on remote Army posts.

The Army of this age was an institution of horses and mules. It was full of soldiers who had served in the Spanish-American War and the Philippine Insurrection. A private was paid fourteen dollars each month, and "an enlisted man had to ask his company commander for permission to get married." Reeder recollects that in this Army of his childhood, the post commander could be "a lieutenant colonel with 43 years active service," and could have "permission from the War Department to wear his hair long, down over the stand-up collar of his blue uniform." These and other descriptions of the "Old Army" are captivating.

Red Reeder was a gifted athlete. He played football and basketball, but baseball was his true love. Reeder was not, however, a very good student. That said, he wanted to go to West Point. This meant attending a preparatory military academy with "connections" before he could try for an appointment. As Reeder relates it in

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* RED REEDER, BORN AT REVEILLE: THE MEMOIRS OF AN AMERICAN SOLDIER (Revised ed.) Vermont Heritage Press, 1994; 335 pages, $27.00 (hardcover).

** Judge Advocate General's Corps, United States Army. Currently assigned to the Criminal Law Division, Office of The Judge Advocate General, Lieutenant Colonel Borch is a member of the Working Group, Joint Services Committee on Military Justice.

describing his conversation with the "prep school" dean, he had lots of studying to do.

"How's your vocabulary?" he [the dean] asked.

"My er-ah what?" I said.

"Vocabulary. The collection of words you use."

"It's fine, thank you."

"How's your spelling? Do you misspell many words in your themes?"

"I only use words I can spell, sir."

Red Reeder did successfully obtain an appointment to West Point, entering with the Class of 1924. He was a star athlete, playing six years of football and four years of baseball. But it took him six years to complete his studies. He graduated in 1926, and was commissioned as an infantry second lieutenant.

Reeder flirted briefly with life as a civilian, taking a leave of absence from the Army to try out for the New York Giants. He made the team, which offered him a $5000 per year salary—significantly more than the $143 per month he made as an Army officer. Reeder decided, however, that he wanted to be a soldier more than a professional baseball player.

On December 7, 1941, then Major Reeder was a battalion commander tasked with defending California from invasion. In June 1942, Reeder went to Washington, D.C. to join General George C. Marshall's staff. Shortly thereafter, he was sent to the Southwest Pacific to gather "lessons learned" by privates and sergeants fighting on Guadalcanal. Reeder's battlefield assessment, written in "out-of-line grammar and slang," was so liked by General Marshall that he ordered a million copies published. *Fighting on Guadalcanal* became a wartime best-seller, for it told in plain English what brave soldiers and Marines were learning under fire.

Red Reeder took command of the 12th Infantry Regiment on April 1, 1944. As the "clock rushed toward D-Day," Reeder prepared his troops for the invasion. On June 6, 1944, he was on the front ramp of the Landing Craft Infantry when it hit Utah Beach. It was hard fighting, and "the confusion of battle was rampant." On D-Day plus six, while walking "across an open field," Reeder was hit by fragments from a single 88-millimeter shell and badly wounded. He lost his left leg below the knee. For his gallantry in action, Reeder received the first Distinguished Service Cross for Normandy.

Although he was out of combat, Red Reeder continued to serve

in uniform until 1947, when the Army retired all disabled officers. "New horizons," however, "lay ahead." Reeder returned to West Point, where he began a new career as the assistant athletic director and a writer in residence, publishing more than thirty fiction and nonfiction books. One book became a television series, another a movie called *The Long Gray Line*. *Born at Reveille* details this and more of Red Reeder's successful life.

Born at Reveille shows how one individual can shape an institution. Red Reeder originated the idea for the Bronze Star Medal, a decoration prized by combat veterans to this day. His *Fighting on Guadalcanal* "changed training methods and thereby saved many lives." And after taking off the Army uniform, Reeder influenced lives as a coach, mentor, and friend, until he left West Point in 1967. Today, he lives quietly outside Washington, D.C., where he continues to positively influence all those with whom he comes in contact.

If you only read one book this year, do not miss *Born at Reveille*. Red Reeder's writing is crisp, clear, and concise. He comes to life in the pages of this book, and that alone makes this autobiography worth reading. *Born at Reveille* is possibly the finest military autobiography written—which explains why General Frederick Franks says "*Born at Reveille* is an inspiration to all Americans."

NO TROPHY, NO SWORD*

REVIEWED BY MAJOR VICKIA K. MEFFORD**

Harold Livingston is a man with a unique military past. In 1948, Livingston—novelist, screenwriter, American—fought in the Israeli War for Independence.[1]

What causes someone to volunteer to fight in a foreign war? Harold Livingston teaches us that the reasons are as diverse as the participants. The Israeli War for Independence attracted the usual

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* HAROLD LIVINGSTON, NO TROPHY, NO SWORD: AN AMERICAN VOLUNTEER IN THE ISRAELI AIR FORCE DURING THE 1948 WAR OF INDEPENDENCE (edition q, inc., 1994); 262 pages (hardcover).

** Judge Advocate General's Corps, United States Air Force. Currently assigned as a Student, 43d Judge Advocate Officer's Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1] Harold Livingston is the author of seven novels and several movie and television screenplays, including *Star Trek—The Motion Picture* and ten episodes of *Mission Impossible*.

array of mercenaries and misfits, plentiful in the aftermath of World War II. However, the war also appealed to many like Harold Livingston, an American Jew.

Livingston did not join the fight because he was Jewish. This is not the story of an idealist, willing to sacrifice his life for something even greater than love of country:

> . . . no, I'm not. I'm not a Zionist. What am I doing here? You want the truth, I just don't know.

Instead, *No Trophy, No Sword* is the story of a young American, an ex-GI, out of war and out of work, faced with the uncertainty of his future. The only thing that he is certain of is his love of aviation. Most troubling to Harold Livingston is his uncertainty toward his Jewish identity, or as he calls it, his "Jewishness." Against the backdrop of Israel's struggle for sovereignty is the author's private battle over his identity as an American and a Jew.

The result is a masterful weaving of storybook adventure and character development. Spanning only one year, it is more of a "mini" autobiography, focusing on a microcosm of this man's long and accomplished life. In this one year, the protagonist and the reader experience nonstop danger and intrigue, as well as a first-rate historical account. The reader is left in awe of this tiny nation and those who, whatever their personal reasons, fought for her.

Livingston's reasons for joining the Israeli War for Independence are, at first, deceptively simple. In his early twenties, aimless and looking for thrills, Livingston enlists in the United States Army Air Force in 1943 to fulfill his boyhood dreams of flying airplanes. He tries in vain to conceal his color-blindness and is sent to radio operator's school. Three years later, the war over, and at the grand old age of twenty-one, Master Sergeant Livingston returns from Europe to American civilian life. He engages in several business misadventures and soon longs for the prestige and excitement of his military days. When a former colleague asks him if he is interested in joining an outfit flying munitions to Palestine, Livingston is elated.

To his chagrin, his Jewish parents are not as elated about his participation in the war. So begins Livingston's paradoxical story. Knowing nothing more about Palestine than what he reads in the papers, the idea of fighting for a Jewish state nonetheless holds a mysterious appeal. Furthermore, it is just plain exciting. The outfit wastes no time recruiting him—it is desperate. Livingston dives in, mindless of his own desperation, one many bicultural readers can identify with—the need to reconcile two, often competing, identities. As Livingston becomes embroiled in this "Jewish" war, his

allegiances are questioned more than once, in vivid and dramatic ways.

The United States has placed an embargo on the export of planes and military equipment to Palestine. Livingston is quickly committed to the Israeli cause when he helps smuggle a C-46, purchased by a puppet American transport company named Service Airways, out of the United States. "T-men"—Treasury Department agents—storm the airfield as the crew takes off, destination unknown.

Livingston eventually reaches Panama, where a bankrupt government has agreed to flag Service Airways assets:

> I think it was in Panama that we first began envisioning ourselves as true life, bigger-than-life, honest to God Yankee adventurers. A latter day Flying Tigers volunteer group, risking life and limb this time for a noble, glorious Jewish cause. . . . An undeservedly romantic image, of course, and belied by the fact we were really a scruffy bunch of ex-USAAF airmen working for a phony airline.

Later, Livingston learns the extent of the operation. Planes purchased from Czechoslovakia are dismantled and ferried to Israel in the smuggled C-46s, where the fuselages just barely fit into the cabins. Ironically, the fighters are Nazi Messerschmitts, or, more accurately, Avia S-199s, a cheap reproduction. They are flying death traps, nicknamed "the Nazi's Revenge." However, these planes and their American pilots are a vast improvement over the dozen or so Taylor Cubs and Austers flown by Israeli aero club students hurling Molotov cocktails on enemy columns. The operation is a fraudulent airline, filing fake flight plans and shuttling fighter planes and arms into Israel out of yet another bankrupt country, Czechoslovakia. A desperate scheme forged from the most desperate of times. Great Britain has blockaded the Palestinian coastline and pressured her allies—such as the United States—into refusing to deal with Israel. Israel's thread-bare defenses are beleaguered by British-equipped and trained Arab forces. Her only hope is a fledgling Israeli Air Force—a.k.a. Service Airways—forged from unholy alliances, the greed of corrupt officials, and grand doses of ingenuity and *chutzpah*.

The newly-acquired transport planes also double as bombers. During one flight, Livingston and a fellow soldier roll fifty-pound bombs toward the open cabin door. Gripping the frame of the transport plane and praying that the pilot does not make a sudden move, they pull the pins and kick the bombs out. They later develop a more

sophisticated system using a track for the bombs and a harness for the "bomb-chucker."

Eventually, real bombers, B-17s, are smuggled from the United States. The bombers, converted after the war, are ostensibly purchased for commercial use. They are flown to Czechoslovakia, where they are painstakingly decommercialized and delivered to the booming and soon-to-be formidable Israeli Air Force.

Many Americans lost their lives defending Israel and helping build her Air Force. Others sacrificed their freedom—not all efforts to elude United States and other governments' officials were successful. All took incredible risks, flying overtaxed aircraft, overloaded with illegal cargo, over unfriendly territory—risks sometimes too great, but, often enough, outweighed by sheer skill and courage. Not surprisingly, many of Livingston's compatriots went on to live extraordinary lives. Many became commercial pilots, aviation executives, and business moguls; one became a major Hollywood film producer. Others remained in Israel, and one, Ezer Weizman, became the nation's President.

Livingston, with a present clarity aided by mature reflection, describes his decision not to remain. Forced to decide between a commission in the Israeli Air Force or repatriation, he is livid. The stage is set for the final showdown in his private war—is he an American hero, deserving of gratitude and admiration, or is he an ungrateful Jew, unwilling to make a real commitment? As Israel forces the world to accept a new nation, Livingston must decide where he stands and learn to accept himself.

No Trophy, No Sword is a real-world, against-all-odds account bound to appeal to aviation buffs and students of military history. It is an indispensable study in the importance, and the interdependence, of technology and ethos in war. Livingston's story demonstrates how collective strength of the human spirit became a decisive factor in a significant world event.

TERRORISM IN WAR—THE LAW OF WAR CRIMES*

REVIEWED BY H. WAYNE ELLIOTT**

"Isn't this all just 'Victor's Justice?'" "Why should we care about the law of war—aren't we supposed to go out and kill the enemy?" "If the enemy doesn't follow the rules, why should we?"

Every judge advocate who has taught a class in the law of war (often erroneously referred to as "teaching the Geneva Conventions") has been asked these or similar questions from soldiers in the audience. Unfortunately, the judge advocate instructor sometimes simply does not have the military experience and the legal knowledge to respond adequately to these questions. In most Staff Judge Advocate offices the duty of teaching the law of war to soldiers tends to fall on the newly assigned judge advocate—the lieutenant who has just completed the Judge Advocate Officer Basic Course. This can be a daunting task for someone who only a few months before was sitting in a law school classroom. For some, standing in front of a company of soldiers and discussing how the law affects combat can be just this side of terrifying. Finally, there is a book that will provide the newly assigned instructor with relevant information that can be used in the classroom—a book that, when mastered, will make the newest officer appear to be a seasoned veteran. The book is Howard Levie's latest contribution to the literature on the law of war, *Terrorism in War—The Law of War Crimes*.

The author is a retired colonel in the Army Judge Advocate General's Corps as well as a retired law school professor. He is a prolific author who wrote the definitive work on prisoners of war[1] while holding the prestigious Stockton Chair of International Law at the Navy War College. The superb quality of his work continues in *The Law of War Crimes*. The book contains numerous case summaries perfect for illustrating the rules of law. The value is that these

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* HOWARD S. LEVIE, TERRORISM IN WAR—THE LAW OF WAR CRIMES (Oceana Pubs., Dobbs Ferry, New York 1993); pages iv, 721; Index, Appendices, Table of cases; $65.00.

** Lieutenant Colonel, United States Army (Ret.). Former Chief, International Law Division, The Judge Advocate General's School, United States Army. Currently an SJD Candidate, University of Virginia School of Law.

[1] HOWARD LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT (1977).

cases simply are not otherwise available to the judge advocate in the field.

Because the law of war is retrospective, the best teaching examples of its rules always are found in the legal practice followed during prior conflicts. Levie has performed a valuable service by culling through the microfilmed records of the National Archives for war crimes cases, distilling the facts and law, and summarizing them in an easy to read style. His summaries of these obscure cases alone would make this book a useful addition to every judge advocate's legal library.

The best law of war instructor tailors the presentation to the specific needs of the audience. Finding the right examples to use can be difficult. This book simplifies that task. Teaching medical personnel the law of war and need some examples? Simply look to this book. It covers misuse of the Red Cross—the trial of Heinz Hagendorf, as well as the prohibition of medical experimentation—the Kyushu University case. Teaching military police and need some examples of the failure to protect prisoners of war? Look at the Essen Lynching case. For occupation cases, look at the trial of Gustave Becker, or the trial of Phillippe Rust. Armed with these cases, the instructor can better convert abstract rules of law into meaningful examples for use in the classroom.

The book has others uses. Levie also provides a comprehensive review of the trial procedures used to try war criminals. As every judge advocate should be aware, substantial legal debate occurred after World War II about how, if at all, to try the major war criminals and exactly what offenses to charge. Was it lawful to try the German and Japanese leadership for "Crimes against Peace" or would this be comparable to creating a crime *ex post facto*? By what theory of law could the Nuremberg Tribunal delve into the internal policies of the Nazi regime? How should an international war crimes tribunal be organized? What procedural rules would it follow? Readers find the answers to these questions in Levie's detailed analysis of the Nuremberg and Tokyo trials.

In addition to the notorious Axis ringleaders, the Allies tried hundreds of other war criminals. In these trials one finds the nuggets of legal practice needed to truly understand the law of war. This book is a gold mine of practice pointers. When the United States military conducted a war crimes trial, what possible defenses existed? How was jurisdiction addressed? What rules of evidence governed the proceedings? While these questions are phrased in the past tense, the answers have contemporary application as well. The answers are in this book.

Most judge advocates can be reasonably certain that they will not be involved with the trial of major war criminals along the likes of Goering, Ribbentrop, or Tojo. But, what about the lesser war criminals? That they might be tried before a general court-martial or a military commission is quite possible. In either forum, judge advocates would play a starring role. This book provides the necessary background for use by both counsel and the military judge.

Judge advocates have to be concerned not only about the enemy's violations of the law, but also our own. The judge advocate's role is to help the commander avoid possible legal problems by providing sound advice on the law of war. Many judge advocates are uncomfortable advising a commander on issues affecting combat. At the same time, many commanders are uncomfortable—if not outright defiant—taking the advice of a lawyer when it comes to combat. This book could help overcome that lack of confidence by providing an understanding of the limits of the law and the consequences for its violation. Commanders do not want to willingly violate the law. What they most often need is a lawyer with the right mix of knowledge of the law and military history, and an ability to articulate legal rules and their rationale. With this book as a reference the lawyer will find the right mix. Articulation follows knowledge.

The appendices include the most pertinent provisions of the major legal documents that govern how war crimes trials might be conducted. Readers find the historical basis for the concurrent jurisdiction of military commissions (General Order 100), the provisions of the Hague and Geneva Conventions concerning the punishment of war criminals, the post-World War II regulations on establishing and conducting war crimes trials, and excerpts from today's treaties and international pronouncements dealing with the punishment of war criminals. The book's utility is further enhanced by the addition of an excellent bibliography listing the major books and articles that deal with the subject.

No judge advocate would dare deploy without taking along a copy of *Field Manual 27-10, The Law of Land Warfare*. This book also should be in the "go to war" materials of every deploying judge advocate. It simply is the best one-volume treatise on the law of war crimes available. The key to understanding the law of war is knowing how it has been applied in the past. *The Law of War Crimes* provides that knowledge. Every judge advocate should be familiar with this book. It belongs in the office library as well as in the deployment package.

This reviewer spent many years teaching the law of war and

working on other substantive legal issues related to this most important field of military law. Had this book been available, it would have made finding the law and illustrative cases much easier. Howard Levie has made an important contribution to the law and in so doing has made every judge advocate's job a little easier.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

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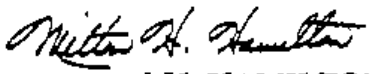

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