Volume 178 **Winter 2003**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

Department of Army Pamphlet 27-100-178

MILITARY LAW REVIEW

Volume 178 **Winter 2003**

CONTENTS

ARTICLES

BOOK REVIEWS

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

Pamphlet No. 27-100-178, Winter 2003

MILITARY LAW REVIEW—VOLUME 178

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

The *Military Law Review* (ISSN 0026-4040) is published quarterly by The Judge Advocate General's Legal Center and School, 600 Massie Road, Charlottesville, Virginia, 22903-1781, for use by military attorneys in connection with their official duties for $17 each (domestic) and $21.25 (foreign) per year (*see* Individual Paid Subscriptions to the *Military Law Review* on pages vii and viii). This periodical's postage is paid at Charlot-

tesville, Virginia, and additional mailing offices. POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's Legal Center and School, United States Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, at (202) 512-1800. See the subscription form and instructions at the end of this section. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Technical Editor of the *Military Law Review.* Inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies should be addressed to the Technical Editor of the *Military Law Review.* Judge advocates of other military services should request distribution from their publication channels.

CITATION: This issue of the *Military Law Review* may be cited as 178 MIL. L. REV. (page number) (2003). Each issue is a complete, separately numbered volume.

INDEXING:

* The primary *Military Law Review* indices are volume 81 (summer 1978) and volume 91 (winter 1981).

* Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Military Law Review* indices.

* Volume 91 included writings in volumes 75 through 90 (excluding Volume 81), and replaces the volume indices in volumes 82 through 90.

* Volume 96 contains a cumulative index for volumes 92-96.

* Volume 101 contains a cumulative index for volumes 97-101.

* Volume 111 contains a cumulative index for volumes 102-111.

* Volume 121 contains a cumulative index for volumes 112-121.

* Volume 131 contains a cumulative index for volumes 122-131.

* Volume 141 contains a cumulative index for volumes 132-141.

* Volume 151 contains a cumulative index for volumes 142-151.

* Volume 161 contains a cumulative index for volumes 152-161.

* Volume 171 contains a cumulative index for volumes 162-171.

Military Law Review articles are also indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; four computerized databases—the JAGCNET, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*—and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East

Delaware Place, Chicago, Illinois, 60611. The *Military Law Review* is available at http://www.jagcnet.army.mil beginning with Volume 154.

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted in Microsoft Word format to the Senior Editor, *Military Law Review*, at Andras.Marton@hqda.army.mil. If electronic mail is not available, please forward the submission in duplicate, double-spaced, to the Senior Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia, 22903-1781. Written submissions must be accompanied by an electronic copy on a 3 1/2 inch computer diskette or CD, preferably in Microsoft Word format.

Footnotes should be typed double-spaced, and numbered consecutively from the beginning to the end of the writing, not chapter by chapter. Citations should conform to *The Bluebook, A Uniform System of Citation* (17th ed. 2000), copyrighted by the *Columbia, Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to *Military Citation* (TJAGSA 8th ed. 2003).

Masculine pronouns appearing in the text refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of branch of service, duty title, present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

EDITORIAL REVIEW: The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of The Judge Advocate General, the Department of Defense, or any other governmental or nongovernmental agency.

The Editorial Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Editorial Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the

military legal community. No minimum or maximum length requirement exists.

When a writing is accepted for publication, the Editor of the *Military Law Review* will provide a copy of the edited manuscript to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies usually are available in limited quantities. Authors may request additional copies from the Technical Editor of the *Military Law Review.*

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Technical Editor of the *Military Law Review.* Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Technical Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, United States Army, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

Individual Paid Subscriptions to the *Military Law Review*

The Government Printing Office offers a paid subscription service to the *Military Law Review.* To receive an annual individual paid subscription (4 issues), complete and return the order form on the next page.

RENEWALS OF PAID SUBSCRIPTIONS: You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSDUE" on the top line of the mailing label as shown in this example:

When this digit is 3, a renewal notice will be sent.

MILR SMITH212J ISSDUE003 R1
JOHN SMITH
212 MAIN ST
FORESTVILLE MD

The numbers following ISSDUE indicate how many issues remain in the subscription. For example, ISSDUE001 indicates a subscriber will receive one more issue. When the number reads ISSDUE000, you have received your last issue unless you renew.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

INQUIRIES AND CHANGE OF ADDRESS INFORMATION: The individual paid subscription service is handled solely by the Superintendent of Documents, not the Editors of the *Military Law Review* in Charlottesville, Virginia.

For inquires and change of address for individual paid subscriptions, fax your mailing label and new address to (202) 512-2250, or send your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402

United States Government
INFORMATION

Credit card orders are welcome!

Fax your orders (202) 512-2250

Phone your orders (202) 512-1800

Order Processing Code:
* 5722

☐ YES, please send subscriptions to:

_____ **Military Law Review** (MILR) at $17 each ($21.25 foreign) per year.

_____ **Army Lawyer** (ARLAW) at $29 each ($36.25 foreign) per year.

The total cost of my order is $ _____.

Price includes regular shipping & handling and is subject to change.

For privacy protection, check the box below:

☐ Do not make my name available to other mailers

Check method of payment:

☐ Check payable to: Superintendent of Documents

☐ GPO Deposit Account ☐☐☐☐☐☐☐☐-☐

☐ VISA ☐ MasterCard ☐ Discover

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

(expiration date)

☐☐☐☐

Name or title (Please type or print)

Company name Room, floor, suite

Street address

City State Zip code+4

Daytime phone including area code

Purchase order number (optional)

Authorizing signature 1/97

Mail to: Superintendent of Documents, PO Box 371954, Pittsburgh PA 15250-7954

Important: Please include this completed order form with your remittance. ***Thank you for your order!***

MILITARY LAW REVIEW

Volume 178 **Winter 2003**

WRESTLING WITH MRE 304(G): THE STRUGGLE TO APPLY THE CORROBORATION RULE

MAJOR RUSSELL L. MILLER[1]

Therefore confess thee freely of thy sin; For to deny each article with oath Cannot remove nor choke the strong conception that I do groan withal. Thou art to die.[2]

I. Introduction

Confessions are powerful. The admission of an accused's confession in a criminal trial carries heavy weight. Likewise, the suppression of such a confession may cause a prosecutor's case to fall apart. Given its importance, our jurisprudence affords the accused several privileges against self-

1. Judge Advocate, U.S. Army. Presently assigned as an Advanced Operational Law Studies Officer with the Center for Law and Military Operations. LL.M, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia; J.D. 1995 (*magna cum laude*), Salmon P. Chase College of Law, Northern Kentucky University; B.A. 1988 (*summa cum laude*) Southwestern Oklahoma State University. Prior assignments include: Deputy Legal Advisor, Joint Task Force Six, Ft. Bliss, Texas, 2000-2002; Deputy District Attorney, 8th Judicial District, Clayton, New Mexico, 1998-2000; Brigade Judge Advocate, 505th Parachute Infantry Regiment, 82d Airborne Division, Fort Bragg, North Carolina, 1997-1998; Chief, Legal Assistance, 82d Airborne Division, Fort Bragg, North Carolina, 1997; Operational Law Attorney, 82d Airborne Division, Fort Bragg, North Carolina, 1996; Legal Assistance Attorney, 82d Airborne Division, Fort Bragg, North Carolina, 1996; 138th Judge Advocate Officer Basic Course, The Judge Advocate General's School, 1995; Assistant Intelligence Officer, 1st Brigade, 3d Infantry Division, Schweinfurt, Germany, 1991-1992; Assistant Personnel Officer, 1st Brigade, 3d Infantry Division, Schweinfurt, Germany, 1991; Mortar Platoon Leader, 5th Battalion, 15th Infantry Regiment, 1st Brigade, 3d Infantry Division, Schweinfurt, Germany, 1989-1990; Rifle Platoon Leader, 5th Battalion, 15th Infantry Regiment, 1st Brigade, 3d Infantry Division, Schweinfurt, Germany, 1989; Bradley Commander's Course, Infantry Mortar Platoon Officer Course and Infantry Officer Basic Course, Fort Benning, Georgia, 1988-1989. Before his commissioning in 1988, Major Miller served as an enlisted infantry soldier and drill sergeant. This article was submitted in partial completion of the Master of Laws requirements of the 51st Judge Advocate Officer Graduate Course.

2. WILLIAM SHAKESPEARE, OTHELLO THE MOOR OF VENICE act 5, sc. 2.

incrimination. One of these important privileges is the notion that a confession or admission of a defendant or accused cannot subsequently be used against them as evidence of guilt in a criminal trial unless there is independent evidence which sufficiently corroborates the confession. This rule is commonly referred to as the corroboration rule. Its common law roots trace back to the courts of England in the mid seventeenth century.[3] The rule was adopted throughout courts in the United States at the state and federal levels.[4] In military practice, the corroboration rule is codified at Military Rule of Evidence (MRE) 304(g).[5] Although it seems fairly simple and straightforward, military courts-martial have, at times, struggled to apply it consistently. Simple mechanical implementation of the rule can be challenging. This article urges a fair and faithful application of this important rule and privilege by identifying recent inconsistent treatments, exploring its rational and historical underpinnings, and making a recommendation to clarify its requirements.

Specifically, this article proposes amendments to MRE 304(g).[6] These proposed amendments require some degree of admissible evidence against the accused in determining whether the accused's confession or admission has been sufficiently corroborated. The purpose of the proposed amendments is to focus the analysis of the rule's application on the quality of the corroborative evidence with the aim of preventing the erosion of an accused's rights and privileges.

II. Background

A. The Distrust of Confessions

A criminal defendant in our system of justice receives the benefit of several forms of privilege against self-incrimination. The privileges against self-incrimination derive, in part, from distrust in American criminal jurisprudence of the confession.[7] A reflection of this mistrust is found in a quote by Justice Goldberg: "a system of criminal law enforce-

3. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago Press 1979).

4. *See* Opper v. United States, 348 U.S. 84, 93 (1954) (adopting corroboration rule for federal courts); *see generally* 3 G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987).

5. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(g) (2002) [hereinafter MCM].

6. *Id.*

ment which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[8] There are two components to this mistrust.

The first component is a concern for a potential abuse of authority that may arise during interrogation of a suspect, which may be of an oppressive nature.[9] To address police misconduct during interrogations, the privilege against self-incrimination has several aspects. These include suppression of coerced confessions[10] and the requirement to advise suspects of their Fifth and Sixth amendment constitutional rights before custodial interrogation.[11] These aspects of the privilege against self incrimination "purport to regulate interrogation in a way that reduces the incidence of false con-

---

7. Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1122 (1984).

8. Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (Goldberg, J., concurring).

9. Ayling, *supra* note 7, at 1123.

10. Payne v. Arkansas, 356 U.S. 560 (1958). In *Payne*, a mentally dull nineteen-year-old African American with a fifth-grade education, was convicted in a state court of first degree murder and sentenced to death.

> At his trial, there was admitted in evidence, over his objection, a confession shown by undisputed evidence to have been obtained in the following circumstances: He was arrested without a warrant and never taken before a magistrate or advised of his right to remain silent or to have counsel, as required by state law. After being held for three days without counsel, advisor or friend, and with very little food, he confessed after being told by the Chief of Police that "there would be 30 or 40 people there in a few minutes that wanted to get him" and that, if he would tell the truth, the Chief of Police probably would keep them from coming in.

Id. The Supreme Court reversed the conviction finding from the totality of the circumstances that the confession was coerced and did not constitute an expression of free choice. *Id.* at 568. Even though there may have been sufficient evidence to support his conviction apart from the coerced confession, the judgment was voided because it violated the Due Process Clause of the Fourteenth Amendment. *Id.*

11. Miranda v. Arizona, 384 U.S. 436 (1966). The Court held:

> Prosecution may not use statements from custodial interrogation of a defendant unless it shows procedural safeguards secured the privilege against self-incrimination. Defendant must be warned that he has the right to remain silent and anything he says may be used against him. He must be clearly informed he has the right to consult with a lawyer and to have the lawyer with him during interrogation.

Id.

fessions, reliability concerns are collateral to the main purpose of each: to suppress all confessions, whether reliable or not, that result from the abuse of power."[12]

The second component of the mistrust of confessions is the concern regarding the reliability of the confession. "The primary doctrinal remedy for the problem of physically uncoerced false confessions, on the other hand, has been the corroboration rule."[13] There are several species of the corroboration rule in American jurisprudence, and all require evidence in addition to the confession as a test of reliability.[14] Military Rule of Evidence 304(g) sets forth the means for corroborating a confession or admission of an accused in courts-martial.[15] An examination of the historical development of the corroboration rule will facilitate a more complete analysis of MRE 304(g).

B. Historical Underpinnings of the Corroboration Rule

1. The Corpus Delecti Rule

a. Origins of the Corpus Delecti Rule

The corroboration rule traces its historical underpinnings back to the development of the corpus delecti rule, which is still followed in most states today.[16] Legal historians identify the origins of the corpus delecti rule in a 1661 English murder prosecution entitled *Perry's Case*.[17] *Perry's Case* was a murder trial in which the victim's body was never found. The "victim" was waylaid, kidnapped, and held as a slave in Turkey. The defendant, his servant, was implicated by his failure to return home after being sent to find his brother and mother. The three were convicted and executed on the basis of the victim's disappearance, a bloodied hat, and a confession by one of the co-defendants.[18] The victim later showed up

12. Ayling, *supra* note 7, at 1124.

13. *Id.*

14. Other forms of the corroboration rule will be discussed *infra* as we examine its origin and development. For a more comprehensive listing of jurisdictions and the form of the corroboration rule they follow, *see generally* E. H. Schopler, Annotation, *Corroboration of Extrajudicial Confession or Admission*, 45 A.L.R. 2d 1316 (1956).

15. MCM, *supra* note 5, MIL. R. EVID. 304(g).

16. Bruce A. Decker, People v. McMahan: *Corpus Delecti Rule or Trustworthiness Doctrine?*, 1997 DET. C.L. REV. 191 (1997).

17. 14 HOW. ST. TR. 1312 (1660).

alive and well after the executions of the defendants.[19] Under English law at the time, a criminal defendant could be convicted solely on the basis of an uncorroborated confession.[20]

In the United States, a similar case arose in which an alleged murder victim surfaced just in time to prevent the execution of the person convicted of the murder.[21] Thereafter, courts throughout the United States began formulating forms of the corpus delecti rule. In fact, during the eighteenth century, all U.S. jurisdictions had adopted a form of the corpus delecti rule with the exception of Massachusetts.[22] Moreover, while English courts applied the rule only to murder cases, U.S. courts began to apply the rule to all kinds of criminal cases.[23]

b. What Is the Corpus Delecti Rule?

While there are different versions of the rule, one can discern its general aspects in defining it. The term "corpus delecti" means "the body of the crime." It is a common law doctrine that requires the prosecutor to prove that a crime was committed before allowing a defendant's extrajudicial confession to be admitted into evidence.[24] "Corpus delecti does not mean dead body, as often assumed by laymen, but the body or substance of the crime. Every offense has its corpus delecti, and independent proof thereof is needed for homicide and non-homicide offenses such as arson, bribery, burglary, conspiracy, false pretenses, incest or larceny."[25] Under the corpus delecti rule, a defendant's extrajudicial confession was admissible only when there was independent evidence that a death had occurred,

---

18. *Id*.; Note, *Construed in Proof of the Corpus Delecti Aliunde the Defendant's Confession*, 103 U. PA. L. REV. 638, 639 (1955).

19. Tom Barber, *Young Lawyers Division: The Anatomy of Florida's Corpus Delecti Doctrine*, 74 FLA. B.J. 80 (2000).

20. Ayling, *supra* note 7, at 1126.

21. Rollin M. Perkins, *The Corpus Delecti of Murder*, 48 VA. L. REV. 173, 175 (1962) (construing *The Trial of Stephen and Jesse Boorn*, 6 AM. ST. TR. 73 (1819)).

22. Ayling, *supra* note 7, at 1126. In declining to adopt the corpus delecti rule, the Massachusetts Supreme Court reasoned the jury was competent to evaluate the probative value of an uncorroborated confession and the "trend of modern decisions is in the direction of eliminating quantitative tests of the sufficiency of evidence." Commonwealth v. Kimball, 73 N.E.2d 468, 470 (1947) (quoting Commonwealth v. Gale, 57 N.E.2d 918, 920 (1944)).

23. Barber, *supra* note 19, at 81.

24. *Id.* at 80.

25. *Id.* (citing Perkins, *supra* note 21, at 179).

and that it resulted from an act of criminal agency.[26] The corpus delecti rule was viewed as both a rule of evidence and a substantive rule. It was an evidentiary rule in that it prohibited the admission of a confession without other proof. It was substantive because it prohibited a criminal conviction if the prosecution had not proven that a crime had been committed.[27]

c. The Purposes of the Corpus Delecti Rule

Formulation of the corpus delecti rule was created to preclude a person from being convicted of a crime that had not been committed and to avoid an undue reliance on confessions. Thus, it served to further three main purposes: (1) it served to protect the mentally unstable from being convicted as a result of an untrue conviction; (2) it helped to ensure people were not convicted as a result of an involuntary, coerced confession; and (3) it helped to promote more thorough law enforcement work by requiring authorities to find evidence beyond the confession.[28] In requiring more thorough investigation by law enforcement and demanding the production of independent evidence of the crime, the confession is more reliable. Additionally, this requirement helps prevent the criminal justice system from becoming inquisitorial.[29]

A custodial interrogation is an inherently coercive environment. In his article, Corey Ayling describes the interrogation environment. "The interrogator and the defendant interact in a certain social environment. That social environment consists of a physical place—an interrogation room—and an institutional setting—imprisonment. Both coerce."[30] The conditions under which interrogations often occur can set the conditions for involuntary and unreliable confessions.[31] The shock and self-mortification of arrest and imprisonment cause the defendant to enter the interrogation room in a badly debilitated state. The physical environment of the interrogation room intensifies the anxiety of the defendant and maximizes

26. Decker, *supra* note 16.

27. Barber, *supra* note 19, at 80.

28. Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delecti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 408 (1993).

29. Ayling, *supra* note 7, at 1128-29.

compliance. The interrogation environment enables the interrogator to confront a defeated, depressed, and compliant individual.[32]

The coercive environment impacts the interaction between investigators and an accused. In discussing the social interaction between an investigator and an accused, Ayling refers to another study which postulates that persons being interrogated tend to respond to external stimuli.[33] When internal cues are unambiguous, the individual does not look to external cues. An accused may well resist self-persuasion because they have direct access to some very strong, unambiguous internal cues, such as the knowledge of their own innocence or fear of self-incrimination. The suspect's internal cues will be more ambiguous notwithstanding his innocence. He may suffer from guilt feelings arising from unrelated acts, the investigator may induce guilt feelings, he may be traumatized by the shock of arrest and imprisonment, or he may feel a need for approval. By manipulating these external stimuli, the investigator may induce the accused in confessing falsely.[34]

A related issue is the sociological aspect of the confession. The confession can be viewed as a ritual of social inclusion through which society

---

30. *Id.* at 1162. In his analysis, Ayling references research at the University of Stanford in which twenty-four male students were divided into two groups. Half were assigned as "guards" and the other half as "prisoners." The prisoners were assigned to "cells" within the psychology building. Other than issuance of appropriate garb and a prohibition on physical force, they were given little guidance. In a very short period of time,

> [t]he guards quickly began to relish their power and increasingly subjected the prisoners to verbal abuse and harassing rules and rituals. Five of the ten prisoners had to be released early because of extreme depression, crying, rage, and acute anxiety; the pattern of symptoms began as early as the second day of imprisonment. On the whole, the prisoners behaved with increasing passivity and complied, after a brief rebellion, with the guards' orders. The prisoners also began to internalize the guard's negative attitudes towards themselves.

Id.

31. *See generally* Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968) (citing Miranda v. Arizona, 384 U.S. 436 (1966)) (collecting social psychological literature and concluding that *Miranda* warnings fail to provide safeguards against the social psychological rigors of arrest and interrogation).

32. Ayling, *supra* note 7.

33. *Id.* at 1174-75 (citing Daryl Bem, *When Saying Is Believing*, 1 PSYCHOLOGY TODAY 21 (June 1967)).

34. *Id.*

reinforces its norms by first defining deviants and then restoring them to the graces of society.[35] The individual comes to realize his deviance from societal norms and confesses it to others. The confession dramatizes and reinforces the importance of the individual's conscience, which in turn mirrors societal norms.[36] Western culture affirms the importance of the individual, yet manages to achieve social control over the individual by causing him to internalize societal norms in the form of an interior conscience. The social purpose of the confession then, is to restore deviants to their former social status. By doing this, the confession legitimates the correctness of the social order, shows deviance and evil to be caused by individuals—not society—and reaffirms the value of individual conscience, which in turn mirrors societal norms.[37] The suspect in an interrogation room has been defined as a deviant and excluded from society by the degradation rituals of arrest and incarceration. The social compulsion to talk is overwhelming: the individual must reaffirm his former social and individual status by either denying guilt or accepting it through confession. In extreme cases, the desire for immediate redemption through confession may outweigh the longer term consequences of a false confession and may induce the suspect to make false inculpatory statements.[38]

There are several reasons that may cause an accused to succumb during custodial interrogation. The confession may be obtained as a result of a coercive environment in which a psychologically defeated suspect is manipulated by a trained and clever investigator or it may be based on sociological reactions derived from being deemed a deviant. Either way, the reliability as well as the voluntariness of the confession is called into question. As the Supreme Court stated in *United States v. Smith*,[39] "[T]hough a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past."[40] The consequence is a powerful

35. *Id.* at 1177-79 (citing MIKE HEPWORTH, CONFESSION: STUDIES IN DEVIANCE AND RELIGION 175 (Routledge, Kegan and Paul ed., 1982)).

36. *Id.*

37. *Id.*

38. *Id.*

39. 348 U.S. 147 (1954). Along with *United States v. Opper*, 348 U.S. 84 (1954), *Smith* was one of two cases that established the so-called trustworthiness doctrine, the current federal standard for corroboration of confessions. *Smith*, 348 U.S. at 147. Both cases are discussed in more detail *infra.*

40. *Smith*, 348 U.S. at 153.

piece of evidence for which stringent safeguards have been erected and must be maintained.

The corroboration rule is one of these safeguards, regardless of which variety of rule a particular jurisdiction follows. As the corpus delecti rule evolved, its primary purpose can be contrasted with the purposes of other privileges against self incrimination. Rather than testing the voluntary nature of the confession or the abuse of authority in procuring the confession, the corroboration rule tests the reliability of the confession itself.[41] It thereby protects from "errors in conviction based upon untrue confessions alone."[42]

As the corpus delecti rule developed, different jurisdictions adopted the rule in varying forms.[43] Most jurisdictions continue to apply the traditional corpus delecti rule.[44] Other jurisdictions have fashioned hybrid forms of rules for corroborating a confession.[45] This includes the Wisconsin rule,[46] the New Jersey rule,[47] the Iowa rule,[48] and the federal rule.[49] The states following the federal rule include Texas, New Mexico, Hawaii,

---

41. Ayling, *supra* note 7, at 1127.

42. *Id.* (citing Warszower v. United States, 312 U.S. 342, 347 (1941)). In *Warszower*, a Russian immigrant gave false statements to obtain a passport in the United States. The Supreme Court held, "the rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist." Thus, admissions made by the defendant before the crime did not need to be corroborated. *Warszower*, 312 U.S. at 347.

43. *See* E. H. Schopler, Annotation, *Corroboration of Extrajudicial Confession or Admission*, 45 A.L.R. 2d 1316 (1956) (providing a somewhat exhaustive listing of the rule followed all states, with the exception of Massachusetts, which has not adopted any form of the corroboration rule).

44. Ayling, *supra* note 7, at 1145. The corpus delecti jurisdictions are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.*

45. *Id.* at 1148-51.

46. The Wisconsin rule provides that a confession may be corroborated by "any significant fact in order to produce a confidence in the truth of the confession." Holt v. State, 17 Wis. 2d 468, 480 (1962). This rule is similar to the federal rule.

47. The New Jersey Supreme Court rule requires: (1) proof of loss or harm associated with the crime; and (2) other proof "tending to establish that when the defendant confessed he was telling the truth." State v. Lucas, 30 N.J. 37, 58 (1959).

and the District of Columbia.[50] The federal rule is also known as the "trustworthiness doctrine."[51]

2. The Trustworthiness Doctrine

a. Two Corroboration Rules in Federal Court

The development of the corpus delecti rule in federal courts led to a split in the circuit courts. In essence, the federal courts were applying two different corroboration rules.[52] The two lines of cases following the corpus delecti rule are set forth in *Daeche v. United States*[53] and *Forte v. United States.*[54]

In *Daeche*, a Russian immigrant was convicted for his involvement in a conspiracy to injure insurance underwriters and a conspiracy to blow up ships.[55] The court found ample evidence to corroborate the defendant's confession from the existence of an agreement to attack ships.[56] In an opinion authored by Judge Learned Hand,

> Proof of any corroborating circumstances is adequate which goes to fortify the truth of the confession or tends to prove facts embraced in the confession. There is no necessity that such proof touch the corpus delecti at all, though, of course, the facts of the admission plus the corroborating evidence must establish all elements of the crime.[57]

---

48. The Iowa rule is the most strict. It requires independent proof of both the corpus delecti and the defendant's link to the crime. State v. White, 319 N.W.2d 213, 214 (Iowa 1982).

49. The federal rule was the product of two Supreme Court cases decided in 1954. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

50. Ayling, *supra* note 7, at 1149.

51. *See generally* Decker, *supra* note 16, at 191; Schopler, *supra* note 43.

52. *Opper*, 348 U.S. at 92-3; *see* Lieutenant Colonel R. Wade Curtis, *Trial Judiciary Note: Military Rule of Evidence 304(g)—The Corroboration Rule*, ARMY LAW., July 1987, at 35.

53. 250 F. 566 (2d Cir. 1918).

54. 94 F.2d 236 (D.C. Cir. 1937).

55. *Daeche*, 250 F. at 569.

56. *Id.*

57. *Id.* at 571.

The rule in *Forte* was much different.[58] It was much stricter and demanded more independent corroborative evidence. In *Forte*, the defendant was convicted of transporting a motor vehicle in interstate commerce. The defendant claimed there was insufficient substantial proof of the corpus delecti because there was no evidence, independent of his confession, that he knew that the car was stolen.[59] The court cited, a number of forms of misconduct sometimes occurring during the conduct of custodial interrogation. This included physical brutality, protracted questioning, threats and illegal detention. Due to their resultant distrust of the confession, the court reversed the conviction. They held there could be no conviction upon an uncorroborated confession and the corroboration had to embrace substantial evidence of the corpus delecti.[60]

> There can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delecti and the whole thereof.[61]

In order to reconcile the split among the circuits regarding the application of the corroboration rule, the Supreme Court set forth a new federal rule which is referred to as the "trustworthiness doctrine."[62]

b. Opper v. United States

Opper was a procurement fraud case.[63] Opper was tried and convicted on charges he had conspired with and induced a federal employee to accept outside compensation for services in a matter before a federal agency in which the United States had an interest.[64] Opper was not a fed-

58. *Forte*, 94 F.2d at 236.
59. *Id.*
60. *Id.* at 241.
61. *Id.* at 240.
62. United States v. Opper, 348 U.S. 84, 86 (1954) (stating "Certiorari was granted because of asserted variance or conflict between the legal conclusion reached in this case—that an extrajudicial, exculpatory statement of an accused, subsequent to the alleged crime, needs no corroboration—and other cases to the contrary.").
63. *Id.*
64. *Id.* at 85.

eral employee but was charged with inducing a federal employee through a conspiracy, to accept compensation for such services.[65] Opper was a subcontractor who supplied goggles to the Air Force as part of a contract for survival kits.[66] The goggles tendered by Opper failed to comply with specifications in the contract. Opper thereafter met with Hollifield, the government contracting officer, and convinced Hollifield to recommend acceptance of the non-conforming goggles in exchange for a payment of cash.[67] During the investigation conducted by the FBI, Opper admitted, in oral and written statements, he had given Hollifield the money but insisted the money was given as a loan.[68]

Opper's statements did not constitute a confession, but were admissions of material facts used to convict him. The Supreme Court held corroboration was required for admissions to the same extent as confessions.[69] The Court then addressed the divergence within the circuit courts with respect to which corroboration rule to apply; the *Daeche* rule or *Forte* rule.[70] The Court held the corroboration required was that which ensured the trustworthiness of the admission or confession, rather than independent evidence that simply touched on the corpus delecti:

> [W]e think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delecti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.[71]

---

65. *Id.*

66. *Id.* at 87.

67. *Id.*

68. *Id.* at 88.

69. *Id.* at 91 (acknowledging that admissions differ from confessions in that "confessions are only one species of admissions" but the Court concluded that the admissions "call for corroboration to the same extent as other statements").

70. *Id.* at 92.

71. *Id.*

In affirming the conviction, the Court found independent evidence in the record to support Opper's statements which was sufficient corroboration as to one element of the crime charged; the payment of money.[72] The government was required to prove by independent evidence the other element—the rendering of services—which was not established by Opper's statements.[73] While *Opper* was a case involving a crime with a tangible corpus delecti, the Court ruled on the application of the corroboration rule involving cases without a tangible corpus delecti in *United States v. Smith.*[74]

c. United States v. Smith

The Supreme Court applied its newly announced trustworthiness doctrine to a crime in which there is no tangible corpus delecti in *United States v. Smith.*[75] In *Smith*, the appellant submitted a five-page document to investigators from the Internal Revenue Service (IRS) that represented his claimed net worth for a five year period.[76] Believing he had understated his net worth for the period, the IRS prosecuted Smith for understating his income to avoid taxation.[77] The appellant asserted, *inter alia*, there was insufficient evidence to corroborate the document he submitted to the IRS as evidence against him.[78]

In addressing the appellant's claims regarding the insufficiency of corroboration, the Court first examined whether the corroboration requirement applied to crimes in which there is no tangible corpus delecti—such as tax fraud.[79] The Court observed the corroboration requirement was formulated to prevent conviction for serious crimes of violence, such as mur-

72. *Id.* at 94.

73. The Court found the corroborative evidence which established the truthfulness of Opper's admissions did not establish a corpus delecti for the entire crime. "Rather it tends to establish only one element of the offense—payment of money. The Government therefore had to prove the other element of the *corpus delecti*—rendering of services by the government employee—entirely by independent evidence." *Id.*

74. 348 U.S. 147 (1954).

75. To say a case has no tangible corpus delecti does not mean there is corpus delecti or body of the crime. It simply means there is no direct tangible victim, such as in a murder case. A case with no tangible corpus delecti can be thought of as a so-called victimless crime, such as tax fraud or drug usage.

76. *Smith*, 348 U.S. at 149.

77. *Id.*

78. *Id.* at 151.

79. *Id.* at 153.

der, unless there was "independent proof . . . *someone* had indeed inflicted the violence, the so-called *corpus delecti*."[80] Once the corpus delecti—the body of the crime—had been established, the confession of the accused could be used to convict him.[81] "But in a crime such as tax evasion there is no tangible injury which can be isolated as a *corpus delecti*."[82] The Court was faced with a choice. It could either apply the corroboration rule, which would provide the accused with greater protection than in a homicide,[83] or the Court could find the rule wholly inapplicable because of the nature of the offense, which would strip the accused of this guarantee altogether.[84] They chose to apply the rule, which provides greater legal protection to an accused.[85] The Court chose to apply the rule to a case in which there is no corpus delecti apparently out of a concern for the inquisitional nature of a law enforcement investigation.[86]

Regarding the sufficiency or quantum of corroboration required, the Court addressed two questions: "(1) whether corroboration is necessary for all elements of the offense established by admissions alone . . . [and] (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged."[87] The Court said yes to both questions, noting that "[a]ll of the elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."[88] From this analysis it can be said that "[t]he 'quantum of corroboration' refers to both the government's burden to corroborate the confession, as well as the government's ultimate burden regarding guilt and innocence."[89]

---

80. *Id.* at 153-4.

81. *Id.*

82. *Id.* at 154.

83. *Id*. (citing Evans v. United States, 122 F.2d 461 (10th Cir. 1941); Murray v. United States, 288 F. 1008 (D.C. Cir. 1923)).

84. *Id.*

85. *Id.*

86. *Id*. (stating, "We hold the rule applicable to such statements, at least where, as in this case, the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element vital to the Government's case.").

87. *Id.* at 156.

88. *Id.*

89. Curtis, *supra* note 52, at 38.

The Supreme Court's decisions in *Smith* and *Opper* authored the standard for determining the legal sufficiency of corroborating a confession or admission in federal courts and courts-martial.[90] Consequently, the next logical step in determining whether amendments to MRE 304(g) are needed is by analyzing how the military developed and incorporated the *Smith-Opper* standard in conducting courts-martial.[91] This article examines military case law to gauge judicial faithfulness to the *Smith-Opper* standard. This analysis demonstrates how recent military case law has eroded some of the protections the Supreme Court intended to erect and maintain.

III. Analysis

A. The Corroboration Rule in Military Criminal Practice

Military Rule of Evidence 304(g) is the codification of the corroboration rule in military criminal practice.[92] It is modeled after the corroboration rule that applies in federal courts following the Court's decisions in *Opper* and *Smith.*[93] Military Rule of Evidence 304(g) is both a rule of evidence and of substantive law. It is an evidentiary rule from the standpoint of ensuring admissibility of the confession. Substantively, it is designed to ensure the accused is not convicted solely on his confession alone.[94] The rule requires independent evidence that corroborates the essential facts admitted to justify sufficiently an inference of their truth. This is a long-standing provision in our jurisprudence that is continued in the codification of MRE 304(g), which seems to assume that corroboration has or will be independently introduced into evidence in determining the admissibility of a confession or admission.[95] "[T]he independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth."[96]

The rule appears fairly simple and straightforward. A review of case law, however, reveals the difficulty with which military courts struggle to make its application uniform.[97] The issues tending to arise often surround the weight and sufficiency of the corroborating evidence and whether the

90. *Smith*, 348 U.S. at 147; United States v. Opper, 348 U.S. 84, 86 (1954).
91. MCM, *supra* note 5, MIL. R. EVID. 304(g).

corroborating evidence must be admitted into evidence. The rule does not specifically address whether the corroborating evidence must be admitted into evidence. As a result, the Court of Appeals for the Armed Forces (CAAF) has recently rendered several inconsistent decisions in applying MRE 304(g).[98] Tracing the genesis and development of MRE 304(g) will assist in grasping an understanding of these inconsistencies. It will also

---

92. *Id.* The text of MRE 304(g) is as follows:

> (g) *Corroboration.* An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.
>
> (1) *Quantum of evidence needed*. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.
>
> (2) *Procedure*. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

Id.

93. *Smith*, 348 U.S. at 147; *Opper*, 348 U.S. at 84.

94. STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 189 (4th ed. 1997).

95. *Id*.

96. *Opper*, 348 U.S at 109.

97. SALTZBURG, SCHINASI & SCHLUETER, *supra* note 94.

prove useful in determining whether amendments are required to preserve its protections.

B. The Historical Development of MRE 304(g)

Before the Supreme Court decisions in *Smith* and *Opper*, the 1951 version of the *Manual for Courts-Martial* incorporated the common law corpus delecti rule as a requirement for corroborating a confession.[99] It required that evidence be admissible as a precondition for sufficient corroboration:

> An accused cannot legally be convicted upon his uncorroborated confession or admission. A court may not consider the confession or admission of an accused as evidence against him unless there is *in the record* other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone . . . . Usually the corroborative evidence is introduced before evidence of the confession or admission; but the court may in its discretion admit the confession or admission in evidence upon the condition that it will be stricken and disregarded in the event that the above requirement as to corroboration is not eventually met.[100]

After the decisions in *Smith* and *Opper*, paragraph 140(a)(5) of the rules of evidence was amended to embrace the trustworthiness doctrine. The drafters' analysis for the *1968 Manual for Courts Martial* states this quite clearly.[101] Their adoption of the trustworthiness doctrine stressed the above stated concern for reliability of the confession or admission: "The main purpose should be to corroborate the confession or admission so that one will be reasonably assured that it is not false."[102] Under the 1984 revision of the *Manual for Courts Martial*, there was another change. The initial determination as to whether a confession was sufficiently corroborated for purposes of admissibility was transferred from the panel members to the military judge, consistent with treatment of other preliminary questions concerning admissibility of confessions.[103] Other than transferring the preliminary question of admissibility to the military

---

98. *See supra* notes 106-30, and accompanying text; *see also* MCM, *supra* note 5, MIL. R. EVID. 304(g).

99. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. iv, ¶ 140(a) (1951) [hereinafter 1951 MCM] (emphasis added).

100. *Id.*

judge, the rule of corroboration in the military was not changed but restated.[104]

C. Applying the *Smith-Opper* Rule, not Corpus Delecti, in Courts Martial

In reviewing military cases involving the application of the corroboration rule, it appears that military courts have, at times, been reluctant to depart from a traditional application of the corpus delecti rule. This is surprising due to the rather clear pronouncement from the drafters of the rules of evidence that military courts will follow the trustworthiness doctrine instead of the older corpus delecti rule.[105] *United States v. Loewen* illustrates this issue.[106]

Loewen involved a soldier convicted of forging a number of prescriptions and the larceny of the drugs prescribed.[107] The prescriptions were

---

101. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. xxvii, ¶ 140(a)(5) (1968) [hereinafter 1968 MCM] (analysis of contents). It provided:

> *Corroboration of confessions and admissions*. This subparagraph contains the new rule pertaining to corroboration of confessions and admissions adopted by the Supreme Court in Opper v. United States, 348 U.S. 84 (1954), and Smith v. United States, 348 U.S. 147 (1954). The *Opper* case is authority for the proposition that the corroborating evidence need only raise a "jury inference" of the truth of the essential facts admitted, and the *Smith* case is authority for the principle that if the prosecution desires to use the accused's statement as evidence to establish a particular essential fact, the essential fact must be corroborated by independent evidence. Although both cases involved offences in which there was no tangible corpus delecti, the Court did not, in announcing its new rule, state that the rule applied only to this type of offense–that is, it did not indicate that the old "corpus delecti" rule would continue to be applied to offenses in which there was a "tangible" corpus delecti, if there is, in fact, any distinction to be drawn. The new rule is entirely different from the corpus delecti rule found in the former Manual. Under the *Opper* and *Smith* rule, all that is required is that there be independent evidence raising a "jury inference" of the truth of the matters stated in the confession or admission, in other words, actual corroboration of the statement; whereas, under the so-called "corpus delecti" rule the confession or admission is completely disregarded until such time as it is shown independently that the offense in question has "probably been committed by someone."

Id.

102. *Id.*

written for the soldier's wife. A special agent of The Army's Criminal Investigations Division (CID), subjected the soldier to custodial interrogation. During the interrogation, the soldier-appellant told the CID agent he had forged the prescriptions and that his wife was not involved in the forgery. His statement was used as evidence against him at trial. The soldier appealed on the basis that his inculpatory statement was not sufficiently corroborated by substantial independent evidence under MRE 304(g).[108] The Army Court of Military Review agreed and reversed his conviction, but their analysis reveals some confusion in applying the rule.[109]

Initially, the court recognized the 1984 version of MRE 304(g) was substantially the same as its predecessor rule[110] and made reference to the *Smith-Opper* standard in the drafters' analysis of the earlier rule.[111] Yet,

---

103. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(g) (1984) (drafter's analysis) [hereinafter 1984 MCM]. The drafter's analysis reveals the change requiring the military judge, rather than the members, to decide the initial determination as to whether a confession was sufficiently corroborated for purposes of admissibility was a result of *United States v. Seigle*, 47 C.M.R. 340 (1973). The drafter's analysis provides:

> Rule 304(g) restates the present law of corroboration with one major procedural change. At present, no instruction on the requirement of corroboration is required unless the evidence is substantially conflicting, self contradictory, uncertain, or improbable and there is a defense request for such an instruction. United States v. Seigle, 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973). The holding in *Seigle* is consistent with the present Manual's view that the admissibility may be decided by the members, but it is inconsistent with the position taken in Rule 304(d) that admissibility is the sole responsibility of the military judge. Inasmuch as the Rule requires corroborating evidence as a condition precedent to admission of the statement, submission of the issue to the members would seem to be both unnecessary and confusing. Consequently, the Rule does not follow *Seigle* insofar as the case allows the issue to be submitted to the members. The members must still weigh the evidence when determining the guilt or innocence of the accused, and the nature of any corroborating evidence is an appropriate matter for the members to consider when weighing the statement before them.

1984 MCM, at A22-12. The analysis quoted above is identical to the current *Manual* at page A22-13. MCM, *supra* note 5, at A22-13.

104. 1984 MCM, *supra* note 103.
105. 1968 MCM, *supra* note 101, analysis of contents.
106. 14 M.J. 784 (1982).
107. *Id*. at 785.
108. *Id.* at 785-6.
109. *Id.*
110. 1968 MCM, *supra* note 101, ¶ 140(a)(5).

rather than simply applying the trustworthiness doctrine to the larceny and forgery charges, the court reasoned that "[t]he Supreme Court did not discard the corpus delecti rule in *Smith* and *Opper*, but instead provided an alternate method of corroboration which could be used in cases where there is no tangible corpus delecti."[112] Larceny and forgery are cases in which there is a tangible corpus delecti. They reasoned the trustworthiness doctrine applied only to cases without a corpus delecti. Rather than applying the *Smith-Opper* rule, they applied the old corpus delecti rule to these facts. Additionally, they held that *Smith* "extends the corroboration requirement to include the identity of the accused as the perpetrator, an element not required to be corroborated under the old corpus delecti rule."[113]

United States v. Yates provides a thorough analysis of the corroboration rule in military practice.[114] The analysis in *Yates* assists in resolving some of the confusion left by *Loewen*.[115] Yates was a sailor charged with the rape and sodomy of his infant step-daughter.[116] He admitted to several instances of sexual contact with the step-daughter during custodial interrogation by the Naval Investigative Service (NIS). He also admitted that while in the Philippines he had sex with an unnamed girl he met in a bar.[117] At trial, he recanted his confession. The government sought to introduce his confession into evidence.[118] The corroborative evidence of his confession consisted of a labial tear on the child's vulva, the child's positive test result for gonorrhea, expert testimony concerning transmission of the disease, and medical evidence that the accused may have had gonorrhea as well.[119]

The Navy-Marine Court of Military Review examined the same cases and drafters' analysis as the *Loewen* court. They reached a conclusion similar to that of the *Loewen* with respect to the corpus delecti rule: "[W]e conclude the Supreme Court has not abandoned the corpus delecti rule, but

111. *Id.*
112. *Loewen*, 14 M.J. at 784.
113. *Id.*
114. 23 M.J. 575 (N.M.C.M.R. 1986).
115. *Id*; *see Loewen*, 14 M.J. at 787; Curtis, *supra* note 52.
116. *Yates*, 23 M.J. at 575.
117. *Id.* at 575-76.
118. *Id.* at 575.
119. *Id.* at 576.

has provided a second approach where the corpus delecti could not be proven independently . . . ."[120]

The crimes charged in *Yates* had a tangible corpus delecti, but unlike the *Loewen* court, the *Yates* court did not apply the corpus delecti rule. Instead, they embraced the more flexible trustworthiness doctrine:

> We believe a persuasive argument can be made that Mil.R.Evid. 304(g) recognized that *Opper-Smith* was designed to give the federal sector more, not less, flexibility in establishing a two-pronged test, and that the revised military rule is broad enough and was designed to emulate the more flexible federal rule, subject to the caveat that under either prong the linchpin consideration is whether the independent evidence corroborates the essential facts admitted sufficiently to justify an inference of their truth.[121]

Misunderstanding of the corroboration rule persisted, however, as evidenced in *United States v. Baldwin*.[122] In *Baldwin*, the trial judge suppressed the confession by applying the corpus delecti rule rather than the trustworthiness doctrine.[123] Air Force Staff Sergeant Baldwin was charged with committing indecent acts on his seven year old stepdaughter. The accused confessed during a custodial interrogation by Air Force investigators.[124] The evidence supplied by the government to corroborate the confession consisted of non-testimonial acts of the accused. These non-testimonial acts consisted of leaving the marital home and moving into on-post quarters, his emotional state of distress, and going to see the chaplain and a counselor.[125] A review of the record from the suppression motion reveals the military judge applied the old corpus delecti rule in his decision to suppress the confession.[126] In ordering the suppression of the confession, the military judge determined the lack of evidence of a corpus delecti was a factor "in determining if the government has presented evidence that establishes an inference of truth as to the 'essential facts admitted' in the confession."[127] The Air Force Court of Criminal Appeals

120. *Id.* at 578.
121. *Id.* at 579.
122. 54 M.J. 551 (A.F. Ct. Crim. App. 2000).
123. *Id.*
124. *Id.* at 552.
125. *Id.* at 553.

(AFCCA) found the military judge had abused his discretion by applying the wrong legal standard and reversed the suppression of the confession.[128]

Military appellate courts have embraced the transformation of applying the trustworthiness doctrine, rather than the corpus delecti rule.[129]

---

126. *Id*. The dialog on the suppression motion went as follows:

> MJ: Okay. Let me ask you this, back in law school the common law rule concerning this was that before an admission or confession is admissible the prosecution has to prove *corpus delecti*. That is, that there was a crime committed. That is, a person can't confess to something where there's no evidence that there was a crime committed. Okay.
> For instance, defendant one goes into the police and confesses that he killed somebody last year on the side of the road. There's no other evidence indicating that anybody's missing, anybody's dead, you know, anything to indicate that what he's saying is correct. Now, of course there are people that can testify that from time to time there are people on the side of the road, but that's all.
>
> My question is, can the prosecution prosecute defendant one for murder where there's no indication whatsoever of *corpus delecti?* Part B of that is, what evidence do we have in this case that there is any *corpus delecti* and, Part C is, what case do you have to support your legal position where there was no evidence presented by the prosecution of a *corpus delecti?*

Id. at 553.

127. *Id.*

128. The AFCCA rebuked the military judge's employment of the wrong legal standard:

> The existence of a corpus delecti is not required by the rule. Despite his acknowledgement that this was the law, the military judge's ruling was based upon the absence of any evidence that the accused was seen committing the acts or that the child-victim exhibited physical or mental injury. So, while eschewing the requirement, he virtually demanded that trial counsel present evidence of the body of the crime, the corpus delecti.

Id. at 555.

129. *See* United States v. Maio, 34 M.J. 215 (C.M.A. 1992) (finding sufficient independent evidence corroborated appellant's voluntary confession, which was shown to be sufficiently trustworthy for admission at his court-martial. In confirming the trustworthiness doctrine as the appropriate legal standard the court announced that "it can be realistically said in the Federal sector that the 'corpus delecti' corroboration rule no longer exists.").

Baldwin, however, shows the corpus delecti rule may still linger in courts-martial.

Having established the trustworthiness doctrine of *Smith-Opper* as the appropriate legal standard, a review of recent applications on the issue of the weight and sufficiency of the corroborating evidence reveals its current interpretation.[130] This will prove useful in determining the need, if any, for amendments to ensure faithfulness to its intended protections.

D. Recent Applications of the Corroboration Rule in Courts Martial

1. United States v. Grant[131]

This is the most recent case analyzing the quality and admissibility of evidence proffered to corroborate a confession. *Grant* was an Air Force case where an Air Force Staff Sergeant (SSG) Grant was found unconscious at the club complex on Incirlik Air Force Base in Turkey.[132] He was taken to the base hospital where Captain (Capt.) Poindexter, the physician on duty, treated SSG Grant.[133] As part of his treatment, Capt. Poindexter ordered a drug screen in accordance with "the customary medical protocol for diagnosis and treatment."[134] Based on the results of other tests, the appellant was treated for acute alcohol poisoning and released.[135]

Despite his release, the hospital continued to process the drug screen.[136] Several weeks later, the physician was notified by email that the accused tested positive for cannabinoids.[137] The hospital notified the Air Force Office of Special Investigations (AFOSI) of the test results, and interrogated the appellant.[138] The appellant initially denied having used illegal drugs but when confronted with the results of the drug screen, the accused confessed in writing.[139] The drug screen results were hearsay

130. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).
131. 56 M.J. 410 (2002).
132. *Id.* at 412.
133. *Id.*
134. *Id.*
135. *Id*.
136. *Id*.
137. *Id.*
138. *Id.*
139. *Id.*

under MRE 801.[140] The government, however, offered the drug screen results under MRE 803(6)[141] as a "business record" exception to the hearsay rule. The drug screen results were not offered as substantive evidence against the appellant, but only for the limited purpose of corroborating the confession.[142]

The court found that, "The Government called no witnesses from either Incirlik [Air Force Base] or Armstrong [Laboratory] to testify about the chain of custody regarding appellant's urine sample. Nor did it call any witnesses to testify about the testing procedures used at Armstrong Laboratory."[143] The government also did not adduce testimony from witnesses regarding the testing procedures used at Armstrong Laboratory.[144] Instead, the government simply called Capt. Poindexter and another hospital employee to demonstrate the hospital's reliance on the record and to establish that the record was procured and incorporated in the hospital's records in the normal course of business.[145] The trial judge, over defense

---

140. MCM, *supra* note 5, MIL. R. EVID. 801.

141. *Id.* MIL. R. EVID. 803(6), which provides that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilation normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

Id.

142. *Grant*, 56 M.J. at 413.

143. *Id.*

144. *Id.*

objection, found the confession sufficiently corroborated and admitted the confession into evidence.[146] The sum of the evidence before the members was the confession and the foundational testimony for the drug screen results as a business record for the "limited purpose" of corroborating the confession.[147] The AFCCA affirmed the conviction.[148]

The CAAF also affirmed the conviction.[149] The appellant asserted the government was required to introduce scientific testimony to interpret the drug screening results and substantiate testing procedures.[150] The CAAF rejected this claim by reasoning the drug screen results were proffered not as substantive evidence, but only for the limited purpose of corroborating the confession. Thus, the foundational testimony which would otherwise be required was not necessary.[151]

The appellant also argued there was insufficient evidence to corroborate the confession.[152] The CAAF also rejected this argument, citing *United States v. Melvin*,[153] for the proposition that the quantum of evidence required to corroborate a confession "may be very slight."[154] Unlike the

---

145. *Id.*

146. *Id.*

147. *Id.*

148. United States v. Grant, 2001 C.C.A. LEXIS 22 (A.F. Ct. Crim. App. Jan. 18, 2001).

149. *Grant*, 56 M.J. at 410.

150. *Id.* at 416. The appellant cited *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987). *Murphy* was part of a trilogy of cases that set forth a three-part test for the admissibility of drug screen results proffered by the government in a court martial. As will be discussed *infra*, the three elements are: (1) the seizure of the urine sample must be a lawful seizure; (2) the laboratory results must be admissible, requiring proof of a chain of custody of the sample, that is, proof that proper procedures were utilized; and (3) there must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful. *Id.* The other two cases are *United States v. Harper*, 22 M.J. 157 (1986) and *United States v. Ford*, 23 M.J. 331 (1987). The three cases are summarized into a three-part test in *United States v. Graham*, 50 M.J. 56 (1999).

151. *Grant*, 56 M.J. at 416.

152. *Id.*

153. *Id.* (citing 26 M.J. 145 (C.M.A. 1988) (finding sufficient independent evidence had been introduced to support the confession of the accused)).

154. *Id.*

situation in *Grant*, the appellant's confession in *Melvin* was corroborated by numerous items of other independently admissible evidence.[155] The *Grant* court chose not to address this distinction.

In *Grant*, the record reflected an adequate foundation for the admission of a business record under MRE 803(6).[156] In affirming the foundational prerequisites, the CAAF examined how other federal courts of appeals applied the business record exception when "a document prepared by a third party is properly admitted as part of a second business entity's records if the second business integrated the document into its records and relied upon it in the ordinary course of its business."[157] The difficulty in this analysis lies in the nature of the record itself. Drug screen results of biochemical testing are scientific evidence. None of the cases cited by the *Grant* court dealt with the admissibility of scientific results of biochemical testing or drug screening.[158] The drug screen was a business record prepared by a third party, not by a testifying witness. The majority in *Grant* cited federal courts of appeal cases involving repair estimates and firearm sales invoices as business records prepared by a third party.[159] There is a qualitative difference between routine transactions that constitute normal business records, such as invoices and receipts, and drug screen results.

---

155. *Id.* In *Melvin*, the COMA listed a variety of independently admissible evidence in the record to corroborate the appellant's confession. We will examine this case in greater detail *infra*. The following describes the quantum of corroboration in *Melvin*:

> In the instant case, independent evidence in the record shows that at the time of his arrest, appellant was in possession of heroin, the very drug he confessed to using earlier. Moreover, the heroin was contained in cigarettes, the very method of consumption he admitted to employing on the earlier dates. Also, the straws found in his car clearly suggest a familiarity with the drug culture consistent with the number of acts he admitted. Finally, evidence of his friendship with Dudu, a known drug dealer, and his leaving Dudu's apartment at the time of his arrest dovetails with his description of the situs and circumstances of his earlier acts.

United States v. Melvin, 26 M.J. 145, 147 (C.M.A. 1986). *See Grant*, 56 M.J. at 416.

156. *Grant*, 56 M.J. at 416; *see* MCM, *supra* note 5, MIL. R. EVID. 803(6).

157. *Grant*, 56 M.J. at 414.

158. *Id.* (citing Air Land Forwarders, Inc. v. United States, 172 F.3d 1338 (Fed. Cir. 1999); MRT Constr., Inc. v. Hardrives, 158 F.3d 478 (9th Cir. 1998); United States v. Doe, 960 F.2d 221 (1st Cir. 1992); United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992); United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978); United States v. Carranco, 551 F.2d 1197 (10th Cir. 1977)).

159. *Grant*, 56 M.J. at 414.

Drug screen results are scientific reports that demand expert testimony as a precondition to admissibility under the rules of evidence.

In the prosecution of a typical urinalysis case, the positive test results of a drug screen are admitted into evidence in one of three ways—through stipulation, judicial notice, or through the testimony of an expert witness.[160] Under MRE 702,[161] an expert witness may be called to explain drug screen testing procedures for proving an accused's usage of an illegal substance. This testimony can be rather involved and complicated.[162] The chain of custody of the urine sample and procedures for its handling at the lab are also admissibility requirements.[163]

Before *United States v. Murphy*,[164] the government proved use of illegal substances by introducing the testimony of the unit alcohol and drug coordinator and the assigned urinalysis observer. The observer linked the accused to a particular urine sample, and then introduced the positive urinalysis results as a business record. The government was able to convict the accused without the testimony of an expert witness.[165] This practice ended with *United States v. Murphy*.[166] In *Murphy*, a sailor was convicted for the wrongful use of illegal drugs. The government presented no scientific or expert testimony, but relied on testimony "from various witnesses from the command concerning the command procedures for taking the specimen from appellant, mailing it to the laboratory, its return to command, and its presence in the courtroom."[167] The Court of Military Appeals (COMA) rejected this approach and required expert testimony to prove illegal use of drugs. "We are not persuaded that the scientific prin-

---

160. Captain David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 7.

161. MCM, *supra* note 5, MIL. R. EVID. 702.

162. Captain Fitzkee's article describes the scientific testimony required of the expert:

> After establishing the witness as an expert, the trial counsel should use the expert's testimony to: explain how the laboratory receives, processes, and tests urine samples; explain the scientific principles behind the radioimmunoassay (RIA) test and the gas chromatography/mass spectrometry (GC/MS) test that the laboratory uses; explain the results of the tests of the accused's sample; explain the meaning of the results; explain the internal and external quality control procedures that guarantee that the result is accurate; and introduce into evidence the accused's urine bottle and the laboratory reports pertaining to that sample.

Fitzkee, *supra* note 160, at 13.

ciples of urinalysis are matters of 'common sense' or of 'knowledge of human nature'. . . the determination of the identity of narcotics certainly is not generally within the knowledge of men of common education and experience."[168]

The foundational testimony for admitting the drug screen results in *Murphy* are nearly identical to those in *Grant*.[169] In *Grant*, the drug screen results were admitted as a business record based on the testimony of workers at the hospital to demonstrate the hospital's reliance on the record and to establish that the record was procured and incorporated in the

---

163. Captain Fitzkee's article also describes the procedural aspects of the drug screen:

> Urine samples typically arrive by registered mail in the laboratory's mail room. The unopened boxes are thereafter transferred to the receiving and processing section. A technician inspects each sealed box, which contains up to twelve urine samples, to ensure that the box is sealed with tape. If the box is not sealed, or there are other signs of tampering, the samples in that box are rejected, and not tested. If everything is in order, the processing technician opens the box and compares the social security number and specimen number on each bottle with the numbers on the DA Form 5180-R that accompanied the box. Each number must exactly correspond. The technician assigns each accepted sample a laboratory accession number, by which the sample is tracked throughout the laboratory. The technician places this number on the urine bottle and on the DA Form 5180-R. The samples are then configured into batches for testing, and are put into temporary storage in a secure, limited-access area. Other technicians later conduct tests by removing aliquots from the bottles kept in temporary storage. All tests are documented to establish a proper chain of custody. The bottles remain in temporary storage until the sample is determined to be negative and is discarded, or until it is determined to be positive and is transferred to long-term storage. The laboratory determines that a sample is negative when the sample contains no drug or drug metabolites or contains drug or drug metabolites at threshold levels below those established by Department of Defense ("DOD"). The laboratory determines that a sample is positive when two separate tests by RIA and GC/MS confirm that it contains drugs or drug metabolites at levels exceeding the DOD thresholds.

Id.

164. 23 M.J. 310 (C.M.A. 1987).
165. Fitzkee, *supra* note 160, at 12.
166. *Murphy*, 23 M.J. at 310.
167. *Id*. at 311.
168. *Id*.
169. *Compare id., and* United States v. Grant, 56 M.J. 410 (2002).

hospital's records in the normal course of business.[170] As a result of *Grant*, the government will no longer have a need to call for scientific testimony, at least when the accused confesses to use.

In their deletion of the requirement to proffer scientific testimony or testimony regarding the chain of custody as a condition precedent to the admission of drug screen results, the CAAF set the legal standard lower than the Supreme Court mandated in *Smith* and *Opper.*[171] An unwanted byproduct may be lower standards in conducting the urinalysis program. Since the government now needs only an email as a business record for the purpose of corroboration of a confession, units may not be as vigilant with chain of custody procedures. The laboratories may lower their level of oversight with handling and testing procedures. Not only does *Grant* erode the protections of the corroboration rule, it causes harm to the integrity of the urinalysis program of the Department of Defense. In effect, *Grant* is a practical reversal of *Murphy.*

Murphy was one of three cases which set forth a three part test for the admission of drug screen results.[172] *United States v. Graham* articulated the three part test.[173] Judge Sullivan authored a concurring opinion in *Grant* in which he recognized the majority's opinion "erodes the holding of this Court in [*United States v.*] *Graham* and I join it."[174] In *Graham*, the appellant was charged with the unlawful use of marijuana when a drug screen analysis of the appellant's urine tested positive with the presence of THC metabolites.[175] Four years earlier (1991), the appellant had another positive urinalysis and was court-martialed for that alleged use.

The court acquitted the appellant at the previous court-martial after he asserted an innocent ingestion defense.[176] At trial for the alleged subsequent use, the military judge allowed the government to cross examine the accused regarding the 1991 positive urinalysis. On cross examination, the evidence of the earlier urinalysis was not offered to prove the accused

---

170. *Grant*, 56 M.J. at 413.

171. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

172. *See* United States v. Ford, 23 M.J. 331 (1987); United States v. Murphy, 23 M.J. 310 (1987); United States v. Harper, 22 M.J. 157 (1986).

173. 50 M.J. 56 (1999).

174. *Grant*, 56 M.J. at 418. Judge Sullivan also authored the dissent in *United States v. Graham*, 50 M.J. 56, 59-64 (1999).

175. *Graham*, 50 M.J. at 57.

176. *Id.*

knowingly used illegal drugs in 1991. It was offered to rebut the appellant's trial testimony that "there is no way I would knowingly use marijuana" and that, after he was notified about the 1995 urinalysis, he was "shocked, upset, and flabbergasted."[177] The CAAF held the trial judge abused his discretion by allowing the government to admit evidence of a positive drug screen for the limited purpose of rebuttal.

The majority relied on the three part test which established the "rules by which factfinders in courts-martial may infer from the presence of a controlled substance in a urine sample that a servicemember knowingly and wrongfully used the substance."[178] To satisfy the three part test: (1) the seizure of the urine sample must be a lawful seizure; (2) "the laboratory results must be admissible, requiring proof of a chain of custody of the sample, i.e., proof that proper procedures were utilized;" and (3) "last, but importantly, there must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful."[179]

The court found none of these rules had been observed by the military judge in admitting the evidence for the limited purpose of rebuttal and the military judge had abused his discretion admitting it to the material prejudice of the appellant.[180] The court concluded as follows:

> Our dissenting colleagues seem to forget, once again, that our service personnel, who are called upon to defend our Constitution with their very lives, are sometimes subject to searches and seizures of their bodies, without probable cause, for evidence of a crime. We should zealously guard the uses of these results and hold the Government to the highest standards of proof required by law.[181]

Judge Sullivan observed the holding in *Grant* eroded the finding in *Graham*.[182] In both, evidence of a positive urinalysis was not offered to prove substantively the appellant used illegal drugs. In *Grant* it was

177. *Id.*
178. *Id*. at 58.
179. *Id.* at 58-9.
180. *Id.* at 59.
181. *Id.* at 60.
182. *Graham*, 50 M.J. at 56 (citing United States v. Grant, 56 M.J. 410 (2002)).

offered under the business record exception to the hearsay rule for the limited purpose of corroborating the confession of the accused.[183] In *Graham* it was offered for the limited purpose of rebuttal on cross-examination.[184] In neither case was evidence adduced regarding the chain of custody nor the compliance with proper procedures in the handling of the specimen. Neither case included scientific or expert testimony to validate the results. *Grant* did not follow any of the three "rules by which factfinders in courts-martial may infer from the presence of a controlled substance in a urine sample that a servicemember knowingly and wrongfully used the substance."[185]

Grant appears to be the only military case in which the CAAF upheld a conviction based solely on a confession that is corroborated on evidence admitted strictly for the limited purpose of corroborating the appellant's confession.[186] The drug screen results in *Grant* admitted under the business record exception to the hearsay rule to corroborate the confession, fell short of the legal standards of *Graham* and *Murphy.*[187] As such, the results should have been considered inadmissible hearsay.[188] As inadmissible hearsay, this information was not evidence at all. This information constituted neither direct nor circumstantial evidence for showing the accused was guilty of the crime charged. Military Rule of Evidence 304(g) requires that "[a]n admission or confession of the accused may be considered as evidence against the accused only if independent evidence, *either direct or circumstantial,* has been introduced that corroborates the essential facts admitted sufficiently to justify sufficiently an inference of their truth."[189] Direct evidence is defined as "[e]vidence in the form of testimony from a witness who actually saw or touched the subject of questioning."[190] Circumstantial evidence is "[t]estimony not based on personal actual knowledge or observation of the facts in controversy, but

183. MCM, *supra* note 5, MIL. R. EVID. 803(6); *Grant,* 56 M.J. at 413.

184. *Graham,* 50 M.J. at 57.

185. *Id.* at 58.

186. *Grant,* 56 M.J. at 414-15.

187. *Id.* at 417; *see* United States v. Murphy, 23 M.J. 310 (1987).

188. "Hearsay is not admissible except as provided by these rules or by any act of Congress applicable in trials by court-martial." MCM, *supra* note 5, MIL. R. EVID. 802.

189. *Id.* MIL. R. EVID. 304(g) (emphasis added).

190. BLACK'S LAW DICTIONARY 576 (7th ed. 1999).

other facts from which deductions are drawn, showing indirectly the facts sought to be proved."[191]

The evidence admitted for the limited purpose of corroborating the appellant's confession in *Grant* meets neither of these definitions. As Judge Sullivan points out in his concurrence,

> [E]vidence of a prior positive test result (in the form of a business record entry) was admitted for a purpose other than to directly show the charged offense. It was admitted to corroborate appellant's confession to all the charged misconduct by proving some of the more recently charged drug misconduct included in that confession.[192]

United States v. Grant is troubling. The CAAF essentially allowed the military judge to forge a single piece of admissible evidence from among several forms of inadmissible hearsay.[193] The accused's confession was not admissible as evidence against him unless corroborated. The drug screen results were not admissible against the accused as a matter of direct evidence under *Graham* and *Murphy.*[194] Yet, the court allowed the judge to bootstrap one onto the other to create a single piece of admissible evidence and convict the accused on that basis. According to Black's Law Dictionary, inadmissible material is not evidence at all. It defines evidence as "[t]hat probative material, *legally received*, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue."[195] The facts of *Grant*[196] are analogous to those in *United States v. Duvall*,[197] in which the opposite result was found.

2. United States v. Duvall

In *Duvall*, the CAAF reversed the conviction of an Air Force appellant who was convicted solely on the basis of his confession.[198] Airman

191. *Id.* at 243.
192. *Grant*, 56 M.J. at 418.
193. *Id.* at 410-17.
194. *See id.*; United Stated v. Graham, 50 M.J. 56 (1999); United States v. Murphy, 23 M.J. 310 (C.M.A. 1987).
195. BLACK'S LAW DICTIONARY, *supra* note 190, at 555 (emphasis added).
196. 56 M.J. at 410-18.
197. 47 M.J. 189 (1997).
198. *Id.*

Duvall, the appellant, was charged with the unlawful use of marijuana. He had allegedly used the marijuana with a buddy, Airman First Class (A1C) McKague. Airman First Class McKague confessed to smoking marijuana with the appellant to Senior Airman (SrA) Brents.[199] Information regarding the use of illegal drugs came to the attention of Air Force investigators, who took the appellant into custody and questioned him.[200] The appellant confessed in a written statement.[201] Before trial, the court held an Article 39(a)[202] session at which A1C McKague invoked his privilege against self-incrimination and stated he would not testify as to the merits of the allegations against appellant. The unavailability of McKague's testimony left the government only with the testimony of SrA Brents.[203] Brents' testimony consisted only that McKague had told him the appellant had used illegal drugs with him (McKague).[204] The military judge ruled that, while Brents' testimony was inadmissible hearsay, [205] he could nevertheless consider Brents' testimony on the issue of corroboration. At the close of the government's case, the only evidence against the accused was the confession.[206] "The 'net' result of the military judge's ruling was Brents' corroborative testimony was not introduced during trial on the merits."[207]

In *Duvall*, the CAAF determined there was a requirement that corroborative evidence of a confession be admissible: "[t]he text of the Rule continues the longstanding requirement that a confession cannot be considered on the issue of guilt or innocence unless corroborating evidence 'has been introduced.'"[208] The CAAF reversed the conviction noting that MRE 304(g) has two parts: (1) a determination that the confession is admissible based on sufficient corroboration, and (2) a determination by the trier of fact that the confession *plus* the corroborating evidence establish guilt beyond a reasonable doubt.[209] The CAAF held the AFCCA ignored the second part of this analysis and reversed the conviction.[210] The CAAF

199. *Id.* at 190.
200. *Id.*
201. *Id.*
202. UCMJ art. 39(a) (2002).
203. *Duvall*, 47 M.J. at 190.
204. *Id.*
205. MCM, *supra* note 5, MIL. R. EVID. 802.
206. *Duvall*, 47 M.J. at 190.
207. *Id.* at 191.
208. *Id.* at 192.
209. *Id.* (emphasis added).
210. *See* Major Martin H. Sitler, *Widening the Door: Recent Developments in Self Incrimination Law,* ARMY LAW., Apr. 1998, at 93.

reasoned that "[t]he role of the members in deciding what weight to give a confession would be undermined if the corroborating evidence were produced only at an out-of-court session under Article 39(a) but not introduced before the members during their consideration of guilt or innocence."[211]

3. United States v. Faciane[212]

Unlike *Grant* and *Duvall*, *Faciane* was not an Air Force drug case but the facts lend themselves to a similar legal analysis.[213] Airman First Class Faciane was convicted of committing indecent acts on his three-year old daughter.[214] After the appellant divorced the child's mother in February 1991, he was granted visitation rights. Several months later, the mother observed the child's aberrant behavior after returning from visitation with the appellant.[215]

By October, the child's behavior worsened.[216] The child's day care provider also observed and testified to the child's worsening behavior.[217] The mother took the child to the hospital. Before going to the hospital, she told the child that she was "going to see a doctor and there would be a lady there for her to talk to."[218] The "lady" who interviewed the child was Mrs. Cheryl Thornton, a member of the Child Protective Committee at Children's Memorial Hospital in Oklahoma City.[219] As a result of the inter-

211. *Duvall*, 47 M.J. at 192.

212. 40 M.J. 399 (C.M.A. 1994).

213. *Compare id.*, *with* United States v. Grant, 56 M.J. 410 (2002), *and* United States v. Duvall, 47 M.J. 189 (1997).

214. *Faciane*, 40 M.J. at 399.

215. *Id.* at 400. The facts of the case provide the mother "noticed that her daughter would wet the bed, have nightmares, would not eat, and would be withdrawn after visiting appellant." *Id.*

216. The mother described her daughter's behavior as "extremely withdrawn and extremely angry. She could not relax. She was running around the house and throwing her toys. When I put her to bed, she would not relax enough to go to sleep. She was hiding under her bed and crying." The mother testified having observed the child inserting a toothbrush inside her vagina. *Id.*

217. *Id.* "Ms. Fancher testified that in October the child's behavior became 'three times worse.' She would throw toys, hit younger children, refuse to use the bathroom, and refuse to eat." *Id.*

218. *Id.*

219. *Id.*

view, Mrs. Thornton reported the matter to the Del City, Oklahoma, police department, who referred the matter to the AFOSI.[220]

Special Agent (SA) Gardner of AFOSI conducted a custodial interrogation of the appellant. Appellant waived his rights and provided a written statement. In his written statement appellant admitted touching his daughter's vaginal area on three occasions.[221] His written statements revealed the appellant's motive for touching the child's vaginal area was "sexual arousal."[222]

At trial, appellant moved to suppress his statement as uncorroborated. He also moved to suppress Mrs. Thornton's testimony as inadmissible hearsay. The government's response was that Mrs. Thornton's testimony was admissible as a statement for the purpose of obtaining medical diagnosis in accordance with MRE 803(4)[223] and her testimony was corroborative of the appellant's confession.[224] The military judge ruled that the child's statements to Mrs. Thornton were admissible under MRE 803(4) and were sufficient to satisfy the corroboration requirement of MRE 304(g).[225] The Air Force Court of Military Review affirmed the conviction, but the COMA overturned it.[226]

The COMA noted the following two-pronged test to satisfy the requirements of MRE 803(4): "first, the statements must be made for the purposes of 'medical diagnosis or treatment;' and second, the patient must make the statement 'with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought.'"[227] The court

---

220. *Id.* at 402.
221. *Id.*
222. *Id.*
223. MCM, *supra* note 5, MIL. R. EVID. 803(4). It provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id.

224. *Faciane*, 40 M.J. at 402.
225. *Id.*
226. *Id*.
227. *Id*. at 403.

held the testimony failed to satisfy the second prong of the test: "[t]here is no evidence indicating that the child knew that her conversation "with a lady" in playroom surroundings was in any way related to medical diagnosis or treatment. Mrs. Thornton testified that she did not present herself as a doctor or do anything medical."[228] Having found Mrs. Thornton's testimony to be inadmissible hearsay, the court further held that it was insufficient to corroborate the appellant's confession.[229] There was independent evidence that the appellant had exclusive custody of the child and, that the accused had, an opportunity to commit the offense. The court, however, found this insufficient to corroborate the confession: "we are unwilling to attach a criminal connotation to the mere fact of a parental visit."[230]

4. Reconciling Grant with Duvall and Faciane

All three of these cases involved a confession which was the result of custodial interrogation. In *Duvall* and *Faciane*, the courts held the evidence proffered to corroborate the confession was inadmissible hearsay, and therefore, insufficient as corroborative evidence.[231] Indeed, after *Duvall*, the issue as to whether inadmissible hearsay could be the basis for corroborating a custodial confession seemed to be settled.

> *Duvall* affirms the traditional protection afforded to an accused under the corroboration rule. The court mandates that the prosecution present admissible corroborating evidence to the trier of fact when introducing the accused's confession. The Air Force court's significant departure from the traditional application of the corroboration rule required the CAAF to resolve the issue to ensure the rule's uniform application. The message is now clear: to convict using an out-of-court statement from the accused, the fact-finder must base its decision on a corroborated confession—that is, a confession plus corroborative evidence.

---

228. *Id.*

229. *Id.*

230. *Id. Duvall* cites *Faciane* as authoritative on the sufficiency of evidence required to corroborate the appellant's confession. *Id.* "Because the military judge's ruling in this case precluded the members from considering any corroborating evidence in deciding what weight to give appellant's confession, the findings that are based solely on the confession must be set aside." United States v. Duvall, 47 M.J. 189, 192 (1997).

231. *See* United States v. Duvall, 47 M.J. 189 (1997); United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).

> To satisfy this requirement, the government must introduce *admissible* corroborative evidence.[232]

In *Grant*, the evidence used to corroborate the confession was an emailed drug screen result, [233] which under *Murphy* and *Graham*, constituted inadmissible hearsay.[234] The CAAF upheld its admission "for the limited purpose of corroborating the appellant's confession"[235] and affirmed the conviction solely on the basis of the confession. Bearing in mind the historical distrust of confessions and the concerns involving abuse of power, reliability, and the aspiration for skillful and thorough law enforcement investigation, it cuts against the rights of the accused and endangers the urinalysis program. It is the quality of the corroborative evidence which ensures the protection of the accused's rights. Yet, the quality of the corroboration also helps to preserve the integrity of the urinalysis program. Military Rule of Evidence 304(g) must demand only evidence of a sufficient quality to serve these ends be operative to corroborate a confession.

E. The Quality of Corroborative Evidence

Appellate issues surrounding the corroboration rule frequently involve the weight and sufficiency of the corroborative evidence. Often, the debate is a determination of whether there exists a sufficient quantum of evidence to ensure the reliability of the confession. As the Supreme Court stated in *Smith:*

> There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty.[236]

---

232. Sitler, *supra* note 210, at 103 (emphasis in original).

233. United States v. Grant, 56 M.J. 410, 412 (2002).

234. *See* United Stated v. Graham, 50 M.J. 56 (1999); United States v. Murphy, 23 M.J. 310 (1987).

235. *Grant*, 56 M.J. at 411.

236. United States v. Smith, 348 U.S. 147, 156 (1954).

This article postulates the quality of the corroborative evidence is of equal, if not greater, importance to the reliability of the confession than the quantum of corroboration. In *Grant*,[237] the CAAF relied on *United States v. Melvin*[238] in noting the quantum of evidence needed to corroborate "may be very slight."[239] A closer review of *Melvin*, however, shows that the assertion of *Melvin* as a means to minimize the sufficiency of corroboration may be misplaced.

In *Melvin*, an Army sergeant and his wife were stopped by German police who found cigarettes in the car containing a white powdery substance and three drinking straws with white adhesions on them later identified them as heroin.[240] As a result of subsequent custodial interrogation, the appellant confessed to the use of heroin and provided information about his supplier.[241] At trial, the appellant redacted his confession. He claimed his wife had used the drugs. His wife corroborated his testimony. There was chemical analysis showing he had not used heroin.[242]

The COMA granted review on the following issue: "Whether appellant's conviction for the offense of wrongful use of heroin can stand solely upon appellant's uncorroborated confession."[243] Having certified this issue for review, it is revealing that the court decided the issue on other grounds. "We hold that appellant's confession was adequately corroborated by other evidence presented in this case and conclude that his conviction was proper."[244] The court did not affirm the conviction based on the legal issue as to whether the conviction could stand solely on the basis of an uncorroborated confession. Instead, they determined there existed sufficient independent admissible evidence sufficient to corroborate his confession. Specifically, the court noted the fact that:

> [I]ndependent evidence in the record shows that at the time of his arrest, appellant was in possession of heroin, the very drug he confessed to using earlier. Moreover, the heroin was contained in cigarettes, the very method of consumption he admitted to employing on the earlier dates. Also, the straws found in his car

237. 56 M.J. at 416.
238. 26 M.J. 145, 146 (C.M.A. 1988).
239. *Grant*, 56 M.J. at 416 (citing *Melvin*, 26 M.J. at 146).
240. *Melvin*, 26 M.J. at 146.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*

> clearly suggest a familiarity with the drug culture consistent with the number of acts he admitted. Finally, evidence of his friendship with Dudu, a known drug dealer, and his leaving Dudu's apartment at the time of his arrest dovetails with his description of the situs and circumstances of his earlier acts.[245]

The record revealed numerable items of evidence, independent of the confession, directly admissible against the accused. The court commented in dicta the evidence "may be very slight," but was referring to the drafter's analysis in making this conclusion.[246] As regards the quantum of evidence, the drafter's analysis provides, "The corroboration rule requires only that evidence be admitted which would support an inference that the essential facts admitted in the statement are true."[247] The drafter's analysis can be read to mandate the admissibility of the corroboration.

Another case often cited for the proposition that the quantity of corroboration is "slight" is *United States v. Yeoman*.[248] In *Yeoman*, a young Marine was charged with larceny for stealing a brown case that contained a number of audio cassettes. Private (Pvt.) Yeoman found the cassette case among some personal items left in a common area. After taking the case, he secreted himself to examine its contents. Inside were twenty-four cassettes, several personal letters and an airline ticket. Yeoman threw sixteen of the cassettes in a dumpster and secured the case in a locker.[249] Once the larceny was reported, Yeoman was taken to the provost marshal's office for interrogation. In the course of custodial interrogation, Yeoman confessed to the larceny in writing.[250]

On appeal, defense counsel argued the confession had not been sufficiently corroborated for its admission into evidence. The COMA, citing the *Military Rules of Evidence Manual*,[251] stated, "the quantum of evidence" needed to raise such an inference is "slight."[252] The corroborative evidence consisted of testimony that Yeoman had missed morning formation,[253] recovery of eight cassette tapes from his locker, recovery of the

245. *Id.* at 147.
246. *Id.* at 146.
247. 1984 MCM, *supra* note 103, MIL. R. EVID. 304 (g), A22-13.
248. 25 M.J. 1 (C.M.A. 1987).
249. *Id*. at 3.
250. *Id.* at 2-3.
251. SALTZBURG, SCHINASI & SCHLUETER, *supra* note 94.
252. *Yeoman*, 25 M.J. at 4.

cassette case, and his fingerprint on the cassette case. The court found this to be sufficient corroboration.[254]

In *Yeoman*, the corroborative evidence consisted of several items of physical evidence that were independently admissible against the accused. Both the quantity and the quality of the corroborative evidence were substantial. This is precisely the type of corroborative evidence contemplated in *Smith* and *Opper*.[255] Given the relative quality of the corroborative evidence, it is ironic that *Yeoman* is cited most often for the simple proposition, in dicta, that the quantum of corroboration need only be "slight."[256]

United States v. Harjak[257] presents an analysis of the corroboration rule which illuminates the role of hearsay testimony as corroboration. In *Harjak*, the appellant faced charges of sodomy and indecent acts upon his ten year-old daughter.[258] The appellant had divorced the victim's mother when the child was three years old. The mother re-married. Several years later, the State of Iowa took the child-victim out of the mother's custody and granted custody to the appellant when it determined the child-victim's stepfather had sexually molested her.[259] Four months after the child-victim had moved into the appellant's home, she was again removed. She was placed in foster care when allegations surfaced to the Naval Investigative Service (NIS) that the appellant had sodomized her and engaged in indecent acts with her.[260]

An NIS agent interviewed the child-victim at the foster home. The agent recorded the interview. The interview was later transcribed and

253. Private Yeoman was also charged with unauthorized absence from his appointed place of duty. *Id.*

254. *Id*. at 5.

255. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

256. *Yeoman*, 25 M.J. at 4.

257. 33 M.J. 577 (N.M.C.M.R. 1991).

258. *Id.* at 580.

259. *Id*.

260. *Id.*

sworn to by the child-victim. After this interview, another NIS agent interviewed the appellant, who confessed in writing twice.[261]

At trial, the government moved *in limine* to get a ruling on the admissibility of the confessions.[262] The proffered corroborating evidence was the interview between the NIS agent and the child-victim. The child-victim did not testify. The government sought admission of the interview for the purpose of corroborating the confessions. As a basis for admissibility, the government cited the unavailability of the child-victim and the residual hearsay exception, MRE 804(b)(5)[263] and 803(24).[264] Determining the child-victim to be unavailable and the interview to possess sufficient particularized guarantees of trustworthiness, the military judge admitted the transcript over defense objeciton, as corroboration of the appellant's two confessions.[265] The defense contended that the appellant's Sixth Amendment right to confrontation of witnesses had been violated and that there was insufficient corroborating evidence.[266]

On appeal, the government conceded to the appellant's assertion the military judge improperly found the victim unavailable to testify at trial. The *Harjak* court then examined the interview for particularized guaran-

---

261. *Id.* at 581.

262. *Id.*

263. MCM, *supra* note 5, MIL. R. EVID. 804(b)(5).

264. *Id.* MIL. R. EVID. 803(24). Both MRE 804(b)(5) and MRE 803(24) are currently codified under MCM, *supra* note 5, MIL. R. EVID. 807. It provides as follows:

> Residual Exception. A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

265. United States v. Harjak, 33 M.J. 577, 581 (1991).

266. U.S. CONST. amend. VI; Maryland v. Craig, 497 U.S. 836 (1990) (upholding a state-court procedure that permitted a child-victim to testify by one way closed circuit television as satisfying the Confrontation Clause of the Sixth Amendment).

tees of trustworthiness to determine its admissibility under MRE 803(24). Citing *Idaho v. Wright*,[267] the court noted the trustworthiness of hearsay statements under MRE 803(24),

> can only be determined by examining of the totality of the circumstances surrounding the making of the statement. These circumstances must eliminate the possibility of fabrication, coaching, or confabulation and, by revealing the declarant to be particularly worthy of belief, render adversarial testing of those statements superfluous.[268]

The *Harjak* court examined the findings of the military judge and found them insufficient to guarantee the trustworthiness of the statements. The statements in the interview lacked the reliability of admissible evidence, and therefore, "should not have been considered as corroborating evidence of appellant's confessions to sodomizing and committing indecent acts with his daughter."[269] Thus, it was not the quantity but the quality of the corroborative evidence that was lacking.

Harjak stands for the proposition that to satisfy the constitutional requirements, the evidence furnished to corroborate a confession must show "particularized guarantees of trustworthiness" or fall within a firmly rooted hearsay exception. In other words, evidence proffered to corroborate a confession must be as reliable as evidence admitted under any other hearsay exception.

Another case that is illuminating on the issue of the quality of the corroborating evidence is *United States v. Rounds*.[270] Senior Airman Rounds was charged with illegally using marijuana and cocaine during the Thanksgiving and New Year's holidays. A female civilian reported his drug use to the AFOSI. The AFOSI interrogated SrA Rounds. After submitting

---

267. 497 U.S. 805 (1990). The Court held that incriminating statements admissible under an exception to the hearsay rule are not admissible under the Confrontation Clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears adequate indicia of reliability. *Id.* The reliability requirement can be met when the statement either falls within a firmly rooted hearsay exception or is supported by a showing of "particularized guarantees of trustworthiness." *Id.* The residual hearsay exception is not a firmly rooted hearsay exception for Confrontation Clause purposes. *Id.*

268. *Harjak*, 33 M.J. at 582.

269. *Id*.

270. 30 M.J. 76 (C.M.A. 1990).

two written statements which were exculpatory, SrA Rounds prepared a third handwritten statement in which he confessed.[271] On appeal, the appellant asserted "this independent evidence was insufficient corroboration because it did not directly show that he consumed, ingested, or otherwise used drugs as he confessed."[272] The court found sufficient independent corroborative evidence of confession pertinent to the drug use at the New Year's Eve party, but insufficient corroboration as to his drug use during Thanksgiving. The testimony of two witnesses "dovetail[ed] with the time, place, and persons involved in the criminal acts admitted by appellant in his confession. More importantly, their testimony concerning these two incidents clearly shows that the appellant had both access and the opportunity to ingest the very drugs he admitted using in his confession."[273] Testimony from the only government witness as to the Thanksgiving incident was able to ascertain the appellant's presence at the place and time charged but he saw no drugs. The court found this insufficient to corroborate the confession.[274]

In *Melvin* and *Rounds*, circumstantial evidence placing the appellant at the place and time of the events charged, combined with the presence of illegal drugs, was held to be sufficient corroboration.[275] The circumstantial testimonial evidence in both cases was independently admissible showing "indirectly the facts sought to be proved."[276] This differs from *Faciane*, in which the government sought to supply corroborative testimony under MRE 803(4) as a statement for the purpose of obtaining medical diagnosis or treatment.[277] There was independent evidence that Faciane had exclusive custody of the child and, thus, an opportunity to commit the offense. But the court found this insufficient to corroborate the confession, deciding, "we are unwilling to attach a criminal connotation to the mere fact of a parental visit."[278] In all three cases, the government provided circumstantial evidence to supply the required

271. *Id.* at 78.
272. *Id.* at 80.
273. *Id.* (citing United States v. Melvin, 26 M.J. 145 (C.M.A. 1988)).
274. *Id.*
275. *See* United States v. Rounds, 497 U.S. 805 (1990); *Melvin*, 26 M.J. at 145.
276. BLACK'S LAW DICTIONARY, *supra* note 190.
277. United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).
278. *Id.* at 403.

corroboration. Reconciliation lies in the quality of the corroborative evidence, rather than in the quantum of the corroboration.

The differing roles of the military judge and the panel members is another important factor in the corroboration-rule analysis. The *Duvall* court, in citing *Faciane* as authoritative on the sufficiency of evidence required to corroborate the appellant's confession, states "[b]ecause the military judge's ruling in this case precluded the members from considering any corroborating evidence in deciding what weight to give appellant's confession, the findings that are based solely on the confession must be set aside."[279]

F. The Role of the Judge and the Role of the Members

Military Rule of Evidence 304(g) assigns to the military judge the role of determining whether there is adequate corroboration of the confession. "The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration."[280] The drafters legislated this assignment directly in response to *United States v. Seigle*,[281] which gave the panel members the decision regarding the admissibility of the confession.[282] This change made the determination of corroboration consistent with the military judge's role in determining the voluntariness of confession under MRE 304(d).[283] The rules generally call upon the military judge to decide preliminary questions on issues as to the admissibility of evidence.[284] Hearings on the admissibility of state-

279. United States v. Duvall, 47 M.J. 189 (1997).
280. MCM, *supra* note 5, MIL. R. EVID. 304(g).
281. 47 M.J. 340 (C.M.R. 1973).
282. For a discussion of this issue *see supra* note 92.
283. MCM, *supra* note 5, MIL. R. EVID. 304(d).
284. *Id.* MIL. R. EVID. 104(a):

> (a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

Id.

ments of the accused are required to be outside the hearing of the members when the case is being tried before a panel.[285]

A determination as to the adequacy of the corroborative evidence speaks to the sufficiency of the evidence as a whole, in addition to admissibility of the confession. This reflects the rule's dual role as a rule of admissibility of evidence and a rule of substantive law. It is because of this duality there can be a blur with the respective roles of the military judge and the panel members as it involves determinations of fact as well as determinations of law.

> A finding of corroboration is a finding of law because it governs the admissibility of evidence—the confession. Yet in two respects the finding is also a finding of fact. First, in order to decide whether a confession is corroborated one must make a judgment about facts. Second, this preliminary finding corresponds with the ultimate issue in the case: whether the confession is believable.[286]

An amendment to MRE 304(g) requiring admissible evidence to serve as corroboration of a confession or admission would aid in clearing up these blurred roles. This was precisely the situation the court faced in *Duvall*.[287] In *Duvall*, the government sought to admit the testimony of SrA Brents. Brents' testimony consisted only that McKague had told him that appellant had used illegal drugs with him (McKague).[288] The military judge found Brents' testimony was inadmissible hearsay. The military judge, however, allowed Brents to testify during the Article 39(a) session outside the presence of members to corroborate the confession, but he would not permit the government to present Brents' testimony to the members during the trial on the merits.[289] Based on Brents' testimony at the

---

285. *Id.* MIL. R. EVID. 104(c):

> (c) *Hearing of members.* Except in cases tried before a special court-martial without a military judge, hearings on the admissibility of statements of an accused under Mil. R. Evid. 301–306 shall in all cases be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

Id.

286. Ayling, *supra* note 7, at 1137.
287. 47 M.J. 189, 191 (2002).
288. *Id.*

Article 39(a) session, the military judge found the confession adequately corroborated and admitted it into evidence.[290]

Out of the hearing of the members, the military judge made a qualitative finding of fact that the confession was sufficiently reliable. While it is true that MRE 104(a) assigns to the judge the task of determining preliminary issues of the admissibility of evidence, the ultimate issue was the reliability of the confession. This provides an explanation for the necessity of having evidence admitted independently of the confession. This was the Supreme Court's intent in formulating the trustworthiness doctrine, as stated in *Opper*:

> Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.[291]

In *Grant*, the situation before the court was similar, but there was a procedural difference that changed the result. There, the government offered the report of the positive drug screen as a business record exception to the hearsay rule. It was offered for the limited purpose of corroborating appellant's confession.[292] The real issue, however, was the reliability and admissibility of the accused's confession.

Military Rule of Evidence 104(c) mandates that "the admissibility of statements of an accused under Mil. R. Evid. 301-306 shall in all cases be conducted out of the hearing of the members."[293] The admissibility of the confession in *Grant* was debated in open court despite the clear language of MRE 104(c) requiring consideration of admissibility of the confession in an Article 39(a) session.[294] The quality of evidence in each case was similar. This begs the question as to whether the CAAF would have decided *Duvall* differently if the military judge would have allowed SrA

289. *Id.*
290. *Id*. at 191.
291. United States v. Opper, 348 U.S. 84 (1954).
292. United States v. Grant, 56 M.J. 410 (2002).
293. MCM, *supra* note 5, MIL. R. EVID. 104(c).
294. *Id*.; *Grant*, 56 M.J. at 410.

Brents' hearsay for the limited purpose of corroborating the confession in open court rather than only in an Article 39(a) session.[295]

An amendment to MRE 304(g) requiring that corroborative evidence of a confession be independently admissible, would enable us to square *Grant* with *Duvall*. It would also clarify the requirements of the corroboration rule for military judges and counsel in its implementation. Most importantly, such an amendment would ensure the preservation of this aspect of the privilege against self-incrimination and faithfulness to the rationale for the creation of the rule.

IV. Conclusion

Military Rule of Evidence 304(g), the military version of the corroboration rule, may seem simple. Our review of its interpretive case law, reminds us that while the rule seems straightforward, its application to a particular set of facts in a case may be difficult. In its current form, it has led to some inconsistent results. The rule's most recent application in *Grant* endangers its role as a privilege against self-incrimination and could harm the integrity of our urinalysis program.

Military Rule of Evidence 304(g) should be amended to clarify its requirements in order to facilitate its fair and consistent application without eroding the protections it was formulated to provide. Accordingly, the rule should be amended to read as follows (proposed amendments emphasized):

> (g) Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced *into evidence* that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. *Independent evidence employed to supply corroboration of the admission must include evidence that is admissible against the accused. Statements of facts constituting otherwise inadmissible hearsay cannot be the sole basis for a finding of*

295. *Duvall*, 47 M.J. at 189.

> *sufficient corroboration of the confession or admission.* If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.
>
> (1) Quantum of evidence needed. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and *quality* of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.
> (2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. *In determining the admissibility of the confession or admission, the military judge must ensure there is some evidence admissible against the accused apart from the confession.* Corroborating evidence usually is to be introduced *into evidence* before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

These proposed amendments are consistent with the historical distrust of confessions and the rationale of the Supreme Court in *Smith* and *Opper.* As Senior Judge Pearson wrote in his dissent in *Duvall* before the AFCCA, "I conclude the trier of fact may use a confession as evidence to support a conviction only when the evidence used for corroboration is otherwise

admissible in evidence before it . . . The majority gives no meaning to words of those great justices who created the corroboration rule."[296]

The proposed amendment simplifies the requirements of the rule and provides clarification. It is consistent with the interpretation given in the majority of military cases. The proposed amendment precludes the erosion of the rule's purpose by preventing the military judge from synthesizing items of inadmissible hearsay in the creation of a single piece of evidence to supply as corroboration, as was the case in *Grant.* The proposed amendment would preserve the precedental value of case law, such as that in *Graham* and *Murphy,* protecting the integrity of our urinalysis program. Most importantly, these proposals strengthen and preserve the corroboration rule as a critical component in self-incrimination jurisprudence.

---

296. United States v. Duvall, 44 M.J. 501, 506-507 (A.F. Ct. Crim. App. 1996) (Pearson, J., dissenting) (citing United States v. Faciane, 40 M.J. 399 (C.M.A. 1994)).

TRANSFORMING INSTALLATION SECURITY: WHERE DO WE GO FROM HERE?

MAJOR GREGORY L. BOWMAN[1]

And let there be no doubt: in the years ahead, it is likely that we will be surprised again—by new adversaries who may also strike in unexpected ways. And as they gain access to weapons of increasing power, these attacks could grow vastly more deadly than those we suffered September 11th. Our challenge in this new century is a difficult one—to prepare to defend our nation against the unknown, the uncertain, the unseen and the unexpected. That may seem, on the face of it, an impossible task. It is not. But to accomplish it, we must put aside comfortable ways of thinking and planning--take risks and try new things—so we can prepare our forces to deter and defeat adversaries that have not yet emerged to challenge us.[2]

I. Introduction

The horrific events of 11 September 2001, demonstrated the United States' tremendous vulnerability to unpredictable, asymmetric terrorist

---

1. Judge Advocate, U.S. Army. Presently assigned as Assigned as Officer in Charge, Baumholder Branch Office, Office of the Staff Judge Advocate, 1st Armored Division, Germany. Currently on special assignment attached to Office of the Judge Advocate General, Administrative Law Division, Military Personnel Law Branch. J.D. 1993, University of Virginia School of Law; B.S. 1990, Longwood University (*summa cum laude*); A.S. & A.A.S. 1988, Southside Virginia Community College (*highest honor graduate*). Previous assignments include Office of the Staff Judge Advocate, Headquarters, U.S. Army Training and Doctrine Command, Fort Monroe, Virginia, 1999-2002 (Chief, Military and Administrative Law Division 2000-2002; Military Law Attorney 1999-2000); U.S. Army Logistics Management College, Fort Lee, Virginia 1997-1999 (Senior Procurement Law Professor); Headquarters, U.S. Army Combined Arms Support Command and Fort Lee, Fort Lee, Virginia, 1996-1997 (Senior Special Assistant United States Attorney and Trial Counsel); Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 1994-1996 (Trial Counsel and Legal Assistance Attorney). Member of the bars of Virginia, the Federal District Court for the Eastern District of Virginia, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court. This article was submitted in partial completion of the Master of Laws requirements of the 51st Judge Advocate Officer Graduate Course.

2. Secretary of Defense Donald H. Rumsfeld, Address at the National Defense University (Jan. 31, 2002).

threats against both civilian and military targets. In the military setting, this vulnerability was particularly evident as Army installations throughout the Continental United States (CONUS) rapidly attempted to increase their force protection conditions,[3] only to discover that their organic security forces were woefully inadequate to meet the challenge.[4] This inadequacy forced installations to turn to temporary security forces comprised of mobilized National Guard and U.S. Army Reserve units as well as active duty personnel reassigned from other duty positions.[5]

Faced with this dangerous and unpredictable operating environment, Army leaders sought to develop a new, innovative installation security strategy, designed to provide not only comprehensive force protection, but also to assist combat units to be fully manned to fight the Global War on Terrorism.[6] Unfortunately, the Army soon discovered that federal statutes significantly restricted one such innovative strategy, the "contracting out"

---

3. U.S. GEN. ACCOUNTING OFFICE REPORT, COMBATING TERRORISM: ACTIONS NEEDED TO GUIDE SERVICES ANTITERRORISM EFFORTS AT INSTALLATIONS GAO-03-14 (Nov. 2002). "After the September 11, 2001 terrorist attacks, domestic military installations increased their antiterrorism measures to their highest levels." *Id*. at 1. *See also* U.S. DEP'T OF ARMY, REG. 525-13, ANTITERRORISM para. B-1 (4 Jan. 2002) [hereinafter AR 525-13]. The Army has five force protection conditions (FPCON), which "describe progressive levels of security measures to counter threats to U.S. Army personnel, information, or critical resources." These FPCON's range from FPCON "normal," in which no discernible terrorist threat exists, to FPCON "delta," in which a terrorist attack has occurred or is likely to occur against a specific target. *Id*; *see generally* U.S. DEP'T OF DEFENSE, DIR. 2000.12, DOD ANTITERRORISM/FORCE PROTECTION (AT/FP) PROGRAM para. 5.1.9 (13 Apr. 1999) [hereinafter DOD DIR. 2000.12] (requiring the development of standards and measures to reduce the vulnerability of DOD personnel and family members to terrorism); U.S. DEP'T OF DEFENSE, INSTR. 2000.16, DOD ANTITERRORISM STANDARDS paras. E3.1.1.11-13 (14 June 2001) [hereinafter DOD INSTR. 2000.16] (defining command responsibility for raising and lowering FPCONs).

4. *See Combating Terrorism: Protecting the United States, Part II*: H*earing Before the 107th Congress House Subcomm. on National Security, Veterans Affairs and International Relations, Committee on Government Reform*, 107th Cong. 4 (2002) [hereinafter *Combating Terrorism Hearing*] (testimony of Peter Verga, Special Assistant for Homeland Security, DOD). As of 21 March 2002, the DOD had mobilized over 31,000 National Guard and Reserve Security Forces to support force protection at domestic and overseas military bases. *Id*; *see also* E-mail from Colonel Calvin M. Lederer, Counsel, U.S. Army Office of the Chief Legislative Liaison (OCLL), to Colonel David Howlett, Command Counsel, Headquarters, U.S. Army Materiel Command (1 Oct. 2001) [hereinafter OCLL E-mail] (on file with author). Data gathered before the September 11th terrorist attacks showed that the Army had a 4,028-person shortfall in security personnel for access control at Army installations. Moreover, sixty percent of the Army's "line military police" were in deployable combat units. *Id*.

of installation security functions.[7] In fact, these statutes had hindered the development of cost-effective installation security solutions for decades.

Recognizing the incredible security problems created by the September 11th terrorist attacks, Congress twice attempted to enact relief.[8] Unfortunately, rather than simply repealing these restrictions, Congress created a complicated contractual authority, which permits the use of contracted security in only limited, poorly defined circumstances. As a result, Army leaders remain greatly hampered in the development of long-term

5. U.S. Army Office of the Deputy Chief of Staff for Operations and Plans, Proposed Legislative Change to Authorize Installations to Contract for Post Security-Guards (May 3, 2002) (unpublished information paper) (on file with author). As of May 2002, the Army had mobilized, deployed, or diverted from their normal duties 28,146 soldiers to perform post security services. This included 15,668 Reserve Component soldiers and 12,478 Active Component Soldiers. *Id.*; *see also U.S. Representative David Hobson (R-Ohio) Holds Hearing on FY 2003 MILCON Appropriations: Subcomm. on Military Construction, House Comm. on Appropriations*, 107th Cong. 7 (2002) (testimony of Jack Tilley, Sergeant Major of the Army) ("Many active duty troops are needed to secure their own post and facilities and are not available on a daily basis for just normal duty within their command"). As an example, Sergeant Major Tilley noted that in January 2002, the U.S. Forces Command used approximately 4,000 reassigned soldiers each day to secure eleven installations, which did not include law enforcement personnel. He noted that the number of reassigned personnel can jump to as many as 11,000 or 15,000 depending on the threat. *Id.*

6. *Combating Terrorism Hearing*, *supra* note 4, at 4 (testimony of Peter Varga) (testimony of Peter Verga) ("Since September 11, the Army has completed a security infrastructure assessment at each of its installations to determine the incremental and total cost for structural and procedural enhancements for access control packages and equipment, critical mission essential areas, and weapons of mass destruction preparedness.").

7. 10 U.S.C. § 2465 (2000). As discussed in Part II *infra*, 5 U.S.C. § 3108, known as the Anti-Pinkerton Act, also prohibits contracting for certain security functions.

8. As discussed in Part III *infra*, the first attempt at legislative relief occurred through the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter U.S.A. PATRIOT Act]. The second attempt occurred through the enactment of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002) [hereinafter NDAA for FY 2003].

force protection programs that would effectively protect CONUS installations and allow the Department to cut costs and fully man combat units.[9]

This article offers a guide to Army leaders seeking to use contracted security services to enhance installation force protection. First, it provides a detailed analysis of the statutory restrictions affecting a contracted security program by reviewing the legislative history and the status of 5 U.S.C. § 3108 and 10 U.S.C. § 2465.[10] Second, it examines the Army's new contractual authority contained in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001[11] (U.S.A. PATRIOT Act), and the Bob Stump National Defense Authorization Act for Fiscal Year 2003[12] (NDAA for FY 2003).[13] Finally, it provides guidance on the appropriate contractual method to implement this new authority, and urges the Army to develop a comprehensive contract security program at the installation and departmental or regional levels.[14] This broad-based program will support a renewed request for the repeal of these statutes and ultimately allow the Army to transform installation security throughout CONUS.

II. The Statutory Restrictions

For well-over one hundred years, Congress has been concerned with the federal government's use of contracted security forces.[15] These concerns have ranged from a fear of private mercenary armies, to an anxiety over the quality[16] of security at military installations. To address these

---

9. Memorandum, Thomas E. White, Secretary of the Army, to Assistant Secretary of the Army (Acquisition, Logistics and Technology) et al., subject: Non-Core Competencies Working Group and The Third Wave (4 Oct. 2002) [hereinafter Third Wave Memo] (on file with the author) ("The Army must quickly free up resources for the global war on terrorism, and do so in a way that avoids disruptions to our core operations.").

10. *See infra* Part II.

11. U.S.A. PATRIOT Act, *supra* note 8, § 1010.

12. NDAA for FY 2003, *supra* note 8, § 332.

13. *See infra* Part III.

14. *See infra* Part IV.

15. CHARLES P. NEMETH, PRIVATE SECURITY AND THE LAW 22 (1995) (explaining that since the passage of the Anti-Pinkerton Act, private security forces have been the subject of continuous congressional concern and governmental oversight). *See, e.g.*, The Security Officer Employment Standards Act of 1991, S. 1258, 102d Cong. (this unenacted legislation provided for the creation of standards for federal security officers and required criminal background checks). *Id.*; *see also* Private Security Officer Employment Standards Act of 2002, S. 2238, 107th Cong. 2002 (This unenacted legislation permitted reviews of the criminal records of applicants for private security officer employment). *Id.*

concerns, Congress passed 5 U.S.C. § 3108 and 10 U.S.C. § 2465. Both of these statutes significantly restrict the Army's use of contracted security services to protect CONUS military installations. To properly understand and implement the Army's new contracting authority, Army leaders must understand the historical underpinnings and current interpretations of these statutes. By understanding and addressing the longstanding congressional concerns behind these restrictions, the Army can develop a comprehensive contracted security program, which will ultimately support their repeal.

A. 5 U.S.C. § 3108 (The Anti-Pinkerton Act)

Congress created the century old Anti-Pinkerton Act to prevent governmental use of private mercenary armies. Although judicial interpretation has narrowed its scope, the Act continues to restrict the Army's ability to obtain certain security services. This subpart describes the Act's historical underpinnings and its current status.

1. Historical Development

Congressional concern over the federal government's use of private security forces began with the rise of the Pinkerton National Detective Agency (Pinkerton Agency). Created in 1850 by former Chicago police officer Allan Pinkerton, the Pinkerton Agency grew to be the most prominent private security force in the United States by 1855, holding several lucrative contracts with major industries throughout the nation.[17] As the

16. Regarding quality, Congress has been specifically concerned with three issues: the control of installation security functions, the potential for labor disputes or strikes by contracted security forces, and the training level of contracted personnel. *See infra* Part II.B.1. Note, however, as discussed in Part II.B.1 *infra*, the original congressional opponents of 10 U.S.C. § 2465 asserted that the design of this statute was to appease government employee unions. Although this assertion contains some validity, the legislative history of 10 U.S.C. § 2465 demonstrates that the primary reasons for its creation related to concerns over the quality of security forces used to protect DOD installations. It is highly unlikely that any contracted security program would ever satisfy the concerns of government employee unions. Thus, the program advocated by this article focuses upon meeting congressional concerns related to the quality of contracted security forces and the government's use of private "quasi-military armed forces."

17. Pinkerton Inc., *Pinkerton History*, available at www.pinkertons.com/company-info/ history/pinkerton/index.asp (last visited Feb. 5, 2003) [hereinafter *Pinkerton History*]; *see also* NEMETH, *supra* note 15, at 7.

Civil War commenced, the Pinkerton Agency's size and reputation led the United States to seek its services for the security of federal facilities and the protection of government personnel.[18] Throughout the war, the United States continuously employed "Pinkertons" as security officers, intelligence gatherers, and counterintelligence operatives.[19]

When the Civil War ended, the Agency resumed its work for major companies throughout the nation, providing both security guard and detective services.[20] As organized labor movements developed, however, the Agency found its security contracts evolving from the protection of company personnel and property to the controversial and often deadly task of "strike-breaking."[21] Unfortunately, one such contract with Carnegie, Phipps & Company, led to a deadly labor riot in Homestead, Pennsylvania, in which striking workers ambushed and killed numerous Pinkerton guards.[22] This riot and similar incidents of strike-breaking sparked great public concern over the use of private security forces. It also led labor organizations throughout the nation to call on Congress to pass federal legislation to prohibit corporations from using such forces. [23]

In response to this significant public outcry, Congress ordered the House of Representatives' Committee on the Judiciary to conduct an inquiry into both the Pinkerton Agency and the Homestead Riot.[24] After an extensive investigation, the Committee determined that the Pinkertons were members of a private mercenary security force consistently used in strikes, riots, and other labor troubles;[25] that corporations used them to supplant local law enforcement; and that their mere presence incited members of labor organizations to extreme deeds of violence.[26]

---

18. *Pinkerton History*, *supra* note 17.

19. JAMES MACKAY, ALLAN PINKERTON THE FIRST PRIVATE EYE 97-110 (1996). In fact, Pinkertons protected President Lincoln during the early months of the Civil War, until Allan Pinkerton was selected to develop and head a new security unit called the Secret Service under the command of General McClellan's Army of the Potomac. *Id.*; *see also Pinkerton History*, *supra* note 17.

20. NEMETH, *supra* note 15, at 8.

21. *Id.* at 9; *see also* GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-140 (1991) [hereinafter FEDERAL APPROPRIATIONS LAW].

22. NEMETH, *supra* note 15, at 9.

23. HOUSE COMM. ON THE JUDICIARY, EMPLOYMENT OF PINKERTON DETECTIVES, H.R. REP. NO. 52-2447, at VII (1893) [hereinafter HOUSE PINKERTON REPORT].

24. *Id.* at I.

25. *Id.* at XIII.

26. *Id.* at XV.

Nevertheless, in spite of the danger posed by these forces, the Judiciary Committee, through a very narrow reading of the Constitution, determined that Congress had no authority to prohibit the employment of Pinkertons by private corporations.[27] Therefore, it recommended that the states "pass such laws as may be necessary to regulate or prohibit the employment of Pinkerton watchmen or guards within their respective jurisdictions."[28] Congress, however, facing continuous union pressure and public concern, felt compelled to pass legislation restricting the use of these private mercenaries. Thus, as part of the 1893 Sundry Civil Appropriations Act, Congress passed what became known as the Anti-Pinkerton Act.[29]

This legislation, which banned all federal government contracts with the Pinkerton Detective Agency or similar agencies, had a significantly adverse effect on government contracting for security services.[30] For more than eighty years after its enactment, the U.S. Comptroller General strictly interpreted the Act to prevent government contracts with any detective agency, even if that agency merely furnished security guards or watchmen for the protection of government property.[31] Consequently, because major detective agencies could not compete for federal security contracts, the Act greatly hampered the government's ability to obtain high quality security services at the most competitive prices.[32] Nevertheless, Congress has refused to repeal the Act.

---

27. *Id*. at XV-XVI. The Committee specifically recognized Congress's authority to regulate interstate commerce. Yet, the Committee interpreted Article IV, Section 2, Clause 1 of the Constitution, which states, "The Citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States," as a significant restriction on that authority. Based on this clause, the Committee found that only the states had the authority to regulate the employment of security forces by private corporations. *Id*.

28. *Id.* at XVI.

29. Sundry Civil Appropriation Act of 1893, 27 Stat. 572, 591 (1893). The full text of the Act stated, "that hereafter no employee of the Pinkerton Detective Agency, or similar agency, shall be employed in any Government service or by an officer of the District of Columbia." *Id.* Congress originally enacted the Anti-Pinkerton Act as a temporary prohibition in the Sundry Civil Appropriation Act of 1892, 27 Stat. 349, 368. Congress used the Act as a stopgap measure while the House Committee on the Judiciary investigated the Pinkerton Agency and the Homestead Riots. Congress later made the Act permanent in the Sundry Civil Appropriations Act of 1893. For an excellent synopsis of the history of the Anti-Pinkerton Act, *see* FEDERAL APPROPRIATIONS LAW, *supra* note 21, at 4-139 to 4-144.

30. S. REP. NO. 88-447, at 7 (1963).

2. The Anti-Pinkerton Act Today

The Anti-Pinkerton Act, currently codified at 5 U.S.C. § 3108, remains virtually unchanged since its original enactment. This statute continues specifically to prohibit the federal government from contracting for services from "[a]n individual employed by the Pinkerton Detective Agency or similar organization."[33] Although the text of the Act remains intact, the landmark case of *Weinberger v. Equifax, Inc*. has drastically changed its interpretation.[34]

In *Equifax*, the U.S. Court of Appeals for the Fifth Circuit reviewed the federal government's use of Equifax, Inc. to gather background information on prospective employees. To support his *qui tam* suit,[35] Weinberger made two allegations. First, he argued that all government contracts with Equifax violated the Anti-Pinkerton Act, because Equifax used "detective-like investigative techniques." Therefore, it was an organization similar to the Pinkerton Detective Agency.[36] Second, he argued that, because the Act barred contracting with Equifax, the corporation violated the False Claims Act[37] each time it billed the government for its "illegal" services.[38]

---

31. *See* Comptroller General McCarl to the Governor of the Panama Canal, 8 Comp. Gen. 89 (1928). Nevertheless, by strictly construing the statute, the Comptroller made several rulings, which actually lessened the reach of the Act's prohibition. For example, in Comptroller General Warren to the Administrator, War Assets Administration, 26 Comp. Gen. 303 (1946), the Comptroller held that the government may employ a "protective agency" but may not employ a "detective agency" to do protective work. The Comptroller also held that the prohibition does not apply to subcontracts with detective agencies. *See* To John Munick, National Aeronautics and Space Administration, 41 Comp. Gen. 819 (1962) (holding that the Act does not extend to a wholly owned subsidiary of a detective agency, providing the subsidiary is not a detective agency itself).

32. S. REP. NO. 88-447, at 7.

33. 5 U.S.C § 3108 (2000). The section in its entirety currently states, "an individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia." *Id*.

34. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977); s*ee also* To the Heads of Federal Departments and Agencies, 57 Comp. Gen. 524 (1978).

35. For an excellent historical review of *qui tam* suits under the False Claims Act, *see generally* Vermont Agency of Natural Resources v. United States, *ex rel.*, Jonathan Stevens, 529 U.S. 765 (Vt. 2000). "*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Vt. Agency of Natural Res.*, 529 U.S. at 768

36. *Equifax*, 557 F.2d at 458.

To determine the validity of the plaintiff's allegations, the *Equifax* court conducted an extensive review of the Anti-Pinkerton Act's legislative history, as well as the Comptroller General's Opinions strictly interpreting the Act's prohibition.[39] First, the court noted that Congress created the Act out of great frustration over the employment of private mercenary forces to engage in strike-breaking and merely used the term "Pinkerton Detective Agency" as a definitional example of these forces.[40] Second, the court determined that by using this example, Congress intended to prohibit government employment of the Pinkerton Detective Agency as it was organized in 1892.[41] Thus, the court held that for a company to be similar to the 1892 Pinkerton Detective Agency, it must offer "quasi-military armed forces for hire."[42] Since Equifax had no such forces, it did not violate the Anti-Pinkerton Act or, by extension, the False Claims Act.[43] Unfortunately, the court did not define the term "quasi-military armed forces," leaving the government's authority to contract for security services uncertain.

Soon after *Equifax*, the Comptroller General issued a decision adopting the court's analysis and rescinding many of its prior restrictive interpretations of the Act.[44] In its decision, the Comptroller also failed to define "quasi-military armed forces." The Comptroller, however, clarified what the term did not include. Specifically, "a company which provides guard or protective services does not thereby become a 'quasi-military armed force,' even if they arm the individual guards, and even though the company may also engage in the business of providing general investigative or 'detective' services."[45] This opinion, which greatly expanded the ability of federal agencies to contract for high-quality secu-

37. The False Claims Act, currently codified at 31 U.S.C. § 3729 (2000) (during *Equifax*, Congress codified the Act at 31 U.S.C. § 231), specifically authorizes private citizens to "bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Originally enacted in 1863, this Act "is the most frequently used of a handful of extant laws creating a form of civil action known as *qui tam*." *Vt. Agency of Natural Res.*, 529 U.S. at 768.

38. *Equifax*, 557 F.2d at 458.

39. *Id.*

40. *Id.* at 462.

41. *Id.*

42. *Id.* at 463.

43. *Id.*

44. To the Heads of Federal Departments and Agencies, 57 Comp. Gen. 524 (1978).

45. *Id.* at 529.

rity services, continues to be the controlling guidance on the application of the Anti-Pinkerton Act today.

Under its current interpretation, the Act provides little impediment to the Army's contracting for security guard services, so long as, the contractor does not offer "quasi-military armed forces for hire."[46] Nevertheless, without a clear definition of this term, the Act may still impair the Army's ability to obtain important special security services, such as special reaction team (SRT) support.[47]

Army Regulation (AR) 190-58 requires all installation commanders to maintain a "specially trained and equipped team of military and civilian security personnel [to] serv[e] as the . . . principal response force in the event of a major disruption or threat situation on the installation."[48] This SRT must be capable of responding to crises ranging from barricaded criminals, sniper incidents, and threatened suicides, to drug raids, terrorist attacks, and even enemy combat operations.[49] Smaller installations often have difficulty meeting this requirement with their organic military police forces and would greatly benefit from the use of private sector contracted SRT support. Unfortunately, without a clear definition of "quasi military armed forces," these contracted SRT teams, which arguably have similar characteristics to the 1892 Pinkertons,[50] could be construed as violating the Act.

---

46. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 37.109 (Sept. 2001) [hereinafter FAR]. This regulation implements both the *Equifax* and Comptroller General's interpretation of the Anti-Pinkerton Act. In pertinent part, this regulation provides the following:

> This prohibition applies only to contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract's character. An organization providing guard or protective services does not thereby become a "quasi-military armed force," even though the guards are armed or the organization provides general investigative or detective services.

Id.; *see also* U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 237.109 (1998) [hereinafter DFARS] (referring only to DFARS 237.102-70, which is the regulatory prohibition implementing 10 U.S.C. § 2465).

47. *See generally* U.S. DEP'T OF ARMY, REG. 190-58, PERSONAL SECURITY para. 4-1 (22 Mar. 1989) [hereinafter AR 190-58] (describing the requirement for an installation SRT).

48. *Id.*

49. *Id.* para. 4-1b.

Although the scope of the Anti-Pinkerton Act has been narrowly interpreted, Army leaders must still consider its restrictions when implementing the Army's new contractual authority. Specifically, any use of contracted security personnel to provide special security services, such as SRT support, may conflict with the Act. As the Army develops long-term installation force protection plans, leaders must be ever mindful of the longstanding congressional concern regarding the government's use of quasi-military armed forces.

B. 10 U.S.C. § 2465 (Contracting Installation Security Functions)

Unlike the Anti-Pinkerton Act, 10 U.S.C. § 2465 did not develop over concerns that the government would use skilled private mercenaries. Rather, Congress created the prohibition to address concerns related to the quality of the private security forces used to protect Department of Defense (DOD) installations.[51] Although Congress provided some temporary relief to its prohibition, 10 U.S.C. § 2465 continues to significantly restrict the Army's use of contracted security. To assist Army leaders in developing a comprehensive contract security program, this subpart

---

50. *See* HOUSE PINKERTON REPORT, *supra* note 23, at XIV-XV. In describing the characteristics of the Pinkertons, the Committee stated, "They are professional detectives and guards or watchmen, and in the latter capacity may properly be characterized as a sort of private military or police force." The Committee also noted that various entities frequently employed the Pinkertons to handle special security situations, such as blockades, strikes, riots, and other labor troubles. *Id.* While some might argue that Congress aimed the Anti-Pinkerton Act at restricting only the government's use of quasi-military armed forces in labor disputes, the *Equifax* court specifically rejected that premise. Weinberger v. Equifax, Inc., 557 F.2d 456, 462 (5th Cir. 1977). Rather, the Court held that the Act must be read to encompass *any use* of these forces by the government. *Id.* Using contracted personnel for high threat, special security missions such as barricaded criminals, drug raids, or hostage situations would at least appear to be the use of a "quasi-military armed force" and may run afoul of the Act. This restriction, however, should not apply to the use of state or local police personnel for contracted SRT support under the program discussed in Part IV *infra*. Based on *Equifax* and the legislative history of the Act, the possibility that a court would find a state or municipal government to be a "similar organization" to the 1892 Pinkerton Detective Agency is quite unlikely.

51. *See infra* Part II.B.1. Note, however, congressional opponents of 10 U.S.C. § 2465 argued that the prohibition stemmed from pressure exerted by government employee unions. Although this assertion may have some validity, the possibility that any comprehensive contracted security program will ever appease government employee unions is unlikely. Therefore, the program advocated by this article does not address this political issue. *See also supra* text accompanying note 16.

describes the historic concerns giving rise to the statute and the status of its prohibition.

1. Historical Development

In 1982, executive agencies throughout the federal government felt the significant effects of the "A-76 Program."[52] This program, which specifically authorized agencies to contract out the performance of "commercial activities,"[53] drew great opposition from government leaders, civil service employees, and numerous unions. Consequently, Congress grew increasingly concerned that the Executive Branch was abusing the program.[54] The DOD naturally became the focus of congressional scrutiny as the largest executive department involved in the program. The concern was so great that the House Committee on Armed Services called for a total moratorium on all DOD contracting out activities that year.[55] This great backlash against the A-76 Program led to the enactment of the 10 U.S.C. § 2465 prohibition.

Several senators, led by Senator George Mitchell, offered an amendment to prohibit the DOD from contracting out any installation security or firefighting services[56] during the floor debate over the Department of

---

52. FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983, Revised 1999) [hereinafter OMB Cir. A-76]. This circular is the current version that replaced the 29 March 1979 version, in force during the 1982 congressional debate over DOD contracting for firefighting and security functions. *Id*. para. 2. Currently, the Office of Management and Budget is completely revising this circular. *See* FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76 (REVISED DRAFT), PERFORMANCE OF COMMERCIAL ACTIVITIES (Nov. 14, 2002) [hereinafter OMB Cir. A-76 (REVISED DRAFT)].

53. "A commercial activity is one which a federal executive agency operates and which provides a product or service obtainable from a commercial source." OMB Cir. A-76, *supra* note 52, para. 6a.

54. 128 Cong. Rec. S9002 (1982) (statement of Sen. Mitchell).

55. *Id.*

56. *Id.* As passed by the Senate, the Mitchell/Dodd amendment stated:

> None of the funds appropriated under an authorization contained in this Act or any other Act enacted after the date of enactment of this Act may be obligated or expended to enter into any contract for the performance of firefighting functions or security functions at any military installation or facility.

Id.

Defense Authorization Act for Fiscal Year 1983.[57] During this hasty yet strenuous debate, proponents of the amendment argued that they intended the prohibition to protect the quality of installation firefighting and security services. The proponents argued that the installation commander should directly control these functions, that lapses in service could occur due to contractor strikes, and that poorly trained and inexperienced contract guards posed a significant danger to the installation.[58] Opponents, however, charged that the legislation was nothing more than a blatant attempt at protecting an entrenched employee union by micromanaging the DOD.[59] Opponents argued that the measure would thwart the very purpose of the A-76 Program—the DOD's development of more cost-effective and efficient operations. Although numerous DOD facilities had contracts for fire protection and security services, no evidence showed that any facility had experienced the quality issues cited in support of the amendment.[60]

In spite of these sharp disagreements, the measure narrowly passed with no Senate hearings and a party line vote. Likewise, the House of Representatives inserted a similar prohibition in its version of the Act, which also passed with minimal debate along party lines.[61] Thereafter, the restriction became law with only one limited exception—grandfather clause permitting renewal of contracts effective the day of the law's enactment.[62] Concerned with the bluntness of the restriction, Congress soon revisited the prohibition to whittle down its broad application.

The first change came just a year later in the DOD Authorization Act for FY 1984,[63] when Congress extended the prohibition for an additional two years and, at the request of the DOD, created two limited exceptions.[64] First, it authorized the DOD to contract for security guard and firefighting services to protect installations or facilities outside of the United States.[65] Second, it permitted contracts for such services to protect government

57. *Id.* at 9001-2.

58. *Id.* at 9001-5 (statements of Sen. Mitchell and Sen. Dodd).

59. *Id.* at 9003-4 (statement of Sen. Jepsen).

60. *Id.* (statement of Sen. Jepsen).

61. 128 CONG. REC. H18645 (1982) (statement of Rep. Gejdenson). House proponents of the prohibition cited similar concerns as those raised in the Senate. They argued that concerns over control, potential strikes, and poor training supported the measure. *Id.* Opponents argued that the legislation was merely a "plum for a special interest group," that no evidence supported the proponents' concerns, and that the measure imposed unnecessary constraints on the management abilities of DOD officials. 128 CONG. REC. H18646-7 (1982) (statements of Rep. Badham and Rep. Derwinski).

owned, but contractor operated facilities.[66] Thereafter, Congress extended the prohibition in one-year increments in both the DOD Authorization Act for 1986[67] and the NDAA for FY 1987.[68]

The second major change to the prohibition occurred in the NDAA for FY 1994.[69] Recognizing the manpower and security problems caused by the implementation of the Base Realignment and Closure program (BRAC), Congress created another limited exception to the prohibition by

---

62. DOD Authorization Act 1983, Pub. L. No. 97-252, § 1111, 96 Stat. 718, 747 (1982). The original prohibition was a temporary restriction only valid for Fiscal Year 1983. It stated,

> None of the funds appropriated under an authorization contained in this Act may be obligated or expended to enter into any contract for the performance of firefighting functions or security guard functions at any military installation or facility, except when such funds are for the express purpose of providing for the renewal of contracts in effect on the date of the enactment of this Act.

Id.

63. DOD Authorization Act, 1984, Pub. L. No. 98-94, § 1221, 97 Stat. 614, 691 (1983).

64. 129 CONG. REC. 18987 (statement of Sen. Levin). The DOD General Counsel expressed great concern regarding the scope of its restrictions after analyzing the temporary prohibition contained in the 1983 DOD Authorization Act. He requested Congress clarify the statute, which led to the enactment of the exceptions for OCONUS activities and government owned or contractor operated facilities.

65. DOD Authorization Act, § 1221.

66. *Id*.

67. DOD Authorization Act, 1986, Pub. L. No. 99-145, § 1232, 99 Stat. 583, 733 (1985). In extending the prohibition, Congress continued to express concern over the quality of contracted personnel. By requiring the DOD to prepare a report regarding the special security and firefighting needs of DOD and how those needs were being met using both government and contract personnel.

68. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1222, 100 Stat. 3816, 3976-77 (1986). Although this Act merely extended the prohibition against contracted security services for another year, it did signal congressional desire for a more permanent restriction. Specifically, the Act it formally codified the prohibition against contracted firefighting services as 10 U.S.C. § 2693. *Id*. One year later, Congress amended § 2693 to also codify the prohibition against contracting for security guard functions. National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 1112, 101 Stat. 1019, 1147 (1987). Congress ultimately recodified 10 U.S.C. § 2693 as 10 U.S.C. § 2465. Codification of Defense Related Provisions, Pub. L. No. 100-370, § 2(b), 102 Stat. 840, 854. (1988).

69. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2907, 107 Stat. 1547, 1921 (1993); *see also* 10 U.S.C. § 2687 (2000) (containing the text of the BRAC exception in the note).

permitting the DOD to contract with local governments for police and fire-fighting services at any military installation slated for closure within 180 days.[70] Although the DOD continued to push for repeal of the statute, [71] Congress made no other substantive changes to the prohibition and continued to voice its great concerns over the use of contracted security forces used on military installations.[72]

2. 10 U.S.C. § 2465 Today

In spite of repeated requests for its repeal, 10 U.S.C. § 2465 still prohibits the DOD from contracting for security guard services at installations or facilities, unless the contract is performed outside the continental United States, at a government owned but contractor operated facility, or is for the performance of a function that was already under contract on 24 September 1983.[73] The BRAC installations have a separate exception, which continues to permit them to contract with local governments for security services as long as the facility will close within 180 days.[74] However, as discussed in Part III *infra*, Congress has recently created some relief from the restrictions of 10 U.S.C. § 2465. Unfortunately, this relief is only tem-

---

70. *Id.*

71. H.R. REP. NO. 105-132, pt. 2, at 13 (1997) (requesting repeal of 10 U.S.C. § 2465 by the DOD as an "impediment to providing efficient and cost-effective fire fighting and security support at defense installations"). *Id.*

72. *Id.* The House Committee on National Security expressed great concern that repeal of the statute was premature and "could negatively impact national security." *Id.*

73. 10 U.S.C. § 2465 (2000). The statute provides the following:

> (a) Except as provided in subsection (b), funds appropriated to the DOD may not be obligated or expended for the purpose of entering into a contract for the performance of firefighting or security guard functions at any military installation or facility.
> (b) The prohibition in subsection (a) does not apply—
> (1) to a contract to be carried out at a location outside the United States (including its commonwealths, territories, and possessions) at which members of the armed forces would have to be used for the performance of a function described in subsection (a) at the expense of unit readiness;
> (2) to a contract to be carried out on a Government-owned but privately operated installation; or
> (3) to a contract (or the renewal of a contract) for the performance of a function under contract on September 24, 1983.

Id.

porary in nature and very limited in scope. Consequently, the statute remains a significant impediment to the development of a comprehensive, contract security program to meet the long-term needs of the Army.

III. Congressional Attempts at Relief

In the wake of the September 11th terrorist attacks, Congress examined numerous aspects of the national defense structure in an attempt to enhance homeland security significantly. During the course of this review, Congress revisited and temporarily modified the prohibition contained in 10 U.S.C. § 2465 through both the U.S.A. PATRIOT Act and the NDAA for FY 2003. Unfortunately, these modifications not only failed to provide a mechanism to resolve the Army's long-term security needs, but they also created a vague, complicated, and difficult to implement authority. This part describes these shortsighted attempts at legislative relief, provides a detailed analysis of their flawed provisions, and recommends that the Army issue specific policy guidance regarding the use of these authorities.

A. U.S.A. PATRIOT Act

The U.S.A. PATRIOT Act is a hastily drafted legislative hodgepodge designed to "deter and punish terrorist acts and to enhance law enforcement investigatory tools."[75] It contains legislation on a myriad of topics ranging from intelligence gathering and money laundering to increased

---

74. *See* 10 U.S.C § 2687. The note accompanying § 2687 contains the uncodified BRAC exception, which in pertinent part states the following:

> The Secretary may enter into agreements (including contracts, cooperative agreements, or other arrangements for reimbursement) with local governments for the provision of police or security services . . . by such governments at military installations to be closed under this part, or at facilities not yet transferred or otherwise disposed of in the case of installations closed under this part, if the Secretary determines that the provision of such services under such agreements is in the best interests of the Department of Defense. * * * The Secretary may not exercise th[is] authority . . . earlier than 180 days before . . . the installation is to be closed.

Id.

75. U.S.A. PATRIOT Act, *supra* note 8, pmbl.

border protection and enhanced information sharing. A minor provision of the Act, § 1010, was Congress' first attempt at easing the restrictions of 10 U.S.C. § 2645.[76] Unfortunately, as discussed below, it utterly failed to provide the authority needed to meet the current or long-term security needs of CONUS military installations and facilities.[77]

1. Background and Elements of the Act

In late September 2001, the DOD submitted a legislative change proposal to Congress, which would amend 10 U.S.C. § 2465, permitting the DOD to contract for installation security from both the public and private sectors.[78] Before this proposal, senior DOD and Army officials conducted extensive meetings with Senate staffers to explain, not only the unprecedented security needs caused by September 11th, but also the long-term requirements faced by military installations throughout CONUS. Once again, quality concerns over the training and control of contractor personnel ruled the day.[79] Members of the Senate Armed Services Committee rejected the proposal and developed a compromise solution, which ultimately became law.[80] Although § 1010 of the Act does permit con-

76. *Id.* § 1010. This authority has been implemented through DFARS 237.102-70(c). DFARS, *supra* note 46, at 237.102-70. However, the DFARS provision merely reiterates the vague requirements of the statute. The Army has issued no additional clarification or implementing instructions as a guide to the use of this authority. *See* Jerry Williams, *Police Mutual Aid Agreements under the Patriot's Act*, OFFICE OF COMMAND COUNSEL NEWSLETTER (U.S. Army Materiel Command Washington, D.C.) Dec. 2002, at 31 (noting that the Army has issued no implementing instructions for the proper use of § 1010 authority).

77. Letter from William J. Haynes II, General Counsel, U.S. DOD, to the Honorable Richard B. Cheney, President, United States Senate (Apr. 19, 2002) (on file with author) [hereinafter DOD General Counsel Letter]. This letter contains two enclosures: a draft bill, which details DOD's legislative proposal for the NDAA FY 2003 and an analysis of the proposal explaining DOD's rationale for the requested legislation. Part of this proposal was a request seeking additional relief from 10 U.S.C. § 2465. In support of this request, the DOD General Counsel criticized the authority provided by the U.S.A. PATRIOT Act. Specifically, he stated, "Although Section 1010 of the PATRIOT Act allows for entering into contracts or other agreements with local or State governments for security, it does not offer flexibility for meeting the long-term security needs of small DOD installations during peace or increased threats." *Id.*

78. OCLL E-mail, *supra* note 4, at 1.

79. *Id.* at 2.

80. *Id.*

tracting for installation security in CONUS, it mandates that all such contracts be with a local or state government, and only for a limited time.[81]

For the Army to use § 1010 authority, it must meet the following specific elements of the Act. First, the contract or other agreement must be for "security functions" at a military installation or facility within the United States.[82] Second, the contract must be with a proximately located local government, state government, or a combination of the two.[83] Third, the contract must contain training and qualification standards, as established by the Secretary of the Army, for all local law enforcement personnel engaged in installation security.[84] Finally, the contract or agreement must not exceed the time that U.S. Armed Forces are engaged in Operation Enduring Freedom (OEF) and up to 180 days thereafter.[85] As demon-

---

81. U.S.A. PATRIOT Act, *supra* note 8, § 1010.

82. *Id.* In pertinent part, subsection (a) of the statute states the following:

> Notwithstanding section 2465 of title 10, United States Code, during the period of time that United States Armed Forces are engaged in Operation Enduring Freedom, and for the period of 180 days thereafter, funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into contracts or other agreements for the performance of security functions at any military installation or facility in the United States with a proximately located local or state government, or combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation.

Id.

83. *Id.*

84. *Id.* Section 1010(b) contains this training requirement and specifically states, "Any contract or agreement entered into under this section shall prescribe standards for the training and other qualifications of local government law enforcement personnel who perform security functions under this section in accordance with criteria established by the Secretary of the service concerned." *Id.*

85. *Id.*; *see supra* text accompanying note 82. Note, § 1010(c) also required that the DOD report on the use of this authority and other means used to improve security at CONUS installations. Specifically §1010(c) requires,

> (c) One year after the date of enactment of this section, the Secretary of Defense shall submit a report to the Committees on Armed Services of the Senate and the House of Representatives describing the use of the authority granted under this section and the use by the Department of Defense of other means to improve the performance of security functions on military installations and facilities located within the United States.

Id. The DOD has submitted no report as of the date of this article.

strated below, several of these elements make this compromise an ineffective solution for the security problems faced by CONUS Army installations.

2. An Ineffective Solution

The U.S.A. PATRIOT Act's contracting authority contains four flaws. First, it drastically limits the resources available to the Army by requiring all contracts to be with local or state governments. Second, it fails to define the scope of "security functions" or to address the authority of contracted personnel. Third, it permits individual Services to determine the appropriate training standards for local law enforcement personnel engaged in contracted security. Finally, the authority is only temporary in nature and its duration is undeterminable.

a. Limited State and Local Resources

First, Congress failed to recognize that many state and local governments simply do not have sufficient resources to provide the security needed by installations facing threats related to the Global War on Terrorism.[86] Although immediately after September 11th many state and local law enforcement agencies did temporarily assist installations with maintaining a heightened security posture, most of these agencies were unable to provide contract security assistance due to their own limited personnel and increased security needs.[87] Thus, § 1010's authority was of no assistance to most Army installations, which were simply unable to find a state or local government vendor.[88] Consequently, since the Act offered no authority to use alternative sources,[89] this flaw became a major factor in the DOD's renewed request for additional relief from 10 U.S.C. § 2465.[90]

86. Telephone Interview with Colonel David Howlett, Command Counsel, Headquarters, U.S. Army Materiel Command (Aug. 20, 2002) [hereinafter Howlett Telephone Interview, Aug. 20, 2002].

87. Telephone Interview with Colonel David Howlett, Command Counsel, Headquarters, U.S. Army Materiel Command (Jan. 22, 2003).

88. Howlett Telephone Interview, *supra* note 86.

89. *Id.* The Act does not specifically prohibit the Army from entering into a prime contract with a local or state government allowing that government to subcontract with a private security firm. However, the Army rejected this "end run" approach as being a clear violation of congressional intent. *Id.*

90. *See supra* text accompanying note 77.

b. Definitions and Authority

Second, § 1010 fails to define "security functions" or to clarify what, if any, law enforcement authority a local or state police officer would retain in his or her contractor status. The term "security functions" lends itself to a wide variety of meanings. For example, these functions could range from controlling access points or patrolling the outer perimeter, to conducting driving under the influence checkpoints or traffic stops, or responding to domestic disturbances. All of these functions directly relate to the security of the installation and could easily fall within the term "security functions."

Similarly, the statute fails to address the authority a local police officer would have on the installation during the period he is performing security functions as a "contractor." This dual role of policeman or contractor is especially confusing considering that many Army installations are composed of a patchwork of "federal legislative jurisdictions." These differing jurisdictions, which developed due to the piecemeal creation of many Army posts, govern the authority of the federal or state government over each portion of the installation.[91] Often, a single installation has exclusive,[92] concurrent,[93] and proprietary jurisdictions.[94] By not addressing the question of authority, the statute leaves this confusing issue open.

For example, does a police officer, currently performing contracted security functions, have the authority to arrest someone in a proprietary or concurrent jurisdiction for a state crime that occurred off the installation? In other words, does he retain that state law enforcement power when he

---

91. U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 1 (1 Aug. 1973) [hereinafter AR 405-20]. This regulation sets forth the Army's policy on acquiring legislative jurisdiction and defines the governmental authority within each type of jurisdiction. Note, the Army's policy is to acquire only a proprietarily interest in land, unless unusual circumstances dictate otherwise. *Id*. para. 5.

92. *Id.* para 3. With exclusive legislative jurisdiction, the federal government possesses all of the authority of the state. The state exercises no concurrent authority; however, the state may reserve the right to serve civil or criminal process regarding matters occurring outside the exclusive jurisdictional area. *Id.*

93. *Id*. With concurrent legislative jurisdiction, the federal government possesses the same legislative authority as it would with exclusive jurisdiction. However, the state has reserved the right to exercise this same level of authority *concurrently* with the United States. *Id*.

94. *Id.* With a proprietary interest, the federal government has certain rights or title to a specific area within a state. However, the federal government has none of the state's legislative authority. *Id*.

assumes the mantle of a federal security contractor? Acting in his normal capacity as a police officer, he clearly has the authority to arrest the individual.[95] However, according to *AR 190-56*, acting as a federal security contractor, he may only apprehend individuals on the installation for offenses committed on post.[96] If he were to make an arrest as a federal contractor, he may arguably be providing unlawful support to civilian law enforcement in violation of the Posse Comitatus Act.[97]

Congress could have easily provided a solution to these concerns, and has done so for the DOD installations in the National Capital Region. By enacting 10 U.S.C. § 2674, which allows contracted security personnel to perform both law enforcement and security functions, the act provides them with the "same powers . . . as sheriffs and constables."[98] Unfortunately, without such a legislative solution in the U.S.A. PATRIOT Act, the Army must resolve these issues by defining the "security functions" which are subject to contract, and by issuing specific guidance regarding the authority of local law enforcement personnel who perform these functions.[99]

c. Training and Qualification Requirements

As noted above, § 1010 requires all contracts or agreements with local or state law enforcement to contain certain training standards and personnel qualifications.[100] Congress failed, however, to specify the standard

95. Note also that some states allow police officers to exercise their law-enforcement authority even when engaged in off duty employment. *See, e.g.*, VA. CODE ANN. § 15.2-1712 (2003) (allowing Virginia localities to permit law-enforcement officers to engage in off-duty employment requiring the use of their police powers).

96. U.S. DEP'T OF ARMY, REG. 190-56, THE ARMY CIVILIAN POLICE AND SECURITY GUARD PROGRAM para. 5-2 (21 June 1995) [hereinafter AR 190-56].

97. 18 U.S.C. § 1385 (2000). *See also* AR 190-56, *supra* note 95, para. 5-2. "Civilian police and security guard personnel, while on duty at an installation, are considered part of the Army, and are therefore subject to the restrictions on aid to civilian law enforcement imposed by section 1385, title 18, United States Code, commonly known as the Posse Comitatus Act." Whether this regulatory interpretation of the Posse Comitatus Act (PCA) would be controlling in the situation described above is unclear. However, to ensure the proper use of contracted security personnel, the issue of authority and the application of the PCA, if any, must be addressed in all contracts or agreements with state or local governments. *See generally* Message 212313Z Feb 03, Headquarters Department of the Army, subject: Contract Security-Guard Implementation [hereinafter Implementation Message § 332] (although not applicable to actions under § 1010, the Army's implementation of § 332 of the NDAA for FY 2003 requires contracts to define the authority of contracted personnel specifically).

for this training or to define the qualifications required. Rather, it authorized individual Secretaries to determine these standards for their respective services. Unfortunately, this authority could produce disparate standards across DOD installations in CONUS, and thereby create significant differences in the quality of the security services provided.

At a minimum, the Army should adopt the training and qualification standards set by the Office of Personnel Management for federal civilian uniformed police.[101] The Army should then coordinate with the other services to adopt common training and qualification standards for all contracts or agreements made under § 1010. This coordination would ensure

---

98. 10 U.S.C. § 2674(b). In pertinent part the statute states the following:

> The Secretary may appoint military or civilian personnel or contract personnel to perform law enforcement and security functions for property occupied by, or under the jurisdiction, custody, and control of the Department of Defense, and located in the National Capital Region. Such individuals—
>
> (a) may be armed with appropriate firearms required for personal safety and for the proper execution of their duties, whether on Department of Defense property or in travel status; and
>
> (b) shall have the same powers (other than the service of civil process) as sheriffs and constables upon the property referred to in the first sentence to enforce the laws enacted for the protection of persons and property, to prevent breaches of the peace and suppress affrays or unlawful assemblies, and to enforce any rules or regulations with respect to such property prescribed by duly authorized officials.

Id.

99. As discussed in detail in Part III.B.2.a. *infra*, the Army should issue policy guidance, which defines "security functions" broadly to include specifically special security functions such as SRT services.

100. U.S.A. PATRIOT Act, *supra* note 8, § 1010(b). *See supra* text accompanying note 84.

101. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, OPERATING MANUAL FOR QUALIFICATION STANDARDS FOR GENERAL SCHEDULE POSITIONS, at IV-B-18 (1998) [hereinafter OPM GS STANDARDS MANUAL]. This manual contains standards for all General Service positions throughout the government. Qualification standards GS-083 and GS-085 define the individual occupational requirements for federal police and security guards, respectively. *Id*. The Army should adopt these basic personnel standards and then incorporate additional requirements for local law enforcement personnel performing special infrequent security functions, such as SRT support. *See infra* discussion at Part IV.A.

a standardized level of security across all DOD installations using this authority.

d. Temporary in Nature

Finally, the U.S.A. PATRIOT Act's contracting authority is not only temporary in nature; its duration is undeterminable. Thus, Army installations are unable to rely on this authority to make any long-term security arrangements. As noted above, the authority terminates no later than 180 days after the end of OEF.[102] Unfortunately, the Army will continue to face significant security threats, coupled with the challenge of fully manning combat units, regardless of when OEF ends. Thus, even if installations could find local or state police able to provide continuous general security services, the duration of § 1010's authority is so indefinite that commanders are simply unable to rely on these services as part of long-term force protection programs. To ensure standardization and symmetry across installation security plans, the Army must provide regulatory guidance regarding the appropriate term for any contract or agreement with a local or state law enforcement agency made under § 1010.[103]

B. NDAA for FY 2003

Similar to the U.S.A. PATRIOT Act, the NDAA for FY 2003 contains numerous provisions covering a myriad of topics related to the DOD and national security.[104] The Act authorizes DOD appropriations, sets personnel strengths for the military departments, and contains numerous provisions directly affecting the management of the DOD.[105] In § 332, a minor

102. U.S.A. PATRIOT Act, *supra* note 8, § 1010(a). It is unclear when Operation Enduring Freedom may end. *See generally The Reconstruction of Afghanistan, Hearing Before the 108th Congress Senate Foreign Relations Committee*, 108th Cong. 4 (2003) [hereinafter Reconstruction of Afghanistan Hearing] (statement of David T. Johnson, U.S. Department of State Coordinator for Afghanistan Assistance). *Id*.

103. To garner the greatest benefit from § 1010 as well as to promote greater standardization across the Service, the Army should require installations to enter into one year contracts or agreements with a maximum of two option years. This potential three-year arrangement will match the period that the Army's private sector contracting authority is available under the NDAA for FY 2003. *See infra* text accompanying note 120.

104. NDAA for FY 2003, *supra* note 8.

105. *Id*.; *see generally* DEPARTMENT OF COMMAND, LEADERSHIP, AND MANAGEMENT, UNITED STATES ARMY WAR COLLEGE, HOW THE ARMY RUNS 10-3 (2002) (National Defense Authorization Acts are yearly enactments which accompany defense appropriations).

provision of the Act, Congress again attempted to provide legislative relief from the restrictions of 10 U.S.C. § 2465.[106] Unfortunately, as explained below, Congress limited the provision so much, that it again failed to provide the Army with the contractual authority needed for an effective long-term contracted security program.

1. Background and Elements of the Act

Recognizing the significant limitations of the U.S.A. PATRIOT Act, the DOD again requested Congress to review and modify 10 U.S.C. § 2465 as part of the NDAA for FY 2003.[107] Although not aimed at repealing the prohibition, the DOD proposal would have provided the flexibility needed to develop a comprehensive contract security program. The proposal would have allowed the DOD to contract for "security guard functions," so long as, "the provision of such services by government personnel [was] not cost effective or practical."[108] Rather than providing the DOD with this much needed flexibility, Congress again sought a compromise solution in the NDAA for FY 2003. Although § 332 of the Act did provide the DOD with the authority to contract with private security firms,[109] Congress again made this authority temporary in nature, limited in scope, and diffi-

106. NDAA for FY 2003, *supra* note 8, § 332. DFARS 237.102-70(d) implemented this authority. DFARS, *supra* note 46, at 237.102-70. Unfortunately, the DFARS provision merely restates the vague requirements of the statute. Although the Army has recently issued implementing instructions for § 332, it failed to adequately clarify or embrace the authority provided by § 332. *See* Implementation Message § 332, *supra* note 96. *See also infra* text accompanying notes 126, and 140.

107. DOD General Counsel Letter, *supra* note 77, encl. 2.

108. *Id.* encl. 1. In pertinent part, DOD's proposal sought to amend 10 U.S.C. § 2465 by adding the following subsection:

> (c) Funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into a contract for the performance of security guard functions provided that the Secretary of Defense determines that such contract is necessary because the provision of such services by government personnel is not cost effective or practical.

Id. In describing the effect of this proposed amendment on DOD Force Protection, the General Counsel stated, "The proposed revision will permit the hiring of security personnel to augment or replace existing federal employee security guards by utilizing contracts to meet and sustain to a level of applicable Force Protection Condition requirements expeditiously, commensurate with compliance with the Directives." *Id.*

109. NDAA for FY 2003, *supra* note 8, § 332.

cult in application. The specific elements of the authority are described and discussed below.

To exercise § 332 authority, the Secretary of the Army must make the following determinations. First, the contract must be for the increased performance of "security guard functions" stemming from the September 11th terrorist attacks. [110] Second, without the contract, members of the Armed Forces would be required to perform the increased security.[111] Third, the contractor's recruiting and training standards are comparable to those of government personnel performing DOD security guard functions.[112] Fourth, the contractor's personnel will be effectively supervised, reviewed, and evaluated.[113] Finally, the contractor's performance will not result in a reduction in security at the installation or facility.[114]

---

110. *Id*. In pertinent part, subsection (a) of the statute states the following:

> The Secretary of Defense or the Secretary of a military department may enter into a contract for any increased performance of security guard functions at a military installation or facility under the jurisdiction of the Secretary undertaken in response to the terrorist attacks on the United States on September 11, 2001, and may waive the prohibition under section 2465(a) of title 10, United States Code, with respect to such contract, if—
>
> (1) without the contract, members of the Armed Forces are or would be used to perform the increased security guard functions; and
>
> (2) the Secretary concerned determines that—
>
> (A) the recruiting and training standards for the personnel who are to perform the security guard functions at the installation or facility under the contract are comparable to the recruiting and training standards for the personnel of the Department of Defense who perform security guard functions at military installations and facilities under the jurisdiction of the Secretary;
>
> (B) the contractor personnel performing such functions under the contract will be effectively supervised, reviewed, and evaluated; and
>
> (C) the performance of such functions by the contractor personnel will not result in a reduction in the security of the installation or facility.

Id.

111. *Id*. § 332(a)(1).

To assist the Secretary in making these determinations, Congress also defined "increased performance" by providing two definitional examples.[115] First, if the installation had no security guard functions on 10 September 2001, then all security guard functions at the installation are considered increased performance.[116] Second, if the installation did have security guard functions on 10 September 2001, then only the functions over and above those performed as of that date are considered increased performance.[117] As demonstrated below, Congress created yet another ineffective solution, which fails to meet the security needs of the Army.

2. Another Ineffective Solution

Similar to § 1010 of the U.S.A. PATRIOT Act, § 332 of the NDAA for FY 2003 uses vague terms and unclear requirements to create a difficult and limited contractual authority.

---

112. *Id*. § 332(a)(2)(A). Specifically, § 332 requires that all contracts contain recruiting and training standards comparable with those of "personnel of the Department of Defense who perform security guard functions." *Id*. Although this broad language could require a comparison to the standards governing military police, the Army should reject this interpretation. Rather, the Army should interpret § 332 merely to require the standards currently detailed in *AR 190-56*. AR 190-56, *supra* note 95. *AR 190-56*, which governs the Army's civilian police and security guard program, specifically requires contract guard personnel standards comparable to Army civilian police standards. *Id*. para. 3-14.

113. NDAA for FY 2003, *supra* note 8, § 332(a)(2)(B).

114. *Id.* § 332(a)(2)(C).

115. *Id*. § 332(b)

116. *Id*. Subsection (b)(1) states that "in the case of an installation or facility where no security guard functions were performed as of September 10, 2001, the entire scope or extent of the performance of security guard functions at the installation or facility after such date" becomes increased performance. *Id*.

117. *Id*. Subsection (b)(2) of the statute states,

> in the case of an installation or facility where security guard functions were performed within a lesser scope of requirements or to a lesser extent as of September 10, 2001, than after such date, the increment of the performance of security guard functions at the installation or facility that exceeds such lesser scope of requirements or extent of performance is considered increased performance.

Id.

a. "Security Functions" v. "Security-Guard Functions"

First, rather than repealing or modifying § 1010 of the U.S.A. PATRIOT Act, Congress provided § 332 as additional authority. In doing so, Congress unfortunately failed to reconcile two key terms: "security functions" and "security guard functions." Under § 1010, an installation may contract with local or state governments for any "security functions" regardless of the nature of the security function or when the need arose.[118] Under § 332, however, an installation may only contract with the private sector for "security guard functions" caused by increased performance requirements stemming from the September 11th terrorist attacks.[119]Since Congress failed to define the nature of these "functions" or to provide any significant legislative history on either provision, Army leaders and contracting officials are left to interpret what distinction, if any, Congress intended by using these different terms.[120]

As such, before using either authority, the Army must provide guidance regarding the scope of these functions.[121] With no definition provided by Congress, the Army may interpret these terms expansively to garner the greatest benefit from each of the Acts. The Army should base

---

118. U.S.A. PATRIOT Act, *supra* note 8, § 1010. *See supra* discussion at Part III A.2b. and the text accompanying note 82.

119. NDAA for FY 2003, *supra* note 8, § 332(a). *See supra* text accompanying note 109.

120. Although the terms "security functions" and "security guard functions" are similar, the Army should not interpret them as referring to the same activities. *See* Clay v. United States, 123 S. Ct. 1072, 1077 (2003) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)) ("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"). Here, both § 1010 of the U.S.A. PATRIOT Act and § 332 of the NDAA for FY 2003 modify the prohibition contained in 10 U.S.C. § 2465. As such, the Army may presume that by using different terms to modify the same Act, Congress intended each term to have an individual meaning. Since the term "security functions" is the more general of the two, its meaning should be given a broader interpretation. Consequently, the Army should interpret "security functions" to include not only security guard activities, but also a broader level of security activities, such as SRT services.

121. Note that the duration of each authority differs. Under § 1010, installations may contract with local or state governments for up to 180 days after the end of OEF. As noted in Part III *supra*, since the Operation has no definite end date, this authority is available for an undeterminable period. Under § 332, however, installations may contract with the private sector for three years from the enactment of the NDAA for FY 2003. As discussed in the text accompanying note 102 *supra*, the Army should reconcile these differences by developing policy guidance, which standardizes (as much as possible) the term for which both authorities are available.

this expansive interpretation upon the realistic ability of state and local governments to provide installation security functions[122] and upon extensive market research to determine the security guard services that are available in the private sector.[123]

b. Increased Performance

Second, the definition of "increased performance" is quite problematic. As the security of the United States began to stabilize in 2002, Army installations lowered their defensive postures from Force Protection Conditions (FPCON) Delta to Alpha.[124] Consequently, the Army reassigned many mobilized, detailed, or deployed military personnel for the massive security requirements of FPCON Delta. As a result, the number of military personnel that are or would be used to perform security has decreased substantially.[125] The definition, however, is silent on whether increased performance refers to the maximum number of personnel required after September 11th to support FPCON Delta or whether the term refers only to that increment currently involved in security operations at FPCON Alpha. With the dangerous operating environment that Army installations

122. As discussed in Part IV *infra*, realistic services available from local governments should include infrequent SRT support and temporary general security guard services in emergency situations.

123. For example, Wackenhut Services Inc., the largest supplier of contract security to the federal government, provides a wide-range of government services including: security management; armed security officers; pass, identification, and badge issuing services; access control operations; random security patrols; escort duties; alarm monitoring; building security checks; vehicle inspections; security inspection and oversight services; traffic control, investigations, and enforcement; and emergency center operations. Wackenhut Services Incorporated, Government Services, *at* www.wackenhut.com/services/wsi/contracts.htm (last visited 5 Feb. 2003). By defining "security functions" and "security guard functions" to meet the standards generally available in the government or industry, the DOD will provide installation commanders with the maximum flexibility to integrate contracted security into their force protection plans.

124. *See Military Training Capabilities/Shortfalls Hearing Before the 107th Congress House Armed Services*, 107th Cong. 5 (2002) (testimony of Brigadier General Jason K. Kamiya, Commanding General of the Joint Readiness Training Center and Fort Polk, Louisiana) (discussing the effects of lowering FPCONs at Fort Polk).

125. *See Nominations, Hearing Before the 107th Congress Senate Armed Services Committee*, 107 Cong. 22 (2002) (testimony of Charles S. Abell Nominee for Deputy Under Secretary Of Defense for Personnel and Readiness). As the Global War on Terrorism began, DOD called up over 100,000 Reservists for a one-year tour. The DOD engaged many of them in force protection. As of 27 September 2002, the Army released most of these Reservists with approximately 14,000 remaining for a second year. *Id*.

continue to face, commanders must have the flexibility to increase installation security to combat terrorist threats. Yet, the vague definition of increased performance leaves uncertain the extent to which contractors can fill this need.[126]

The Army should interpret this term expansively to meet installation security needs at the highest threat levels. With the strong possibility of new terrorist attacks in CONUS, installations must be able to use contracted security to maximize force protection measures rapidly. Interpreting the scope of increased performance to mean those at FPCON Delta will ensure that commanders have the flexibility to contract for sufficient security personnel to augment their organic forces.[127]

c. Supervision and Security

Finally, two other requirements in § 332 are vague and redundant. First, the Secretary must determine that contractor personnel are "effectively supervised, reviewed and evaluated."[128] This statutory provision is a strange, statutory provision considering that by regulation all procurements require such determinations. Whether it is the responsibility determination of the procuring contracting officer[129] or the oversight duties of the contract administration office,[130] all government acquisitions must ensure that contractor activities are supervised, reviewed, and

126. Implementation Message § 332, *supra* note 96, also ignores the need to replace military personnel that were performing security duties *before* September 11th. As the Army continues to restructure its forces to man combat units fully, the use of contracted security could free significant numbers of military personnel for reassignment. Unfortunately, § 332 focuses solely on contracting for increased performance after 11 September 2001, thereby removing a valuable tool to assist the Army in restructuring its forces to fight the Global War on Terrorism.

127. The Army has greatly hampered the flexibility of its installation commanders by interpreting increased functions to be those at the FPCON Bravo level. Implementation Message § 332, *supra* note 96, para. 3.H.(1). This interpretation fails to garner the maximum benefits offered by § 332, and inhibits the development of a comprehensive contracted security program. Therefore, the DOD should reconsider this overly restrictive interpretation.

128. NDAA for FY 2003, *supra* note 8, § 332(a)(2)(B).

129. FAR, *supra* note 46, at 9.103.

130. *Id*. at 42.302.

evaluated.[131] Thus, the purpose of this statutory requirement is unclear from a substantive standpoint.

Second, the Secretary must determine that contractor performance will not reduce security at the installation or facility.[132] This requirement is also a strange requirement in that the whole purpose of § 332 is to allow installations to contract for *increased* security. It would be unusual indeed for an installation to procure security guards if it would ultimately decrease security at that facility. Again, it is unclear what Congress is seeking to regulate by this vague requirement.

Consequently, with no legislative history to shed light on these provisions, the Army should interpret this as Congress, once again, expressing its historic concerns over the quality of contracted security personnel.[133] Therefore, as discussed extensively in Part IV *infra*, the Army should address these quality concerns by establishing a comprehensive, standardized contractual framework, which will ensure that installations throughout CONUS can easily contract for the highest quality security guard services available to meet their needs.[134]

---

131. *See also* AR 190-56, *supra* note 95, para. 3-1. This regulation establishes the Army's Individual Reliability Program (IRP) for security personnel. The IRP requires a systematic and periodic review of all Army security personnel to ensure their fitness for duty. The IRP specifically covers contracted security personnel. *Id.*

132. NDAA for FY 2003, *supra* note 8, § 332(a)(2)(C).

133. Note, § 332 also requires a comparison of the contractor's training and recruiting standards to those of DOD personnel performing similar functions. NDAA for FY 2003, *supra* note 8, § 332(a)(2)(A). The Army should interpret this requirement to be another expression of congressional concern over the quality of contract security personnel. However, this requirement is easily definable as the Army provides such standards in *AR 190-56* (incorporating the OPM standards mentioned in the text accompanying note 100 *supra*).

134. Nevertheless, to meet the letter of the statute, the Army should also require the source selection authority to make these factual determinations specifically in writing before the award.

IV. Program Implementation

Based on the foregoing analysis, this Part recommends a comprehensive, contracted security program under the authority provided by both the U.S.A. PATRIOT Act and the NDAA for FY 2003. As described below, this program will utilize limited contracts or cooperative agreements[135] at the installation level; and a multiple award, omnibus contract at the departmental or regional level. This bifurcated approach will effectively implement the Army's new contractual authority, will address Congress' historic concerns over quality and the use of quasi-military armed forces, and will thereby support a renewed request for the ultimate repeal of the statutory restrictions.

A. Installation Level

At the installation level, the Army should require all facilities to pursue individual contracts or cooperative agreements with state and local agencies[136] for the provision of special, infrequent security services, such as special weapons and tactics (SWAT) support for installation SRT operations.[137]

As discussed in Part III *supra*, most state and local agencies simply do not have sufficient resources to provide the general security services required by CONUS installations. However, these governments should be able to provide assistance with special, infrequent security threats such as snipers or hostage situations.[138] To entice state and local governments to enter such contracts or agreements, installations may provide funding

---

135. *See generally* 31 U.S.C. § 6305 (2000) (defining the authority of federal agencies to use cooperative agreements).

136. For decades, certain federal agencies have had the authority to use contracts and cooperative agreements with state and local law enforcement organizations to handle security operations at remote federal facilities. *See, e.g.*, 16 U.S.C. § 460ww-1 (Dep't of the Interior); 42 U.S.C. § 1962d-5d) (U.S. Army Corps of Engineers); 8 U.S.C.S. § 1103 (Dep't of Justice Immigration and Naturalization Service). Often these agreements merely involve coordinating with local authorities to enforce state criminal laws in federal proprietary jurisdictions. *See, e.g.*, 36 C.F.R. 330.4 (authorizing law enforcement contracts to service U.S. Army Corps of Engineers' water resource development projects).

137. Note, if SWAT support is not available from the state or local government, or if the installation has sufficient SRT resources available, the contract or agreement could be for short-term, general security guard assistance. For example, while organic installation security personnel are conducting SRT operations, state or local personnel could provide the facility with temporary access control, security patrols, or traffic control.

for the training of civilian SWAT teams and other civilian law enforcement personnel.[139]

Such an installation level program will have two key benefits. First, by requiring installations to pursue these contracts or agreements, the Army will not only enhance installation security, but will also strengthen relations with local communities, thereby enhancing homeland security in general.[140] Second, by using only state and local governments to provide these special security functions, the Army will demonstrate to Congress that any remaining concerns over the government's use of private "quasi-military armed forces" are unfounded.

B. Departmental or Regional Level

At the departmental or regional level, the Army should use the authority of § 332 to enter multiple award, performance-based, omnibus contracts to procure general security guard services that are common to all CONUS installations.[141] This method has three main benefits. First, it supports the Army's new installation management and contracting systems by centralizing and standardizing the procurement of all installation general security guard functions. Second, it supports the DOD's goal of promoting innovation, competition, and quality through performance-based service contracts. Finally, it will further demonstrate to Congress that the

---

138. As discussed in Part III *supra*, the Army may interpret "security functions" broadly. By doing so, the Army may go beyond typical "security guard functions" and contract with local law enforcement personnel to support these emergency security missions.

139. Recall that § 1010 requires training and qualification standards for all local law enforcement personnel engaged in installation security functions and authorizes the Army to expend appropriated funds in support of such contract or agreements. *See also supra* text accompanying notes 82, 84, 100. Each contract or agreement may contain a provision for the Army to provide training for local SWAT or other law enforcement personnel. This provision could be for civilian law enforcement training funded as part of the contract or agreement or could be for SRT training provided by the U.S. Army Military Police School. *See generally* Memorandum, John P. White, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: DOD Training Support to U.S. Civilian Law Enforcement Agencies (29 June 1996) [hereinafter DOD CLEA Training Memo] (on file with author).

140. The DOD is encouraging installations to interact with local communities to enhance emergency preparedness planning and to develop joint military civilian response procedures. *See Combating Terrorism Hearing supra*, note 4, at 4 (statement of Peter Verga Special Assistant for Homeland Security, DOD).

Department can responsibly use contract personnel without jeopardizing installation security.

1. Supporting the Transformation of Installation Management and Army Contracting

On 1 October 2002, the Army completely restructured its installation management and contracting programs in an effort to streamline, standardize, and enhance base functions; [142] to consolidate common use contracts; and to leverage economies of scale.[143] Specifically, these programs centralized installation management and contracting functions at the Departmental level under the newly created Army Installation Management Agency (IMA) [144] and Army Contracting Agency (ACA),[145] respectively.

As discussed below, an omnibus departmental or regional security guard contract will support every major goal of these programs. First, it

141. The Army recently promulgated general implementing instructions for the use of § 332's contracting authority. *See* Implementation Message § 332, *supra* note 96. Although these instructions establish "project officers" at the Army G-3 and the new Installation Management Agency, they fall far short of effectively creating a comprehensive contract security program. *Id*. paras. 3.B.(3), 3E.(3). Unfortunately, rather than providing a standardized procurement scheme for all general security guard services, the implementation instructions require garrison commanders at the installation level to ensure that the qualifications, training, recruitment, and authority of contract security guards meet the requirements of § 332. *Id*. para. 3.H. This requirement does little to further the long-term security needs of CONUS installations. As advocated throughout this Part, the Army should create a more centralized comprehensive program at the Departmental or Regional level. By doing so, the Army will standardize installation contract security, further their overall transformation efforts, and provide support for the ultimate repeal of the statutory restrictions.

142. Headquarters, Dep't of Army, Gen. Orders No. 4 (22 Aug. 2002) (creating the new Army Installation Management Agency). The Transformation of Installation Management (TIM) program is a "top-down regional alignment [that] creates a corporate structure with the sole focus on efficient, effective management of all [Army] installations." *FY 2003 Defense Authorization Request Before the 107th Congress Subcommittee on Military Installations and Facilities House Armed Services*, 107th Cong., 27 (2002) (testimony of Mario Fiori, Assistant Secretary of the Army, for Installations and Environment).

143. Headquarters, Dep't of Army, Gen. Orders No. 6 (23 Sept. 2002) (creating the Army Contracting Agency).

144. Gen. Orders No. 4, *supra* note 141, para. 2. The IMA, which falls directly under the Assistant Chief of Staff for Installation Management (ASCIM), supports the management of all installations and installation support services throughout the Army. *Id*. The IMA oversees seven directorates, which in turn manage Army installation functions within specified geographic regions throughout the world. *Id*.

will streamline the procurement of general security guard services. Second, it will provide greater stability and standardization of these services. Third, it will increase competition and ultimately enhance the quality of security services. Finally, it will allow the department or region to leverage great economies of scale, ultimately reducing the cost of security guard services.

One of the key goals of both the Department and the ACA is efficiency. By using multiple award omnibus contracts, installations will save time and money, through a streamlined, consolidated procurement process.[146] First, with an omnibus contract, installations need only issue task orders against the existing procurement. Unlike a stand-alone procurement, task orders do not require a synopsis and need not be open for thirty days.[147] Second, the Army generally does not permit protests on task orders, which will save time and expense at the installation level.[148] This ability to acquire security guard services quickly will also prove invaluable when the installation rapidly increases the base FPCON for an extended time.[149]

Another key objective of the IMA is the stabilization and standardization of installation functions across the Army.[150] Omnibus contracts will allow the Army to maintain strict visibility on the quality of security guard services provided to all CONUS installations. Specifically, once the instal-

---

145. Gen. Orders No. 6, *supra* note 142, para. 2. The ACA, which falls directly under the Assistant Secretary of the Army (Acquisition, Logistics & Technology), provides "command and control of the regional and installation contracting offices; the U.S. Army Information Technology, E-Commerce, and Commercial Contracting Center (ITEC4); and the contingency contracting function." *Id*. para. 1. The ACA oversees three directorates, which in turn manage contracting based upon requirements (i.e., ITEC) or geographic regions (e.g., complementing IMA geographic regions). *Id*. para. 4.

146. *See generally* OFFICE OF FEDERAL PROCUREMENT POLICY, BEST PRACTICES FOR MULTIPLE AWARD TASK AND DELIVERY ORDER CONTRACTING (1997) [hereinafter OFPP MULTIPLE AWARD BEST PRACTICES GUIDE]. To enhance efficiency, the ACA is also in the process of consolidating all "common use" contracts over $500,000. At a minimum, the regional level will handle such contracts. *See* Perry Hicks, Address at the U.S. Army Assistant Chief of Staff for Installation Management A-76 Conference (Aug. 15, 2002).

147. FAR, *supra* note 46, at 5.202(a)(6).

148. *Id*. at 16.505(a)(8).

149. Any omnibus contract must specifically provide for the rapid movement of security guard forces to installations faced with heightened FPCONs and emergencies. Although the use of contracts or agreements with state and local law enforcement agencies under § 1010 will assist in temporary emergency situations, when installation FPCONs are raised for an extended period of time, the omnibus contract must provide for the significant increase of long-term general security guard services.

lation establishes the contract, this process will provide a set of pre-qualified contractors from which to choose. Although the contractors may be different at each installation, the quality, standards, and functions performed will generally be the same.

Third, the IMA also seeks to create effective management of all installation functions. In this regard, an omnibus contract at the departmental or regional level will enhance competition and improve the quality of the security services provided. Using multiple awards creates two layers of competition. First, the initial procurement will be competitive in nature and will be large enough to attract experienced contractors, who may greatly assist the Army in enhancing its contracted security program.[151] Second, each order issued against the contract must be the product of competition among the "pre-qualified" vendors.[152] With these multiple levels of competition, using the performance-based contracting methods discussed in Part IV.B.2. *infra*, installations will be able to obtain rapidly the best quality services available to meet their security needs.

Finally, omnibus contracts will generate significant economies of scale—a major goal of the ACA. The large number of security guard requirements throughout CONUS, coupled with the multiple levels of competition discussed above, will provide the department or region significant leverage in any procurement. The Army can use these economies of scale to obtain the highest quality security guard services at the best prices.

2. Performance-based Security Contracting

The effective acquisition of services from the private sector is playing an ever-increasing role in the successful achievement of DOD objectives.[153] As a result, the DOD has recognized the importance of molding its services acquisition policy around the business practices used in the commercial sector.[154] One such practice, the use of performance-

150. Press Release, U.S. Army Public Affairs, Secretary of the Army Announces Regions for Transformation of Installation Management (March 19, 2002) (on file with the author).

151. *See also infra* Part IV.B.2.b. (discussing the unique benefits of using statements of objectives (SOO) at the departmental or regional level to maximize industry participation in the procurement).

152. FAR, *supra* note 46, at 16.505. *See also* DFARS, *supra* note 46, at 216.505-70 (requiring DOD organizations to comply with competition requirements for any task order exceeding $100,000 against a multiple award contract).

based service contracting, has become a major thrust of the DOD acquisition reform. In fact, the Department announced in April 2000 that at least "50 percent of service acquisitions, measured both in dollars and actions, are to be performance-based by the year 2005."[155] Moreover, Congress,[156] the Office of Management and Budget, [157] and the President[158] support this strong emphasis on the use of performance-based service contracting. Consequently, Army leaders and contracting personnel should strongly consider using this method for the acquisition of general security guard services under § 332. As demonstrated below, this acqui-

---

153. *See Technology and Procurement Policy, Hearing before the 107th Congress Subcommittee on Technology and Procurement Policy Committee on Government Reform*, 107th Cong., 2 (2002) [hereinafter *DOD Procurement Policy Hearing*] (testimony of Deidre A. Lee Director, Defense Procurement, Office of the Under Secretary of Defense for Acquisition, Technology & Logistics).

> Our business environment within the Department of Defense has become very complex, particularly in the acquisition of services. The amount of money the Department spends on services has increased significantly over the past decade, to the point where we now spend approximately an equal amount of money for the acquisition of services as we do for equipment.

Id.; *see also* Memorandum, Principle Deputy Under Secretary of Defense for Acquisition and Technology, to Secretaries of the Military Departments et al., subject: Acquisition of Services (5 Jan. 2001) [hereinafter DOD Acquisition of Services Memo] (on file with author); Memorandum, Acting Assistant Secretary of the Army Acquisition, Logistics & Technology, to Program Executive Officers et al., subject: Performance-Based Service Acquisition (PBSA) Implementation (6 Sept. 2001) [hereinafter Army PBSA Implementation Memo] (on file with author) (stating, "Services represent approximately 30 percent of our acquisition dollars and 40 percent of our actions. This is by far the Army's largest single acquisition category and has been increasing at a rate of one to two percent per year."). *Id*.

154. *See* U.S. DEP'T OF DEFENSE, GUIDEBOOK FOR PERFORMANCE-BASED SERVICES ACQUISITION (PBSA) IN THE DEPARTMENT OF DEFENSE iii (2000) [hereinafter DOD PBSA GUIDEBOOK] (on file with author) ("Performance Based Services Acquisition (PBSA) strategies strive to adopt the best commercial practices and provide the means to reach world class commercial suppliers.").

155. Memorandum, Under Secretary of Defense for Acquisition and Technology, to Secretaries of the Military Departments et al., subject: Performance-Based Services Acquisition (PBSA) (5 Apr. 2000) [hereinafter DOD PBSA Goals Memo] (on file with author); *see also* Army PBSA Implementation Memo, *supra* note 152, at 1 (discussing the Army's plan to meet DOD's 50 percent PBSA goal, and tasking senior acquisition leaders to implement PBSA strategies to the maximum extent practicable).

156. NDAA for FY 2003, *supra* note 8, § 805 (stating that "it shall be an objective of the Department of Defense to achieve efficiencies in procurements of services under multiple award contracts through the use of . . . performance-based services contracting.").

sition method not only offers several practical advantages, such as increased innovation and competition, but it would also support DOD policy and further demonstrate to Congress the Army's ability to effectively implement a comprehensive contract security program.

a. Performance-based Contracting Methods

Performance-based service contracting is a method of obtaining services, which dictates the result desired by the requiring activity rather than the manner of performance by the contractor.[159] Its goal is to encourage creativity and innovation in the private sector by allowing contractors to develop their own means of meeting the government's needs. To achieve this goal, performance-based contracts have four general characteristics. First, they describe work in terms of results rather than methods of performance.[160] Second, they have specific standards designed to measure performance as well as quality assurance surveillance plans to ensure that the standards are met.[161] Third, they have penalty provisions, which reduce the fee or price when the vendor fails to meet certain performance

157. Memorandum, Deputy Director, Office of Management and Budget, to Heads and Acting Heads of Departments and Agencies, subject: Performance Goals and Management Initiatives for the FY 2002 Budget (Mar. 9, 2001) [hereinafter OMB Performance Goals Memo] (on file with author). As one of its primary goals for Fiscal Year 2002, OMB instructed all federal executive agencies to make greater use of performance-based contracts. "For FY 2002, the Performance-Based Service Contracting (PBSC) goal [was] to award contracts over $25,000 using PBSC techniques for not less than 20 percent of the total eligible service contracting dollars." *Id.*

158. PROCUREMENT EXECUTIVES COUNCIL, FISCAL YEAR 2001-2005 PROCUREMENT EXECUTIVES COUNCIL STRATEGIC PLAN (2001) (on file with author) ("Over the next five years, a majority of the service contracts offered throughout the Federal Government will be performance-based . . . the Government must set the standards, set the results and give the contractor the freedom to achieve it in the best way.") (quoting Presidential Candidate Governor George W. Bush, Making the Government More Efficient, Address at Philadelphia, Pennsylvania (June 9, 2000)).

159. FAR, *supra* note 46, at 37.601.

160. *Id*. at 37.601(a). The key document for any performance-based acquisition is an individually tailored statement of work (SOW) that describes the requirements, rather than how to accomplish the work. *Id.* at 37.602-1(a). Under the comprehensive contracted security program proposed in this Part, the key task for installation security planners will be to develop an individual SOW to support task orders placed against the omnibus contract.

standards.[162] Finally, they may include incentive provisions to reward work that exceeds certain performance standards.[163]

Although the *Federal Acquisition Regulation* provides authority for performance-based service contracting, it does not provide a system to implement the method. Rather, individual agencies are left to develop their own means of employing these concepts.[164] Consequently, a group of federal agencies recently formed an interagency or industry team to create the *Seven Steps to Performance-Based Services Acquisitions Program (Seven Steps PBSA Program)*.[165] As described below, this detailed guide provides a useful framework for Army leaders and contracting officials to create an effective contract security program.

b. Seven Steps to Contracting for General Security-Guard Services

The Seven Steps PBSA Program covers the entire contractual process from acquisition planning to contract administration. The interagency team designed this program to "shift the paradigm from traditional 'acquisition think' into one of collaborative performance-oriented teamwork."[166] The Seven Steps are the following: establish a team, describe the problem, examine private sector and public sector solutions, develop the performance work statement or statement of objectives, deter-

161. *Id*. at 37.601(b). Properly prepared, these plans can encourage a strong collaboration with the contractor to meet the government's needs. In performance-based acquisitions, not only does the Quality Assurance Surveillance Plan (QASP) have government inspection and acceptance criteria, but it also can incorporate the contractor's normal, commercial quality control obligations. The QASP also ties all surveillance criteria to measurable contractor output rather than the method of performance. *Id*. at 37.602-2. The plan, if developed and administered properly, can further encourage innovation and collaborating by the contractor.

162. *Id*. at 37.601(c). The ability to motivate the contractor to work at or above performance standards is a key advantage of performance-based acquisitions. Various factors may motivate contractors, from the type of contract chosen to the negative or positive performance incentives in the contract. *Id*. at 37.602-4; 37.602-1. Consequently, the generally preferred contract type in performance-based acquisitions is the fixed price contract. *Id*. at 37.602-4.

163. *Id*. at 37.601(d).

164. *See, e.g.*, DOD PBSA GUIDEBOOK, *supra* note 153.

165. U.S. Dep't of Commerce, *Seven Steps to Performance-Based Services Acquisitions*, *at* http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/home.html [hereinafter SEVEN STEPS PBSA GUIDE] (last visited 5 Feb. 2003).

166. *Id*.

mine how to measure and manage performance, select the right contractor, and then manage the performance.[167] Each of these steps relates to contracting for general security guard services.[168]

The first step is for the Department or regions to establish a multi-discipline, contract security acquisition team. This team should include not only contracting personnel and Army force protection experts, but also security managers from each major Army installation as well as private sector security consultants. By establishing this broad based team, the department or region can effectively use this program to rethink installation security from all levels and perspectives.

Second, the team must effectively define the problem. To do so, the Department must first develop comprehensive policy guidance, which addresses the flaws of § 332 as identified in Part III.B.2. Next, with this guidance, the team should develop and issue an Army or region-wide security survey, which requires each installation to identify all security guard functions currently available for contracting under § 332.[169] This information will permit the team to determine which functions are common to all CONUS facilities, and thereby, define the scope of the problem that the acquisition will address.

---

167. *Id*.

168. Naturally, a Departmental or regional omnibus contract using performance-based methods will require some lead-time to implement. Unfortunately, with the Global War on Terrorism (GWOT) operations ongoing, CONUS installations must be able to contract for general security guard services immediately. The Department should consider authorizing temporary procurement of such services through contractors on the GSA Schedule 539 or 084 at a regional level. The GSA criteria for contract guard training and recruitment meet current OPM guard standards and should be sufficient to satisfy the general requirements of § 332. For a description of these standards, *see supra* text accompanying note 100. By temporarily using GSA schedules, the Army will be able to provide installations with immediate support, while developing a comprehensive Army-specific contract security program. Note that DFARS 208.404-70 requires competition for any order from a GSA schedule if it is in excess of $100,000. DFARS, *supra* note 46, at 208.404-70.

169. *See also* Implementation Message §332, *supra* note 96, para. 3.F.(1). Under the Army's current implementation plan, Major Army Commands determine their command-wide security guard needs. *Id*. While this blunt method may yield some of the required data, a standardized Departmental or regional survey (coupled with detailed policy guidance) would provide a better analysis of installation needs. With such standardized data, the Army will be in a much stronger position to support its request for the ultimate repeal of the statutory restrictions.

Third, the team must conduct extensive market research to determine the private sector's ability to provide a solution to common installation security guard needs.[170] This research will be the most important part of the acquisition. In fact, "the right kind of market research can dramatically shape an acquisition and draw powerful, solution-oriented ideas from the private sector."[171] Here, the team should not only take advantage of the traditional methods of market research,[172] but should also tap into the vast experience of industry leaders in private sector security firms. Although the FAR permits several methods of market research, which directly involve the participation of contractors,[173] commentators have argued that "one-on-one" sessions with industry leaders provide the best method of developing performance-based solutions.[174] By using this direct approach early in the process, the team will be able to craft its requirements to take advantage of the latest security solutions. Moreover, the team may obtain key information regarding the performance measures used by the security industry to evaluate the effectiveness of these solutions. This information will directly influence the team's development of the statement of work (SOW) or the statement of objectives (SOO).

Fourth, based on its survey and market research, the team must develop a broad based SOW or SOO for the omnibus contract as well as guidance for installations to develop individual performance-based task orders.[175] For the base contract, the Army should use a SOO. A SOO is a performance-based acquisition technique, where the government merely identifies the desired objectives and allows contractors to offer solutions in

---

170. Although the Seven Steps Program emphasizes examining both private and public sector solutions, the public sector aspect of installation security is addressed through the use of contracts or agreements using §1010 of the U.S.A. PATRIOT Act. *See* discussion *supra* Part IV.A.

171. Bob Welch, *Commercial Keys to Performance-Based Acquisition: Emulating the Commercial Sector's Streamlined Acquisition Approaches and Target Marketing Efforts Could Help the Government Generate More Creative Solutions at a Lower Price*, CONTRACT MGMT. 20 (2002) (Welch goes on to note that effective market research "can support a fundamental rethinking about the nature of the requirement, and deliver better results to the program office through performance-based partnership with high-performing contractors.)

172. FAR, *supra* note 46, at 10.002(b)(2) (describing general methods available for market research).

173. *See id*. at 15.201 (describing early exchanges of information with contractors such as industry or small business conferences, public hearings, presolicitation notices and draft requests for proposals (RFP)).

174. Welch, *supra* note 170, at 2. *See also* FAR, *supra* note 46, at 15.201 (permitting use of one-on-one meetings with potential offerors).

the form of detailed statements of work. These contractor SOWs must include specific performance measures based upon existing commercial practices.[176] For this acquisition, the SOO's objectives should focus upon the contractor's ability to fulfill common installation security guard functions and its ability to provide increased security guard support rapidly in the event of an emergency or heightened FPCON. Using this approach, the team will encourage innovation and competition, while also obtaining the most current performance standards used in the commercial marketplace. With this information, the team can then develop detailed guidance to assist installations with producing performance-based SOWs to support individual task orders.[177]

Fifth, while the installation will base each task order upon its particular needs, the team can provide examples of common performance-based standards and measures to assist in SOW development. For instance, the team may issue sample standards and measures for such common services as installation access control, security patrolling, dispatch operations, and emergency response actions.[178] Although the installation will modify such samples based upon individual security guard needs, all installations will have a common starting point for SOW development.

Sixth, the departmental or regional Source Selection Authority must choose the right contractors for the omnibus contract. This authority should base its selection upon the best value "trade-off" approach,[179] rather than the "lowest cost technically acceptable" standard,[180] to ensure that

175. FAR, *supra* note 46, at 37.602-1. Since this task-order will involve an omnibus multiple award acquisition, the team needs to first define the overall scope of the basic contract. The statement of work for each task order will then be performance-based in accordance with the guidance of the Department or Region.

176. Welch, *supra* note 170, at 2.

177. Issuing this guidance to assist all installations with the development of SOWs will further promote the IMA goal of standardization of installation services.

178. Recently, the U.S. Department of Commerce began using performance-based methods to acquire security guard services. Telephone Interview with E. Darlene Bullock, Contracting Officer, Commerce Acquisition Solutions, Business Solutions Office, U.S. Department of Commerce (Jan. 31, 2003). For an example of performance standards and measures used with a security guard services contract *see*, U.S. DEPARTMENT OF COMMERCE, *Request for Quotation for U.S. Department of Commerce Security Guard Services*, RFQ NO. SA1301-03-RQ-0009 (Jan. 23, 2003) (on file with the author U.S. Department of Commerce Business Solutions Office and the author) (providing performance-based standards and measures for such requirements as roving patrols, entrance control, and emergence response activities).

179. FAR, *supra* note 46, at 15.101-1.

180. *Id*. at 15.101-2.

appropriate tradeoffs can be made in determining the acceptable contractor pool.[181] Once this authority determines the pool, installations should be able to use the "lowest cost technically acceptable"[182] standard to issue performance-based task orders.

Finally, all installations must effectively manage the performance of each task order. This management not only entails a strong quality assurance and surveillance plan (QASP), but also a strong partnership with the contractor. First, as part of the QASP, installations must define appropriate inspection or acceptance criteria, linked directly to the performance objectives in the statement of work. Contractors must understand this linkage and be aware of the penalties for poor performance. Second, installations should appoint multiple contracting officer representatives or inspectors to monitor contractor performance.[183] Third, the contracting officer and their representatives should meet monthly with the contractor to review performance levels and discrepancies. Finally, the department or region should require detailed quarterly reports on the performance of each task order. This will ensure the effective monitoring of all security guard functions throughout CONUS. These reports will provide useful guidance for obtaining even higher quality security guard services in future acquisitions.

In summary, using a multiple award omnibus contract, coupled with performance-based contracting methods, will support DOD and Army

---

181. Note also that DFARS 212.102 now authorizes contracting officers to use FAR Part 12 procedures for any performance-based service contract or task order valued at $5 million or less, so long as, certain specified criteria are met. DFARS, *supra* note 46, at 212.102. Although this authority may make contracting for such services easier, this authorization is only temporary in nature (ending on 30 October 2003). Unless extended, this authority will provide little assistance in the development of a comprehensive contract security program.

182. Although installations will be able to use the "best value approach" in issuing task orders, this approach seems unnecessary. Once the Department or region determines the group of contractors, which are able to meet the agency's screening criteria, installations should be able to choose the contractor simply, which offers the lowest cost technically acceptable services for their task orders.

183. *See* AR 190-56, *supra* note 95, para. 1-4(i)(3)(b) (requiring the contracting officer's representative (COR) to be the Provost Marshal of the installation concerned). *See also* Implementation Message § 332, *supra* note 96, para. 3.H.(6) (reiterating the COR requirement of AR 190-56).

management goals as well as maximize quality through increased competition and contractor innovation.

3. Satisfying Congress

As discussed throughout Parts II and III, Congress has historically shown concern with two main aspects of contracting for private security: the quality of the security used to protect DOD installations[184] and the government's use of quasi-military armed forces. As demonstrated throughout this Part, this program addresses each of these concerns.

First, regarding quality, Congress has shown concern with the control of installation security functions, the potential for labor disputes, and the training level of contracted security personnel. Fortunately, by using omnibus contracts at the departmental or regional level, the Army can control the quality of the services procured, and therefore can provide significant stability, standardization, and control across the service. Moreover, if the employees of one contractor should strike, the contract will have sufficient vendors available to obtain substitute services quickly. Regarding training, § 332 requires all vendors to have training and recruitment standards that are comparable to the DOD security personnel. The Army need only define these standards and make them mandatory requirements in the omnibus contract. By controlling general security guard contracting at the departmental or regional level, the Army will ensure all CONUS installations have high quality security services.

Second, by restricting private sector contracts to the provision of general security guard services, the Army will in no way use private quasi-military armed forces as described in Part II.A.2.[185]

---

184. As discussed in Part II.B.1 *supra*, the original congressional opponents of 10 U.S.C. § 2465 (2000) asserted that Congress enacted this statute to appease government employee unions. The possibility that any contracted security program would ever satisfy the concerns of government employee unions is highly unlikely. *See supra* text accompanying note 16. As such, the program advocated by this article focuses upon meeting congressional concerns related to the quality of contracted security forces as well as concerns related to governmental use of quasi-military armed forces.

185. *See supra* text accompanying note 50.

Consequently, this program will fully address each of the historic congressional concerns which led to the development of both 5 U.S.C § 3108 and 10 U.S.C. § 2465. As such, this program will not only effectively implement the Army's new temporary contractual authority, but will also provide strong support for a renewed request for a complete repeal of the statutory restrictions. The repeal of these restrictions will play a key role in the Army's transformation efforts. Specifically, this program will permit the Army to use the A-76 process to study the feasibility of contracting out security positions currently held by federal government personnel. This process should allow the Department to shift essential resources to the performance of "core competencies;"[186] to use competition to obtain higher quality security services; and most importantly, to establish cost-effective, long-term installation force protection programs throughout CONUS.

V. Conclusion

As demonstrated throughout this article, the Army continues to face significant statutory restrictions in the development of a comprehensive contract security program to meet the long-term needs of CONUS installations. Although Congress has provided some temporary relief, it continues to express significant concerns regarding the quality and use of private security forces in the DOD, as evidenced by the vague, complicated, and limited contractual authority created by both the U.S.A. PATRIOT Act and the NDAA for FY 2003. By understanding and addressing these historic concerns, the Army can use this limited contractual authority to develop a broad-based security program, which will support a renewed request for the repeal of these antiquated restrictions.

---

186. *See* Third Wave Memo, *supra* note 9 (stating, "The Army must focus its energies and talents on our core competencies–functions we perform better than anyone else–and seek to obtain other needed products or services from the private sector where it makes sense."). *Id.*

NO SHIRT, NO SHOES, NO STATUS: UNIFORMS, DISTINCTION, AND SPECIAL OPERATIONS IN INTERNATIONAL ARMED CONFLICT

MAJOR WILLIAM H. FERRELL, III[1]

The United States is in international armed conflict with Country X, a nation that harbors terrorist group Y. A U.S. Special Operations Force (SOF) has been tasked to conduct a direct action raid to destroy a group Y terrorist cell in Country X. Both X and Y forces have been declared hostile. Two days before the anticipated raid, several reconnaissance teams are inserted to gather information on the objective and to assume sniper positions to support the follow-on raid force. These reconnaissance teams are inserted wearing local civilian clothing to help avoid detection, and they will remain in civilian clothing throughout the mission to conceal their true identity. After two days of reporting from near the objective, one of the reconnaissance teams identifies a building where several members of Country X's armed forces and terrorists from group Y conduct daily meetings.

The mission of the raid force is to kill or capture all members of Country X's armed forces and terrorist group Y found at the building. The reconnaissance teams are instructed that a sniper

---

1. U.S. Marine Corps. Currently assigned as the Deputy Chief, Operational Law, U.S. Forces Korea; Assistant Judge Advocate, United Nations Command; Operational Law Attorney, ROK-U.S. Combined Forces Command; Legal Advisor, United Nations Command Military Armistice Commission; and Staff Judge Advocate, U.S. Marine Corps Forces Korea. LL.M., 2002, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. J.D., 1991, University of Richmond; M.B.A., 1991, University of Richmond; B.A., 1986, Virginia Polytechnic Institute and State University. Previously assigned as Marine Representative, Center for Law and Military Operations (CLAMO), Charlottesville, Virginia, 1998-2001; Military Observer, United Nations Mission for the Referendum in the Western Sahara, 1998; International Law Officer, Marine Corps Bases, Japan, 1995-1998; Staff Judge Advocate, SPMAGTF Caribbean, 1993-1994; Trial Counsel, 2d Legal Services Support Section, 2d FSSG, Camp Lejeune, North Carolina, 1992-1993 and 1994-1995. The views expressed in this article are my own and do not necessarily reflect the views or policy of the Department of Defense (DOD) or the U.S. Marine Corps. I would like to thank Mr. W. Hays Parks, LtCol Michael C. Jordan, USMC, Major Cody M. Weston, USMC, and Major Alton L. Gwaltney, U.S. Army, for their comments and assistance in preparing this article. Any errors or omissions remain my own.

shot from one of the teams will initiate the raid on the building. The raid force, wearing black jumpsuits with no indicia of rank, service, or nationality, launches by helicopter into an insert point, and then moves to an attack position just off the objective. With perfect synchronization, a reconnaissance team sniper in civilian clothing engages an unsuspecting terrorist, and the raid force rushes in to complete the assault. The other reconnaissance teams, still in civilian clothing, provide overwatch and a base of fire for the raid force.

I. Introduction

Current U.S. operations in Afghanistan against the war on terrorism highlight the increased role special operations forces will likely play in future conflicts. The above fictional scenario is typical of a mission that special operations forces train for, and may be called on to perform, in today's world-environment. This scenario raises some important law of war (LOW) considerations for U.S. forces. The LOW delineates criteria that combatants must meet to gain prisoner of war (POW) status, and it obligates combatants to distinguish themselves from civilians.[2] Further, the LOW limits the conduct that combatants can engage in while dressed in civilian clothing, violations of which may result in a loss of POW status as well as disciplinary action against the combatants and their superiors.[3]

First, this article briefly discusses the two types of armed conflict and how the type of armed conflict determines which body of the LOW applies. Next, the article examines the issue of POW status, and how obtaining this coveted status is directly related to the LOW principle of distinction and the wearing of a uniform or some other fixed identifying emblem. In sections VI and VII, this article examines the conduct of military operations in civilian clothes, and how this conduct could result in a LOW violation (perfidy) or the loss of POW status (spying) depending on the type of conduct engaged in. Finally, this article examines the Supreme Court case, *Ex parte Quirin*,[4] and how the Court's holding, though contra-

2. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(1), 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 37(1)(c), 1125 U.N.T.S. 3 [hereinafter Protocol I].

4. 317 U.S. 1 (1942).

dictory to the current state of the LOW regarding distinction and spying, is nevertheless binding on the U.S. armed forces.

II. Type of Armed Conflict

When analyzing a question under the LOW, one must first determine whether the armed conflict in question is international or internal because the type of conflict determines which body of the LOW applies. International armed conflicts, defined in Common Article 2 of the Geneva Conventions of 1949,[5] trigger the entire body of the LOW, whereas conflicts classified as internal, defined by Common Article 3 of the Geneva Conventions,[6] do not. This article assumes that the United States is in an international armed conflict with Country X.[7] As a result, the complete body of the LOW applies to the conflict, primarily the Hague Regulations,[8] the four Geneva Conventions of 1949,[9] and Protocol I.[10]

---

5. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.S.T.S. 85 [hereinafter GWS Sea]; GPW, *supra* note 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. Common Article 2 of the Geneva Conventions defines international armed conflicts as "all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Article 1(4) of (Protocol I) expanded the definition of international armed conflict to include "[a]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." Protocol I, *supra* note 3, art.1(4). The United States specifically disagrees with Article 1(4)'s expansion of Common Article 2. *See* Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 425 (1987).

6. Common Article 3 defines internal armed conflicts as "[c]onflicts which are not of an international character." GWS, *supra* note 5, art. 3; GWS Sea, *supra* note 5, art. 3; GPW, *supra* note 2, art. 3; GC, *supra* note 5, art. 3. A detailed discussion of the criteria for meeting the definition of internal armed conflict is beyond the scope of this article.

III. Status

After determining the type of conflict, one must resolve the issue of status. Status is inextricably linked to all questions regarding the LOW because status determines the duties owed or owing to people or objects, or who or what may be lawfully targeted. For example, as discussed below, POWs are immune from prosecution for their lawful, pre-capture warlike acts (combatant immunity).[11] Similarly, one may not target persons characterized as noncombatants or civilians as long as the noncombatants refrain from actively participating in hostilities.[12] As the opening

---

7. The conclusions of this article could change substantially if the scenario involved internal armed conflict. The DOD Law of War Program states that it is DOD policy to comply with the LOW "in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized." U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 5.3.1 (8 Dec. 1998) [hereinafter DOD DIR. 5100.77]. *Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DoD Law of War Program*, likewise states:

> The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations.

CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4(a) (27 Aug. 1999) [hereinafter CJCSI 5810.01B]. While it is U.S. policy to comply with the spirit and intent of the LOW in all conflicts, exactly which principles are so fundamental under the LOW that the United States will apply as a matter of policy in all conflicts remains to be seen.

8. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations]. The United States considers the entire body of the Hague Regulations to be reflective of customary international law and binding on all parties, whether or not they are signatories. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 6 (18 July 1956) [hereinafter FM 27-10].

9. *See supra* note 4.

10. *See generally* Matheson, *supra* note 5 (providing an in-depth discussion of which articles of Protocol I the United States considers as either reflective of customary international law or deserving of such status). While the United States has not ratified Protocol I, the United States recognizes many of its provisions as customary international law and the U.S. armed forces follow these provisions in international armed conflict. *Id.*

11. Commentary on the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 515 [hereinafter Commentary, Protocol I].

12. Protocol I, *supra* note 3, art 37(1)(c).

scenario primarily concerns the status of people, the following discussion focuses on people instead of objects.

The status of lawful combatants is critical to members of the armed forces because it brings with it the privilege of combatant immunity. Combatant immunity protects lawful combatants, on capture, from prosecution under the capturing nation's domestic law for pre-capture warlike acts as long as these acts were performed in accordance with the LOW.[13] As Bothe, Partsch, and Solf state in their commentary on Protocol I:

> [Combatant immunity] provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict.[14]

The Hague Regulations of 1907 were the first international convention to define fully who qualified for combatant status, and conversely, noncombatant status.[15] Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) built on this definition and is the current authority for determining who is a lawful combatant.[16] Article 4A(1) of the GPW states:

> A. Prisoners of war,[17] in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

---

13. *See* Major Geoffrey S. Corn, "*To Be or Not to Be, That Is the Question" Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1, 14-15; *see also* Commentary, Protocol I, *supra* note 11, at 510.

14. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 243 (1982). Conversely,

> Civilians who participate directly in hostilities, as well as spies and members of the armed forces who forfeit their combatant status, do not enjoy that privilege, and may be tried, under appropriate safeguards, for direct participation in hostilities as well as for any crime under municipal law which they might have committed.

Id. at 244.

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.[18]

Thus, "[m]embers of the armed forces of a Party to the conflict"[19] are accorded POW status, and consequently combatant immunity, when cap-

---

15. *See* Hague Regulations, *supra* note 8, arts. 1-3. The Hague Regulations provide the following regarding who qualifies for belligerent status:

> Article 1: The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> (1) To be commanded by a person responsible for his subordinates;
> (2) To have a fixed distinctive emblem recognizable at a distance;
> (3) To carry arms openly; and
> (4) To conduct their operations in accordance with the laws and customs or war.
>
> In countries where militia or volunteer corps constitute the army, or form any part of it, they are included under the denomination "army."
>
> Article 2: The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.
>
> Article 3: The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

Id.

16. *See* Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War 51 (1960) [hereinafter Commentary, GPW] ("[T]he present Convention [GPW] is not limited by the Hague Regulations nor does it abrogate them, and cases which are not covered by the text of this Convention are nevertheless protected by the general principles declared in 1907.").

17. Although the GPW uses the term "prisoner of war" instead of the terms "lawful combatant" or "combatant immunity," it is understood under the GPW and the accompanying commentaries that the term POW applies only to lawful combatants that have fallen into enemy hands, and encompasses "combatant immunity." *Id.* at 46-47; Commentary, Protocol I, *supra* note 11, at 509; BOTHE ET AL., *supra* note 14, at 233-34. Bothe states, "The essence of prisoner of war status under the [GPW] is the obligation imposed on the Detaining Power to respect the privilege of combatants who have fallen into its power." BOTHE ET AL., *supra* note 14, at 243-44.

tured. Despite this language, however, further analysis reveals that membership in the armed forces of a party to the conflict is not the only requirement to be a POW. Certain inherent requirements and responsibilities concomitant with such membership must also be met.

The term "member of the armed forces of a Party to the conflict" implies several things. First, this term "refers to all military personnel, whether they belong to the land, sea, or air forces" of a State, and is generally considered to encompass the regular, uniformed armed forces of a State.[20] This term also connotes an organizational structure, a chain of command, and a means of identification.[21] Article 4A(2) of the GPW provides further clarification. It accords POW status to:

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly; [and]
> (d) that of conducting their operations in accordance with the laws and customs of war.[22]

---

18. GPW, *supra* note 2, art. 4A(1). Article 4 of the GPW provides for several categories of persons entitled to POW status in addition to Article 4A(1), which are not pertinent to this discussion. These include: members of militias and other volunteer corps meeting certain criteria, *id.* art. 4A(2); "members of an armed force who profess allegiance to a Government not recognized by a detaining power," *id.* art. 4A(3); "persons who accompany the force," *id.* art. 4A(4); crews of ships and aircraft of the civil fleet, *id.* art. 4A(5); inhabitants of a non-occupied territory who rise up in a levee en masse, *id.* art. 4A(6); persons belonging to, or having belonged, to an armed force of an occupied territory, *id.* art. 4B(1); and persons belonging to one of the above categories who are found in a neutral or non-belligerent country and who must be interned under international law, *id.* art. 4B(2).

19. *Id.* art. 4A(1).

20. Commentary, GPW, *supra* note 16, at 51.

21. *Id.* at 51-67.

22. GPW, *supra* note 2, art. 4A(2). These four criteria originally appeared in Article 1 of the Hague Regulations and were incorporated nearly verbatim into Article 4A(2) of the GPW. *See also* Hague Regulations, *supra* note 8, art. 1.

Thus, members of militia or resistance forces who meet these four criteria are accorded POW status just the same as a member of the regular armed forces to a party to the conflict.

While Article 4A(2) of the GPW specifically does not apply to members of the regular armed forces of a party to the conflict,[23] the drafters of the GPW crafted the four criteria of Article 4A(2) because they believed these criteria were indicative of the characteristics inherent in the regular armed forces of a State.[24] Bothe makes the clearest statement on this point:

> Other than the reference to the "armed forces of a Party to the conflict" in Article 4A(1), the Geneva Conventions do not explicitly prescribe the same qualifications for regular armed forces. It is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered to be unnecessary and redundant to spell them out in the Conventions. It seems clear that regular armed forces are inherently organized, that they are commanded by a person responsible for his subordinates and that they are obliged under international law to conduct their operations in accordance with the laws and customs of war.[25]

This only seems logical, since it would be unreasonable to accord POW status, and the accompanying privilege of combatant immunity, to an organization that met a far lower standard than that met by the regular armed force of a state. Thus, while Article 4A(2) does not apply to the regular armed forces, the four criteria listed therein do apply because these criteria are already deemed inherent in the regular armed forces of a state.[26]

On 7 February 2002, the United States made clear its position on this matter when the White House announced that it considered the Geneva Conventions applicable to Taliban detainees, but not to al Qaeda detain-

---

23. GPW, *supra* note 2, art. 4A(2)(b); Commentary, GPW, *supra* note 16, at 49.
24. Commentary, GPW, *supra* note 16, at 51-67; BOTHE ET AL., *supra* note 14, at 234-35.
25. BOTHE ET AL., *supra* note 14, at 234-35.
26. Commentary, GPW, *supra* note 16, at 49.

ees.[27] During a press conference on this matter, Mr. Ari Fleischer, the White House Press Secretary, stated:

> To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population in Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war . . . . In any case, the United States would always be covered by the Geneva Convention, our military, because as I mentioned, under Article 4, you have to wear a uniform, you have to wear an insignia, carry your weapons outside, be distinguishable from the civilian population, all of which covers our military.[28]

Clearly, the U.S. position is that the four criteria provided in Article 4A(2) are inherent in the definition of regular armed forces, and must be met by combatants before they are afforded POW status.

IV. Distinction

As discussed above, one of the prerequisites for gaining POW status is wearing a distinctive sign or emblem.[29] This requirement of identification is critical because it encompasses one of the fundamental principles of the LOW—distinction. The principle of distinction is codified in article 48 of Protocol I, which states:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[30]

---

27. Press Release, Office of the Press Secretary, the White House, Status of Detainees at Guantanamo (Feb. 7, 2002) (on file with author).

Although the United States has not ratified Protocol I, it treats article 48 as customary international law.[31]

---

28. *Id.* A DOD General Counsel briefing paper on this same matter states:

> [The Taliban] are not the regular armed forces of any government. Rather, they are an armed group of militants who have oppressed and terrorized the people of Afghanistan and have been financed by, and in turn supported, a global terrorist network. They do not meet the criteria under which members of militias can receive POW status either. To qualify as POWs, militias must satisfy four conditions: they must be part of a military hierarchy; they must wear uniforms or other distinctive sign visible at a distance; they must carry arms openly; and they must conduct their operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war . . . . The Taliban do not qualify under Article 4(a)(3) which covers "members of the regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power" because the Convention applies only to regular armed forces who possess the attributes of regular armed forces, i.e. distinguish themselves from the civilian population and conduct their operations in accordance with the laws and customs of war.

Memorandum from the Department of Defense General Counsel, to Military Departments General Counsels and Judge Advocates General, subject: Background on Status and Treatment of Detainees (7 Feb. 2002) (on file with author). The briefing paper references Article 4(a)(3) because the United States never officially recognized the Taliban as the official government of Afghanistan. *Id* at 8. Article 4(a)(3) was specifically written for this sort of situation and requires the armed forces of that "unrecognized regime" to meet the same criteria as that imposed on the regular armed forces of a party to be afforded POW status. GPW, *supra* note 2, art 4(a)(3).

29. *Id.* art. 4A(2)(b).

30. Protocol I, *supra* note 3, art. 48.

31. *See* Matheson, *supra* note 5, at 425. Although Matheson does not mention article 48, one can surmise the position of the United States based on Matheson's comments regarding articles 44 and 45. *See* Protocol I, *supra* note 3, arts. 44-45, 48. Matheson states that the United States specifically rejects articles 44 and 45 because they reduce the requirement for obtaining POW status to carrying arms openly in some situations, thereby blurring the distinction between combatant and civilian. Matheson states: "[W]e support the principle that combatant personnel distinguish themselves from the civilian population when engaging in military operations." Matheson, *supra* note 5, at 425. These comments indicate that the United States considers distinction critical to the LOW.

The principle of distinction is of fundamental importance to the LOW. Regarding Article 48, the Commentary to Protocol I states:

> The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law.[32]

To understand Article 48 completely, one must read it in conjunction with Articles 43, 44, and 50 of Protocol I.[33] Article 43 defines "combatant,"[34] Article 50 defines "civilian,"[35] and Article 44 determines when the distinction between the two must be in effect.[36] Article 43(2) defines combatants as members of the armed forces of a party to the conflict and is derived generally from Article 4 of the GPW.[37] Article 43(2) states that combatants are entitled to participate directly in hostilities, which is intended to clearly codify the principle of combatant immunity that was only implicitly mentioned in the Hague Regulations and the GPW.[38] Article 50 uses a negative definition of civilian—anyone not meeting the criteria of Article 4A(1), (2), (3), and (6) of the GPW or Article 43 of Protocol I.[39] Article 44(3) of Protocol I reaffirms the principle of distinction by

---

32. Commentary, Protocol I, *supra* note 11, at 598.
33. *See* Protocol I, *supra* note 3, arts. 43-44, 50.
34. *See id.* art. 43.
35. *See id*. art. 50.
36. *See id.* art. 44.
37. *See id*. art. 43(2). Article 43(1) of Protocol I states:

> The armed forces of a Party to the conflict consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Id. art. 43(1). Matheson's article is silent regarding the U.S. position on whether Article 43 of Protocol I reflects customary international law or deserves such status. *See generally* Matheson, *supra* note 5.

38. Commentary, Protocol I, *supra* note11, at 510, 515.
39. Protocol I, *supra* note 3, art. 50.

requiring combatants to distinguish themselves from the civilian population during an attack or while preparing for an attack.[40]

These Articles of Protocol I, when read in conjunction with Article 4 of the GPW, squarely address the matter of armed forces and identification. Parties to the conflict must distinguish between combatants and civilians when conducting military operations. Not only must parties to the conflict refrain from targeting civilians and civilian objects, they must also ensure that their own combatants are distinguishable from civilians.[41] This interrelationship between the armed forces, civilians, identification, and combatant immunity has been accurately described as a "quid pro quo."[42] Only lawful combatants are entitled to the privilege of combatant immunity. To qualify for this privilege, combatants must distinguish themselves from the civilian population. While this eases an opponent's ability to identify the combatants as legitimate targets, it is the price to obtain combatant immunity.[43]

To summarize, the LOW places a duty on parties to a conflict to distinguish combatants from civilians. This is a reciprocal duty, requiring all parties to distinguish among enemy combatants and civilians when conducting military operations[44] and to ensure a party's own armed forces are distinguishable from enemy combatants and civilians.[45] This principle of distinction is fundamental under the LOW and has been codified since the Hague Regulations of 1907.[46] This principle was inherent in GPW Article 4's definition of POW status[47] and carried through in the definition of combatant in Protocol I, Article 43.[48] Further, Protocol I specifically addresses this distinction again in Article 44(3), requiring combatants to distinguish themselves during an attack and in military operations preparatory to an attack.[49] As demonstrated in the following sections, distin-

40. *See id*. art. 44(3).

41. *See generally id.* art. 48 (indicating that distinction is a reciprocal duty placed on all parties to the conflict); BOTHE ET AL., *supra* note 14, at 281-83.

42. Major Geoffrey S. Corn, *International and Operational Law Note*, ARMY LAW., June 1999, at 35-37.

43. *Id.*

44. BOTHE ET AL., *supra* note 14, at 282-84.

45. *Id*.

46. Commentary, Protocol I, *supra* note 11, at 598.

47. *See* GPW, *supra* note 2, art. 4.

48. *See* Protocol I, *supra* note 3, art. 43.

49. *Id.* art. 44(3).

guishing combatants from civilians is critical because failure to do so could result in violations of the LOW.

V. Uniforms

Regular armed forces and the wearing of uniforms appear to go hand and hand. The GPW, however, does not specifically state that a person must wear a uniform to be considered a member of a regular armed force, at least not in the sense of a complete head-to-toe outfit that one normally associates with regular armed forces. The Commentary to Protocol I states:

> The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of the armed forces should have for the purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians.[50]

Thus, states are free to choose their armed forces uniform, so long as it is readily distinguishable from the enemy and civilians.

In discussing the requirement for a distinct sign for irregular forces, the Commentary says the sign, while substituting for the requirement of a uniform, must be continuously worn and distinctive not only in the manner of distinguishing the wearer from the civilian population, but also in that all members of the group wear the same sign or emblem.[51] The requirement that the sign distinguish the wearer from the civilian population does not mean a general civilian population, but the specific civilian population where the wearer is operating. Further, the sign must be recognizable at a comparable distance to that of a traditional uniform, and it must be "fixed" in that it cannot be easily taken on and off.[52] The Council of Government Experts for the drafting of Article 4 of the GPW suggested that the language should read "habitually and constantly display a fixed distinctive sign recognizable at a distance."[53] The drafters rejected this proposal

50. Commentary, GPW, *supra* note 16, at 52.
51. *Id.* at 59-61.
52. *Id.* at 60.
53. *Id.* at 59-60.

because they wanted to retain the "fixed distinctive sign" language first used in the Hague Regulations. Additionally, the drafters indicated that they considered the phrase "habitually and constantly" redundant with the term "fixed" in this context.[54] Thus, it is apparent that the drafters intended the term fixed to mean the same as habitually and constantly display.[55]

What particular item or items will qualify as a uniform is far from clear. In regard to particular items of apparel, the Commentary to the GPW provides: "It may be a cap (although this may frequently be taken off and does not seem fully adequate), a coat, a shirt, an emblem or a colored sign worn on the chest."[56] That a cap may not be a sufficient sign focuses on the requirement that the sign must also be fixed, in other words, not easily removed. Conversely, the Commentary to Article 39 of Protocol I (Emblems of Nationality) states:

> In temperate climates it is customary for a uniform to consist of regulation headdress, jacket and trousers, or equivalent clothing (flying suits, specialist overclothes, etc.). However, this is not a rule, and "any customary uniform which clearly distinguished the member wearing it from a non-member should suffice." Thus a cap or an armlet etc. worn in a standard way is actually equivalent to a uniform.[57]

Thus, under the GPW, the Commentary says that a cap might be insufficient because it is too easily removed. Under Protocol I, however, the Commentary considers a cap sufficient to be a uniform. This dichotomy illustrates the extent to which this remains a gray area in the LOW.

It appears that the drafters of both the GPW and Protocol I intended that combatants distinguish themselves from the local civilian population with a sign or emblem. To qualify, this sign or emblem must be fixed in that it is not easily detached or removed. Further, fixed also denotes that the sign or emblem must be constantly worn and not conveniently removed by the combatant to blend in with the local population. Additionally, the

---

54. *Id.* at 59-61.

55. *Id.* at 59-60.

56. *Id.* at 60.

57. Commentary, Protocol I, *supra* note 11, at 468. This quotation is from the Commentary discussing Article 39, Emblems of Nationality, which prohibits using enemy uniforms "while engaging in attacks or in order to shield, favor, protect, or impede military operations." *Id.* at 465-68. While discussing a different article in a different Convention, this discussion is persuasive in determining what qualifies as an appropriate uniform.

sign or emblem must be such that it does, in fact, distinguish the combatant from the civilian population where the combatant is operating. While it is unlikely that this requirement will impact the traditional armed forces uniform, it will impact those forces that only wear a sign or emblem. The sign or emblem these forces rely on must be sufficiently different from the dress of the civilian population to ensure their identification as combatants.

The drafters of both the GPW and Protocol I, however, did not indicate that regular armed forces cease wearing traditional uniforms. In fact, it is apparent that the opposite is true. Paragraph 7 of Article 44, Protocol I, entitled Combatants and Prisoners of War, states: "This Article is not intended to change the generally accepted practice of States with respect to wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict."[58] Paragraph 3 of Article 44, Protocol I, relaxes the requirements for obtaining POW status for irregular forces in certain conflicts short of international armed conflict, merely requiring that such forces carry arms openly in certain circumstances.[59] Concern was so high that this paragraph would encourage regular armed forces to stop wearing uniforms that the working group for Article 44 drafted paragraph 7 to reiterate the traditional rule that the wearing of uniforms is the primary means for armed forces to distinguish themselves from civilians.[60]

As previously noted, the drafters of the GPW considered a distinctive sign or emblem as inherent to a regular armed force, thus its inclusion as one of the four criteria required for irregular forces to gain POW status.[61] International law scholar Dieter Fleck expressed belief that Article 44(7)

---

58. Protocol I, *supra* note 3, art. 44(7). While the United States specifically objects to Article 44 of Protocol I because it reduces the criteria for obtaining POW status in some situations, *see* GPW, *supra* note 2, art. 4A(2)(b), the U.S. would likely not have qualms with paragraph 7 of Article 44. The United States has consistently stated that it supports the principle that combatants must distinguish themselves from the civilian population while engaged in military operations. Matheson, *supra* note 5, at 425. Since paragraph 7 furthers this principle by encouraging regular armed forces to continue to wear traditional military uniforms, the United States would likely support this specific provision of Article 44. *Id.*

59. *See* Protocol I, *supra* note 3, art. 44(3).

60. BOTHE ET AL., *supra* note 14, at 257.

61. *See supra* notes 23-26 and accompanying text.

reflects a rule of customary international law that requires members of the regular armed forces of a party to wear a uniform.[62] Fleck states:

> [Paragraph 7 of Article 44, Protocol I] refers to a rule of international customary law according to which regular armed forces shall wear the uniform of their party to the conflict when directly involved in hostilities. This rule of international customary law had by the nineteenth century already become so well established that it was held to be generally accepted at the Conference in Brussels in 1874. The armed forces listed in Article 4(1) of the GPW are undoubtedly regarded as "regular" armed forces within the meaning of this rule. This is the meaning of "armed forces" upon which the identical Articles I of the Hague Regulations of 1899 and 1907 were based.[63]

The GPW drafters, however, concluded that requiring a partisan or resistance force to wear a complete uniform was an unobtainable goal.[64] Thus, the compromise was the fixed distinctive sign to distinguish the force from civilians and the enemy. While this compromise relaxes the requirement of the traditional uniform, it also reaffirms that combatants must clearly distinguish themselves from the civilian population.

Having determined that lawful combatants must wear a uniform or some sort of device or emblem to distinguish themselves from civilians, the next issue is when the uniform or device must be worn to comply with the LOW. Article 44(3) of Protocol I answers this question.[65] The first sentence of Article 44(3) obligates combatants to distinguish themselves: (1) "while engaged in an attack"; and (2) in any "military operations preparatory to an attack."[66] Remember that Article 44(3) was written primarily to address guerilla warfare situations,[67] thus the limitation on when distinction from civilians is required. The drafters of Article 44(3) believed that the danger to civilians would be greatest if guerillas wearing civilian clothing could simply emerge from a crowd, produce weapons, and begin firing.[68] The drafters wanted to ensure that guerilla forces were required to distinguish themselves from the civilian population in opera-

---

62. *See* Protocol I, *supra* note 3, art. 44(7); DIETER FLECK ET AL., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 76 (1995).

63. *Id.*

64. Commentary, GPW, *supra* note 16, at 54-55.

65. Protocol I, *supra* note 3, art. 44(3). Similar to Article 44(7), the United States would probably agree with the first sentence of Article 44(3) because it reaffirms the principle of distinction. *See id.* arts. 44(3), 44(7). Matheson, *supra* note 5, at 425.

tions preceding an attack. Despite Article 44(3)'s focus on guerilla operations, the drafters clearly intended Article 44(3) to apply to all combatants in international armed conflict, whether members of the regular armed forces or guerillas.[69]

Requiring combatants to distinguish themselves "while engaged in an attack" seems unambiguous.[70] The phrase "military operations preparatory to an attack," is open to debate.[71] Bothe asserts that this phrase should be interpreted broadly based on the purpose of distinction, which is to minimize danger to the civilian population. In this view, administrative and logistical activities conducted before an attack should fall under the meaning of the phrase because they are likely carried out close to the civilian population.[72] The Commentary only mentions that this phrase should

66. Protocol I, *supra* note 3, art. 44(3). The first sentence of Article 44(3), Protocol I, states: "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack." *Id. But see* Commentary, Protocol I, *supra* note 11, at 528 ("It is certain that the humanitarian principle requiring appropriate clothing, applies throughout military operations in all cases which are not covered by the second sentence of this [paragraph 3 of Article 44]."). It is unclear what the Commentary to Protocol I means regarding appropriate clothing since, as demonstrated earlier, the Commentary to Protocol I and the Commentary to the GPW contradict each other concerning what items of apparel qualify as a uniform. *See supra* notes 56-57 and accompanying text.

67. BOTHE ET AL., *supra* note 14, at 245-48.

68. Commentary, Protocol I, *supra* note 11, at 520-28.

> The purpose of this rule, of course, is to protect the civilian population by deterring combatants from concealing their arms and feigning civilian non-combatant status, for example, in order to gain advantageous positions for the attack. Such actions are to be deterred in this fashion, not simply because they are wrong (criminal punishment could deal with that), but because this failure of even minimal distinction from the civilian population, particularly if repeated, places that population at great risk.

Id. at 533.

69. *Id.* at 527; BOTHE ET AL., *supra* note 14, at 251-52.

70. Commentary, Protocol I, *supra* note 11, at 527.

71. *Id.*

72. BOTHE ET AL., *supra* note 14, at 252.

cover "any action carried out with a view to combat,"[73] which is a less than helpful insight. Fleck is silent on this issue.[74]

The second sentence of Article 44(3) may shed additional light on the meaning of "military operations preparatory to an attack," because the two criteria requiring combatants to distinguish themselves listed in sentence two are remarkably similar to the criteria for combatant distinction listed in sentence one. Sentence two provides:

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in military deployment preceding the launching of an attack in which he is to participate.[75]

By its clear language, this sentence is an exception to the general rule contained in Article 44(3)'s first sentence. This provision only applies in occupied territories and in armed conflicts described in Article 1(4) of Protocol I—armed conflicts against colonial domination, alien occupation, and racist regimes.[76] Commentators reviewed by the author are silent as to why the drafters chose slightly different language for the criteria in sentence one versus sentence two. Notwithstanding the limited application of Article 44(3)'s second sentence, arguably one may apply the Protocol I Commentary regarding the application of the criteria in sentence two in general to the criteria of sentence one. Both sentences of Article 44(3) address the same fundamental requirement—distinction—and both sentences contain similarly worded criteria for determining when combatants must maintain distinction.

Like the "while engaged in an attack" language in sentence one, the phrase "during each military engagement" in the second sentence is fairly unambiguous and not mentioned by the commentators reviewed by the

---

73. Commentary, Protocol I, *supra* note 11, at 527.
74. *See generally* FLECK ET AL., *supra* note 62.
75. Protocol I, *supra* note 3, art. 44(3).
76. FLECK ET AL., *supra* note 62, at 77; BOTHE ET AL., *supra* note 14, at 251-52.

author. Sentence two's second criterion, however, receives significant coverage, especially regarding the interpretation of the term "military deployment." Fleck states that Germany and several other States understand "military deployment" to mean "any movement towards the point from which an attack is to be launched."[77] The Commentary to Protocol I supports this point, stating that the United States, the United Kingdom, Australia, Canada, the Netherlands, and the Republic of Korea all made a declaration of understanding regarding Article 44(3)'s second sentence that "the term 'deployment' signifies any movement towards a place from which an attack is to be launched."[78] The Commentary to Protocol I interprets this understanding to mean that deployment begins when combatants move from an assembly or rendezvous point with the intention of advancing on their objective.[79] Other countries (such as Egypt, Qatar, and the United Arab Emirates) and the Palestine Liberation Organization understand the phrase to only cover the final movements to firing positions or the moments immediately before the attack.[80] Although these are just examples of some of the countries mentioned, they illustrate that countries typically not known for adhering to the LOW are the ones backing the later interpretation.

Bothe supports the view of the United States and the United Kingdom as correct when considered in light of the rule's objective, the protection of civilians. Bothe quotes Dr. Hans Blix, head of the Swedish delegation, who stated:

> If a guerilla movement were systematically to take advantage of the surprise element that lies in attacking while posing as civilians until—as one expert said "a split second before the attack"—it would inevitably undermine the presumption, which is vital to maintain, namely that unarmed persons in civilian dress, do not attack. The result of undermining or eliminating this presumption is bound to have dreadful consequences for the civilian population.[81]

The Commentary to Protocol I sums up the varying understandings of the term "military deployment" by indicating that the second sentence's word-

77. FLECK ET AL., *supra* note 62, at 78.

78. Commentary, Protocol I, *supra* note 11, at 534 n.57; BOTHE ET AL., *supra* note 14, at 254.

79. Commentary, Protocol I, *supra* note 11, at 534-35.

80. *Id.* at 534; BOTHE ET AL., *supra* note 14, at 254.

81. BOTHE ET AL., *supra* note 14, at 254.

ing was a significant compromise among the Diplomatic Conference delegates and that "[t]he interpretation of the term 'deployment' remained the subject of divergent views."[82]

If one considers the commentary on the meaning of "military deployment" in sentence two of Article 44(3) to apply to the interpretation of "military operations preparatory to an attack" in sentence one, the meaning of the latter phrase becomes clearer. Combatants are required to distinguish themselves from the civilian population not only during an attack, but also when preparing for an attack. Preparing for an attack likely encompasses making final preparations in an assembly area before beginning an operation as well as movements to a final assembly area before commencing an attack. Considering the understanding that the United States, United Kingdom, and other countries took regarding the phrase "military deployment," combatants must distinguish themselves earlier in an operation, rather than later, to protect the civilian population and prevent the dissolution of the principle of distinction.[83] This is an extremely unsettled area of Protocol I; many parties simply agreed to disagree on the meaning of key phrasing.[84]

Although portions of Article 44(3) remain unsettled, its application can have serious implications for the U.S. armed forces. Failure to distinguish U.S. combatants from civilians properly "during an attack" and during "military operations preparatory to an attack" is a violation of Article 44(3),[85] and consequently, a violation of the LOW. Article 86 of Protocol I affirmatively obligates the parties to the conflict to prevent LOW violations, and it sanctions commanders if they knew or should have known of a violation and failed to prevent it.[86] Article 86 provides:

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to

---

82. Commentary, Protocol I, *supra* note 11, at 536

83. *Id.*

84. *Id.*

85. Protocol I, *supra note* 3, art. 44(3).

86. *Id.* art. 86. The United States supports the principles contained within Articles 86 and 87 of Protocol I and finds they are either reflective of customary international law or deserve such status. Matheson, *supra* note 5, at 428. For a detailed discussion of the evolution of the principle of command responsibility and the U.S. view on this topic, *see* Major Michael L. Smidt, Yamashita, Medina, *and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000).

> suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
>
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[87]

Importantly, Article 86 covers acts of omission as well as acts of commission. The drafters of Article 86 found that the 1949 Geneva Conventions adequately covered acts of commission in their recitation of grave breaches, but that they did not adequately cover acts of omission; hence, the drafters included specific language at the end of Article 86(1).[88] Article 86(2) was included to tie the responsibility for LOW breaches to the need for POW status,[89] which requires members of an armed force to be commanded by someone responsible for their conduct.[90] After all, the purpose of mandating a "responsible commander" is to ensure that the force complies with the LOW.[91] A commander is subject to sanctions under Article 86(2) if the following conditions are met:

> (a) The superior concerned must be the superior of the subordinate;
> (b) The commander knew, or had information which should have enabled him to conclude that a breach was committed or was going to be committed; and
> (c) The commander did not take the measures within his power to prevent it.[92]

---

87. Protocol I, *supra* note 3, art. 86. Article 86 of Protocol I applies to all breaches of the LOW, not only to grave breaches. Commentary, Protocol I, *supra* note 11, at 1010-11. For purposes of Protocol I, grave breaches include those previously enumerated in the Geneva Conventions of 1949, *id.* at 1009, as well as those outlined in Articles 11 and 85 of Protocol I. Protocol I, *supra* note 3, art. 85.

88. Commentary, Protocol I, *supra* note 11, at 1007-09.

89. *See* Protocol I, *supra* note 3, art. 86(2).

90. GPW, *supra* note 2, art. 4.

91. Commentary, Protocol I, *supra* note 11, at 1011.

92. *Id.* at 1012-13.

The Commentary to Protocol I specifically mentions the failure of combatants to distinguish themselves in accordance with paragraphs 3 and 7 of Article 44 as an example of a breach the drafters intended Article 86 to address.[93]

Article 87 of Protocol I complements Article 86. It requires commanders to prevent and report breaches of the Conventions and Protocol and to discipline those under their command who commit violations of the LOW. Article 87, entitled "Duty of Commanders," states:

> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, suppress and report to competent authorities breaches of the Conventions and of this Protocol.
>
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
>
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violations thereof.[94]

Article 87 applies to all commanders, regardless of their rank or level of responsibility.[95] As with Article 86, holding commanders responsible for the actions of their subordinates is directly linked to the requirement that combatants must be commanded by a "person responsible" to obtain POW status.[96] Article 87, however, goes further than Article 86, requiring

---

93. *See id*. at 1009.

94. Protocol I, *supra* note 3, art. 87.

95. Commentary, Protocol I, *supra* note 11, at 1019. Under Article 87, a commander is defined as someone who "exercises command responsibility." Protocol I, *supra* note 3, art. 87.

96. Commentary, Protocol I, *supra* note 11, at 1018-19.

commanders to "prevent," "suppress," and "report" breaches of the LOW.[97] Thus, commanders are not only liable for the underlying breaches of their subordinates under Article 86, they may also be liable under Article 87 for failing to prevent and report LOW breaches. Further, Article 87(3) requires commanders to initiate disciplinary action against subordinates who commit breaches of the LOW.[98]

Department of Defense Directive (DODD) 5100.77, DOD LOW Program, and *Chairman of the Joint Chiefs of Staff Instruction 5810.01, Implementation of the DOD LOW Program*, further delineate the principles of educate, train, prevent, and report contained in Articles 86 and 87 of Protocol I.[99] To prevent LOW violations, these authorities require all DOD components to establish a LOW program to teach all U.S. service members their obligations and responsibilities under the LOW. Additionally, these authorities require that all "reportable incidents"[100] be reported, investigated, and if warranted, corrected with disciplinary action.[101]

---

97. Protocol I, *supra* note 3, art. 87.

98. Commentary, Protocol I, *supra* note 11, at 1019-23.

99. *See* DOD DIR. 5100.77, *supra* note 7; CJCSI 5810.01B, *supra* note 7.

100. DOD DIR. 5100.77, *supra* note 7, para. 3.2 (defining "reportable incident" as "[a] possible, suspected, or alleged violation of the law of war.").

101. *Id.* para. 4; CJCSI 5810.01B, *supra* note 7, para. 4. For example, *DOD Dir. 5100.77* states:

> It is DOD policy to ensure that:
>
> (1) The law of war obligations of the United States are observed and enforced by the DOD Components.
>
> (2) An effective program to prevent violations of the law of war is implemented by the DOD Components
>
> (3) All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

DOD DIR. 5100.77, *supra* note 7, para. 4. These authorities also require, as a matter of policy, that the U.S. armed forces apply the "spirit and principles" of the LOW in all conflicts no matter how they are characterized. DOD DIR. 5100.77, *supra* note 7, para. 5.3.1; CJCSI 5810.01B, *supra* note 7, para. 4. As previously mentioned, this article does not address the applicable LOW in internal armed conflicts, but *DOD Dir. 5100.77* and *CJCSI 5810.01B* may make many of the principles discussed in this article applicable to internal armed conflicts.

While the heads of the DOD components, the Secretaries of the Military Departments, and the commanders of the combatant commands are all tasked with implementing this guidance, primary responsibility for implementation of this policy falls to the commanders of the combatant commands.[102] These authorities also require that legal advisers be made available at appropriate levels of command to ensure that the U.S. military operations are planned and executed in accordance with the applicable LOW.[103] Finally, DODD 5100.77 paragraph 6 provides detailed guidance on the reporting requirements for LOW violations.[104]

VI. Perfidy

The prohibition against perfidy was first codified in Article 23(b) of the Hague Regulations.[105] Perfidy means the breaking, or a breach, of faith, and it devolves from the concept of chivalry that originated during the Middle Ages.[106] As codified in Article 37 of Protocol I, perfidy means the abuse of a protected status under the LOW to gain an advantage over the enemy.[107] Article 37(1) of Protocol I states:

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
>
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;

---

102. DOD DIR. 5100.77, *supra* note 7, para. 5.8.1; CJCSI 5810.01B, *supra* note 7, encl. A, para. 3.

103. DOD DIR. 5100.77, *supra* note 7, para. 5.8.3; CJCSI 5810.01B, *supra* note 7, encl. A, para. 3d .

104. *See* DOD DIR. 5100.77, *supra* note 7, para. 4.

105. Hague Regulations, *supra* note 8, art. 23 (b). Article 23(b) states, "[I]t is especially forbidden . . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army . . . ." *Id.* This provision stills applies as customary international law. Commentary, Protocol I, *supra* note 11, at 431.

106. Fordham University, Medieval Sourcebook: Humbert de Romans, On Markets & Fairs, c. 1270, *available at* http://www.fordham.edu/halsall/source/1270romans.html (last visited Feb. 20, 2004).

107. BOTHE ET AL., *supra* note 14, at 203-04; Commentary, Protocol I, *supra* note 11, at 430-35.

(b) the feigning of an incapacitation by wounds or sickness;

(c) the feigning of civilian, non-combatant status; and

(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States or Parties to the conflict.[108]

The United States interprets Article 37 of Protocol I to reflect customary international law.[109] The intent of Article 37(1) is to prevent the dissolution of certain fundamental protections under the LOW. As the Commentary to Protocol I states, "The central element of the definition of perfidy is the deliberate claim to legal protection for hostile purposes."[110] If parties to a conflict were allowed to lure an enemy into an unfavorable situation by feigning a protected status, respect for these protections would slowly dissipate until they were meaningless, with fateful consequences for the persons the LOW intends to protect.[111] As a result, Article 37(1) limits perfidy to those acts involving the fundamental protections afforded the wounded and sick, noncombatants or civilians, neutral parties, and flags of truce or surrender. Notably, Article 37(1)(a)-(d) only provides examples of prohibited acts of perfidy, not an exhaustive list.[112]

It is important not to confuse perfidy with legitimate ruses of war, which Article 37(2) specifically permits.[113] Legitimate ruses involve deception, but not a breach of faith involving a protection applicable under the LOW.[114] Further, Article 37(1) of Protocol I does not prohibit all acts of perfidy that occur during armed conflict. Article 37(1) essentially

---

108. Protocol I, *supra* note 3, art. 37(1).
109. Matheson, *supra* note 5, at 425.
110. Commentary, Protocol I, *supra* note 11, at 435.
111. BOTHE ET AL., *supra* note 14, at 202-03.
112. *Id*. at 205.
113. *See* Protocol I, *supra* note 3, art. 37(2). Article 37(2) of Protocol I provides:

> Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under the law. The following are examples of such ruses: camouflage, decoys, mock operations and misinformation.

Id.

focuses on combat by only prohibiting those acts of perfidy that result in the death, injury, or capture of an adversary.[115] Furthermore, the act of perfidy must be the proximate cause of the death, injury, or capture of the enemy.[116] The Commentary to Protocol I considers this a specific weakness of Article 37 because it may be almost impossible to determine where to draw the line.[117] Additionally, if the intent of Article 37 is to prevent the dissolution of certain fundamental protections under the LOW, limiting perfidious conduct only to those acts which result in death, injury, or capture of the enemy may not go far enough in ensuring respect for these protections.[118]

The Commentary to Protocol I also suggests that an attempted act of perfidy that Article 37(1) would prohibit (if the act were successful) should likewise be prohibited. The rationale is that a party should not benefit from the failure of an otherwise punishable act.[119] Fleck disagrees, saying that failure to actually kill, injure, or capture the enemy through one of the means listed in Article 37(1)(a)-(d) is not perfidious within the plain mean-

---

114. BOTHE ET AL., *supra* note 14, at 206-07. Bothe states: "The essential distinction between perfidy and treachery on the one hand, and non-perfidious deception is that the latter neither contravenes any specific rules of international law applicable in armed conflict, nor invites confidence of an adversary with respect to protection under international law." *Id.*

115. *Id.* at 203-04; Commentary, Protocol I, *supra* note 11, at 432-33.

116. BOTHE ET AL., *supra* note 14, at 204.

117. Commentary, Protocol I, *supra* note 11, at 432-35.

118. BOTHE ET AL., *supra* note 14, at 204. The Commentary to Protocol I acknowledges that limiting prohibited perfidy to only those acts intended to kill, injure, or capture creates a gray area not satisfactorily addressed by the current version of Article 37(1). The Commentary states:

> Moreover, it seems that a prohibition which is restricted to acts which have a definite result would give the parties to the conflict a considerable number of possibilities to indulge in perfidious conduct which was not directly aimed at killing, injuring, or capturing the members of the armed forces of an adverse party, but at forcing them to submit to tactical or operational measures which will be to their disadvantage . . . people will then be killed, injured, or captured in the course of combat. It will be no easy matter to establish a causal relation between the perfidious act that has taken place and the consequences of combat . . . . This gray area forms a subject of permanent controversy in practice as well as in theory.

Commentary, Protocol I, *supra* note 11, at 432-33.

119. *Id.*

ing of Article 37. Fleck submits that his position accords with the belief of most parties who participated in Article 37's drafting.[120]

The portion of Article 37 directly relevant to the fictional scenario at the beginning of this article is paragraph (1)(c), which prohibits the killing, injuring, or capture of an enemy by "feigning . . . civilian, non-combatant status."[121] The original International Committee of the Red Cross (ICRC) draft of Article 37(1)(c) submitted to the drafting committee reads "the disguising of combatants in civilian clothing."[122] The drafting committee found that the version of Article 37(1)(c) as it currently reads was more accurate and comprehensive. While ultimately rejected, the proposed ICRC draft indicates Article 37(1)(c)'s ultimate intent. Of note, commentators consider the comma between the words "civilian" and "noncombatant" in Article 37(1)(c) to be the conjunction "or" as reflected in the French translation of Protocol I.[123]

As previously mentioned, Article 50 of Protocol I defines a civilian as anyone not fitting Protocol I Article 43's definition of combatant.[124] Under Article 4 of the GPW and Article 43 of Protocol I, members of the regular armed forces of a party, and certain other categories of individuals, are considered combatants.[125] An inherent characteristic of combatants is the requirement that they wear a distinctive sign or emblem, or somehow ensure that they distinguish themselves from the civilian population.[126] This is the quid pro quo for being accorded combatant immunity.[127] It follows then that combatants who fail to distinguish themselves from the civilian population, or actually disguise themselves as civilians, are "feign-

120. FLECK ET AL., *supra* note 62, at 472.

121. Protocol I, *supra* note 3, art. 37(1)(c).

122. Commentary, Protocol I, *supra* note 11, at 436-37; BOTHE ET AL., *supra* note 14, at 205-06.

123. BOTHE ET AL., *supra* note 14, at 206.

124. Protocol I, *supra* note 3, art. 50.

125. *See* GPW, *supra* note 2, art. 3; Protocol I, *supra* note 3, art. 43.

126. GPW, *supra* note 2, art. 4A(2).

127. *See supra* text accompanying notes 41-43.

ing . . . civilian, non-combatant status,"[128] and if they kill, injure, or capture the enemy as a result, they have violated Article 37(1)(c).

In discussing Article 37(1)(c), the Commentary states:

> A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may never feign a civilian status and hide amongst a crowd. This is the crux of the rule.[129]

It is understandable why this is the crux of the rule. An increased protection for civilians was one of the primary goals of the drafters of Protocol I. Once combatants begin disguising themselves as civilians, or failing to distinguish themselves from civilians, to gain an advantage over the enemy, civilians will become suspect and ultimately targets in international armed conflict. Combatants cannot be expected to honor protections accorded under the LOW if their opponent continuously abuses these protections to gain military advantage. Fleck made perhaps the strongest statement the author found on the importance of Article 37(1)(c):

> Of most importance in that respect is [Article 37(1)(c)], because the feigning of civilian, non-combatant status in order to attack the enemy by surprise constitutes the classic case of "treacherous killing of an enemy combatant" which was prohibited by Article 23(b) of the Hague Regulations; it is the obvious case of disgraceful behavior which can (and should) be sanctioned under criminal law as a killing not justified by the laws of war, making it a common crime of murder. Obscuring the distinction between combatants and civilians is extremely prejudicial to the chances of serious implementation of the rules of humanitarian law; any tendency to blur the distinction must be sanctioned heavily by the international community; otherwise the whole system based on the concept of distinction will break down.[130]

---

128. Protocol I, *supra* note 3, art. 37(1)(c).

129. Commentary, Protocol I, *supra* note 11, at 438.

130. FLECK ET AL., *supra* note 62, at 471. *See also* BOTHE ET AL., *supra* note 14, at 205 ("[E]xample (c) reinforces the principle of distinction between combatants and the civilian population and is therefore indispensable to the protection of civilians against the hazards of war, a principal goal of Protocol I.").

Statements such as these from Fleck and from the Commentary should leave no doubt of the importance the international community places on the fundamental principle of distinction.

Article 37(1)(c) does not, however, prohibit all acts of killing, wounding, or capturing the enemy while attired in civilian clothing. Only the wearing of civilian clothing with the intent to deceive the enemy that results in his death, injury, or capture is perfidious conduct within the meaning of Article 37(1)(c).[131] The intent to deceive, instead of the wearing of civilian clothing, is the gravamen of the prohibition. One can think of many instances where U.S. service members may have to defend themselves while wearing civilian clothing. For example, U.S. service members could find their base camp under attack while in the midst of physical training (PT) or lounging in their tent. The LOW obviously does not require them to change from liberty attire into their uniforms before taking up arms to defend themselves. Any resulting death or injury to the attackers is not perfidious conduct because the service members are not wearing civilian clothing with the intent to deceive the enemy.

Article 37(1)(c) must be read in conjunction with Article 44(3) of Protocol I to be understood fully.[132] Both Articles 37(1)(c) and 44(3) caused quite a bit of consternation within their respective drafting committees because it appeared they directly conflicted with each other.[133] As discussed above, Article 44(3) requires all combatants to distinguish themselves from the civilian population during an attack and in military operations in preparation for an attack. The second sentence of Article 44(3), however, also reduces the requirement for POW status to the sole condition of carrying arms openly in conflicts when the nature of the hostilities (the conflicts enumerated in Article 1(4) of Protocol I) prevents combatants from distinguishing themselves from the civilian population.[134]

Several delegations feared that combatants who complied with the second sentence of Article 44(3) could still find themselves subject to a charge of perfidy under Article 37(1)(c) if they killed, injured, or captured the enemy. This is because they would likely be dressed in civilian cloth-

131. Protocol I, *supra* note 3, art. 37(1)(c).

132. *Id*. arts. (37)(1)(c), 44(3).

133. Commentary, Protocol I, *supra* note 11, at 521. The Commentary of Protocol I states that Article 44 was "one of the most bitterly disputed Articles at the Conference." *Id.*

134. Protocol I, *supra* note 3, art. 44(3).

ing while engaged in combat, and thus could be accused of feigning civilian, noncombatant status. The last sentence of Article 44(3) was specifically drafted to allay these fears: "Acts which comply with the requirements of this paragraph shall not be considered perfidious within the meaning of Article 37, paragraph 1(c)."[135] Thus, irregular forces engaged in the conflicts outlined in Article 1(4) of Protocol I only need to carry arms openly to distinguish themselves properly under Article 44(3). If they do this, they cannot be charged with perfidy for feigning civilian, noncombatant status under Article 37(c)(1).

VII. Spies

A charge of perfidy is not the only danger a combatant faces when participating in armed conflict while wearing civilian clothing. Combatants found in enemy-controlled territory while wearing civilian clothing may be viewed as engaging in espionage and treated as spies. Spying is not a violation of international law or the LOW.[136] The combatant caught spying, however, is not entitled to POW status and is subject to the capturing nation's domestic laws.[137] Article 46 of Protocol I builds on the principles enunciated in Articles 24 and 29 of the Hague Regulations,[138] stating in part:

> (1) Notwithstanding any other provision of the Conventions or the Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.
>
> (2) A member of the armed forces of a Party to the conflict who, on behalf of that Party and in a territory controlled by as adverse Party, gathers or attempts to gather information shall not be con-

---

135. *Id.*

136. BOTHE ET AL., *supra* note 14, at 264. Spying can also involve wearing the enemy's uniform, instead of civilian clothing, while operating in enemy-controlled territory. In addition, wearing the uniform of the enemy may also violate Article 39(2) of Protocol I. *See* Protocol I, *supra* note 3, art. 39(2). The implications of Article 39(2) are beyond the scope of this article. Notably, the United States specifically disagrees with the prohibition on the use of enemy uniforms in military operations as provided in Article 39(2). Matheson, *supra* note 5, at 425; *see also* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 76 n.259 (1990).

137. BOTHE ET AL., *supra* note 14, at 264.

> sidered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.[139]

Articles 46(1) and (2), when read together, codify the customary rule that the combatant found behind enemy lines in civilian clothing while trying to gather information about the enemy is not entitled to POW status and the accompanying combatant immunity.[140] Consequently, this combatant is subject to trial and punishment under the capturing nation's domestic laws not only for espionage,[141] but also for any pre-capture warlike acts. By its language, Article 46 does not address espionage by civilians. Civilian espionage remains subject to Article 29 of the Hague Regulations.[142]

Although Article 46(2) actually defines a spy by stating who is not a spy, the definition is clearer than the one provided in Article 29 of the Hague Regulations. Article 29 of the Hague Regulations defines a spy as one who acts "clandestinely or under false pretenses" and exempts soldiers who do not wear a "disguise."[143] While this language was intended to encompass the wearing of civilian clothing by combatants within the def-

---

138. Article 24 of the Hague Regulations provides: "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible." Hague Regulations, *supra* note 8, art. 24. Article 29 of the Hague Regulations states:

> A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of the belligerent, with the intent of communicating it to the hostile party.
>
> Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies . . . .

Id. art. 29.

139. Protocol I, *supra* note 3, art. 46.

140. Matheson is silent on whether the United States views Article 46 of Protocol I as reflective of customary international law. *See generally* Matheson, *supra* note 5. The United States, however, views Articles 24 and 29 of the Hague Regulations as reflective of customary international law, FM 27-10, *supra* note 8, para. 6, and at a minimum is bound by these provisions.

141. Conviction for espionage has traditionally been punished with death to provide a strong deterrent to spying. Commentary, Protocol I, *supra* note 11, at 562-65; BOTHE ET AL., *supra* note 14, at 264-65.

142. BOTHE ET AL., *supra* note 14, at 267.

143. Hague Regulations, *supra* note 8, art. 29.

inition of spying, it does not explicitly say so.[144] Under Article 46(2), the key to the definition is wearing the uniform of the combatant's nation. Members of the armed forces of a party who wear their nation's uniform while gathering or attempting to gather information in enemy territory are not considered spies. Conversely, a member of the armed forces not wearing a uniform under such circumstances is considered engaging in espionage and may be treated as a spy. Thus, Article 46(2) eliminates the uncertainty of Article 29 of the Hague Regulations by substituting "in the uniform of his armed forces" for the "acting clandestinely or under false pretenses" and "disguise" language of the Hague Regulations.[145] The thrust of this change is that a member of an armed force found in enemy territory while not wearing his uniform is presumed to be "acting clandestinely and under false pretenses"[146] as provided in Article 24 of the Hague Regulations.

The term "espionage" as used in Article 46(1) encompasses the phrase "gathering or attempting to gather information" used in Article 46(2) and is at the heart of Article 46 as a whole.[147] As its the title indicates, Article 46 is primarily intended to address spies, in which gathering or trying to gather information is a critical component. While this may seem obvious, it is a crucial component to defining espionage and spies because Article 44(3) does not require combatants to distinguish themselves constantly from the civilian population. Article 44(3) only requires combatants to distinguish themselves during an attack and in military operations preparatory to an attack.[148] Thus, combatants may go into enemy territory while wearing civilian clothing, and as long as they are not "gathering or attempting to gather information"[149] and they properly distinguish themselves as required under Article 44(3), they have neither engaged in

144. Commentary, Protocol I, *supra* note 11, at 562-67; BOTHE ET AL., *supra* note 14, at 265-66.

145. *See* Hague Regulations, *supra* note 8, arts. 29, 46.

146. *Id.* art. 24.

147. *Id.* art. 46(1), (2).

148. *See* Protocol I, *supra* note 3, art. 44(3).

149. *Id.* art. 46(2).

espionage under Article 46, nor violated the principle of distinction under Article 44(3).[150] This idea was recognized by Bothe, who states:

> It is, therefore, not prohibited for a Party to the conflict contemplating a surprise offensive in a quiet sector, to infiltrate regular commando units disguised as civilians into the territory of an adverse Party, to lie in wait until needed, provided, that its members distinguish themselves from the civilian population when the commando unit begins its preparation for a pre-planned sabotage operation after the major offensive has started.[151]

Article 46 does not define the phrase "uniform of his armed forces."[152] It was the general belief of the drafters that a uniform, as referred to in Article 46, was the same uniform as defined elsewhere in Protocol I. The report of the drafting committee for Article 46 states "there was no intent to define what constitutes a uniform, but any customary uniform which clearly distinguishes the member wearing it from a nonmember should suffice."[153] Thus, everything discussed above regarding what is an appropriate uniform seems equally applicable here.

VIII. *Ex Parte Quirin* and U.S. Policy

The Supreme Court case *Ex parte Quirin*[154] further muddies the waters regarding when combatants must distinguish themselves because it is directly contradicted by Articles 44(3) and 46 of Protocol I. In *Ex parte Quirin*, the Court decided whether the detention of eight Nazi saboteurs for trial by military commission on charges of violating the LOW was in accordance with U.S. law. During World War II, a German submarine landed these saboteurs on the U.S. east coast. When they landed, they were wearing German Marine infantry uniforms, in whole or in part, and were carrying explosives, fuses, and timing devices. Upon landing, they promptly buried their uniforms, changed into civilian clothing, and proceeded to their pre-arranged rendezvous points. The Federal Bureau of

---

150. FLECK ET AL., *supra* note 62, at 98-99. Combatants that engage in this type of activity in enemy territory, however, will likely lose their right to be treated as POWs. *See infra* Section VIII (discussing the impact of *Ex parte Quirin*, 317 U.S. 1 (1942)).

151. BOTHE ET AL., *supra* note 14, at 252-53.

152. *See* Protocol I, *supra* note 3, art. 46.

153. Commentary, Protocol I, *supra* note 11, at 566; BOTHE ET AL., *supra* note 14, at 265.

154. 317 U.S. at 1.

Investigation subsequently apprehended all eight saboteurs before they could carry out their missions.[155]

In determining that the detention of the eight saboteurs for trial by military commission was in accordance with U.S. law, the Court first had to determine whether the offenses the Nazis were charged with were, in fact, violations of the LOW. Four charges were preferred against each of the saboteurs: (1) violation of the LOW;[156] (2) violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to the enemy; (3) violation of Article 82 of the Articles of War, defining the offense of spying; and (4) conspiracy to commit the offenses alleged in charges 1, 2, and 3.[157] In deciding that eight saboteurs clearly violated the LOW, the Court stated:

> The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to status as Prisoners of War, but to be offenders against the law of war subject to trial and punishment by military tribunals.[158]

In reaching this conclusion, the Court relied heavily on the Hague Regulations and the 1940 Rules of Land Warfare promulgated by the U.S. War Department.[159] Paragraph 9 of the Rules of Land Warfare, using verbatim language from Article 1 of the Hague Regulations, defined lawful

---

155. *Id*. at 21-22.

156. Specification 1 of Charge I stated that petitioners:

> Being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purposes of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States.

Id. at 23.

157. *Id*.

158. *Id*. at 31.

159. *Id*. at 33-34.

belligerents as, among other things, those who "carried arms openly" and "wore a fixed distinctive emblem."[160] Conversely, belligerents who engaged in hostilities while failing to meet these criteria violate the LOW and were considered unlawful belligerents.[161] Thus, the Court based its decision, in part, on the principle of distinction. Combatants who fail to distinguish themselves appropriately by wearing a fixed distinctive sign and carrying arms openly are unlawful belligerents and not entitled to engage in combat.[162] From these sources, the Court concluded, "Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear 'fixed and distinctive emblems.'"[163]

In commenting on specification 1 of charge 1, which alleged unlawful belligerency in violation of the LOW, the Court stated:

> This specification so plainly alleges a violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.[164]

It follows that the Court would find combatants who enter enemy territory for whatever purpose, while not wearing their uniform or a fixed and dis-

---

160. U.S. DEP'T OF WAR, FIELD MANUAL 27-10, THE RULES OF LAND WARFARE para. 9 (1 Oct 1940). Paragraph 9 of the Rules of Land Warfare was derived from Article 1 of the Hague Regulations. *See also* Hague Regulations, *supra* note 8, art. 1.

161. *Ex parte Quirin*, 317 U.S. at 33-34.

162. *Id*. at 35.

163. *Id.*

164. *Id*. at 36-37.

tinctive emblem, unlawful combatants who violate the LOW and are not entitled to POW status.

Quirin's holding, however, actually conflicts with the Hague Regulations, on which the Court, at least in part, rested its decision.[165] Article 29 of the Hague Regulations specifically recognizes spying as a permissible activity under the LOW.[166] Further, spying during armed conflict has long been deemed permissible under customary international law.[167] Nonetheless, *Quirin* finds that "the spy who secretly and without uniform passes the military lines" is an unlawful belligerent who violates the LOW.[168] This assertion certainly clouds the holding in *Quirin*, at least as an interpretation of the Hague Regulations.

The Court did not rely solely on the Rules of Land Warfare and the Hague Regulations to reach its holding. The Court also relied on the Military Law Manual issued by the War Office of Great Britain, the practice of nations, and the legal writings of several authorities on international law, to support its conclusion that the saboteurs violated the LOW.[169] The Court stated:

> By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniform upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government.[170]

---

165. *Id.*

166. Hague Regulations, *supra* note 8, art 29.

167. Commentary, Protocol I, *supra* note 11, at 562.

168. *Ex parte Quirin*, 317 U.S. at 31.

169. *Id*. at 35 n.12. The end of the footnote provides, "These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as prisoners of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war." *Id*.

170. *Id*. at 35-36.

Not only does the Court state that it is U.S. Government policy to treat as unlawful combatants those combatants that enter enemy territory, for whatever purpose, while not wearing their uniforms, but also through the last sentence of the above quotation, indicates this is a principle of customary international law. In the earlier case, *The Paquete Habana*,[171] the Court held that customary international law was ascertained by looking at the practice of nations and the works of international jurists and writers[172]—the very authorities the Court relied on in reaching the decision in *Quirin*.[173]

Bothe supports the position that *Quirin*'s holding is indicative of customary international law, stating in his commentary on Article 44 of Protocol I:

> Under the practice of States and customary international law, members of the regular armed forces of a Party to the conflict were deemed to have lost their right to be treated as prisoners of war whenever they deliberately concealed their status in order to pass behind enemy lines of the adversary for the purposes of:
>
> (a) gathering military information, or
>
> (b) engaging in acts of violence against persons or property.[174]

Thus, Bothe concurs with the *Quirin* holding that the principle that combatants who cross enemy lines while wearing civilian clothing are not entitled to POW status is reflective of customary international law.

Bothe does not, however, assert that this conduct amounts to a LOW violation. Interestingly, Bothe cites Article 29 of the Hague Regulations, paragraph 74 of Field Manual (FM) 27-10, and *Quirin* in support of this

171. 175 U.S. 677 (1900).
172. *Id.* at 700-01.
173. *Ex parte Quirin*, 317 U.S. 1 (1942).
174. BOTHE ET AL., *supra* note 14, at 256; *see also Ex parte Quirin*, 317 U.S. at 1.

assertion.[175] Paragraph 74 of FM 27-10, the Department of the Army's Law of Land Warfare Manual, states:

> Members of the armed forces of a party to the conflict and members of militia or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.[176]

Thus, the current Law of Land Warfare Manual relied on by the U.S. armed forces agrees in part with the holding in *Quirin*. Further, the language of paragraph 74 of FM 27-10 is nearly identical to the language from the first quotation from *Quirin* cited above, suggesting that the drafters of paragraph 74 relied on *Quirin*'s holding in concluding that combatants found behind enemy lines in civilian clothing are not entitled to POW status, and consequently, combatant immunity. The important difference between *Quirin* and FM 27-10, however, is that paragraph 74 does not state that crossing into enemy territory while wearing civilian clothing is a LOW violation. This aligns FM 27-10 with Bothe.[177]

Despite its apparently flawed analysis, the *Quirin* Court's interpretation of the LOW is binding on the U.S. armed forces. First, the *Quirin* holding is based on customary international law due to its reliance on the Hague Regulations, which the United States considers as reflective of customary international law,[178] as well as the practice of nations and the thoughts of international legal scholars.[179] In the *Habana* case, the Court held that customary international law is part of the federal law, and thus

---

175. *See id.* at 256 n.37; FM 27-10, *supra* note 8, para. 74; *see also Quirin*, 317 U.S. at 48.

176. FM 27-10, *supra* note 8, para. 74. Notably, paragraph 74 is not accompanied by citations to relevant treaties as is customary within *FM 27-10*. Paragraph 1, *FM 27-10*, states that this means such text is not binding on courts and tribunals applying the LOW, but is evidence bearing on questions of custom and practice. *Id.* para. 1.

177. *See Quirin*, 317 U.S. at 48; BOTHE ET AL., *supra* note 14, at 256; *see also* FM 27-10, *supra* note 8, para. 74.

178. FM 27-10, *supra* note 8, foreword; para. 6.

179. *Ex parte Quirin*, 317 U.S. at 31-35.

applies as such.[180] The Court based a sizeable part of its holding on specific language derived from the Hague Regulations,[181] a treaty to which the United States is a party.[182] Article VI of the Constitution provides that treaties entered into by the United States are the supreme law of the land.[183] Since the ultimate authority of the Court is to interpret U.S. law, of which treaty law is a part, its holding is binding on the United States. Until the United States ratifies another treaty that supercedes the Hague Regulations, or until the customary rule upon which *Quirin* is based changes due to State practice, *Quirin* remains binding on the United States.[184]

Even assuming arguendo that the Court was mistaken in asserting that its position reflected customary international law, its holding may nevertheless be considered the United States view regarding customary international law on this topic. As late as 1980, the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*[185] rearticulated the general principle that the domestic legal decisions of a nation are indicative of that nation's views regarding customary international law.[186] At a minimum, the holding in *Quirin* is the United States view regarding the LOW principle of distinction and the LOW requirement concerning the wearing of uniforms.

Quirin significantly impacts U.S. forces because its holding directly contradicts Articles 44(2), 44(3), and 46 of Protocol I.[187] Article 44(2) of Protocol I provides specific protections regarding the loss of POW status:

> While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in [Article 1(3)-(4)].[188]

---

180. *Paquette Habana*, 175 U.S. at 34-35.

181. *Ex parte Quirin*, 317 U.S. at 34-35.

182. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2001, at 454-55 (June 2000).

183. U.S. CONST. art. VI.

184. *Ex parte Quirin*, 317 U.S. at 1.

185. 670 F.2d 876 (2d Cir. 1980).

186. *Id.* at 880-81.

187. *See Ex parte Quirin*, 317 U.S. at 1; *see also* Protocol I, *supra* note 3, art. 44(2).

188. Protocol I, *supra* note 3, art. 44(2).

Thus, a combatant can only lose POW status under Protocol I if he fails to distinguish himself by carrying arms openly in a conflict described in Article 1(4) or if he engages in espionage.[189] Article 46 states that combatants found in enemy territory while wearing civilian clothing and "gathering or attempting to gather information" may be considered as engaging in espionage and treated as spies.[190] It follows that combatants found behind enemy lines in civilian clothing while not trying to gather information should not be treated as spies.

While this may initially seem irrelevant because combatants caught behind enemy lines in civilian clothing will likely be treated as spies regardless of their activity, there is a difference when Article 46 is read in conjunction with Article 44(3).[191] The first sentence of Article 44(3) only requires combatants to distinguish themselves "when engaged in an attack and in military operations preparatory to an attack."[192] Thus, Article 44(3) permits combatants entering enemy territory in civilian clothing as long as they distinguish themselves in an attack and when preparing for an attack. The fact that spying is not a violation of the LOW[193] further supports this conclusion. This position is also supported by the previous quotation from Bothe[194] regarding the infiltration of combatants into enemy territory while wearing civilian clothing to lie in wait for an upcoming offensive.

Under Article 44(2), combatants do not lose POW status for failing to distinguish themselves in accordance with Article 44(3), although they can be charged with a LOW violation.[195] Therefore, parties must affirmatively prove that combatants are found behind enemy lines in civilian clothing were gathering or attempting to gather information before considering the combatants as spies. This is because Article 44(3) of Protocol I allows combatants entering enemy territory in civilian clothing for purposes other than spying.

The dichotomy between Articles 44(2), 44(3), and 46 of Protocol I and the *Quirin* holding is illustrated by applying these provisions to *Qui-*

189. BOTHE ET AL., *supra* note 14, at 249. Article 46, while not mentioned in Article 44(2), is included within Article 44(2)'s meaning because Article 46(1) states that combatants who engage in espionage lose their POW status. *Id*.

190. Protocol I, *supra* note 3, art. 46.

191. *Id.* arts. 44(3), 46.

192. *Id*. art. 44(3).

193. Commentary, Protocol I, *supra* note 11, at 562-63.

194. *See supra* text accompanying note 151.

195. *See* Protocol I, *supra* note 3, art. 44(2).

rin's facts. The Nazi saboteurs were found in U.S. territory while wearing civilian clothing.[196] They did not appear to fit the prohibition of Article 46, however, because they were not gathering or attempting to gather information other than to identify their targets properly. They were in the United States to blow up factories, not to commit espionage, a fact demonstrated by their possession of explosives, fuses, and timing devices.[197] If they were not gathering information, but preparing to blow up industrial targets, Article 44(3) permits their conduct, so long as they distinguished themselves from the local U.S. population while they engaged in military operations preparatory to the attack and during the attack. It is unlikely that the Nazi saboteurs in *Quirin* would have satisfied Article 44(3) because they buried their uniforms when they landed.[198] Even if they failed this requirement, they would still have been entitled to POW status. Therefore, if Articles 44(2), 44(3), and 46 of Protocol I had been in effect in 1940, the eight Nazi saboteurs would neither have violated the LOW nor lost their entitlement to POW status. Under the holding in *Quirin*, the Nazi saboteurs not only lost their status as POWs, but they were also charged with violating the LOW simply for being in enemy territory dressed in civilian clothing.[199]

This distinction between *Quirin* and Protocol I becomes clearer when the Commentaries to Protocol I are considered. Recall the earlier quotation from Bothe regarding the application of Article 44 of Protocol I that was used to support the proposition that the *Quirin* holding was based on customary international law:

> Under the practice of States and customary international law, members of the regular armed forces of a Party to the conflict were deemed to have lost their right to be treated as prisoners of war whenever they deliberately concealed their status in order to pass behind enemy lines of the adversary for the purposes of:
>
> (c) gathering military information, or
>
> (d) engaging in acts of violence against persons or property.[200]

196. *Ex parte Quirin*, 317 U.S. 1, 21 (1942).
197. *Id.*
198. *Id.*
199. *Id.* at 36.
200. BOTHE ET AL., *supra* note 14, at 256.

The second half of this quotation (intentionally omitted by the author earlier), reads:

> Nothing in Protocol I affects the application of the foregoing rule relative to spies, but in the absence of para. 7, the provisions of para. 3 would probably have been construed to have affected the rule relative to attacks against persons and objects which are military objectives.[201]

Thus, according to Bothe, absent Article 44(7), Article 44(3) would have changed the customary rule enunciated in *Quirin*—combatants caught in enemy territory in civilian clothing lose their POW status regardless of their intended activities. Article 44(7), which states, "This Article is not intended to change the generally accepted practice of States with respect to wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict,"[202] keeps alive the customary rule. Article 44(7) also limits the application of the first sentence of Article 44(3), which states, "[C]ombatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."[203]

Bothe's assertion seems to accord with *Quirin*. In *Quirin*, the Court held that the entering of enemy territory by combatants while dressed in civilian clothing was an instantaneous offense. The Court stated:

> Nor are petitioners any less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theater or zone of activity of military operations. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification.[204]

---

201. *Id.*
202. Protocol I, *supra* note 3, art. 44(7).
203. *Id.* art. 44(3).
204. *Ex parte Quirin*, 317 U.S. at 38.

If Bothe's comment is taken literally, the customary rule, as enunciated by *Quirin*, severely restricts the application of Article 44(2) as well. Bothe's assertion means that the customary rule, which results in a loss of POW status for combatants found in enemy territory while wearing civilian clothing, continues to apply despite Article 44(2).

Bothe does not totally emasculate Article 44(3), however. Bothe does not mention a LOW violation, as does *Quirin*. This is where Bothe and *Quirin* part company. Under *Quirin*, being in enemy territory in civilian clothing as a combatant is a LOW violation and results in a loss of POW status. Under Bothe's interpretation, as well as paragraph 74 of FM 27-10, the combatant would lose his POW status but his conduct would not be a LOW violation.

This distinction between Bothe and *Quirin* is critical because of the impact of Articles 86 and 87 of Protocol I. Both Articles 86 and 87 place an affirmative obligation on commanders to prevent LOW violations and subject commanders to sanctions for knowingly allowing LOW violations.[205] While the United States has not ratified Protocol I, it considers Articles 86 and 87 either reflective of customary international law or deserving such recognition.[206] Further, both DODD 5100.77 and CJCSI 5810.01 require that all LOW violations be reported, investigated, and if warranted, punished.[207] Since *Quirin* considers the placing of combatants into enemy territory while wearing civilian clothing a LOW violation, Articles 86 and 87 of Protocol I place an affirmative obligation on U.S. commanders to prevent such conduct and to discipline those who engage in such conduct. Commanders who know, or should know, that such conduct is taking place and fail to take all reasonable measures to stop it are subject to disciplinary action as well.

Clearly, the holding in *Quirin* is outdated in the sense that it considers entering enemy territory in civilian clothing a LOW violation. Articles 44(2), 44(3), and 46 of Protocol I reflect a more modern view of the LOW in this area: allowing combatants to wear civilian clothing in enemy territory so long as they distinguish themselves as required by Article 44(3). Nevertheless, *Quirin* remains binding on U.S. forces because the United States has not ratified Protocol I. While Bothe supports the *Quirin* Court's

---

205. *See* Protocol I, *supra* note 3, arts. 86-87.

206. Matheson, *supra* note 5, at 428.

207. DOD DIR. 5100.77, *supra* note 7, para. 4.3; CJCSI 5810.01B, *supra* note 7, para. 4a(3) and (4).

assertion that entering enemy territory in civilian clothing results in a loss of POW status, neither Bothe, nor anyone else, agree that this is also a LOW violation. This appears to be a case in which the United States is placed under a stricter standard than that required by Protocol I because of its failure to ratify Protocol I.

IX. Conclusion

Returning to the opening scenario of this article, recall that there are two groups of U.S. forces, the reconnaissance teams and the raid force. The raid force appears to be in compliance with the applicable provisions of the LOW. They are wearing black jumpsuits typically worn by U.S. special operations forces, and this is a fixed, distinctive uniform or sign. They are all wearing the same thing, and the jumpsuit is fixed in that it is not easily removed. Unless the local population of Country *X* wears black jumpsuits on a regular basis, black jumpsuits are sufficient to distinguish the raid force from the local population as required by Article 44(3) of Protocol I.[208] Since the raid force members belong to a regular armed force that meets the four criteria required under GPW Article 4, they are combatants and entitled to participate directly in hostilities under Article 43 of Protocol I.[209] Further, because the black jumpsuit is sufficient under Article 44(3), members of the raid force do not face any issues regarding perfidy or espionage. They have complied with the quid pro quo by properly distinguishing themselves, and if they are captured, they are entitled to POW status as members of a regular armed force under GPW Article 4.[210] Additionally, *Quirin* has no impact because the members of the raid force are wearing uniforms when they enter enemy territory.

The members of the reconnaissance teams are an entirely different story. They are members of a regular armed force of a party to the conflict. As such, they are required to distinguish themselves from the civilian population while engaging in an attack and in military operations preparatory to an attack in accordance with Article 44(3).[211] As discussed previously, the phrase "military operations preparatory to an attack" likely includes any movement toward a place where an attack is to be launched,[212] which in this case, encompasses the movement of the reconnaissance teams

208. Protocol I, *supra* note 3, art. 44(3).
209. *Id.*
210. *Id.*
211. *Id.*
212. *See supra* notes 65-76 and accompanying text.

toward their overwatch positions. Thus, under Article 44(3), the reconnaissance teams are required to distinguish themselves not only while acting as a base of fire and overwatch during the raid, but also when moving toward their overwatch positions. Their failure to do this is a violation of Article 44(3) of Protocol I.[213]

The reconnaissance teams will also violate Article 37(1)(c) if they kill, wound, or capture any of the members of Country *X*'s armed force. Article 37(1)(c) prohibits the killing, injuring, or capturing of an adversary while feigning civilian, noncombatant status.[214] Even though the United States has not ratified Protocol I, it considers Article 37 as reflective of customary international law.[215] The reconnaissance teams are feigning civilian, noncombatant status by remaining dressed in civilian clothing while providing a base of fire and overwatch during the conduct of the raid. Therefore, the reconnaissance teams would be guilty of perfidious conduct in violation of Article 37(1)(c) if they kill, injure, or capture any member of Country *X*'s armed force.[216]

Articles 86 and 87 of Protocol I place an affirmative duty on parties and commanders to prevent and punish breaches of the LOW. If commanders know, or should have reason to know, that a breach of the LOW will take place, they must stop it. If they fail to stop it, they are also guilty of a violation of the LOW.[217] Department of Defense Directive 5100.77 and CJCSI 5810.01 place similar obligations on U.S. commanders.[218] Since the commander of this mission should know that the reconnaissance teams will violate both Article 44(3) and Article 37(1)(c), he cannot let this part of the mission take place.[219] If he does, he also violates the LOW and is subject to sanctions.

The members of the reconnaissance teams may also face a charge of espionage if they are captured before the raid takes place. They are combatants gathering or attempting to gather information in enemy territory, and fall under the provisions of Article 46 of Protocol I.[220] As mentioned

213. Protocol I, *supra* note 3, art. 44(3).

214. *Id.* art. 37(1)(c).

215. Matheson, *supra* note 5, at 425.

216. Protocol I, *supra* note 3, art. 37(1)(c).

217. *See id.* arts. 86-87.

218. *See* DOD DIR. 5100.77, *supra* note 7, paras. 5.5.2–5.5.5, 5.8.4, 6; CJCSI 5810.01B, *supra* note 7, encl. A, para. 3(f).

219. *See* Protocol I, *supra* note 3, arts. 37(1)(c), 44(3).

220. *See id.* art. 46.

earlier, spying is not a violation of the LOW.[221] Combatants, however, caught spying are not entitled to POW status and may be prosecuted by the capturing nation under its domestic law for espionage, as well as for any pre-capture warlike acts.[222] A conviction for espionage traditionally results in a death sentence.[223]

Ex parte Quirin further restricts the mission of the reconnaissance team. The *Quirin* Court held that combatants who enter enemy territory while wearing civilian clothing violate the LOW, whether they intend to engage in espionage or a direct action mission.[224] Further, this is an instantaneous offense, subject to sanction as soon as combatants cross into enemy territory.[225] The *Quirin* holding specifically contradicts Articles 44(2), 44(3), and 46 of Protocol I, but since the United States has not ratified Protocol I, it is bound by *Quirin*.[226] Thus, the reconnaissance teams cannot enter Country *X* dressed in civilian clothing. While they could enter Country *X* to gather information under Article 46 of Protocol I, *Quirin* finds this is a LOW violation. Under Articles 86 and 87 of Protocol I, U.S. commanders must prohibit the reconnaissance teams from entering the territory of Country *X* while wearing civilian clothing because, according to *Quirin*, this is a LOW violation.[227]

This article attempts to demonstrate the difficulty and intricacy of this area of the LOW. What constitutes an appropriate uniform and when combatants must distinguish themselves, continue to be areas of disagreement among the parties to Protocol I as well as the commentators. For U.S. forces, *Ex parte Quirin* further complicates this area, as this case takes a more restrictive view of the LOW. The holding in *Quirin* has certainly not kept pace with the LOW as evidenced by Protocol I. Further, *Quirin* is suspect considering its assertion that spying is a violation of the LOW,[228] when clearly it is not. Until the United States ratifies Protocol I or another treaty that supercedes the Hague Regulations, or until State practice suffi-

---

221. Commentary, Protocol I, *supra* note 11, at 562-63.

222. BOTHE ET AL., *supra* note 14, at 264-65.

223. Commentary, Protocol I, *supra* note 11, at 562-65; BOTHE ET AL., *supra* note 14, at 264-65.

224. *Ex parte Quirin*, 317 U.S. 1 (1942).

225. *Id.* at 38.

226. *Id*; *see* Protocol I, *supra* note 3, arts. 44(2), 44(3), 46.

227. *See* Protocol I, *supra* note 3, arts. 86, 87.

228. *See Ex parte Quirin*, 317 U.S. at 38.

ciently changes the customary international law on which *Quirin* relied, *Quirin* remains binding on the United States.

THE NINTH ANNUAL HUGH J. CLAUSEN LECTURE ON LEADERSHIP[1]

MAJOR GENERAL (RET.) WILLIAM K. SUTER[2]

Good morning. That was good enough! Thank you for the introduction, it was too much, Cal. But I enjoyed every minute of it and I know my wife did, too. I deeply appreciate the opportunity to return to the home of

1. This is an edited transcript of a lecture delivered by Major General (Retired) William K. Suter to the members of the staff and faculty, their distinguished guests, and officers attending the 51st Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, on 11 April 2003. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, U.S. Army, from 1981 to 1985 and served over thirty years in the U.S. Army before retiring in 1985. His distinguished military career included assignments as the Executive Officer of The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood; Commander, U.S. Army Legal Services Agency and Chief Judge, U.S. Army Court of Military Review; The Assistant Judge Advocate General; and finally, The Judge Advocate General. On his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

2. Clerk of the Supreme Court of the United States. Born in Portsmouth, Ohio, General Suter grew up in Millersburg, Kentucky, where he attended Millersburg Military Institute for twelve years. He received his B.A. degree from Trinity University in San Antonio, Texas, in 1959. He attended Trinity on a basketball scholarship. He received his law degree from Tulane Law School in 1962. He attended Tulane on an academic scholarship. He was on the Tulane Law Review Board of Editors and was elected to the Order of the Coif.

General Suter was commissioned through the Reserve Officer Training Corps (ROTC) program at Trinity. He entered active duty in the Army Judge Advocate General's Corps following graduation from law school. His first assignment after completing the Armor Officer Orientation Course and the JAG School Basic Course was at Fort Richardson, Alaska.

He thereafter served in numerous assignments, including Staff Judge Advocate, U.S. Army Support Thailand; Deputy Staff Judge Advocate, U.S. Army Vietnam; Staff Judge Advocate, 101st Airborne Division and Fort Campbell; Chief, Personnel, Plans, and Training Office, Office of The Judge Advocate General; Commandant, The Judge Advocate General's School; Chief Judge, U.S. Army Court of Military Review; and the Assistant Judge Advocate General.

He is a graduate of the Judge Advocate General's Graduate Course, the Army Command and General Staff College, and the Industrial College of the Armed Forces. His military awards include the Distinguished Service Medal, Bronze Star, and Parachutist Badge.

He was appointed the nineteenth Clerk of the Supreme Court of the United States on 1 February 1991, the same day he retired from the Army. He is a frequent lecturer at law schools and bar associations. He is married to Jeanie Suter, a teacher. They have two sons and four grandchildren.

the Army JAG Corps; and it really is wonderful, and you have to get to be my age before you realize how wonderful it is to see so many friends from years gone by. I appreciate the special efforts of the Judge Advocate General, the Assistant Judge Advocate General, and all the others, even driving as far away as Louisville, Kentucky, to come here. You honor me by your presence. All of you do. And I see some family members of graduates here, too; I thank all of you for attending. Graduates, you really didn't have a choice but I do thank you for being here, too.

This school really is the crown jewel of the military legal community. I was fortunate enough to spend eight years here including my time as a faculty member, the Commandant, and in the classroom. I enjoyed it here immensely. Now the Commandant is still in charge in here. It says, "The Judge Advocate General's School" with an apostrophe. It belongs to you, Tom, but the Commandant is in charge and he told me I'm supposed to speak for a while, say something important if I can, and then we'll stop and we'll go into questions, if you have any. And I hope you do have some, in fact, start thinking of some questions right now because I won't let you go until you ask some.

It's really fitting that this chair is named for Major General (MG) Hugh Clausen. Hugh was a superb officer, lawyer, and leader. I had the pleasure of serving as his subordinate on several occasions and I learned a great deal from him. His hallmarks are honesty and integrity, and he is a gifted leader. Good leaders take care of their troops. A noncommissioned officer told me when I was a lieutenant that troops only need three things. It's the three "M's"—Meals, Mail, and Money. I soon learned that they need much more than that. All troops, regardless of their age and grade and experience, need leadership.

I recall an example of Hugh Clausen's leadership when I was Commandant of the JAG School. He was The Judge Advocate General. A former faculty member was on a short tour in Korea. While he was gone, his wife became gravely ill and the officer had to come home on emergency leave. General Clausen was visiting the school that day and he asked to meet alone with this officer in my office. So we made the arrangements. The officer went in with General Clausen and after a while, the officer came out alone and he was crying softly. I walked with him to a private location and I said, "Are you okay?" I didn't know what had happened to him. He said General Clausen told me the Corps will take care of my family; he said I could go anywhere I want at any time; he asled what we can do for you and your family, and it will be done. He was greatly

moved, and he was good to his word. The officer was reassigned to this school, and the JAG family took care of this officer and his family until she passed away. Now that was a sad period for all of us, but I saw the JAG family at its best. That's when we can be our best, and I've got to tell you, that you and Betty Clausen set the example. And you still do.

Leadership is a wonderful subject. It's discussed and debated, volumes are written about it, but no one can define it with clarity. It's a bit like Justice Potter Stewart's inability to define a coherent test for obscenity. He said simply, "I know it when I see it." But leadership is a lot like that. My first encounter with leadership, of course, was with my parents. They were natural leaders. I attended a military school in Kentucky for twelve years. And I witnessed leadership there, too. Later at Trinity University in San Antonio, Texas, I had wonderful leaders. My basketball coach was fantastic. I really didn't have much talent despite what Cal just said. But he gave me a scholarship and I appreciated it. What is important is that he demanded that his players study and make good grades. He taught us to be upright and gracious as winners and as losers. I will boast just a little bit here and let you know – in case you haven't heard – that in my senior year, little Trinity beat the mighty University of Texas Longhorns in basketball. I don't think that will ever happen again.

My history professor, who was also my academic advisor, led me through many challenges and he was the sole reason I was able to get a scholarship and go to law school. When I was a senior, Dr. Everett demanded that I enroll in the typing class. You call it keyboarding today, but he saw me typing, and he said, "Bill, you're taking typing!" Well I was humiliated sitting in a classroom with fifty giggling freshmen and me a senior, a BMOC [Big Man On Campus], I thought. But I took typing and learned how to type and was forever grateful. Once again, he knew what I needed.

Although lawyers and law professors are not noted for exhibiting much in the way of leadership, all of that's going to change with the Commandant and the Deputy Commandant entering that field. I did have some fine leaders at Tulane Law School. My first year, we were required to stand when we spoke in the classroom. All first year students were required to take contracts. It met at 8:00 in the morning, six days a week. I think most people would quit law school today if you had to do that. One professor conducted small tutorial groups to ensure that we were comprehending the law. The professors were always available to talk with us and provide guidance. My student colleagues on the Law Review were great

leaders because they taught me to write, and re-write, and re-write, and re-write, until it was ready to publish. It's my impression that many law schools no longer stress this type of teacher-student relationship.

A few years ago, I was invited to speak to a law student group at the University of Chicago Law School. The group called itself "Lawyers as Leaders." The founder of the group was a student who was a Navy veteran. As an officer in the Navy, she saved every other paycheck. I don't know anyone who's ever done that. For four years she saved enough money to go to law school. She graduated with honors, had no debts, and later clerked on the Fifth Circuit Court of Appeals. I was amazed that about one hundred and fifty students at that prestigious law school showed up for my presentation. They'd never heard of me before but what they were starved for—they wanted to hear about leadership because they saw no leadership in the law school environment.

This lecture is not about me. It's about leadership. But let me tell you some stories about some experiences I had in the Army where leadership made a real impression on me. Ventures like this usually result in my forgetting to mention someone who is a very talented leader. I regret any omissions I might make.

My first tour as a JAG officer was at Fort Richardson, Alaska. I had great officer bosses and I learned about the value of good warrant officers, noncommissioned officers, and civilian employees. Those that were not my leaders, nevertheless, taught me much about leadership. The warrant officer taught me how to manage my time and my cases, the sergeant major taught me about administration and staffing. For the first six months, I thought I actually worked for the sergeant major. The civilian court reporter constantly helped me with trial advocacy advice. She was terrific and I listened to her. I learned early on that the noncommissioned officers, warrant officers, and civilian employees are truly the backbone of the Army.

I also learned that to be a good JAG officer, you had to be "of the Army" and not just "in the Army." And there's a big difference. Visiting commanders and troops in their unit areas to conduct business rather than in my office was a good technique in that regard. Let me give you an example where I saw real leadership a few years later, up close. As a fairly new major, I was the Staff Judge Advocate in Thailand. The Vietnam War was in progress. My boss was a new Brigadier General named "Jack" Vessey.[3] He was an enlisted soldier in World War II and received a battlefield

commission. He went on, by the way, to become the [Chairman of the] Joint Chiefs of Staff. You were only four years old when that happened.

One of our Army trucks loaded with valuable Air Force avionics had been hijacked in a rural area. The Thai police apprehended the suspects and recovered the truck and the parts. The local police told me the parts were needed as evidence at trial and they would not release them to me. I suggested substituting a photograph. Nothing doing. Negotiations started and stalled. The parts were urgently needed by the Air Force. General Vessey told me, "Do everything possible to get those parts back, Judge." I finally wised-up and paid a claim to the local police for our negligence.

Do you get it? It was a shakedown and I was the shakee. I retrieved the parts and later told General Vessey that I had paid a false claim and was a felon. He leaned back in his chair and chewed on his cigar and he said, "Judge, if some pointed-headed so-and-so starts investigating this, you just tell them Jack Vessey approved everything." He backed me up. He wasn't going to let me get in trouble for doing what was necessary.

Loyalty runs both ways, my friends. We needed the parts, we needed them for the war effort. There was only one way to get them back and I knew right then and there that I did the right thing, and I also knew that Jack Vessey was my leader. And by the way, his troops all knew that he was a leader, also.

At staff meetings, General Vessey would listen to a proposal and then he would look up and say, "What will rear-rank Rudy think about this?" He never forgot his origins as an enlisted soldier. He was also a good storyteller. He was from Minnesota and liked to tell jokes about the Scandinavians and Vikings that live up there. When he was Chairman of the Joint Chiefs of Staff, the Secretary of Defense told him that he was not politically correct and he would have to stop telling those ethnic jokes. At his next appearance, General Vessey revealed this chastisement by the Secretary. Then he said, "Let me tell you a story about two Hittites. Oley and Sven . . . ."

I saw leadership in Vietnam. It was an unpopular war but hundreds of thousands of fine soldiers served and fought there. They never got the respect they deserved. America sent them to fight and then, to a great

---

3. General John W. Vessey, Jr., USA, Chairman of the Joint Chiefs of Staff, June 1982 through September 1985.

extent, abandoned them. We should never do that again. Those who oppose that war had a right to do so but some were amoral and lawless in burning down ROTC buildings, and burning laboratories, and visiting North Vietnam to give comfort to our enemies. It is worth remembering that in 1963, Congress approved the Gulf of Tonkin Resolution, which was tantamount to a declaration of war with only two dissenting votes; and thereafter, annually provided appropriations to fight the war. That resolution was finally rescinded in 1975 and those are facts.

Now leadership can be exhibited in many ways. One is commitment to mission. We had a captain in our office when I served in Vietnam named Jimmy Wilson. Of course, everybody had a nickname and he was "Jimmy Pooh" from Alabama. He was preparing to prosecute an attempted murder case when he became quite ill. It was an important case; it was a hand grenade fragging case. A cowardly soldier had seriously injured his company commander. Jimmy developed an esophagus problem and was throwing up into a bag all day long. The doctors ordered him to be MEDEVACed [medically evacuated] to the States. Jimmy refused. He vowed to finish this case because it was his duty. He was not a career officer. We couldn't make him change his mind. He lost weight and sustained himself on milkshakes. He got a conviction and he got a good sentence. He was then ready to go home. We gave him his bronze star and he flew back to the States for medical treatment. I've got to tell you, his courage and commitment inspired all of us in that office.

Great leaders have vision. They don't simply plan for tomorrow, they look over the horizon. When I returned from Vietnam in 1972, I was assigned as the Plans Officer in the Office of the Judge Advocate General. I was a DLJO. I see some stares coming from the Basic Course. A DLJO is "Dirty Little Jobs Officer." Major General George Prugh was the TJAG and Colonel (COL) Hugh Clausen was his executive. General Prugh was a man of vision. He decided that we should have a law student summer intern program. The program was designed to promote awareness of how the military's legal system operates and to recruit good lawyers with an emphasis on appealing to minorities and women. The program worked, and I believe it continues in existence to this day.

The young officer who was detailed to design the program, obtain funding for it, and get it started was Captain Ken Gray. Later, MG Ken Gray. Now there's a lesson here, young folks. Do those dirty, little, nasty

jobs well when you are a junior officer, and you stand a good chance of becoming a senior officer.

The late MG Larry Williams, a former boss of Hugh Clausen, me and a lot of others on these front two rows down here, used to say that the secret to success in the Army is to "saw the wood in front of you." When I was Commandant, I related this to a Basic Class one day. A short time later, they all were wearing T-shirts that said, "I came, I sawed, I conquered." That was a nice take-off on Julius Caesar's words, "Vine, Vidi, Vici."

Later, as Assistant Chief of Personnel Plans and Training in the Pentagon, I recall an example of good leadership. It was exhibited by none other than Hugh Clausen. I was a major and he was a colonel and Staff Judge Advocate of III Corps at Fort Hood. We had a JAG captain in Korea who had problems with just about everything. He climaxed his list of shenanigans by streaking through the Officers' Club without wearing his uniform. To be more exact, he wasn't wearing anything! The Commander-in-Chief in Korea sent a message to the Judge Advocate General in strong words saying, "Get this guy out of here!" Well, the Judge Advocate General decided this fellow should go to Fort Hood. And it was my duty, a major, to call COL Clausen and tell him he's getting this fellow. I took a deep breath and made the call.

Friends, there's no way to package something like this as good news. I told COL Clausen everything. Many SJAs would have protested. I had one SJA one time have his Commanding General call me, a major, and complain about the assignment of some officer there. Let me tell you what Hugh Clausen said. He said, "Thanks for the heads up Bill. I'll be happy to take him. Please give everyone my warm regards." My friends, that was a class act. The miscreant officer subsequently reported to Fort Hood and left the Army a short time later. He never knew what hit him! Hugh, good work, buddy.

A few years later, I was the Staff Judge Advocate at the 101st [Airborne Division] at Fort Campbell, and JAG personnel branch called me and told me they were dropping a problem child on me. I handled it just like Hugh Clausen. I said, "I'll welcome the officer, send him on down." He got there and we had a heart to heart. I helped him find a civilian job

in the private sector. He turned out to be a very effective and popular law school professor. That figures.

I was fortunate to attend the Command and General Staff College as a new lieutenant colonel. It was there, for the first time, that I had the opportunity to take some courses about leadership. I'm not sure you can teach leadership but I think you can learn about it by studying, observation, and practice. I also took courses on management and participated in a lot of debates in the differences between leadership and management.

My assignment as the SJA at the 101st at Fort Campbell was a great highlight in my career. Shortly after arriving there, I learned that there was going to be a division load-out. That means putting all of your equipment on flat cars, rail cars. This was in preparation of an exercise that would take our division and our equipment to Germany for maneuvers. The SJA had two jeeps and a trailer that had to be loaded. I asked our Chief Legal NCO whose name was "Big Pete" about the load-out and he said, "Everything's under control, sir." Well, I got the schedule and saw that our turn to load out was at 0300 hours. I arose early on the appointed day and went to the railhead to check on the operation. It started raining, it was dark, and it was cold. Of course, I forgot my raincoat. I finally found the right flat car and saw that our equipment was already loaded and tied down. I was standing there in the dark, wet and cold, and wondering what to do next. I heard a voice say, "Colonel, under here, sir." I looked under the rail car and there was Big Pete and two of our soldiers. Of course, it was dry under the rail car. I then joined them. Big Pete handed me a cup of hot coffee and he said, "Breakfast is coming up."

Back in those days we had C-rations. The soldiers left and Big Pete looked me in the eye and he said, "Sir, this is NCO business." And what he meant was that although I was the boss, I was really meddling in his business and it was unnecessary for me to check on him in this situation. And that was a form of leadership where an officer learned a valuable lesson from a noncommissioned officer. My message to you is get good subordinates, train them, give them authority, and get out of the way.

Not long after this, we were in the field at Fort Campbell preparing for the overseas exercise. We JAGs had to learn to erect our tent and live in the woods. If you want to see something funny, watch a bunch of JAGs try to erect a tent. It isn't pretty. One evening, one of our soldiers, I'll call him Private First Class (PFC) Cowoski, entered the tent with something wrapped up in a tarpaulin. I said, "What is that?" He said, "Sir, it's a stove

that we're going to take to Germany and I'll make hot coffee every morning." I had a bad feeling about that nice, new, stainless steel stove wrapped in the tarpaulin. So I drove my jeep into the cantonment the next morning and found Big Pete and I told him what I'd seen. I asked him a few days later and he said, "It's all taken care of, sir." Then I prevailed upon him to tell me what happened. Well, Pete had called around and found out that the division support command was missing a new stove. He grabbed our mischievous private by the neck and made him return the stove with an apology. The regulation said that I should have reported this larceny to the military police. Right? But why? The object was to return the stove. The soldier had liberated it, in his view, for his JAG comrades. Did I really need a military police report and an Article 15 to do justice? No. Big Pete took care of this soldier. PFC Cowoski later participated in the exercise, received an Army Commendation Medal that I pinned on him, served his enlistment, got a discharge, and went back to Wisconsin. I think I did the right thing.

Now I'm sure some pointed-headed IG could have found fault with what I did. But you know what, sometimes you just have to do what's right. Choose those times carefully. The 101st Airborne Division commander, at that time, was Major General John Wickam, who subsequently became the Chief of Staff of the Army. He was tough, but he was fair. He maintained high standards, and set the example. He had proved himself in combat and as a staff officer.

I recall late one afternoon when I was in General Wickams' office discussing several matters and he came across a piece of paper. It was a recommendation from one of the brigade commanders and it had the appearance of being a little bit soft. It was an administrative matter, not a military justice matter, so don't think about unlawful command influence here. He said to me, "I think this is soft." I said, "Well I think under the circumstances, the colonel's recommendation is OK." He said, "Get him up here." So I asked the general's aide to call the colonel and get him up there. I started to leave the office. I'm just a lieutenant colonel. I'm getting a two-star ready to talk to a colonel. I'm a lieutenant colonel and it's time to leave, and the general said, "Sit down," so I sat down.

The colonel appeared shortly thereafter, knocked on the door, entered and saluted. The general asked him about the somewhat lenient recommendation. The colonel replied that he had considered the matter carefully and stood by his recommendation. The general chewed him out unmercifully. He said, "You're soft, you're losing control of your brigade." The

colonel respectfully stood his ground and adhered to his recommendation. I was really slinking down in my chair by this time. This was not fun at all. Finally, the General said, "You're excused." The colonel saluted and left. The door closed, the General looked at me, smiled and said, "Don't worry judge, I'm just teaching him how to be a general."

The colonel went on to become the Chairman of the Joint Chief of Staff and he is now our Secretary of State. The colonel passed that little test, didn't he? What if he had changed his mind and sucked up to the general? I don't know, no one can give you that answer, and I've never asked the Secretary of State that question. The next time I see him, I will, because he remembered that day for years.

As a student of the Industrial College of the Armed Forces, I had the privilege of being in some seminars on leadership. We had great speakers– the late General Maxwell Taylor and Secretary of State Henry Kissinger. There's a little story about Henry Kissinger I ought to tell you. He once received a position paper from a subordinate at the State Department that he sent back with a note saying, "Is this the best you can do?" The subordinate revised it and returned it to the Secretary. Kissinger put the same note on it and sent it back. The subordinate revised the paper again and added a note saying, "This is the best I can do." Kissinger thanked him and told him it was an excellent paper. Now that was leadership.

As a boss, demand the most from your subordinates. As a subordinate, do your best, be honest, and stand up for what you do.

Now, that's enough of my little stories about my short and non-illustrious career. I could go on, but I won't, but they are little stories to think about. Let me talk about leadership on a larger scale. The old question is, "Are leaders born or made?" Well, I don't know and I don't care. Think of some great leaders; Washington, Napoleon, Lincoln, and Churchill, both presidents Roosevelt, Generals Pershing, Bradley, McArthur, Eisenhower. Golda Meier, Margaret Thatcher, Martin Luther King. I should add Chief Justice John Marshall. He exercised leadership with his brilliance, strategy, and his superb scholarship.

My favorite lawyer-leader and hero is the late Justice Louis Powell. He did not lead an organization or serve as an elected official. He did serve in World War II even though he was exempt from military service. He was an intelligence officer in North Africa and later worked in the Office of Strategic Services (OSS), the OSS in England. You might have read that

the OSS broke the German's secret code called the Ultra Secret, and this was a major break for the allies in ending World War II. Louis Powell later served as president of the school board in Richmond, Virginia, and led it to the successful, peaceful desegregation of schools there. He later served as President of the American Bar Association and twice he was asked to come and be a member of the Supreme Court. Both times he said, "No, I want to stay in Richmond and practice law." Finally, a group went to see him and said, "Louis, your country needs you on the Supreme Court." The third time was the charm, and he accepted and served, somewhat reluctantly, on the Supreme Court of the United States with great extinction. John Jeffries, the dean of the law school next door, was a law clerk to him and has written a wonderful biography of Louis Powell. I highly recommend it to you. Justice Powell's great hallmark was unselfishness. He always put his country first and himself second. Listen to what he said in a letter to his son:

> The really important thing is to be somebody and do something worth while in this one life each of us is given by God. This doesn't mean making the headlines or making the most money. Many who succeed in both of these are quite contemptible. It does mean using your ability in some profession or calling in a way that contributes something to your generation. It also means being a man of honor, character, patriotism, civic consciousness and some leadership of your fellow citizens.

Great leaders seem to all have the same qualities. They have intelligence, courage, loyalty, patriotism, character, humility, desire, decisiveness, patience, integrity, intuition, a sense of justice, a sense of humor, and selflessness. The last one, to me, is the most important.

General Dwight Eisenhower and General Colin Powell were both sought out by both political parties to be presidential candidates. Eisenhower, of course, won twice in a landslide, and most political polls say that Colin Powell could have done the same thing if he wanted to by either party. What do they have in common? They had character, quality, proven leadership abilities, and great smiles.

Now don't confuse leadership with popularity. It's easy to be popular. Leadership is much more difficult and complex. Remember that great leaders were first great followers. In addition, be careful not to confuse

character with reputation. Character is what you are; reputation is what others think you are. Both are important, but character is paramount.

There are many styles of leadership. A few days before the invasion of Sicily in World War II, General George Patton had all of his Seventh Army generals together for a briefing. He let his staff brief the details, and he then gave an emotional and moving address on the theme of the quality of the American soldier. He talked about the bravery of the soldiers, and told the generals that if anything went wrong, the General's were to blame. He then ended with this, he said, "Now we're going to break up and I never want to see you blankety-blanks again unless it's on the shores of Sicily." His language was slightly more colorful than what I've told you here. I compare that with General Omar Bradley. He was a quiet man of few words. He briefed his generals on the tactical details prior to the World War II D-Day landing, and at the end he looked up and said, "Good luck."

Why did General Patton's Third Army fight so well? They were inexperienced and unschooled in war. They were not volunteers, yet they fought with a morale and spirit that made them one of the most successful armies in the world. One officer said, "Patton had the ability to deliver that indefinable something which makes you want to go out and give your all for him, to do just a little bit more." Patton was an excellent speaker, but he constantly used profanity. That wouldn't work today. He was flashy. He wore a form fitting jacket, he had oversized stars on his helmet, shoulders, collars, and pearl-handled pistols. A real showboat. He wore riding britches, cavalry boots with spurs, and carried a riding crop in his hand. He rode around in an open jeep on the battlefield with a loud siren blaring. He was brave. In World War I he was wounded several times and constantly walked into cities where there was sniper fire and delayed bomb fuses. He could put on a mean face when he needed it. He trained his troops hard but he took care of his troops. He took responsibility for his actions and mistakes, he was decisive and result-oriented.

One cold rainy afternoon, Patton came up on a group of soldiers repairing one of our tanks that had been hit by enemy fire. He stopped and crawled under the tank. The men were startled to see a four-star general on his belly in the mud. He stayed twenty-five minutes. When he returned to his jeep his staff said, "What was wrong with the tank?" He said, "I have

no idea. But I'm sure that the word will spread throughout the division that I was on my belly helping repair that tank."

I met a police lieutenant in Chicago a number of years ago and he told me that he had been a 19-year-old rifleman in Patton's Third Army. Those old timers don't say Third Army; they say "Patton's" Third Army. He said to me in an excited voice, "I once saw Patton himself. We had just come out of a firefight. Patton rode by in his jeep with his siren wailing." I said, "What happened?" He said, "We all stood and cheered." I didn't ask the poor man why, he probably didn't know, but he knew his leader and he respected him and he'd follow him anywhere.

Patton is remembered for slapping a soldier. He suspected the soldier was faking an illness to avoid combat. An enterprising reporter made headlines with this story and, of course, Patton apologized and was reprimanded by General Eisenhower to please the press and the politicians. Should Patton have been relieved of his command as some people wanted? Should the reporter have run the story at all? My answer to these two questions is to pose a question to you. Were we there to win a war or follow Emily Post's Rules of Etiquette?

General George C. Marshall was the Army Chief of Staff during World War II. After the war he served as Secretary of State and Secretary of Defense. He promoted the Marshall Plan to rebuild Europe. When asked what his most exciting moment in life was, he said, "Being promoted to First Lieutenant." He had been a second lieutenant for five years after graduating from Virginia Military Institute. Fourteen years later, he was still a first lieutenant. There is hope.

General Dwight Eisenhower became President of Columbia University after retiring from the Army. In 1947, he bought his first automobile. He paid for it in cash and he told his wife, "I just spent our entire savings after thirty-seven years in the Army." He and other great leaders in the Army are not there for the money and neither are you.

Let me just give you a silent quiz: just think these things through as I go through. Name three Heismann Trophy winners; name three Nobel Prize winners; name three Academy Award Winners. Name the last three Super Bowl winners. I bet you don't have a very good score, do you? The point is, we don't remember headlines very well. The winners of these

events are achievers but the applause dies quickly and awards tarnish. Achievements are forgotten because they are not that important.

Now take this little silent quiz. Name three teachers who helped you, name three friends who helped you through a difficult time, name three people who taught you something worthwhile, name three people you enjoy spending time with. I bet you did better on that second quiz than that first quiz. The lesson here is that the people who make a difference in your life are not the ones with the most credentials, the most money, the most rank, or the most awards. They are the ones that care and they are your leaders.

So how do you acquire these leadership skills? Yogi Berra had some good advice in this regard when he said, "You can observe a lot by just watching." Let me add some other nuggets that you might want to remember. Never miss the golden opportunity to keep your mouth shut. The art of listening is one that is difficult to master. I recommend it.

Remember that you are officer-lawyers, set and maintain high standards. Integrity is the key word. No no one can teach you two things that are very important: good judgment and experience. You learn about good judgment by being observant and experience comes with making a few mistakes. I encourage you to read, especially legal history and biographies. Be positive, anybody can gripe all the time. Don't take yourself too seriously, enjoy life. And lastly, be selfless; give of yourself to your country and to those less fortunate.

The best officer-lawyers that I've every known share the same great qualities but selflessness is the most important. While we are here today in this lovely setting, our armed forces are fighting a just war in a strange and hostile environment. I join all of you in a prayer for victory and for a safe return of our colleagues.

I thank you for your kind attention. I thank the Judge Advocate General and the Assistant Judge Advocate General for their presence. I thank all my friends for coming; it's great to see all of you. Lastly, I thank Hugh Clausen and Betty Clausen for their great leadership, their friendship, and their dedicated service to our nation. How about some questions? No questions? Thank you very much!

LEADERSHIP THE ELEANOR ROOSEVELT WAY: TIMELESS STRATEGIES FROM THE FIRST LADY OF COURAGE[1]

REVIEWED BY MAJOR ALISON MARTIN[2]

Women who are willing to be leaders must stand out and be shot at. More and more they are going to do it, and more and more they should do it.[3]

I. Introduction

In recent years, authors have studied the words and the lives of former presidents, political appointees, and even the occasional sports icon in an effort to find leadership principles that can be translated for use in everyday life.[4] In her book, Leadership the Eleanor Roosevelt Way, Robin Gerber attempts to show how women leaders can also provide leadership wisdom.[5] The author derives leadership principles from Eleanor Roosevelt's remarkable life and tries to demonstrate how these principles can be "a model for personal achievement."[6] Gerber uses the biographical format because she is specifically targeting women readers and believes that "women respond to the narrative of whole lives."[7]

As a senior scholar at the Academy of Leadership at the University of Maryland, the author has been training women in leadership for more than twenty years and has a unique perspective on the subject.[8] Her experience in the area of women's leadership allowed her to use this book to start a dialogue on the role of women, not just as leaders, but in all walks

---

1. ROBIN GERBER, LEADERSHIP THE ELEANOR ROOSEVELT WAY: TIMELESS STRATEGIES FROM THE FIRST LADY OF COURAGE (2002).

2. U.S. Army. Written while assigned as a student, 52d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

3. 2 BLANCHE WIESEN COOK, ELEANOR ROOSEVELT, 1933-1938, at 372 (1992), *noted in* RUBY BLACK, ELEANOR ROOSEVELT: A BIOGRAPHY 138 (1940).

4. *See, e.g.*, BOBBY BOWDEN & STEVE BOWDEN, THE BOWDEN WAY: 50 YEARS OF LEADERSHIP WISDOM (2001); JEFFREY A. KRAMES, THE RUMSFELD WAY: LEADERSHIP WISDOM OF A BATTLE-HARDENED MAVERICK (2002); DONALD T. PHILLIPS, LINCOLN ON LEADERSHIP: EXECUTIVE STRATEGIES FOR TOUGH TIMES (1992).

5. GERBER, *supra* note 1, at ix.

6. *Id.* at inside cover.

7. *Id*. at x.

of life.[9] Although the title of the book would indicate that it is simply another in the leadership genre, Gerber's underlying goal appears to be one of a continued fight for women's equality.[10]

II. Analysis

Gerber developed a list of twelve leadership principles that she gleaned from the life of Eleanor Roosevelt. These principles include: "Learn from Your Past"; "Find Mentors and Advisors"; "Mothering: Training for Leadership"; "Learning the Hard Way"; "Find Your Leadership Passion"; "Your Leadership Your Way"; "Give Voice to Your Leadership"; "Face Criticism With Courage"; "Keep Your Focus"; "Contacts, Networks, and Connections"; "Embrace Risk"; and "Never Stop Learning."[11] Some of the principles Gerber advocates are the same ones included in most leadership books. Others are new and different, but Gerber appears to struggle to find stories from Roosevelt's life that match the principle. Still other principles are interesting, well developed, and worth reading.

Have I Not Seen These Before?

Principles like "Learn from Your Past"[12] and "Find Mentors and Advisors"[13] were not particularly new or noteworthy. The author fails to distinguish these principles from other leadership books stating the same ideas. There are no startling revelations from Roosevelt's life that help to solidify these concepts or really bring them to life. Instead, Gerber uses the same themes that any student of leadership would already know.

Not only does Gerber fail to show why some principles are new or particularly important to Roosevelt's life, she also uses some principles

---

8. *See id.* at inside cover; *see also* James MacGregor Burns Academy of Leadership, *Staff Biographies, available at http://www.academy.umd.edu/aboutus/staff/rgerber.htm* (last visited Sept. 13, 2003).

9. *See, e.g.*, Robin Gerber, *Don't Send Women to the Back of the Troop Train*, USA TODAY, Sept. 23, 2003, at 13A; Robin Gerber, *Golf's Grass Ceiling*, CHRISTIAN SCI. MONITOR, Aug. 2, 2002, at 11.

10. *See* GERBER, *supra* note 1, at xi.

11. *Id.* at xvii.

12. *Id.* at 1.

13. *Id.* at 21.

that are very similar to each other. Thus, "Learning the Hard Way"[14] reads a lot like "Learn from Your Past,"[15] while the chapter on "Find Mentors and Advisors,"[16] could easily have been addressed by the section on "Contacts, Networks, and Connections."[17] For example, in "Learning the Hard Way," the author notes that in 1918, Roosevelt discovered that her husband had been carrying on a long-term affair with her social secretary, Lucy Mercer.[18] Roosevelt realized she could not control her husband's behavior, so she chose to focus on her own goals and priorities and gradually forgave her husband's indiscretions.[19]

Gerber believes that difficult situations can make or break a leader. "What sets a leader apart is how he or she handles the lowest points, the darkest hours."[20] The author demonstrates that good leaders use difficult times to strengthen their own resolve and make positive changes within themselves, which sounds a lot like her lessons she listed in "Learn from Your Past."[21] In this chapter, the author notes that Roosevelt had a privileged but emotionally difficult childhood. Roosevelt learned how to take a "positive view of otherwise painful memories"—this can be a model for one's own growth.[22] The author raises some important points in these chapters, but fails to distinguish them from one another. The concepts may have been more effective and more meaningful if Gerber had merged them into one principle.

Deductive vs. Inductive Search for Leadership Principles

For other principles, Gerber seems to have to stretch to find corresponding examples. In "Mothering: Training for Leadership," the author tries to show how Roosevelt believed that motherhood was a training-ground for life.[23] Gerber explained that mothers have to be very orga-

14. *Id.* at 65.
15. *Id.* at 1.
16. *Id.* at 21.
17. *Id.* at 203.
18. *Id.* at 70.
19. *See id.* at 72.
20. *Id.*
21. *Id.* at 65.
22. *Id.* at 17.
23. *Id.* at 58-9.

nized and disciplined—early descriptions of what we would today call "multi-tasking."[24]

In her description of Roosevelt's role as a mother, the author details how a team of nannies, maids, and other personal assistants always assisted Roosevelt as she moved from her summer home to her winter home.[25] Rather than serving as a good demonstration of how mothering skills can translate to leadership skills, the scenario seems to be a reflection of a socially significant, very wealthy wife who is perhaps a bit spoiled. It is difficult for the average person to derive leadership principles from someone who led that kind of lifestyle and more difficult to make the leap from mothering to leadership in the traditional corporate structure, much less to a military unit. Thus, not only does the author sometimes stretch to find stories from Roosevelt's life to fit a principle, some of the principles seem to have very narrow applicability.

A Must Read

Despite some problems in the way she addresses certain principles, Gerber provides excellent leadership advice in other chapters. Most noteworthy are: "Find Your Leadership Passion"[26]; "Your Leadership Your Way"[27]; "Give Voice to Your Leadership"[28]; "Face Criticism With Courage"[29]; and "Keep Your Focus."[30] These chapters are well researched and presented. Gerber does a particularly good job of laying out a framework for applying some of these more amorphous principles—these chapters deserve a more detailed description.

"Find Your Leadership Passion"

Eleanor Roosevelt's first foray into the political arena came quite by accident when a wealthy Republican offered her a position on the board of the New York League of Women Voters.[31] This position was the first in

24. *See id.*
25. *Id.* at 60.
26. *Id.* at 83.
27. *Id.* at 105.
28. *Id.* at 131.
29. *Id.* at 155.
30. *Id.* at 177.
31. *Id.* at 86.

many when Roosevelt found her "leadership passion, her sense of mission."[32] Roosevelt's childhood experiences, the loss of her child, and her husband's transgressions "led her to a driving desire to improve the lives of those less fortunate than she."[33]

Gerber uses Maslow's hierarchy of needs to show that one is never truly happy unless they are doing what they are best suited for—the best leaders are those that work in an area for which they have great passion.[34] Gerber encourages leaders to discover what they value most. To find out, leaders must ask themselves many questions: "Who do you admire and why? What captures your thoughts and imagination? Whom do you choose to spend time with? What do you read?"[35] After answering those types of questions, one can find passion, live that passion, and take steps to build on that passion.[36]

"Your Leadership, Your Way"

By the time her husband was elected President, Eleanor was the most powerful political woman in the state of New York.[37] She continued to be active in politics and women's causes when she became first lady, but had to find a new way to carry out her duties in her new role. Gerber's application of this leadership principle is that women "often have different ways of leading and make different impacts on organizations than men."[38] She encourages women to be bold and not risk-averse. Women can use a traditional organization's framework to carve out niches and create new positions.

"Give Voice to Your Leadership"

After Franklin Roosevelt assumed the presidency, Eleanor gave the "first on-the-record press conference by a wife of a president."[39] The new first lady used these conferences to give a voice to women's issues, work-

32. *Id.* at 87.
33. *Id.*
34. *Id.* at 88.
35. *Id.* at 91.
36. *See id.* at 92-103.
37. *See id.* at 107.
38. *Id.* at 111.
39. *Id.* at 133.

ers' rights, and poverty law. Although she was very cautious not to undermine her husband's agenda, she sometimes deliberately made controversial statements in an effort to cause public comment about divisive issues.[40] Gerber notes that strong communication and advocacy skills are critical tools for an effective leader. She points to Roosevelt's life as proof-positive that a person can improve and develop her speaking skills. Additionally, Gerber encourages leaders to "cultivate creative communications strategies" and use them to further one's leadership mission.[41]

"Face Criticism with Courage"

Although Roosevelt was extremely popular with certain segments of American society, her controversial statements alienated other groups and sometimes caused problems for her husband's presidency.[42] Gerber argues that critics should not sway leaders from their purpose.[43] Instead, she encourages leaders to get out and gain a better understanding of the issues before taking a stand. If one is a truly passionate leader, one is bound to face her share of critics, but this should not sway a leader from her mission.[44]

"Keep Your Focus"

As the 1930s ended, America found itself on the brink of war. Roosevelt continued her fight for her original causes, but shifted the tone and linked her "vision to values of patriotism and democracy."[45] She also started working for the rights of African-Americans to serve in the military and pressed political parties to work together because she predicted that America would get involved in the evolving conflict in some capacity.[46] The author notes that leaders must have the flexibility to continually update and even transform their visions as the situation requires. Transformation does not mean, however, that a leader has to lose her focus.

---

40. *See id.* at 136-38.
41. *Id.* at 138-44.
42. *See id.* at 157-60.
43. *See id.* at 160-61.
44. *See id.* at 165-75.
45. *Id.* at 186-87.
46. *See id.* at 183-85.

Instead, Gerber advocates that leaders maintain their focus while recognizing that the means and methods to their ultimate goal may change.[47]

General Considerations

Gerber effectively uses interesting examples from Roosevelt's life, and also presents tips on how the reader can apply these principles to the modern world. She uses recent studies and other research to show how women in leadership positions are changing the shape of corporations and other organizations. She also uses many photographs that show Roosevelt's travels around the world and ways in which she influenced women everywhere. The author, however, still struggles with the limited applicability of these leadership principles. Although they are very interesting and may be easily applied to a person searching for life's meaning and self-actualization, these principles are not easily applied to the corporate world and are even more difficult to link to military leadership.[48] While we all understand the importance of ideas like finding a passion in life and embracing it, that concept is not necessarily compatible with working in a large company or a government agency.

Another weakness with this book is its citation. Gerber effectively uses quotations from Eleanor Roosevelt, historians, and other leadership experts, but she does not use pinpoint citations in the endnotes, which makes academic review very difficult.

An additional criticism is that the "On Leadership" style does not necessarily do justice to Roosevelt's contributions to society. Roosevelt worked tirelessly for the needs of the underprivileged and completed her tasks in such a way as to give dignity to even the most oppressed. While Gerber effectively derives leadership principles from Roosevelt's life in some chapters, she also seems to struggle to find "Eleanor" anecdotes that fit a predetermined list of leadership principles in other areas of the book. Themes like "find a mentor" and "take risks" do not adequately capture Roosevelt's originality and creativity.[49] Gerber's career in the leadership

47. *See id.* at 186-201.

48. *See id.* at inside cover.

49. Interview by Ali Velshi with Joel Kurtzman, Partner, Pricewaterhouse Coopers, and regular book reviewer, CNNfn (Oct. 15, 2002).

field seems to have limited the framework with which she viewed Roosevelt's remarkable journey through life.

III. Conclusion

Eleanor Roosevelt's triumphs and tragedies are inspirational in and of themselves. Although the author effectively uses stories from contemporary women's lives to help illustrate different leadership principles today, these examples do not easily translate to traditional careers.

Another limitation of these examples is that they are gender-specific. Even though the author's stated purpose was to provide principles of leadership, she acknowledges that her review of Eleanor Roosevelt's speeches, letters, and books motivated her to continue to fight for equality for women.[50] In the months surrounding the release of this book, Gerber wrote numerous articles in national publications addressing issues concerning women's equality.[51] Therefore, regardless of the title of the book, the reader should be prepared for a platform to launch discussions on women's issues rather than a book of general applicability on leadership.[52]

Despite the shortcomings of some of the principles and perhaps the leadership format, this book is a recommended read. Eleanor Roosevelt led a remarkable life, and it is interesting to see how she transformed herself and the role of the First Lady and became a leader, albeit in a nontraditional way.

---

50. *See* GERBER, *supra* note 1, at xi.

51. *See, e.g.*, Gerber, *supra* note 9, at 13A; Robin Gerber, *Finally Equalize Sexes in Combat*, USA TODAY, Apr. 22, 2003, at 11A; Robin Gerber, *Team Sports Create Leaders*, USA TODAY, Feb. 26, 2003, at 13A; Robin Gerber, *Women Hone Leadership Skills on Career Breaks*, USA TODAY, Jan. 9, 2003, at 11A; Robin Gerber, *Finding the Best Woman to Run for the White House*, CHRISTIAN SCI. MONITOR, Jan. 8, 2003, at 9; Robin Gerber, *Golf's Grass Ceiling*, CHRISTIAN SCI. MONITOR, Aug. 2, 2002, at 11.

52. It is interesting to note that many of the favorable book reviews do not address the merits of the book, but rather praise Eleanor Roosevelt's dignity and courage. *See, e.g.*, Aliza Pilar Sherman, *Required Reading: We've Got Your Summer Reading List--Books to Inspire You, From Women Entrepreneurs*, ENTREPRENEUR, July 1, 2003, at 32; Cord Cooper, *Roosevelt's Better Half*, INVESTOR'S BUS. DAILY, Nov. 11, 2002, at AO3; Kelly DiNardo, *Learning from Eleanor Roosevelt*, USA TODAY, Oct. 28, 2002, at 5B; Paula Voell, *Eleanor Roosevelt Continues to Lead the Way for Women*, BUFF. NEWS, Oct. 18, 2002, at C4; Helen Thomas, *Eleanor Roosevelt, Perfect Role Model*, SEATTLE POST-INTELLIGENCER, July 9, 2002, at B4.

LEADERSHIP THE ELEANOR ROOSEVELT WAY: TIMELESS STRATEGIES FROM THE FIRST LADY OF COURAGE[1]

REVIEWED BY MAJOR KAREN L. DOUGLAS[2]

> *Women, whether subtly or vociferously, have always been a tremendous power in the destiny of the world*.[3]

This quote from Eleanor Roosevelt summarizes her faith in the power of women to effect change on a global scale. In her biography of Eleanor Roosevelt, Robin Gerber presents a chronological roadmap of Roosevelt's life, and broadcasts Roosevelt's call to action for women to grasp the courage within themselves to take their rightful place in world leadership. This book traces Roosevelt's life, from shy orphan to what is arguably the most accomplished female leader in American history. Roosevelt's evolution illustrates Gerber's point that regardless of a woman's background or temperament, she should become involved in shaping world events.

Gerber brings her academic skills as a senior scholar at the Academy of Leadership at the University of Maryland to focus on Roosevelt's legacy of leadership. She illustrates Roosevelt's techniques by relating examples from Roosevelt's life and from the lives of contemporary women. This simplified look at Roosevelt's life makes for an easy-to-read book, which has the power to galvanize even the most inexperienced and sheltered of women to take a hand in constructing the world's future.

This review discusses the book's qualities as both a historical biography and as a leadership blueprint. Further, it discusses the book's failure to adequately explore the controversial but critical events in Roosevelt's life. Finally, it reviews the lessons learned from Roosevelt's life that are readily applicable to the life of a judge advocate.

Gerber introduces the theme of her book in the opening preface, stating that the book is a narrative biography, chronologically analyzing the

---

1. ROBIN GERBER, LEADERSHIP THE ELEANOR ROOSEVELT WAY: TIMELESS STRATEGIES FROM THE FIRST LADY OF COURAGE (2002).

2. U.S. Air Force. Written while assigned as a student, 52d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

3. GERBER, *supra* note 1, at 106.

leadership lessons Roosevelt learned in each part of her life.[4] Gerber wrote the book for women, intentionally employing the whole-life narrative concept because Gerber believes women respond better to such formats.[5] The author explains her approach in giving practical examples taken from Roosevelt's and other women's lives by opining that such examples bring immediacy and greater relevance to the leadership advice.[6] The contemporary examples Gerber provides were culled from her personal acquaintance, and through her study of women leaders at the University of Maryland's Academy of Leadership. Gerber's historical and biographical information regarding Roosevelt is soundly founded on the scholarly research of historical authors Blanche Weisen Cook, Allida Black, and James McGregor.[7]

Gerber presents a glowing biography of Roosevelt, focusing on positive and publicly acceptable events in Roosevelt's life. Gerber virtually ignores Roosevelt's likely victimization of incest by her uncles,[8] her permanent withdrawal of sexual relations with her husband,[9] her failures as a mother,[10] her failed Authurdale settlement experiment,[11] and the failure of her long-term romantic relationship with Lorena Hickock.[12] In fact, Gerber never addresses the well-documented lesbian affair[13] between Roosevelt and Hickock, instead offering only two passing mentions of Hickock.[14] For this reason, persons interested in reading a full and accurate biography on Eleanor Roosevelt should not rely on this book. The

---

4. *Id.* at preface.

5. *Id*. at x.

6. *Id.*

7. *Id.*

8. 1 BLANCHE WEISEN COOK, ELEANOR ROOSEVELT, 1884-1933, at 126 (1992). Gerber's book utterly omits this formative experience in Roosevelt's life. *See* GERBER, *supra* note 1.

9. *Id.* at 232.

10. *Id.* at 47. Gerber's chapter on "Mothering: Training for Leadership" brushes aside accusations by the Roosevelt children (and Roosevelt's own admissions) that she absented herself from her children's upbringing in order to devote herself to political pursuits, and instead laughably claims Roosevelt's leadership techniques were gleaned from her motherhood experiences. *Id.*

11. *Id.* at 115, 241. Gerber's minimizing treatment of the failed planned community (that cost the federal government a great deal of money, and the Roosevelt administration a great deal of embarrassment) is limited to a single paragraph that extols the failure as publicity for the plight of America's poor. *Id.*

12. RODGER STREITMATTER, EMPTY WITHOUT YOU: THE INTIMATE LETTERS OF ELEANOR ROOSEVELT AND LORENA HICKOCK 127 (1998).

13. *Id.* at 19.

14. GERBER, *supra* note 1, at 107, 134.

intentional omission of Roosevelt's failings focuses the book on using her successes as a leadership blueprint. These omissions are sometimes overwhelming to the point of becoming preposterous, and make Gerber's use of Roosevelt's biography suspect as nothing more than a vehicle to publish a leadership book. It appears that Gerber's academic studies led her to compile a twelve-step leadership recipe, which she then overlaid on Roosevelt's biography, regardless of the fit.

Roosevelt becomes interesting from a leadership perspective only after she learned of her husband's adulterous betrayal and rebuilt her life independently of him.[15] Gerber wisely chose not to begin the leadership lessons with the new and improved Eleanor Roosevelt of 1920. Instead, the book addresses the leadership techniques that Roosevelt employed in life, even though most women, including Roosevelt herself, would not recognize these life experiences as leadership training.

The first chapter, "Learn from Your Past," begins as each chapter does, with a quote from Roosevelt herself, "[c]haracter building begins in our infancy, and continues until death."[16] Through this chapter, Gerber explores how women can find the factors that shape our lives and color our perspectives by reflecting on our own past. Just as Roosevelt's deep empathy for the poor and oppressed surely arose from her own childhood feelings of rejection and abandonment,[17] women can learn about their own motivations by reflecting on their past.

Gerber urges the reader to write her own autobiography, and to draw from her own memories to focus on the positive lessons that came from those experiences. Gerber asserts we are shaped by our mentors and counsels proactively seeking out appropriate sources of inspiration and guidance. Just as Roosevelt relied on the tutelage of her boarding school headmistress, the author suggests everyone needs a mentor to guide her in finding her path.[18]

Gerber also recognizes that many potential leaders have, like Roosevelt, taken the time to first have a family, and then enter the world of leadership after their children are grown. While at first a military officer may scoff at the idea that leadership technique is learned by child-rearing,

15. *Id.* at 76.
16. *Id.* at 2.
17. *Id.* at 10.
18. *Id.* at 41.

the point of Gerber's "Mothering: Training for Leadership" chapter can best be summed up in the words of Roosevelt herself, "[r]emember that a home requires all the tact and all the executive ability required in any business."[19] This chapter reminds the reader that life is the best leadership training there is, and that by examining our experiences in life, we can cull out more leadership training lessons than we recognize at first.

Gerber then addresses the transformative year of Roosevelt's life. Before 1918, Roosevelt admits she "had no sense of values whatsoever," and left all decision making to her husband.[20] Then, in 1918, while unpacking her husband's traveling trunk, Roosevelt found a stack of love letters that gave incontrovertible evidence that he was having an affair with her beautiful twenty-two year old social secretary.[21] Roosevelt secluded herself for a year, and spent her time in depression and anorexia.[22] After her year of personal agony, when she was entering her forties,[23] she abandoned her efforts to be an ideal wife, mother, and dutiful daughter-in-law, and instead built her own separate house, made the furniture to appoint it, and took her first steps toward becoming the most admired woman in history.[24]

The book's failure to adequately explore just what happened in that amazing year of transformation is likely not the fault of the author, since in the words of Roosevelt, "[r]eadjustment is a kind of private revolution."[25] Roosevelt's suffering was done privately and she never gave a full account of how she overcame her pain. Gerber does offer some illustrations of contemporary women who have undergone challenges in their personal and private lives. She concludes that you cannot avoid your share of personal disasters; it is one's response to them that determines whether your leadership potential develops.[26] She advocates the reader's acceptance of circumstances beyond one's control, belief in one's own resilience, positive diversion of energy, reflection on the negative event,

---

19. *Id.* at 44.
20. *Id.* at 89.
21. *Id.* at 70.
22. *Id.* at 74.
23. *Id.* at xix. Roosevelt was born in 1884. *Id.*
24. The Gallup Organization, *65 Years of Polling History, available at* http://www.gallup.com/content/?ci=9970&pg=2 (last visited Feb. 17, 2004) ("Eleanor Roosevelt has the highest average rank (1.1) among all women appearing on the list throughout its history.").
25. GERBER, *supra* note 1, at 66.
26. *Id.* at 82.

and optimistic faith in emerging as a stronger person.[27] This advice can be found in countless grief and divorce books penned throughout the last half-century and offers nothing new to the reader. Anyone searching for a blueprint on how Eleanor Roosevelt overcame such devastating grief as the death of her infant son[28] and the publicly humiliating betrayal by her will be sorely disappointed.

From there, the book explores the public figure that America came to embrace from 1920 onward. The book addresses finding a leadership passion in work that consumes your whole heart. Gerber recommends allowing yourself the gift of acting like a woman, instead of assuming leadership by imitating men.[29] Further, it urges against apathy, and stresses that leadership is not just a woman's right but also her responsibility.[30]

In a more practical sense, the book addresses many people's fears of public speaking by detailing Roosevelt's progression from a reluctant and poor public speaker into an effective orator, whose words and ideas were disseminated through public speaking engagements, her own newspaper column, books she published, and even her own television show.[31] The book reveals that it was a slow and deliberate process of trial and error and that it took quite some time for Roosevelt to lose an annoying high pitched giggle that distracted from her message.[32] In this way, Gerber effectively removes the reader's ability to hide from her call to leadership by professing to be a poor public speaker.

Politicians and the press viciously criticized Roosevelt for her liberal ideas. She suffered everything from jokes to all out attacks on her character.[33] Roosevelt's recommendation to "develop a skin as thick as a rhinoceros hide!"[34] succinctly sums up the chapter entitled "Face Criticism With Courage." Gerber gives practical guidance on how Roosevelt expected criticism to come with the territory and how she was prepared to

---

27. *Id.*

28. *Id.* at 53.

29. *Id.* at 129.

30. *Id.* at 112. Gerber cleverly entitles her subchapter "Claim your Right to be a Leader," using "claim" as an imperative, and asserting that leadership is a woman's right. *Id.*

31. *Id.* at 281. Mrs. Roosevelt worked on television and radio with NBC studios, and eventually hosted a television program entitled, "The Prospects of Mankind." *Id.*

32. *Id.* at 140.

33. *Id* at 166-67.

34. *Id.* at 156.

counter-attack her detractors' criticisms by being knowledgeable about her field.[35] Gerber also provides specific examples of Roosevelt's effectively handling criticism in a calm and dispassionate manner. Roosevelt's sage wisdom of "no one can make you feel inferior without your consent" strongly illustrates Gerber's point on how leaders should take criticism.[36]

After Franklin Delano Roosevelt's (FDR) death on 12 April 1945,[37] Roosevelt lost her husband's political clout as President and her status as First Lady. She found herself depending on the networks she had established over her lifetime to continue her work. This period of her life perfectly illustrates Gerber's recommendation that women create strong networks in order to become leaders. Roosevelt had done such a skillful job in creating a strong political network that she accomplished her arguably best work, the United Nations Universal Declaration of Human Rights,[38] years after FDR's death. Gerber recommends following Roosevelt's example of maintaining loose contacts with everyone you meet and occasionally following up with those contacts to maintain the relationship.[39]

Roosevelt's last years of public service were spent as a United Nations Delegate and honorary ambassador to the United Nations.[40] Such an appointment was unlike any of her previous experiences and represented a huge risk to her. This part of Roosevelt's life is the basis for Gerber's chapter on embracing risk.[41] In taking the UN job, Roosevelt was going head to head with the Russian delegates over the fate of World War II refugees to determine whether they should be treated as traitors and forced to return home, as the Russians advocated.[42]

Though Roosevelt was at first apprehensive about taking the job as a UN delegate,[43] she accepted the risk of failure in sight of the whole world and the possible devastating consequences for the refugees should she lose her bid to protect them. She knew that her performance would either pave or block the way for future women delegates. Gerber points out that lead-

35. *Id.*
36. *Id.* at 171.
37. *Id.* at 205.
38. *Id.* at 248.
39. *Id.* at 223.
40. *Id.* at 230.
41. *Id.* at 227.
42. *Id.* at 233.
43. *Id.* at 230.

ers are risk takers and she focuses the reader's attention on belief in oneself as the foundation for willingness to take risks. Gerber recommends discussing risk with your family, friends, and allies before undertaking it. She astutely reminds us that with risk comes failure, such as Roosevelt's Authurdale debacle, but that failure is not an excuse for future inaction.

Gerber also addresses the sunset of Roosevelt's life. She explains that though her body was aging, Roosevelt remained an active participant in life and continued educating herself about the world until her death at the age of seventy-eight.[44] In Roosevelt's words, "[y]ou must be interested in anything that comes your way."[45]

Sadly, the book mentions nothing about Roosevelt's unconventional marriage to Franklin D. Roosevelt and utterly fails to explore Roosevelt's love affair with Lorena Hickock. This book also fails to solve the mystery of how Eleanor Roosevelt transformed herself from a heartbroken, shy housewife, into an outspoken, fearless, public figure. It seems that Roosevelt decided that if her husband's rules did not apply to him, then they did not apply to her, and she was completely free to live by her own rules. Once that floodgate of open thinking hit her consciousness, the sky was her limit, all societal rules were open for review, and she could choose to live as she pleased. It makes sense to this reviewer that remarkable leaders disregard societal rules as they see fit.[46] A chapter of the book should have been dedicated to examining and rejecting society's rules that interfere with feminine leadership.

Finally, the book does not fully explore Roosevelt's stalwart diligence in obtaining her goals. The book's inclusion of a subchapter entitled "The Power of Conviction"[47] fails to fully address how doggedly determined Roosevelt was and how she did not let societal pressures to act like a lady deter her from her goals. Frankly, nobody is going to follow a leader who obeys societal pressures to "be a good little girl." Roosevelt certainly did not care whether she annoyed anyone by her persistence. She was a self-proclaimed "hair shirt"[48] to her husband, irritating and itching him whenever she felt the need to influence his policymaking. Further, she persis-

---

44. *Id.* at xxi.

45. *Id.* at 265.

46. LEWIS V. BALDWIN, THE LEGACY OF MARTIN LUTHER KING, JR., THE BOUNDARIES OF LAW, POLITICS AND RELIGION 198 (2002). Dr. Martin Luther King, Jr. practiced civil disobedience by deliberately disobeying laws in order to further his struggle for civil rights.

47. Gerber, *supra* note 1, at 195.

48. *Id.* at 126.

tently contacted people to further her goals, even when they refused to take her calls.[49] Roosevelt's tenacious follow-through may have exasperated some, but she got the job done without worrying whether her diligence made her unladylike. Such an excellent leadership quality deserves a more thorough review.

After applying this book to the leadership challenges inherent in being a female judge advocate, it is clear that we have much to benefit from reading it. The book contains practical reminders to expand mentorship networks and to perfect our public speaking. Gerber challenges us to thoroughly examine our lives and get to know ourselves before taking on the challenges of leadership. The book raises, but does not resolve, the matriarch's dilemma of whether to place family or leadership first. Roosevelt tried to straddle the fence but she wound up a largely absent parent. Probably the most important aspect of this book for the leadership future of women in the Judge Advocate General's Corps is that of accepting our call to leadership duty. It is not only our right to lead, but our obligation. Roosevelt's example is as applicable to the judge advocate as it is to any political leader: do not wait for someone else to work for change, do it yourself.

---

49. *Id.* at 196.

United States Postal Service

Statement of Ownership, Management, and Circulation

1. Publication Title	2. Publication Number	3. Filing Date
Military Law Review	0026-4040	October 1, 2003
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Quarterly	Four	Domestic: $17.00 Foreign: $21.25

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4)*

The Judge Advocate General's Legal Center & School, U.S. Army

600 Massie Road, Charlottesville, VA 22903-1781

Contact Person: Chuck Strong

Telephone: (434) 971-3396

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*

Office of The Judge Advocate General, U.S. Army

2200 Army Pentagon, Washington, DC 20310-2200

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*

Brigadier General Scott C. Black

The Judge Advocate General's Legal Center & School, 600 Massie Road, Charlottesville, VA 22903-1781

Editor *(Name and complete mailing address)*

Captain Heather J. Fagan

The Judge Advocate General's Legal Center & School, 600 Massie Road, Charlottesville, VA 22903-1781

Managing Editor *(Name and complete mailing address)*

Captain Heather J. Fagan

The Judge Advocate General's Legal Center & School, 600 Massie Road, Charlottesville, VA 22903-1781

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	Complete Mailing Address
Office of The Judge Advocate General, U.S. Army	2200 Army Pentagon, Washington, DC 20310-2200

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☒ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*

The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:

☒ Has Not Changed During Preceding 12 Months

☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title			14. Issue Date for Circulation Data Below	
Military Law Review			December 2003	
15.	Extent and Nature of Circulation		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a.	Total Number of Copies *(Net press run)*		5,615	5,586
b. Paid and/or Requested Circulation	(1)	Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. *(Include advertiser's proof and exchange copies)*	3,845	3,740
	(2)	Paid In-County Subscriptions Stated on Form 3541 *(Include advertiser's proof and exchange copies)*	3	0
	(3)	Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	1,767	1,746
	(4)	Other Classes Mailed Through the USPS	0	0
c.	Total Paid and/or Requested Circulation *[Sum of 15b. (1), (2),(3),and (4)]* ▶		5,615	5,586
d. Free Distribution by Mail *(Samples, complimentary, and other free)*	(1)	Outside-County as Stated on Form 3541	0	0
	(2)	In-County as Stated on Form 3541	0	0
	(3)	Other Classes Mailed Through the USPS	0	0
e.	Free Distribution Outside the Mail *(Carriers or other means)*		0	0
f.	Total Free Distribution *(Sum of 15d. and 15e.)* ▶		0	0
g.	Total Distribution *(Sum of 15c. and 15f)* ▶		5,615	5,586
h.	Copies not Distributed		0	0
i.	Total *(Sum of 15g. and h.)* ▶		5,615	5,586
j.	Percent Paid and/or Requested Circulation *(15c. divided by 15g. times 100)*		100	100

16. Publication of Statement of Ownership
☒ Publication required. Will be printed in the December 2003 issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner
Heather J Vaze
CPT, Judge Advocate

Date
1 Oct. 03

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

Instructions to Publishers

1. Complete and file one copy of this form with your postmaster annually on or before October 1. Keep a copy of the completed form for your records.
2. In cases where the stockholder or security holder is a trustee, include in items 10 and 11 the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who are stockholders who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check the box. Use blank sheets if more space is required.
3. Be sure to furnish all circulation information called for in item 15. Free circulation must be shown in items 15d, e, and f.
4. Item 15h., Copies not Distributed, must include (1) newsstand copies originally stated on Form 3541, and returned to the publisher, (2) estimated returns from news agents, and (3), copies for office use, leftovers, spoiled, and all other copies not distributed.
5. If the publication had Periodicals authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or, if the publication is not published during October, the first issue printed after October.
6. In item 16, indicate the date of the issue in which this Statement of Ownership will be published.
7. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of Periodicals authorization.

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER
General, United States Army
Chief of Staff

Official:

JOEL B. HUDSON
Administrative Assistant to the
Secretary of the Army
0402904

U.S. GOVERNMENT PRINTING OFFICE: 1994-300-757:00001

PIN: 081228-000