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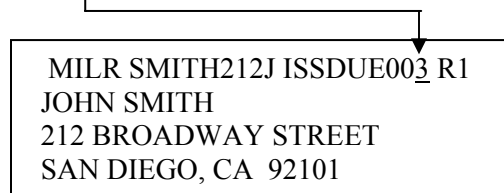
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MILITARY LAW REVIEW

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SPIT AND POLISH: A CRITIQUE OF MILITARY OFF-DUTY PERSONAL APPEARANCE STANDARDS

MAJOR JOHN P. JURDEN*

*The essence of military service “is the subordination of
the desires and interests of the individual to the needs of
the service.”¹*

I. Introduction

The U.S. military has tremendous discretion to regulate service members' on-duty appearance. Historically, this discretion has extended both to a service member's on-duty personal appearance and to his uniform appearance.² From regulating a service member's hair length

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¹ *Parker v. Levy*, 475 U.S. 503, 507 (1986) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)).

² See, e.g., U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS (3 Feb. 2005) [hereinafter AR 670-1]; U.S. DEP'T OF NAVY, UNIFORM REGS. (Jan. 2005) [hereinafter NAVY UNIFORM REGS.]; U.S. DEP'T OF AIR FORCE, INSTR. 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL (29 Sept. 2002) [hereinafter AFI 36-2903]; U.S. MARINE CORPS, ORDER P1020.34G, MARINE CORPS UNIFORM REGULATIONS (31 Mar. 2003) [hereinafter MARINE CORPS ORDER].

and style,³ to regulating weight,⁴ the military has a latitude unequalled in the civilian sector to dictate “appropriateness” in the context of on-duty physical appearance.

Arguably, the American public has been conditioned to stereotypical depictions of what it means to “be” a member of the armed forces, as projected in the media.⁵ For instance, Marine Corps commercials routinely feature images of clean-cut recruits striving to be one of “The Few, The Proud.”⁶ Conversely, negative public perceptions, such as those of male service members as “extremists,”⁷ or those of female service members as “butch,”⁸ also are prevalent.

What it means to “be” a service member has changed dramatically over the years, as more emphasis on personal freedoms and individuality⁹

³ See, e.g., AR 670-1, *supra* note 2, para. 1-8 (dictating hair length for Army members).

⁴ See, e.g., U.S. DEP’T OF ARMY, REG. 600-9, THE ARMY WEIGHT CONTROL PROGRAM (1 Sept. 1986) (prescribing weight standards for Army members).

⁵ See, e.g., Dr. John Hillen, *The Gap Between American Society and its Military: Keep It, Defend It, Manage It*, 4 J. NAT’L SEC. L. 151, 165 (2000) (describing three recently-released Hollywood motion pictures as examples of America’s “thirst” for celebration of American military culture). Dr. Hillen posits the notion that the American public would welcome an Army recruiting campaign equating the physical portrayal of today’s Soldier with the heroic Soldiers depicted in the movie *Saving Private Ryan*. *Id.*

⁶ See, e.g., Paula Span, *The Marines Go Medieval*, WASH. POST MAG., Mar. 22, 1992, at 25; see also Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 501 (1991) (noting that because the armed forces are the nation’s preeminent symbol of power, it is not surprising that “the Marines are looking for a few good men”).

⁷ For instance, former Assistant Secretary of the Army Sarah Lister publicly labeled members of the Marine Corps “extremists” due to their marked difference from the rest of American society. See Sydney J. Freedberg, Jr., *Taking Aim at GI Jane*, 30 NAT’L J. 590, 590 (1998) (quoting Ms. Lister as stating that “[t]he Marines are extremists The Marine Corps is – you know – they have all these fancy uniforms and stuff.”); see also Hillen, *supra* note 5, at 156 (describing the furor over Ms. Lister’s remarks); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68, 116 (2002) (describing the nearly shaved style of haircut popular in the U.S. Army Ranger Regiment as “a symbol of hypermasculinity”).

⁸ See, e.g., Vojdik, *supra* note 7, at 116 (noting that women with short haircuts often are considered less feminine, and even to be lesbians).

⁹ See generally Jane McHugh, *Baldness is Authorized*, ARMY TIMES ARCHIVE (Jan. 21, 2002), available at www.armytimes.com/archivepaper.php?f=0-ARMYPAPER-698421.php (noting that the evolution of “hip hop” and rap cultures has greatly influenced the personal appearance expectations of the pool of military recruits); see also Emanuel Gonzales & Macarena Hernandez, *Army Could Loosen Regs Just a Hair*, SAN ANTONIO EXPRESS-NEWS, Jan. 9, 2002, at 1A (quoting Army spokeswoman Martha Rudd as describing the Army’s justification in amending its regulation governing personal

has infiltrated military culture.¹⁰ This change is embodied in the Army's 2001 adoption of the slogan "An Army of One," which emphasized—even if unintentionally—individual achievement and self-fulfillment,¹¹ perhaps at the expense of teamwork and unity.¹² By increasingly tolerating—and even welcoming—aspects of individuality in its ranks,¹³ the military must anticipate that evolving social norms will manifest themselves through the physical appearance of service members.¹⁴

appearance because the Army is "trying to be a lot more politically correct . . . and . . . more considerate of cultural and ethnic backgrounds").

¹⁰ See, e.g., Jonathan Turley, *The Military Pocket Republic*, 97 NW. L. REV. 1, 65-66 (2002) (describing a post-World War II study that recommended sweeping reforms in the officer-enlisted ranks to eliminate the Army's "caste" system). For an excellent discussion of the effects of emphasizing individuality in the military ranks, see Hillen, *supra* note 5, at 160. Hillen relates that, following the end of the Vietnam War, the military voluntarily altered its slogan to "Today's Army Wants to Join YOU" in an effort to "make itself look enough like the drug-plagued, race-troubled, 'question-authority!' American society at large in order to attract some volunteers." *Id.* In the early 1980s, the military dropped this disastrous slogan and replaced it with its "Be All that You Can Be" slogan. *Id.* This, according to Hillen, immediately preceded the United States' rise as the pre-eminent military power in the world. *Id.*

¹¹ See generally Thomas W. Evans, *The Wrong Campaign: Army's Latest Ad is Poor Recruiter*, ADVERTISING AGE, Jan. 29, 2001, at 28 (describing the relative inefficacy of the Army's changed recruiting slogan); see also Matt Labash, *The New Army: Be Whatever You Want to Be*, WKLY. STANDARD, Apr. 30, 2001, at 20 (describing the Army's "desperate" attempt to lure more recruits in an era in which it suffers from an "identity crisis"). The Army introduced its "Army of One" recruiting slogan in January 2001. See George Coryell, *'Army of One' Defends Ad Spots*, TAMPA TRIB., May 6, 2001, at 1.

¹² See Coryell, *supra* note 11, at 1 (describing the Army's new advertising campaign as abandoning the former themes of unity and cohesion).

¹³ "Army officials say that, just as fashion trends in the civilian world evolve into mainstream culture, the Army must adapt as well." Sean Gill, *Being All They Can Be, but with Individuality*, L.A. TIMES, Jan. 27, 2000, at 30.

¹⁴ "A quick survey of recent cultural criticism reveals commonly accepted characterizations of contemporary society – narcissistic, morally relativist, self-indulgent, hedonistic, consumerist, individualistic, victim-centered, nihilistic, soft, etc." Hillen, *supra* note 5, at 155 (citing A.J. Bacevich, *Tradition Abandoned: America's Military in the New Era*, NAT'L INTEREST, Summer 1997, at 22). Dr. Hillen also notes that critics have likened American culture today as one marked by "narcissism, relativism, and 'culture of complaint.'" *Id.* at 163. Applying this fatalistic view to the potential pool of current American military recruits, one commentator notes that "in the era of the all-volunteer force, as the armed services seek to induce talented, educated, upward mobile youths to choose a military career, exclusive reliance on 'duty, honor, country' has waned." C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other 'Special Contexts'*, 56 U. CIN. L. REV. 779, 825 (1988).

Predictably, the military's quest to permit more individual identity within its ranks has led service members to "individualize" their bodies, in much the same way that American society at large has done.¹⁵ Thus, the military must prepare to encounter evolving societal trends within its ranks, including those of acceptable male and female appearance,¹⁶ and those unique to particular American subcultures.¹⁷

Courts recognize the right to "individualize" one's body appearance as a liberty interest under the U.S. Constitution.¹⁸ From cases involving

¹⁵ For an excellent description of this trend, see generally Major L.M. Campanella, *The Regulation of "Body Art" in the Military: Piercing the Veil of Service Members' Constitutional Rights*, 161 MIL. L. REV. 56 (1999) (describing the then-recent recent phenomenon of "body art").

¹⁶ For example, young people have taken to affixing one or more gold teeth, or "grills," over their natural teeth. See Lynn Porter, *St. Pete Police Chomp Owner of Teeth Shop*, TAMPA TRIB., June 5, 2003, at 1. Alternatively, they may bond diamonds to their teeth using epoxy. *Id.* Moreover, the practice of "tongue splitting," in which people have their tongues surgically split down the middle to produce a "forked" appearance, is increasingly popular. See Bryan Smith, *Tongue-Splitting Ban Slices its Way Through Legislature*, CHI. SUN-TIMES, May 1, 2003, at 5. Finally, in addition to physically altering the appearance of one's body, emerging trends in dress are prevalent. For instance, the recent trend of wearing "low riding" or "hip hugging" jeans has caused controversy, especially in educational institutions. See, e.g., Lisa Lenoir, *Jeans: How Low Can They Go?*, CHI. SUN-TIMES, Aug. 5, 2003, at 42. For a description of other such trends, see generally Campanella, *supra* note 15, at 61-66 (describing tattoos, brands, and various forms of body piercing).

¹⁷ One example of such appearance trends is the braided, or "corn row" hairstyle that is popular and prevalent in the African-American community. This hairstyle consists of thin, tightly knitted braids hugging the scalp, and often includes adornment with beads. See Ruth M. Bond, *The Cornrow Tangle*, WASH. CITY PAPER, Oct. 4, 1991, at 8. African-Americans, for example, often find braided hairstyles easier to maintain and reflective of their cultural heritage. See Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN'S L.J. 115, 132-33 (2001). In *Rogers v. American Airlines, Inc.*, for instance, an African-American woman unsuccessfully challenged the airline's prohibition against braided hairstyles, asserting that she should be permitted to identify with traditional cultural symbols of the African-American community. 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981).

¹⁸ See, e.g., *Neinast v. Bd. of Trs.*, 346 F.3d 585, 595 (6th Cir. 2003) (noting "a considerable body of precedent" revealing the existence of a liberty interest in personal appearance); *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 542-43 (10th Cir. 1987) (recognizing a liberty interest in firefighter trainees' right to smoke when off duty); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987) (noting the Eleventh Circuit's recognition of a liberty interest in citizens' rights to choose their mode of hair grooming); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 101 (5th Cir. 1982) (finding a liberty interest in choice of hair style); *Pence v. Rosenquist*, 573 F.2d 395, 399 (7th Cir. 1978) (noting the Seventh Circuit's finding of a liberty interest in public school students' rights to control personal appearance); see also *Kelley v. Johnson*, 425 U.S.

choice of clothing¹⁹ to cases involving choice of hairstyle,²⁰ courts continuously have acknowledged individuals' rights to express themselves "in a veritable fashion show of factual scenarios."²¹

In the late 1990s, the Department of the Army confronted a mounting controversy regarding Soldiers' self-decoration propensities.²² The Army addressed and attempted to resolve, through a series of three Army-wide messages, specific issues regarding the propriety of certain tattoos and body piercings.²³ Legal commentary has examined the military's authority to regulate service members' on-duty appearance in the context of "body art," including tattoos and body piercings.²⁴ That commentary concluded that regulating the natural appearance of an on-

238, 244 (1976) (assuming that the citizenry at large possesses a liberty interest in personal appearance).

¹⁹ See, e.g., *DeWeese*, 812 F.2d at 1367 (finding unreasonable a blanket prohibition on shirtless jogging).

²⁰ See, e.g., *Domico*, 675 F.2d at 101 (declaring "a constitutional liberty interest in choosing how to wear one's hair").

²¹ *Zalewska v. County of Sullivan*, N.Y., 316 F.3d 314, 321 (2d Cir. 2003).

²² See Campanella, *supra* note 15, at 61-66 (describing the Army's response to an alleged white supremacist killing near Fort Bragg, North Carolina, in which a soldier's alleged motivation in committing the act was to obtain a spider web tattoo on his elbow).

²³ Message, 051601Z, Jun 98, Dep't of Army, DAPE-HR-PR, subject: Wear and Appearance of Army Uniforms and Insignia [hereinafter June Uniform Message]; Message, 241710Z Aug 98, Dep't of Army, DAPE-HR-PR, subject: Wear and Appearance of Uniforms and Insignia, AR 670-1 [hereinafter August Uniform Message]; Message, 310609Z, Dec 98, Dep't of Army, DAPE-HR-PR, subject: Administrative Guidance to Army Tattoo Policy in Accordance with AR 670-1 [hereinafter December Uniform Message]. These Department of Army Messages detailed several interim changes to Army Regulation 670-1, the then-current Army regulation governing personal appearance. The first message, published in June 1998, prohibited all body piercings while soldiers were in uniform, except for earrings for females, as for which the then-current regulation already provided. June Uniform Message, *supra*. Regarding tattoos, the message prohibited "visible tattoos or brands on the neck, face or head . . ." *Id.* The message also prohibited tattoos anywhere else on a soldier's body that would be "prejudicial to good order and discipline . . ." *Id.* The second message, published two months later in an attempt to clarify the earring restrictions contained in the first message, prohibited male soldiers from wearing earrings while on a military installation, whether on or off-duty. August Uniform Message, *supra*. In December 1998, the Army published a third message, clarifying particulars regarding the tattoo guidance the first message contained. December Uniform Message, *supra*. This message reinforced that the Army tattoo policy did not contain a clause providing exceptions for service members who obtained tattoos before the effective date of the policy. *Id.*

²⁴ See Campanella, *supra* note 15, at 58. Major Campanella defines "body art" as "the different methods a person may use to change the natural appearance of his body through various 'additions.'" *Id.* at 59. Included in the rubric of body art are tattoos, body piercings, and brands. *Id.*

duty service member's body, insofar as it furthers "legitimate military interests" such as protecting a "soldierly appearance," is constitutional.²⁵ That commentary, however, specifically did not determine whether, or to what extent, the military rightfully may regulate service members' off-duty physical appearance.²⁶

In February 2005, the Army published a new version of its regulation regarding uniforms and personal appearance standards.²⁷ The regulation governs Soldiers' general on- and off-duty appearance, and incorporates much of the Army's previous interim guidance regarding the regulation of Soldiers' body art.²⁸ To some extent, promulgation of the new regulation lays to rest many of the controversies regarding regulation of Soldiers' body art, at least while they are on duty. Unfortunately, the regulation continues to provide only cursory guidance regarding Soldiers' general off-duty appearance.²⁹

The Army is not alone. The Marine Corps,³⁰ Navy,³¹ and Air Force³² regulations also contain provisions that offer vague guidance, at best, regarding off-duty appearance standards. Such guidance may consequently impinge improperly on service members' individual liberties. For example, what does it mean to avoid "eccentricities" in civilian dress while off duty?³³ A Marine who does not know is subject to potential punishment under the Uniform Code of Military Justice (UCMJ).³⁴ Or, is it rational for the Navy to prohibit male off-duty Sailors from wearing an earring on a military installation, when they can don one as soon as they enter the civilian community for an evening out?³⁵ Finally, is it a valid military concern whether or not service

²⁵ See *id.* at 113-14.

²⁶ *Id.* at 94. ("To what extent the military can lawfully control a soldier's physical appearance off-duty, while not in uniform, is a question that remains unanswered.")

²⁷ See AR 670-1, *supra* note 2, at i. The regulation, dated 3 February 2005, became effective on 3 March 2005. *Id.*

²⁸ See *id.* para. 1-8 (regulating the style and placement of soldiers' tattoos).

²⁹ For example, the regulation dictates that "[s]oldiers must take pride in their appearance at all times, in or out of uniform, on and off duty." *Id.* para. 1-7.

³⁰ MARINE CORPS ORDER, *supra* note 2.

³¹ NAVY UNIFORM REGS., *supra* note 2.

³² AFI 36-2903, *supra* note 2.

³³ See *infra* note 46 and accompanying text (describing the Marine Corps' prohibition on "eccentricities" in appearance when Marines are dressed in civilian attire).

³⁴ See *infra* note 91 and accompanying text (describing the punitive nature of the Marine Corps regulation).

³⁵ See *infra* note 58 and accompanying text (noting the Navy regulation's delineation between male members' on- and off-installation wear of earrings).

members—in the privacy of their homes on a military installation—adhere strictly to off-duty personal appearance standards?³⁶

Courts and commentators generally are loath to question the military services' authority, in furtherance of the services' maintenance of discipline and unity, to prescribe a service member's personal appearance while in uniform. Rather than delving into such a well-established area, this article analyzes the extent to which the military properly may—or should—regulate off-duty “personal appearance.”³⁷

The concept of “personal appearance” consists of “a set of meanings and understandings that are socially constructed.”³⁸ Put bluntly, combining or altering dress items or accoutrements such as jewelry, or even adopting certain hairstyles, often help to express self-identity.³⁹ Such appearance choices may pose great risks to service members, for appearance standards have the perhaps unintended effect of empowering those in a position of authority to enforce stereotypes, and to discourage deviation from accepted institutional or social norms.⁴⁰

At one extreme, the result may be criminal or administrative punishment for those service members who deviate from traditionally acceptable off-duty appearance standards that military regulations establish.⁴¹ At the other extreme, courts may reject a military

³⁶ See *infra* Part VI.B.1 (discussing off-duty, on-installation appearance standards and their potential to impact on service members who reside on military installations).

³⁷ The term “personal appearance” imports different meanings, depending on the context. For instance, it may refer to innate, physical characteristics, such as choice of hair style or the presence or absence of facial hair. It may refer to attempts to alter innate physical characteristics, through brandings, piercings or other “body art.” It may also refer to mode of dress. For instance, the choice of clothing color or style also constitutes an appearance “choice.” This article incorporates under the rubric of “personal appearance” the following: piercings, tattoos, and “body art;” hairstyle; facial hair; and mode of dress.

³⁸ Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1408 (1992). “Social construction” refers to individuals' actions, in a cultural context, involving the creation of symbols, meanings, understandings and beliefs. *Id.* at 1407. “Dress and appearance practices can be understood as one type of meaning-creating human action situated within cultural context.” *Id.* at 1408.

³⁹ *Id.* at 1408-09.

⁴⁰ See *id.* at 1398 (“The primary social function of appearance law is to empower employers, school officials, judges, and other authority figures to enforce the dominant expectations about appearance and to discipline deviance from the approved social norms.”).

⁴¹ See *infra* text accompanying notes 141-48 (describing one Marine's punishment for violating a Marine Corps regulation governing personal appearance).

commander's attempted enforcement of his own brand of "style," which the commander predicates on a misinterpretation of regulatory standards.⁴² Such judicial determinations thus may undermine the perceived legitimacy of military command authority. In this sense, then, the stakes are high: regulation of off-duty appearance in the military implicates encroachment on individual liberties, as well as preservation of the military's institutional legitimacy in regulating certain aspects of service members' private lives.

In exploring the military's right to enforce off-duty appearance standards, one must understand what empowers the military to dictate the meaning of "being" and "looking like" a service member. This article examines military culture, in the context of the military as a supposed "separate society." Acknowledging that the military is, in some respects, a separate society, this article next explores what it means to "be" and "look like" a military service member, at least in the armed forces' opinion.⁴³

This article next examines the constitutional implications of enforcing what it means to "be" a service member. The military's interest in promoting "order and discipline," *esprit*, and a positive public image sometimes conflicts with service members' liberty interests and personal freedoms. This article concludes that there is great potential for the military to enact vague standards for off-duty appearance, to enforce those standards arbitrarily, and to perpetuate irrational stereotypes of what it means to maintain a "soldierly appearance" out of uniform. The military properly can do so only where important military interests justify it, and where regulations are narrowly tailored.

After examining the feasibility of employing Department of Defense (DOD)-wide policies applicable to common aspects of service members' off-duty appearance, this article recommends an approach requiring the military to employ time, place, circumstances, and purpose criteria when evaluating the majority of off-duty appearance issues. A natural

⁴² See *infra* note 356 and accompanying text (describing the Military Court of Appeals' rejection of a commander's restrictive interpretation of an appearance provision regarding hair length).

⁴³ As Professor Klare observes, "[t]here is, for example no natural meaning to 'looking like a woman' or to 'appearing like an African-American male.'" Klare, *supra* note 38, at 1408. One might view, therefore, societal or institutional acceptance of appropriate "personal appearance" standards as dependent on and constrained by societal or institutional attitudes toward appearance.

consequence of this proposal might be the military's ability to regulate more closely off-duty appearance standards when the service member is on a military installation, based on the military's heightened interest in regulating activities under its physical jurisdiction. This article also recommends that the military more fully articulate standards of acceptable appearance, in order to avoid constitutional issues of vagueness.

II. The "Nonuniformity" of Off-Duty Military Appearance Standards

Each branch of the uniformed services has enacted rather recent appearance regulations.⁴⁴ Each regulation addresses off-duty appearance in the larger context of regulating service member uniform and dress policies. The four regulations differ significantly regarding the extent to which each branch regulates off-duty appearance. By promoting different interests and emphasizing different aspects of off-duty appearance, the uniformed services' regulations governing off-duty appearance are strikingly nonuniform. Rather than examining each service's regulation in a vacuum, this part compares and contrasts the current regulations according to five off-duty criteria: general guidelines, on- and off-installation applicability, civilian clothing, body alteration and enforcement mechanisms.

A. General Guidelines

Each of the regulations speaks, in one form or another, of the need for service members to present a respectable appearance, whether on or off duty. The Marine Corps regulation dictates that "Marines will present the best possible image at all times."⁴⁵ It further prohibits "eccentricities"⁴⁶ in appearance when in civilian attire, requiring Marines to ensure their personal appearance and dress is "conservative and

⁴⁴ The Army enacted the most recent version of its regulation in February 2005. *See* AR 670-1, *supra* note 2. The Marine Corps enacted the most recent version of its order in 2003, while the Air Force enacted the most recent version of its regulation in 2002. *See* AFI 36-2903, *supra* note 2; MARINE CORPS ORDER, *supra* note 2. In January 2005, the Navy enacted the most recent version of its regulation. *See* NAVY UNIFORM REGS., *supra* note 2.

⁴⁵ MARINE CORPS ORDER, *supra* note 2, para. 1004(1).

⁴⁶ *Id.* para. 1005(2). The regulation does not define or provide examples of such "eccentricities."

commensurate with the high standards traditionally associated with the Marine Corps.”⁴⁷

The Air Force does not distinguish between on- and off-duty appearance, dictating only that its members will “present the proper military image”⁴⁸ and noting that an installation commander may prohibit “offensive . . . personal grooming.”⁴⁹ The Navy simply provides that “those whose appearance may bring discredit upon the Navy”⁵⁰ may lose the privilege of wearing civilian clothing. The Army urges Soldiers to “take pride in their appearance at all times, in or out of uniform”⁵¹ and to present “a neat and soldierly appearance.”⁵²

Not surprisingly, these guidelines provide little concrete guidance to service members or commanders regarding the manner, style or appropriateness of off-duty dress and appearance. The ramifications for those who do not adhere to these guidelines—whether intentionally or not—may include punishment for failing to understand “conservative” or “eccentric” in the same manner as those charged with enforcing the regulations.⁵³

B. On-Post Versus Off-Post Applicability

Most branches of the military draw distinctions between standards of off-duty appearance, depending on whether their members are on or off of an area under military jurisdiction. The Marine Corps regulation is the exception, however; it draws no distinction between on- or off-post applicability.⁵⁴

⁴⁷ *Id.* The regulation does not define or provide guidance regarding what types of clothing are “conservative.”

⁴⁸ AFI 36-2903, *supra* note 2, tbl. 2.5. The regulation does not define what constitutes a “proper military image.”

⁴⁹ *Id.* tbl. 1.1.

⁵⁰ NAVY UNIFORM REGS., *supra* note 2, para. 7101(1).

⁵¹ AR 670-1, *supra* note 2, para. 1-7a.

⁵² *Id.* The Army regulation does not further define what constitutes “neat and soldierly” in this context.

⁵³ *See infra* Part II.E (discussing the service regulations’ enforcement measures).

⁵⁴ MARINE CORPS ORDER, *supra* note 2, para. 1005(2) (“Marines are associated and identified with the Marine Corps in and out of uniform, and when on or off duty.”).

The Air Force regulates body piercing, when off-duty and on a military installation.⁵⁵ One might rationally infer, therefore, that the regulation does not regulate off-duty, off-installation body piercings. The Air Force also prohibits “body alterations or modifications”⁵⁶ which detract “from a professional military image.”⁵⁷ The Air Force draws no distinction between such alterations and modifications, on- or off-installation, implying that the Air Force prohibits them even if off-duty and not on a military installation.

The Navy draws only two distinctions between on- and off-installation appearance. First, where Navy personnel are on a military installation, only females may wear earrings, and neither males nor females may wear body piercings in other parts of their body.⁵⁸ Second, the Navy forbids the wear, on any military installation as well as anywhere else where such wear would discredit the Navy, of clothing, jewelry or tattoos depicting a controlled substance or advocating drug use.⁵⁹

The Army prohibits males from wearing earrings while off-duty and on an “Army installation or other places under Army control.”⁶⁰ The Army also prohibits males and females from wearing any other body

⁵⁵ AFI 36-2903, *supra* note 2, tbl. 2.5. The Air Force regulation states: “*Off Duty on a military installation*: Members are prohibited from attaching, affixing or displaying objects, articles, jewelry or ornamentation to or through the ear, nose, tongue or any exposed body part . . .” *Id.*

⁵⁶ *Id.* The regulation defines such “alteration or body modification” as those that present a “visible, physical effect that disfigures, deforms or otherwise detracts from a professional military image.” *Id.* tbl. 2.5 n.1. The regulation provides examples such as, but not limited to, “tongue splitting or forking, tooth filing and acquiring visible, disfiguring skin implants.” *Id.*

⁵⁷ *Id.* tbl. 2.5. This prohibition is logical, in that such “alterations” and “modifications” to which the Air Force refers—tongue splitting and tooth filing, for instance—constitute permanent or semi-permanent alterations to the Air Force member’s body that cannot be changed when the member returns to duty and to uniform.

⁵⁸ NAVY UNIFORM REGS., *supra* note 2, paras. 7101(4)-(5). This applies regardless whether clothing conceals the piercings. *Id.* The restrictions on earring wear and body piercings also apply to Navy personnel “participating in any organized military recreational activities.” *Id.* para. 7101(4)-(5). By its terms, the Navy regulation makes no exception for recreational activities that take place off a military installation.

⁵⁹ *Id.* para. 7101(3).

⁶⁰ AR 670-1, *supra* note 2, para. 1-14(c). The plain meaning of this provision implies that it is inapplicable to Army Soldiers on a Navy base or other armed service installation not under Army control.

piercing on an Army installation, except that females have no off-duty restriction on their wear of earrings.⁶¹

C. Off-Duty Civilian Clothing

The Marine order permits Marines to wear civilian clothing, in accordance with dress standards that are “conservative”⁶² and not “eccentric.”⁶³ Curiously, the Marine Corps’ punitive⁶⁴ order specifically bans the wear of clothing that is “not specifically designed to normally be worn as headgear (*e.g.*, bandannas, doo rags)[,]”⁶⁵ but otherwise does not mention articles of clothing.

The Air Force regulation notes only that installation commanders may prohibit “offensive civilian clothes” based on safety, legal, sanitary, and moral grounds.⁶⁶ The Navy forbids civilian clothing if a sailor’s appearance would discredit⁶⁷ the Navy, requiring that sailors’ dress and personal appearance be “appropriate for the occasion” and “conservative and in good taste.”⁶⁸ Specifically, the Navy forbids the wear of clothing or jewelry, while on a military installation or in any circumstance likely to discredit the Navy, that depict a controlled substance or advocate drug use.⁶⁹ The Army regulation simply permits the wear of civilian clothing when off duty, unless prohibited by certain commanders.⁷⁰ It provides

⁶¹ *Id.*; *see also id.* para. 1-14(d)(3) (providing that “[w]hen females are off duty, there are no restrictions on the wear of earrings”). Like the Army provision regarding male Soldiers’ wear of earrings, *see supra* note 60 and accompanying text, this provision’s plain meaning apparently makes it inapplicable to Soldiers who wear such piercings on a military installation not under Army control.

⁶² MARINE CORPS ORDER, *supra* note 2, para. 1005(2)(a).

⁶³ *Id.*

⁶⁴ *See infra* text accompanying note 91 (discussing the Marine Corps regulation’s punitive provisions for violation of any of its terms).

⁶⁵ *Id.* para. 1005(2)(d).

⁶⁶ AFI 36-2903, *supra* note 2, tbl. 1.1. The Air Force regulation provides no guidance regarding what clothing may be “offensive” in this context.

⁶⁷ NAVY UNIFORM REGS., *supra* note 2, para. 7101(1).

⁶⁸ *Id.* para. 7101(2).

⁶⁹ *Id.* para. 7101(3).

⁷⁰ AR 670-1, *supra* note 2, para. 1-13. Commanders who may restrict such wear are installation commanders within the United States, and Major Command commanders overseas. *Id.*

no context in which to judge the appropriateness of civilian clothing, other than the general guidance on overall appearance.⁷¹

D. Body Alterations

The Marine Corps prohibits any “mutilation” of body parts,⁷² the display of “objects, articles, jewelry or ornamentation” on the skin or tongue (except for females’ wear of earrings)⁷³ and tattoos or brands on the neck or head.⁷⁴ It also prohibits tattoos or brands on other parts of the body that undermine good order, discipline, and morale or that would “discredit” the Marine Corps.⁷⁵

The Air Force prohibits body piercings through any exposed body part, including the tongue, except for females’ wear of earrings.⁷⁶ This provision applies while Airmen are on duty, regardless of location, and when they are off duty and on a military installation.⁷⁷ The Air Force also prohibits “body alteration or modifications” resulting in a visible, physical effect that detracts from a professional military image.⁷⁸ The Air Force forbids certain tattoos and brands, both in and out of uniform.⁷⁹ The Air Force also forbids “excessive”⁸⁰ tattoos or brands, not otherwise prohibited, that detract from an “appropriate military image”⁸¹ while in uniform. The regulation is silent regarding Air Force members’ out-of-uniform display of tattoos or brands.

⁷¹ See *id.* para. 1-7 (urging soldiers to project a “conservative military image” and providing that “in the absence of specific procedures or guidelines, commanders must determine a [S]oldier’s compliance with standards”).

⁷² MARINE CORPS ORDER, *supra* note 2, para. 1004(1)(a). The regulation does not define “mutilation.”

⁷³ *Id.* para. 1004(1)(b).

⁷⁴ *Id.* para. 1004(1)(c).

⁷⁵ *Id.* The regulation does not provide examples of such tattoos or brands.

⁷⁶ AFI 36-2903, *supra* note 2, tbl. 2.5. The regulation provides that females’ earring piercings “should not be extreme or excessive.” *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* These include such alterations as “tongue splitting or forking, tooth filing and acquiring visible, disfiguring skin implants.” *Id.* n.1; see *supra* note 16 (describing the practice of “tongue forking”).

⁷⁹ The regulation prohibits tattoos or brands that are obscene; advocate sexual, racial, ethnic or religious discrimination; and those that are prejudicial to good order and discipline or otherwise would discredit the Air Force. AFI 36-2903, *supra* note 2, tbl. 2.5.

⁸⁰ *Id.*

⁸¹ *Id.*

The Navy regulation forbids males to wear earrings while male members are concurrently on a military installation and off duty, as well as when they participate in organized military recreational activities, regardless of location.⁸² It also forbids other body piercings, except for females' wear of earrings, on any other part of the body while Navy members are on a military installation or when they participate in an organized military recreational activity, regardless of location.⁸³ Moreover, the Navy forbids its members to have any tattoo or brand on their faces or necks, and other tattoos or brands anywhere else on their bodies that are "prejudicial to good order, discipline and morale" or that may "bring discredit" upon the Navy.⁸⁴ Finally, the Navy forbids body piercings, mutilations or brands that are "excessive or eccentric,"⁸⁵ as well as the use of gold, platinum or other veneers or caps for purposes of tooth ornamentation.⁸⁶ Regarding the prohibitions on piercings, mutilations, brands, and tooth ornamentations, the pertinent Navy regulatory provisions do not specifically differentiate between on- and off-installation scenarios, implying that these are blanket prohibitions.

The Army prohibits a wide variety of tattoos or brands.⁸⁷ It also prohibits male Soldiers from wearing earrings on an Army installation,⁸⁸ as well as the wear of all other body piercings (except for females' wear of earrings) on an Army installation.⁸⁹ The Army regulation is silent

⁸² NAVY UNIFORM REGS., *supra* note 2, para. 7101(4).

⁸³ *Id.* para. 7101(5).

⁸⁴ *Id.* para. 7101(6). Specifically, the Navy prevents tattoos, body art or brands that are "excessive, obscene, sexually explicit or advocate or symbolize sex, gender, racial, religious, ethnic or national origin discrimination." *Id.* Additionally, the Navy forbids tattoos, body art or brands "that advocate or symbolize gang affiliation, violence, supremacist or extremist groups, or drug use." *Id.*

⁸⁵ *Id.* para. 7101(7). Examples of such forbidden piercings or mutilations include tongue splitting and intentional scarring of the neck, face or scalp. *Id.*

⁸⁶ *Id.* para. 7101(8). "Teeth, whether natural, capped or veneer, will not be ornamented with designs, jewels, initials etc." *Id.*

⁸⁷ The Army prohibits those brands or tattoos that are extremist, indecent, sexist or racist, regardless of where on the body they are located. AR 670-1, *supra* note 2, para. 1-8(e)(2). The Army also prohibits those that are visible when the Soldier wears the Army's Class A green dress uniform. *Id.* para. 1-8(e)(1).

⁸⁸ *Id.* para. 1-14(c).

⁸⁹ *Id.* To this end, the Army regulation provides that "[t]he term 'skin' is not confined to external skin, but includes the tongue, lips, inside the mouth, and other surfaces of the body not readily visible." *Id.*

regarding the relatively recent phenomena of tongue splitting and tooth capping.⁹⁰

E. Enforcement Criteria

Only the Marine Corps and Air Force regulations provide punitive measures for violations. The Marine Corps is the most draconian of all the service regulations, permitting criminal or nonjudicial punishment for violations of any provision.⁹¹ The Air Force regulation permits punishment only for violations of its body alteration, tattoo and brand, and body piercing policies.⁹² Neither the Army nor Navy regulations provide for punishment for *per se* violations, although the Navy regulation requires geographic Navy commanders to implement and publish uniform guidelines that “must be punitively enforceable with the force of a general order.”⁹³ Punishment for a violation of the Army regulation must be based on a violation of a lawful order to comply with the regulation or, as with the Navy regulation, based on a violation of a local commander’s punitive regulation or policy. The Army regulation, however, does not require commanders to implement punitive regulations or policies.

III. The Military as a “Separate Society”

*If a society is slouching towards Gomorrah as some have claimed, must the military slouch along with it?*⁹⁴

The answer to this question has, when considered objectively, proven to be a resounding “No.” The U.S. military has progressed from the constitutional framers’ original concept of a small, necessary evil into a robust agency possessing its own specialized culture and infrastructure.

⁹⁰ See *supra* note 16 and accompanying text (discussing the practice of tongue splitting and tooth decorating); see *supra* notes 78, 85-86 (describing recently-enacted Air Force and Navy policies addressing these recent body alteration phenomena).

⁹¹ MARINE CORPS ORDER, *supra* note 2, para. 1000(9). The punitive provision states that “[v]iolation of the specific prohibitions and requirements . . . may result in prosecution under the Uniform Code of Military Justice . . .” *Id.*

⁹² AFI 36-2903, *supra* note 2, tbl. 2.5; see also *supra* text accompanying notes 76-81 (describing the Air Force body alteration, tattoo and brand, and piercing policies).

⁹³ NAVY UNIFORM REGS., *supra* note 2, para. 1201(5).

⁹⁴ Hillen, *supra* note 5, at 163.

Incorporating over two hundred years of customs and traditions, the U.S. military has, as a professional institution, drifted apart, culturally, from the rest of American society, in some respects.

The military's development of customs and traditions has produced great repercussions for military law; the "specialized society" of the military discourages and even criminalizes many actions that a civilian society, which some view as "slouching toward Gomorrah," believes permissible or otherwise takes for granted. The American judiciary has, to a great extent, been a willing accomplice in the continued bifurcation of military and civilian societies and customs. This part examines the development of a military "society apart" and explores why the military enjoys such great judicial deference in accomplishing its internal goals, including the regulation of its members' dress and appearance.

A. Military and Civilian Cultures: Drifting Further Apart?

The constitutional framers preferred a civilian militia to a standing army because of the restrictions on civil liberties that military culture threatens.⁹⁵ Nevertheless, while the framers feared and despised the thought of a standing military,⁹⁶ they created it out of necessity, intending that it be no larger than absolutely necessary.⁹⁷ Because of this fear the framers ensured effective civilian control over the military by

⁹⁵ See generally Stephanie A. Levin, *The Deference that is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1023-61 (1990) (arguing that the constitutional framers never anticipated the monolithic military establishment that today's armed services represent, and that they preferred to rely on a civilian militia that could maintain both close connections to civilian life and tight protections of individual liberties).

⁹⁶ See generally Barney F. Bilello, Note, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 468-71 (1989) (detailing the founders' distrust of a standing army); Katherine Hunt Federle, *The Second Amendment Rights of Children*, 89 IOWA L. REV. 609, 634 (2004) (noting that "[t]he Second Amendment . . . sought to preserve the individual right to self-defense and freedom from tyranny while expressing a preference for a militia over a standing army"); Lieutenant Colonel Michael H. Gilbert, *The Military and the Federal Judiciary: An Unexplored Part of the Civil-Military Relations Triangle*, 8 USAFA J. LEG. STUD. 197, 202-03 (1998) (describing the framers' reluctant creation of a standing army based on their distrust of British forces that previously dominated the colonies).

⁹⁷ See THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961) (noting that James Madison visualized the standing army as being comprised of no more than one percent of the population, and of no more than one-fourth of the population capable of bearing arms).

providing for the executive and legislative branches to oversee and control the military.⁹⁸

For the majority of time from this country's inception to the present, the American military has been characterized as a "small, peacetime, nonscripted" one,⁹⁹ containing volunteers who view themselves as participants in a unique profession, rather than as indentured servants.¹⁰⁰ Not surprisingly, the development of a professional military has fostered a "cultural and corporate identity"¹⁰¹ among its members, who view themselves as both the protectors and the "last bastion" of American values.¹⁰² The values that have taken root in this unique "corporate culture," of course, have tended to reflect the values of those who voluntarily entered the military and made it their profession.¹⁰³

What has developed is a "highly centralized and bureaucratic military,"¹⁰⁴ which even the Supreme Court labeled as "a specialized society separate from civilian society."¹⁰⁵ The military, as a profession,

⁹⁸ For example, the framers vested Congress with the power to raise and support armies, maintain a navy, and to regulate the Army and Navy. U.S. CONST. art. I, § 8. The framers gave the President the power of Commander in Chief of the military. *Id.* § 2. For an excellent description of the relationship the framers envisioned between the military, Congress, and the executive branch, see generally Kaylani Robbins, *Framers' Intent and Military Power: Has Supreme Court Deference to the Military Gone Too Far?*, 78 OR. L. REV. 767, 785-89 (1999).

⁹⁹ Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 400 (1976).

¹⁰⁰ See Gilbert, *supra* note 96, at 202-03 (describing the transformation of military service from that as involuntary conscription to that of a profession).

¹⁰¹ Turley, *supra* note 10, at 35.

¹⁰² Gilbert, *supra* note 96, at 205.

¹⁰³ See, e.g., Pat Kane, *Ambition Hitting the Glass Ceiling*, GLASGOW HERALD, Aug. 7, 1977, at 17 (describing military members as fighting to maintain the "disciplined, virtuous" military values that they and other military professionals worked so long to develop).

¹⁰⁴ Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 352 (1998). Conversely, Professor Jonathan Turley characterizes the military as more than a mere bureaucracy. According to Professor Turley, the military's system of accountability and hierarchy of "elite quasi-aristocratic" commanders, combined with the inability of individuals to influence local authority, lends itself more to an oligarchic, rather than bureaucratic, model. Turley, *supra* note 10, at 71.

¹⁰⁵ *Parker v. Levy*, 417 U.S. 733, 743 (1974). Ironically, Professor Jonathan Turley notes that while the constitutional framers repeatedly warned against the development of a "military class" and "separate society" within the larger republic, the Supreme Court consistently attributes its deference to all things "military" as in accordance with the intent of those same framers. See Turley, *supra* note 10, at 12.

views itself as requiring a hierarchy of values and a strict internal social structure in order to fulfill its primary mission of warfighting.¹⁰⁶ Not surprisingly, then, the military institutional bias cants toward maximizing the armed services' warfighting effectiveness, at the expense of achieving social goals or accommodating individual desires.¹⁰⁷ The result has been an American military particularly resistant, in many contexts, to social change where it believes such change poses a threat to its mission.¹⁰⁸

Nevertheless, the notion of the military as a "society apart" arguably has lost much of its persuasiveness, in a purely cultural sense, even as courts continue to affix that label in their written opinions. For instance, in the post-Vietnam War era, the military returned to reliance on an all-volunteer force, and the armed services increasingly compete to recruit and retain a highly-talented and educated citizenry during a period of relative economic prosperity.¹⁰⁹ The armed services increasingly feel compelled to make themselves more attractive to civilians in order to boost recruitment. This was a prime impetus for the new push to tolerate individuality in the ranks, and to "civilianize" the military.¹¹⁰

¹⁰⁶ Hillen, *supra* note 5, at 152-53.

¹⁰⁷ James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 241-42 (1984).

¹⁰⁸ For example, the Army segregated African-American units until President Truman ordered an end to this policy. See STEPHEN A. AMBROSE, *Blacks in the Army in Two World Wars*, in *THE MILITARY AND AMERICAN SOCIETY* 177-91 (Stephen Ambrose ed., 1972). Moreover, the military historically opposed the inclusion of women in combat, and only recently have some combat positions opened to females in the military. See generally Steven A. Delchin, *United States v. Virginia and Our Evolving 'Constitution': Playing Peek-a-boo with the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121, 1135-37 (1997) (describing efforts to open combat positions to female military members); Michael J. Frevola, *Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services*, 28 CONN. L. REV. 621, 625 (1996) (describing congressional modification of the combat exclusion rules).

¹⁰⁹ See, e.g., Labash, *supra* note 11, at 20 (describing the military services' increasingly intense competition to attract recruits). Military authorities also cite the U.S. military's continued operations in Iraq and Afghanistan as major reasons for the military's current recruiting shortfalls. See, e.g., Michael Kilian, *Army Sees Continued Slump in Recruiting*, CHI. TRIB., Mar. 24, 2005, at C10 (describing Secretary of the Army Francis Harvey's acknowledgment that "a significant factor in the recruitment failures has been the reluctance of potential recruits' parents to let their children be put in harm's way in the U.S. occupation of Iraq").

¹¹⁰ See, e.g., Labash, *supra* note 11, at 20 (describing the armed forces' increasing efforts to make themselves more attractive to the "Generation X" recruiting pool).

Moreover, in the decade following the Gulf War the military experienced dual pressures to reform itself and to assimilate itself more fully into American culture—in essence, to make itself “look more like America.” First came the predictions of fewer wars to be fought and rapid advances in technology, which implicated the need for a smaller, but more educated, military force.¹¹¹ Second, a series of high profile military scandals prompted public pressures to transform military culture into one that, at least facially, reflects more fully the social mores of American society.¹¹² The result has been a military both more cognizant of the need to reform itself from within,¹¹³ and yet ever more protective of its perceived unique place in society.¹¹⁴

This tension between changing societal values and the unique and rather static culture of the military is not surprising.¹¹⁵ Ample evidence, however, suggests that this tension has failed to impede the military from

¹¹¹ See generally Rowan Scarborough, *Troops-Cut Plan Faces Wide Opposition; Civilian Service Secretaries Join Officers to Argue Against Reduction in Forces*, WASH. TIMES, Aug. 13, 2001, at A1 (describing the proposed overhaul of the military in terms of reducing and restructuring Army divisions, Air Force wings, and Navy carrier battle groups).

¹¹² See, e.g., Kathryn R. Burke, *The Privacy Penumbra and Adultery: Does Military Necessity Justify an Adultery Regulation and What Will it Take for the Court to Declare it Unconstitutional?*, 19 HAMLINE J. PUB. L. & POL'Y 301, 302 (1997) (describing the public's dubious reaction to a thirteen-year-old adultery allegation that forced the retirement of a promising Army general); Hillen, *supra* note 5, at 154 (describing the public's dubious reaction to the Air Force's "Kelly Flinn" affair, involving adultery charges); Valorie K. Vojdik, *The Invisibility of Gender in War*, 9 DUKE J. GENDER L. & POL'Y 261, 268 (2002) (describing the Navy Tailhook incidents of the 1990s that exposed male officer misconduct against their female counterparts).

¹¹³ "Reform," in this context, refers not only to organizational reform in terms of troop restructuring, but also to social reform, in terms of more fully assimilating societal values and norms into aspects of military culture.

¹¹⁴ For example, the military vehemently opposed the integration of females into combat positions on the ground that doing so would impede its mission, until congress passed legislation that permitted it, in some limited circumstances. See generally Pamela R. Jones, *Women in the Crossfire: Should the Court Allow It?*, 78 CORNELL L. REV. 252, 269-70 (1993) (describing congressional legislation in the wake of military opposition to females in combat). Moreover, the military opposed integration of open homosexuals into the military on the ground that it would impede military readiness and, until 1993, continued to ask potential recruits if they were homosexuals. See generally *Philips v. Perry*, 106 F.3d 1420, 1421-23 (9th Cir. 1997) (describing the military's historical opposition to open homosexuals in the ranks and the development of the "don't ask/don't tell" policy).

¹¹⁵ See Hillen, *supra* note 5, at 152 (noting that, historically, the values that have evolved and changed over time in America's liberal democracy have caused the "culture gap" between the military and society to be fluid).

changing from within. The military leadership, when it chooses to do so, often can change the policies and procedures governing the internal workings of the institution, despite the opinions and wishes of lawmakers, the general public, or even its own service members.¹¹⁶ Should military leaders choose to allow more civilian values to infiltrate military culture, such a policy choice is constrained, to a great extent, only by the intensity with which the leaders pursue that policy objective.¹¹⁷

Thus, the notion of the military as a “society apart” relies partially on the premise that military necessity requires the armed services to insulate their members from the rest of society. History reveals, however, that the military adapts very well in the face of the need to be more attuned to societal norms.¹¹⁸ The “society apart” rationale also posits that the military is unwilling, to a great extent, to change its traditions and customs. Relatively recent events reveal, however, that the armed forces are quite capable of doing this, when they choose to do so.¹¹⁹ It follows, therefore, that military leaders thus can change policies on off-duty personal appearance, with little fear of opposition outside of the military ranks or the military’s civilian leadership. The primary roadblock to enacting such policies emanates from within the military.

¹¹⁶ For instance, when the Army decided to outfit its Soldiers with black berets, the traditional headgear of the elite Army Ranger Regiment, the Army Chief of Staff ignored the objections of the Chairman of the Joint Chiefs of Staff, who outranked him but who had no control over such a policy choice. See Paul Bedard, *Outlook; Washington Whispers: Beret Mutiny*, U.S. NEWS & WORLD REP., July 23, 2001, at 14; see generally Labash, *supra* note 11, at 20 (describing the controversy surrounding the Army’s change in beret policies). Additionally, the DOD’s current initiative to prevent a mass exodus of service members whose enlistment terms otherwise would allow them to revert to civilian status—“stop loss”—has fostered resentment within the military ranks. See, e.g., Dick Foster, *Troops Feeling Strain: GI Discontent Grows as Uncle Sam Struggles to Find Enough Forces*, ROCKY MOUNTAIN NEWS (Colo.), Nov. 22, 2004, at 5A.

¹¹⁷ For instance, the Army in the 1990s focused, to a large extent, on sensitization to cultural differences rather than on warfighting. See generally Labash, *supra* note 11, at 20 (describing the Army’s Consideration of Others training as a top priority of the then-Secretary of the Army). The DOD’s civilian leadership, which prioritized such sensitivity training to the alleged detriment of military preparedness, made and enforced this policy choice. *Id.*

¹¹⁸ See, e.g., Richard Whittle, *Baldness In, Dreadlocks Out: Army Spit-Shines Dress Code*, DALLAS MORNING NEWS, Jan. 8, 2002, at 1A (describing the Army’s revision of its personal appearance regulation that was “prompted by changes in [cultural] styles”).

¹¹⁹ See, e.g., Michael Kilian, *Army Elite Blows Tops Over Berets*, CHI. TRIB., Oct. 30, 2000, at N1 (describing the Army’s decision to outfit its members in black berets, despite the protests of high-ranking members in the Army).

However one views the military—whether as a “society apart” or as a microcosm reflective of larger America—it maintains some customs and traditions that are unique from its societal counterparts. Many of these traditions and customs are purely ceremonious; reveal themselves only in the daily, mundane operations of the armed forces; and are susceptible to change virtually at the whim of military leaders.¹²⁰ Other customs are more rigid, and military members perceive them as inviolable. These customs import more serious consequences for those who violate them. The emergence of this latter type of custom has led to what the Supreme Court has deemed “customary military law.”

B. The Development of Customary Military Law

In 1974, the Supreme Court in *Parker v. Levy*¹²¹ invoked early 19th Century judicial precedent to resurrect the concept of “customary military law.”¹²² In upholding a service member’s conviction for making disloyal statements, the Supreme Court addressed the constitutionality, under the doctrines of vagueness and overbreadth, of Articles 133 and 134 of the UCMJ.¹²³ Specifically, the Court addressed whether the articles fairly notify service members whether conduct in which they might engage would be punishable,¹²⁴ and whether the articles are so inartfully drafted as to impinge unconstitutionally on free speech.¹²⁵

In determining that the articles are not unconstitutionally vague, the Court quoted from an 1827 case noting that the military, in maintaining discipline, has developed “what ‘may not unfitly be called the customary

¹²⁰ See, e.g., Mike Conklin, *The ‘Army of One’ Gets One Singular Hat*, CHI. TRIB., June 14, 2001, at N1 (describing the choice which the Army leadership made in 2001 to outfit all its members in a black beret, the traditional headgear of the Army’s elite Ranger Regiment).

¹²¹ 417 U.S. 733 (1974).

¹²² *Parker* involved the prosecution of an Army physician for, among other offenses, suggesting to enlisted Soldiers that they should refuse to fight in Vietnam because of what he described as the war’s illegitimacy. *Id.* at 737-38.

¹²³ *Id.* at 752-62. Specifically, the Army prosecuted Parker for violating Article 133, by engaging in “conduct unbecoming an officer and a gentleman” and for violating Article 134, by engaging in conduct “to the prejudice of good order and discipline in the armed forces.” *Id.* at 738. The validity of Parker’s conviction hinged on whether his speech to the enlisted Soldiers, to the effect they should refuse to fight in Vietnam, was “unbecoming” of an officer and “prejudicial” to discipline.

¹²⁴ *Id.* at 755.

¹²⁵ *Id.* at 758.

military law' or 'general usage of the military service.'"¹²⁶ The Court stressed that it had long acknowledged that the military has "by necessity, developed laws and traditions of its own during its long history."¹²⁷ Military officers, the Court deemed, are "more competent judges than the courts of common law" to determine the application of such military custom.¹²⁸

Parker v. Levy is significant for two reasons. First, the Court declared that military culture does, in fact, hold special *legal* meaning and legitimacy because of its unique differences from the rest of American society. Second, the Court declared that military professionals, by virtue of their inculcation into this culture, are more fitting judges of breaches to military customs than are members of the civilian judiciary. Other courts have followed the Supreme Court's lead in acknowledging the unique importance of military customs and traditions in the context of challenges to military policies. For instance, a federal circuit court in *United States v. Bitterman*¹²⁹ found military history and custom compelling when it upheld an Air Force regulation prohibiting the wear of religious headgear by Air Force members.

Courts' recognition of the importance of "customary military law" has, however, perpetuated the notion of the military as a "society apart" in the judicial or legal sense, rather than in a merely cultural sense. It is one thing to recognize that unique customs and traditions within the military may help lend meaning to military policies, regulations, and criminal statutes. It is a far more dangerous proposition for judges, acknowledging the importance of those customs, to view themselves as unworthy or legally incapable of scrutinizing the legitimacy of those policies. Unfortunately, courts' attitudes following *Parker* have both perpetuated the myth of the military "society apart," and perpetuated the notion of courts' unfitness to delve into matters that particularly implicate military policy.

¹²⁶ *Id.* at 744 (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 35 (1827)).

¹²⁷ *Id.* at 742.

¹²⁸ *Id.* at 748 (quoting *Smith v. Whitney*, 165 U.S. 553, 562 (1897)).

¹²⁹ 553 F. Supp. 719, 721-22 (D.D.C. 1982).

C. The Courts' Complicity in Maintaining the Cultural Gap

Following *Parker v. Levy*, courts have continuously narrowed the scope of judicial review of matters of "particular military interest." Depending on one's outlook, the courts' attitude may reflect merely the "highest degree of deference,"¹³⁰ or that attitude may equate to utter "judicial abdication"¹³¹ of the courts' role. Two primary themes dominate the courts' rationale of extreme deference in these decisions.

The first theme is that of the judiciary as unfit to question military decision making where "important military interests" are implicated. This may fairly, if not disparagingly, be viewed as the "incompetence rationale" for judicial deference. Under this rationale, courts assert their lack of sophistication and knowledge in all matters military, when asked to assess the merits of military policies.¹³² This "incompetence rationale" posits that courts are incapable of truly understanding the military interests that a policy purports to advance. Courts simply presume that the military would not enact such a policy if the military had no good reason for doing so. Under this rationale, courts often express concern that they have no judicially manageable standards for reviewing military policy decisions.¹³³ Distilled to its essence, the theory posits that judging the wisdom of military policies is best left to the military, the very agency that enacted the policies.¹³⁴

The second theme rests on separation of powers grounds, with courts declaring that Congress and the executive branch have entrusted matters of particular military import to the military, not the judiciary. This may be viewed as the "prohibition rationale" for judicial deference. Under

¹³⁰ The Honorable Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 557 (1994).

¹³¹ See, e.g., Dienes, *supra* note 14, at 779.

¹³² See, e.g., Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (refusing to overturn military training and composition determinations where the issue concerned the "complex, subtle, and professional decisions" of the policy makers, and finding that such decisions were "essentially professional judgments" better left to the military and monitored by the legislative and executive branches).

¹³³ See, e.g., Doe v. Alexander, 510 F. Supp. 900, 904 (D. Minn. 1981) ("[C]ourts are peculiarly ill-equipped to develop judicial standards for passing on the validity of judgments concerning medical fitness for the military.").

¹³⁴ See, e.g., Khalsa v. Weinberger, 779 F.2d 1393, 1395 n.1 (9th Cir. 1985) (noting that a review of "internal" military regulations, such as those governing personal appearance, requires "appropriate deference to a unique discipline, set apart from civilian society to perform the special task of national defense").

this rationale, courts view the legislative and executive branches as responsible for shaping military policy¹³⁵ and changing it,¹³⁶ in the absence of the military's willingness to do so.¹³⁷ Courts employing this "prohibition rationale" defer to military decision makers to avoid upsetting what they perceive to be a sensitive system of checks and balances¹³⁸ that the constitutional framers established. Unfortunately, the courts' ideal of civilian control over the military has been replaced with a doctrine of virtual non-interference with executive and congressional control over the institution.¹³⁹ Nothing in the Constitution, however, reveals the framers' supposed intent that legislative and executive power over the military should justify courts' refusal to review decisions affecting the military.¹⁴⁰

D. *United States v. Lugo*:¹⁴¹ A Case Study

On the evening of 2 April 1999, Corporal Emmanuel Lugo, an off-duty U.S. Marine, attempted to enter an enlisted club on a Marine base in North Carolina, but a military superior stopped him and told him to

¹³⁵ See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."); see also *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972) ("[T]he primary function of a military organization is to execute orders, not to debate the wisdom of decisions that the Constitution entrusts to the legislative branches of the Government and to the Commander in Chief.").

¹³⁶ See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) (noting that, where the procedures for processing Army grievances are concerned, "judges are not given the task of running the Army" and the resolution of controversial policy matters rests with Congress, the executive branch, and their military subordinates).

¹³⁷ History has proven that Congress will, when faced with judicial hesitancy to invade on the prerogatives of the military, proactively shape military policy through legislation. For instance, following a Supreme Court case in which the Court deferred to the military in refusing to invalidate an Air Force regulation prohibiting the wear of religious headgear while on duty, Congress legislatively mandated accommodation, provided such apparel is "neat and conservative" and does not interfere with duty performance. 10 U.S.C. § 774 (2000). See *infra* notes 281-82 and accompanying text (discussing the legislative overturning of the Supreme Court case).

¹³⁸ See, e.g., *Orloff*, 345 U.S. at 94 ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters . . .").

¹³⁹ See Gilbert, *supra* note 96, at 222.

¹⁴⁰ Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 411 (1984).

¹⁴¹ 54 M.J. 558 (N-M. Ct. Crim. App. 2000).

remove the gold hoop earrings that he wore in each ear.¹⁴² The military thereafter convicted Corporal Lugo of violating a punitive¹⁴³ Marine Corps regulation prohibiting male Marines from wearing earrings, even while off duty, and regardless of whether the Marines are on or off a military installation.¹⁴⁴

Lugo appealed his conviction on the ground that the regulation unreasonably interfered with the private rights and personal affairs of Marines.¹⁴⁵ In rejecting Lugo's argument, the appellate court noted the "great deference" that courts must give to the professional judgment of military authorities on matters of "particular military interest."¹⁴⁶ The court further noted "nothing improper" in the purported purpose of the Marine regulation which, the court assumed, was to promote both a public "spit-and-polish" image of Marines and good order and discipline.¹⁴⁷ The court noted that military officials (presumably other than military judges), using their "considered professional judgment," are the proper authorities for determining the desirability of the challenged regulation.¹⁴⁸ Finally, the court observed that Congress delegated to the armed forces the regulation of matters that may discredit the military.¹⁴⁹

¹⁴² *Id.* at 559.

¹⁴³ The military may criminally charge violations of regulations which state specifically that they are punitive in nature. Article 92 of the UCMJ cautions against charging as criminal the violation of "[r]egulations which only supply general guidance or advice for conducting military functions . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 16c(1)(e) (2002) [hereinafter MCM]. For example, Army regulation 608-99, governing financial support to family members, states that Soldiers may be punished under Article 92 for violations of some of the regulation's provisions. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY para. 2-5 (29 Oct. 2003). More often than not, however, such regulations provide merely the "general guidance" or "advice" that Article 92 mentions; violations of those regulations are not criminally punishable, *per se*.

¹⁴⁴ *Lugo*, 54 M.J. at 559. The regulation to which the court referred was Marine Corps Order P1020.34F, dated 27 January 1995. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 560 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

¹⁴⁷ *Id.* "Public recognition and 'esprit de corps' are sufficiently rational justifications to withstand a constitutional challenge of a governmental regulation on personal appearance . . ." *Id.* (citing *Kelley v. Johnson*, 425 U.S. 238, 248 (1976)).

¹⁴⁸ *Id.* at 560 (quoting *Goldman*, 475 U.S. at 509).

¹⁴⁹ *Id.* ("Congressional recognition of the importance of public confidence and trust in the armed forces . . . is apparent in the General Article of the UCMJ, which proscribes, among other things 'all conduct of a nature to bring discredit upon the armed forces.'" (quoting MCM, *supra* note 143, pt. IV, para. 60a)).

The *Lugo* court, in line with principles of judicial deference that *Parker v. Levy* established, thus deferred both on incompetence grounds and separation of powers grounds in refusing to scrutinize closely the validity of the Marine Corps regulation. *Lugo*, representing a recent case addressing off-duty military appearance, thus provides excellent insight into courts' historical deference to military decision makers.

IV. "Being" a Soldier in the Separate Society: Good Order and Discipline, *Esprit de Corps*, and Public Image

*The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.*¹⁵⁰

Having detailed the unique aspects of military culture that arguably make the military a "separate society," this article now examines the method by which the military regulates aspects of its members' lives. Articles 90 and 92 of the UCMJ impose an important restriction on the validity of such regulation, however: regulations must promote a valid military purpose. In examining the validity of regulations governing service members' appearance, three primary military purposes—promoting "order and discipline," *esprit de corps*, and public image—permeate court opinions.

A. Military Purpose and Substantive Due Process

The validity of military regulations depends on the purpose behind their issuance. The UCMJ provides that a service member may only be punished for violating an order or regulation if the order or regulation relates to a military duty.¹⁵¹ This requires that the order or regulation be "reasonably necessary" to accomplish military missions and to promote morale, discipline, and usefulness.¹⁵² Such orders or regulations also must be "directly connected" to maintaining good order in the service.¹⁵³

¹⁵⁰ *Goldman*, 475 U.S. at 509.

¹⁵¹ MCM, *supra* note 143, pt. IV, para. 14c(2)(a)(iii). Specifically, Article 90 of the UCMJ relates to the lawfulness of orders, *id.* para. 14, while Article 92 of the UCMJ relates to the lawfulness of regulations that the military promulgates. *Id.* para. 16.

¹⁵² *Id.*

¹⁵³ *Id.*

They may not, without such valid military purpose, interfere with service members' private rights and personal affairs.¹⁵⁴

The U.S. Constitution contains certain provisions to ensure that laws are not arbitrary and unreasonable and, consequently, violative of individual rights. The Fifth Amendment's Due Process Clause,¹⁵⁵ for example, guards against federal government action that is arbitrary or unreasonable. Some types of government regulation, if they impinge on individual liberties, may be so unreasonable or arbitrary as to constitute an unconstitutional denial of liberty.¹⁵⁶ Such arbitrariness violates substantive due process,¹⁵⁷ the constitutional guarantee against government conduct either that interferes with fundamental rights and fundamental liberty interests¹⁵⁸ or that "shocks the conscience" by arbitrarily interfering with non-fundamental liberty interests.¹⁵⁹ Courts

¹⁵⁴ *Id.*

¹⁵⁵ "No person shall . . . be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V. While the Fifth Amendment, by its terms, applies to federal government action, the Fourteenth Amendment's Due Process Clause, similarly, applies the same restriction to state actions that may impinge on individual rights: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV, § 1.

¹⁵⁶ For instance, where fundamental rights such as marriage or procreation are concerned, the government must narrowly tailor its action to achieve a compelling government interest. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 718-21 (2000). Where other rights that are not considered "fundamental" are concerned, the government's action must rationally or reasonably relate to a legitimate government interest. *See, e.g., id.*

¹⁵⁷ *See generally* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003) (describing the history behind, and jurisprudence regarding, substantive due process); Burke, *supra* note 112, at 312 n.52 (distinguishing substantive due process from procedural due process, which concerns itself with the procedures by which the government executes policies) (citing RALPH C. CHANDLER ET AL., CONSTITUTIONAL LAW DESKBOOK INDIVIDUAL RIGHTS 494 (1987)); *see also* *Brown v. Glines*, 444 U.S. 348, 357 n.15 (1980) ("Commanders sometimes may apply . . . regulations 'irrationally, invidiously, or arbitrarily,' thus giving rise to legitimate claims under the Fifth Amendment." (quoting *Greer v. Spock*, 424 U.S. 828, 840 (1976))).

¹⁵⁸ *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978). The Supreme Court has identified the following nonexclusive categories of "fundamental" rights: to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); to enjoy marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and to vote in state elections, *Kusper v. Pontikes*, 414 U.S. 51 (1973). In determining what qualifies as a fundamental liberty interest, courts will examine whether the right is "deeply rooted" in American history and traditions. *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977).

¹⁵⁹ *Unites States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). The Supreme Court further has equated such "conscience

will scrutinize strictly the government regulation of those rights or liberty interests that the Supreme Court has deemed fundamental.¹⁶⁰ Conversely, courts will invalidate the regulation of non-fundamental rights or non-fundamental liberty interests only if the regulation fails to relate rationally to a legitimate government purpose.¹⁶¹ Article 90 of the UCMJ, by requiring military orders or regulations to further a valid military purpose, echoes this substantive due process protection.

Besides requiring that orders or regulations be reasonable and not arbitrary, due process also dictates that service members receive “fair notice” that an act is forbidden and subject to criminal punishment.¹⁶² Due process also requires, in accordance with *Parker v. Levy*,¹⁶³ that service members be provided fair notice of the standard that military authorities will apply in scrutinizing such conduct.¹⁶⁴

In the context of personal appearance cases, courts consistently have refused to declare a fundamental right in the choice of personal appearance.¹⁶⁵ Rather, courts have declared that such a choice implicates “lesser” liberty interests, the government regulation of which is subject to a review for mere rationality.¹⁶⁶ The military’s assertion that an internal regulation or order reflects a rational DOD goal, however, does not assure compliance with due process. Federal agencies often profess “rational” objectives that justify regulations, base their findings on their “internal expertise,” fail to support their decisions with facts, and request

shocking” governmental actions to those which are “arbitrary . . . in a constitutional sense.” *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992).

¹⁶⁰ *Washington*, 521 U.S. at 719; *see generally* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 417 (1997) (noting that the Supreme Court’s “strict scrutiny” analysis requires that government action be necessary to achieve a compelling purpose, using the least restrictive method by which to do so). *See supra* note 158 (describing a non-exhaustive list of rights that the Supreme Court has deemed “fundamental”).

¹⁶¹ *See, e.g., Kadrmas v. Dickinson Public Sch.*, 487 U.S. 450, 458 (1988). The Supreme Court has established a semantic variation of this “rational relation” test, by also proscribing governmental action that is “arbitrary in a constitutional sense.” *Collins*, 503 U.S. at 128.

¹⁶² *See, e.g., United States v. Bivins*, 49 M.J. 328, 330 (1998).

¹⁶³ 417 U.S. 733 (1974).

¹⁶⁴ *See supra* text accompanying notes 121-26 (describing the *Parker* standard of “customary military law” and “general usage of the military service”).

¹⁶⁵ *See, e.g., Kelley v. Johnson*, 425 U.S. 238, 244 (1976); *Rathert v. Village of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990).

¹⁶⁶ *See, e.g., Kelley*, 425 U.S. at 244; *Neinast v. Bd. of Trs.*, 346 F.3d 585, 595 (6th Cir. 2003); *Rathert*, 903 F.2d at 514.

judicial deference to their particularized expertise.¹⁶⁷ Jurisprudence in the wake of *Parker v. Levy* virtually has obliterated the need for the military truly to articulate a rational basis for the internal regulations it promulgates. Indeed, *Parker*'s lasting legacy seemingly is that courts routinely dispense with the need for the military to demonstrate a nexus between their regulations and the purposes they seek to promote. Courts defer to the military's expertise and the supposed "necessity" for the regulation.¹⁶⁸ As Supreme Court Justice William Brennan warned six years after *Parker*, however, "the concept of military necessity is seductively broad."¹⁶⁹

Military courts examining the validity of orders or regulations occasionally have invalidated those that, in the courts' opinion, have no legitimate military purpose. For instance, military courts have invalidated orders directing service members to report personal financial transactions while in a "leave" status,¹⁷⁰ regulations prohibiting all loans between service members without prior command consent,¹⁷¹ and orders broadly proscribing the consumption of alcohol without limitations on the time and place for consumption.¹⁷² These cases affirm the notion that orders and regulations must further an important military interest.

Nevertheless, the authority to regulate service members' personal affairs undoubtedly extends to the regulation of activities affecting service members' general welfare and safety,¹⁷³ as well as to the

¹⁶⁷ See, e.g., *FCC v. Nat'l Citizen's Comm. for Broad.*, 436 U.S. 775 (1978) (holding that FCC determinations are committed to the judgment and expertise of the agency and refusing to require a complete factual basis for those determinations).

¹⁶⁸ See, e.g., *United States v. Young*, 1 M.J. 433, 435 (C.M.A. 1976) (relieving the military of the need to articulate a basis for an appearance regulation, and placing on service members the burden to show the lack of a basis for the regulation) (citing *United Public Workers v. Mitchell*, 330 U.S. 75, 100-101 (1947), *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); see also *Kelley*, 425 U.S. at 247 (declaring the appropriate test for the constitutionality of a civilian police appearance regulation to be "whether respondent can demonstrate that there is no rational connection between the regulation . . . and the promotion of safety of persons and property").

¹⁶⁹ *Brown v. Glines*, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting).

¹⁷⁰ *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958).

¹⁷¹ *United States v. Smith*, 1 M.J. 156 (C.M.A. 1975).

¹⁷² *United States v. Wilson*, 30 C.M.R. 165 (C.M.A. 1961).

¹⁷³ See, e.g., *United States v. James*, 52 M.J. 709 (Army Ct. Crim. App. 2000) (upholding the validity of an order prohibiting a service member from writing checks, based on that service member's history of bad check writing); *United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980) (upholding the validity of a regulation requiring service members to register for safety reasons all personal firearms); *United States v. Dykes*, 6

regulation of on-duty appearance.¹⁷⁴ *United States v. Lugo* extended this reasoning to find important military interests in regulating a service member's off-duty appearance. The question remains, however, whether a rational nexus exists between enforcing *off-duty* appearance standards and furthering a valid military purpose.

B. Examining the Military Purposes Behind Military Appearance Regulations

The legitimacy of military decisions rests, to a great extent, on the military's inherent right to regulate good order and discipline within its ranks. The military, as a warfighting profession, seeks to cultivate and preserve discipline and unity in furtherance of its goals. The military also has developed a certain image of itself and its service members, which it seeks to preserve and project to the general public. Courts, recognizing these goals, often refer to them when deferring to the "military expertise" behind the issuance of regulations and orders.

1. Enforcing "Good Order and Discipline"

In the context of examining and justifying military personal appearance standards, the notion of "good order and discipline" escapes precise legal definition. Courts and legal commentators often invoke the term, but rarely define it. Article 134 of the UCMJ proscribes as criminal "all disorders and neglects to the prejudice of good order and discipline in the armed forces"¹⁷⁵ Recognizing that virtually any "irregular or improper act" by a service member conceivably could constitute an act that is prejudicial to good order and discipline, however, Article 134 provides that it does not contemplate within its purview the "distant effects" of an act.¹⁷⁶ Rather, the Article contemplates as

M.J. 744 (N.M.C.M.R. 1978) (upholding the validity of a regulation prohibiting the possession of drug paraphernalia).

¹⁷⁴ See, e.g., *United States v. Pinkston*, 49 C.M.R. 359 (N.M.C.M.R. 1974) (upholding the validity of an order to a male Marine to remove an earring while in uniform); *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978) (upholding the validity of an Air Force regulation prohibiting the wear of hairpieces except in limited circumstances).

¹⁷⁵ MCM, *supra* note 143, pt. IV, para. 60a.

¹⁷⁶ *Id.* para. 60c(2)(a).

criminal only those acts that have a “reasonably direct and palpable” prejudicial effect.¹⁷⁷

Courts historically have shaped the parameters of service members’ actions that have a “direct and palpable” effect on the erosion of good order and discipline. Military courts, for instance, have noted that Article 134 does not proscribe conduct prejudicial to good order and discipline in a purely indirect and remote sense.¹⁷⁸ The U.S. Supreme Court has determined that breaches of “good order and discipline” under Article 134 are “not measurable by [a judicial] sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties.”¹⁷⁹

Despite courts’ reliance on the mantra of preserving “discipline” in personal appearance cases, however, there is a scarcity of cases in which a service member has been prosecuted—on the sole basis of a breach of Article 134—because of his personal, off-duty appearance. One rare case, *United States v. Guerrero*, involved the prosecution of a Navy Sailor-crossdresser.¹⁸⁰ The court upheld Guerrero’s conviction for donning makeup and women’s clothing in the presence of a fellow Sailor, on the basis that Guerrero knew the “appropriate standards of civilian attire to which sailors must adhere.”¹⁸¹ More importantly, however, the court found that the time, place, circumstances, and purpose for the service member’s cross-dressing were critical factors in determining prejudice to good order and discipline.¹⁸² Curiously, the court conceded that “cross-dressing can certainly be non-prejudicial and even enhance morale and discipline.”¹⁸³ Outside of the cross-dressing

¹⁷⁷ *Id.*

¹⁷⁸ *See* *United States v. Caballero*, 23 C.M.A. 304, 307 (1975) (noting that the possession of an otherwise legal smoking instrument does not violate Article 134 simply because a service member could, conceivably, use it for an illegal purpose).

¹⁷⁹ *Parker v. Levy*, 417 U.S. 733, 748-49 (1974) (quoting *Swaim v. United States*, 28 Ct. Cl. 173, 228 (1893)).

¹⁸⁰ 33 M.J. 295 (C.M.A. 1991).

¹⁸¹ *Id.* at 298 (quoting *United States v. Guerrero*, 31 M.J. 692, 696 (N.M.C.M.R. 1990)).

¹⁸² *Id.* Specifically, the appellant in *Guerrero* brought a Navy recruit back to his off-base apartment, poured him whiskey, withdrew into another room, and emerged fifteen minutes later in women’s clothing and makeup. *Id.* at 296. When the recruit attempted to leave the apartment, the appellant stated “I thought you had experienced it. I’ll have to show you sometime.” *Id.*

¹⁸³ *Id.* The court cited circumstances in which popular entertainers such as Dustin Hoffman and Jamie Farr successfully portrayed cross-dressers, much to service members’ delight. *Id.* at 298.

realm,¹⁸⁴ *United States v. Lugo*¹⁸⁵ appears to be the sole military criminal case addressing the off-duty appearance of a service member that specifically references, albeit in dicta, “good order and discipline”¹⁸⁶ as a valid basis for enforcing off-duty personal appearance standards.

Scrutiny of each of the current armed service regulations governing personal appearance reveals that none refer specifically to “good order and discipline.” The Marine Corps regulation speaks in terms of the “high standards” associated with the Corps,¹⁸⁷ but does not elaborate on how this applies to order and discipline. The Navy regulation cautions against “discrediting” the Navy.¹⁸⁸ Both the Army and Air Force urge their respective members to take pride in a military image.¹⁸⁹

2. *Preserving Unity and Esprit de Corps*

A second mantra that courts often invoke when upholding military appearance regulations is that of preserving unity and *esprit de corps*. Defining what it means to preserve unity and *esprit de corps* is problematic, in the context of enforcing personal appearance standards.¹⁹⁰ Much as Supreme Court Justice Potter Stewart “knew” obscenity when he saw it,¹⁹¹ courts often appear to “know” unity and *esprit de corps* when they see these concepts, and they invoke these terms often. More often than not, however, courts fail to define the terms or to reason why the concepts are so integral to the enforcement of appearance regulations.

¹⁸⁴ See, e.g., *id.*; see also *United States v. Modesto*, 39 M.J. 1055 (A.C.M.R. 1994), *aff'd*, 43 M.J. 315 (1995); *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988).

¹⁸⁵ 54 M.J. 558 (N-M. Ct. Crim. App. 2000).

¹⁸⁶ *Id.* at 560.

¹⁸⁷ MARINE CORPS ORDER, *supra* note 2, para. 1005(2).

¹⁸⁸ NAVY UNIFORM REGS., *supra* note 2, paras. 7101(1)-(2).

¹⁸⁹ See AR 670-1, *supra* note 2, para. 1-7a; AFI 36-2903, *supra* note 2, tbl. 2.5.

¹⁹⁰ For instance, in *Goldman v. Weinberger*, regarding the Air Force’s asserted need to maintain uniformity and unity in denying an exception to its uniform policy, Justice Stevens remarked, “Because professionals in the military service attach great importance to that *plausible interest*, it is one that we must recognize as legitimate” 475 U.S. 503, 512 (1986) (Stevens, J., concurring) (emphasis added).

¹⁹¹ Justice Stewart said of obscenity, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

In *Gadberry v. Schlesinger*,¹⁹² for instance, an Air National Guardsman challenged an Air Force regulation governing on-duty hair length. Dismissing the Guardsman's claim, the court noted, simply, that the Air Force's desire "to instill in its members discipline and esprit de corps" was a "sufficiently rational justification"¹⁹³ for the regulation. The U.S. Supreme Court, in *Goldman v. Weinberger*,¹⁹⁴ upheld an Air Force regulation proscribing the wear of religious headgear on the basis, *inter alia*, that general uniformity of appearance promotes "hierarchical unity" within the military.¹⁹⁵ Military court cases, similarly, invoke the *esprit* mantra in the context of service member appearance cases.¹⁹⁶ *United States v. Lugo*, addressing the off-duty appearance issue, specifically mentioned the term as a valid basis for the enforcement of the Marine regulation in question.¹⁹⁷ Military courts, likewise, consistently have failed to articulate how or why *esprit de corps* suffers or flourishes as a result of military appearance policies. Moreover, courts tend to ignore that "appearance" regulations purporting to foster *esprit* may have the residual effect of fostering antipathy and resistance among service members who feel the impact of the regulations.¹⁹⁸

Scrutiny of each of the current armed service regulations reveals that none refer explicitly to "*esprit de corps*" or unity as a purpose for off-duty appearance standards. The Marine Corps, Air Force, and Army policies, however, impose restrictions on racist, sexist, or otherwise offensive tattoos and brands.¹⁹⁹ It is possible to interpret these restrictions as meant to advance *esprit* and unity in the ranks, however,

¹⁹² 419 F. Supp. 949 (E.D. Va. 1976).

¹⁹³ *Id.* at 950.

¹⁹⁴ 475 U.S. 503 (1986).

¹⁹⁵ *Id.* at 508. In this context, the *Goldman* Court appears to use the term "unity" in the context of uniformity, rather than cohesion.

¹⁹⁶ See, e.g., *United States v. Young*, 1 M.J. 433, 435 (1976) (approving of civilian police appearance regulations purporting to promote *esprit de corps*).

¹⁹⁷ *United States v. Lugo*, 54 M.J. 558, 560 n.1 (N-M. Ct. Crim. App. 2000) ("Public recognition and '*esprit de corps*' are sufficiently rational justifications to withstand constitutional challenge of a governmental regulation on personal appearance" (quoting *Kelley v. Johnson*, 425 U.S. 238, 248 (1976))).

¹⁹⁸ See Klare, *supra* note 38, at 1402-03 (arguing that grooming rules for off-duty police officers, purportedly advancing the police force's *esprit de corps*, are "absurd, given the deep resentment and staunch resistance the rules obviously provoked" in one court case (citing *Kelley*, 425 U.S. at 238)).

¹⁹⁹ See *supra* notes 75, 79, 84, 87 and accompanying text (describing the Marine Corps prohibition on tattoos or brands that undermine discipline or morale, and Air Force, Navy, and Army bans on racist and extremist body alterations).

by preventing exposure of divisive or racially-charged symbols to other service members.²⁰⁰

3. Promoting Public Image

A third, and perhaps more prevalent theme running through courts' justifications in military appearance cases is the notion that the military rightfully seeks to project a certain image—a “spit and polish” image²⁰¹—in the eyes of the general public. The military does, in fact, carefully cultivate and ardently protect a positive public image.²⁰² Service members also cherish the status and admiration that the American public affords them.²⁰³ Determining what makes such an image of service members “positive” in the eyes of the public, however, is a potentially impossible task.

In the context of cases involving the personal appearance of service members, courts often invoke “preservation of public image” as a laudable and rational goal of appearance regulations and orders. In *Gadberry v. Schlesinger*, for example, a federal district court noted, *sua sponte*, that the Air Force sought to promote discipline and *esprit de corps* by promulgating its personal appearance regulation.²⁰⁴ According to the court, the Air Force “also desire[d] to promote these qualities as its

²⁰⁰ See generally Campanella, *supra* note 15, at 79-80 (describing the maintenance of morale within the Army's ranks as a legitimate reason to remove from the Army those soldiers with, *inter alia*, “extremist political or social views”) (citing Major Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1 (1999)).

²⁰¹ See, e.g., *Lugo*, 54 M.J. at 560 (“The purposes of these restrictions [on off-duty appearance] is to ensure that off-duty Marines do not dress in extreme or eccentric civilian attire that detract from the public ‘spit-and-polish’ image of the United States Marine Corps . . .”).

²⁰² For instance, officer members of the U.S. Army's Old Guard, responsible for high profile ceremonial duties at Arlington National Cemetery, must satisfy rigorous physical appearance requirements, including standing at least five feet, ten inches tall. 3d United States Infantry Regiment, The Old Guard, *Officer's Information*, at <http://www.mdw.army.mil/oldguard/officerapp.htm> (last visited May 31, 2005). See generally Hillen, *supra* note 5 (discussing the military's historic struggle to maintain its self-identity in the wake of constant social pressures to make it comport with societal changes); see also Turley, *supra* note 10, at 9 (arguing that, historically, “the military culture strongly defended and maintained a unique military society despite continuing pressure from civilian society to create consistency between the military and civilian systems”).

²⁰³ Turley, *supra* note 10, at 116.

²⁰⁴ 419 F. Supp. 949, 950 (E.D. Va. 1976).

public image.”²⁰⁵ Thus, in the court’s opinion, the preservation of a clean cut public image apparently was a sufficient justification to uphold the regulation’s validity. The court in *United States v. Lugo* also noted with approval the apparent goal of projecting a public “spit and polish” image of the U.S. Marine Corps.²⁰⁶ Significantly, the court went on to find “[c]ongressional recognition of the importance of public confidence and trust in the armed forces” through the promulgation of Article 134 of the UCMJ.²⁰⁷

Both the U.S. Supreme Court and at least one federal circuit court have found important goals and rational bases in states’ regulation of civilian police officers’ personal appearance, based on promoting a positive public image. The Supreme Court found that the promotion of a positive public image justified hair length restrictions for on-duty officers.²⁰⁸ The Seventh Circuit found a similar rational justification with regard to regulating officers’ *off-duty* appearance: specifically, with regard to male officers’ wear of earrings.²⁰⁹

What separates *United States v. Lugo* from *Gadberry v. Schlesinger*, and other military cases addressing soldierly appearance, is the court’s specific reference to public perception in the context of an *off-duty* service member. Other jurisprudence discusses the importance of projecting an appropriate public image in determining the propriety of military regulations governing *on-duty* appearance.²¹⁰ The courts in those cases found rational the military’s intent that service members in uniform should present a clean cut, military appearance. *Lugo* is unique for its implication that off-duty service members also have a duty to

²⁰⁵ *Id.*

²⁰⁶ 54 M.J. 558, 560 (N-M. Ct. Crim. App. 2000). The Marine Corps regulation at issue stated, in pertinent part, that “Marines are associated and identified with the Marine Corps in and out of uniform, and when on or off duty. Therefore, Marines will ensure that their dress and personal appearance are conservative and commensurate with the high standards traditionally associated with the Marine Corps.” *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Kelley v. Johnson*, 425 U.S. 238, 248 (1976); *see also Inturri v. City of Hartford*, 365 F. Supp. 2d 240 (D. Conn. 2005) (upholding a city police department’s ban on officers’ display of “spider web” tattoos while in uniform). *But see Pence v. Rosenquist*, 573 F.2d 395 (7th Cir. 1978) (invalidating a public high school policy that prohibited employees who wore mustaches from driving school buses, on the basis that the policy lacked a rational relationship to any proper school purpose).

²⁰⁹ *Rathert v. Village of Peotone*, 903 F.2d 510, 516 (7th Cir. 1990).

²¹⁰ *See, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986); *Gadberry v. Schlesinger*, 419 F. Supp. 949 (E.D. Va. 1976); *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978); *United States v. Young*, 1 M.J. 433 (C.M.A. 1976).

project a “spit and polish” image to the public, wherever the public may find them. *Lugo* fails to address, however, what image the public holds of off-duty service members, assuming the public can even identify them as service members in their civilian clothes.

Scrutiny of each of the services’ regulations reveals veiled references to promoting service member images in the eyes of the public. The Marine Corps regulation, for instance, instructs Marines to “present the best possible image at all times,”²¹¹ but does not mention public image. This provision thus could refer to promoting image within, or outside of, the Marine Corps or the larger military community. Similarly, the Air Force urges a “military image,”²¹² while the Army urges a “soldierly appearance.”²¹³ Neither service, however, speaks about how the public might view the service members. The Navy policy comes the closest, by forbidding any appearance that may discredit the Navy.²¹⁴ While this provision most likely refers to discredit in the eyes of the public, the Navy regulation does not specifically state this.

C. Public Image, or Institutional Stereotype?

*No spectre is more terrifying than our own negative identity.*²¹⁵

United States v. Lugo represents the most recent case addressing the off-duty appearance of a service member, finding rational the Marine Corps’ goals of promoting discipline and a public “spit and polish” image of Marines. The *Lugo* court failed to address, however, why maintaining a *public* spit-and-polish image, the purported basis of the Marine regulation, was rational in this context. This is not surprising, however; those attacking the validity of a regulation (such as Corporal Lugo, in his case) have the burden to show that regulation is irrational and arbitrary.²¹⁶

²¹¹ MARINE CORPS ORDER, *supra* note 2, para. 1004(1).

²¹² AFI 36-2903, *supra* note 2, tbl. 2.5.

²¹³ AR 670-1, *supra* note 2, para. 1-7a.

²¹⁴ NAVY UNIFORM REGS., *supra* note 2, paras. 7101(1)-(2).

²¹⁵ Karst, *supra* note 6, at 508.

²¹⁶ *See, e.g.,* Kelley v. Johnson, 425 U.S. 238, 244 (1976) (placing the burden on police officers to show that a police regulation regarding hair length was irrational and arbitrary); Grusendorf v. Oklahoma City, 816 F.2d 539, 543 (10th Cir. 1987) (placing the burden on a firefighter to show that a city regulation banning off-duty smoking by first-

Corporal Lugo entered an on-base military club,²¹⁷ presumably populated with his Marine counterparts. The court did not address any supposed “danger” that his earrings would offend the sensibilities of the club’s civilian patrons, assuming any were present. Moreover, the court did not address how, even if the civilian populace viewed his earrings, this would endanger the Marine Corps’ standing in the eyes of the public. Corporal Lugo apparently wore civilian clothes, rather than a military uniform. He entered the club as an off-duty Marine, not a Marine carrying out military duties. A civilian who saw Lugo would not know, with certainty, that Lugo even was a Marine, let alone a service member. Nevertheless, the *Lugo* court’s rationale typifies the type of roadblock confronting a service member daring to challenge a military appearance regulation.

Lugo arguably stands for the proposition that the armed services seek to promote an image of their members in the eyes of the military establishment, at least as much as in the eyes of the civilian populace. Military members generally take great pride in their appearance and the appearance of their fellow service members.²¹⁸ Human nature dictates that military members understandably would not want to see standards relaxed or conventions flaunted, simply to accommodate the desires of some members to be more “in fashion” and in tune with the general public.²¹⁹

There thus is strong potential that appearance regulations pay lip service to promoting *public* perception, as a subterfuge for preserving the

year firefighters was arbitrary and irrational); *United States v. Young*, 1 M.J. 433, 435 (C.M.A. 1976) (requiring a service member to show that the Army’s regulation governing hair length was irrational and arbitrary).

²¹⁷ *United States v. Lugo*, 54 M.J. 558, 559 (N-M. Ct. Crim. App. 2000).

²¹⁸ See, e.g., Bill Keller, *Marines Warn Embassy Guards About their Trademark Haircuts*, N.Y. TIMES, July 9, 1985, at A11 (noting that “[t]he ‘high and tight’ haircut . . . has long been a badge of pride, especially among elite Marines”); Vojdik, *supra* note 7, at 116 (describing the nearly shaved haircuts of the Army’s elite Ranger Regiment as “a symbol of hypermasculinity”).

²¹⁹ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 987 (1995). Professor Lessig notes, for instance, that “[t]here is a picture of the ‘military man’—a stereotype, no doubt, but extant nonetheless.” *Id.* Professor Lessig notes that “membership in the military offers a certain status,” and that “there is a strong interest in preserving the image that the military presents.” *Id.* Furthermore, Professor Lessig continues, for those who join the military and who value this image, “part of the value in belonging to this military depends on the preservation of this image.” *Id.*

military's *institutional* stereotypes.²²⁰ As the court in one military case noted, with regard to appearance standards in the years before earrings for males became fashionable, "it may well be that the drafters of the regulations considered it beyond speculation that anyone who was a man and bore the name Marine . . . would ever degrade his uniform and Corps by such an affectation."²²¹

Style and culture change dramatically and often.²²² The armed services are hardly groundbreakers with regard to recognizing, let alone accepting, this fact. It thus seems likely that the *Lugo* court, in paying lip service to the Marine Corps' supposed goal of promoting a positive *public* perception of Marines, failed to consider that the military's greatest benefit in regulating off-duty appearance is the ability to preserve a *military institutional* perception of what it means to look like a Soldier Sailor, Airman, or Marine.

In today's society, it is a dubious notion to believe that a private citizen's view of a male service member wearing an earring, out of uniform and off post, would tend to "discredit" the armed forces, in a legal sense. Consider that the same citizen may view a female service member, out of uniform and off post, wearing five hoop earrings in one ear. This, however, is permissible, under Army standards,²²³ and yet her action arguably is more audacious, ostentatious, and "unsoldierly" than that of a male counterpart wearing a single stud earring. On this issue, the Army policy, at least, seems to be in tune with that of the opinion in *United States v. Pinkston*: that "no man" would degrade his service by daring to wear an earring.²²⁴

²²⁰ For example, Professor Kenneth Karst notes that, "[I]t should be no surprise that officers who have an important part in selecting other officers for promotion tend to respond warmly to people who look like themselves." Karst, *supra* note 6, at 575.

²²¹ *United States v. Pinkston*, 49 C.M.R. 359, 360 (N.M.C.M.R. 1974). *Pinkston* involved a Marine's prosecution for disobeying an order to remove an earring that he sported while wearing his duty uniform. *Id.*

²²² See *supra* notes 15-17 and accompanying text (describing constantly-evolving personal appearance trends).

²²³ See AR 670-1, *supra* note 2, para. 1-14(d)(3) (providing that females have no restrictions on their off-duty wear of earrings).

²²⁴ See *supra* text accompanying note 221 (describing a military court's dubious reaction to a male's wear of an earring).

V. Constitutional Concerns in Regulating Off-Duty Appearance

The result of the military's unique institutional status is that "[n]o other segment of American society is as vulnerable to the judgments of others, or required to comply with someone's personal will or otherwise fear criminal sanctions."²²⁵ The military has no more "discretion" to violate service members' constitutional rights, such as freedom of speech or free exercise of religion, than other federal agencies have to violate private citizens' rights.²²⁶ Nevertheless, regulations purporting to further a rational military interest such as regulating service members' off-duty appearance may impermissibly impinge on service members' rights. Moreover, the precise language that military appearance regulations contain may subject the regulations to attack on overbreadth and vagueness grounds.

A. Free Speech Concerns

Military regulations governing service member appearance warrant constitutional scrutiny on free speech grounds. The First Amendment's freedom of speech clause,²²⁷ as it relates to the military community, has received virtually endless analysis from courts²²⁸ and commentators.²²⁹ In the civilian community context, the Supreme Court has held that content-based regulations impinging the right of free speech are

²²⁵ Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 861 (1987).

²²⁶ See, e.g., *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) (refusing to defer to an agency's decision where a constitutional question presented itself); *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979) (refusing to defer to "agency expertise" where the issue concerned the constitutionality of that agency's actions).

²²⁷ "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

²²⁸ See, e.g., *Brown v. Glines*, 444 U.S. 348 (1980) (upholding the validity of an Air Force regulation requiring prior command approval before circulating certain literature on a military installation); *Parker v. Levy*, 417 U.S. 733 (1974) (upholding Article 134 of the UCMJ against vagueness and overbreadth challenges in a free speech case); *United States v. Wilson*, 33 M.J. 797 (A.C.M.R. 1991) (rejecting a free speech challenge where a service member was convicted for blowing his nose on the American flag).

²²⁹ See generally Carr, *supra* note 104, at 344-50 (analyzing freedom of speech restrictions in the context of cases involving purported "military necessity"); Hirschhorn, *supra* note 107, at 185-93 (discussing freedom of speech restrictions that the military, as a "separate community," imposes).

invalid,²³⁰ except in cases involving legally unprotected speech, such as obscenity,²³¹ fighting words,²³² and dangerous speech.²³³

The Supreme Court has declared obscene²³⁴ communications wholly unprotected.²³⁵ In the context of fighting words or dangerous speech, the Supreme Court has stated unambiguously that the “First Amendment does not protect violence.”²³⁶ What lie outside of these clearly-defined areas of speech are the “gray areas” that the military’s appearance standards implicate.

1. Free Speech in the Military

Despite the Supreme Court’s very permissive stance on free speech in the civilian context, courts’ application of these principles to military scenarios has proven not to be hard and fast. While conceding that service members enjoy freedom of speech protections that include the right to both verbal and non-verbal speech,²³⁷ courts grant substantial deference to the military where the exercise of the right of free speech poses a perceived threat to important military interests.²³⁸ Military necessity, especially the “fundamental necessity for discipline,” may warrant limitations on service members’—as opposed to civilians’—speech.²³⁹ In fact, the Supreme Court has stated that while service members may be entitled to First Amendment protection in certain

²³⁰ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (declaring that the First Amendment does not allow the government to prohibit free speech or expression based on disapproval of the ideas communicated).

²³¹ See *United States v. Roth*, 354 U.S. 476 (1952).

²³² See *Cohen v. California*, 403 U.S. 15 (1971).

²³³ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

²³⁴ Obscene material is material addressing sex in a manner appealing to prurient interest. *Roth*, 354 U.S. at 487.

²³⁵ *Id.* at 485.

²³⁶ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

²³⁷ See, e.g., *United States v. Wilson*, 33 M.J. 797, 799 (A.C.M.R. 1991). See *infra* note 244 and accompanying text (discussing various forms of symbolic, or nonverbal, speech).

²³⁸ See, e.g., *Brown v. Glines*, 444 U.S. 348 (1980) (upholding the validity of an Air Force regulation requiring command approval prior to circulating certain literature on a military installation); *Ethredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995) (upholding the validity of a military installation commander’s order banning bumper stickers that disparaged the President of the United States).

²³⁹ *Wilson*, 33 M.J. at 799. *Wilson* upheld an Army military policeman’s dereliction of duty conviction for blowing his nose on an American flag while he prepared for a military flag-raising ceremony. *Id.* at 798.

circumstances, “the different character of the military community and of the military mission requires a different application of those protections.”²⁴⁰ Lending context to the Supreme Court’s generalized statement, the Army Court of Criminal Appeals, in *United States v. Zimmerman*, declared that “[a]lthough members of the armed forces enjoy First Amendment freedoms, the fundamental need for *good order and discipline* can be compelling enough” to curtail those freedoms.²⁴¹

In the context of a military free speech case, the Supreme Court has approved military regulations that restrict speech, as long as they do so “no more than reasonably necessary to protect a substantial government interest.”²⁴² Courts generally relax or dispense with many free speech protections afforded to civilians, in deferring to the military’s determination of the disruptive effect of the speech.²⁴³

2. *Personal Appearance as “Speech” (Or at Least “Self Expression”)*

In the military off-duty appearance context, free speech or self-expression concerns may arise with regard to choice of clothing or with regard to expressive body decorations. While the Supreme Court has deemed nonverbal conduct as a form of protected speech in certain limited circumstances,²⁴⁴ courts typically do not recognize people’s choice of personal appearance as pure “speech,” for First Amendment purposes.²⁴⁵ Choice of personal appearance thus typically qualifies as a

²⁴⁰ *Parker v. Levy*, 417 U.S. 733, 758 (1974).

²⁴¹ 43 M.J. 782, 785 (Army Ct. Crim. App. 1996) (emphasis added).

²⁴² *Brown*, 444 U.S. at 355.

²⁴³ *See, e.g., Parker*, 417 U.S. at 748 (upholding an Army physician’s conviction for advising service members not to fight in Vietnam, on the grounds that his comments undermined the effectiveness of response to command); *United States v. Brown*, 45 M.J. 389, 398 (1996) (upholding a service member’s conviction under an anti-union statute for organizing battalion-wide meetings to discuss living conditions).

²⁴⁴ *See, e.g., Texas v. Johnson*, 491 U.S. 397, 418 (1989) (deeming as protected speech the burning of the American flag); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 514 (1969) (deeming as protected speech the wearing of an armband). Such “symbolic speech” must meet a two-part test: first, the person must intend to convey a particular message; and second, those who witness the activity must understand the message that the “speaker” intends to convey. *See Spence v. Washington*, 418 U.S. 405, 409-11 (1974).

²⁴⁵ *See, e.g., Olesen v. Bd. of Educ.*, 676 F. Supp. 820, 822 (N.D. Ill. 1987) (determining that in order to claim First Amendment protection, an earring wearer must show that the

form of self-expression,²⁴⁶ presumed not to be intended to convey a religious, political or other message.²⁴⁷ For instance, clothing choice often conveys self-expressive messages.²⁴⁸

Such a choice also may convey mutually exclusive messages of either *identifying with* or *belonging to* a particular group or genre.²⁴⁹ Self-decoration²⁵⁰ or hairstyle²⁵¹ may convey these same mutually exclusive “identification with” or “belonging to” messages. Because these personal appearance choices implicate recognized liberty interests, but not fundamental rights, however, military proscriptions on these forms of self-expression must be merely rational.²⁵²

earring is intended to convey a message); *Jackson v. Dorrier*, 424 F.2d 213, 217 (6th Cir. 1970) (refusing to declare a person’s choice of hair length to be protected “expression”).

²⁴⁶ As the Second Circuit Court of Appeals observed: “clothing and personal appearance are important forms of self-expression. For many, clothing communicates . . . cultural background and values, religious or moral disposition, creativity or its lack, awareness of current style or adherence to earlier styles . . . gender identity, and social status.” *Zalewska v. County of Sullivan*, New York, 316 F.3d 314, 319 (2d Cir. 2003). However, the Second Circuit noted, “acknowledging the symbolic speech-like qualities of a course of conduct is ‘only the beginning, and not the end, of constitutional inquiry.’” *Id.* (quoting *East Hartford Educ. Ass’n v. Bd. of Educ. of the Town of East Hartford*, 562 F.2d 838, 857 (2d Cir. 1977)).

²⁴⁷ *See, e.g., Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1307 n.4 (8th Cir. 1997) (determining that a tattoo is merely a form of self-expression, where its wearer did not intend to convey a religious or political message).

²⁴⁸ For example, the manner of wearing a pair of jeans, permitting them to sag at the waist, can convey identification with African-American culture and the styles of African-American urban youth. *See Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 560-61 (D.N.M. 1985).

²⁴⁹ For instance, the color of clothing may signify gang affiliation. *See, e.g., Stephenson*, 110 F.3d at 1311. Similarly, the manner of wearing pants, by letting them sag at the waist, also may signify gang affiliation. *Bivens*, 899 F. Supp. at 561.

²⁵⁰ Members of the “punk” and anti-establishment cultures, for example, view body piercing as a symbol of rebellion. *See S. Samantha M. Tweeten & Leland S. Rickman, Infectious Complications of Body Piercing*, 26 CLINICAL INFECTIOUS DISEASES 735, 735-40 (1998). Courts have considered tattoos, similarly, as indicative of self-expression. *See, e.g., Stephenson*, 110 F.3d at 1307.

²⁵¹ African-American women often choose to braid their hair in a positive display of ethnic identification with their African heritage. *See Turner, supra* note 17, at 133.

²⁵² *See supra* notes 155-61 and accompanying text (discussing the difference between governmental regulation of fundamental rights and of those rights not deemed fundamental). Because such personal appearance choice normally would not implicate a fundamental right such as the right of freedom of speech, government regulation must merely rationally relate to a legitimate government interest. *See also, e.g., Neinast v. Bd. of Trs.*, 346 F.3d 585, 592 (6th Cir. 2003) (determining that government action impeding the right of personal appearance must rationally relate to a legitimate government interest); *Bivens*, 899 F. Supp. at 561 n.7 (“Even if the wearing of sagging pants could be

3. *The “Identification”—“Affiliation” Quandary: Actions Speak Louder than Words*

Where a Soldier’s clothing or self-decoration is benign, in that it does not convey constitutionally-unprotected messages and it does not convey messages that clearly have a nexus to undermining military discipline or *esprit de corps*, the military walks a fine line in its attempts to quash such expression. A Soldier’s off-duty choice in personal appearance may convey mere *identification* with a group or genre, for instance.²⁵³ Where civilians are concerned, courts have affirmed the right to wear clothing identifying the wearer with a specific, even if controversial, organization.²⁵⁴

The military may forbid clothing or self-decoration that conveys constitutionally unprotected speech (such as obscenity)²⁵⁵ or messages that clearly undermine military discipline and unity (such as extremist messages or glorification of drug use). For instance, an off-duty Soldier, regardless of whether he is on or off a military installation, would have no right to convey a racist or otherwise extremist message through his clothing or appearance. Such practice would undermine discipline and unity within the ranks by permitting Soldiers to convey a message that would, predictably, negatively impact fellow Soldiers who might learn of

construed as protected speech, I would have grave doubts about the merits of Plaintiff’s claim. Not all constraints on protected expressive conduct . . . are unconstitutional.”).

²⁵³ See *supra* notes 249-51 and accompanying text (describing personal appearance as potentially conveying an “association” message). For instance, a Soldier’s choice to wear an earring and an athletic jersey may convey identification with “hip hop” culture. Alternatively, the Soldier’s choice to wear the same garb, but only in the color red, may convey *affiliation with a particular gang*.

²⁵⁴ See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978) (ruling that the first amendment permits the wear of armbands signifying membership in the American Nazi party); *Hernandez v. Superintendent, Fredricksburg-Rappahannock Joint Sec. Ctr.*, 800 F. Supp. 1344, 1351 (E.D. Va. 1992) (authorizing the wear of robes and hoods signifying membership in the Ku Klux Klan); see also *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1245 (D.N.M. 2000) (“There is nothing in the zero-tolerance rule [against the wear of gang apparel] that in any way specifies what is meant by gang activity, gang symbols, or gang-related apparel. Due to this lack of specificity, enforcement of the dress code is [improperly] left to the unfettered discretion of individual officers”); *City of Harvard v. Gaut*, 660 N.E.2d 259, 264 (Ill. App. Ct. 1996) (permitting the wear of colors and symbols signifying gang membership, but only on the grounds that the local ordinance attempting to restrict the wear of such articles was constitutionally overbroad).

²⁵⁵ See *supra* text accompanying notes 231-33 (describing categories of unprotected speech).

the Soldier's "communications." Military case law supports²⁵⁶ and military regulations enforce²⁵⁷—this prohibition on such speech.²⁵⁸

For example, an off-duty Soldier may choose to dress in "punk" or "Goth" clothing that might include a black trenchcoat, military-style boots, an earring, and "moussed" hair.²⁵⁹ The Soldier may be influenced by recent Hollywood productions,²⁶⁰ or by his interest in alternative music. Such appearance does not, in and of itself, necessarily undermine military discipline or *esprit de corps*. While it is possible that the Soldier's off-duty appearance could suggest extremist²⁶¹ affiliation or association,²⁶² it may simply reveal his identification with popular culture or alternative style.

²⁵⁶ See, e.g., *United States v. Zimmerman*, 43 M.J. 782, 786 (Army Ct. Crim. App. 1996) ("[R]acist attitudes and activities are perniciously destructive of good order and discipline in the armed services.").

²⁵⁷ See, e.g., U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-12c (13 May 2002) (authorizing commanders to prohibit soldiers from engaging in "any" extremist activities that will adversely affect morale or discipline) [hereinafter AR 600-20].

²⁵⁸ For thorough analyses of the predictably detrimental effects on military order and discipline that extremist communication, conduct or affiliation produces, see generally Campanella, *supra* note 15, at 79-82; Cadet First Class Douglas Daniels, *Freedom of Hate and Service in the United States Coast Guard: Rights vs. Duty*, 9 USAFA J. L. STUD. 147, 152-54 (1998).

²⁵⁹ See, e.g., Dan Nailen, *Pop Stars Try to be Punk by Donning Retro T-Shirts*, AUGUSTA CHRON. (Ga.), at D1 (describing "punk" fashion as including military boots and "Mohawk" hair styles).

²⁶⁰ See, e.g., Marc Fisher, *'Trenchcoat Mafia' Spun Dark Fantasy*, WASH. POST, Apr. 21, 1999, at A1 (noting that the movie *The Basketball Diaries*, in which a lead character wore a trench coat, may have influenced the highly-publicized murders at Columbine High School in Littleton, Colorado).

²⁶¹ The Department of the Army defines "extremist activities" as:

[O]nes that advocate racial, gender or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, gender, religion, or national origin or advocate the use of or use force or violence or unlawful means to deprive individuals of their rights . . . by unlawful means.

AR 600-20, *supra* note 257, para. 4-12.

²⁶² See, e.g., Todd Richissin, *Five Bragg Soldiers Photographed Saluting Nazi Flag*, RALEIGH NEWS & OBSERVER, at A1 (describing suspected "skinhead" Soldiers from Fort Bragg, North Carolina wearing calf-length military style boots, a hallmark of racist skinhead dress).

Similarly, the First Amendment protects citizens' right to affiliate with groups and associate with others who hold those same beliefs.²⁶³ However, should a service member's actions or stated intentions, combined with his personal appearance, convey affiliation with an extremist organization or gang, the military rightfully may proscribe such dress.

The U.S. Army Court of Criminal Appeals' decision in *United States v. Billings*²⁶⁴ helps to illuminate the potential blurring of the line between identification and affiliation. The *Billings* court denied the service member's First Amendment challenge to her conviction for acting as a "regional chief" of a criminal street gang, finding that "[a]ssociation with a group may be punished if there is 'clear proof'" that the service member specifically intends to effect the organization's goals through violence.²⁶⁵ The court then noted that the service member actually took steps to lead and participate in the street gang's activities.²⁶⁶

Another Army Court of Criminal Appeals case, *United States v. Cyrus*,²⁶⁷ illuminates the hazards of attempting to criminalize or proscribe a Soldier's mere association with distasteful societal elements. In *Cyrus*, a service member faced charges of "wrongfully associating" with drug dealers by visiting them at their residences where they purportedly kept drugs.²⁶⁸ The court overturned the service member's conviction, finding that while the service member did "associate" with suspected drug users and traffickers by visiting them at their residence, he did not know that they were engaged in such acts.²⁶⁹ *Cyrus*, despite failing to address squarely the criminal "association" issue,²⁷⁰

²⁶³ See, e.g., *Dawson v. Delaware*, 503 U.S. 159 (1992).

²⁶⁴ 58 M.J. 861 (Army Ct. Crim. App. 2003).

²⁶⁵ *Id.* at 865 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)). The *Billings* court went on to note that the appellant did not merely associate with criminal elements; she led the crime syndicate and participated in the organization's activities. *Id.*

²⁶⁶ *Id.* at 865-66. Specifically, the court noted that the service member conspired with gang members to commit robbery and assault, and recruited other Soldiers into the gang whose *modus operandi* involved settling disputes through murder. *Id.* at 866.

²⁶⁷ 46 M.J. 722 (Army Ct. Crim. App. 1997).

²⁶⁸ *Id.* at 727.

²⁶⁹ *Id.* at 728. The court further noted that "whatever degree of 'association' may be . . . criminal, here the government proved no more than that the appellant was acquainted with certain person whom the *police* reasonably believed to be drug traffickers." *Id.*

²⁷⁰ "We need not address [freedom of association and due process issues] here or define in what circumstances Article 134, UCMJ, may be violated by 'association' with others who may be engaged in criminal acts." *Id.* at 727-28.

nevertheless is significant for its requirement of some degree of knowledge on the part of service members whose associations or affiliations may otherwise implicate them in criminal conduct.

Billings' and *Cyrus'* directives—if applied in the context of a service member's personal appearance case—seem clear: knowing actions speak louder than words—or mere appearance. It may be necessary for the military to examine a Soldier's actions and words, in concert with his appearance, to determine whether extremist or otherwise unprotected speech is implicated. The Army, thus, might require a service member suspected of extremist or gang affiliation—identified only by his choice of dress—to rebut the presumption. If the Soldier successfully rebuts the presumption, he may remain in the service. Where visible or covered extremist body art is the catalyst for the Army's suspicion, however, Army policy does not grant the Soldier such leeway, and the Soldier is subject to separation from the service.²⁷¹

B. Free Exercise of Religion

Military appearance regulations also warrant scrutiny on the basis that they threaten to violate the First Amendment's free exercise of religion clause.²⁷² Military members have challenged such regulations in the context of their right to wear facial hair²⁷³ or religious headgear²⁷⁴ while on duty, in harmony with their religious convictions. The Supreme Court, in accordance with its landmark free exercise decision in *Sherbert v. Verner*,²⁷⁵ evaluated free exercise claims under a "strict scrutiny" test.²⁷⁶ Subsequent cases have affirmed the Court's adherence to this

²⁷¹ For an excellent description of the Army's policy in this regard, see generally Campanella, *supra* note 15, at 83-84 (describing the Army's interest in the "regulation of inflammatory tattoos" as necessary in maintaining unit cohesion).

²⁷² The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I.

²⁷³ See, e.g., *Geller v. Sec'y of Defense*, 423 F. Supp. 16 (D.D.C. 1976); see also *Khalsa v. Weinberger*, 779 F.2d 1393, 1394-95 (9th Cir. 1985) (upholding an Army regulation barring prospective applicants from enlisting, where the applicant, a member of the Sikh religion, requested an exemption to permit him to wear a beard).

²⁷⁴ See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding an Air Force regulation proscribing the wear of religious headgear while in uniform).

²⁷⁵ 374 U.S. 398, 406 (1963).

²⁷⁶ "Strict scrutiny" requires the government to justify significant burdens on the free exercise of religion as the least restrictive method by which to accomplish a compelling

“strict scrutiny” standard, at least in instances involving the free exercise rights of civilians.²⁷⁷

Nevertheless, courts traditionally have not come to the defense of service members attempting to exercise religious beliefs that are contrary to military policies.²⁷⁸ In a similar landmark case, *Goldman v. Weinberger*,²⁷⁹ the Supreme Court addressed a free exercise issue in which the petitioner, an active duty Air Force member, challenged an Air Force regulation prohibiting the wear of religious headgear. The Court, abandoning its prior “strict scrutiny” analysis in similar civilian cases, held that the regulation “reasonably and evenhandedly regulate[d] dress in the interest of the military’s perceived need for uniformity.”²⁸⁰ However, Congress wasted little time in responding to what it perceived as *Goldman’s* improper infringement on service members’ religious rights. Congress directed that military service members be permitted to wear “neat and conservative” religious apparel while in uniform,²⁸¹ thus legislatively overturning the Supreme Court’s decision.²⁸²

government interest. *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). *See generally supra* note 160 and accompanying text (discussing courts’ use of the “strict scrutiny” standard of review when evaluating alleged violations of fundamental rights). *See also Sherbert*, 374 U.S. at 406 (examining whether a “compelling state interest” justified South Carolina’s “substantial infringement” on a Seventh-Day Adventist’s religion, when the state denied her request not to work her government job on her Sabbath day).

²⁷⁷ *See, e.g., Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) (invalidating a city ordinance prohibiting broadly the ritual sacrifice of animals for religious purposes).

²⁷⁸ Major Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Military*, ARMY LAW., Nov. 1998, at 1, 8.

²⁷⁹ 475 U.S. 503 (1986).

²⁸⁰ *Id.* at 510.

²⁸¹ 10 U.S.C. § 774 (2000).

²⁸² Congressional legislation mandating the accommodation of religion continues to leave to the DOD the details of implementing congress’s intent. In response to congress’s action following *Goldman*, the DOD issued a directive implementing the legislation, which addresses a broad range of religious accommodation issues. U.S. DEP’T OF DEFENSE, DIR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICE (3 Feb. 1988) (C1, 1988). The directive states in pertinent part that religious accommodation requests “should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards of discipline.” *Id.* para. C1. In kind, the Army regulation governing religious accommodation provides that the Army’s policy is to approve accommodation requests, absent an adverse impact on military readiness, cohesion, morale, health, safety or discipline. AR 600-20, *supra* note 257, para. 5-6a. The Army further qualifies accommodation requests by providing that requests “cannot be guaranteed,” and that accommodation depends, ultimately, on military necessity. *Id.*

In the military off-duty appearance context, freedom of exercise issues may arise regarding choice of hair style, clothing, or expressive decorations. For example, the wear of dreadlocks off duty may implicate religious affiliation with Rastafarianism,²⁸³ but the wear of dreadlocks also has been associated with advocating marijuana use.²⁸⁴ The off-duty wear of a shirt depicting Native American peyote use arguably promotes the use of a controlled substance,²⁸⁵ and yet the military accommodates Native American religious use of the drug.²⁸⁶ As with regard to the free speech analysis, the military will walk a fine line in restricting such off-duty appearance.

C. Drafting Concerns: Vagueness and Overbreadth

The Due Process Clause of the Fifth Amendment to the U.S. Constitution protects against arbitrary and unreasonable federal government action.²⁸⁷ The “void for vagueness” doctrine ensures the federal government’s respect for due process by requiring “fair notice or warning” of prohibited conduct²⁸⁸ and by preventing arbitrary and

²⁸³ See, e.g., *Goldman*, 475 U.S. at 519-20 (Brennan, J., dissenting) (noting that a Rastafarian seeking accommodation of his religion could, conceivably, request that he be permitted to wear dreadlocks).

²⁸⁴ See, e.g., INSIGHT GUIDE: JAMAICA 103-06 (Paul Zach ed., 1984) (noting that Rastafarians frequently smoke marijuana as a sacred ritual).

²⁸⁵ Federal law categorizes peyote as a controlled substance. 21 U.S.C. § 812, sched. I (c)(12) (2000).

²⁸⁶ Congress has directed that the federal government, including the military, accommodate peyote use. American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified as amended at 42 U.S.C. § 1996a(b)(1) (2000)). See also Memorandum, Assistant Secretary of Defense (Force Management), subject: Sacramental Use of Peyote by Native American Service Members (25 Apr. 1997) (copy on file with author) (providing guidance to the military departments regarding accommodation of service members’ religious practices involving the use of peyote in religious ceremonies).

²⁸⁷ U.S. CONST. amend. V; see generally *supra* notes 155-74 and accompanying text (discussing governmental action implicating due process clause protections, and courts’ scrutiny of such action).

²⁸⁸ *Smith v. Goguen*, 415 U.S. 566, 572 (1974) (“The [vagueness] doctrine incorporates notions of fair notice or warning.”). In *Goguen*, for example, the Supreme Court invalidated for vagueness a statute that criminally punished anyone who “treats contemptuously” the U.S. flag. *Id.* at 568-69; see also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”); *United States v. Harris*, 347 U.S. 612, 617 (1954) (“Void for vagueness simply means that criminal responsibility

discriminatory enforcement of laws or regulations.²⁸⁹ A regulation, for instance, is “void for vagueness” if it “forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.”²⁹⁰ A “void for vagueness” attack would argue, in essence, that the regulation or order lacks a standard by which to determine criminality.²⁹¹

The overbreadth doctrine protects First Amendment freedoms of individuals where inartful regulatory drafting may impede their right of expression.²⁹² It also prohibits the selective enforcement of regulations.²⁹³ An attack on a regulation as overbroad would argue that certain of its provisions implicate and prohibit constitutionally protected conduct.²⁹⁴ In this way, the overbreadth doctrine requires that a regulation relate closely to furthering a stated purpose, without impinging unnecessarily on constitutional rights.

In the off-duty appearance context, the scenarios in which the military may seek to enforce vague standards are virtually endless. The services’ current appearance regulations refer, for example, to standards of dress as “conservative,”²⁹⁵ “offensive,”²⁹⁶ and in “good taste.”²⁹⁷ These terms are notoriously imprecise and subject to arbitrary enforcement;²⁹⁸ it is hardly inconceivable that one Soldier’s fashion

should not attach where one could not reasonably understand that his contemplated conduct is proscribed.”)

²⁸⁹ *Goguen*, 415 U.S. at 573; *see also* Hirschhorn, *supra* note 107, at 187 (describing the “void for vagueness” doctrine as guarding against the blurring of the lines between permitted and prohibited conduct, and prohibiting authorities charged with enforcing statutes from enforcing the laws arbitrarily or with invidious motives).

²⁹⁰ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

²⁹¹ *See generally* Gilbert, *supra* note 96, at 216 (describing the “void for vagueness” doctrine).

²⁹² *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989).

²⁹³ *See generally* *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (invalidating as “an obvious invitation to discriminatory enforcement,” a city ordinance that prohibited three or more persons to assemble on any sidewalk and “annoy” passersby).

²⁹⁴ *See Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972) (noting that overbroad laws, like vague ones, deter privileged activity); *see also* *United States v. Nation*, 26 C.M.R. 504, 506 (C.M.A. 1958) (invalidating a Navy regulation that imposed a waiting period on service members wishing to marry non-U.S. citizens).

²⁹⁵ MARINE CORPS ORDER, *supra* note 2, para. 1005(2).

²⁹⁶ AFI 36-2903, *supra* note 2, tbl. 1.1.

²⁹⁷ NAVY UNIFORM REGS., *supra* note 2, para. 7101(2).

²⁹⁸ *See Klare*, *supra* note 38, at 1441 (noting that appearance “standards are too nebulous and volatile, and the necessary judgments too speculative and ideologically grounded” for proper institutional monitoring and enforcement).

tastes may conflict with those of the military commander charged with enforcing the regulation.²⁹⁹ Military appearance regulations similarly may implicate overbreadth concerns. By attempting to further the purposes of “good order and discipline,” *esprit de corps*, and public perception, the regulations threaten to sweep up in their purview a host of otherwise protected speech and liberty interests.

The Army, Navy, and Air Force regulations, by permitting service members to express more individuality off of military installations than on them,³⁰⁰ are more narrowly-tailored than their Marine Corps counterpart, which fails to distinguish between those two very different locations. Consider, for instance, a Marine on thirty days leave, traveling the countryside and not in contact with the Marine Corps. Under the Marine policy, if he dons an earring³⁰¹ or a bandana,³⁰² he has violated the regulation and is, according to the regulation’s terms,³⁰³ subject to potential punishment, regardless of whether those with whom he comes into contact even know that he is a service member. From this standpoint, the Marine regulation is overbroad.

²⁹⁹ Of course, if regulations come under a “vagueness” attack through the courts, it is likely that courts will rely on the “customs of the service” and “general usage” language of *Parker v. Levy* for contextual definitions of such terms as “conservative” and “good taste.” In all but the most egregious instances, therefore, courts likely will look to customs of the service to uphold otherwise vague or overbroad regulatory provisions. *See supra* notes 126-28 (discussing the Supreme Court’s reliance on military officers to define “customs of the service” and “general usage” in the context of a challenge to allegedly vague terms in the UCMJ).

³⁰⁰ All three of these regulations do permit, for instance, male soldiers to wear earrings outside of areas under military jurisdiction. *See supra* notes 77, 82, 88 and accompanying text. Nevertheless, the Navy and Air Force’s policies on body piercing remain arguably overbroad, for both policies forbid off-duty, on-installation piercings, other than for female service members’ ear piercings, regardless whether the piercings may be concealed under clothing. *See supra* notes 76-77, 82-83 and accompanying text (describing the Air Force and Navy policies).

³⁰¹ The Marine regulation forbids male Marines to wear earrings while off-duty, whether or not they are on a military installation. MARINE CORPS ORDER, *supra* note 2, para. 1004(1)(b).

³⁰² The Marine regulation forbids specifically the wear of “bandannas [and] doo rags.” *Id.* para. 1005(2)(d).

³⁰³ The Marine Corps prohibition on males’ wear of earrings and all Marines’ wear of bandanas and “doo rags” does not distinguish between on- and off-duty wear. *See supra* note 54 and accompanying text (noting that the Marine Corps regulation does not distinguish between on- and off-installation scenarios).

VI. Can Military Appearance Regulations Be Improved?

The military's attempts to regulate off-duty appearance threaten service members' liberty interests in their personal appearance.³⁰⁴ Moreover, the military, as a "separate society," often jealously protects its customs and traditions from social pressures to change.³⁰⁵ The gravity of such a clash in interests might seem trivial in the larger legal or military sense;³⁰⁶ after all, commentators³⁰⁷ and judges,³⁰⁸ alike, commonly assert that individuals who become service members abdicate certain rights that the citizenry at large takes for granted. Nevertheless, there is a perhaps misplaced tendency to dismiss or trivialize³⁰⁹ appearance issues, under the presumption that officials have more pressing issues than "appearance choices" to resolve.³¹⁰ Such a tendency threatens to ignore the interests of service members attempting to assert their self-identity while off-duty.³¹¹ Thus, the conundrum for the

³⁰⁴ See *supra* notes 18-21, 165-66 and accompanying text (describing liberty interests in choice of personal appearance).

³⁰⁵ See *supra* Part III.A (describing the military as a "separate society," in some respects).

³⁰⁶ For instance, a federal district court in one "appearance" case remarked of the controversy regarding a juvenile's method of wearing a baseball cap in a public setting: "This case involves a seemingly trivial matter, the wearing of one's baseball cap backward or forward. However, it raises important issues concerning the extent to which government officials can regulate any activity that might be an indicator of gang presence." *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1247 (D.N.M. 2000).

³⁰⁷ "Once military status is acquired . . . that person's . . . living conditions, privacy, and grooming standards are all governed by military necessity, not personal choice. In a nation that places great value on freedom of expression, freedom of association, freedom of travel, and freedom of employment, the armed forces stand as a stark exception." Nunn, *supra* note 130, at 559.

³⁰⁸ See, e.g., *United States v. Kazmierczak*, 37 C.M.R. 214, 219 (C.M.A. 1967) (noting that the military's traditions and customs dictate that service members do not enjoy the same degree of personal liberties as the citizenry at large).

³⁰⁹ See, e.g., *Rathert v. Village of Peotone*, 903 F.2d 510, 511 (7th Cir. 1990). *Rathert*, which addressed the constitutionality of prohibiting off-duty police officers from wearing earrings, begins its analysis with the somewhat incredulous phrase, "Male police officers wearing earrings? Yes . . ." *Id.*

³¹⁰ Klare, *supra* note 38, at 1400-01.

³¹¹ See *id.* at 1411 (noting that something so "mundane" as choice of hair style may constitute an assertion of cultural identity or celebration of self-esteem, especially where cultural or racial expression is involved); *Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 772 (Cal. Ct. App. 2002) ("[E]ven if a person's choice of dress and manner of appearance does not constitute the sort of expressive conduct protected by the First Amendment, it is nevertheless a form of individual expression that is constitutionally entitled to some protection against arbitrary governmental suppression."); see also Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards*,

military—and commanders charged with enforcing military policies—is to determine the conditions in which commanders should regulate service members' off-duty appearance.

A. Finding Common Ground

1. *Should There Be One Unifying Military Policy?*

Initially, it would appear that a simple first step toward demystifying the military's off-duty appearance policies would be for the DOD to unify each of the separate services' policies, by enacting an overarching DOD policy or by directing the implementation of common standards through each of the branches' regulations. Such a policy shift would interject more certainty and uniformity into the off-duty appearance debate. Differing service policies often have the residual effect of undermining cohesion and *esprit de corps*, especially in the increasingly common joint³¹² operational environment³¹³ of the current military structure. For example, the DOD's directive to the armed services to enact common standards of conduct regarding fraternization within the military ranks³¹⁴ attempted to resolve problems of cohesion and *esprit*.³¹⁵

Community Norms, and Workplace Equality, 92 MICH. L. REV. 2541, 2559 (1994) (noting that a prohibition against cultural appearance choices, such as braided hairstyles, may seem trivial to those who find such appearance "bizarre or threatening," but may seem significant to those wishing to assert their cultural identity through such appearance).

³¹² The term "joint" refers to "activities, operations, organizations, etc., in which elements of two or more Military Departments participate." JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (30 Nov. 2004). For instance, a military operation incorporating Army and Marine Corps elements constitutes a joint operation.

³¹³ See, e.g., Vivienne Heines, *Perspective from Tailhook: Time-Critical Targeting, Joint Operations Need Attention*, ARMED FORCES J., Nov. 1, 2003, at 21 (arguing for fuller integration between defense industry suppliers and the DOD, given the "increasingly joint nature of military operations" that dictates a centralized procedure for procuring military equipment).

³¹⁴ On 29 July 1998, then-Secretary of Defense William Cohen directed that the branches of the armed services "eliminate as many differences in disciplinary standards as possible and . . . adopt uniform, clear and readily understandable policies" regarding fraternization. Memorandum, Secretary of Defense, to Service Secretaries, Chairmen of the Joint Chiefs of Staff, and Under Secretaries of Defense, subject: Good Order and Discipline (29 July 1998) (on file with author).

³¹⁵ "Such differences," Secretary Cohen observed, "are antithetical to good order and discipline, and are corrosive to morale, particularly so as we move towards an increasingly joint environment." *Id.*; see also Paul Richter, *Pentagon Toughens Fraternization Rules*, L.A. TIMES, July 30, 1998, at A11 (describing different rules on

Any DOD unification of the different services' off-duty appearance standards, however, would alter greatly at least some of the services' policies. For instance, the Marine Corps and Air Force regulations currently impose punitive sanctions for violations of certain of their provisions,³¹⁶ while the Army does not.³¹⁷ Additionally, each of the services' regulations treat issues of body art in slightly different manners.³¹⁸ More importantly, the Marine Corps regulation is the most restrictive:³¹⁹ unification of appearance standards under one DOD umbrella policy necessarily would cause the other services to move away from their more "permissive" standards and toward the Marine policy, or *vice versa*. The prospects for such a "unifying" DOD policy to reach fruition are poor. The different military branches doubtless will hesitate to abdicate tradition, as well as control over their members' appearance, simply for the sake of "uniformity."³²⁰ More importantly, it is unlikely that the DOD would view such a policy as necessary, absent clamor for reform in this area.

2. *Settling on Common Regulatory Provisions*

Absent the enactment of a unifying DOD policy on personal appearance, the military services can interject more certainty and uniformity into certain off-duty appearance scenarios by reaching common ground on certain key provisions. Such commonality in prohibiting service-discrediting appearance and appearance that suggests

fraternization and different methods of enforcement between branches of the armed services, which prompted the Secretary to dictate a unified, DOD-wide fraternization policy).

³¹⁶ See *supra* notes 91-92 and accompanying text.

³¹⁷ The practical effect of the Army policy, therefore, is that service members may be punished for violating orders to comply with the regulation's requirements.

³¹⁸ See *supra* notes 72-90 and accompanying text (describing each branch of the military's differing standards regarding tattoos and body piercings).

³¹⁹ See *supra* Part II.E (noting that the Marine Corps' regulation permits punishment for any violation of any provision, whereas Air Force, Navy, and Army policies do not provide for automatic punishment for regulatory violations).

³²⁰ The Marine Corps, for example, was widely reported to be the most vocal critic of any attempts to relax fraternization standards in the late 1990s when the services' fraternization policies came under scrutiny. See, e.g., Bradley Graham, *New Rules on Adultery in Military Resisted*, WASH. POST, July 20, 1998, at A1; Michael Kilian, *Military Adultery Regulation Eased: Cohen Orders More Uniform Treatment Among the Services*, CHI. TRIB., July 30, 1998, at N3.

gang or extremist affiliation³²¹ would provide service members more certainty in terms of standards of acceptable appearance, and in terms of expected ramifications for violations. Managing service members' expectations is especially important in the current military joint operating environment.³²²

a. Service-Discrediting or Prejudicial—Profanity and Drugs

The first common requirement which each service's regulation might include relates to the wear of clothing that is prejudicial to good order and discipline or is service-discrediting. For instance, commanders may deem clothing that advocates illegal drug use³²³ or that broadcasts profane or indecent messages³²⁴ inappropriate for service member wear on a military installation. This follows from the power of and requirement for military installation commanders to regulate all that occurs on areas under their control.³²⁵

In cases in which appearance either communicates profanity or indecency, or advocates drug use, military commanders rightfully should be able to restrict service members' on-installation wear of such clothing or jewelry, on the basis that the message it communicates is

³²¹ This recommendation ignores, obviously, mention of prohibitions on unprotected speech, such as obscenity, fighting words, or dangerous speech. See *supra* text accompanying notes 231-36 (describing these categories of unprotected speech). Overarching constitutional prohibitions on such speech apply equally across the branches of the armed services, obviously.

³²² See *supra* note 315 (describing then-Secretary of Defense William Cohen's concern that differing rules on fraternization among the armed services lowered morale in the increasingly joint operational environment).

³²³ For instance, t-shirts depicting a marijuana leaf with the caption "legalize it" commonly would be viewed as advocating marijuana use. See, e.g., *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 161 (D. Mass. 1994).

³²⁴ The most obvious example relates to the t-shirt at issue in the Supreme Court's *Cohen v. California* decision. 403 U.S. 15 (1971). *Cohen* held impermissible a ban on a private citizen's wear of a shirt stating "Fuck the Draft." *Id.* at 25. Moreover, the Army's regulation governing personal appearance defines "indecent," in the context of tattoos, as something that is "grossly offensive to modesty, decency, or propriety; [that] shock[s] the moral sense because of [a] vulgar, filthy, or disgusting nature or tendency to incite lustful thought; or [that] tend[s] reasonably to corrupt morals or incite libidinous thoughts." AR 670-1, *supra* note 2, para. 1-8(e)(2)(b).

³²⁵ See *infra* notes 338-41 and accompanying text (describing Supreme Court jurisprudence granting military installation commanders great discretion in regulating activities on areas under their control).

inappropriate for association with the military, or that it undermines morale and discipline.³²⁶ Where on-installation appearance is implicated, the risk that civilians—or even the military community—will know and associate the articles' wearer with the military is high enough to warrant an outright ban on such appearance.

Regarding off-post enforcement of such prohibitions, the military must tread carefully, so as not to impinge on the free speech rights of its members. Such off-installation personal appearance should warrant neither prior proscriptions nor corrective measures after the fact, without a clear nexus³²⁷ between the service member's appearance and otherwise discrediting appearance. This, perhaps, is the reason that the Navy regulation (the only such service regulation addressing personal appearance that glorifies or advocates drug use), treads so cautiously in proscribing clothing and adornments that depict or advocate drug use.³²⁸

Where questions arise regarding the “profane” or otherwise service-discrediting quality of an article of clothing or jewelry, regulations should leave such determination to local commanders. This may occur, for example, where clothing conveys “double entendre”³²⁹ messages

³²⁶ See generally Campanella, *supra* note 15, at 85-86 (describing the rationale of providing a “non-hostile” work environment for all soldiers as a proper justification for prohibiting indecent body art); see also *United States v. Dykes*, 6 M.J. 744, 748 (N.M.C.M.R. 1978) (upholding an order banning possession of drug paraphernalia on the basis that it discouraged the use of illegal narcotics, thus furthering morale and discipline).

³²⁷ In this sense, the term “nexus” requires more than mere status of the individual as a member of the armed forces. It requires additional acts that identify that person as a service member (thus fulfilling a potential “service-discrediting” aspect of his conduct) or that imply DOD endorsement of his activities. For instance, the DOD permits service members to participate in local, nonpartisan political activities in their capacities as private citizens, provided that they do not wear their uniforms in pursuit of those activities. U.S. DEP'T OF DEFENSE, DIR. 1334.1, WEARING OF THE UNIFORM para. 3.1.2 (17 May 2004).

³²⁸ “Wearing or displaying clothing, jewelry, tattoos, etc., depicting marijuana or any other controlled substance or advocating drug abuse is prohibited at all times on any military installation *or under any circumstance which is likely to discredit the Navy.*” NAVY UNIFORM REGS., *supra* note 2, para. 7101(3) (emphasis added). The Navy regulation appears to acknowledge, without specifically stating so, that the wear of such clothing or articles may, in fact, *not* be service discrediting, if no clear nexus exists between the service member's “communication” of these messages and his status as a service member.

³²⁹ See, e.g., M. Christopher Bolen et al., *When Scandal Becomes Vogue: The Registrability of Sexual References in Trademarks and Protection of Trademarks from Tarnishment in Sexual Contexts*, 39 IDEA 435, 451 (1999) (describing the U.S.

containing both profane or indecent meanings, and those that are not profane or indecent.

b. Extremist and Gang Affiliation

A second area that each service's regulation might address in a coordinated manner relates to appearance that conveys extremist or gang affiliation. As with the identification-affiliation debate,³³⁰ however, such a prohibition must consider the possibility that appearance might convey purely unintended and inadvertent messages of extremist or gang affiliation.³³¹

Thus, such a policy should provide guidance on the types of appearance to be avoided. A key component of any military installation's proscription on "gang" or "extremist" appearance must be the proper definitions of the terms "gang" and "extremist." Without properly defining these terms, policies likely will not survive attacks on the basis of vagueness.³³² The Army policy on extremist activities, for example, provides a detailed definition of "extremist activities,"³³³ and service regulations or installation-level policies might properly incorporate this definition. Regarding "gang" definitions, military case law has likened gangs to criminal organizations and extremist groups.³³⁴

Trademark Trial and Appeal Board's registration of trademarks for such clothing brands as "Big Pecker Brand" and "Big Johnson's," and noting that for a trademark "consisting of crude terms or references to be registrable, something must still be left to the viewer's imagination other than the vulgar or profane meaning").

³³⁰ See *supra* notes 253-54, 263 and accompanying text (describing the legality of personal appearance choices that indicate identification with or affiliation with certain groups).

³³¹ See, e.g., *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1311 (8th Cir. 1997) ("Sadly, gang activity is not relegated to signs and symbols otherwise indecipherable to the uninitiated. In fact, gang symbols include common, seemingly benign jewelry, words and clothing. . . . Baseball caps, gloves and bandannas are deemed gang-related attire by high schools around the country." (citations omitted)).

³³² "We find no federal case upholding a regulation, challenged as vague or overbroad, that proscribes 'gang' activity without defining that term." *Id.* at 1309.

³³³ See *supra* note 257 and accompanying text.

³³⁴ See *United States v. Billings*, 58 M.J. 861, 865-66 (Army Ct. Crim. App. 2003). Moreover, the U.S. Supreme Court has implicitly validated the definition of "criminal street gang" as

[A]ny ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more . . . criminal acts

Service regulations should then direct local military installation commanders, when they deem necessary, to further define and prohibit on their installations the wear of specific articles of clothing, jewelry, or tattoos—or the mode of wearing clothing—that import gang or extremist affiliation. Permitting this latitude to local commanders has the additional advantage of allowing them to address and quash known gang or extremist affiliation problems that are common in the areas surrounding their installations. Courts have upheld bans on the wear of specific articles of clothing that signify gang affiliation, based on “public safety” and “prevention of disruption” rationales, for instance.³³⁵

B. Other Regulatory Improvements

As noted in the preceding section, each branch of the military can fairly easily enact regulations that establish common standards regarding service-discrediting appearance or extremist and gang affiliation. The harder issue—and one in which each branch of the service should receive leeway in regulating—regards the “grayer” areas of “appropriateness.” For instance, what type of clothing is so “revealing” that it warrants censure on a military installation? Or, where unofficial military events, such as office parties or military unit functions, permit the wear of civilian clothing, jewelry or hairstyles, what constitutes “inappropriate” appearance?

In regulating off-duty personal appearance, each branch of the armed services should afford commanders the discretion to make “appropriateness” determinations on a case-by-case basis. A necessary corollary of this approach is that commanders should be permitted to exercise more control over the appearance of service members who

. . . and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

See City of Chi. v. Morales, 527 U.S. 41, 47 n.2 (1999); *see also Stephenson*, 110 F.3d at 1309-11 (noting the fatally flawed definition of “gangs” in relation to a statute proscribing “gang activity”).

³³⁵ *See, e.g., Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 560-61 (D.N.M. 1985) (“[T]he dress code adopted at [the public school] was a reasonable response to the perceived problem of gangs within the school. Together with other measures taken by school administrators, adoption of the dress code may have been responsible for the perception of an improved climate and learning environment at the school.”); *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1429, 1462 (C.D. Cal. 1993).

remain within the confines of the “separate society” of a military installation.

1. On- Versus Off-Installation Application

The military has great discretion to govern its affairs on installations under its control. A military installation is, after all, a limited-access area subject to the installation commander’s control.³³⁶ Arguably, therefore, the military rightfully has a greater interest in regulating the appearance of its members when they physically are on military installations or other areas under military control, as opposed to off of those areas. Military off-duty appearance regulations should thus differentiate between a service member’s on-installation and off-installation appearance.

Military regulations should clearly delineate that off-duty appearance standards apply to service members on areas under military control, with some limited exceptions.³³⁷ The military has great authority to control the appearance of, and actions taking place within, its installations. From controlling the right of civilian entry,³³⁸ to imposing reasonable limits on speech,³³⁹ virtually everything that happens on a military installation, a publicly-owned but limited-access area,³⁴⁰ rests within the considered discretion of its commander.

It follows that a commander, having considerable discretion to control the lives of the service members under his or her command,³⁴¹

³³⁶ See, e.g., *Greer v. Spock*, 424 U.S. 828, 838 (1976) (noting that the government does not abandon control over a military installation simply by virtue of permitting limited public access).

³³⁷ Such exceptions are for service members who live in government housing on military installations. See *infra* text accompanying notes 343-44 and accompanying text (describing government housing of service members).

³³⁸ See, e.g., *Brown v. Glines*, 444 U.S. 348, 354-57 (1980); *Greer*, 424 U.S. at 840.

³³⁹ See, e.g., *Ethredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995) (upholding the validity of a military installation commander’s order banning bumper stickers that disparaged the President of the United States).

³⁴⁰ See, e.g., *Brown*, 444 U.S. at 356 & n.13 (noting that civilians have “no specific right to enter a military base”); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 893 (1961) (noting the installation commander’s extensive and exclusive authority to control entrance to, and residence in, a military installation).

³⁴¹ See, e.g., *Brown*, 444 U.S. at 356 (describing installation commanders’ duty to maintain morale, discipline, and readiness); *Greer*, 424 U.S. at 837-38 (noting an installation commander’s authority to ban certain written materials from the installation).

also has considerable discretion to regulate their off-duty appearance, at least while they remain physically within this “separate society.” Courts generally uphold civilian dress codes differentiating between male and female appearance standards, for instance, if the codes rely on “generally accepted community standards” regarding appearance.³⁴²

Nevertheless, military installations also are “home” to many service members who occupy government housing.³⁴³ These service members live on the installation, and are subject to the installation’s rules.³⁴⁴ No military regulation governing personal appearance currently includes exceptions for service members who remain in the confines of their homes on the military installation. This, perhaps, is an unintended result of military appearance regulations, but it remains a significant concern.

The practical—even if unintended and unenforced—effect of these regulations, when they mandate certain “on-installation” and, therefore, “in-home” appearance, is that service members forfeit some of their liberty interests if they choose to dress in certain ways in the privacy of their own homes on a military installation. Each branch of the military should consider amending their regulations to permit relaxed standards of personal appearance when service members remain inside their homes or on their property on military installations.

³⁴² See, e.g., *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (upholding, in the face of a Civil Rights Act challenge, a private employer’s dress code requiring different hair lengths for men and women, on the basis that such requirements rely only upon “generally accepted community standards of dress and appearance”).

³⁴³ In Fiscal Year 2004, for instance, the DOD owned and managed about 230,000 family housing units for military families. GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: OPPORTUNITIES EXIST TO BETTER EXPLAIN FAMILY HOUSING O&M BUDGET REQUESTS AND INCREASE VISIBILITY OVER REPROGRAMMING OF FUNDS, GAO-04-583, at 4 (May 27, 2004). As of February 2004, the DOD “privatized” about 55,000 housing units by transferring them over to civilian companies to manage, and expected to privatize another 160,000 more by the end of Fiscal Year 2007. *Id.* at 5.

³⁴⁴ For instance, installation commanders may suspend or revoke driving privileges on their installation, for cause. U.S. DEP’T OF ARMY, REG. 190-5, MOTOR VEHICLE TRAFFIC SUPERVISION para. 2-5 (8 July 1988). Installation commanders also may evict tenants of government housing on the installation, for cause. See U.S. DEP’T OF ARMY, REG. 210-50, HOUSING MANAGEMENT para. 3-23 (26 Feb. 1999) (detailing steps that commanders should take in determining whether to evict installation housing occupants). Commanders also may dictate the circumstances under which solicitors may frequent a military installation to sell products or services. U.S. DEP’T OF ARMY, REG. 210-7, COMMERCIAL SOLICITATION ON ARMY INSTALLATIONS para. 2-1 (22 Apr. 1986).

Once a service member departs a military installation, and provided his appearance does not implicate aforementioned modes of unacceptable communication,³⁴⁵ his liberty interest in expressing his individuality normally will outweigh the military's interest in forcing him to conform to the military's notion of "good taste." While service members retain their legal status as military members when they depart an installation, they shed some of the characteristics that help to identify them, physically, as service members. Their off-duty time is uniquely their own, to a great extent, and their self-identities should be their own, as well.³⁴⁶

2. Time, Place, Circumstances, and Purpose Considerations

Current military case law regarding personal appearance can assist military appearance regulations to achieve some degree of uniformity and certainty. Specifically regulations can require commanders to utilize the same "time, place, circumstances, and purpose" test regarding off-duty appearance which military case law has utilized in certain circumstances.³⁴⁷ Such a test would permit commanders to balance the physical appearance of off-duty Soldiers against the circumstances involved, in a particular case.³⁴⁸ Before permitting commanders to curtail a service member's personal appearance choices, regulations

³⁴⁵ See *supra* text accompanying notes 231-33 (describing the regulation of unprotected speech); *supra* notes 256-57 and accompanying text (describing the military's regulation of personal appearance that advocates discrimination).

³⁴⁶ Obviously, military members have no liberty interest outweighing military interests where their choice of appearance infers allegiance with, for instance, gangs or extremist groups. This article does not suggest that the military's interest in maintaining discipline outside the installation gates lessens, in this context.

³⁴⁷ See, e.g., *United States v. Modesto*, 39 M.J. 1055 (A.C.M.R. 1994), *aff'd*, 43 M.J. 315 (1995); *United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991). Both *Guerrero* and *Modesto* examined the allegedly discrediting or prejudicial nature of service members' off-duty conduct involving cross-dressing. See *supra* notes 180-84 (describing military case law addressing off-duty appearance standards, including situations involving cross-dressing).

³⁴⁸ Such is the approach of the *Guerrero* decision. The court declared, for example, that "if a service member cross-dresses in the privacy of his home, with his curtains or drapes closed and no reasonable belief that he was being observed by others or bringing discredit to his rating as a petty officer or to the U.S. Navy, it would not constitute the offense." *Guerrero*, 33 M.J. at 298. The court also noted that the off-duty appearance conundrum is "one not easily disposed of under the general rubric of prejudice or discredit. It is difficult because [controversial appearance] can certainly be non-prejudicial and even enhance morale and discipline." *Id.*

should require a clear nexus between an individual's off-duty appearance and other facts that identify him as a service member, *other than* his mere status as a member of the military.

Regulations should permit a relaxed appearance standard for off-installation appearance, based on the "lesser" military interests involved in regulating personal appearance. However, where certain special circumstances involving a military nexus are involved,³⁴⁹ regulations should permit commanders to determine whether—based on all attendant circumstances—a service member's appearance is appropriate. For instance, a service member's wear of cutoff shorts and a tank top may be "acceptable" in a legal sense, for everyday off-post wear. However, the same clothing may be inappropriate for wear in certain public areas of a military installation³⁵⁰ or at a military event hosted off the installation.³⁵¹ In the aforementioned two circumstances, the nexus between the service member's status (either as a service member taking advantage of opportunities offered on the installation, or as a military member attending a military event) is clear. A provision permitting commanders to dictate the appropriateness of such clothing, in such circumstances, thus is rational.

Or, consider the case of body piercings: the military legally might forbid a male service member's wear of an earring on at least the *public* areas of an installation,³⁵² based on commanders' heightened interest in regulating activities that occur there. The nexus between the service member's right to be present on the installation and his status as a service member is obvious.

However, regulations should provide that the same service member has a heightened liberty interest in his personal appearance once he steps outside the gate of that installation. Regulations should permit the male

³⁴⁹ These circumstances are as varied as are the controversial appearance issues that they raise. They include, for example, situations involving off-duty, unofficial military events, such as unit or office picnics. They also might include situations in which a service member's appearance borders on service-discrediting, such as her wear of clothing that conveys a profane message, and in which she takes other actions drawing attention to her status as a service member.

³⁵⁰ Such public areas include, for example, installation movie theaters, commissaries, and exchanges.

³⁵¹ Such events include, for example, office picnics or other gatherings that occur outside the boundaries of a military installation.

³⁵² See *supra* notes 336-41 and accompanying text (discussing commanders' exercise of discretionary functions over installations that they control).

service member to wear an earring under those circumstances, if there is no military nexus—other than his mere status as a service member—to his off-installation activities.³⁵³ Again, a regulatory provision that requires a military nexus before limiting off-installation appearance is rational, and will provide more certainty both for service members and for commanders charged with enforcing appearance standards.

C. Addressing Vagueness Concerns

By attempting to provide descriptions of manners of appearance that are acceptable, military regulations governing appearance understandably muddy the water. The outer limits of terms such as “conservative” and “in good taste” rest in the eyes of the beholder. Regulation drafters undoubtedly have one ideal, while eighteen-year-old recruits may have another. Thus, it is disconcerting that regulations which are drafted, approved, and implemented by officers threaten to impact disproportionately on the military’s enlisted ranks. The terms “conservative” and “good taste” perhaps import certain meaning within the officer corps, which they may not, within the enlisted ranks. The U.S. military is a tradition-laden institution, and its ranks remain rather sharply divided along socioeconomic, or “class” lines.³⁵⁴ Put more bluntly, military members commonly understand that officers are expected to “act and dress the part.”³⁵⁵ Therefore, when regulations leave commanders to their own devices to decide what is—or is not—

³⁵³ The Army, Navy, and Air Force regulations currently permit male members to wear earrings when off duty and off of military installations. *See supra* notes 77, 82, 88 and accompanying text. However, the Marine Corps maintains a blanket prohibition on such wear. *See supra* note 54 and accompanying text.

³⁵⁴ *See, e.g.,* Turley, *supra* note 10, at 63 n.288. Professor Turley argues, for instance, that “officers remain part of the educated and relatively affluent class. . . . [T]hey remain ‘officers and gentlemen’ who are separated by more than simple rank. Officers do not socialize or fraternize with enlisted personnel and share a common identity as the managing class” *Id.* Moreover, Professor Turley adds, “the sharp division of enlisted personnel and officers—as well as such preferred entry qualifications like college degrees—preserve social stratification and class elements in military service.” *Id.* at 66 n.296. *But see* LIEUTENANT COLONEL KEITH E. BONN, ARMY OFFICER’S GUIDE 83 (49th ed. 2002) (observing that “[t]he Army is *not* a caste system” and that it represents a “contract between *equals* serving in different capacities with different roles, responsibilities, and compensation”).

³⁵⁵ For instance, the Army Officer’s Guide advises officers that for casual get-togethers, “[g]entlemen are never wrong to wear a sport jacket and dress slacks . . . and ladies should wear a blouse and skirt or slacks or a simple dress.” BONN, *supra* note 354, at 414.

“conservative,” “eccentric” or in “good taste,” the risks are two-fold. First, commanders may improperly attempt to enforce more stringent standards throughout the officer and enlisted ranks than even the regulations intend.³⁵⁶ Second, commanders may fail to apply the standards evenhandedly throughout the officer and enlisted ranks, under the demeaning presumption that enlisted members do not “know” how to, or are not expected to, dress or appear appropriately.

If regulations choose to refer to terms such as “good taste” or “conservative,” it is more prudent to describe what manner of dress definitely does not meet the definition. Numerous installation-level policies, for instance, detail the types of clothing which installation commanders have determined are inappropriate and thus prohibited.³⁵⁷ Some of those local appearance standards rightfully may be reactions to particular problems observed by the installation commander.

Service regulations should consider incorporating such descriptions, in order to contextualize otherwise vague terms. Each service’s regulation also should mandate that installation commanders, in implementing the regulation, further define the potentially vague terms at the local level through those commanders’ promulgation of policy letters.

D. Considering Punitive Measures

The potential for commanders to enforce vague standards of “acceptability” in arbitrary ways warrants that service regulations governing personal appearance should not be punitive in their entirety. There is too great a potential for arbitrary enforcement of standards that

³⁵⁶ The United States Court of Military Appeals, for instance, noted this when overturning a Soldier’s conviction for failing to obtain a hair cut to conform to an Army appearance regulation that his commander interpreted. *United States v. Young*, 1 M.J. 433, 436 (C.M.A. 1976). As the *Young* court noted, where regulations use descriptors such as “excessive,” such regulations may still import far more permissible appearance standards than a commander is prepared to tolerate. *Id.* at 435.

³⁵⁷ See, e.g., XVIII AIRBORNE CORPS AND FORT BRAGG REG. 600-2, INSTALLATION DRESS CODE (23 Sept. 1994) (prohibiting the on-post wear of clothing such as that which depicts drug use or drug paraphernalia or that “is immodest or likely to offend other patrons”), available at <https://airborne.bragg.army.mil/pubs/Regs/reg600-2.doc>; Policy Letter CSM-01, Headquarters, III Corps and Fort Hood, subject: Uniform and Appearance Policy (Apr. 2004) (forbidding the on-post wear of shorts, skirts or “cut-off” pants that expose “any part of the buttocks,” as well as the on-post wear of halter tops and tank tops in any Army and Air Force Exchange Service facility) (copy on file with author).

do not lend themselves to easy interpretation.³⁵⁸ Service members should not face the threat of punishment simply for violating prohibitions on “eccentric” appearance, or for failing to maintain a “conservative” appearance. However, where regulations specifically articulate certain standards,³⁵⁹ the violations of which are punishable under the UCMJ, regulations place service members on notice that their actions regarding appearance are punishable.

As this article notes, the U.S. Marine Corps has made a conscious policy choice that a violation of *any* of its appearance regulation’s provisions could prompt punishment under the UCMJ. Concomitantly, the Army apparently has determined that violations of its appearance regulation’s terms do not, in and of themselves, warrant punishment, *per se*. This difference in approaches reveals, apparently, the strength of the respective services’ feelings, regarding how their members should appear out of uniform. A perhaps more even-handed approach is that which the Air Force takes: to provide for possible punitive sanctions for certain enumerated appearance infractions, the violations of which the Air Force apparently believes are especially serious.

VII. Conclusion

This article calls for the different branches of the armed services to revisit their off-duty appearance policies; it does not call for the retraction of those policies. Judicial deference to the military “separate society” virtually has eliminated the need for the armed services to articulate the bases for many—if not most—service regulation provisions, even outside of the “appearance” realm. Nevertheless, it is time for the services to undertake a more circumspect examination³⁶⁰ of

³⁵⁸ For instance, former Secretary of the Navy John Lehman commented about changing attitudes toward hairstyles among service members: “Braids and cornrows are perfectly appropriate, as long as they’re kept neat, clean, trimmed, and compatible with military headwear.” Whittle, *supra* note 118, at A1. Conversely, a Marine Corps spokesman confided that “I don’t think that cornrows would be necessarily welcome, simply because they would be considered eccentric.” *Id.*

³⁵⁹ For instance, regulations might specifically state that the on-installation wear of clothing or jewelry that conveys a clearly profane message, or that glorifies or advocates drug use, is punishable as a violation of those regulations.

³⁶⁰ In this context, a “circumspect examination” would require services to examine whether and to what extent the implementation of off-duty appearance standards promotes good order and discipline, *esprit de corps*, and promoting a positive public image. See *supra* Part IV.B (discussing the rationales of good order and discipline, *esprit*

the policies they enact, in light of the historical underpinnings for those policies. This type of evaluation by the services is overdue. A service review will not automatically prompt the retraction of those policies, necessarily. Instead, it merely will require the services to articulate more fully the bases for their decisions.

The liberty interests involved in choice of off-duty personal appearance will always conflict, to some extent, with valid military interests in maintaining discipline, unity, and public image. This is not a remarkable proposition; societal and cultural values have clashed with the customs of the “separate society” virtually since the inception of the military. To a great extent, the military has a valid interest in regulating the appearance of its off-duty members, at least where service members’ individuality threatens to undermine important military interests.

Nevertheless, military off-duty appearance standards will continue to evolve, even if slowly over time, as the military faces greater pressures to make itself “look like America.” The challenge the military faces will be to hold firm where off-duty personal appearance trends threaten truly valid military interests, and yet to abandon irrational stereotypes of what it means to “be” a service member, where no rational bases exist for its off-duty appearance policies. The debate over these competing interests is healthy; it will force the military to articulate its rationales, and potentially show service members the dangers involved in some of their appearance decisions.

de corps, and public image). Such an examination need not rise to the same level of agency review of its own actions under the “Hard Look” doctrine, which governs federal agency rulemaking. See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 662-63 (1996) (describing the “Hard Look” doctrine as requiring agencies to produce “elaborate justifications” for their determinations in order to survive judicial scrutiny of their rulemaking). Rather, such an examination would require, for instance, that the services describe within their appearance regulations the purposes that are furthered.

**MAKING SENSE OF CRUEL AND UNUSUAL PUNISHMENT: A
NEW APPROACH TO RECONCILING MILITARY AND
CIVILIAN EIGHTH AMENDMENT LAW**

CAPTAIN DOUGLAS L. SIMON*

*It cannot be helped, it as it should be, that the law is
behind the times.*¹

I. Introduction

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”² The drafters of the amendment did not write these clear prohibitions in a vacuum. Early on, the Founding Fathers recognized the past abuses the Crown inflicted on the English people.³ Torture and barbaric treatment “were notoriously applied” to the accused and guilty alike, with those receiving a conviction from the many English offenses most likely sentenced to death.⁴ From this history lesson, the Founding Fathers borrowed England’s prohibition against cruel and unusual punishment found in the English Bill of Rights of 1689.⁵ In borrowing the cruel and unusual language, the Framers intended to prohibit

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¹ RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 192 (Suzy Platt ed., 1993) (citing OLIVER WENDELL HOLMES, SPEECHES BY OLIVER WENDELL HOLMES (1913)).

² U.S. CONST. amend. VIII.

³ *Furman v. Georgia*, 408 U.S. 238, 317 (1972) (Marshall, J., concurring) (commenting on the history of the cruel and unusual punishment in English history).

⁴ *Id.* at 316.

⁵ *Id.* at 318.

objectionable and barbaric modes of punishment.⁶ Since the amendment's ratification in 1791, the Supreme Court construes the Cruel and Unusual Punishment Clause to require a *per se* prohibition against modes of punishment that inflict "the unnecessary and wanton infliction of pain."⁷ Yet the Supreme Court interprets the Clause to mean much more than dispelling punishments that were barbaric and cruel at the time of the English Bill of Rights' promulgation. The Court's interpretation has led to recognition that punishments that are excessive, or disproportionate to the crime, also violate the Eighth Amendment.⁸

Much of the development of Eighth Amendment law is an extension of the death penalty debate and the death penalty's proper role in a civilized society.⁹ The Court, in construing the appropriateness of the death penalty, fashioned a legal doctrine to guide the death penalty's decision making. This doctrine, which the Court refers to as "evolving standards of decency," is an elastic, progressive doctrine that assumes change.¹⁰ This doctrine is essentially a three-pronged analysis.¹¹ First, the Court surveys the text and legislative history of the Eighth Amendment to ascertain whether a particular mode of punishment was so barbaric at the time of the amendment's ratification that it is inherently unconstitutional today.¹² Second, if the Court is unable to discover the

⁶ *In re Kemmler*, 136 U.S. 436, 446 (1890) (explaining the historical underpinnings of the Cruel and Unusual Punishment Clause and that it extends to the prohibition of manifestly barbaric punishments).

⁷ *Gregg v. Georgia*, 428 U.S. 153, 171-73 (1976) (explaining that the principal purpose of the Cruel and Unusual Punishment Clause is to prohibit punishment that is nothing more than the gratuitous infliction of pain and suffering).

⁸ The terms "excessive" and "disproportional" are used interchangeably throughout this article. *See, e.g., Furman*, 408 U.S. at 457 (Powell, J., dissenting) (referring to the punishments handed down in *Weems* as "grossly excessive" and "disproportional" for particular crimes).

⁹ The phrases "Eighth Amendment law" and "substantive Eighth Amendment law" are used interchangeably with the "Cruel and Unusual Punishment Clause." This clarification is offered to inform the reader that the Eighth Amendment's prohibition against excessive bail or fines is not considered in this article's proposed framework. *See infra* Part IV.

¹⁰ *See Earl Martin, Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 93 (1997) (discussing how the doctrine assumes the possibility of change).

¹¹ *But cf. LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 27* (LEXIS 2004) (identifying the evolving standards of decency doctrine as a two-pronged analysis rather than a three-pronged analysis).

¹² *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (citing a major premise of the Eighth Amendment that methods and modes of punishment that were cruel and unusual at the time of the Bill of Rights' ratification are cruel and unusual today).

Framer's intent on a mode of punishment, the Court considers whether a particular punishment comports with the norms and values of contemporary society.¹³ To determine society's mores on the death penalty, the Court considers two crucial indicators: laws enacted by state legislatures and jury decisions.¹⁴ From this survey, the Court attempts to decide whether a "national consensus" exists on the acceptability of the death penalty for the type of crime or for a distinct class of offenders.¹⁵ In addition to the legislative and jury components, the Court relies on public opinion polls, international opinion, and comments by professional associations.¹⁶ Individually and collectively, these societal measurement tools are controversial among some Court members. In particular, the concern of some members rests on whether it is constitutionally appropriate for these components to enter into the Court's cruel and unusual analysis.¹⁷ Third, the Court brings its own judgment to bear on the acceptability of capital punishment.¹⁸ In doing so, the Court looks to whether a particular punishment meets societal goals, like retribution and deterrence.¹⁹ The Court's interest in bringing its own independent judgment to bear ensures the challenged punishment comports with "human dignity."²⁰ Among some justices critical of the third prong, it merely represents a convenient method for invalidating death penalty legislation.²¹ Nevertheless, the doctrine as a whole is well received by the Court and contributes extensively to the development of Eighth Amendment jurisprudence.

An intellectually rich doctrine, shortcomings do still exist. The doctrine's exposure to civilian courts is apparent through more than one hundred years of history. In military jurisprudence, the doctrine's application is scant. With a few exceptions, the doctrine's applicability occurs only in military cases discussing conditions of confinement.²² The result is a murky, doctrinal gap that fails to address the full range of constitutional protections against cruel and unusual punishment that must apply in some way within the military. It is unsettling that a framework

¹³ See CARTER & KREITZBERG, *supra* note 11, at 27.

¹⁴ See discussion *infra* pt. II.B.1-2.

¹⁵ See *id.*

¹⁶ See *infra* notes 211-38 and accompanying text.

¹⁷ See *infra* notes 215, 217-18, 224, 226, 231, 233, 236-37 and accompanying text.

¹⁸ See discussion *infra* pt. II.B.3.

¹⁹ See *id.*

²⁰ See CARTER & KREITZBERG, *supra* note 11, at 27.

²¹ See *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (criticizing the Court for assuming too much power in invalidating state death penalty laws).

²² See discussion *infra* pt. III.B.

does not exist to reconcile the divergent interests of military and civilian Eighth Amendment law.

There is a new approach. The intent is to harmonize the competing interests of civilian and military Eighth Amendment law, yet still maintain a criminal justice system responsive to the military's needs. In this light, this article advocates a two-track system that seeks to bridge the doctrinal gap between civilian and military courts in applying evolving standards of decency. Track one applies civilian Eighth Amendment substantive law. This track recognizes that various crimes and punishments within the civilian criminal justice system are similar to offenses and punishments found within the military's criminal justice system.²³ Like offenses and punishments should follow one coherent legal regime that maintains consistency and fairness to the accused. Track two recognizes that the military contains offenses and punishments which share no civilian counterpart and, therefore, a different standard should govern.²⁴ That is, because the evolving standards of decency doctrine relies on an index of state legislatures to determine the appropriateness of punishment—indeed, the state legislative index is the doctrine's primary component—its application to the military is doctrinally unworkable.²⁵ State legislatures do not share the military's laws for unique crimes and punishments, especially in times of war, and therefore, it is inappropriate—if not impossible—to fairly gauge the sentiments of society against a method or form of punishment. For that reason, this article advocates for a rational basis application when the offense or punishment is unique to the military.

Part II of this article provides the historical backdrop for the doctrine's creation, development, and further refinement. This section examines the doctrinal components, primarily considering death penalty cases challenged on excessiveness grounds, and also addresses methods of punishment perceived as barbaric. In addition, this section examines the doctrine's relevancy to noncapital disproportionality challenges and conditions of confinement. Part III considers the Eighth Amendment's application to the military, reviewing its history and the drafting of Article 55 of the Uniform Code of Military Justice (UCMJ). Part IV addresses the problems with applying a pure evolving standards of decency analysis to the military. This section offers a framework to

²³ See discussion *infra* pt. IV.A.

²⁴ See discussion *infra* pt. IV.B.1-2.

²⁵ See *infra* notes 312-13 and accompanying text.

harmonize the military's interest in assuring that it can effectively punish Soldiers who commit the vilest of crimes, with the civilian court's interest in ensuring that the protections of the Cruel and Unusual Punishment Clause are available to all. In particular, Part IV explores the feasibility of applying a two-track framework that is flexible and doctrinally logical in incorporating evolving standards of decency to both civilian and military life. Part V concludes by emphasizing that military and civilian courts need an Eighth Amendment framework that is flexible enough to meet the military's needs during war and peace.

II. Evolving Standards of Decency: A Brief History

In Supreme Court jurisprudence, evolving standards of decency began its doctrinal development in *Weems v. United States*.²⁶ Before *Weems*, the Court interpreted the Cruel and Unusual Punishment Clause only to prohibit modes of punishment that were barbaric and cruel.²⁷ *Weems* changed this; in *Weems* the Court addressed whether fifteen years imprisonment at hard labor constituted excessive punishment for petty theft.²⁸ The defendant maintained a position as a disbursing officer with the Bureau of Coast Guard and Transportation located in the Philippine Islands.²⁹ While in this position, the defendant falsified a "public and official document,"³⁰ which led to the unlawful conversion of 612 pesos.³¹ Upon conviction by a Philippine court, the defendant received a sentence of *cadena temporal*.³² The defendant received fifteen years

²⁶ 217 U.S. 349 (1910).

²⁷ See, e.g., *In re Kemmler*, 136 U.S. 436, 447 (1890) (holding that the Eighth Amendment's protection against cruel and unusual punishment is implicated when punishment amounts to torture or furthers a lingering death); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (holding that a sentence of public execution by firing squad did not violate the Eighth Amendment). In *Wilkerson*, the Court further mentioned that there is "[d]ifficulty . . . attend[ing] the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Wilkerson*, 99 U.S. at 135-36.

²⁸ *Weems*, 217 U.S. at 358.

²⁹ *Id.* at 357.

³⁰ *Id.*

³¹ *Id.* at 358.

³² *Id.* At a minimum, *cadena temporal* imposed imprisonment for twelve years and one day. BLACK'S LAW DICTIONARY 195 (7th ed. 2000). Derived from Spanish law, *cadena* is defined as "[a] period of imprisonment; formerly, confinement at hard labor while

imprisonment, hard labor, confinement to chains at the ankles, lifetime surveillance, and a fine of 4,000 pesetas.³³ In reaching its decision, the Supreme Court searched for the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause, considering whether it applied, if at all, to punishments that may be excessive, but were not "inhuman and barbarous, and something more than the mere extinguishment of life."³⁴ In its inquiry, the Court found that the protection from cruel and unusual punishment did indeed go beyond simply the method of punishment, but the excessiveness of punishment as well.³⁵ Justice Joseph McKenna, for the Court majority, identified the progressive nature of the Eighth Amendment, stating "[t]he clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as the public opinion becomes enlightened by a humane justice."³⁶ This interpretation permitted this and successor Courts to consider cruel and unusual punishment challenges that are not fixed to an Eighteenth Century definition of punishment—like whipping, burning at the stake, disemboweling, or breaking on the wheel—but that are simply excessive.³⁷ In other words, *Weems* broke new ground in establishing an Eighth Amendment jurisprudence that did not concern itself with simply the method of punishment (the Clause's traditional interpretation), but whether the Clause should reflect society's changing values and norms toward punishment (or the standard today toward an evolving definition of punishment). Not until *Trop v. Dulles*,³⁸ almost fifty years after

chained from waist to ankle." *Id.* *Cadena temporal* is defined as "[i]mprisonment for a term less than life." *Id.* *Temporal* is a Spanish term for incarceration. *Id.*

³³ *Id.* at 364-66.

³⁴ *Weems*, 217 U.S. at 370 (citing *In re Kemmler*, 136 U.S. 436, 447 (1890)); see also *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting) (explaining the difficulty in interpreting a constitutional provision "that is less than self-defining" and "the most difficult to translate into judicially manageable terms").

³⁵ *Weems*, 217 U.S. at 378. The Court reviewed the history of the protection against cruel and unusual punishment going back to the reign of the Stuarts, where cruel and barbaric punishments were levied against the accused. *Id.* at 371-72. From this, the Court gleaned that the Eighth Amendment, if nothing else, checked overzealous power of the state. *Id.* at 373. On this point, the Court commented that, "[t]his [checking state power] was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history." *Id.*

³⁶ *Id.* (citing *Ex parte Wilson*, 114 U.S. 417, 427 (1885)) (commenting that "punishments . . . considered as infamous may be affected by the changes of public opinion from one age to another").

³⁷ *Id.* at 377.

³⁸ 356 U.S. 86 (1958).

Weems, however, did the Court crystallize how changing societal attitudes can influence the meaning of cruel and unusual punishment.

In *Trop*, the Court considered whether denationalization of a native-born American citizen violated the Eighth Amendment.³⁹ At issue was Section 401(g) of the Nationality Act of 1940, which said that U.S. citizens shall lose their citizenship by “[d]eserting the military or naval forces of the United States in time of war”⁴⁰ The defendant did just that while serving with the U.S. Army in French Morocco.⁴¹ The defendant, confined to a stockade in Casablanca for prior misconduct, escaped, and an Army truck picked him up less than a day later.⁴² “A general court-martial convicted [Mr. Trop] of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge.”⁴³ This court-martial conviction, combined with the penal nature of Section 401(g) of the Nationality Act, resulted in the defendant becoming stateless.⁴⁴ It is this limbo status that the Court found untenable. Writing for a plurality of the Court, Chief Justice Earl Warren stated that “[becoming stateless] is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”⁴⁵ Yet, the Court did not stop at merely articulating its disdain for the harshness of the punishment; instead, Chief Justice Warren began to craft the legal argument for why such punishment violated basic Eighth Amendment protections. It is here that the Court fashioned the language that it believed captured the meaning of the Eighth Amendment’s Cruel and Unusual Punishment Clause: “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴⁶ Recognizing the language’s infinite meanings, the Court began to define at length what the doctrine meant. For this inquiry, the Court needed something to measure the maturity of a society. Taking a comparative perspective, the Court looked to a United Nations survey of eighty-four nations.⁴⁷ In this survey, the Court found

³⁹ *Id.* at 88.

⁴⁰ *Id.* at 87 n.1.

⁴¹ *Id.* at 87.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 88.

⁴⁵ *Id.* at 101.

⁴⁶ *Id.* The Court implicitly took the position that it was writing from a blank slate, as the terms “cruel” and “unusual” are imprecise, and because of this, the Court felt free to expound on what the Clause meant at that time. *Id.* at 100 n.32, 103.

⁴⁷ *Id.* at 102-03.

only two countries which imposed the penalty of denationalization for desertion, the Philippines and Turkey.⁴⁸ From this data, the Court found that denationalization for wartime desertion did not comport with civilized standards.⁴⁹ This finding, coupled with the Court's pronouncement that the Eighth Amendment is progressive rather than static, gave the Court the basis to find Section 401(g) of the Nationality Act unconstitutional.⁵⁰ It is this rationale, which provided the Court its intellectual footing to challenge excessive punishment, both for capital and noncapital offenses, on Eighth Amendment grounds.⁵¹

The Court reaffirmed its willingness to examine excessive punishment in *Robinson v. California*.⁵² In *Robinson*, California criminalized addiction to narcotics, and consequently, the defendant, a narcotics user, was convicted and sentenced to ninety days imprisonment.⁵³ Justice Potter Stewart, writing the opinion for the Court, relied on the excessive punishment rationale to hold that "in the light of contemporary human knowledge," such a penalty amounts to cruel and unusual punishment.⁵⁴ With *Trop* and *Robinson*'s legal rationale soundly established, relying on the progressive character of the Eighth Amendment, the Court next turned to the constitutionality of the death penalty.

A. Challenging the Death Penalty: The Early Cases

The earliest capital case invoking evolving standards of decency to challenge the legitimacy of the death penalty is *Rudolph v. Alabama*.⁵⁵

⁴⁸ *Id.* at 103.

⁴⁹ *Id.* at 102. Civilized standards to the Court could be drawn from the Eighth Amendment, where "[t]he basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100.

⁵⁰ *Id.* at 103-04.

⁵¹ *See id.* at 102-03. The Court further left open the possibility that the punishment of death itself could be questioned, "in a day when it is still widely accepted, [the death penalty] cannot be said to violate the constitutional concept of cruelty." *Id.* at 99.

⁵² 370 U.S. 660 (1962).

⁵³ *Id.* at 660 n.1.

⁵⁴ *Id.* at 666. *Robinson* is significant because a majority of the Court agreed with an excessiveness rationale, unlike *Trop* where only a plurality was garnered; yet it should be noted that the *Robinson* Court did not specifically cite to *Trop*. *Id.*

⁵⁵ 375 U.S. 889-90 (1963) (Goldberg, J., dissenting from a denial of writ of certiorari) (arguing that world-wide trends support at least a discussion of whether it is appropriate to punish a convicted rapist with the death penalty).

In *Rudolph*, the Court denied a writ of certiorari for review of a death penalty conviction for rape.⁵⁶ Dissenting from the denial, Justice Joseph Goldberg argued that punishing convicted rapists with the penalty of death was contrary to trends within the states⁵⁷ and the world,⁵⁸ and therefore, merited consideration.⁵⁹ Five years after *Rudolph*, the Court again considered evolving standards of decency in *Witherspoon v. Illinois*, but only tangentially.⁶⁰ Nevertheless, even though the Eighth Amendment was not squarely at issue, the Court articulated the critical value of juries, stating that “one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’”⁶¹ Soundly relying on evolving standards of decency, the Court suggested that the jury is the body that encapsulates those changing, evolving societal norms that reflect the conscience of the community.⁶²

Jury sentencing resurfaced three years later in *McGautha v. California*.⁶³ Unlike *Witherspoon*, which concerned the disqualification of jurors who were morally opposed to the death penalty, *McGautha* dealt with whether juries could award the death penalty in an absence of standards to guide their decision.⁶⁴ Referring to *Witherspoon* and *Trop*, the Court recognized the important link that juries serve in representing society’s collective conscience, but failed to provide an in-depth discussion on how this should determine the role of juries in the future.⁶⁵ Nevertheless, the impact of *Witherspoon* and *McGautha* is the emphasis

⁵⁶ *Id.* at 889; *see also* Martin, *supra* note 10, at 93.

⁵⁷ *Rudolph*, 375 U.S. at 890 (noting the trend in the states is to no longer permit the penalty of death for rape).

⁵⁸ *Id.* at 890 n.1 (relying on a United Nations survey where only five countries continued the use of the death penalty for convicted rapists: Nationalist China, Northern Rhodesia (now Zambia), Nyasaland (now Malawi), Republic of South Africa, and the United States).

⁵⁹ *Id.* at 889.

⁶⁰ 391 U.S. 510, 518-19 (1968) (holding that the state of Illinois infringed on the defendant’s right to an impartial jury when those jurors who opposed capital punishment on moral grounds were systematically excluded for cause).

⁶¹ *Id.* at 520 n.15 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁶² *Id.* at 519-20.

⁶³ 402 U.S. 183 (1971).

⁶⁴ *Id.* at 196.

⁶⁵ *Id.* at 202. The Court held that the absence of standards to guide the jury’s discretion as to whether to award a life sentence or the death penalty was constitutional. *Id.* at 221-22.

on the jury as an important, objective component in defining societal norms that shape the meaning of evolving standards of decency.⁶⁶

The 1970's marked a period of reflection for Eighth Amendment jurisprudence. The Court, troubled with the death penalty's selective application on society's most vulnerable, handed down the landmark, and controversial, decision of *Furman v. Georgia*.⁶⁷ *Furman*, in its differing legal rationales, questioned whether states could craft a capital sentencing scheme that would be free of jury arbitrariness.⁶⁸ *Furman* also represents a Court struggling to discern how evolving standards of decency should enter into its Eighth Amendment jurisprudence. This is apparent, as the Court failed to find a unifying legal rationale to guide it; however, the plurality did reach one conclusion: arbitrary imposition of capital punishment violates the Cruel and Unusual Punishment Clause.⁶⁹ This conclusion resulted in nullifying the District of Columbia and thirty-nine states' capital punishment schemes.⁷⁰ *Furman*'s effects are significant, but more elusive are the controlling legal theories. For this inquiry, Justice William Brennan's concurring opinion is insightful. Justice Brennan relied on four principles: (1) the punishment cannot be so severe as to deprive one of human dignity;⁷¹ (2) the state cannot arbitrarily inflict a severe punishment;⁷² (3) severe punishment must comport with societal norms;⁷³ and (4) "severe punishment must not be excessive."⁷⁴ Of the four principles, the third provides the most insight on how evolving standards of decency are determined. It is here that Justice Brennan examined objective societal indicators to determine the acceptability of severe punishment.⁷⁵ The evidence that Justice Brennan offered to show that contemporary attitudes toward the death penalty

⁶⁶ See Martin, *supra* note 10, at 94.

⁶⁷ 408 U.S. 238 (1972) (per curiam) (holding that Georgia's capital sentencing scheme violated the Eighth Amendment).

⁶⁸ See generally *id.* at 294 (Brennan, J., concurring) (commenting that "when a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied").

⁶⁹ *Id.* at 256-57.

⁷⁰ *Id.* at 417 (Powell, J., dissenting) (rejecting the plurality's encroachment of the legislature's ability to fashion its own laws).

⁷¹ *Id.* at 271 (Brennan, J., concurring).

⁷² *Id.* at 274.

⁷³ *Id.* at 277.

⁷⁴ *Id.* at 279.

⁷⁵ *Id.* Justice Brennan went on to say that capital punishment is only tolerated because of its disuse. *Id.* at 300.

changed is that society chose not to use the punishment.⁷⁶ In other words, in 1972, the United States' population increased, the number of crimes committed that would make one eligible for the death sentence increased, yet the number of death verdicts decreased to a very small number.⁷⁷ The conclusion Justice Brennan drew is that contemporary society (at least in 1972) disagreed with the death penalty as a form of punishment, thus supporting the conclusion that this punishment violated the Cruel and Unusual Punishment Clause.

Justice Thurgood Marshall agreed with much of Justice Brennan's analysis, but Justice Marshall took a slightly different track to conclude that Georgia's death penalty violated the Eighth Amendment. Justice Marshall relied on four factors to find the death penalty cruel and unusual: (1) the punishment involves so much physical pain that society rejects it; (2) the punishment is unusual because of its disuse; (3) the punishment is excessive and serves no valid legislative purpose;⁷⁸ and (4) society abhors the type of punishment even though it may not be excessive.⁷⁹ The fourth factor offers a glimmer of Justice Marshall's approach to evolving standards of decency.⁸⁰ Justice Marshall attempted to determine objective standards that may reflect the norms of a civilized state, considering opinion polls and whether a certain punishment may shock the conscience. In the end, Justice Marshall took a leap of faith and asserted that if Americans knew that the application of the death penalty fell disproportionately on minorities and men, society would reject it.⁸¹

Chief Justice Warren Burger, writing for the dissent, offered a different perspective on how to assess evolving standards of decency. First, Chief Justice Burger argued that little evidence existed suggesting society disfavored the imposition of capital punishment. As mentioned by the Chief Justice, quite the opposite is true in that over two-thirds of

⁷⁶ *Id.*

⁷⁷ *Id.* (Brennan, J., concurring).

⁷⁸ *Id.* at 330 (Marshall, J., concurring) (articulating why a legislature may craft capital punishment laws). Justice Marshall's justifications for why legislatures may craft capital punishment laws are: (1) retribution, (2) deterrence, (3) recidivism, (4) encouragement of guilty pleas and confessions, (5) eugenics, and (6) economy. *Id.* at 342. Justice Marshall concluded that these reasons individually and collectively could not support the imposition of death. *Id.* at 359.

⁷⁹ *Id.*

⁸⁰ *Id.* at 360.

⁸¹ *Id.* at 369.

the states in 1972 still approved of the death penalty.⁸² Less reliable, but still relevant, were public opinion polls that supported the death penalty.⁸³ Chief Justice Burger went on to refute claims that society disdained the death penalty because its imposition is “freakishly rare.”⁸⁴ In the end, the real impact in the dissent’s analysis is that it illustrates the doctrine’s amorphous nature. Since it relies on statistics and trends, the ease in which a particular result is reached is largely based upon how the data is interpreted.⁸⁵

Four years later, the Court decided *Gregg v. Georgia*, ending *Furman*’s four-year moratorium on capital punishment.⁸⁶ Justice Potter Stewart, writing for a plurality, narrowed the Court’s excessiveness inquiry into two distinct aspects: (1) “the punishment must not involve the unnecessary and wanton infliction of pain[;]”⁸⁷ and (2) “the punishment must not be grossly out of proportion to the severity of the crime.”⁸⁸ As to the first aspect, Justice Stewart reviewed the propriety of the death penalty, considering “objective indicia that reflect the public attitude toward [this] sanction.”⁸⁹ The legislative response after *Furman* swayed Justice Stewart. After *Furman*, thirty-five states and the District of Columbia enacted laws authorizing capital punishment.⁹⁰ In addition, the jury, also a significant and reliable index of societal norms, had over the decades handed down less death verdicts, illustrating the humanity in the process.⁹¹ This suggested to the Court that the jury, as a reflection of

⁸² *Id.* at 385.

⁸³ *Id.*

⁸⁴ *Furman*, 408 U.S. at 386 (Burger, J., dissenting) (arguing that the number of cases in which the death penalty is imposed, as compared with the number of case in which it is available, does not indicate a general revulsion toward the death penalty that would lead to its repeal).

⁸⁵ *Id.* at 384-86. The Court has relied on public opinion polls to support their position that societal sentiments have changed. *Id.* This author refers to them only to demonstrate that the Court is continually looking to objective measures to gauge society’s attitudes, but the Court has indicated that its influence on the Court’s judgment is marginal. *Id.* As such, this article does not elevate this objective criterion to a status that is equal in weight to the legislature and jury determinations.

⁸⁶ 428 U.S. 153, 207 (1976) (holding that Georgia’s statutory capital sentencing scheme did not violate the Eighth Amendment).

⁸⁷ *Id.* at 173.

⁸⁸ *Id.* Justice Stewart writes that this two-part test to determine excessive punishment “is intertwined with an assessment of contemporary [societal] standards,” and but one critical factor to consider is the legislative judgment. *Id.* at 175.

⁸⁹ *Id.* at 173.

⁹⁰ *Id.* at 179-80.

⁹¹ *Id.* at 182.

the collective conscience, would reserve death for only the most appropriate cases.⁹² For these reasons, the Court held that the death penalty did not result in the unnecessary and wanton infliction of pain that the Eighth Amendment finds offensive.⁹³

As to the second aspect, the Court reviewed Georgia's comprehensive capital sentencing scheme. This scheme bifurcated the trial proceeding into a guilt and sentencing stage, provided standards to the jury to guide them in deliberating the appropriateness of death (referred to as aggravating and mitigating circumstances), and provided special avenues of appeal to ensure the reliability of a death verdict.⁹⁴ These measures safeguarded against jury arbitrariness and caprice, channeling its discretion toward a just result that would not result in a "freakish" death verdict.⁹⁵ These checks ensured that when capital punishment was an appropriate response, its infliction would be proportional to the severity of the crime.

The use of objective indicia in *Furman* and *Gregg* to assess societal sentiments on the death penalty marked a new era for the Court. It is clear from these cases that the evolving standards of decency analysis under the Cruel and Unusual Punishment Clause had the opportunity to develop even further as society's moral sentiments changed.⁹⁶

B. The Doctrinal Components

Post-*Gregg* Supreme Court decisions provided further development of the doctrine's components. Of these doctrinal components, the legislature, jury verdicts, and the Court's independent judgment became permanent fixtures in the Court's jurisprudence. Apart from this framework, the Court relied upon additional societal indicators in its Eighth Amendment jurisprudence. This section deals primarily with death penalty and noncapital excessive punishment cases, but due

⁹² *Id.*

⁹³ *Id.* at 187.

⁹⁴ *Id.* at 196-99.

⁹⁵ *Id.* at 206-07.

⁹⁶ See *Thompson v. Oklahoma*, 487 U.S. 822, 823 n.7 (1988) (Stevens, J., plurality) (explaining that the rationale for using this index of constitutional values, as reflected by the actions of legislatures and juries, is to construe what "unusual" means, and this understanding depends "upon the frequency of its occurrence [the punishment] or the magnitude of its acceptance").

consideration is given to a distinct class of cases, conditions of confinement, as they relate to the doctrine.⁹⁷

1. The Legislative Role in Evolving Standards of Decency

In cruel and unusual punishment cases, the Court consistently looks to the enactments of state legislatures to determine whether a challenged punishment conforms with the Eighth Amendment. This section examines the legislative component, separating it into two subcategories: capital and noncapital offenses.

a. Capital Punishment and the Legislative Role in Evolving Standards of Decency

The legislative role in staking out the contours of what is cruel and unusual is fixed prominently in the Supreme Court's psyche. Time and time again, the Court emphasizes its important role, stating that "legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency."⁹⁸ The utility of looking to the legislature continued, and immediately following *Gregg*, the Court handed down two controversial decisions: *Woodson v. North Carolina*⁹⁹ and *Coker v. Georgia*.¹⁰⁰ In *Woodson*, the Court struck down North Carolina's mandatory death penalty statute for first degree murder, finding it to "depart[] markedly from contemporary standards respecting the imposition of the punishment of death"¹⁰¹ In reaching its decision, the Court found that legislatures were rejecting mandatory death sentences.¹⁰² In rejecting automatic death sentences, the legislatures instead began empowering the jury to make those critical life or death choices.¹⁰³ The next year, the *Coker* Court struck down a

⁹⁷ See discussion *infra* pt. II.C.

⁹⁸ *Woodson v. North Carolina*, 428 U.S. 280, 294-95 (1976) (affirming that the state legislatures are an important index for determining societal sentiments on the appropriateness of the capital punishment).

⁹⁹ *Id.* at 280.

¹⁰⁰ 433 U.S. 584 (1977).

¹⁰¹ *Woodson*, 428 U.S. at 301.

¹⁰² *Id.* at 298-99.

¹⁰³ *Id.* at 293. The Court traced mandatory death sentences from its common law heritage to as late as 1963, where only eight states at that time permitted such a sanction. *Id.* at 289, 293. After *Furman*, a handful of states reenacted their mandatory death penalty statute. *Id.* at 292-93.

Georgia statute that permitted a death sentence for the rape of an adult woman.¹⁰⁴ Like *Woodson*, the Court sought guidance from the country's state legislatures to determine whether rape of an adult woman justified the death sentence.¹⁰⁵ Referring to state legislative records, where the nation's judgment on punishment could be measured, the Court noted that state legislatures clearly rejected the death penalty for rape.¹⁰⁶ Through a series of Court decisions and the passage of time, only one state—Georgia—still retained legislation for capital rape.¹⁰⁷ The Court concluded that the country no longer sanctioned the death penalty for the rape of an adult woman, as it failed to comport with the dignity of man, and as such, found it unconstitutional.¹⁰⁸

The Court's legislative focus in assessing whether society rejects a punishment that is so excessive that it fails to meet a semblance of proportionality continued in *Enmund v. Florida*.¹⁰⁹ There, the Court considered whether a convicted felony-murderer who "neither took life, attempted to take life, nor intended to take life"¹¹⁰ could face the death penalty. The Court's survey of the thirty-six jurisdictions that authorized the death penalty in this circumstance revealed that only eight states permitted the death penalty when another robber takes life.¹¹¹ The other twenty-eight jurisdictions required a higher degree of culpability before imposing the death penalty.¹¹² The Court's examination of state felony-murder laws revealed that "only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed."¹¹³ This fact weighed considerably in the Court's ruling. An accomplice to murder must have the requisite level of moral culpability (or something greater than one who neither took life, attempted to take life, nor intended to take life) to become eligible for the

¹⁰⁴ *Coker*, 433 U.S. at 592.

¹⁰⁵ *Id.* at 593-94.

¹⁰⁶ *Id.* at 595-96.

¹⁰⁷ *Id.* at 593-94. The Court sought to demonstrate that the public consensus on the death penalty for the rape of an adult woman had markedly changed against the sanction. *Id.* In fact, before *Furman*, only sixteen states authorized such a punishment, and after *Furman* and *Woodson*, only the state of Georgia still retained this punishment. *Id.*

¹⁰⁸ *Id.* at 597-98.

¹⁰⁹ 458 U.S. 782, 801 (1982) (holding unconstitutional Florida's felony-murder statute because it permitted the death penalty for one who neither killed nor attempted to kill).

¹¹⁰ *Id.* at 787.

¹¹¹ *Id.* at 789-90.

¹¹² *Id.*

¹¹³ *Id.* at 792.

death penalty.¹¹⁴ The Court's ruling, however, left open the degree of moral culpability required. Not until *Tison v. Arizona* did this issue again receive the Court's attention.¹¹⁵ In *Tison*, Justice Sandra Day O'Connor, writing for the majority, placed the moral culpability requirements within the felony-murder regime on a continuum.¹¹⁶ At one end of the continuum is felony-murder *simpliciter*,¹¹⁷ which requires minimum participation in the capital felony (at issue in *Enmund*), and at the other end is the intent to kill or "major participation"¹¹⁸ in the capital felony, where one's moral culpability is quite high.¹¹⁹ In the middle rests a hodge-podge of culpability standards, which were at issue in *Tison*.¹²⁰ The Court concluded, after surveying state laws, that a consensus was reached in "that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'"¹²¹ As such, Arizona's felony murder statute, which the Court believed properly fell within the midrange of culpability standards, did not result in a disproportional punishment, and therefore, did not violate the Eighth Amendment.¹²²

Woodson, *Coker*, *Enmund*, and *Tison* challenged state laws that authorized the death penalty. Since then, a different, yet effective approach has been used by those on death row to further restrict the sovereign's ability to exact a death sentence. Rather than challenging the constitutionality of capital punishment for the offense itself, this new approach challenges the capital offender's eligibility for the death penalty based on some defining characteristic of that person. The effect of this tactic is to limit the reach of the death penalty by narrowing the

¹¹⁴ *Id.* at 801. It is because of this weight of legislative evidence that the Court found the death penalty in this circumstance disproportional to the crime of robbery-felony murder. *Id.* at 788.

¹¹⁵ 481 U.S. 137 (1987).

¹¹⁶ *Id.* at 147.

¹¹⁷ See BLACK'S LAW DICTIONARY 1389 (7th ed. 2000). *Simpliciter* is defined as "[i]n a simple or summary manner; simply." *Id.*

¹¹⁸ *Tison*, 481 U.S. at 158 (explaining that "major participation" in a felony where a murder results is enough to satisfy a state's claim for the death penalty).

¹¹⁹ *Id.* at 157-58.

¹²⁰ *Id.* at 147 (identifying the various middle-range culpability standards for felony murder found in some states as: (1) "recklessness or extreme indifference to human life," (2) "minimal participation in a capital felony," and (3) participation that is not "relatively minor").

¹²¹ *Id.* at 154 (citations omitted).

¹²² *Id.* at 158.

class of people eligible for capital sentencing. That is, by disqualifying certain groups, the Court is essentially granting a constitutional exemption from the death penalty. Central to whether a group deserves an exemption, the Court identifies the trends of state legislatures.¹²³ This approach permits the Court to determine whether the sanction of death comports, as applied to a particularized group, with contemporary standards. This exemption movement began in *Ford v. Wainwright*.¹²⁴ There, the Court “[took] into account objective evidence of contemporary values” to find that executing the insane offended the “human dignity” protected by the Eighth Amendment.¹²⁵ In particular, the Court traced the common law rule that abhorred execution of the insane, finding that every state legislature prohibited the practice.¹²⁶ This historical fact represented a national consensus against the practice.¹²⁷

In *Atkins v. Virginia*, the Court held that executing the mentally retarded is cruel and unusual under the Eighth Amendment.¹²⁸ Finding significant change since the Court decided *Penry v. Lynaugh*,¹²⁹ the Court concluded that “the American public, legislators, scholars, and judges” reached a consensus that executing the mentally retarded is cruel and unusual.¹³⁰ Justice John Paul Stevens, writing for the majority, did not look to mere numbers of state legislatures that prohibited the practice. Rather, Justice Stevens looked at the trend and consistency of some states that rejected executing the mentally retarded, and from this, concluded “[t]he practice . . . has become truly unusual, and it is fair to

¹²³ See *Atkins v. United States*, 536 U.S. 304, 315-16 (2002).

¹²⁴ 477 U.S. 399, 417-18 (1986) (holding that execution of the insane violates the Eighth Amendment).

¹²⁵ *Id.* at 406.

¹²⁶ *Id.* at 406-07.

¹²⁷ *Id.* at 408-09 n.2. Even though the Court found it constitutionally defective to execute the insane, the Court still had to rule on whether an evidentiary hearing was required to resolve whether the defendant was sane. *Id.* at 410. The Court held that a fact-finding procedure is required to assess a defendant’s sanity before imposing execution. *Id.* at 417-18. *But cf.* *Sell v. United States*, 539 U.S. 166, 169 (2003) (holding that the Fifth Amendment’s Due Process Clause does not prohibit, in certain circumstances, the involuntary medication of a mentally ill criminal defendant, who committed serious but non-violent felonies, for the purposes of rendering the defendant competent to stand trial).

¹²⁸ 536 U.S. 304, 321 (2002) (holding that executing the mentally retarded violated the Eighth Amendment).

¹²⁹ 492 U.S. 302, 340 (1989) (permitting the execution of the mentally retarded), *overruled by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹³⁰ *Atkins*, 536 U.S. at 307.

say that a national consensus has developed against it.”¹³¹ State trends disfavoring a class of offenders from being subject to capital punishment signaled to the Court that the nation had moved beyond the reasoning reached decades ago, finding in this case that a national consensus exists against executing the mentally retarded.¹³² *Atkins*’ relevance to the legislative component is that the Court continued to strive to find a national consensus before rejecting or affirming the propriety of the death penalty.¹³³ The primary component for discovering this national consensus exists with an index of state legislatures.

In *Thompson v. Oklahoma*, the Court relied on legislative trends to exempt minors under the age of sixteen years from the death penalty’s reach.¹³⁴ In *Thompson*, the Court articulated as an important societal indicator the manner in which state legislatures treated minors under the age of sixteen years of age.¹³⁵ In this exercise, the Court surveyed legislative enactments in two respects: (1) the Court identified how legislatures treated minors differently than adults, finding it to be quite disparate;¹³⁶ and (2) the Court considered the age at which legislatures authorized the death penalty.¹³⁷ As to the latter point, the Court identified thirty-one jurisdictions that prohibited the death penalty for minors under the age of sixteen.¹³⁸ To the Court, this evidence suggested

¹³¹ *Id.* at 315-16 (looking at both trends and total numbers to identify a significant shift in state attitudes toward executing the mentally retarded, and concluding that a national consensus clearly prohibits the practice). *Cf. id.* at 342 (Scalia, J., dissenting) (rejecting the Court’s holding that a national consensus exists against executing the mentally retarded).

¹³² *Id.*

¹³³ *See, e.g.,* *Thompson v. Oklahoma*, 487 U.S. 815 (1989) (O’Connor, J., concurring in judgment) (explaining that before the Court can find a national consensus that would result in restricting the state from imposing the death penalty on defendants under the age of sixteen, the evidence supporting it must be clear).

¹³⁴ *Thompson v. Oklahoma*, 487 U.S. 815, 823-24 (1988) (declaring that execution of minors below the age of sixteen violates the Eighth Amendment).

¹³⁵ *Id.* at 823-24 (Stevens, J., plurality).

¹³⁶ *Id.* (Stevens, J., plurality) (finding that minors are “not eligible to vote, . . . to marry without parental consent, or to purchase alcohol or cigarettes”) (internal footnotes omitted).

¹³⁷ *Id.* at 824-28.

¹³⁸ *Id.* at 826-28. Justice Stevens, writing for the Court plurality, noted that fourteen states did not authorize capital punishment under any circumstances for any offense. *Id.* at 826. Then, Justice Stevens found nineteen states that had “no minimum age expressly . . . stated in the death penalty statutes.” *Id.* at 827. Because it is inconceivable that a state would execute a ten-year old, as these nineteen state statutes would logically permit, Justice Stevens felt free to brush these nineteen state death penalty statutes aside because they were of no assistance in determining where the appropriate age should rest. *Id.* at

the practice offended “civilized standards of decency” and, therefore, violated the Eighth Amendment.¹³⁹

The result in *Thompson* led to the Court’s ruling in *Stanford v. Kentucky*.¹⁴⁰ In *Stanford*, the Court considered whether sixteen and seventeen-year-old capital offenders should receive the death penalty.¹⁴¹ In finding no Eighth Amendment violation, the Court relied on legislative enactments as the relevant societal indicator. This societal indicator revealed that a consensus remained on the appropriateness of sanctioning the death penalty for sixteen and seventeen-year-old capital offenders.¹⁴² More than a decade later, however, in the landmark case of *Roper v. Simmons*,¹⁴³ the Court revisited the appropriateness of executing sixteen and seventeen-year old capital offenders. Writing for the Court, Justice Anthony Kennedy searched for a national consensus against a juvenile death penalty, finding that thirty states prohibited the practice altogether.¹⁴⁴ Of the remaining twenty states, the frequency of executing juveniles was so rare that the Court could confidently conclude that a national consensus existed against the juvenile death penalty.¹⁴⁵ Even though not much had changed since *Stanford*,¹⁴⁶ the trend among the

828-29. Finally, eighteen states remained, and of those, all required capital offenders to be at least sixteen for death penalty eligibility (for purposes of Justice Stevens’ simple math, the federal government is included as a state, which brings the total number of jurisdictions to fifty-one). *Id.* at 829.

¹³⁹ *Id.* at 830.

¹⁴⁰ 492 U.S. 361, 380 (1989) (holding that the Eighth Amendment does not prohibit sixteen and seventeen-year old capital offenders from receiving the death penalty), *overruled by* *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

¹⁴¹ *Id.*

¹⁴² *Id.* at 371-72. To find a semblance of a national consensus on this issue, Justice Scalia only looked to states that permitted capital punishment. Of those states, Justice Scalia considered not only the states that specifically provided sixteen and seventeen-year old defendants were eligible for the death penalty, but those nineteen states that had no minimum age set at all. *Id.* at 371 n.3. *Cf. id.* at 384 (Brennan, J., dissenting) (rejecting the plurality’s exclusion of those fifteen states and the District of Columbia that do not permit the death penalty, claiming that these states inclusion should enter into the calculus of a national consensus).

¹⁴³ 125 S. Ct. 1183 (2005) (holding that the Eighth Amendment prohibits the execution of sixteen and seventeen-year old capital offenders).

¹⁴⁴ *Id.* at 1192. *But cf. id.* at 1219 (Scalia, J., dissenting) (arguing that counting states that prohibit capital punishment altogether is like “including old-order Amishmen in a consumer-preference poll on the electric car”).

¹⁴⁵ *Id.* at 1192-93 (citing that since *Stanford*, only six states had executed prisoners for crimes committed as juveniles).

¹⁴⁶ *See id.* at 1217 (Scalia, J., dissenting) (criticizing the Court’s reversal of *Stanford* just fifteen years after it was decided).

states toward abolition suggested to the Court majority that the time had come to reverse *Stanford* and recognize the juvenile death penalty's incompatibility with a civilized society.¹⁴⁷

Thus far, the legislative component is considered in light of excessive or disproportional death penalty challenges. However, a limited number of cases concerning the method of punishment have reached the Court. First, the controversial practice of death by electrocution visited the Court. Challenged as a method of punishment in *In re Kemmler*¹⁴⁸ almost a century ago, the issue of using an electric chair to execute capital offenders surfaced again in *Glass v. Louisiana*.¹⁴⁹ In *Glass*, Justice Brennan, in his dissent from a denial of writ of certiorari, failed to mention the trends of state legislatures, and instead made his argument against electrocution by its sheer barbarism.¹⁵⁰ In this regard, Justice Brennan emphasized how the Court's judgment may be brought to bear in striking down death by electrocution.¹⁵¹ In light of recent changes in state laws turning to lethal injection rather than electrocution; however, Justice Brennan's argument for abolishing the electric chair would certainly be more persuasive.¹⁵² States have questioned whether the electric chair is a humane method of execution, and given this fact, Justice Brennan's argument against the electric chair carries more weight today than in 1986.¹⁵³ Second, in *Gomez v. United States*,¹⁵⁴ Justice Stevens challenged the use of lethal gas to execute death

¹⁴⁷ *Id.* at 1198.

¹⁴⁸ 136 U.S. 436, 447 (1890) (holding that the death by electrocution does not violate the Eighth Amendment); see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (holding that death by electrocution after an interrupted first attempt did not violate the Eighth Amendment).

¹⁴⁹ 471 U.S. 1080 (1987) (Brennan, J., dissenting from a denial of writ of certiorari).

¹⁵⁰ *Id.* at 1086-87 (explaining in great detail that death by electrocution results in severe pain and disfigurement that ends in a prolonged and cruel death).

¹⁵¹ *Id.* at 1083-84.

¹⁵² See Death Penalty Information Center, *Facts About the Death Penalty* (Apr. 22, 2005), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf> [hereinafter DPIC]. Thirty-seven of the thirty-eight states that authorize the death penalty use lethal injection as the primary method. *Id.* at 4; see also *Methods of Execution*, available at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=245#News> (last visited May 16, 2005) (noting that ten states that offer the electric chair as a means of execution, only one state—Nebraska—offers it as the sole means).

¹⁵³ See DPIC, *supra* note 152, at *News and Information*, (noting that Alabama, Georgia, Tennessee, Kentucky, and Florida have recently changed their laws to permit death row inmates to choose whether they are executed by electrocution or lethal injection).

¹⁵⁴ 503 U.S. 653 (1992) (Stevens, J., dissenting from a denial of a petition for certiorari).

row inmates.¹⁵⁵ Such a practice, Justice Stevens argued, is contrary to the trends of the states.¹⁵⁶ While both decisions are denials of petitions for *certiorari*, their significance to the legislative component is still worthy of consideration.

b. Non-capital Punishment and the Legislative Role in Evolving Standards of Decency

In challenging capital punishment, whether by looking at the capital offense or the group that may be subject to the death penalty, the legislative determination, as a component of the evolving standards of decency doctrine, is a convenient tool to assess the sentiments of society. But one striking fact is that the doctrine did not originate with death penalty challenges. Rather, the doctrine originally was used to challenge noncapital, excessive, and disproportionate punishment.¹⁵⁷ This fact leads to a natural transition in assessing the Court's reliance on the legislative will in shaping the Court's Eighth Amendment jurisprudence. It is in this light that this article's focus shifts from capital to noncapital cases. In making this shift, it is important to recognize that the Court relies on the evolving standards of decency doctrine, but applies different criteria to inform its judgment. One component of the Court's analysis remains a survey of state legislatures. It is from this posture that this article examines noncapital cases.

The Court decided three important cases that tested the limits of what is deemed grossly excessive punishment. In *Rummel v. Estelle*,¹⁵⁸ the defendant, in his unremarkable criminal past, received three minor, non-violent felony convictions, and pursuant to Texas' recidivist statute,

¹⁵⁵ *Id.* at 657-58 (explaining that death by lethal gas is barbaric and cruel and runs counter to the norms of a civilized state); *see also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (holding that death by electrocution after an interrupted first attempt does not violate the Eighth Amendment).

¹⁵⁶ *Gomez*, 503 U.S. 653 (1992).

¹⁵⁷ *See* *Weems v. United States*, 217 U.S. 349, 378 (1910); *supra* notes 26-51 and accompanying text; *see also* *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The Eighth Amendment's excessive punishment rationale had its genesis in *Weems* and was further clarified in *Trop*. Ironically, both cases' ground-breaking pronouncement of a progressive, evolving Eighth Amendment, which led to a doctrine positioned to challenge the death penalty, did not crossover in perfect form to noncapital cases. However, one of the chief components of the Court's noncapital jurisprudence is a survey of state legislatures.

¹⁵⁸ 445 U.S. 263 (1980).

received life imprisonment with the possibility of parole.¹⁵⁹ Chief Justice William Rehnquist, writing for a plurality Court, found it difficult to compare state recidivist statutes with the intent that judges could discover whether Texas' statute was grossly excessive. Instead, Chief Justice Rehnquist deferred to Texas' legislative scheme, stating that, "[the Court] would like to think that we are 'moving down the road toward human decency' . . . however, we have no way of knowing in which direction that road lies."¹⁶⁰ In other words, a survey of state recidivist statutes provided no guidance as to whether Texas' scheme was grossly disproportional, and because the evidence remained inconclusive, the defendant's life sentence did not offend the Eighth Amendment.¹⁶¹

The Court revisited recidivist statutes just three years later in *Solem v. Helm*.¹⁶² In an outcome quite different than *Rummel*, the Court held that South Dakota's recidivist statute, as applied, did indeed amount to cruel and unusual punishment because the punishment was grossly disproportionate to the offense. As in *Rummel*, the state convicted the defendant of a number of minor, non-violent felonies;¹⁶³ however, unlike *Rummel*, South Dakota's recidivist statute automatically imposed life imprisonment without the possibility of parole.¹⁶⁴ It was this severe punishment that the Court found untenable. Writing for the majority, Justice Lewis Powell fashioned a new framework to determine whether a sentence was excessive in a noncapital case. The Court used this framework to guide its proportionality analysis: (1) "the gravity of the offense and the harshness of the penalty[;]" (2) "the sentences imposed on other criminals in the same jurisdiction[;]" and (3) "the sentences imposed for commission of the same crime in other jurisdictions."¹⁶⁵ Of the three factors, the third is the most relevant to this discussion, as it seeks to gauge how different legislatures would treat the defendant if he committed the same crime in those jurisdictions. Justice Powell

¹⁵⁹ *Id.* at 265-66. The three felony offenses were credit card fraud, passing a forged check, and false pretenses, with the total dollar amount sought to be stolen just \$229.11.

Id.

¹⁶⁰ *Id.* at 283.

¹⁶¹ *Id.* at 285.

¹⁶² 463 U.S. 277 (1983) (holding that South Dakota's recidivist statute results in a grossly disproportionate punishment, and therefore, violates the Eighth Amendment).

¹⁶³ *Id.* at 279-81. The defendant received convictions for: third degree burglary, obtaining money under false pretenses, grand larceny, driving while intoxicated (third offense), and uttering a "no account" check." *Id.*

¹⁶⁴ *Id.* at 281-82.

¹⁶⁵ *Id.* at 292.

concluded that “[Mr.] Helm could not have received such a severe sentence in forty-eight of the fifty states.”¹⁶⁶ For this reason, and a consideration of the first two factors, the Court found South Dakota’s recidivist statute, as applied, unconstitutional.

Whatever progress the Court achieved in marking out clear, measurable factors to assess grossly disproportional, noncapital sentences became—arguably—eviscerated in *Harmelin v. Michigan*.¹⁶⁷ In this case that represents sharp disagreement among members of the Court on whether a proportionality element even exists in the Eighth Amendment, the Court struggled to provide a clear, controlling legal theory to guide its decision.¹⁶⁸ Nevertheless, Justice Kennedy’s concurrence offers some assistance with respect to the legislative component. Commenting on *Solem*’s third factor, the sentences imposed for commission of the same crime in other jurisdictions, Justice Kennedy remarked that: “[I]nterjurisdictional analys[is] [is] appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”¹⁶⁹ In other words, Justice Kennedy considered how other states treat like-kind, disproportional sentences, but only when seeking to validate what should already be known through a proper analysis of *Solem*’s first factor, the gravity of the offense and the harshness of the penalty, that a sentence on its face is disproportional to the crime committed.¹⁷⁰ While *Harmelin* certainly raised more questions than it answered, the Court likely will continue to review legislative enactments to determine whether noncapital punishments are grossly excessive.¹⁷¹

¹⁶⁶ *Id.* at 299.

¹⁶⁷ 501 U.S. 957, 961 (1991) (plurality) (holding that a one-time convicted felon sentenced to life without the possibility of parole for possessing 672 grams of cocaine is a proportional sentence that is constitutional within the meaning of the Eighth Amendment).

¹⁶⁸ *Id.* at 955 (commenting that *Solem* was wrongly decided and that the Eighth Amendment contains no proportionality guarantee).

¹⁶⁹ *Id.* at 1005 (Kennedy, J., concurring).

¹⁷⁰ *But cf. id.* at 1018-19 (White, J., dissenting) (rejecting Justice Kennedy’s conclusion that *Solem* only requires an analysis of its first factor in order to determine whether a sentence meets the Eighth Amendment’s proportionality requirement).

¹⁷¹ *See id.* at 1005-06. (Kennedy, J., concurring). Justice Kennedy, in his concurring opinion (with Justices O’Connor and Souter joining) agreed that the *Solem* factors are still relevant to a proportionality analysis. Combined with the dissenters (Justices White, Blackmun, and Stevens), who also believe the *Solem* factors are entitled to great deference, a clear Court majority exists to endorse the *Solem* factor’s use. *Id.* at 1021.

In summary, of the objective components to measure evolving standards of decency, the legislative component is the most significant. It is a tested and reliable tool to gauge the sentiments of society. Indeed, in all facets, whether capital or noncapital cases, the Court finds itself using the state legislatures as its moral compass to gauge whether justice is served. Only the Court's consideration of the second component, the jury, retains a level of significance approaching the legislative component. It is from this point that this examination continues, considering the role of jury verdicts as they relate to capturing the public's sentiments on capital and noncapital punishments.

2. *The Jury*

The jury, one of the cornerstones of American democracy, serves an important safeguard in checking a tyrannical government.¹⁷² Enjoying a rich history in American jurisprudence,¹⁷³ the jury system is historically, in many different forms, at the center of the death penalty debate.¹⁷⁴ Because it is an integral component of evolving standards of decency, this section explores the jury's importance, considering its reluctance, or willingness, to issue severe punishments, to include the death penalty.

The jury's importance in sensing the conscience of the community is critical to the Court's assessment of societal sentiments. The *Furman* dissent recognized this importance:

[o]ne of the most important functions any jury can perform in making such a selection [the death penalty or life imprisonment] is to maintain a link between contemporary community values and the penal system—

¹⁷² U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .”).

¹⁷³ See THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

¹⁷⁴ In order to frame the issues properly, it is important to narrow this section to its proper purpose. This section will not address those cases that are essentially procedural, or those cases which concern themselves with how juries reach their verdicts, like weighing aggravating or mitigating circumstances in a death penalty case. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 648 (1990) (holding that “the Sixth Amendment does not require that specific findings authorizing the imposition of the sentence of death be made by a jury”), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002); *Lockett v. Ohio*, 438 U.S. 586, 609 (1978) (holding that a death penalty statute that precludes consideration of relevant mitigating circumstances violates the Eighth Amendment).

a link without which the determination of punishment could barely reflect “the evolving standards of decency that mark the progress of a maturing society.”¹⁷⁵

The jury’s link with community values permits the Court to infer whether societal values reject a form—or indeed severity—of punishment. The Court finds these societal values in statistical evidence. That is, the Court considers the frequency and type of verdict adjudged for a particular offense using nationwide and historical surveys. If, for example, the Court finds in its statistical survey that juries are unwilling to return a death verdict for the rape of an adult woman, then this suggests to the Court that society rejects the death penalty for the crime of rape.¹⁷⁶ Exemplifying this principle, the *Coker* Court found that less than one out of ten jury verdicts for rape of an adult woman in Georgia resulted in the death penalty.¹⁷⁷ This extremely low percentage suggested to the Court that the jury, as a reflection of society, found the death penalty to be a disproportionate punishment.¹⁷⁸ Jury analysis swayed the *Woodson* Court, where it considered how jurors historically treated mandatory death sentences for capital offenses.¹⁷⁹ Justice Stewart, for the plurality, argued that jurors historically disregarded their oaths and refused to convict defendants in cases resulting in mandatory death sentences for convictions. Consequently, an ensuing legislative backlash occurred nationwide.¹⁸⁰ This movement resulted in changes to most death penalty statutes, from mandatory to permissive capital punishment. These events, all stemming from the jury’s reluctance to adjudge mandatory death sentences, suggested to the Court that the

¹⁷⁵ *Furman v. Georgia*, 408 U.S. 242, 441 (1972) (Powell, J., dissenting) (relying on language from *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968), to argue that the jury, as a key societal indicator in determining evolving standards of decency, has accepted the morality of the death penalty) (internal citations omitted).

¹⁷⁶ See, e.g., *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977); see *supra* notes 104-08 and accompanying text (discussing further the *Coker* decision).

¹⁷⁷ *Coker*, 433 U.S. at 597.

¹⁷⁸ *Id.*

¹⁷⁹ *Woodson v. North Carolina*, 428 U.S. 280, 294 (1976) (finding that American juries refused to convict defendants when the death sentence would be adjudged automatically); see *supra* notes 101-04 and accompanying text (discussing further the *Woodson* decision).

¹⁸⁰ *Woodson*, 428 U.S. at 290-91 (commenting that the harshness of mandatory death sentences led some state legislatures to reform their death penalty statutes by permitting juries discretion to weigh mitigating factors). By the year 1900, “twenty-three States and the Federal government had made death sentences discretionary for first-degree murder and other capital offenses,” and over the next two decades, fourteen additional states followed suit. *Id.* at 291-92.

“aversion of jurors to mandatory death penalty statutes is shared by society at large.”¹⁸¹

The Court confirmed the utility of juries as indicators for contemporary societal values in two subsequent death penalty cases. First, in *Thompson*, the Court referred to the frequency in which minors under the age of sixteen were given the death penalty for committing willful criminal homicide.¹⁸² The evidence revealed that only a scant .03% of minors arrested for this offense received the death penalty.¹⁸³ The rarity of the occurrence suggested to the Court that the practice was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”¹⁸⁴ Second, in *Enmund*, the Court surveyed felony murder convictions dating back to 1954.¹⁸⁵ In only six out of 362 cases did a felony murderer, who did not actually kill the victim, receive the death penalty.¹⁸⁶ This statistic implied two things: (1) juries are unwilling to adjudge death verdicts unless the defendant actually pulled the trigger; and (2) that juries find the death penalty too excessive (or disproportionate) for felony-murderers who do not actually kill. *Thompson* and *Enmund*’s significance is the Court’s reliance on jury verdicts to assess contemporary social values on the appropriateness of the death penalty.¹⁸⁷

Court decisions, like *Atkins*, and more recently *Roper*, fail to address the role of the jury in gauging societal attitudes toward executing the mentally retarded and juveniles. It is not that the jury’s role is unimportant; rather, the failure to apply the jury component is more likely due to the fact that statistics on this matter are not recorded. Whatever the reason, the jury component remains vital to ascertaining societal sentiments on the death penalty.

¹⁸¹ *Id.* at 295.

¹⁸² *Thompson v. Oklahoma*, 487 U.S. 822, 832-33 (1988).

¹⁸³ *Id.* at 833 n.39; *see supra* notes 134-39 and accompanying text (discussing *Thompson* in light of the Court’s legislative component).

¹⁸⁴ *Thompson*, 487 U.S. at 833 (Stevens, J., plurality) (quoting the language in *Furman* that imposition of the death penalty is freakishly rare).

¹⁸⁵ *Enmund v. Florida*, 458 U.S. 782, 794 (1982); *see supra* notes 109-14 and accompanying text (discussing *Enmund* in light of the Court’s legislative component).

¹⁸⁶ *Enmund*, 458 U.S. at 794.

¹⁸⁷ *But cf.* *Atkins v. Virginia*, 536 U.S. 304, 313 (2002) (explaining that the Court considers only legislative enactments and its judgment on the permissibility of sentencing the mentally retarded to death).

3. *The Court's Judgment*

The role of the legislature and the jury in discovering whether a form of punishment is congruent with society's sense of justice is empirically based. That is, the Court, for each criterion, relies on statistical surveys to support, partially support, or reject capital punishment as antithetical to the norms of a civilized state. This empirically-based, fact-finding methodology is absent in the third prong of the Court's evolving standards of decency capital framework. Instead, the Court exercises its constitutional responsibility in bringing its judgment to bear on the acceptability of the death penalty. In bringing its judgment to bear, the Court merely identifies whether the method or application of the death penalty comports with human dignity.¹⁸⁸ Two important philosophical goals the Court considers in informing its judgment are deterrence and retribution.

In *Coker*, Justice Byron White wrote the Court's plurality opinion, opining that Eighth Amendment judgments "should not be, or appear to be, merely the subjective views of individual Justices; judgments should be informed by the objective factors to the maximum possible extent."¹⁸⁹ Justice White made this statement because he would soon explain the basis for finding Georgia's capital rape statute unconstitutional, and his opinion would have greater precedential value if he based its conclusion on solid empirical evidence. Relying on statistical evidence drawn from legislative enactments and jury verdicts to substantiate his opinion, Justice White claimed that:

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, *for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.*¹⁹⁰

¹⁸⁸ See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005) (commenting that the Court's own independent judgment will be brought to bear to determine whether the death penalty is a disproportionate punishment for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 319-21 (2002) (noting that the Court brings its judgment to bear in confirming or rejecting whether a national consensus exists for imposing the death penalty on the mentally retarded).

¹⁸⁹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977); see *supra* notes 104-08 (discussing the *Coker* decision).

¹⁹⁰ *Coker*, 433 U.S. at 597 (emphasis added).

Justice White's final clause in this statement makes clear that, regardless of what the objective evidence suggests on the appropriateness of the death penalty, ultimately the burden rests on the Court to make those critical constitutional determinations. Nevertheless, Justice White believed that the weight and trends of legislative enactments and jury verdicts simply confirmed the Court's judgment in *Coker* that the death penalty is a disproportionate response to adult rape.¹⁹¹ Justice White further elaborated on how the Court may bring its judgment to bear in *Enmund v. Florida*.¹⁹² Drawing inspiration from the *Coker* rationale, Justice White identified how the Court would consider a challenge to a felony-murder statute, concluding that, "[a]lthough the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us to judge whether the Eighth Amendment permits imposition of the death penalty"¹⁹³ Justice White explored additional factors that would weigh in the Court's judgment in determining the constitutionality of Florida's felony-murder statute. Drawing from *Gregg*, Justice White identified the social purposes that inform the Court's judgment on the appropriateness of the death penalty: deterrence and retribution.¹⁹⁴ Neither purpose could be satisfied to substantiate a death sentence, and without more, such a penalty would be tantamount to cruel and unusual punishment.¹⁹⁵

In *Atkins v. Virginia*,¹⁹⁶ Justice Stevens, in searching for a national consensus against executing the mentally retarded, wrote that legislative judgment would lend guidance to this question, but ultimately, the Court would consider reasons to agree or disagree with the legislative judgment.¹⁹⁷ Those reasons again turned to the two principal goals underlying capital punishment: deterrence and retribution. In pointing out these two principals, Justice Stevens staked out the basis for considering them, writing that "[u]nless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless

¹⁹¹ *Id.*

¹⁹² 458 U.S. 782, 794 (1982).

¹⁹³ *Id.* at 797.

¹⁹⁴ *Id.* at 799.

¹⁹⁵ *Id.* at 799-801 (writing that statistical surveys do not support the conclusion that capital punishment deters individuals from engaging in felonies where murder may result).

¹⁹⁶ 536 U.S. 304 (2002).

¹⁹⁷ *Id.* at 313.

imposition of pain and suffering.”¹⁹⁸ The Court concluded that the execution of the mentally retarded did not satisfy either societal goal.¹⁹⁹ Consequently, the Court, after independently evaluating the evidence, found no reason to disagree with the legislative consensus, finding that such excessive punishment is unsuitable for this class of offenders.²⁰⁰ Contrary to the majority opinion, the dissenters were less than enthusiastic with the Court’s rationale. In particular, Justice Scalia found the majority’s approach extremely arrogant in that the Court’s judgment is not “confined . . . by the moral sentiments originally enshrined in the Eighth Amendment . . . nor even by the current moral sentiments of the American people.”²⁰¹ In fact, as Justice Scalia wrote, the majority’s opinion is nothing more than “the feelings and intuition of a majority of the Justices . . .”²⁰² Clearly, the dissenters in *Atkins* disagreed with injecting the Court’s own judgment into its death penalty determinations. The practice permits the Court to look outside traditional objective indicia, such as legislative and jury determinations, that have guided the Court in times past, and instead, broadens the range of sources for which the Court can rely on to inform its judgment.

Like *Atkins* and its progeny, the Court’s independent judgment entered into the juvenile death penalty debate. In *Thompson*, Justice Stevens, wrote that the Court must first consider whether “the application of the death penalty to this class of offenders [minors under the age of sixteen] ‘measurably contributes’ to the social purposes that are served by the death penalty.”²⁰³ The social goals which the death penalty serves are retribution and deterrence,²⁰⁴ and for minors under the age of sixteen, as Justice Stevens explained, it satisfied neither goal.²⁰⁵ This rationale

¹⁹⁸ *Id.* at 319 (citing *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

¹⁹⁹ *Id.* at 319-20. Justice Stevens argued that the goal of retribution would not be served, as it would be inappropriate to give mentally retarded offenders their “just desserts” because only the most deserving should suffer the imposition of the death penalty. *Id.* Furthermore, because of the limited cognitive ability of the mentally retarded offender, the deterrent value that capital punishment may otherwise serve for the general class of offenders is not served in *Atkins*. *Id.*

²⁰⁰ *Id.* at 321.

²⁰¹ *Id.* at 348 (Scalia, J., dissenting).

²⁰² *Id.*

²⁰³ *Thompson v. Oklahoma*, 487 U.S. 822, 833 (1988) (citing *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

²⁰⁴ *Id.* at 836.

²⁰⁵ *Id.* at 836-38. Justice Stevens’s analysis concluded that retribution did not serve a social purpose because a juvenile possessed a lesser degree of culpability, maintained a capacity for growth, and in the end, society still maintained fiduciary obligations to its children. *Id.* For deterrence, Justice Stevens remained unconvinced that a child is

did not find its way in *Stanford*. There, Justice Scalia took a more limited approach in bringing the Court's judgment to bear on the constitutionality of the death penalty for sixteen and seventeen year old minors.²⁰⁶ While the *Stanford* Court declined to bring its judgment to bear, the *Roper* Court did.²⁰⁷ Justice Kennedy, writing for the *Roper* majority, identified the age of the offender as an important factor to consider in determining whether the societal goals of retribution and deterrence are furthered. Because of the diminished culpability of juvenile capital offenders, Justice Kennedy argued that the "penological justifications for the death penalty apply to [juvenile offenders] with lesser force than to adults."²⁰⁸ Relying significantly on the same reasoning used in *Atkins*, the Court reasoned that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders"²⁰⁹

4. Additional Sources

The prominent components of the evolving standards of decency doctrine are legislative enactments, jury verdicts, and the Court's independent judgment.²¹⁰ While the Court as a whole accepts these components, some individual justices stray from this framework and consider other sources when searching for contemporary attitudes toward the death penalty. These additional sources are international opinion, public opinion polls, and the opinions of professional associations.

The Court's reliance on international opinion for measuring societal values on the appropriateness of punishment is firmly grounded in precedent. First seen in *Trop*, the Court considered a United Nations' survey to determine how other nations treated denationalization for

deterred from committing a capital crime. *Id.* Justice Stevens's explanation rests on the likelihood that a child would make the cost-benefit calculation in choosing to commit a crime with the possible death penalty a foreseeable result. *Id.* Such a cold calculation by a child, for Justice Stevens, was simply remote. *Id.*

²⁰⁶ *Stanford v. Kentucky*, 492 U.S. 361, 377-79 (1989) (declining to bring the Court's own independent judgment into the constitutional mix), *overruled by Roper v. Simmons*, 125 S. Ct. 1183 (2005). Justice Scalia refuted the position that socio-scientific evidence supported the hypothesis that retribution and deterrence are not served with respect to sixteen and seventeen capital offenders. *Id.*

²⁰⁷ *Roper*, 125 S. Ct. at 1196-97.

²⁰⁸ *Id.* at 1196.

²⁰⁹ *Id.* at 1198.

²¹⁰ See discussion *supra* pt. II.B.1-3.

wartime desertion, finding that only three, including the United States, permitted the practice.²¹¹ This suggested, among other objective factors, that this punishment did not comport with “evolving standards of decency that mark the progress of a maturing society.”²¹² It also suggested that the Court is poised to look outside the country’s borders to determine the maturity level of society. This comparative analysis carried over to *Rudolph v. Alabama*, where, in a denial of a writ of certiorari, the dissent highlighted the fact that only five nations, including the United States, permitted the death penalty for rape.²¹³ While some justices in early death penalty cases preferred considering international opinion to determine civilized standards, other justices wrote in opposition.²¹⁴ In *Furman*, Chief Justice Burger, in dissent, wrote that, “[t]he world-wide trend limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight, hardly points the way to a judicial solution in this country under a written Constitution.”²¹⁵ Chief Justice Burger’s word of caution against borrowing international opinion to gauge the sentiments of a civilized state did not persuade the *Thompson* plurality. In *Thompson*, the Court looked to western Europe, Canada, and even the then-Soviet Union, to support the premise that executing juveniles under the age of sixteen was cruel and unusual.²¹⁶ The Court’s reliance on international norms for the execution of juveniles over the age of sixteen did not fair as well in *Stanford*. There, Justice Scalia, writing for the plurality, referenced international norms only in the context of rejecting them. Justice Scalia emphasized that it is the “American conceptions of decency that are dispositive,”²¹⁷ and that the opinions of other nations “cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.”²¹⁸ Justice Brennan, in dissent, however, disagreed, arguing that international opinion is important to frame the norm that civilized nations should aspire to, and in this case, the norm in

²¹¹ *Trop v. Dulles*, 356 U.S. 86, 103 (1958); *see supra* notes 39-51 and accompanying text (discussing *Trop*’s significance in forming the evolving standards of decency language).

²¹² *Trop*, 356 U.S. at 101.

²¹³ 375 U.S. 889-90 (1963) (Goldberg, J., dissenting).

²¹⁴ *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 403 (1972) (Burger, C.J., dissenting).

²¹⁵ *Id.* (explaining the incompatibility with using international norms to interpret the parameters of the Cruel and Unusual Punishment Clause).

²¹⁶ *Thompson v. Oklahoma*, 487 U.S. 822, 830 (1988) (plurality).

²¹⁷ *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989) (plurality), *overruled by Roper v. Simmons*, 125 S. Ct. 1183 (2005).

²¹⁸ *Id.*

other nations was to reject the execution of juvenile capital offenders.²¹⁹ Justice Brennan may have lost this battle, but his vision became a reality more than a decade later in *Roper*. Justice Kennedy, writing for the *Roper* majority, found international opinion on the juvenile death penalty as instructive to interpreting the Eighth Amendment.²²⁰ Recognizing international opinion is not controlling, Justice Kennedy was undeterred from citing striking, if not embarrassing, facts: only eight countries, to include the United States, have executed a juvenile since 1990.²²¹ Of those nations, only the United States failed to publicly disavow the juvenile death penalty.²²² These facts, and the overwhelming weight of international opinion against the juvenile death penalty, confirmed for the *Roper* majority that the practice did not comport with civilized standards.²²³ In dissent, Justice Scalia pointed out that the Court majority is selective in its application of international standards.²²⁴ If international opinion is relevant to American constitutionalism, then incorporating other nations' laws on the exclusionary rule, the right to a jury trial, direct endorsement of religion, and abortion—whether they are compatible with the domestic law or not—are worthy of inclusion given the *Roper* majority's reasoning.

The juvenile capital offense cases are reflective of the deep divisions that exist within the Court in using international opinion to measure whether society rejects, or should reject, the death penalty. Such divisions were on display in *Atkins*. In *Atkins*, Justice Stevens argued that the world community rejects imposing the death penalty on the mentally retarded. This fact represented further evidence that this practice did not comport with modern justice.²²⁵ His support for this argument rested on an amicus curiae brief the European Union filed in another case. The utility of borrowing foreign sentiments on the death penalty to gauge whether a national consensus exists against executing the mentally retarded struck a chord with Chief Justice Rehnquist. In his dissenting opinion, Chief Justice Rehnquist clearly declined to inject international values and norms into American constitutionalism, writing that he

²¹⁹ *Id.* at 405 (Brennan, J., dissenting).

²²⁰ *Roper v. Simmons*, 125 S. Ct. 1183, 1198-99 (2005).

²²¹ *Id.* at 1199 (identifying Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, China and the United States as the only countries to execute a juvenile since 1990).

²²² *Id.*

²²³ *Id.* at 1200.

²²⁴ *Id.* at 1226-27 (Scalia, J., dissenting).

²²⁵ *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

“fail[ed] to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination.”²²⁶ Chief Justice Rehnquist then cited *Stanford* for the proposition that the Court already addressed, and soundly rejected, the issue of applying international values in American sentencing practices.²²⁷

The Court inconsistently applies international opinion as a measurement of civilized standards on the appropriateness of capital punishment. For the conservative wing of the Court, which supports the death penalty—or at least that its legitimacy is consistent with their ideological views on federalism, originalism, and strict constructionism—international opinion is a doctrinal liability that presupposes judicial activism. Yet one cannot underestimate international opinion’s importance, as it indicates an attempt to shift the Court’s evolving standards of decency doctrine to emulate, at least in part, the values of western European culture.

Public opinion polls are less significant in measuring societal sentiments than state legislatures and jury verdicts, yet from time-to-time, they enter into the Court’s death penalty jurisprudence. For instance, in *Furman*, Justice Marshall referenced public opinion polls as helpful in indicating public acceptance of the death penalty; however, he conceded that its overall utility was marginal.²²⁸ Not until *Atkins* did the Court refer to public opinion polls, and when it did, the Court used polls to support society’s rejection of executing the mentally retarded.²²⁹ Public opinion polls, however, have their detractors. Justice Scalia flatly rejects the use of opinion polls to assist the Court in finding a national consensus, stating that “the results of opinion polls are irrelevant.”²³⁰ Chief Justice Rehnquist shares Justice Scalia’s contempt for public

²²⁶ *Id.* at 324-25 (Rehnquist, C.J., dissenting).

²²⁷ *Id.* at 325 (Rehnquist, C.J., dissenting) (noting the Court addressed whether international opinion is proper for determining societal sentiments on the death penalty and soundly rejected its inclusion in *Sanford*).

²²⁸ *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring); *see also id.* at 386 (Burger, C.J., dissenting) (commenting that even though no judicial reliance should be placed on public opinion polls, a majority of American population still supported capital punishment).

²²⁹ *Atkins*, 536 U.S. at 316 n.21 (citing polling data that Americans reject executing the mentally retarded).

²³⁰ *Id.* at 347 (Scalia, J., dissenting).

opinion polls, commenting that any reliance on them “is seriously mistaken.”²³¹

Equally divisive as public opinion polling is the reliance on professional associations. In *Thompson*, the Court relied on a Amnesty International report that identified the juvenile death penalty as inconsistent with civilized standards.²³² In dissent, Justice Scalia claimed such reliance “is totally inappropriate as a means of establishing the fundamental beliefs of this Nation.”²³³ This message carried over to the *Stanford* plurality, where the Court declined to consider the opinions of professional associations in determining whether a national consensus existed against executing juveniles over the age of sixteen.²³⁴ *Atkins*, however, turned again to opinions of professional organizations.²³⁵ While these opinions, in the form of amicus curiae briefs, were relegated to a footnote, their conclusions against the propriety of executing the mentally retarded sparked the ire of Justice Scalia. In Justice Scalia’s dissenting opinion, he commented that “the Prize for the Court’s most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of assorted professional and religious organizations”²³⁶ Justice Scalia’s criticism for relying on public opinion polls and the opinions of professional organizations stems from his own judicial philosophy. That is, the Court is to identify the measures that reflect the norms of a civilized state, not to dictate what they should be.²³⁷ Such a position represents the Court’s divergent approaches in identifying objective criteria that reflects the norms of a civilized state.²³⁸

²³¹ *Id.* at 328 (Rehnquist, C.J., dissenting).

²³² *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 n.34 (1988).

²³³ *Id.* at 869 n.4 (Scalia, J., dissenting).

²³⁴ *Stanford v. Kentucky*, 492 U.S. 371, 377 (1989).

²³⁵ *Atkins*, 536 U.S. at 316 n.21 (citing opinions on the death penalty from the American Psychological Association, the United States Catholic Conference, and opinions from Christian, Jewish, Muslim and Buddhist groups).

²³⁶ *Id.* at 347 (Scalia, J., dissenting) (maintaining “that the views of professional and religious organizations and the results of opinion polls are irrelevant”).

²³⁷ *Id.* at 378-79 (Scalia, J., plurality) (explaining that federal and state statutes and jury verdicts are proper indicia for making Eighth Amendment determinations).

²³⁸ *See generally Atkins*, 536 U.S. at 304. The “liberal” wing of the Court (composed of Justices Stevens, Ginsburg, Breyer, and Souter) favor an expansive tool chest (public opinion polls and opinions of professional associations) to diagnose whether a challenged sentence violates the Cruel and Unusual Punishment Clause. The “conservative” wing of the Court (composed of Chief Justice Rehnquist, and Justices Thomas and Scalia) favor a limited role for the Court in reaching its death penalty determinations. Somewhere in between, the “moderates” (Justices Kennedy and O’Connor), seek to balance the competing sides. Whatever the approach that is used in subsequent opinions there is little

C. Conditions of Confinement

The Eighth Amendment's drafters were principally concerned with prohibiting punishment that amounted to nothing more than the gratuitous infliction of pain, terror, and torture.²³⁹ Practices such as drawing and quartering, burning alive at the stake, and breaking at the wheel, were firmly established as punishments that amounted to cruel and unusual punishment.²⁴⁰ Yet, nearly 200 years after ratification, the Court took one step further in identifying methods of punishment that failed to pass constitutional muster. This step placed the Court firmly in U.S. prisons, where aggrieved inmates challenged their treatment as violative of the Eighth Amendment. Such challenges were premised on two underlying Eighth Amendment principles. The first principle was a derivative of the Eighth Amendment's prohibition against unnecessary cruelty in punishment, or punishment that simply was "inhuman and barbarous."²⁴¹ The second principle relied on evolving standards of decency to ensure that the punishment, or the condition of confinement, was compatible with contemporary societal standards.²⁴²

These underlying principles, as applied to conditions of confinement, first appeared in *Estelle v. Gamble*, where a prison inmate challenged the inadequate medical treatment he received after he suffered an injury.²⁴³ The Court, in reflecting on the primary purpose of the Eighth Amendment, held that, at the very least, the Amendment proscribed "the unnecessary and wanton infliction of pain."²⁴⁴ From this posture, the Court articulated the standard, holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and

doubt that reliance on additional objective sources, like international opinion, public opinion polls, and opinions of professional associations, will cause controversy.

²³⁹ *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879) (finding that the historical scope of the Eighth Amendment's prohibition against cruel and unusual punishment did not encompass death by firing squad).

²⁴⁰ See *In re Kemmler*, 136 U.S. 436, 446-47 (1890).

²⁴¹ *Glass v. Louisiana*, 471 U.S. 1080, 1084 (1987) (Brennan, J., dissenting) (citing *In re Kemmler*, 136 U.S. at 447) (identifying punishments that result in "torture or a lingering death" violative of the Eighth Amendment).

²⁴² *Estelle v. Gamble*, 429 U.S. 101, 103 (1976) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (identifying the Eighth Amendment's repugnance toward punishments that are incompatible with evolving standards of decency).

²⁴³ *Id.* at 101 (challenging that inadequate medical care constituted a deprivation of a constitutional right, namely the prohibition against cruel and unusual punishment, which was actionable under 42 U.S.C. § 1983 (2000)).

²⁴⁴ *Id.* at 102-03 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

wanton infliction of pain.”²⁴⁵ It is this indifference the Court found to fall properly within the meaning of cruel and unusual punishment.²⁴⁶ The impact of this decision was three-fold: first, it firmly placed Eighth Amendment protections within the penal system; second, it provided a standard for the Court to ascertain a cognizable Eighth Amendment claim;²⁴⁷ and third, it established evolving standards of decency as a relevant principle to guide the Court’s judgment.²⁴⁸ Justice Marshall, writing the majority opinion, referenced evolving standards of decency as an important ingredient in crafting the appropriate standard for determining violations of the Cruel and Unusual Punishment Clause.²⁴⁹ However, Justice Marshall failed to provide an in-depth analysis on the interplay between the doctrine and the creation of the willful disregard standard.

Estelle ushered in further Eighth Amendment challenges. Following the deliberate indifference standard *Estelle* articulated, prison inmates challenged double celling,²⁵⁰ prison overcrowding, inadequate food service, faulty heating and cooling systems,²⁵¹ exposure to second-hand smoke,²⁵² and failure to safeguard inmates from serious risk of harm.²⁵³ The crux of these decisions is the proof required to satisfy what the Court calls “deliberate indifference.”²⁵⁴ In *Helling v. McKinney*, the Court provided guidance on this matter, holding that to have a cause of action under the Eighth Amendment, a prisoner must demonstrate, both

²⁴⁵ *Id.* at 104.

²⁴⁶ *Id.* at 105-06 (citing *Gregg*, 428 U.S. at 173) (explaining deliberate indifference to mean something more than negligence or inadvertent acts or omissions).

²⁴⁷ *See id.* at 101.

²⁴⁸ *Id.* at 103.

²⁴⁹ *Id.*

²⁵⁰ *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (holding that double celling inmates did not constitute cruel and unusual punishment).

²⁵¹ *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (holding that “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates” may constitute cruel and unusual punishment if the complainant can demonstrate that prison officials exhibited deliberate indifference).

²⁵² *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding that exposure to second hand smoke may rise to a legitimate cause of action under the Eighth Amendment if the prisoner can show, both subjectively and objectively, a deliberate indifference to an unreasonable risk of serious injury to his future health).

²⁵³ *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that in order for a prisoner to satisfy the deliberate indifference standard, prison officials must be subjectively aware of a serious risk of harm and disregard that risk by failing to take measures to prevent it).

²⁵⁴ *Estelle*, 429 U.S. at 104.

subjectively and objectively, that prison officials exhibited a deliberate indifference to a serious risk of harm.²⁵⁵ Yet the Court found this standard deficient in addressing a slightly different class of confinement cases—whether deliberate indifference is the appropriate standard when the intentional use of force is applied to quell a prison riot.²⁵⁶ In determining whether inmates suffered the unnecessary and wanton infliction of pain that the Eighth Amendment prohibits, the Court elevated the standard to malicious and sadistic. In crafting the standard that prison officials may be held accountable for excessive use of force when they inflict pain “maliciously and sadistically for the very purpose of causing harm,”²⁵⁷ the Court relied in part upon the contemporary standards of decency principle to guide its decision.²⁵⁸ This rationale carried over to *Hudson v. McMillian*, another excessive use of force case.²⁵⁹ In *Hudson*, the Court opined that when “prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.”²⁶⁰ The significance of both *Whitley* and *Hudson* is two-fold: first, they recognized that use of force and conditions of confinement cases were different in kind, and thus required different standards; second, in use of force cases, an underlying principle, like condition of confinement cases, was that evolving standards of decency was a vital component to ascertain whether a legitimate Eighth Amendment claim existed.

In summary, conditions of confinement and use of force cases are derivatives of the Eighth Amendment’s prohibition against unnecessary and wanton infliction of pain. In each category, the Court draws a distinct difference in the legal standard that should apply. In pure

²⁵⁵ *Helling*, 509 U.S. at 35.

²⁵⁶ *Whitley v. Albers*, 475 U.S. 312, 320 (1986) (holding that the appropriate standard to determine a deprivation of an Eighth Amendment right when use of force is applied is whether prison officials unjustifiably inflicted pain maliciously and sadistically for the very purpose of causing harm).

²⁵⁷ *Id.* at 320-21 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)) (identifying the constitutional threshold for a cognizable claim against a prison officer who struck the defendant several times in the head).

²⁵⁸ *Id.* at 327 (citing *Estelle v. Gamble*, 429 U.S. 101, 103 (1976) for the proposition that brutal conduct in the nation’s prisons is “inconsistent with contemporary standards of decency” and “repugnant to the conscience of mankind”).

²⁵⁹ 503 U.S. 1, 8-9 (1992) (holding that in use of force cases, injuries received from blows to the body, like bruises, swelling, loosened teeth, and a cracked dental plate, are not minor injuries and may amount to the unnecessary and wanton infliction of pain that the Eighth Amendment proscribes).

²⁶⁰ *Id.* at 9.

conditions of confinement cases, the legal standard is “deliberate indifference.” In use of force cases, the standard is “malicious and sadistic.” For both standards, the underlying principle that supports their constitutional legitimacy is evolving standards of decency.²⁶¹

III. The Eighth Amendment in the Military

The American military’s authority to decree capital punishment is as old as the military itself. At the inception of the Revolutionary War in 1775, Americans adopted, with little change, the Articles of War from the British military justice system.²⁶² Within the articles, a spectrum of wartime criminal offenses and punishments were identified.²⁶³ Of these punishments, the articles identified the death penalty as a punishment for abandonment of post, improper use of countersign, mutiny, desertion, and misbehavior before the enemy.²⁶⁴ The Articles of War of 1776 increased the number of capital offenses to fourteen, but restricted ordinary, common law capital offenses to the jurisdiction of the civil courts.²⁶⁵ After ratifying the Constitution, the newly formed Congress amended the Articles of War in 1789, and in 1806, revamped them in their entirety.²⁶⁶ In the 1806 revision, Congress rejected a proposal to remove the death penalty from court-martial jurisdiction,²⁶⁷ and in 1863, expanded death penalty court-martial jurisdiction to encompass common law capital felonies and the authority to impose the death penalty during wartime.²⁶⁸ Not until 1916 did the Articles of War receive another rewrite, and at that time, Congress retained for the civilian courts jurisdiction for rape and murder committed in the United States during

²⁶¹ See *supra* notes 243-60 and accompanying text.

²⁶² DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICES AND PROCEDURES* § 1-6(A) (5th ed. 1999).

²⁶³ See generally AMERICAN ARTICLES OF WAR OF 1775, arts. XXV, XXVI, XXXI, LI, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 953 (2d ed. 1920).

²⁶⁴ *Id.* at 955.

²⁶⁵ *United States v. Loving*, 517 U.S. 748, 752 (1996) (citing WINTHROP, *supra* note 263, § 10, art. 1, at 964 (requiring commanders to use utmost endeavors to deliver accused capital offenders to the civil magistrate).

²⁶⁶ SCHLUETER, *supra* note 262, § 1-6(B).

²⁶⁷ *Loving*, 517 U.S. at 753 (citing Frederick Bernays Wiener, *Court’s Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 20-21 (1958)) (explaining Congressman Campbell’s failed attempt to remove the death penalty from court-martial jurisdiction).

²⁶⁸ *Id.* (citing Act of Mar. 3, 1863, § 30, Rev. Stat. § 1342, art. 58 (1875)).

peacetime.²⁶⁹ But even this changed in 1950, when Congress approved the UCMJ and lifted the jurisdictional restriction for rape and murder.²⁷⁰ At present, the UCMJ authorizes the death penalty for fifteen offenses, both in peace and wartime.²⁷¹

Concomitantly with promulgation of the capital offenses, Congress, in an effort to ensure that protections against cruel and unusual punishment existed, enacted Article 55 of the UCMJ.²⁷² This section examines Article 55 in light of its legislative history and case law to gauge its faithfulness to, and deviations from, civilian Eighth Amendment law. Both military case law and Article 55 provide little guidance in defining the protections from cruel and unusual punishment afforded to service members.

A. Cruel and Unusual Punishment

From the beginning of the Revolutionary War, some punishments were deemed excessive and limited as to their severity. In the 1775 Articles of War, Article 51 prohibited flogging of more than thirty-nine lashes.²⁷³ The number of lashes inflicted upon the convicted varied with each revision of the Articles of War.²⁷⁴ In the 1874 Articles of War, Article 98 codified an absolute prohibition against the practice and added an additional restriction: “[n]o person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.”²⁷⁵ Article 98 retained its language in subsequent revisions, and was recodified in 1928 as Article 41.²⁷⁶ When Congress, in 1950,

²⁶⁹ *Id.* (citing Articles of War of 1916, ch. 418, § 3, arts. 9-93, 39 Stat. 664).

²⁷⁰ *Id.*

²⁷¹ UCMJ art. 85 (desertion), art. 90 (assaulting or willfully disobeying superior commissioned officer), art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 101 (improper use of countersign), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106 (spying), art. 106(a) (espionage), art. 110 (improperly hazarding a vessel), art. 113 (misbehavior of sentinel), art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape) (2002).

²⁷² UCMJ art. 55.

²⁷³ WINTHROP, *supra* note 263, at 438.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 994, *reprinting* Articles of War of 1874 (emphasis added).

²⁷⁶ Article of War 41, MANUAL FOR COURTS-MARTIAL, U.S. Army, 1928, at 212. It reads, “[c]ruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited. Compare 1874 Articles of War, *reprinted in* WINTHROP, *supra* note 263, at 994 (referring to Article 98, it reads, “[n]o

accepted the formidable task of drafting a uniform code for all of the services, it incorporated the Article 41 language (found in the Articles of War of 1928) and recodified much of it into Article 55. It reads:

Punishment by flogging, or by branding, marking or tattooing on the body, or any other cruel and unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.²⁷⁷

From Article 55's plain reading, it certainly proscribes a distinct class of punishments, but it does not elaborate on the phrase "cruel and unusual punishment." The legislative debates on Article 55 provide little enlightenment. In the congressional hearings, Congressman Overton Brooks inquired, "[i]s there any comment or discussion of this article? This is based on the forty-first article of war, is it not?"²⁷⁸ Mr. Robert Smart, a professional staff member, responded suggesting that the proposed article, "takes us out of the dark ages."²⁷⁹ The House Report had even less commentary, stating that "[g]enerally speaking, [Article 55] reenacts existing provisions of law."²⁸⁰ The Senate Hearings offer less than their House counterparts, albeit with one exception. The Senate Hearings reference Article 55's inclusion into the UCMJ as a product of the Eighth Amendment's inapplicability to the military.²⁸¹ These legislative accounts suggest that Congress promulgated Article 55 to

person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body").

²⁷⁷ UCMJ art. 55 (1951).

²⁷⁸ *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings Before a Subcommittee of the Committee on Armed Service House of Representatives*, 81st Cong. 1087 (1950), reprinted in *INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE*, (U.S. Government Printing Office 1950) [hereinafter *House UCMJ Hearings*].

²⁷⁹ *Id.*

²⁸⁰ H.R. REP. NO. 81-491, at 27, reprinted in *House UCMJ Hearings*, *supra* note 278.

²⁸¹ *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings Before a Subcommittee of the Committee on Armed Service House United States Senate*, 81st Cong. 112 (1950), reprinted in *INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE*, (U.S. Government Printing Office, 1950) [hereinafter *Senate UCMJ Hearings*]. The Senate subcommittee hearings pointed out Article 55's codification was required because "apparently . . . the eighth amendment is inapplicable [to the military] . . ." *Id.*

ensure legislative restrictions on cruel and unusual punishment existed, modeling its basic protections from previous versions of the Articles of War.

Congress diverted little attention to expounding upon the meaning of Article 55 and the Eighth Amendment's application to the military. Congress's omissions left the military courts some latitude to interpret Article 55 and the Eighth Amendment's role in capital court-martial proceedings. *United States v. Matthews* is indicative.²⁸² In *Matthews*, the U.S. Court of Military Appeals (COMA) (now the Court of Appeals for the Armed Forces (CAAF)) reacted to the shockwave left by *Furman*. The court ruled that existing capital punishment procedures under the 1969 Manual did not satisfy constitutional requirements.²⁸³ In analyzing Article 55, the court noted that Congress "intended to grant protection covering even wider limits than that afforded by the Eighth Amendment."²⁸⁴ The court further noted that while service members are entitled to the protections afforded by Article 55 and the Eighth Amendment, under certain circumstances the rules governing capital punishment will differ from civilian courts.²⁸⁵ In *United States v. Curtis*, the Court of Military Appeals revisited the constitutionality of the military's death penalty.²⁸⁶ *Curtis* is not a cruel and unusual punishment case; rather, the court considered the delegation doctrine.²⁸⁷ In so doing, the court held that Congress properly delegated to the President the

²⁸² 16 M.J. 354 (C.M.A. 1983).

²⁸³ *Id.* at 380 (finding military sentencing procedure defective because of the failure to require court members to rely on individualized aggravating circumstances when imposing the death penalty); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, 283, R.C.M. 1004 analysis, at A21-73 (2002) [hereinafter MCM] (recognizing that RCM 1004 and its analysis were drafted before *Matthews*; after *Matthews*, the decision encouraged discussion to further revise capital sentencing procedures).

²⁸⁴ *Id.* at 368 (citing *United States v. Wappler*, 2 U.S.C.M.A. 393, 396 (1953)). *Wappler* held that Article 55 prohibits the imposition of confinement on bread and water in excess of three days while embarked at sea. *Wappler*, 2 U.S.C.M.A. at 396. In its analysis on the interplay between Article 55 and the Eighth Amendment, the *Wappler* court did not refer to Article 55's legislative history in reaching its conclusion that Congress "intended to grant protection covering even wider limits" than afforded by the Eighth Amendment. *Id.*

²⁸⁵ *Id.* (alluding to offenses committed during combat conditions).

²⁸⁶ 32 M.J. 252 (C.M.A. 1991).

²⁸⁷ See *id.* at 260-61 (considering *Mistretta v. United States*, 488 U.S. 361 (1989) in discerning the scope of the delegation doctrine. The delegation doctrine's premise is that Congress is vested with the lawmaking function. Congress may, however, pursuant to general broad directives, delegate lawmaking authority to coordinate branches of government so long as an "intelligible principle" exists. *Mistretta*, 488 U.S. 371-72.

authority to promulgate Rule for Court Martial (RCM) 1004 for adjudging the death penalty.²⁸⁸ *Matthews* and *Curtis* were a direct result of *Furman*, and therefore, offered little insight into the interplay between Article 55 and the Eighth Amendment except that both provisions applied to the military. In fact, military courts refer to Article 55 and the Eighth Amendment case law, but rarely articulate how each apply to the military.²⁸⁹

The only Supreme Court case to consider the military death penalty is *Loving v. United States*.²⁹⁰ Like *Curtis*, the Court held that Congress properly delegated to the President the authority to prescribe aggravating and mitigating factors found in RCM 1004.²⁹¹ Such a delegation did not offend the separation of powers or the Eighth Amendment. In reaching its decision, the Court assumed that its death penalty jurisprudence applied to the military.²⁹² In a striking concurring opinion, Justice Clarence Thomas questioned whether the extensive rules under the Eighth Amendment necessarily applied to capital prosecutions in the military.²⁹³ Justice Thomas cited *Parker v. Levy* as the predicate for providing Congress greater breadth in fashioning rules for the military.²⁹⁴ This flexibility, Justice Thomas argued, is an extension of the constitutional necessity granted to Congress and the President to fight the nation's wars.²⁹⁵ Justice Thomas's concurring opinion reflects at least one justice's view that the constitutional protections afforded to civilians and service members are different.

²⁸⁸ *Id.* at 269.

²⁸⁹ *See, e.g.*, *United States v. Thomas*, 43 M.J. 550, 605 (N-M. Ct. Crim. App. 1995) (citing *Trop v. Dulles*, 356 U.S. 86 (1958) for the proposition that death by lethal injection does not violate Article 55 or the Eighth Amendment). In so doing, the court dedicated one small paragraph to support this conclusion and offered no analysis on how Article 55 and the Eighth Amendment complement each other. *Id.* at 605-06.

²⁹⁰ 517 U.S. 748 (1996).

²⁹¹ *United States v. Loving*, 517 U.S. 748, 774-75 (1996); *United States v. Curtis*, 32 M.J. 252, 255 (C.M.A. 1991).

²⁹² *Loving*, 517 U.S. at 755. The government did not contest the Eighth Amendment's applicability for murder committed during peacetime. *But cf.* WINTHROP, *supra* note 263, at 398 (stating that while courts-martial are not legally bound by the Eighth Amendment they should observe it as a general rule of practice).

²⁹³ *Loving*, 517 U.S. at 777 (Thomas, J., concurring).

²⁹⁴ *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 756 (1974)).

²⁹⁵ *See id.*

The legislative history and case law regarding capital cruel and unusual punishment challenges in the military is limited. In each decision, no court explains properly how Article 55 and the Eighth Amendment complement each other.²⁹⁶ Yet in the realm of cruel and unusual punishment, military courts invest much of their time in cases concerning conditions of confinement. The next section explores these cases and their relevance to civilian Eighth Amendment law.

B. Conditions of Confinement

The Supreme Court's Eighth Amendment jurisprudence in conditions of confinement cases is well established.²⁹⁷ Military courts are faithful to these decisions, applying those legal standards created by the Court to determine if an Eighth Amendment or Article 55 violation exists. Operating a penal system in the military is very similar to operating one in the civilian sector. Consequently, applying standards crafted by the Supreme Court for the civilian penal system is compatible with the military. This is apparent in *United States v. Martinez*.²⁹⁸ In *Martinez*, the Army Court of Military Review (ACMR) (now the Army Court of Criminal Appeals (ACCA)) held that pre and post-trial segregation did not violate Article 55 or the Eighth Amendment.²⁹⁹ In its analysis, the court reviewed the congruence between Article 55 and the Eighth Amendment, stating that, "Article 55, UCMJ, encompasses all constitutional safeguards of the eighth amendment, as the former parallels the latter."³⁰⁰ From this premise, the court turned to federal law, adopting the test articulated in *Trop*: "whether the conditions can be said to be cruel and unusual under contemporary standards of decency."³⁰¹ The court then diagnosed the applicable standard from *Rhodes v.*

²⁹⁶ This statement is based upon the underlying principle that military courts have had few opportunities to consider the reach of the Eighth Amendment in capital cases, especially cases where capital offenses in "times of war" are at issue. See MCM, *supra* note 283, R.C.M. 103(19) (defining "time of war" to mean "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists").

²⁹⁷ See discussion *supra* pt. II.C.

²⁹⁸ 19 M.J. 744 (A.C.M.R. 1984) (holding that defendant's conditions of confinement did not violate Article 55 or the Eighth Amendment).

²⁹⁹ *Id.* at 749-50.

³⁰⁰ *Id.* at 747 (citing *United States v. Matthews*, 13 M.J. 501, 521 n.10 (A.C.M.R. 1984)).

³⁰¹ *Id.* at 748 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Chapman and held that no Eighth Amendment violation existed.³⁰² *Martinez* is representative of the military courts' approach to resolving conditions of confinement challenges. Because the type of challenge is quite similar to the civilian sector, military courts incorporate Eighth Amendment standards without deviation. For instance, military courts apply Supreme Court standards created in *Estelle v. Gamble*,³⁰³ *Wilson v. Seiter*,³⁰⁴ *Farmer v. Brennan*,³⁰⁵ and *Hudson v. McMillian*.³⁰⁶ In only a select few cases did a military court address a unique military punishment and resolve it applying Article 55.³⁰⁷

³⁰² *Id.*; see also *Rhodes v. Chapman* 452 U.S. 337, 346 (1981). The ACMR relied on *Rhodes* for two important legal propositions. First, when using the evolving standards of decency doctrine, courts "should make informed decisions using objective factors to the maximum extent possible." *Rhodes*, 452 U.S. at 346. Second, "courts should consider the totality of the confinement conditions to determine whether . . . contemporary standards of decency have been violated." *Id.* at 347. Factors that inform the court on inadequate conditions are those that deprive one of their basic human needs. *Id.* (citing *Hutto v. Finney*, 437 U.S. 678, 687 (1978)).

³⁰³ See, e.g., *United States v. Erks*, No. 33059, 2000 CCA LEXIS 171 (A.F. Ct. Crim. App. July, 14, 2000) (unpublished) (holding that confinement under stark conditions and segregation from the main population did not, under the totality of the circumstances, constitute cruel and unusual punishment under Article 55 and the Eighth Amendment).

³⁰⁴ See, e.g., *United States v. White*, 54 M.J. 469 (2001). In *Wilson*, the Supreme Court distilled its condition of confinement analysis into two prongs: first, the Court considered whether an act or omission resulted in the denial of necessities and is objectively serious (objective component); and second, the Court considered whether prison officials exhibited deliberate indifference to the inmates safety. *Id.* at 474 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)); see also *supra* note 251 (explaining the deliberate indifference standard applied in *Wilson*).

³⁰⁵ See, e.g., *United States v. Sanchez*, 53 M.J. 393 (2000). The CAAF relied on *Farmer* to define the two factors necessary for a valid Eighth Amendment claim. The first (the objective component) is whether an act or omission results from the denial of necessities and is sufficiently serious; and second, whether a deliberate indifference (subjective component) to the health and safety toward the inmate exists. *Farmer v. Brennan*, 511 U.S. 825 (1994) (citing *Wilson*, 501 U.S. at 298); see also *supra* note 253 (clarifying how the deliberate indifference standard is to be applied).

³⁰⁶ See, e.g., *United States v. Kinsch*, 54 M.J. 641 (Army Ct. Crim. App. 2000) (holding that a prison guard maliciously and sadistically struck an inmate in his testicles with the intent of unnecessarily and wantonly causing physical and mental pain); see also *supra* note 259 (stating that blows to an inmate resulting in "bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis*" (quoting *Hudson v. McMillian*, 503 U.S. 1, 10 (1992))).

³⁰⁷ See, e.g., *United States v. Lorange*, 35 M.J. 382 (C.M.A. 1992) (holding that confinement to bread and water on a vessel docked in a domestic shipyard violates Article 55 of the UCMJ); *United States v. Yatchak*, 35 M.J. 379 (C.M.A. 1992) (holding that Article 55 and the Eighth Amendment were violated when the convening authority sentenced a sailor to confinement on bread and water on a ship docked in a domestic shipyard).

As this section demonstrates, military courts closely follow Supreme Court decisions in conditions of confinement cases. This pattern stems from the ease in adapting civilian legal standards to the military and the frequency with which military courts apply the rules. But these types of cases represent a narrow application of the evolving standards of decency doctrine. What is unknown is the effect the doctrine may have in military capital cases where the offense is unique to the military. To address this unknown, a two-track model to harmonize military and civilian Eighth Amendment law is proposed. This model's purpose is to offer consistency and direction for military courts when applying Eighth Amendment law and address the inherent flaw that exists with evolving standards of decency in the military. The flaw rests with the legislative component, which surveys state legislatures to determine whether the offense or the offender's status permits a death penalty sentence. Because some of the offenses and punishments are unique to the military, a survey of the state legislatures is unhelpful in diagnosing whether an Eighth Amendment violation exists. It is this flaw that the following passages explore and remedy.

IV. A New Framework

In the death penalty arena, evolving standards of decency is a vibrant doctrine that relies on objective criteria to form conclusions on the appropriateness of punishment.³⁰⁸ The prominent factors the Court considers are legislative enactments and jury verdicts.³⁰⁹ After a thoughtful analysis of the evidence, the Court brings its judgment to bear on the appropriateness of the death penalty.³¹⁰ The doctrine's chief components are not as starkly examined in noncapital proportionality and conditions of confinement challenges, but the doctrine is still invoked for the proposition that society accepts or rejects a form of punishment based upon the attitudes of the day.³¹¹ The doctrine's acceptance by civilian courts is well-established, in part because its chief components maintain a civilian character. It is this civilian character that makes the doctrine inadaptable to the military.

³⁰⁸ See discussion *supra* pt. II.B.1-2.

³⁰⁹ See *id.*

³¹⁰ See discussion *supra* pt. II.B.3.

³¹¹ See discussion *supra* pt. II.B.1.b & II.C.

The Court's primary criterion is legislative enactments. By surveying state laws and the punishments proscribed, the Court has a versatile tool to measure the sentiments of society. This tool is constitutionally rooted in principles of federalism and seeks to defer to the elected legislative bodies when a national consensus exists.³¹² These legislative bodies, however, proscribe the death penalty for heinous common law felonies. The military proscribes the death penalty for fifteen offenses, yet only three of them are rooted in the common law.³¹³ For the twelve unique military offenses,³¹⁴ it is difficult to reach a conclusion that a national consensus exists on the appropriateness of the death penalty when state legislatures may never address the issue. Jury verdicts present the same problem, albeit differently. In comparison to the military's crimes of rape, felony-murder, and premeditated murder, the twelve unique military capital offenses that authorize the death penalty are rarely charged. For the most part, this is a result of the nature of the unique offense, which is not authorized as a permissible charge unless, in most cases, the nation is in a "time of war."³¹⁵ Because capital charges rarely occur,³¹⁶ and therefore convictions are even rarer, it remains difficult to measure the attitudes of court-martial panels.³¹⁷

³¹² See, e.g., *Atkins v. United States*, 536 U.S. 304, 312-13 (2002) (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) for the proposition "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures'").

³¹³ UCMJ art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape) (2002).

³¹⁴ *Id.* art. 85 (desertion), art. 90 (assaulting or willfully disobeying superior commissioned officer), art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 101 (improper use of countersign), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106 (spying), art. 106(a) (espionage), art. 110 (improperly hazarding a vessel), art. 113 (misbehavior of sentinel).

³¹⁵ See *supra* note 296 (explaining the Rules for Courts-Martial's definition of "time of war").

³¹⁶ See *MCM*, *supra* note 283, R.C.M. 103 analysis A21-4, A21-5 (identifying national conflicts, absent a declaration by war by Congress or a factual determination by the President, that qualify as a "time of war[:]" Korean War and Vietnam War). The inference to be drawn is for purposes of the UCMJ, the military is rarely in "time of war," as both Gulf War I and Gulf War II, and the Global War on Terrorism failed—at least at the time of this writing—to trigger the congressional or Presidential action required to achieve this special status.

³¹⁷ See DPIC, *supra* note 152, at *The U.S. Military Death Penalty: News and Developments (Prior to 2005)*, at <http://www.deathpenaltyinfo.org/article.php?did=180&scid=32#facts> (last visited May 19, 2005) (identifying PVT Eddie Slovic as the only Soldier to be executed for a time of war offense, desertion, since the Civil War).

Whether a mature society rejects or accepts the death penalty or an offense that proscribes the death penalty in the military is not answered by looking to the evolving standards of decency's chief components. Extending the doctrine's analysis to additional objective sources, like international opinion, public opinion, and the opinions of professional organizations, is equally unhelpful. For instance, the trend in the international community is to ban the death penalty under all circumstances, including offenses committed during times of war.³¹⁸ This is antithetical to American tradition, culture, and policy.³¹⁹ Military officers and elected officials take an oath to support the Constitution, not to support the integration of European laws that lack America's culture and history.³²⁰ Public opinion polls provide even less guidance on the appropriateness of the death penalty or punishment that appears to be barbaric. Public opinion polls are mere snapshots in time that reflect the passions of the public, who may be informed or uninformed. As the national mood changes, so do public opinion polls. One only need consider presidential exit polling conducted in 2004 to reach the conclusion that polling is an imprecise science.³²¹

Noncapital disproportionality challenges present their own set of hurdles for the military justice system. The framework used to guide the Court's analysis is the *Solem* factors: (1) the gravity of the offense and the harshness of the penalty; (2) the sentence imposed on other criminals

³¹⁸ See Council of Europe: The Death Penalty Outlawed, at <http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/default.asp> (last visited Apr. 28, 2005). Forty-four of the forty-six members of the Council of Europe have ratified Protocol 6 to the Convention, which prohibits capital punishment in times of peace. See Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, as amended by Protocol No. 11 (Apr. 28, 1983), available at <http://conventions.coe.int/Treaty/en/Treaties/Word/114.doc> (last visited Apr. 28, 2005). Protocol 13 prohibits capital punishment in time of war or of imminent threat of war. Twenty-nine of the forty-six members of the Council of Europe have ratified Protocol 14. See Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/187.doc> (last visited Apr. 28, 2005).

³¹⁹ The author recognizes that objections against using international opinion in Eighth Amendment cases apply equally to military and civilian courts. Those objections have been deferred until this section.

³²⁰ See U.S. CONST. art. VI. The relevant portion reads: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound, by Oath or Affirmation, to support this Constitution. . . ." *Id.*

³²¹ Richard Morin & Claudia Dean, *Report Acknowledges Inaccuracies in 2004 Exit Polls*, WASH. POST, Jan. 20, 2005, at A6 (reporting that the 2004 exit polls were the most inaccurate of any of the last five presidential elections).

in the same jurisdiction; and (3) the sentence imposed for commission of the same crime in other jurisdictions.³²² Criteria one and two are self-explanatory and cause no concern to the military in its ability to apply the rules. Criterion three is troubling. The criterion directs a court to consider sentences imposed for the commission of a crime in other jurisdictions.³²³ The military does not have a comparable jurisdiction in which to measure the harshness of a penalty that is unique to the military. For example, the crime of desertion in time of war may carry death or other punishment as a court-martial may direct.³²⁴ Setting aside the possible death verdict, another punishment that may result from a conviction for desertion is life without the possibility of parole.³²⁵ The third *Solem* factor provides no guidance on the appropriateness of this punishment. Consequently, the *Solem* factors' applicability to the military's noncapital proportionality analysis is limited.

The framework advocated in this article reconciles the doctrine's inadaptability in its capital and noncapital jurisprudence. This framework, however, is not limited to the death penalty; it extends to capture other dimensions of substantive Eighth Amendment law—like noncapital disproportionality and conditions of confinement challenges—into a holistic, logical framework.³²⁶ Not only is the framework holistic in its application, but it remains faithful to American tradition and law.³²⁷ A central piece to this framework is recognition that Congress is constitutionally responsible for the regulation of the armed forces.³²⁸ Congress promulgates laws to ensure the military is prepared to fight the nation's wars. Such laws are presumed lawful and rational.³²⁹ It is from this premise that the framework begins. The framework first considers whether an offense or punishment is unique to the military. If the offense or punishment is common to the states, the applicable

³²² *Solem v. Helm*, 463 U.S. 277, 292 (1983); *see also supra* note 171 for the proposition that *Solem*'s noncapital proportionality factors remain good law despite Justice Scalia's plurality opinion in *Harmelin*.

³²³ *See id.* at 291-92.

³²⁴ UCMJ art. 85.

³²⁵ *See id.*

³²⁶ *See* Appendix A for graphical representation.

³²⁷ *See United States v. Loving*, 517 U.S. 748, 752 (1996) (citing 1776 Articles of War, *reprinted in* WINTHROP, *supra* note 263 at 976 (following the British example, Congress reauthorized the Articles of War with a provision that the civil courts would maintain jurisdiction over common law capital offenses).

³²⁸ *See* U.S. CONST. art. I, § 8, cls. 11-14.

³²⁹ *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (explaining that congressional statutes bear a strong presumption of validity).

approach remains civilian Eighth Amendment law. If the offense or punishment, however, is unique to the military, whether in peace or war, the applicable standard is rational basis. To elaborate further, this article examines each track of the framework. First, track one is examined, addressing common offenses or punishments that civilian and military societies share. Second, track two is examined, identifying the unique military offenses and applying to them a rational basis standard.

A. Track One: The Civilian Standard

Track one applies civilian, substantive Eighth Amendment law without deviation. The underlying principle of track one is the recognition that many aspects of military criminal law parallel civilian criminal law. For those aspects that bear an instinctively civilian character, no rational policy basis exists to prevent the application of civilian standards. This parallelism allows military courts to confidently follow civilian Eighth Amendment law. In conjunction with the Eighth Amendment's application, military courts also have interpreted Article 55 to not only mirror Eighth Amendment protections, but to beyond them as well.³³⁰ This comprehensive umbrella of Eighth Amendment protections affords service members protections that are at least as generous as their civilian counterparts. In this comprehensive umbrella, the overall scope of substantive Eighth Amendment law in the military is considered. Of particular importance to the scope of the Eighth Amendment law is the recognition that track one analysis permits full doctrinal application of that law to the military. That is, evolving standards of decency and its objective components are applicable because they assess the legal standards for civilian offenses and punishments. Since track one analysis requires that the offense or punishment maintains a civilian character, it necessarily follows that the doctrine is applicable.

A track one examination identifies particular military offenses, punishments, conditions of confinement, and possible future cruel and unusual punishment challenges that may reach the Court. What follows after identifying these categories is a matching process, where each distinct group is compared to its civilian counterpart. This process

³³⁰ United States v. Martinez, 19 M.J. 744, 748 (A.C.M.R. 1984) (citing United States v. Wappler, 2 U.S.C.M.A. 393, 396 (1953)); *see also supra* notes 298-302 and accompanying text.

permits an opportunity to analyze the applicability of a category and determine whether the civilian and military legal standards are congruent.

The UCMJ maintains three common law capital felonies: rape, felony-murder, and premeditated murder.³³¹ Of the three offenses, the crime of rape's maximum punishment bears the greatest likelihood of violating federal Eighth Amendment law. This punitive article's punishment is arguably incongruent with *Coker*,³³² yet it maintains a civilian character. This is apparent by examining the language of Article 120. Article 120 is absent of language offered to limit the death penalty to those occasions where the offense is committed in times of war. Moreover, the history of the crime of rape in the military indicates that at one time, civilian courts maintained jurisdiction over the offense.³³³ Not until the Civil War did Congress extend to courts-martial jurisdiction for the crime of rape.³³⁴ In 1916, Congress granted the military jurisdiction over common law felonies, but maintained civilian jurisdiction over the crimes of rape and murder.³³⁵ This evidence suggests that the crime of rape, even as enacted in Article 120, is traditionally a civilian offense. Therefore, civilian and military courts should remain faithful to the

³³¹ UCMJ art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape) (2002).

³³² See *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (holding that the imposition of the death penalty for the rape of an adult woman violates the Eighth Amendment). The *Coker* plurality's rejection of capital rape stems from a "death is different" rationale. That is, the rape of an adult woman does not involve the unjustified taking of human life. Consequently, imposing the death sentence for capital rape where no loss of life results is a disproportionate punishment. *Id.* at 598-99. *But see* MCM, *supra* note 283, R.C.M. 1004(c)(9) (identifying two conditions before a capital rape offender can become eligible for the death penalty: (1) the victim must be under the age twelve; or (2) the accused maimed or attempted to kill the victim). The *Coker* rationale casts doubt as to whether either condition satisfies the Eighth Amendment.

³³³ See *supra* note 328 (Congress reauthorized the Articles of War with a provision that the civil courts would maintain jurisdiction over the common law offense of rape. Congress changed this in 1863 when it expanded courts-martial jurisdiction to include the common law felony of rape).

³³⁴ See *Coleman v. Tennessee*, 97 U.S. 509, 514 (1879) (citing Act of Mar. 3, 1863 § 30, 12 Stat. 736, Rev. Stat. § 1342, Art. 58 (1875)) (finding that Congress authorized subject matter jurisdiction over murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny during times of war or rebellion).

³³⁵ Articles of War of 1916, ch. 418, § 3, Arts. 92, 93, 39 Stat. 664.

Eighth Amendment and its prohibition against the death penalty for this offense.³³⁶

Article 118(4), felony-murder, properly falls within a track one analysis. Again, felony-murder is a common law offense that carries the death penalty. Like the crime of rape, because felony murder bears a civilian character, it should properly be construed in light of federal law. The Supreme Court is not remiss in this area, having decided two capital felony-murder challenges, *Enmund* and *Tison*, to guide lower courts.³³⁷ Both decisions provide guidance on the requisite level of moral culpability warranted for the death penalty. Military courts and the drafters of the RCM are cognizant of *Enmund* and *Tison*'s significance in sentencing. For instance, in *Loving v. United States*,³³⁸ the CAAF construed RCM 1004(c)(8) to comply with *Enmund* and *Tison* "provided that it is . . . limited to a person who kills intentionally or acts with reckless indifference to human life."³³⁹ In its opinion, the court considered the drafter's intent in writing RCM 1004(c)(8), finding that the language was written with *Enmund* and *Tison* in mind.³⁴⁰ Under a track one construction, consistent with present practice, military courts would adhere to both *Enmund* and *Tison* when evaluating whether to sentence a felony-murderer to death.

³³⁶ See MCM, *supra* note 283, art. 120 analysis, at A23-13. *Coker* is interpreted as prohibiting the death penalty for the rape of an adult woman. *Id.* R.C.M. 1004 analysis, at A21-77. This interpretation lends itself to permitting capital punishment for those who rape a child. The Court has yet to address this issue, but nevertheless, the military still permits the death penalty for rape in two instances. See *supra* note 333 (identifying the two conditions necessary for capital rap conviction). See MCM, *supra* note 283, R.C.M. 1004(c)(9).

³³⁷ See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that Arizona's felony murder rule authorizing the death penalty maintained an appropriate moral culpability standard to satisfy Eighth Amendment requirements). *But see* *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (holding that Florida's felony murder rule failed to satisfy the requisite level of moral culpability to warrant the death penalty).

³³⁸ 47 M.J. 438, 443-44 (1998) (holding that felony murder under Article 118(4) and the aggravating factor in RCM 1004(c)(8)—the "actual perpetrator of the killing"—is constitutional as long as the aggravating factor is limited to those who intend to kill or those who act with reckless indifference to human life).

³³⁹ *Id.* at 444.

³⁴⁰ See MCM, *supra* note 283, R.C.M. 1004(c)(8) analysis, at A21-77 (2002) (citing *Enmund v. Florida*, 458 U.S. 782 (1989) and *Tison v. Arizona*, 481 U.S. 137 (1989) as the basis for writing RCM 1004(c)(8)'s aggravating factor).

A challenge involving the method in which a death row inmate is executed also maintains a civilian character. To date, the method of execution in the military is lethal injection.³⁴¹ Whatever standards civilian courts impose in administering lethal injection (to include whether the method even comports with civilized standards), military courts should faithfully observe. This statement is premised on the observation that no distinction exists between the military and the civilian sectors imposing lethal injection. The method of execution may, however, properly fall into a track two analysis if Congress seeks to revive a historic method for reasons of military necessity. For instance, if Congress revived death by firing squad, and believed it to be an appropriate punishment for those committing a capital offense while deployed overseas and during wartime, then the method would be presumed legitimate.³⁴²

The Court's construction of the *Solem* factors for noncapital disproportionality cases requires a track one analysis, yet this is limited.³⁴³ Application of the *Solem* factors is only appropriate when the offense maintains a civilian character. For instance, in *Harmelin*, a majority of the justices supported the use of the *Solem* factors to determine whether a sole conviction for possessing 672 grams of cocaine warranted life imprisonment without the possibility of parole.³⁴⁴ While a harsh punishment, the decision is relevant to a track one analysis because the UCMJ also criminalizes drug possession.³⁴⁵ Since no qualitative distinction exists between the military and civilian drug possession laws, a court-martial that imposes a sentence of life without the possibility of parole for drug possessions, in a quantity similar to that in *Harmelin*, would not offend the Eighth Amendment.³⁴⁶ This analysis is applicable to other civilian-like offenses found in the UCMJ.

³⁴¹ See DPIC, *supra* note 152 (identifying lethal injection as the sole method of execution in the military).

³⁴² See *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (identifying death by firing squad as a permissible form of punishment in the military).

³⁴³ See *Solem v. Helm*, 463 U.S. 277, 292 (1983).

³⁴⁴ See *Harmelin v. Michigan*, 501 U.S. 957, 997-98 (1991) (Kennedy, J., concurring) (explaining that the *Solem* factors remain relevant in noncapital proportionality challenges).

³⁴⁵ UCMJ art. 112(a) (2002).

³⁴⁶ See *id.* (wrongful use or possession of cocaine provides a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and five years confinement). This assumes that Congress changed the existing maximum penalty from five years to life without the possibility of parole.

Conditions of confinement challenges offer a reservoir of cases to demonstrate the military's faithfulness to Eighth Amendment law when the management of a penal system is commonly shared by the two sectors. That is, both the military and civilian sectors maintain facilities to incarcerate convicted felons. There is little distinction between the manner in which civilian and military facilities are managed.³⁴⁷ Because the Eighth Amendment applies to persons incarcerated, both the military and civilian penal systems adhere to constitutional prohibitions against "the unnecessary and wanton infliction of pain."³⁴⁸ The military's commitment to this standard is illustrated in a host of conditions of confinement challenges decided by military appellate courts. These military appellate decisions follow the standards articulated in *Estelle* (treatment of medical needs), and *Whitely* (use of force cases), with successor decisions clarifying the culpability standards for both.³⁴⁹ This is significant because it demonstrates that military courts follow Eighth Amendment standards when the application is clear and unambiguous.³⁵⁰ This line of cases also supports the track one analysis: punishments maintaining a civilian character should follow the applicable civilian Eighth Amendment standard.

Thus far, track one analysis concerns itself with traditional Eighth Amendment challenges that the Court has addressed. Yet track one's applicability also extends to other issues that have not been clearly decided or encountered by military courts. That is, there are a number of death penalty challenges that the Court has either addressed, or may address in the coming years that may become relevant to the military. For instance, the Court trend exempting groups from the reach of the

³⁴⁷ U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 1-5 (5 Apr. 2004) [hereinafter AR 190-47] (stating that the Army Corrections System "will strive to be accredited by the American Corrections Association").

³⁴⁸ *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

³⁴⁹ See, e.g., *United States v. Kinsch*, 54 M.J. 641 (Army Ct. Crim. App. 2000) (holding that prison officials acted maliciously and sadistically when they used excessive force in a patdown); *United States v. White*, 54 M.J. 469 (2000) (holding that prison officials did not exhibit a deliberate indifference to an inmate's medical needs when basic psychiatric care was provided); *United States v. Sanchez*, 53 M.J. 393 (2000) (holding that prison officials did not inflict unnecessary cruel treatment when an inmate became subject to verbal sexual abuse).

³⁵⁰ *But cf.* *United States v. Yatchak*, 35 M.J. 379 (C.M.A. 1992) (failing to address the deliberate indifference standard advanced in *Estelle* when the Sailor was confined to bread and water on a vessel docked in a domestic port.); see also *United States v. Lorange*, 35 M.J. 382 (C.M.A. 1992) (failing to address the *Estelle* deliberate indifference standard).

death penalty follows a track one analysis. To date, the mentally insane,³⁵¹ mentally retarded,³⁵² and minors below age eighteen are exempt from receiving a death sentence.³⁵³ It is plausible that a court-martial could encounter an exempt group when deciding the punishment for a capital offense. Since enlistment into the services begins at age seventeen,³⁵⁴ this decision bears some importance. For instance, Congress could change the military's minimum age to receive the death penalty to seventeen (it is presently set at eighteen).³⁵⁵ If Congress so acted, and a court-martial sentenced a seventeen-year-old service member to death, this action would constitute a constitutional violation under a track one analysis. Second, in another nuance to the Eighth Amendment, Justice Breyer in a denial of a writ of certiorari raised the possibility that an inmate on death row for too long may constitute cruel and unusual punishment.³⁵⁶ Justice Thomas criticized this proposition as absurd considering the death row inmate is largely responsible for the extended delay in execution.³⁵⁷ Nevertheless, both types—death penalty exempt status categories and excessive length on death row cases—may properly receive a track one analysis.

In summary, track one's underlying principle is the recognition that civilian and military similarities in the offense and punishment deserve to be treated in accord with Eighth Amendment requirements. Thus, deviation from this rule is not permissible unless the offense or punishment is uniquely military.

³⁵¹ *Ford v. Wainwright*, 477 U.S. 399 (1986).

³⁵² *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁵³ *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *see supra* notes 143-47 and accompanying text (discussing *Roper*'s significance to the legislative component).

³⁵⁴ 10 U.S.C. § 505 (2000) (identifying the age of enlistment into the services as a person "not less than seventeen years of age . . . [;]however, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control").

³⁵⁵ *See* DPIC, *supra* note 152 (identifying eighteen as the minimum age a service member can receive the death penalty).

³⁵⁶ *Foster v. Florida*, 537 U.S. 990, 993 (Breyer, J., dissenting from denial of writ of certiorari) (explaining that twenty-seven years on death row may be unusual for purposes of the Eighth Amendment).

³⁵⁷ *Id.* at 990 (Thomas, J., concurring from denial of writ of certiorari).

B. Track Two: The Military Standard

Track two analysis applies a rational basis standard to determine the appropriateness of punishment for unique military offenses. Track two is the crux of the thesis advocated in this article and the most controversial. Track two's policy rationale stems from three positions: (1) the objective components embedded in the evolving standards of decency doctrine fail to address the unique aspects of military Eighth Amendment law; (2) Congress is better suited to craft laws that regulate the armed forces in times of war; and (3) civilian courts should grant great deference to crimes and offenses that are unique to the military and share no civilian comparison. As addressed in the legal research, no court decision properly fixes the appropriate Eighth Amendment standard when the capital crime or punishment is uniquely military. For that reason, this article advocates a rational basis standard. Borrowed from equal protection, due process and First Amendment jurisprudence,³⁵⁸ the rational basis test is customarily recognized as a standard that presumes the validity of a statute unless it fails to achieve a rational relationship to a legitimate state interest.³⁵⁹ With a rational basis standard applied in the Eighth Amendment and Article 55 military context, the burden of proof rests with the challenger in contesting the propriety of a capital offense or punishment.³⁶⁰ Moreover, the challenged law does not fail because Congress neglected to make a record identifying the policy basis for creating the law.³⁶¹ Overall, a rational basis application, whether in the First Amendment, equal protection, or due process regimes, is presumed legitimate and constitutional.³⁶² The burden for the challenger is to demonstrate that the challenged law does not rationally relate to a legitimate state interest, or in the alternative, the law itself serves no legitimate state interest.³⁶³ For these reasons, it is difficult, if not rare, for a challenger to overcome this heavy burden of demonstrating the irrationality, or indeed, illegitimacy, of a challenged law under a rational basis standard. Indeed, the standard supports, for the most part, the

³⁵⁸ See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

³⁵⁹ *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that an amendment to a State Constitution that prohibits all legislative, executive, or judicial action designed to protect homosexual persons from discrimination lacked a rational basis).

³⁶⁰ See *FCC*, 508 U.S. at 315.

³⁶¹ *Id.*

³⁶² *But cf.* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that Texas's law prohibiting homosexual sodomy does not serve a legitimate state interest).

³⁶³ See *FCC*, 508 U.S. at 315.

validity of a law, and entrusts the responsibility for its fairness with the legislature and not the courts.

This track two analysis identifies capital offenses and punishments that implicate the Eighth Amendment but deserve a rational basis application. The nature of each capital offense or punishment examined is firmly rooted to the military, whether through tradition, culture, or custom. A starting point to determine whether an offense or punishment is unique to the military is whether its roots can be traced to the Articles of War. Thereafter, a rational basis standard is applied to determine whether these unique offenses withstand constitutional scrutiny. Finally, the analysis is divided into two sections, unique military capital offenses and unique noncapital punishments.

1. Unique Military Capital Offenses

Uniform Code of Military Justice capital offenses are a product of Congress's intent to ensure the military possesses the means to effectively punish service members who, by their conduct, harm the safety and integrity of the unit or the interests of national security.³⁶⁴ A conviction on any offense could possibly result in the death penalty.³⁶⁵ For a challenger to make a successful excessiveness or proportionality challenge, he or she must show that the punitive article and its prescribed punishment are irrational.³⁶⁶ That is, the challenged article and its complement punishment (whether unique military punishment, life in

³⁶⁴ See MCM, *supra* note 283, R.C.M. 1004(c)(2) (stating an aggravating factor that the death penalty can be adjudged if the accused "knowingly created a grave risk of substantial damage to the national security of the United States;" or "[k]nowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected").

³⁶⁵ See UCMJ art. 85 (desertion), art. 90 (assaulting or willfully disobeying superior commissioned officer), art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 101 (improper use of countersign), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106 (spying), art. 106(a) (espionage), art. 110 (improperly hazarding a vessel), art. 113 (misbehavior of sentinel), art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape) (2002). Each punitive offense maintains the death penalty as a possible punishment.

³⁶⁶ See *FCC*, 508 U.S. at 315 (commenting that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it . . .'" (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

prison, or death) fail to further the legitimate interests of the government. As long as Congress reasonably believes that the punishment deters or redresses misconduct that is detrimental to the unit or national security, it remains constitutionally valid. For those who disagree with Congress's conclusion on the appropriateness of the punishment, the remedy remains with Congress, which serves at the will of the people.

The UCMJ provides twelve capital offenses that are unique to the military.³⁶⁷ Of these offenses, five authorize the death penalty only in times of war.³⁶⁸ Seven offenses permit the death penalty whether the nation is at war or not.³⁶⁹ Of the twelve, only two military capital offenses, article 106 (spying)³⁷⁰ and article 106a (espionage)³⁷¹ have

³⁶⁷ See *supra* note 314 (identifying the military's twelve unique capital offenses).

³⁶⁸ See UCMJ art. 85 (desertion), art. 90 (assaulting or willfully disobeying superior commissioned officer), art. 101 (improper use of countersign), art. 106 (spying), art. 113 (misbehavior of sentinel).

³⁶⁹ See *id.* art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106(a) (espionage), art. 110 (improperly hazarding a vessel).

³⁷⁰ 18 U.S.C. § 794(a) (2000). The relevant section reads:

Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

Id.

³⁷¹ *Id.* § 794(b). The relevant section reads:

Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy,

comparable civilian counterparts. Even though the UCMJ crimes of spying and espionage are federally-based, they still maintain a military character because the offenses are not recognized by state legislatures, the key component the evolving standards of decency doctrine relies upon to assess whether society accepts or rejects a capital offense.³⁷² For both, whether in war or peace time, Congress's legitimate state interest is to ensure that the nation's security remains intact. The means by which Congress has chosen to attain this objective is to prescribe severe punishments—up to and including the death penalty—for these serious infractions. Congress through history recognizes that the unlawful release of sensitive information to foreign nations directly threatens the national security of the United States, and consequently, prescribes the most severe punishment.³⁷³ Given the low standard that rational basis requires and Congress's intent to protect the national security of the United States, espionage and spying survive a rational basis application.

The crimes of desertion, assaulting or willfully disobeying a superior commissioned officer, improper use of a countersign, and misbehavior of a sentinel during wartime are rooted in the Articles of War.³⁷⁴ The legitimate state interest in prescribing death for these offenses,

shall be punished by death or by imprisonment for any term of years or for life.

Id.

³⁷² House UCMJ Hearings, *see supra* note 278, at 1229 (referencing spying as an Article of War); *see also* MCM, *supra* note 283, pt. IV, ¶ 106a analysis, at A23-9 (identifying peace time espionage as a recent amendment to the UCMJ). Even though Congress included the crime of espionage within the UCMJ in 1986, its derivative is spying—a traditional offense under the Articles of War, committed only in times of war. House UCMJ Hearings, *see supra* note 278, at 1229; *see also* WINTHROP, *supra* note 263, at 756-66 (commenting that the American Articles of War did not have an offense of spying until 1806, in which the offense of spying carried a death penalty sentence).

³⁷³ *See* MCM, *supra* note 283, R.C.M. 1004(d) (stating that the “military judge shall announce that by operation of law a sentence of death has been adjudged [for the crime of spying]”); *see also id.* R.C.M. 1104 analysis, at A21-77 (distinguishing *Woodson* as only prohibiting the mandatory death sentences for the crime of murder. This statement presumes that *Woodson*'s holding does not apply to the crime of spying).

³⁷⁴ House UCMJ Hearings, *supra* note 278, at 1225 (referring to desertion as an Articles of War offense and commenting that Article 85 is meant to consolidate various provisions relating to the crime of desertion; referring to Article of War 86, and importing its exact language into UCMJ art. 113, to permit the death penalty for misbehavior of a sentinel), 1226 (identifying article 90 as a derivative of Article of War 64 and further commenting that the death penalty may be imposed only in times of war), 1228 (referring to improper use of a countersign as an Article of War offense that carries the death penalty).

individually and collectively, is to ensure that during times of war, the armed forces maintains a ready force to meet foreign threats.³⁷⁵ Congress has chosen the death penalty as one punitive means to further this legitimate interest. As long as a nexus, or rational relationship, exists between the state's legitimate interests to maintain a responsive military and the means to achieve the objective (the death penalty for serious wartime offenses), the questioned law overcomes a constitutional challenge.³⁷⁶ As such, the death penalty, as one of the many punishments Congress provides to court-martial panels, is selected only for those crimes that, if committed, bear a substantial risk of harming the unit, the war effort, or even national security. A service member who commits a "time of war" capital offense, maintains the burden of proof to challenge its propriety. Yet, as mentioned, the standard is pro-government. In writing legislation, Congress is not required to justify the policy rationale for permitting such harsh punishment.³⁷⁷ Rather, the statute's mere promulgation affords it a presumption that it is constitutionally valid. Only in the rarest cases has the Court applied a rational basis standard and found for the challenger.³⁷⁸ Whether these cases are indicative of new Court trends in applying a rational basis standard is difficult to assess, but these decisions are anomalous and arguably represent more politics than legal reasoning.³⁷⁹

During peace time, seven unique military offenses permit the death penalty. Of those capital offenses, five—mutiny or sedition, misbehavior before the enemy, subordinate compelling surrender, forcing a safeguard, and aiding the enemy—are for the most part, like the war time capital

³⁷⁵ See *Parker v. Levy*, 417 U.S. 733, 743 (1974) (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) for the proposition that "the difference[] the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise'").

³⁷⁶ See *supra* notes 359-64 and accompanying text (explaining the great deference given to Congress's legislative enactments when a rational basis standard is applied).

³⁷⁷ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); see *supra* note 362 and accompanying text (discussing the rational basis test's presumption toward the legitimacy of a statute even if Congress has failed to provide a policy basis for the statute's enactment).

³⁷⁸ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (applying a rational basis standard and finding Texas's anti-sodomy law as serving no legitimate state interest); *Romer v. Evans*, 517 U.S. 620, 635-36 (1995) (striking down as unconstitutional a Colorado constitutional amendment, which implicitly supported discrimination against homosexuals, as serving no legitimate state interest).

³⁷⁹ See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (arguing the Court majority misapplied the Due Process Clause's rational basis standard).

offenses, rooted in the Articles of War.³⁸⁰ Espionage, as identified earlier, is a derivative of spying, and therefore, maintains a unique military character.³⁸¹ The only unique military capital offense not originating in the Articles of War is improperly hazarding a vessel.³⁸² Nevertheless, this offense is not one shared by the states, and therefore, is properly characterized as unique to the military. The seven peace time capital offenses are, like the war time capital offenses, designed to further the nation's interest in safeguarding the armed forces, and ultimately the nation, from internal and external threats. These are serious peace time offenses, which is why Congress reserved the death penalty only for this select group. In applying a rational basis standard, one must address whether safeguarding the armed forces from internal and external threats is a legitimate state interest. The obvious answer to this question is yes. More attenuated, but nonetheless relevant, is whether the death penalty furthers this national interest. Again, a rational basis standard presumes the statute's legitimacy, and the burden of proof to demonstrate a statute's irrationality, or that no plausible nexus exists between the means and ends, rests with the challenger. Each unique capital offense, individually and collectively, satisfies a rational basis standard.³⁸³

The twelve unique military capital offenses are justified, but some are a throwback to archaic reasoning that has carried over to the present time.³⁸⁴ Nevertheless, a rational basis standard in this legal regime affords the responsibility to Congress to correct perceived injustices, not the courts.

³⁸⁰ House UCMJ Hearings, *supra* note 278, at 1227 (commenting that UCMJ art. 94, mutiny or sedition, consolidates Articles of War 66 and 67), 1228 (commenting that UCMJ art. 99, misbehavior before the enemy, consolidates Articles of War 75), 1228 (referring to UCMJ art. 100, subordinate compelling surrender, as originating from Articles of War 76), 1229 (commenting that UCMJ art. 102, forcing a safeguard, derives from Articles of War 78 but with "time of war" language omitted), 1229 (commenting that UCMJ art. 104, aiding the enemy, derives from Articles of War 81).

³⁸¹ See *supra* note 373 and accompanying text.

³⁸² See House UCMJ Hearings, *supra* note 278, at 1230 (identifying UCMJ art. 110, improperly hazarding a vessel, as originating from the proposed Articles for the Government of the Navy).

³⁸³ Applying a different standard, such as intermediate or strict scrutiny, would certainly reveal a different result, but such is not the standard advocated in this article.

³⁸⁴ Permitting the death penalty for UCMJ art. 85 (desertion) and art. 90 (assaulting or willfully disobeying a superior commissioned officer) (2002) appear, even given the extreme case, unduly severe. Yet, a rational basis standard presumes the legitimacy of a statute and defers, with limited exceptions, to Congress for its rationality.

2. *Unique Noncapital Military Punishments*

Track two is not concerned solely with capital offenses. It may extend to noncapital disproportionality challenges as well. For instance, Article 15 authorizes punishment of confinement to bread and water on a disembarked vessel.³⁸⁵ This practice is found primarily within the U.S. Navy, and military courts, in reviewing the practice, find it consistent with Article 55 and congressional intent as long as the confinement lasts no longer than three consecutive days and is implemented at sea.³⁸⁶ Applying a track two analysis, this practice is in accord with the theme presented throughout this article. Confinement to bread and water is a unique punishment that is historically rooted.³⁸⁷ Commanders find its application necessary because it is one of the few effective punishments at their disposal.³⁸⁸ Even though Congress debated bitterly whether this punishment is simply a throw-back to barbarism, the debates' eventual outcome resulted in the punishment's promulgation.³⁸⁹ Since those debates, this punishment moved from courts-martial proceedings to non-judicial punishment found in Article 15.³⁹⁰ Whether confinement to bread and water as a punishment is found in courts-martial proceedings or non-judicial punishment, applying a rational basis standard would

³⁸⁵ UCMJ art. 15(b)(2)(A). Bread and water confinement is permissible "if imposed upon a person attached to or embarked in vessel . . . for not more than three consecutive days." *Id.*

³⁸⁶ See *United States v. Yatchak*, 35 M.J. 379 (C.M.A. 1992) (holding that Article 55 of the UCMJ and the Eighth Amendment were violated when the convening authority sentenced a Sailor to confinement on bread and water on a ship docked in a domestic shipyard); see also *United States v. Lorange*, 35 M.J. 382 (C.M.A. 1992) (holding that confinement to bread and water on a vessel docked in a domestic shipyard violated Article 55, UCMJ).

³⁸⁷ S. REP. NO. 81-486, at 11 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, (U.S. Government Printing Office 1950) (commenting that Article 15's inclusion of confinement to bread and water on an embarked vessel is a "combination and revision of Article of War 104 and article 14 of the proposed amendments to the Articles for the Government of Navy").

³⁸⁸ *United States v. Wappler*, 2 C.M.A. 393, 395 (1953) (referring to the legislative history that Navy commanders lobbied for confinement to bread and water to ensure they had an effective punishment at their disposal).

³⁸⁹ See House UCMJ Hearings, *supra* note 278, at 643 (referring to bread and water confinement as cruel and barbaric punishment that "fit[s] in the same category as the floggings, brandings, and tattooings which are specifically prohibited by article 55"). Congress debated Article 15's authorization of confinement to bread and water in the context of Article 55's prohibition against cruel and unusual punishment.

³⁹⁰ UCMJ art. 15(b)(2)(A) (2002). The relevant portion of Article 15 reads: "if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days . . ." *Id.*

reach the same result: the punishment is constitutional. This is significant and underlies one of the premises for track two analyses—Congress is the proper forum to debate the merits of a unique military offense or punishment.

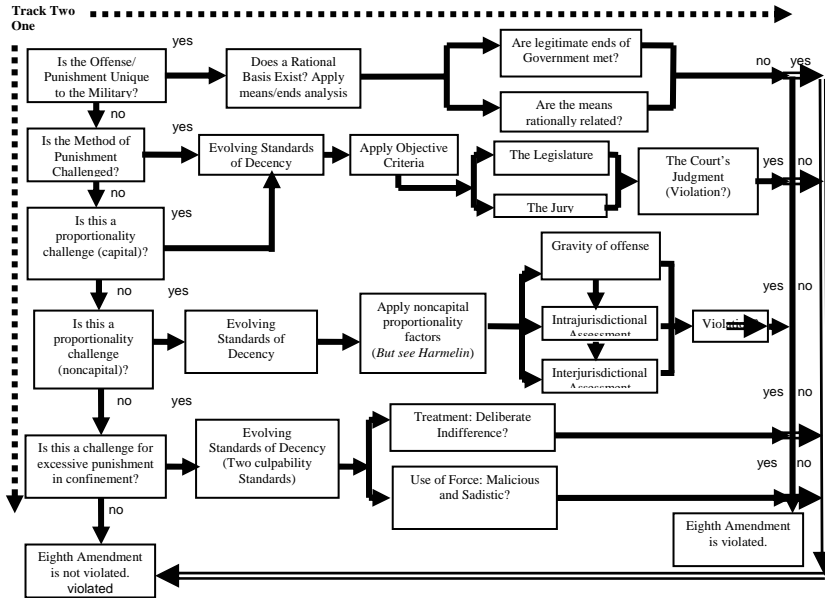
Track two analysis is controversial in that it provides great deference to Congress in legislating offenses and punishments that are unique to the military. Again, the rationale for this proposition is the inability of the evolving standards of decency doctrine to address the appropriateness of punishment. Therefore, the recommended standard is one that is deferential to the will of Congress, which is ultimately accountable to the people.

V. Conclusion

This article examined the components of the evolving standards of decency doctrine and demonstrated its shortcomings with the military justice system. A primary shortcoming is the inability to apply the doctrine's primary component—the sense of the nation's legislatures as expressed in their statutory pronouncements—to determine whether a military offense or punishment conflicts with the Eighth Amendment. Given this shortcoming, the competing interests of civilian and military Eighth Amendment law must be harmonized while still maintaining a criminal justice system responsive to the military's needs. The framework advocated is comprehensive in that a clear standard is identified for any offense or punishment. The framework is also progressive in that it follows Supreme Court pronouncements on the death penalty when the offense or punishment maintains a civilian character. For those offenses or punishments that are unique to the military, a rational basis standard—or track two application—is advocated. Track two's most attractive feature is the simplicity of application. With simplicity may come occasional injustice, but the forum for addressing the "bad facts" cases in a track two application resides with Congress and not the courts. For both track one and two, the result is a framework that ultimately achieves a methodology that provides clear answers on the appropriate Eighth Amendment standards for the military criminal justice system.

Appendix A

Eighth Amendment Framework



This flowchart represents the Eighth Amendment framework proposed in this article. The critical question is whether the offense or punishment is uniquely military. If the offense possesses a civilian character, apply Track One analysis (vertical dotted arrow). If the offense is uniquely military, apply Track Two analysis (horizontal dotted arrow).

**COMPETITIVE QUOTES ON FSS BUYS: HOLD THE PICKLE,
HOLD THE MAYO—CAN YOU HAVE IT YOUR WAY AND
STILL HAVE COMPETITION?[†]**

MAJOR DANA J. CHASE^{*}

I. Introduction

When government agencies want to buy commercial supplies or services quickly, they turn to the U.S. General Services Administration's (GSA)¹ Federal Supply Schedules (FSS)² to meet their needs. Instead of

[†] Referring to the 1974 Burger King advertising campaign created by Batten, Burton, Durstine, and Osborne, in which patrons were encouraged to customize the toppings on their hamburgers.

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¹ The GSA is a government agency which works in conjunction with the executive branch to develop policies and guidelines for a variety of business interests to include: property management, travel, transportation, commercial acquisition, global supply, and vehicle acquisition and leasing services. Its mission is to assist federal agencies in their service to the public by providing, "at best value, superior workplaces, expert solutions, acquisition services, and management policies." See General Services Administration, *GSA Federal Supply Service*, at <http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelPage=%2Fep%2Fchannel%2FgsaOverview.jsp&channelId=-13263> (last visited May 17, 2005) [hereinafter *GSA Overview*].

The GSA operates eleven regional offices, located in Boston, New York, Philadelphia, Atlanta, Chicago, Kansas City, Fort Worth, Denver, San Francisco, Auburn, and Washington, DC, to service customers worldwide in the acquisition of office space, equipment, supplies, telecommunication, and information technology. See General Service Administration, *GSA Regions*, at <http://www.gsa.gov/Porta/gsa/ep/channelView.do?pageTypeId=8199&channelPage=/ep/channel/gsaOverview.jsp&channelId=-13362> (last visited May 17, 2005) [hereinafter *GSA Regions*].

The GSA's acquisition services assist federal agencies in accomplishing their mission by ensuring an effective and efficient federal procurement system through guidance and support, which is available on the GSA website. According to GSA for FY

contracting directly with vendors, government agencies use the FSS program as a simplified process to obtain “commonly used” commercial supplies and services.³ These purchases satisfy the requirements for full and open competition, thereby allowing contracting officers to use different contracting vehicles such as Blanket Purchase Agreements (BPA),⁴ sole-source acquisitions,⁵ and negotiation-like competitions⁶ to

2004, its services are used in procurements totaling nearly \$34.96 billion. *GSA 2004 Annual Performance and Accountability Report: Creating a Successful Future at GSA*, GENERAL SERVS. ADMIN., Nov. 15, 2004, at 52, available at <http://www.gsa.gov/gsa/cm-attachments/GSA-DOCUMENT/GSAFY2004PAR-R2F-aAB-0Z5RDZ-i34K-pR.ddf> [hereinafter *GSA 2004 Ann. Rep.*].

² The FSS are part of a program is also known as the “GSA Schedules Program or the Multiple Award Schedule Program” whereby vendors are awarded indefinite delivery contracts for supplies and services “at stated prices for given periods of time.” GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 8.402(a) (Mar. 2005) [hereinafter FAR]. The GSA directs and manages the Federal Supply Schedule program the purpose of which is to provide “Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.” *Id.*

Vendors awarded contracts by GSA under the schedule are required to publish an “Authorized Federal Supply Schedule Pricelist,” which comprises all of the supplies and services provided by a schedule contractor. *Id.* at 8.402(b). Any federal agency that orders under the FSS program can obtain a pricelist from any schedule contractor. *Id.*

Government agencies use the Federal Acquisition Regulation (FAR) subpart 8.402 and the pricelists to place task and delivery orders with schedule contractors. *Id.* In addition, the GSA schedule contracting office issues FSS publications that contain a general overview of the FSS program and address pertinent topics within FSS acquisitions. *Id.*

³ W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION 881 (2d ed. 1996).

⁴ FAR, *supra* note 2, at 8.405-3(c). A Blanket Purchase Agreement (BPA) is a contract established with FSS contractors to fill repetitive needs for supplies and services. *Id.* A government agency can establish either a single BPA in which only one schedule contractor provides the supply or service, or a multiple BPA where multiple schedule contractors for supplies and services. *Id.* The BPA must be the best value to the government and should not exceed five years. *Id.*

⁵ *Id.* at 8.405-6(a). Normally orders placed under the FSS are exempt from the requirements of FAR Part 6, Full and Open Competition, however, if government agencies are going to procure from only one source (sole-source), the need to conduct the acquisition as a sole-source must be justified in writing and approved at the levels outlined in FAR Subpart 8.405-6. *Id.*

⁶ *Id.* at 15.000. A negotiated procurement is any contract that is awarded using other than sealed bidding procedures under FAR part 15 in which the contracting officer discusses the contract with offerors. *Id.* at 15.102. In instances where the FSS is used to conduct competitions, contracting officers will conduct a competition similar to that of FAR part 15. *Id.* at 8.405-2.

obtain needed commercial supplies and services without having to pursue a lengthy procurement process.⁷

Government agencies can obtain needed commercial supplies and services at a lower cost from the FSS than contracting directly with the vendor, due to the FSS program's ability to buy commercial supplies and services in volume.⁸ The GSA accomplishes this by awarding vendors indefinite delivery/indefinite quantity (IDIQ)⁹ contracts for their commercial supplies and services.¹⁰ Currently, there are over 6.8 million commercial supplies and services available from more than 14,000 vendors on the GSA schedules.¹¹ These GSA schedules divide the vendors' commercial supplies and services into general categories, such as office supplies.¹² The general categories are then subdivided into numbered schedules that give a general description of the commercial supplies and services available within that numbered schedule along with a pricelist.¹³ Government agencies use the schedule contractor pricelists to determine which schedule contractor offers the best price on the needed supplies and services.¹⁴ The agencies then place task and delivery orders¹⁵ for the needed commercial supplies and services to the schedule contractors who offer the best value.¹⁶

⁷ Sales Res. Consultants Inc., Comp. Gen. B-284943, B-284943.2, June 9, 200, 2000 CPD ¶ 102; FAR, *supra* note 2, at subpt. 8.404(a); John G. Stafford Jr. & Pang Khou Yank, *The Federal Supply Schedules Program*, Briefing Papers No. 04-05, 2 (Apr. 2004).

⁸ KEYES, *supra* note 3, at 881.

⁹ FAR, *supra* note 2, at 16.501-1. Indefinite delivery contracts are used when the exact time or amount of supplies or services is unknown at the time of contract formation. *Id.* "There are three types of indefinite-delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts." *Id.* at 16.501-2(a).

The indefinite delivery/indefinite quantity contract allows the government to place orders for supplies or services when they are needed during a fixed period. *Id.* at 16.504(a). The orders placed must be within a stated amount provided for in the contract in either "number of units" or "dollar values." *Id.*

¹⁰ Stafford & Yank, *supra* note 7, at 2.

¹¹ Current FSS data is available from the GSA website. General Services Administration, *GSA Schedules*, at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA_OVERVIEW (last visited May 17, 2005) [hereinafter *GSA Schedules*].

¹² Past GSA FSS are available from the GSA website. General Services Administration, *GSA Schedules e-Library*, at <http://www.gsaelibrary.gsa.gov/ElibMain/ElibHome> (last visited May 2, 2005) [hereinafter *GSA Schedules e-Library*].

¹³ *Id.*

¹⁴ Stafford & Yank, *supra* note 7, at 2.

¹⁵ "Pursuant to 10 U.S.C. § 2304d and section 303K of the Federal Property and Administrative Services Act of 1949, task and delivery order contracts are also known as

With the ease of the FSS purchase process, the amount of supplies and services purchased using the FSS has increased substantially in recent years due to legislative changes to streamline further the acquisition process.¹⁷ The increase in FSS purchases is evident in the statistics provided in the Government Accountability Office's (GAO)¹⁸ annual reports. For example, FSS purchases totaled \$8.1 billion in fiscal year (FY) 1997,¹⁹ and \$34.96 billion in FY 2004,²⁰ thus making a 25 billion dollar increase in FSS sales in less than ten years.

Although the FSS is designed to simplify purchases for supplies and services, government agencies must still comply with the Federal Acquisition Regulation (FAR)²¹ when ordering commercial supplies and services at various threshold amounts.²² These ordering procedures are in place to assist the government in achieving the best value through competition for available commercial supplies and services using government funds.²³ Further, FAR section 8.404(a),²⁴ Use of Federal

requirements contracts and indefinite quantity contracts." FAR, *supra* note 2, at 16.501-2(a).

¹⁶ Stafford & Yank, *supra* note 7, at 2.

¹⁷ *Id.* at 1. This Briefing Paper focuses on the impact of the Federal Acquisition Streamlining Act (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994) and Clinger-Cohen Act, Pub. L. No. 104-106, 110 Stat. 186 (1996), on purchases under the FSS program. The Briefing Paper identified the concept that FASA and Clinger-Cohen were enacted to have the federal government to purchase more supplies and services using the commercial contracting methods that GSA could provide. *Id.*

¹⁸ The Government Accountability Office (GAO) evaluates almost every federal program, activity, and function on behalf of Congress to improve government operations through legislation and provide financial benefits to taxpayers. Government Accountability Office, *History of the GAO*, at <http://www.gao.gov/about/history> (last visited May 2, 2005) [hereinafter *GAO History*]. Specifically, the GAO, through its Inspector General, will review the FSS and how purchases are being made by government agencies and will hear bid protests on issues arising under government contracting. *Id.*

¹⁹ *GSA 1997 Annual Report*, GENERAL SERVS. ADMIN., Sept. 30, 1997, at 44, available at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/1997AnnRpt_R2F_aAB_0Z5RDZ-i34K-pR.doc [hereinafter *GSA 1997 Ann. Rep.*].

²⁰ See *GSA 2004 Ann. Rep.*, *supra* note 1.

²¹ The *Federal Acquisition Regulation* (FAR) is a system that codifies and publishes "uniform policies and procedures for acquisition by all executive agencies." FAR, *supra* note 2, at 1.101. The FAR system consists of the primary document of the FAR, "and agency acquisition regulations that implement or supplement the FAR," such as the *Army Federal Acquisition Regulation* (AFAR), the *Defense Federal Acquisition Regulation* (DFAR) and the *Special Operations Federal Acquisition Regulation* (SOFAR). *Id.*

²² *Id.* at 8.404(b)(1)-(3).

²³ *Id.* at 8.404(a). Competition under the FSS is determined as follows:

Supply Schedules, exempts the requirements under the FAR for FSS purchases made through the contracting methods of sealed bidding,²⁵ negotiated procurements,²⁶ and simplified acquisitions.²⁷

Because orders placed against a MAS contract satisfy full and open competition, “ordering agencies need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business programs” when buying off a schedule contract. Although this language seemingly eliminates the need for further competition, the FAR nonetheless requires some minimal competition among MAS vendors depending on the dollar value of the acquisition. Centered on “maximum order threshold” (based on bulk buying), such minimal competition requires the government to compare catalogs and pricelists among scheduled vendors, and sometimes negotiate price reductions with those vendors.

Contract and Fiscal Law Developments of 2001—The Year in Review, ARMY LAW., Jan./Feb. 2002, at 35-36 (internal footnotes omitted).

²⁴ FAR, *supra* note 2, at 8.404(a). FAR 8.404(a) states generally that Parts 13, Simplified Acquisition Procedures, 14, Sealed Bidding, 15, Contract by Negotiation, and 19, Small Business Program, do not apply to BPAs or orders placed against a FSS, since orders using the procedures in Subpart 8.4 are considered to have been issued using full and open competition.

²⁵ *Id.* at 14.101(e). Sealed bidding is a method of contracting that “awards a contract based upon submission of competitive bids in response to an invitation for bids from the government.” *Id.* These bids are then opened in a public forum at a prescribed date and time and the contract is awarded without discussions to the “responsible bidder whose bid, conform[ed] to the invitation for bids” and is the “most advantageous to the government, considering only price and the price-related factors included in the invitation” for bids. *Id.*

²⁶ *Id.* at 15.000-15.102. A negotiated procurement is any contract that is awarded using other than sealed bidding procedures. *Id.* at 15.000. There are two types of negotiation procurements: sole source acquisition where only one contractor has the required supply or service and competitive acquisitions where numerous contractor's supplies and services are put through three types of source selection processes and techniques, tradeoff, lowest price technically acceptable, and oral presentations, to determine which contractor to award. *Id.* at 15.101-1-15.102.

²⁷ *Id.* at pt. 13. Simplified acquisitions are acquisitions conducted using procedures such as the government purchase card, purchase orders, and Blanket Purchase Agreements for supplies or services not exceeding the simplified acquisition threshold of \$100,000, however, under FAR 13.5, the simplified acquisition threshold is \$5 million for certain supplies and services. *Id.* The purpose of simplified acquisition procedures is to “reduce administrative costs; improve opportunities for small, small disadvantaged, and women-owned small business concerns to obtain a fair proportion of Government contracts; promote efficiency and economy in contracting; and avoid unnecessary burdens for agencies and contractors.” *Id.* at 13.002(a)-(d).

When government agencies are looking to acquire best value²⁸ from the FSS, however, they will use FAR part 15, Contracting by Negotiation, procedures to hold a FAR part 15 type competition.²⁹ Even though contracting officers are not required under FAR section 8.404 to use FAR part 15 procedures when conducting negotiation-like competitions for FSS purchases, the GAO will apply FAR part 15 requirements when reviewing vendor protests.³⁰ The GAO determined that, “where an agency intends to use . . . an approach [for FSS procurements] that is like a competition in a negotiated procurement, . . . and a protest is filed, we will review the protested agency actions to ensure that they were reasonable and consistent with the terms of the solicitation.”³¹ The GAO further held that, “while the provisions of FAR part 15 . . . do not directly apply, we analyze [the protest] by the standards applied to negotiated procurements.”³² This standard of review contrasts with the language in FAR section 8.404, which states that, “[p]arts 13 (except 13.303-2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202-1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedules contracts.”³³ Therefore, contracting officers are not on notice that the GAO will apply FAR part 15 procedures when reviewing FSS purchases using negotiation-like procedures.

This article examines the purpose and history of the FSS and analyzes the current level of competition under the FSS. This article analyzes how FSS purchases through the use of Blanket Purchase Agreements (BPA), sole-source acquisitions, and unduly restrictive requirements limit competition. Specifically, this article concludes by

²⁸ Best value is a determination by the government that the outcome of the acquisition will “provide the greatest overall benefit in response to the requirement.” *Id.* at 2.101. This means that the government agency can choose an item with a greater cost and higher quality as long as all the evaluation criteria are met. *Id.* at 15.101.

²⁹ Ralph C. Nash & John Cibinic, *Federal Supply Schedule Procurements: The Protest Process*, 16 NASH & CIBINIC REP. 5 ¶ 26 (2002).

³⁰ See *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489 (1997); *Cross Match Tech., Inc.*, Comp. Gen. B-293024.3, B-293024.4, June 25, 2004; *Symplicity Corp.*, Comp. Gen. B-291902, Apr. 29, 2003; *Garner Multimedia, Inc.*, Comp. Gen. B-291651, Feb. 11, 2003, 2003 CPD ¶ 35 (holding that the agency failed to properly evaluate contractor quotations after applying FAR Part 15).

³¹ *Uniband, Inc.*, Comp. Gen. B-289305, Feb. 8, 2002, 2002 CPD ¶ 51, at 7 (citations omitted); see also Nash & Cibinic, *supra* note 29, ¶ 26.

³² *Digital Sys. Group, Inc.*, Comp. Gen. B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50, at 6; see also Nash & Cibinic, *supra* note 29, ¶ 26.

³³ FAR, *supra* note 2, at 8.404(a).

analyzing recent protests on FSS acquisitions, that negotiation-like FSS competitions contradict the original intent of the FSS. This article concludes that contracting officers must apply FAR part 15 procedures when conducting FSS competitions over the simplified acquisition threshold and that the Department of Defense, Defense Federal Acquisition (DFAR) Supplement 208.404-70 should be added to FAR subpart 8.4 as a means to ensure full and open competition.

II. How Did We Get Here?

In order to understand the changes in purchases made under the GSA FSS one must first look at the FSS program from its inception. This section discusses the purpose of the GSA FSS and the statutory changes that have affected the GSA FSS in the past twenty years. This section will demonstrate how the GSA FSS transformed from a highly regulated procurement vehicle to a streamlined method for government agencies to obtain commercial supplies and services through regulatory and statutory changes and how ultimately these changes limited competition.³⁴

A. The GSA FSS Program

Section 201 of the Federal Property and Administrative Service Act of 1949,³⁵ gives the GSA authority to administer the FSS program.³⁶ The purpose of the FSS program is to provide government agencies with a convenient method of purchasing supplies and services by taking advantage of commercial buying practices, thereby saving the government time and money through volume buying.³⁷ The GSA provides two types of schedules to accomplish its purpose. The first is the single award schedule, whereby a contract is awarded to one

³⁴ Gov't Accountability Office, *Ineffective Management of GSA's Multiple Award Schedule Program— A Costly, Serious, and Longstanding Problem*, PSAD-79-71, at 47-48 (May 1979) (concluding that due to GSA's poor management of the multiple award schedule, legislation mandating action to ensure price competition and competitive purchase methods was needed); JAMES F. NAGLE, *HISTORY OF GOVERNMENT CONTRACTING* 511 (2d ed. 1999).

³⁵ 40 U.S.C. § 501(b) (2000).

³⁶ Michael Fames Lohnes, *Attempting to Spur Competition for Orders Placed Under Multiple Award Task Order and MAS Contracts: The Journey to the Unworkable Section 803*, 33 PUB. CONT. L.J. 599, 602 (2004).

³⁷ *Id.*

contractor to provide a single product at a specific price and location.³⁸ The second, and most used, is the multiple award schedule (MAS)³⁹ in which the GSA negotiates indefinite delivery/indefinite quantity contracts with thousands of contractors for millions of commercial supplies and services.⁴⁰ Once the government awards contracts to the vendors the GSA issues a catalog, separated into general categories and subcategories, known as the FSS or schedules to government agencies.⁴¹ This catalog contains pricelists for every supply and service that a schedule contractor offers.⁴² The pricelist also contains a listing of the terms and conditions of each item on the schedule.⁴³ Government agencies, in turn, use the FSS catalog to place orders with the contractors listed in the schedule.⁴⁴ The schedules make ordering commercial supplies and services easy, allowing government agencies to obligate funds on the FSS purchases quickly.⁴⁵

The success of the FSS is evident in the number and variety of schedule contractors in the program. According to the GSA, the FSS program has more than 14,000 contractors providing more than 6.8 million products and services.⁴⁶ This adds up to more than 34 billion dollars of government purchases from the FSS each year and the amounts purchased keep rising.⁴⁷ However, even with the large number of contractors and items available on the FSS, competition in contracting is a concern for the federal government, which spends billions of dollars each year on goods and services.⁴⁸

³⁸ Stafford & Yank, *supra* note 7, at 2.

³⁹ Multiple award schedules (MAS) are contracts awarded by GSA for supplies and services with more than one schedule contractor. FAR, *supra* note 2, at 8.401. "The primary statutory authority for the MAS program is derived from both Title III of the Administrative Services Act of 1949 and Title 40 U.S.C., Public Buildings, Property and Works." *Id.*

⁴⁰ Stafford & Yank, *supra* note 7, at 2.

⁴¹ Lohnes, *supra* note 36, at 602.

⁴² FAR, *supra* note 2, at 8.402(b).

⁴³ *Id.*

⁴⁴ Lohnes, *supra* note 36, at 602.

⁴⁵ John A. Howell, *Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway*, 27 PUB. CONT. L.J. 395, 405 (1998).

⁴⁶ *GSA Overview*, *supra* note 1.

⁴⁷ *GSA 1997 Ann. Rep.*, *supra* note 19, at 44.

⁴⁸ NAGLE, *supra* note 34, at 496.

B. Competition in Contracting Act of 1984 (CICA)⁴⁹

Congress enacted the CICA in response to a scandal involving government agencies spending thousands of dollars for readily available commercial items such as toilet seats, hammers, and wrenches.⁵⁰ Congress determined that these inflated costs resulted from inadequate competition for government contracts.⁵¹ The CICA requires government agencies to seek full and open competition in contracting.⁵² This means that government agencies must use competitive contracting procedures, allowing all responsible sources⁵³ to compete, through sealed bidding, contracting by negotiation and FSS purchases when obtaining supplies and services.⁵⁴

The FSS program meets the requirements of a competitive contracting procedure in accordance with the CICA when participation in “the FSS program is open to all responsible sources and orders or contracts under the FSS program result in the lowest overall cost alternative to meet the needs of the government.”⁵⁵ In addition to the statutory requirements of the CICA, government agencies must also use the ordering procedures of FAR subpart 8.4 in order to satisfy all of the CICA’s requirements.⁵⁶ Further, the GAO has determined that if the government agency follows FAR subpart 8.4 ordering procedures⁵⁷ there is no requirement for the government agency to seek further competition outside the FSS.⁵⁸

⁴⁹ 10 U.S.C. § 2306 (2000).

⁵⁰ NAGLE, *supra* note 34, at 496. In 1983 inflation on routine items caught the attention of the country and Congress held hearings discussing “procurements of \$400 hammers, \$700 toilet seats, \$2,000 pliers, and \$9,000 wrenches.” *Id.*

⁵¹ *Id.*

⁵² 10 U.S.C. § 2306.

⁵³ FAR, *supra* note 2, at 5.203. All responsible sources are defined as all vendors who could compete for the proposed contract. *Id.* FAR part 5.1, Dissemination of Information and FAR part 5.2, Synopses of Proposed Contract Actions, require that notification of contracts over specified amounts be publicized to all responsible sources. *Id.* at 5.1, 5.2. This is not the same with the FSS. Under the FSS all vendors currently on the schedule are deemed to be responsible sources and there is no requirement to go outside the FSS to fulfill contract requirements. *Id.* at 8.404(a).

⁵⁴ *Id.* at subpt. 6.1 (Full and Open Competition).

⁵⁵ Robert J. Sherry, et al., *The Present and Future of MAS Contracting*, 27 PUB. CONT. L.J. 369, 380 (1998) (citing 10 U.S.C. § 2302(2)(C) (1994)).

⁵⁶ Stafford & Yank, *supra* note 7, at 2.

⁵⁷ FAR, *supra* note 2, at 8.405.

⁵⁸ *FSS Program Satisfies Competition Requirements of CICA*, 42 GOV’T CONTRACTOR 25 ¶ 260 (2000) (citing 41 U.S.C. § 259(b)(3), FAR 6.102(d)(3), and Sales Res. Consultants,

C. The Packard Commission

Even though the CICA's goal was to prevent any further scandal in government contracting, the GAO found that "over half of the top 100 defense contractors" were involved in "approximately 200 fraud investigations."⁵⁹ In an attempt to restore the public's trust in defense contracting, Congress and President Ronald W. Reagan "created the Blue Ribbon Commission on Defense Management" also known as the Packard Commission.⁶⁰

In 1986, the Packard Commission submitted their report to the President regarding defense acquisitions.⁶¹ This report emphasized that the Department of Defense (DOD) was spending too much money and too much time acquiring items that could be purchased commercially.⁶² The Packard Commission's report found that even though the DOD acquisition program "is the largest business enterprise in the world" with purchases exceeding that of "General Motors, Exxon, and IBM combined," the DOD acquisition process was so cumbersome and overregulated that acquisition personnel could not use their own

Inc, Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102). In *Sales Res. Consultants*, the Comptroller General held that an agency is not required to consider unsolicited offers from non-FSS vendors when making a purchase under the FSS because the program is open to all responsible sources and ensures selection of the lowest-cost alternative, therefore, requiring consideration of non-FSS vendor proposals is inconsistent with the purpose of the FSS. *Sales Res. Consultants, Inc.*, 2000 CPD ¶ 102 at 8.

⁵⁹ NAGLE, *supra* note 34, at 497.

⁶⁰ *Id.* (citing Pub. L. No. 99-433 100 Stat. 992 (1984)). President Reagan selected former Deputy Defense Secretary David Packard, who was the Chairman of the Board for Hewlett Packard to head the Commission, consequently resulting in the name the Packard Commission. *Id.*

⁶¹ THE PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, *A FORMULA FOR ACTION* (Apr. 1986).

⁶² *Id.* at 1. The report stated that:

All of our analysis leads us unequivocally to the conclusion that the defense acquisition system has basic problems that must be corrected. These problems are deeply entrenched and have developed over several decades from an increasingly bureaucratic and overregulated process. As a result, all too many of our weapon systems cost too much, take too long to develop, and, by the time they are fielded, incorporate obsolete technology.

Id. at 5.

judgment to determine how to purchase supplies.⁶³ Not only were acquisition personnel bound by rigid procurement regulations and statutes, the government itself insisted that contractors use only government specifications for items, even if a commercially available item would suffice.⁶⁴

The Packard Commission's report concluded with several recommendations to streamline the acquisition process.⁶⁵ This included a recommendation to revamp existing procurement laws into one simplified statute applicable to all government agencies.⁶⁶ The Commission believed that Congress's and DOD's past attempts to improve the acquisition system by passing more intricate and detailed statutes and regulations only caused the acquisition system to become so cumbersome that it cost the government more money to purchase needed items.⁶⁷ Even though the commission made several recommendations to streamline the acquisition process, Congress implemented none of them.⁶⁸

⁶³ *Id.* at 3.

⁶⁴ *Id.* at 1. At the time of the Packard Commission, DOD made only a small percentage of its own equipment and relied on defense contractors to make manufacture everything that was needed, even if it was available in the commercial market place. *Id.* at 3. When creating an item for the military, the DOD would establish an approved set of military requirements that either require the contractor to come up with new technology to meet the military requirements. *Id.* at 6. The DOD would not allow the contractors to deviate from these military requirements even when it would benefit the cost of the item. *Id.* at 7. At the time the contract was entered into, these requirements would only meet the needs of the military. *Id.* at 23. However, with advances in technology, these once military items became items that were available to the public and readily purchased. *Id.* The DOD would maintain the military requirement for the item, even though they could save money purchasing the commercial item off the contractor's shelf. *Id.* at 25.

⁶⁵ *Id.* at 15-33. The Commission recommended streamlining acquisition organization and procedures by: (1) creating through statute a new position of Under Secretary of Defense (Acquisition) and the appointment of an additional Level II in the Office of the Secretary of Defense (OSD); the presidential appointment of a comparable senior civilian in the Army, Navy, and Air Force who would then appoint numerous program executive officers and reduce the number of acquisition personnel; and simplified government-wide procurement statutes; (2) using technology to reduce procurement costs; (3) balance cost and performance through trade-offs; (4) stabilize procurement programs through "baselining" major weapon systems and expanding "multi-year procurement for high-priority systems;" (5) expand the use of commercial off the shelf items; (6) increase the use of competition through the use of commercial practices; (7) enhance the quality of acquisition personnel through education and training. *Id.* at 15-33.

⁶⁶ *Id.* at 18.

⁶⁷ *Id.*

⁶⁸ NAGLE, *supra* note 34, at 498.

D. The Section 800 Panel⁶⁹

The Packard Commission's recommendations were given new life in 1990, when Congress directed the DOD to establish a panel to study the various acquisition methods and laws, and to recommend how best to streamline those laws, regulations and the acquisition process.⁷⁰ Congress gave the panel two years to complete the study and provide a report.⁷¹

1. *Truth In Negotiations Act (TINA)*

The Section 800 Panel released their extensive report entitled "Streamlining the Defense Acquisition Law" to Congress on January 12, 1993.⁷² In the report, the Panel recommended amending and repealing various statutes to include recommending relief from the TINA⁷³ when contracting for commercial items.⁷⁴ The TINA requires that contractors certify certain cost or pricing data when conducting negotiated contracts with the government.⁷⁵ As a result, contractors must provide all information that "prudent buyers and sellers would reasonably expect to affect price negotiations significantly" and certify that the provided cost or pricing data is "current, accurate and complete" as of the date the contractor and the government agency agreed upon the price.⁷⁶ If a

⁶⁹ Pub. L. No. 101-510, § 800, 104 Stat. 1587 (1990). Section 800 of the National Defense Authorization Act for Fiscal Year 1991, enacted 5 November 1990 mandated the DOD to study acquisition methods, adopting the name Section 800 Panel. See The Honorable Jeff Bingaman, *The Twelfth Annual Gilbert A. Cuneo Lecture: The Origins and Development of the Federal Acquisition Streamlining Act*, 145 MIL. L. REV. 149, 154 (1994).

⁷⁰ See Cheryl Lee Sandner & Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 PUB. CONT. L.J. 461, 462 (2001).

⁷¹ Bingaman, *supra* note 69, at 157.

⁷² NAGLE, *supra* note 34, at 511.

⁷³ 10 U.S.C. § 2306 (2000) (applying to defense contracts); 41 U.S.C. § 254b) (applying to civilian agencies).

⁷⁴ Richard J. Wall & Christopher B. Pockney, *Revisiting Commercial Pricing Reform*, 27 PUB. CONT. L.J. 315, 317-18 (1998).

⁷⁵ 10 U.S.C. § 2306. Prior to the passage of the statutory changes to TINA through FASA and FARA, contractors had to certify cost or pricing data on contracts over \$100,000. After the passage of FASA and FARA that amount was raised to \$500,000. See Major Nathanael Causey et al., *1994 Contract Law Developments— The Year in Review*, ARMY LAW., Feb. 1995, at 5.

⁷⁶ James W. Brown & James E. Shipley, Jr., *Defense Commercial Pricing Management Improvement: Back to the Commercial Acquisition Reform Drawing Board?*, 18 J.L. & COM. 31, 34 (1998) (citing 10 U.S.C. § 2306a).

contractor fails to certify properly the cost or pricing data, the government agency may bring a “defective pricing claim” against the contractor.⁷⁷ Under a defective pricing claim, the government agency can demand compensation for the effect of the inaccurate data through a reduction in the contract price.⁷⁸ Contractors complain that they should not have to provide any cost or pricing data since that information is not provided to commercial customers and is therefore inconsistent with “commercial sales practices.”⁷⁹

The TINA, however, does contain an exception for “catalog or market prices of commercial items sold in substantial quantities to the general public.”⁸⁰ Federal Supply Schedule contracts are negotiated under this exemption to the TINA when the GSA conducts a reasonable price analysis of the commercial items to ensure they are receiving the same discounted price of a commercial customer.⁸¹

2. *The Federal Acquisition Streamlining Act (FASA)*⁸²

In addition to the Panel’s recommendations to amend the TINA, the Panel also recommended overhauling the procurement system by enacting new laws which also affected the TINA by eliminating cost and pricing data certification.⁸³ One such law, the FASA⁸⁴ sought to reduce the costs and administrative burden of government contracting through the proper utilization of the FSS.⁸⁵

⁷⁷ *Id.* (citing 10 U.S.C. § 2306a).

⁷⁸ *Id.*

⁷⁹ *Offices of the GSA Inspector General and VA Inspector General, Procurement Reform and the MAS Program -- Safeguarding the Taxpayer’s Interests*, GENERAL SERVS. ADMIN., July 1995, at 6, 12, available at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/reform_R2W_t35-0Z5RDZ-i34k-pR.doc [hereinafter *GSA IG Position Paper*]. The contractors argue that no information regarding discounts is given to any commercial customer and that time and money are wasted by contractors gathering this information for the government. *Id.*

⁸⁰ Brown & Shipley, *supra* note 76, at 34 (citing 10 U.S.C. § 2306a(b)).

⁸¹ *GSA IG Position Paper*, *supra* note 79, at 11-12 (citing 10 U.S.C. § 2306 (1994) and 48 C.F.R. § 15-804-3(h) (1994)).

⁸² Pub. L. No. 103-355, 108 Stat. 3243 (1994).

⁸³ NAGLE, *supra* note 34, at 511.

⁸⁴ Pub. L. No. 103-355, 108 Stat. 3243.

⁸⁵ Sandner & Snyder, *supra* note 70, at 462.

The Federal Acquisition Streamlining Act of 1994 radically changed federal acquisition laws.⁸⁶ The Act, as its name implies, “promotes the Government’s use of flexible, streamlined procedures to purchase supplies and services to achieve procurement efficiencies and price savings.”⁸⁷ The provisions of the FASA which have had the greatest impact on the FSS are those dealing with the definition of commercial items, cost and pricing data requirements, and the evaluation of offers. For instance, section 8001 of the FASA broadened the definition of commercial item.⁸⁸ Before the FASA, an item had to be “sold in substantial quantities to the general public” in order to qualify as a commercial item.⁸⁹ Under the FASA, commercial items include products sold, offered for sale or offered to the government in time to meet its requirements.⁹⁰ The FASA also increased the simplified acquisition threshold from \$25,000 to \$100,000, thereby increasing the amount of supplies and services that could be acquired by government agencies using simplified acquisition procedures, which includes the FSS.⁹¹ The FASA also amended the TINA by eliminating certified cost and pricing data for purchases less than \$500,000, in addition to eliminating or severely limiting the previous requirements for cost and pricing data on contract modifications.⁹² As a result, the government relies on competition in the commercial market place to obtain fair and reasonable pricing rather than a price set through negotiation, which may be more than the market price.⁹³

Most importantly, the FASA allowed contracting officers to consider best value—or factors other than price—when conducting simplified acquisition procurements, including FSS purchases.⁹⁴ However, contracting officers must still be fair and reasonable when evaluating offers from FSS contractors.⁹⁵ The FASA requires contracting officers acquiring supplies or services under FSS contracts to provide offerors

⁸⁶ NAGLE, *supra* note 34, at 515-16.

⁸⁷ Linda S. Lebowitz, *Bid Protest Issues Arising in Commercial Item Acquisitions*, 27 PUB. CONT. L.J. 429 (1998).

⁸⁸ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

⁸⁹ Wall & Pockney, *supra* note 74, at 319.

⁹⁰ *Id.* (citing FASA § 8001(a)(2)(B), 108 Stat. at 3384).

⁹¹ 60 Fed. Reg. 34,784 (1996) (amending FAR 13.101 of 1994 and implementing FASA § 1502).

⁹² Wall & Pockney, *supra* note 74, at 319.

⁹³ *Id.*

⁹⁴ Faculty, The Judge Advocate General’s School, *TJAGSA Practice Notes, Contract Law Notes, New Simplified Acquisition Rule Issued*, ARMY LAW., Nov. 1995, at 35.

⁹⁵ Lebowitz, *supra* note 87, at 429.

with a “fair opportunity to be considered”⁹⁶ on each order over the micro-purchase threshold.⁹⁷ Under the FASA this means that each solicitation shall contain a “statement of work (SOW),⁹⁸ specifications,⁹⁹ or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.”¹⁰⁰

3. *The Clinger-Cohen Act of 1996*¹⁰¹

Soon after Congress passed the FASA, it passed the Clinger-Cohen Act of 1996, also known as the Federal Acquisition Reform Act (FARA).¹⁰² The Clinger-Cohen Act further amended the TINA by completely removing the catalog or market price exception for cost and pricing data and adding an exception for all commercial items.¹⁰³ All the contractor needs to do to qualify for this exception is to show that its goods and services meet the current definition of commercial item.¹⁰⁴ Consequently, government agencies no longer receive a guaranteed price or know the prices offered to commercial customers.¹⁰⁵

The Clinger-Cohen Act also abolished the requirements for contractors to allow the government to audit and inspect contractor records for commercial products, including FSS contracts.¹⁰⁶ The Clinger-Cohen Act further eliminated the requirement of contractors to

⁹⁶ FAR 16.505(b)(1) requires contracting officers to consider all vendors equally for MAS contracts over \$2,500. Even though the contracting officer has “broad discretion” determining which contracting procedures to use, the contracting officer must ensure that the procedures used will fairly consider each vendor and that the method used does not allocate or designate any preferred vendor. FAR, *supra* note 2, at 16.505(b)(1).

⁹⁷ Lohnes, *supra* note 36, at 605.

⁹⁸ A statement of work (SOW) is the section of the contract that defines “the work to be performed; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements.” FAR, *supra* note 2, at 8.405-2.

⁹⁹ Specifications are the defined needs of the government agency stated as requirements in the contract of what functions to perform; what type of performance is required; or the essential physical characteristics of the item needed. *Id.* at 11.002(a)(2).

¹⁰⁰ Sandner & Snyder, *supra* note 70, at 478 (citing 10 U.S.C. § 2304 a(b)(3) (1994)).

¹⁰¹ Pub. L. No. 104-106, 110 Stat. 186 (1996).

¹⁰² *Id.*

¹⁰³ Wall & Pockney, *supra* note 74, at 319.

¹⁰⁴ *Id.*

¹⁰⁵ GSA IG Position Paper, *supra* note 79, at 3.

¹⁰⁶ NAGLE, *supra* note 34, at 517.

keep records of what it sold to the government and to other enterprises.¹⁰⁷ These changes were made to further streamline the acquisition process and use market forces to obtain the best value; however, the GAO Inspector General cautioned that eliminating audit rights and recordkeeping requirements would “eliminate or render ineffective key safeguards” in the procurement process which allowed the government to obtain best value.¹⁰⁸

E. Section 803 of the National Defense Authorization Act for Fiscal Year 2002¹⁰⁹

Congress imposed competition requirements in section 803 of the National Defense Authorization Act for Fiscal Year 2002 for the DOD, despite the enactment of the FASA and the FARA, due to what was viewed as a lack of competition in DOD purchases.¹¹⁰ Section 803 requires contracting officers to implement procedures to promote competition.¹¹¹ It specifically requires contracting officers to award contracts on a competitive basis, even when making purchases under the FSS, unless an exception applies waiving the competition requirement.¹¹² The DFAR Supplement 208.404-70, implemented these changes, requiring contracting officers to provide notice of an intent to make a purchase over the simplified acquisition threshold to as many FSS vendors as practicable.¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ Wall & Pockney, *supra* note 74, at 330 (citing *GSA IG Position Paper*, *supra* note 79, at 11). The GSA IG was referring to requirements on vendors to disclose price and cost data, to certify that cost and pricing data, to provide price reductions when the contractor provides them to commercial customers, and to audit contracts up to three years after final payment if the vendor chose to do so. The IG argued that eliminating these requirements would “dilute” the government’s ability to use its volume buying power to get the best value for the taxpayer’s dollar. *GSA IG Position Paper*, *supra* note 79, at 11-25.

¹⁰⁹ Pub. L. No. 107-107, 115 Stat. 1012 (2001).

¹¹⁰ Brown & Shipley, *supra* note 76, at 41-44.

¹¹¹ See Gov’t Accountability Office, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874, at 2 (July 2004) [hereinafter GAO Report No. GAO-04-874].

¹¹² *Contract and Fiscal Law Developments of 2002—The Year in Review*, ARMY LAW., Jan./Feb. 2003, at 59.

¹¹³ U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 208.404-70 (Apr. 2005) [hereinafter DFAR]. This supplement requires that MAS contracts for services be placed on a competitive basis as follows:

F. Federal Acquisition Regulation

The FAR subpart 8.4 governs the purchase of supplies and services by government agencies using the GSA FSS.¹¹⁴ Pursuant to FAR section 8.404, contracting officers do not have to seek competition outside the FSS or “synthesize the requirement.”¹¹⁵ However, FAR section 8.405-2 does give specific requirements that contracting officers must follow when ordering supplies or services requiring a SOW or when the order exceeds the micro-purchase threshold.¹¹⁶ If contracting officers follow the procedures set out in FAR subpart 8.4, orders from the FSS are deemed to have been made on a competitive basis.¹¹⁷

(c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection to -

(1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the work requirements, and the contracting officer --

(i)(A) Receives offers from at least three contractors that can fulfill the work requirements; or

(B) Determines in writing that no additional contractors that can fulfill the work requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered; or

(2) All contractors offering the required services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have the offer fairly considered. Posting of a request for quotations on the General Services Administration's electronic quote system, “e-Buy” (www.gsaAdvantage.gov), is one medium for providing fair notice to all contractors as required by this paragraph (c).

Id.

¹¹⁴ See generally FAR, *supra* note 2, at subpt. 8.4.

¹¹⁵ *Id.* at 8.404(a). A synopsis is a method of disseminating information about a proposed contract to possible vendors. For acquisitions of supplies and services over \$25,000, the contracting officer must synopsise the proposed contract and submit it to fedbizopps.gov. *Id.* at 5.101-5.202. However, if purchases are being made under the FSS no synopsis is required. *Id.* at 8.404(a).

¹¹⁶ *Id.* at subpt. 8.405-2.

¹¹⁷ Lohnes, *supra* note 36, at 610.

III. Competition is Limited Under the FSS

The FSS program meets the competition standard of full and open competition when the GSA authorizes all responsible sources to compete for placement on a schedule.¹¹⁸ The FAR authorizes government agencies various contracting vehicles under the FSS program: blanket purchase agreements, sole-source acquisitions, and negation-like competitions between FSS vendors.¹¹⁹ Following the rules applicable to these contract vehicles ensures compliance with the competition standards.¹²⁰ However, these contract vehicles actually limit the competition that Congress intended when used under the FSS.¹²¹ This section of the article will explore how these contract vehicles, when used under the FSS limit competition, thwart congressional intent.

A. Blanket Purchase Agreements (BPA)

A BPA is a simplified method of meeting the anticipated and repetitive needs for supplies and services of a government agency.¹²² Government agencies establish charge accounts with one vendor or multiple vendors to provide maximum competition, simply ordering from the selected contractor(s) whenever the supply or service is needed.¹²³ Contracting officers may establish BPAs upon the determination that a BPA would be advantageous due to the varying amounts and variety of supplies and services required,¹²⁴ when there is a need to provide commercial supplies and services to more than one office or area that cannot purchase independently,¹²⁵ when avoiding the need to write numerous purchase orders,¹²⁶ or when there is no existing

¹¹⁸ Sales Res. Consultants, Inc, Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102, at 7.

¹¹⁹ FAR, *supra* note 2, at 8.405-2, 8.405-3, 8.405-6.

¹²⁰ *Id.* at 8.405.

¹²¹ Ralph C. Nash & John Cibinic, *Contracting Methods: Square Pegs and Round Holes*, 15 NASH & CIBINIC REP. 9 ¶ 48 (2001) (citing H.R. CONF. REP. NO. 98-861, June 23, 1984, which states: “the conferees believe that schedule contracts are a worthwhile method of meeting agency needs for a broad range of commercial products, while imposing a minimum administrative burden on the using agencies . . . and should be used when GSA can negotiate quantity discount[s].”).

¹²² FAR, *supra* note 2, at 8.405-3(a)(1).

¹²³ *Id.* at 13.303-1(a).

¹²⁴ *Id.* at 13.303-2(a)(1).

¹²⁵ *Id.* at 13.303-2(a)(2).

¹²⁶ *Id.* at 13.303-2(a)(3).

contract for the supply or service used.¹²⁷ Once the contracting officer determines that “a BPA would be advantageous,” the contracting officer must establish purchase parameters regarding individual items, groups or classes of items and which supplier to use.¹²⁸ However, the simplified acquisition threshold and the five million dollar limit on individual purchases of commercial items do not apply to BPAs established with FSS vendors.¹²⁹

Once a BPA is established, it can remain in effect for five years, but must be reviewed annually.¹³⁰ When the contracting officer conducts the annual review of the BPA he or she must determine: whether the vendor is still under that schedule contract; whether the BPA is still the best value for the government; and whether additional price reductions could be obtained due to an increase in the amounts of supplies and services purchased.¹³¹ Finally, the contracting officer must document the results of the annual review.¹³²

Blanket purchase agreements limit competition when contracting officers use them to make large purchases, involving millions of dollars, from the FSS.¹³³ Using the FSS to establish BPAs is appealing to contracting officers since there is no dollar limit for individual purchases of commercial items.¹³⁴ If the contracting officer were to establish a BPA with a vendor outside the FSS, there would a dollar limitation based upon the simplified acquisition threshold of \$100,000 and the commercial item threshold of five million dollars.¹³⁵ By creating a BPA with one vendor under the FSS, the contracting officer can exceed the thresholds by ordering unlimited dollar amounts of items.¹³⁶ Therefore, contracting officers look to vendors on the FSS, rather than all potential vendors when establishing BPAs to avoid these dollar thresholds. Furthermore, once a BPA is established under the FSS, it may remain in place for five years and the contracting office does not have to notify the public or other contractors when an order is placed against that BPA

¹²⁷ *Id.* at 13.303-2(a)(4).

¹²⁸ *Id.* at 13.303-2(b).

¹²⁹ *Id.* at 13.303-5(b)(1).

¹³⁰ *Id.* at 8.405-3(c)-(d).

¹³¹ *Id.* at 8.405-3(d)(1).

¹³² *Id.* at 8.405-3(d)(2).

¹³³ Ralph C. Nash & John Cibinic, *Postscript: Federal Supply Schedule Protests*, 18 NASH & CIBINIC REP. 3 ¶ 9 (2004).

¹³⁴ FAR, *supra* note 2, at 13.303-5(b)(1).

¹³⁵ *Id.* at 13.303-5(b)(2).

¹³⁶ *Id.* at 13.303-5(b)(1).

through solicitation or synopsis.¹³⁷ Consequently, a contracting officer can order unlimited dollar amounts of items from one vendor for five years without having to consider whether other vendors both in and outside the FSS offer a better value.¹³⁸ Using BPAs in this manner saves time, but does not necessarily obtain the best value for the government.¹³⁹ Requiring contracting officers to meet competition requirements for BPAs is no different than the requirement of the FSS to allow vendors a fair opportunity to compete for an FSS contract. All vendors should have the opportunity to compete for a BPA to ensure the best value to the government, instead of having the contracting officer select one vendor for a multi-million dollar long-term BPA.

1. Department of Army's BPA for Office Products

The Department of the Army currently has a mandatory BPA for office supplies with twelve FSS contractors.¹⁴⁰ The decision to use a BPA for office supplies was based upon the amount of office supply purchases the Army makes annually.¹⁴¹ According to the memorandum, issued by the Office of the Assistant Secretary of the Army, Acquisition Logistics and Technology, Army Contracting Agency, the Army purchases an estimated \$100 million in office supplies annually.¹⁴² The Army Contracting Agency (ACA) determined that most purchases are made without using the FSS, resulting in the Army paying full retail price for most office supplies instead of getting the benefit of volume buying from the FSS.¹⁴³ Further, "many of the purchases ignored the statutory mandate to obtain comparable products available from blind and severely disable vendors under the Javits-Wagner-O'Day (JWOD) Program."¹⁴⁴

¹³⁷ *Id.* at 8.405-3(c); Ralph C. Nash & John Cibinic, *Blanket Purchase Agreements: The Ultimate In "Acquisition Reform,"* 18 NASH & CIBINIC REP. 7 ¶ 32 (2004).

¹³⁸ *See generally* FAR, *supra* note 2, at pt. 13.

¹³⁹ Nash & Cibinic, *supra* note 137, ¶ 32.

¹⁴⁰ Memorandum, Army Contracting Agency, to Heads of Contracting Activities, subject: Mandatory Use of BPAs for Office Products for the Army (26 Sept. 2002) [hereinafter *Mandatory Use of Blanket Purchase Agreements (BPAs) for Office Products for the Army Memo*] (on file with the Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing 41 U.S.C. §§ 46-48c (2000)). The Javits-Wagner-O'Day Act of 1971, established a mandatory source of supplies for government agencies from nonprofit

The Army instituted the BPA to “standardize the Army’s method of procuring office supplies while offering requiring activities better prices (by maximizing quantity discounts), delivery of orders as quickly as within 24 hours, and enhancing the Army’s commitment to support the JWOD Program,” while promoting “the use of small and/or disadvantaged businesses.”¹⁴⁵ The ACA believes that the mandatory BPA will “ensure compliance with the JWOD [P]rogram, as the suppliers will automatically substitute JWOD products for like commercial products.”¹⁴⁶

Despite the Army’s goal of promoting, the JWOD program and small and/or disadvantaged businesses, one has to wonder how awarding approximately \$100 million in annual purchases to only twelve vendors truly meets the overarching goal of full and open competition in government contracting. Full and open competition requires the government to solicit all responsible sources.¹⁴⁷ This means that all vendors who are able to meet the requirements of the BPA will be able to compete for that contract. However, when a government agency determines that they only want FSS vendors for the BPA, the level of competition is limited to only those vendors listed on the schedules that meet the requirements of the contract. The selection of only one or a few vendors from the selected schedule is a further limitation on competition from the beginning of the acquisition process where all responsible vendors are able to compete. Therefore, while the FSS is considered full and open competition if all responsible sources are allowed to compete for an FSS contract, a BPA under the FSS limits the ability of even those vendors on the FSS to obtain a portion of a large FSS BPA.¹⁴⁸ For the

agencies who employ people who are blind or have other severe disabilities who, in return, provide training and jobs for these individuals. 41 U.S.C. §§ 46-48c. Information about the JWOD program is available at the JWOD Program website, at <http://www.jwod.com> (last visited May 2, 2005).

¹⁴⁵ Mandatory Use of BPAs for Office Products for the Army Memo, *supra* note 140.

¹⁴⁶ *Id.* Three months later, the ACA issued another memorandum clarifying the previous memorandum that instituted the mandatory BPA. This memorandum reiterated the requirement to purchase office supplies from the mandatory BPA. The only exception would be purchases made with the local Self Service Supply Centers which are generally “operated by JWOD-participating nonprofit agencies.” Memorandum, Army Contracting Agency, to Heads of Contracting Activities, subject: Mandatory Blanket Purchase Agreements (BPAs) for Office Products (23 Dec. 2002) (on file with the the Contract and Fiscal Law Department, The Judge Advocate General’s Legal Center and School).

¹⁴⁷ FAR, *supra* note 2, at subpt. 6.1.

¹⁴⁸ Sales Res. Consultants, Inc, Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102, at 7.

Army, the ACA selected only twelve vendors, some of whom are large businesses, out of hundreds of available vendors under the office supply FSS for a BPA that could last up to five years.¹⁴⁹

Because the Army BPA is under the FSS there is no limitation on the amount of an order.¹⁵⁰ The limitations of the simplified acquisition threshold and the five million dollar commercial items limitation does not apply to BPAs created under the FSS.¹⁵¹ The Army BPA for office supplies will enter its third year in September 2005 without any changes to the listed vendors. Even though there are hundreds of FSS vendors offering office supplies, there are thousands of other office supply businesses not represented on the FSS that the Army did not have to consider and that do not have a chance to compete for office supply purchases from the Army.¹⁵²

Furthermore, the mandatory BPA does not have an enforcement mechanism in place to ensure that only those vendors who support the JWOD or are small and/or disadvantaged businesses obtain all Army office supply requirements. Each time an office needs supplies, the local contracting officer could conceivably go to the local office supply store without any fear of punishment from ACA for violating the mandatory BPA. Consequently, it seems that while government agencies are using the streamlined contracting procedures of the FSS to obtain the required supplies and services, potential vendors who could offer the same or similar items at the same or lower price are left out of the BPA agreement. "If 'full and open competition' has any meaning, it is to keep agencies from handpicking a few sources with which to deal."¹⁵³

¹⁴⁹ Mandatory Use of BPAs for Office Products for the Army Memo, *supra* note 140, enclosure. The vendors selected for the Army's office products BPA are: Adams Marketing Associates, Inc., George W. Allen Company, Inc., BENTCO Office Solutions, Inc., Boise Cascade Office Products, CADDO Design and Office Products, Corporate Express, Creative Sales Solutions, Inc., Metro Office Products, Inc., Miller's Office Products, Office Depot, Staples National Advantage, and Stephens Office Supply. *Id.*

¹⁵⁰ FAR, *supra* note 2, at 13.303-5(b)(1).

¹⁵¹ *Id.*

¹⁵² *Sales Res. Consultants, Inc.*, 2000 CPD ¶ 102, at 8.

¹⁵³ *Nash & Cibinic*, *supra* note 29, ¶ 26.

2. BPA Protest

Protests involving BPAs typically involve long-term BPA contracts worth millions of dollars.¹⁵⁴ Even though BPAs are part of the simplified acquisition procedures, they are not subject to the simplified acquisition threshold if they are established with FSS contractors.¹⁵⁵ Therefore, there is no limit on the amount of an individual order under a BPA established through the FSS.¹⁵⁶ Despite the BPA advantage of a simplified ordering arrangement to cut down on the need to complete multiple purchase requests, contracting officers also use BPAs to avoid complex and time consuming FAR competition and synopsis requirements.¹⁵⁷

An example of how government agencies use a FSS BPA to limit competition can be seen in *OMNIPLEX World Services Corporation* (OMNIPLEX).¹⁵⁸ In this case, the Immigration and Naturalization Service (INS)¹⁵⁹ issued a request for proposals (RFP)¹⁶⁰ to award a BPA for investigative services from only three offerors for a total cost of more than seventy-five million dollars.¹⁶¹ The awards were “to be made to the three offerors submitting technically acceptable proposals with the lowest prices.”¹⁶² Proposals from the offerors were required to contain all necessary information to conduct a comprehensive evaluation of the price proposed by the offeror for “price realism and reasonableness, as

¹⁵⁴ *Id.* (citing RVJ Int’l Inc., Comp. Gen. B-292161, B-292161.2, July 2, 2003, 2003 CPD ¶ 124 and KPMG Consulting LLP, Comp. Gen. B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196). *RVJ Int’l Inc.*, 2003 CPD ¶ 124, was a single award BPA with a fifty-three-month period of performance worth between \$352,000 and \$4.9 million. *Id.* at 2-4. *KPMG Consulting LLP*, 2002 CPD ¶ 196, was a single award BPA for five years worth approximately \$33 million. *Id.* at 2-3.

¹⁵⁵ Nash & Cibinic, *supra* note 121, ¶ 48 (citing FAR 13.303-2(c)(3)).

¹⁵⁶ *Id.*

¹⁵⁷ Nash & Cibinic, *supra* note 137, ¶ 32.

¹⁵⁸ OMNIPLEX World Servs. Corp., Comp. Gen. B-291105, Nov. 6, 2002, 2002 CPD ¶ 199.

¹⁵⁹ The INS is now named the U.S. Bureau of Citizenship and Immigration Services (USCIS). The USCIS transitioned to the Department of Homeland Security on March 1, 2003, under the Homeland Security Act of 2002. Homeland Security Act of 2002, 6 U.S.C. § 271 (LEXIS 2004).

¹⁶⁰ A request for proposals is the name of the solicitation when using negotiated contracting procedures. A solicitation is “any request to submit offers or quotations to the Government.” FAR, *supra* note 2, at 2.101.

¹⁶¹ OMNIPLEX World Servs. Corp., 2002 CPD ¶ 199, at 1-5.

¹⁶² *Id.* at 3.

well as total evaluated price.”¹⁶³ The INS evaluated the proposals and awarded the BPA to the three offerors with the lowest price.¹⁶⁴ OMNIPLEX argued that one of the winning vendors, B&W Technologies, “was improper and contrary to the terms of the solicitation.”¹⁶⁵ Specifically, OMNIPLEX asserted that the INS failed to properly evaluate B&W’s technical proposal in accordance with the solicitation and that the BPA awarded to B&W exceeded the scope of the FSS contract.¹⁶⁶

The Comptroller General sustained OMNIPLEX’s protest addressing what it viewed as the misuse of a BPA to limit competition by the INS.¹⁶⁷ The Comptroller General opinion stated:

Here, it appears that INS and the private parties view the issuance of BPAs as the form of “down-select” that will effectively determine which vendors INS will consider to meet its requirements. Presumably because the process of issuing BPAs is serving as a key step in the selection process, the agency, instead of simply choosing among FSS vendors (with or without a BPA “charge account”), elected to conduct what was treated as a Part 15 negotiated procurement, beginning with the issuance of the RFP and continuing through the evaluation and selection process.¹⁶⁸

In this case, the INS used a FAR part 15-type-competition to obtain the offer with the best value.¹⁶⁹ However, the case illustrates that the contracting officer was not genuinely seeking best value from multiple vendors for this BPA.¹⁷⁰ Here, the contracting officer selected a few of the available vendors from the FSS and further limited competition through the use of a negotiation-like competition.¹⁷¹ Blanket purchase agreements that are awarded in this manner allow the contracting officer to limit competition from all responsible sources to a few vendors

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 5.

¹⁶⁵ *Id.* at 6.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2, 7.

¹⁶⁸ *Id.* at 7.

¹⁶⁹ Nash & Cibinic, *supra* note 133, ¶ 9.

¹⁷⁰ *OMNIPLEX World Servs. Corp.*, 2002 CPD ¶ 199, at 7.

¹⁷¹ *Id.* at 2.

available on the FSS.¹⁷² The only true requirement to establish a BPA is the contracting officer's determination that a BPA is most advantageous to the government.¹⁷³ It was unnecessary to compete the requirement among the vendors.¹⁷⁴ The contracting officer merely needed to select any vendors it believed would meet the requirements of the RFP.¹⁷⁵ By conducting a negotiation-like competition to select a vendor for a BPA, the acquisition process was not streamlined, rather it was used as a means of limiting the number of vendors who can compete for and win the BPA award.¹⁷⁶

B. Sole-Source Contracts

In addition to BPAs, contracting officers also use sole-source acquisitions under the FSS to limit competition.¹⁷⁷ Generally, government acquisitions must be conducted using full and open competition.¹⁷⁸ However, there are regulatory exceptions for other than full and open competition.¹⁷⁹ One such exception is when there is only one responsible source and no other supplies or services will satisfy agency requirements, or what is known as sole-source.¹⁸⁰ When an agency determines that there is only one responsible source, it must be able to support that determination through a justification and approval process documenting why the contract can only be awarded to one vendor.¹⁸¹ However, contracting officers fail to properly award sole-source contracts in accordance with the requirements of FAR subpart 6.3, Other Than Full and Open Competition, thereby limiting competition.¹⁸²

¹⁷² Nash & Cibinic, *supra* note 133, ¶ 9 (citing *OMNIPLEX World Servs. Corp.*, 2002 CPD ¶ 199).

¹⁷³ FAR, *supra* note 2, at 13.303.

¹⁷⁴ *OMNIPLEX World Servs. Corp.*, 2002 CPD ¶ 199, at 7.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*; see also Nash & Cibinic, *supra* note 29, ¶ 26.

¹⁷⁷ Nash & Cibinic, *supra* note 133, at ¶ 9.

¹⁷⁸ FAR, *supra* note 2, at pt. 6.

¹⁷⁹ *Id.* at subpt. 6.3.

¹⁸⁰ See generally *id.* at 6.302-1.

¹⁸¹ See generally *id.* at 6.303.

¹⁸² GAO Report No. GAO-04-874, *supra* note 111, at 3.

1. Contracting Officers Inappropriately Using Sole-Source Contracts

Despite the requirements for contracting officers to use competition to obtain best value from vendors under the FSS, contracting officers continually award to only one FSS vendor, typically the incumbent, without considering competition.¹⁸³ In November of 2000, the GAO released a report to Congress that determined that most DOD contracting officers did not follow procedures established by the GSA to ensure fair and reasonable prices when procuring commercial supplies and services using the FSS.¹⁸⁴ The GAO study found that a majority of contracting officers were not obtaining competitive quotes from multiple contractors prior to making purchases under the FSS.¹⁸⁵ This study led to the enactment of section 803 of the National Defense Authorization Act for FY 2002, which was subsequently implemented in *DFAR Supplement 208.404-70*, in an effort to increase competition.¹⁸⁶

Section 803 of the National Defense Authorization Act for FY 2002 (FY 2002 NDAA) requires DOD contracting officers to solicit offers from all contractors that are offering the required services under a FSS contract exceeding the simplified acquisition threshold of \$100,000.¹⁸⁷ Contracting officers are required to solicit all contractors under the selected schedule or at least enough contractors to ensure the receipt of three offers.¹⁸⁸ If the contracting officer fails to obtain three offers, the contracting officer must determine in writing that no additional contractors could be identified despite reasonable efforts to do so.¹⁸⁹

Based upon a requirement in the FY 2002 NDAA, the GAO conducted a subsequent study to: (1) identify the to extent to which competition requirements under section 803 were waived by the selected DOD organizations; and (2) determine the level of competition for available orders.¹⁹⁰ The results of the study showed that DOD contracting officers waived competition requirements in nearly half (34

¹⁸³ *Id.* at 4.

¹⁸⁴ Gov't Accountability Office, *Contract Management: Not Following Procedures Undermines Best Pricing Under GSA's Schedule*, GAO-01-125, at 4 (Nov. 2000).

¹⁸⁵ *Id.*

¹⁸⁶ Pub. L. No. 107-107, 115 Stat. 1012 (2001); *see also* DFAR, *supra* note 113, 208.404-70.

¹⁸⁷ DFAR, *supra* note 113, at 208.404-70(c).

¹⁸⁸ *Id.* at 208.404-70(c)(1).

¹⁸⁹ *Id.* at 208.404-70(c)(1)(i)(B).

¹⁹⁰ GAO Report No. GAO-04-874, *supra* note 111, at 2.

of 74) of the FSS orders reviewed.¹⁹¹ In most of these cases the contracting officer waived competition based on a determination that a sole-source award was the only viable option.¹⁹² The GAO determined, however, that these competition waivers were based on a desire to retain the current contractor rather than waivers based upon the requirements of section 803 or FAR subpart 6.3.¹⁹³ The GAO identified that the “guidance for granting waivers did not sufficiently describe the circumstances under which a waiver of competition could be used. In addition, the requirements for documenting the basis for waivers were not specific, and there was no requirement that waivers be approved above the level of the contracting officer.”¹⁹⁴ The GAO concluded that competition was limited for most of the orders that were available for competition during the study.¹⁹⁵ Based upon the results of the study, GAO made three recommendations to the Secretary of Defense: “(1) [d]evelop additional guidance on the circumstances under which competition may be waived; (2) require detailed documentation to support competition waivers; and (3) establish approval levels above the contracting officers for waivers of competition on orders exceeding specified thresholds.”¹⁹⁶

Even when contracting officers have specific competition requirements to meet, the lack of oversight and review limits the effect these requirements have on competition.¹⁹⁷ The recommendations from the July 2004 GAO study offer some guidance. However, enforcement is needed to ensure competition. This can be accomplished through either refusal by the GAO to authorize the award of FSS sole-source contracts without proper documentation or punishment of contracting officers who fail to properly meet competition requirements for sole-source acquisitions.

2. *Sole-Source Protest*

In addition to the aforementioned study, *REEP Inc.* (REEP), further illustrates how contracting officers limit competition by awarding sole-

¹⁹¹ *Id.* at 3.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 4.

¹⁹⁵ *Id.* at 3.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

source FSS contracts.¹⁹⁸ In *REEP*, the U.S. Army 5th Special Forces Group (SFG) required continuing language training services and had a current FSS contract with Worldwide Language Resources, Inc., (Worldwide) that was due to expire.¹⁹⁹ The 5th SFG issued two delivery orders to Worldwide without issuing a solicitation or receiving any competitive quotes.²⁰⁰ Worldwide provided language training under schedule 69 and was the only vendor on that schedule that provided language training.²⁰¹ REEP and numerous other vendors had language training contracts under another schedule, 738-II.²⁰² REEP argued that it was improper for the agency to award delivery orders to Worldwide without considering other vendors on schedules other than schedule 69.²⁰³

The GAO agreed and sustained REEP's protest stating, that government agencies are required to "consider reasonably available information, typically by reviewing the prices of at least three schedule vendors" when purchasing goods and services under the FSS to ensure that it is meeting the requirement to "obtain the best value at the lowest overall cost to the Government."²⁰⁴ The GAO determined that government agencies must consider information gleaned from other schedules in the FSS even though government agencies "are not required to conduct competitive acquisitions when making purchases under the FSS."²⁰⁵ According to the GAO, failing to consider other applicable schedules did not meet the requirement of full and open competition.²⁰⁶ The GAO commented on the 5th SFG's obvious attempt to limit competition by awarding a sole-source contract to Worldwide even though it knew there were other contractors that could provide language training and at a lower cost to the government.²⁰⁷ The GAO stated:

Here the agency's only explanation for its actions is that it placed the delivery orders with Worldwide because it was the only vendor with a contract under FSS No. 69.

¹⁹⁸ REEP, Inc., Comp. Gen. B-290665, Sept. 17, 2002, 2002 CPD ¶ 158, at 3.

¹⁹⁹ *Id.* at 2.

²⁰⁰ *Id.* at 3.

²⁰¹ *Id.* at 5.

²⁰² *Id.*

²⁰³ *Id.* at 3.

²⁰⁴ *Id.* at 4 (citing FAR § 8.404(b)(2) and Commercial Drapery Contractors, Inc., Comp. Gen. B-271222, B-271222.2, June 27, 1996, 96-1 CPD ¶ 290, at 3).

²⁰⁵ *Id.* at 3-4.

²⁰⁶ *Id.* at 5.

²⁰⁷ *Id.*

However, the record shows that the agency had actual knowledge of numerous other vendors that offered the same language training services under FSS No. 738-II. The agency has not asserted that there is anything unique about the training offered by Worldwide under its FSS contract ... that would provide a basis for paying a price premium for the services. Accordingly, we find the agency failed to meet its obligation to consider reasonably available information, namely, the prices offered by other vendors under FSS No. 738-II, before placing its delivery orders with Worldwide. Had it done so, it would apparently have discovered that same requirement could be met at a lower overall cost to the government.²⁰⁸

In *REEP*, the contracting officer failed to follow the requirements of FAR Subpart 6.3 when sole-sourcing the language contract to Worldwide.²⁰⁹ The contracting officer erroneously awarded Worldwide the language contract, determining it was the only responsible source under schedule 69 even though the contracting officer was aware that REEP also provided language training under another schedule as they previously protested the same language contract.²¹⁰ The contracting officer's actions in *REEP*, are the same as those highlighted in the July 2004 GAO study.²¹¹ Contracting officers in the study were failing to compete contracts and instead waived competition to award the contract to the incumbent.²¹² The contracting officer in *REEP* awarded the contract to the incumbent, Worldwide, rather than competing the requirement as required under section 803 of the FY 2002 NDAA.²¹³ Even though there is a competition requirement under section 803 of the FY 2002 NDAA, there is an exception for unusual and compelling urgency, where delay in awarding the contract would cause serious injury to the government.²¹⁴ However, in this case there is no evidence that the need for language training was urgent and compelling nor did the contracting officer document any urgent requirement.²¹⁵ Therefore, the

²⁰⁸ *Id.* at 4-5.

²⁰⁹ *Id.* at 4.

²¹⁰ *Id.* at 3; REEP, Inc., Comp. Gen. B-290688, Sept. 20, 2002, 2002 CPD ¶ 156.

²¹¹ GAO Report No. GAO-04-874, *supra* note 111, at 3.

²¹² *Id.* at 3-6.

²¹³ *Id.* at 1-5.

²¹⁴ FAR, *supra* note 2, at 6.302-2.

²¹⁵ REEP, Inc., 2002 CPD ¶ 158, at 3-5.

contracting officer limited competition by awarding the contract to Worldwide on a sole-source basis.

REEP demonstrates how, without proper oversight, contracting officers can award millions of dollars in sole-source contracts to one vendor selected under the FSS.²¹⁶ There are millions of supplies and services and thousands of vendors from which to choose.²¹⁷ By limiting the pool to only one vendor or schedule, contracting officers fail to use potential competition among FSS vendors to obtain best value for the government.²¹⁸

C. Unduly Restrictive Requirements

Contracting officers also have great discretion in determining which contractors can compete for FSS awards.²¹⁹ Contracting officers can exclude contractors from participation in the competition for an FSS award if they determine that the contractor will not provide best value to the government and if the contracting officer has a sufficient number of other contractors competing for the award.²²⁰ Contracting officers may also exclude contractors from competition by writing restrictive requirements and pre-selecting contractors that meet the unduly restrictive requirements.²²¹

In *Delta International Inc.* (Delta), the Federal Bureau of Investigation (FBI) issued a purchase order for portable x-ray inspection systems from Science Applications International Corporation (SAIC).²²² The FBI did not consider purchasing the portable x-ray inspection systems from Delta because it believed that only the SAIC portable x-ray machine would meet the needs of the FBI.²²³ When questioned by the

²¹⁶ *Id.*

²¹⁷ *GSA Schedules*, *supra* note 11.

²¹⁸ *REEP, Inc.*, 2002 CPD ¶ 158, at 5.

²¹⁹ Ralph C. Nash & John Cibinic, *Federal Supply Schedule Procurements: Choosing The Right Schedules*, 17 NASH & CIBINIC REP. 1 ¶ 1 (2003).

²²⁰ *Id.*

²²¹ Nash & Cibinic, *supra* note 29, ¶ 26.

²²² *Delta Int'l, Inc.*, Comp. Gen. B-284364.2, May 11, 2000, 2000 CPD ¶ 78, at 1.

²²³ *Id.* at 2-3. The FBI wanted a fully digitized machine and believed that only SAIC's machine met that requirement. *Id.* at 9. However, Delta's machine was also digitized, thereby meeting the FBI's requirements. *Id.* at 10.

GAO, the contracting officer could not identify what qualities of the SAIC machine made it more desirable than the Delta machine.²²⁴

The GAO sustained the protest concluding that the FBI's requirements were too restrictive.²²⁵ Specifically, the GAO stated that:

In connection with an FSS purchase in excess of the micro-purchase threshold, a bid protest [that] challenges an agency's definition of its needs that excludes consideration of supplies or services offered by the protesting FSS vendor, we will review the agency's documentation, including its report to our Office, in order to determine whether the agency's definition of its needs has a reasonable basis.²²⁶

Although the needs of the agency and the determination of which products meet those needs are within the discretion of the contracting officer, the agency determination must have a reasonable basis.²²⁷ Again, as with other contracting vehicles, there is no oversight, other than protest by an eliminated vendor, to determine whether the requirements are reasonable and not unduly restrictive. Without oversight, contracting officers can continue to eliminate vendors from competition by drafting contract requirements so restrictively that only one, pre-selected vendor can meet those requirements. Pre-selecting contractors and drafting unduly restrictive requirements only serve to limit competition.

D. Analysis

Contracting officers have great discretion to determine which contracting methods to use for an acquisition. When planning an acquisition, however, they must seek the method that promotes full and open competition.²²⁸ Since the FSS is open to all responsible sources,

²²⁴ *Id.* at 9.

²²⁵ Nash & Cibinic, *supra* note 29, ¶ 26.

²²⁶ *Id.* (citing Design Contempo, Inc., B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146 at 3; National Mailing Sys., B-250411, Jan. 28, 1993, 93-1 CPD ¶ 72 at 2, recon. denied, B-250411.2, June 28, 1993, 93-1 CPD ¶ 496; TSI Inc., B-249815, Dec. 22 1992, 92-2 CPD ¶ 429 at 2).

²²⁷ *Id.* (citing *Design Contempo, Inc.*, 96-1 CPD ¶ 146, at 3).

²²⁸ FAR, *supra* note 2, at subpt. 7.1.

purchases under the FSS are made pursuant to full and open competition.²²⁹ Nevertheless, in practice, contracting officers are procuring millions of dollars of commercial supplies and services using FSS BPAs, sole-source awards, and excluding FSS vendors through unduly restrictive requirements, thereby failing to achieve competition.²³⁰ The purpose of the FSS is to obtain supplies and services using streamlined procedures, not to avoid competition altogether.²³¹ Thus, there must be a balance between streamlined acquisition procedures under the FSS and competition. This balance can be obtained through review by higher authority and enforcement of competition requirements. For example, to balance the need between streamlined procedures and competition for BPAs, BPAs over the simplified acquisition threshold should be reviewed by higher authority as there is no limit on purchases made from one FSS vendor as opposed to the simplified acquisition threshold limit on BPAs created outside the FSS.²³² This review would prevent one vendor from obtaining a multi-million dollar BPA to the exclusion of all other potential vendors. Oversight from higher authority on contracts over the simplified acquisition threshold also would prevent contracting officers from drafting unduly restrictive requirements that effectively allow for the pre-selection of a contractor prior to solicitation. Finally, enforcement of competition requirements, through either refusal to authorize the award or punishment of contracting officers for failure to meet competition requirements for sole-source contracts would ensure that competition requirements are met.

The July 2004 GAO report revealed that contracting officers are failing properly to award and document awards under the FSS.²³³ The GSA is aware that there is a problem with the methods contracting officers use to procure commercial supplies and services through the FSS

²²⁹ Sales Res. Consultants, Inc., Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102, at 7.

²³⁰ Nash & Cibinic, *supra* note 133, ¶ 9 (citing RVJ Int'l, Inc., Comp. Gen. B-292161, B-292161.2, July 2, 2003, 2003 CPD ¶ 124; KPMG Consulting LLP, Comp. Gen. B-290716, B-290716.2, Sept. 23, 2002 CPD ¶ 196; OMNIPLEX World Servs. Corp., Comp. Gen. B-291105, Nov. 6, 2002, 2002 CPD ¶ 199; and Warden Assoc., Inc., Comp. Gen. B-291238, Dec. 9, 2002, 2002 CPD ¶ 215).

²³¹ Lohnes, *supra* note 36, at 602.

²³² FAR, *supra* note 2, at 13.303-5(b)(1).

²³³ GAO Report No. GAO-04-874, *supra* note 111, at 3. The GAO's report with recommendations went to the DOD for comment and the Secretary of Defense for action. *Id.* at 17.

and, with the DOD, has implemented a plan called “Get It Right” to ensure the proper use of GSA’s FSS.²³⁴ But will this plan work?

IV. GSA’s “Get It Right” Plan

On 13 July 2004, the GSA and DOD released to the public a plan to improve contracting operations with GSA and to ensure the proper use of the FSS.²³⁵ The GSA “Get It Right” plan calls for the GSA to “proactively supervise the proper use of its contract vehicles and services to ensure the best value for the American taxpayer and federal agencies.”²³⁶ The major objectives of the “Get It Right” plan are to:

- (1) ensure compliance with federal contracting regulations;
- (2) make contracting policies and procedures clear and explicit;
- (3) ensure the integrity of GSA’s contract vehicles and services;
- (4) improve competition in the marketplace when GSA’s contract vehicles and services are used;
- (5) improve transparency related to how GSA’s contract vehicles and services are used;
- (6) ensure that taxpayers get the best value for their tax dollar whenever GSA’s contract vehicles or services are used.²³⁷

The “Get It Right” plan responds to GAO Inspector General reports over the past few years that documented the abuse of the GSA schedules by government agencies.²³⁸ To this end, the GSA is reviewing all awarded contracts over \$100,000 and determining whether proper procedures were followed.²³⁹ The plan also includes training of contracting personnel on proper contracting procedures and includes

²³⁴ General Servs. Admin, News Release #10097 GSA, “*Get It Right*” Plan Will Ensure Proper Use of GSA Contract Vehicles (July 13, 2004), available at, http://www.gsa.gov/Portal/gsa/ep/contentView.do?pageTypeId=8199&channelId=3259&P=XIcontented=16390&contentType=GSA_BASIC.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Shane Harris, *Defense, GSA Officials Vow To Clean Up Contracting*, GovExec.Com (July 13, 2004), available at http://www.govexec.com/story_page.cfm?articleid=28979&printerfriendlyVers=1&.

²³⁹ *Id.*

checklists for GSA employees to conduct self-assessments on the proper use of GSA contract vehicles.²⁴⁰

While the goal of the “Get It Right” plan is to eliminate the misuse of the GSA’s FSS, the plan does not have an enforcement mechanism. There is nothing in the “Get It Right” plan to prevent contracting officers or government agencies from continuing to avoid competition. There is no punishment for contracting officers or government agencies who fail to follow the “Get It Right” plan. There is no threat to contracting officers that they could lose their warrant to contract.²⁴¹ The plan is simply another requirement for contracting officers and government agencies to complete before contracting with their pre-selected FSS contractor. Without an enforcement mechanism, the “Get It Right” plan will be unsuccessful.

The purposes of the FASA and the Clinger-Cohen Act were to limit the restrictions on FSS purchases and to make the process more like buying commercial items in the general market place.²⁴² However, in the effort to make FSS purchases more commercial, the oversight that once ensured competition eroded. While contracting officers should have discretion to determine which contract vehicles to use, higher authority should review the documentation before the contracting officer awards the contract when awarding FSS contracts using BPAs, sole-source acquisitions or using restrictive requirements. Requiring review by higher authority would provide needed oversight to force contracting officers to document properly their business decisions and keep a record of that determination in the event of a protest.

V. Contracting Officers Should Use FAR Part 15 Procedures When Conducting Complex FSS Buys

Government agencies are required to conduct acquisitions using full and open competition to the maximum extent practicable.²⁴³ The FSS meets this requirement when participation in the FSS program is open to

²⁴⁰ *Id.*

²⁴¹ A warrant is a contracting officer’s “authority to enter into, administer, or terminate contracts and make related determinations and findings.” FAR, *supra* note 2, at 1.602-1. Contracting officers may only “bind the Government to the extent of the authority delegated to them” in writing from the appointing authority. *Id.*

²⁴² Stafford & Yank, *supra* note 7, at 2.

²⁴³ 10 U.S.C. § 2306 (2000).

all responsible sources and the requirements of FAR subpart 8.4 are followed.²⁴⁴ Further, when contracting officers purchase commercial supplies and services from the FSS, they may use negotiation-like procurements among FSS vendors, but they are not required by FAR section 8.404 to use FAR part 15 procedures.²⁴⁵ However, when the GAO reviews protests of FSS purchases using negotiation-like procedures they will use FAR part 15 procedures to determine whether the government agency was “reasonable and consistent with the terms of the solicitation.”²⁴⁶ Requiring contracting officers to use FAR part 15 procedures may increase competition by forcing contracting officers to determine whether to use the FSS or to solicit the procurement to all potential vendors. If the contracting officer determines that the FSS is the best alternative, FAR part 15 procedures, in combination with FAR section 8.405 ordering procedures, require contracting officers to consider all possible vendors instead of focusing on only one vendor or schedule to the exclusion of others,²⁴⁷ thereby, increasing competition within the FSS.

A. Contracting by Negotiation Procedures

FAR part 15 details the policies and procedures contracting officers must follow when using competitive negotiations.²⁴⁸ Competitive negotiation procedures, according to the FAR, “are intended to minimize the complexity of the solicitation, the evaluation, and the source selection decision, while maintaining a process designed to foster an impartial and comprehensive evaluation of offerors’ proposals, leading to selection of the proposal representing the best value to the Government.”²⁴⁹ To do this the contracting officer may employ any one or a combination of three source selection processes in order to determine which acquisition represents the best value for the government.²⁵⁰

The contracting officer could use the tradeoff process, in which there is a determination that factors other than price are more important to

²⁴⁴ Sherry, *supra* note 55, at 380.

²⁴⁵ Sales Res. Consultants, Inc., Comp. Gen. B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102, at 8; *see also* FAR, *supra* note 2, at 8.404.

²⁴⁶ Uniband, Inc., Comp. Gen. B-289305, Feb. 8, 2002, 2002 CPD ¶ 51, at 7.

²⁴⁷ FAR, *supra* note 2, at 15.3, 8.405-2.

²⁴⁸ *Id.* at pt. 15.

²⁴⁹ *Id.* at 15.002 (relying on definitions contained in FAR 2.101).

²⁵⁰ *Id.* at subpt. 15.1.

obtaining the best value for the government.²⁵¹ This allows the government to select other than the lowest cost proposal in return for a better commercial supply or service.²⁵² The second source selection process is the “lowest price technically acceptable” option.²⁵³ This option sets out evaluation criteria that the government agency requires for the product or service.²⁵⁴ The contracting officer then selects the lowest priced contractor whose requirements meet the evaluation criteria listed in the solicitation.²⁵⁵ The last source selection process is oral presentations.²⁵⁶ Here the government agency requests in their solicitation that the offerors submit part or all of the proposal through oral presentation.²⁵⁷ The contracting officer then uses FAR subpart 15.3, Source Selection, “to select the proposal that represents the best value.”²⁵⁸ The decision to award is based on “evaluation [of] factors and significant subfactors that are [relevant and] tailored to the acquisition.”²⁵⁹

B. Protests on FSS Buys Using Negotiation-Like Procedures

The majority of protests on FSS buys occur when contracting officers use negotiation-like procedures for large purchases.²⁶⁰ When these protests arise, the GAO will determine whether the protest meets the requirements of FAR part 15 in order to determine if the agency’s actions “were reasonable and consistent with the terms of the solicitation.”²⁶¹

COMARK Federal Systems (COMARK) illustrates how competition is limited when contracting officers use the FSS for negotiation-like competition for large purchases, rather than using FAR part 15

²⁵¹ *Id.* at 15.101-1.

²⁵² *Id.*

²⁵³ *Id.* at 15.101-2.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 15.102.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 15.302.

²⁵⁹ *Id.* at 15.304.

²⁶⁰ Nash & Cibinic, *supra* note 133, ¶ 9.

²⁶¹ Nash & Cibinic, *supra* note 29, ¶ 26 (2002) (citing Digital Sys. Group, Inc., Comp. Gen. B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 6).

procedures to solicit all possible vendors.²⁶² In *COMARK*, the Department of Health and Human Services (DHHS) issued a request for quotes (RFQ)²⁶³ for computer desktop workstations to six FSS vendors.²⁶⁴ These vendors received packages that included a sample specification for a personal computer, the “BPA Evaluation Requirements Criteria,” and other requirements of the BPA for review.²⁶⁵ The DHHS initially chose *COMARK* as part of its BPA, but DHHS later issued another RFQ under the BPA and did not select *COMARK* due to a pricing error in the evaluation.²⁶⁶

COMARK protested the DHHS decision not to award the BPA based upon the faulty evaluation, arguing that the RFQ did not contain any evaluation criteria the agency would use in its best value determination.²⁶⁷ The GAO determined that even though the provisions of FAR subpart 8.4 applied in this RFQ, “the agency must provide some guidance about the selection criteria, in order to allow vendors to compete intelligently” when the agency shifts the burden of what item to offer to the vendor.²⁶⁸ The GAO went further and held, that:

²⁶² *COMARK Fed. Sys.*, B-278343; B-278343.2, 1998 U.S. Comp. Gen. LEXIS 26 (Jan. 20, 1998).

²⁶³ The request for quotation (RFQ) is a contracting procedure used in negotiation-like FSS purchases where the ordering agency included the statement of work and evaluation criteria such as past performance and management in the request for quotation posted on “GSA’s electronic RFQ system e-Buy.” FAR, *supra* note 2, at 8.405-2(c).

²⁶⁴ *COMARK Fed. Sys.*, 1998 U.S. Comp. Gen. LEXIS 26, at *1.

²⁶⁵ *Id.* at *2.

²⁶⁶ *Id.* at *2-*5.

²⁶⁷ *Id.* at *5.

²⁶⁸ *Id.* at *8. Specifically, the court held:

The RFQ specifically referred to the BPA, which, in turn, stated that it was issued pursuant to the GSA FSS. Accordingly, the provisions of Federal Acquisition Regulation (FAR) [s]ubpart 8.4 apply. Those provisions anticipate agencies reviewing vendors’ federal supply schedules -- in effect, their catalogs -- and then placing an order directly with the schedule contractor that can provide the supply (or service) that represents the best value and meets the agency’s needs at the lowest overall cost. When agencies review competing vendors’ schedule offerings, they are permitted to make a best-value determination that takes into account “special features of one item not provided by comparable items which are required in effective program performance.” When agencies take this approach, there is no requirement that vendors receive any advance notice, regarding either the agency’s needs or the selection criteria. Agencies, however, may shift the responsibility for selecting items from schedule offerings to the vendors, by issuing solicitations

Where the agency intends to use the vendors' responses as the basis of a detailed technical evaluation and cost/technical trade-off, the agency has elected to use an approach that is more like a competition in a negotiated procurement than a simple FSS buy, and the RFQ is therefore required to provide for a fair and equitable competition.²⁶⁹

COMARK illustrates that using the FSS for a negotiation-like procurement limits competition due to the limited number of vendors selected to compete and that competition is further inhibited when contracting officers do not evaluate solicitations properly. The purpose of the FSS is to allow government agencies to obtain needed commercial supplies and services quickly with little administrative burden.²⁷⁰ The streamlined process of the FSS normally would not require a contracting officer to "conduct a full-scale competition to select the winning" vendor; rather the contracting officer would select the vendor or vendors that met the needs of the government.²⁷¹ By having the FSS vendors compete for an award, the contracting officer ignores the possibility that a vendor outside the FSS could offer the same commercial supply or service at a better price than that of the FSS vendors.

In another example, the Department of Justice (DOJ) limited competition in a negotiation-like procurement for a financial system by

(typically in the form of RFQs) that call on the vendors to select, from among the hundreds (or thousands) of possible configurations of the items on their schedules, a particular configuration on which to submit a quotation. It is certainly understandable that an agency would prefer for the vendors to construct these configurations; particularly in the area of information technology, the large number of possible combinations might make it difficult for agency personnel unfamiliar with the particular equipment or related technical issues to select one configuration by reviewing vendors' schedule offerings. Yet once an agency decides, by issuing an RFQ.... to shift to the vendors the burden of selecting items on which to quote, the agency must provide some guidance about the selection criteria, in order to allow vendors to compete intelligently.

Id. at *5-*8 (internal citations and footnotes omitted).

²⁶⁹ *Id.* at *8.

²⁷⁰ KEYES, *supra* note 3, at 881.

²⁷¹ Nash & Cibinic, *supra* note 29, ¶ 26.

selecting seven FSS vendors to compete for an FSS contract.²⁷² In this instance, the DOJ limited competition by pre-selecting seven vendors to compete in a complex mini-competition prior to issuing an RFQ, rather than using market research to determine all possible vendors who could compete in the mini-competition or conducting a FAR part 15 competition outside the FSS.²⁷³ In *Savantage Financial Services, Inc.* (Savantage), the DOJ wanted to replace its seven different financial management systems with one unified financial management system.²⁷⁴ The DOJ wanted to use the FSS to purchase “a commercial off-the-shelf (COTS) product certified by the Joint Financial Management Improvement Program (JFMIP) as meeting core federal accounting and systems security requirements.”²⁷⁵ There were seven JFMIP-certified financial management software vendors in one schedule on the FSS with a maximum order threshold of \$500,000, which the DOJ planned to exceed.²⁷⁶ The DOJ asked the seven certified vendors to complete a 100-page market survey describing their products and put the vendors on notice that the DOJ wanted a COTS system that required little customization to support the DOJ’s business process.²⁷⁷

After receiving the market surveys and client lists from the vendors, the DOJ then asked each vendor to provide a demonstration of its software system.²⁷⁸ The request for demonstrations stated the DOJ’s criteria for the understanding and ease of use of each vendor’s system.²⁷⁹ The DOJ indicated that the information obtained from the demonstration would not be used to “target a particular solution or narrow the potential field of products for future acquisition activities.”²⁸⁰

Of the seven potential vendors, six, including Savantage, completed the market survey and provided a product demonstration.²⁸¹ After reviewing the market surveys and the product demonstrations, the DOJ

²⁷² *Savantage Fin. Serv., Inc., Comp. Gen. B-292046, B-292046.2, June 11, 2003, 2003 CPD ¶ 113.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 2.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 3, 8.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 4.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 5.

decided to solicit quotes from only four of the vendors, excluding Savantage.²⁸² The DOJ informed Savantage that:

Based on its evaluation, the Department has concluded that [Savantage] would have no reasonable chance of being selected for award over other schedule vendors offering JFMIP-certified software. Accordingly, [the DOJ has] concluded that it would not serve the interests of the Department, or be in Savantage's interest, for you to undergo the expense and effort of responding to an RFQ.²⁸³

Savantage protested the DOJ's opinion, arguing that the DOJ violated FAR section 8.404(b)(3) which provides that before an agency places and order that exceeds the maximum order threshold, it must:

- (i) Review additional schedule contractors' catalogs or pricelists, or use the GSA Advantage! on-line shopping service;
- (ii) Based upon the initial evaluation, generally seek price reductions from the schedule contractor(s) appearing to provide the best value (considering price and other factors); and
- (iii) After seeking price reductions, place the order with the schedule contractor that provides the best value and results in the lowest overall cost alternative. If further price reductions are not offered, an order may still be placed, if the ordering office determines that it is appropriate.²⁸⁴

The DOJ argued that the "market research" conducted was not a competition, and therefore is not reviewable by the GAO.²⁸⁵ The DOJ maintained that the information the vendor provided was only to inform the DOJ about products available to meet the DOJ's procurement needs and was consistent with FAR section 8.404(b)(3) requirements to review

²⁸² *Id.*

²⁸³ *Id.* at 6.

²⁸⁴ *Id.* at 7-8 (internal citations omitted).

²⁸⁵ *Id.* at 8.

additional schedule contractors when placing an order above the maximum threshold.²⁸⁶

The GAO disagreed and determined that Savantage had a valid basis for protest, stating that the DOJ failed to follow FAR subpart 8.4 procedures, ensuring competition by reviewing catalogs and pricelists of at least three other FSS vendors.²⁸⁷ The GAO determined:

Use of the FSS in lieu of conducting a full and open competition is thus premised on following the Subpart 8.4 procedures to reach a determination regarding what the agency's needs are and which FSS vendor meets those needs at the lowest overall cost. DOJ concedes that an agency's failure to follow the procedures in Subpart 8.4 by, for example, failing to review the catalogs or pricelists of three FSS vendors, is reviewable in a bid protest. Moreover, where an FSS vendor protests the agency's decision not to solicit from the protester for an FSS purchase the agency is making, we will review the agency's action for compliance with applicable law.²⁸⁸

The GAO further determined that it would review the DOJ's best value determination for reasonableness since the DOJ removed Savantage from consideration when the DOJ stated in its letter to Savantage that there was "no reasonable chance" that Savantage would be selected for award.²⁸⁹ The GAO cited that "[t]he agency conducted a comparative evaluation of the relative merits of the vendor's products and abilities, through its market survey, in order to determine which vendors appeared to offer the best value. It was the best value determination that led to the letter" to Savantage.²⁹⁰ While the GAO found that it could review the DOJ's determination of best value for reasonableness, the GAO did not sustain Savantage's protest based upon the GAO's determination that the DOJ's elimination of Savantage from competition was reasonable.²⁹¹

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 10.

²⁸⁸ *Id.* at 12 (citing Delta Int'l, Inc., Comp. Gen. B-284364.2, May 11, 2000, 2000 CPD ¶ 78, at 6) (additional internal citations omitted).

²⁸⁹ *Id.* at 15.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 27.

Even though the GAO determined that the DOJ's evaluation was reasonable, this case demonstrates how competition can be limited through legitimate, negotiation-like competition procedures. By conducting a complex mini-competition with pre-selected vendors, the DOJ eliminated other possible vendors available in the commercial market place and other FSS schedules. Requiring contracting officers to use market research and document their decision to either use the FSS or to solicit all possible vendors would maximize competition and truly result in best value to the government. This would be particularly true in instances such as *Savantage*, where the DOJ had specific requirements for the RFQ and used a complex selection process on the limited number of FSS vendors to determine the winning vendor.

C. Analysis

Reviewing *COMARK* and *Savantage*, it would appear that true full and open competition using FAR part 15 would have been more beneficial to both government agencies as they were purchasing items over the simplified acquisition threshold of \$100,000, and they could conceivably cost the government millions of dollars. When government agencies make large FSS purchases using negotiation-like procedures, they should be required to conduct their competition under FAR part 15 and not be exempt under FAR subpart 8.4. Requiring contracting officers to conduct FSS competitions under FAR part 15 will force them to evaluate each vendor equally and to state the relevance of the evaluation criteria in the RFQ.²⁹² Applying FAR part 15 procedures to FSS negotiation-like competitions, is also likely to result in contracting officers considering more vendors for procurements, in order to determine best value, consequently increasing competition.²⁹³

In addition to eliminating the exemption of FAR part 15 procedures from FAR subpart 8.4, the FAR should add provisions from *DFAR Supplement 208.404-70* to increase competition. The DOD currently requires contracting officers to use market research and document contracting decisions on purchases over the simplified acquisition threshold of \$100,000 through requirements in *DFAR Supplement 208.404-70*.²⁹⁴ Requiring contracting officers to document market

²⁹² Nash & Cibinic, *supra* note 29, ¶ 26.

²⁹³ See Nash & Cibinic, *supra* note 133, ¶ 9.

²⁹⁴ DFAR, *supra* note 113, at 208.404-70.

research and their decision to use negotiation-like procedures for an FSS purchase rather than soliciting the requirement to all potential vendors on purchases over the simplified acquisition threshold, will force contracting officers to consider other options to increase competition resulting in best value to the government. Conducting market research would not be overly onerous to contracting officers. They would merely need to call local vendors to check prices on the needed commercial supplies or services or conduct a short internet search to determine whether the market price is less than that which the FSS vendors are offering.²⁹⁵ Amending the FAR to require FAR part 15 procedures in negotiation-like FSS purchases and requiring documentation of market research would increase competition under the FSS resulting in best value for the government.

D. *DOD DFAR Supplement 208.404-70* Competition Requirements

When a contracting officer contracts for the DOD, section 803 of the FY 2002 National Defense Authorization Act (NDAA) must be met by awarding contracts for services “on a competitive basis.”²⁹⁶ *DFAR Supplement 208.404-70* implements FY 2002 NDAA by requiring:

- (c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contacting officer will make the selection, to –
 - (1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the work requirements, and the contracting officer –
 - (i)(A) Receives offers from at least three contractors that can fulfill the work requirements; or
 - (B) Determines in writing that no additional contractors that can fulfill the work requirements could be identified despite reasonable efforts to do so (documentation

²⁹⁵ Ralph C. Nash & John Cibinic, *Postscript IV: Multiple Award Schedules*, 14 NASH & CIBINIC REP. 9 ¶ 46 (2000).

²⁹⁶ Pub. L. No. 107-107, 115 Stat. 1012 (2001).

should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered; or
(2) All contractors offering the required services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered. Posting of a request for quotations on the General Services Administration's electronic quote system "e-Buy" (<http://www.gsaAdvantage.gov>), is one medium for providing fair notice to all contractors as required by this paragraph (c).²⁹⁷

While the DOD appears to require full and open competition through these DFAR procedures, the requirement lacks enforcement. The July 2004 GAO report showed that even though contracting officers must meet *DFAR 208.404-70* competition requirements, a majority of the officers failed to meet these requirements when soliciting contracts under the FSS.²⁹⁸ Adding an enforcement mechanism and requiring approval by someone above the contracting officer would increase competition among vendors. When billions of dollars of commercial supplies and services are purchased by government agencies each year, some enforcement and oversight is needed to ensure competition and, ultimately, that the government is getting the best value.²⁹⁹ Amending FAR subpart 8.4 to include FAR part 15 competition negotiations and *DFAR Supplement 208.404-70*, along with enforcement and oversight provisions would truly make the FSS a full and open competition system.

VI. Conclusion

Congress established the FSS program to give government agencies a convenient way to purchase commercial supplies and services.³⁰⁰ However, the FSS program is limited in use through the restrictive

²⁹⁷ Nash & Cibinic, *supra* note 133, ¶ 9 (citing DFAR 208.404-70).

²⁹⁸ GAO Report No. GAO-04-874, *supra* note 111, at 3. The GAO randomly selected 74 orders over the simplified acquisition threshold from five DoD buying organizations to determine the level of competition. *Id.* at 5. Of the 74 orders reviewed, competition was waived in 34 of them without proper justification. *Id.* at 6.

²⁹⁹ *Id.*

³⁰⁰ FAR, *supra* note 2, at subpt. 8.4.

definition of commercial items and procurement procedures.³⁰¹ In an effort to streamline government acquisition of commercial items, Congress passed the FASA and the Clinger-Cohen Act, making FSS purchases worth billions of dollars more convenient.³⁰² The change was an effort to make government contracting more like commercial acquisitions, thereby saving the government time and money.³⁰³ While these changes made FSS purchases more convenient, competition has been lost.³⁰⁴ Congress did not intend to limit competition through streamlined acquisition methods, but rather Congress intended streamlined acquisition methods to create competition and let the market give the government the best price.³⁰⁵

While it appears that Congress has gone too far with acquisition streamlining, the procurement system should not take a step backwards with the introduction of legislation to restrict contracting officers from making sound business judgment. Instead, minor changes in the FAR to force contracting officers to show that they complied with the rules on purchases over the simplified acquisition threshold would still allow for a streamlined process and full and open competition. The “Get It Right” program and the *DFAR Supplement 208.404-70* are a step in the right direction to increase competition; however, creating another requirement for contracting officers without an enforcement mechanism and oversight does not provide for guaranteed success. Adding enforcement mechanisms and oversight to FAR subpart 8.4 would ensure competition for large purchases under the FSS without eliminating the purpose of the FSS as a convenient means of purchasing commercial supplies and services.

³⁰¹ NAGLE, *supra* note 34, at 498.

³⁰² *Id.* at 511-17.

³⁰³ Stafford & Yank, *supra* note 7, at 2.

³⁰⁴ Nash & Cibinic, *supra* note 29, ¶ 26.

³⁰⁵ Nash & Cibinic, *supra* note 133, ¶ 9; Stafford & Yank, *supra* note 7, at 2.

**EIGHTEENTH WALDEMAR A. SOLF LECTURE IN
INTERNATIONAL LAW[†]**WILLIAM H. TAFT, IV^{*}

Let me begin by thanking the Army's Judge Advocate General's Legal Center and School for inviting me to deliver this year's Waldemar A. Solf Lecture in International Law. Colonel (COL) Solf was a distinguished lawyer and Soldier. He fought in World War II as a young man and served in increasingly important positions during his long career as a judge advocate. He became a legend in the practice of military justice. Later in life, COL Solf played an important role in the negotiation and analysis of the Additional Protocols to the 1949 Geneva Conventions¹—a subject that I have considered repeatedly in my role as

[†] The Judge Advocate General's School, U.S. Army, established the Waldemar A. Solf Chair of International Law on 8 October 1982, in honor of Colonel (COL) Waldemar A. Solf (1913-1987). Commissioned in the field artillery in 1941, COL Solf became a member of the Judge Advocate General's Corps in 1946. Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the U.S.; the Staff Judge Advocate of the Eighth U.S. Army and U.S. Forces Korea, the United Nations Command, and the U.S. Strategic Command. He also served as the Chief Judicial Officer, U.S. Army Judiciary, and as the Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf reaffiliated himself with the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and accepted an appointment as the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

^{*} This is an edited transcript of a lecture delivered on 2 March 2005, by William H. Taft, IV, to the members of the staff and faculty, distinguished guests, and officers attending the 53d Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

legal adviser to the Secretary of State over the last four years and which I would like to consider again with you this morning. It is a privilege to speak at this lecture series that honors this remarkable man of many accomplishments.

The United States has long promoted the rule of law both in the domestic affairs of states and in their relations with each other. The rule of law is a fundamental aspect of our own democracy. We rely on international law to advance our foreign policy interests. We appeal to it as a source of authority. We develop it to advance U.S. interests. We employ it as a means to secure a peaceful world and to establish and

Mr. Taft served as the legal adviser to the Secretary of State from April 2001 through February 2005. In this office, Mr. Taft was the principal adviser on all domestic and international legal matters to the Department of State, the Foreign Service and diplomatic and consular posts abroad, as well as the principal adviser on legal matters relating to the conduct of foreign relations to other agencies and, through the Secretary of State, to the President and the National Security Council.

Before joining the Department of State, Mr. Taft had been a litigation partner in the Washington, D.C., office of Fried, Frank, Harris, Shriver and Jacobson, concentrating in government contracts counseling and international trade. Upon completion of his government service he returned to Fried, Frank as a litigation partner.

Prior to joining Fried, Frank in 1992, Mr. Taft was U.S. Permanent Representative to NATO from 1989 to 1992. Before that, he served as Deputy Secretary of Defense from January 1984 to April 1989 and as Acting Secretary of Defense from January to March 1989. From 1981 to 1984, Mr. Taft was General Counsel for the Department of Defense.

Prior to his initial appointment to the Department of Defense, Mr. Taft was in private law practice in Washington, D.C., from 1977 to 1981. Before entering private practice, he served in various positions at the Federal Trade Commission, the Office of Management and Budget, and the Department of Health, Education and Welfare, where he was appointed by President Ford in 1976 to serve as General Counsel.

Mr. Taft received his J.D. in 1969 from Harvard Law School and his B.A. in 1966 from Yale University. He is admitted to the bar in the District of Columbia.

¹ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 3, *reprinted in* 16 ILM 1391 (1977); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

protect the rights of U.S. citizens and companies. We use it as a standard to which we hold other countries, and it is a measure by which other countries judge our actions. Through international law, we have achieved important objectives in nearly every area—trade, investment, security, environment, human rights, technology, health, law enforcement, and so forth. In short, international law is indispensable to the successful conduct of our foreign and security policy.

It is important here to recall the United States' historic role in the development and expansion of international law. For nearly a century, the United States has led the world in the promotion of international law and has been the key player in negotiating treaties and setting up international institutions to resolve disputes. During this period, the United States has seen a huge increase in the quantity and complexity of its international engagements, and the United States and other countries have had to develop more international law to carry out these new engagements. More countries have accepted international law as a set of rules that must be followed or according to which their actions must be justified. Even the most powerful countries offer international legal justifications for their actions to obtain greater legitimacy. Certainly, the United States does this.

Overall, the growth of international law and its influence over the past century has been a very positive development, and the United States and the world have benefited enormously from increased international cooperation. We have seen increased economic and social welfare for millions of people throughout the world. Several significant and terrible diseases have been wiped out entirely and considerable progress is being made in the fight against other diseases, notably AIDS. Important portions of the global environment have been protected. Millions of suffering people have received humanitarian assistance during armed conflicts and natural catastrophes, including recently on an unprecedented scale in response to the devastation following the massive earthquake in the Indian Ocean. Potentially bloody conflicts have been prevented from escalating into major wars, and most nations now are parties to treaties that commit them to provide to their people a broad range of widely accepted human rights.² Many of the treaties and

² International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (154 parties); International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (170 parties);

conventions brought about by the United Nations (UN) and other regional and international organizations as well as numerous multilateral treaties in technical, economic, and scientific areas have been critical in making all this happen.

Although the United States has been the principal advocate, as well as a strong supporter, politically and financially, of the modern international legal system and its key institutions as they developed over the last century, recently our credibility as an advocate of the rule of law has not gone unquestioned. Our reputation for compliance with our international obligations—and hence our ability to pressure other states to carry out their obligations—has been diminished as a result.

Strengthening our reputation as a country that abides by the rule of law would help us achieve our foreign policy and security objectives by encouraging other countries to cooperate with us and by allowing us more effectively to use legal principles to influence other countries' behavior. We need to enhance both our reputation and authority in this regard.

As lawyers on the front lines of our foreign and security policy, you regularly provide legal advice to military leaders regarding treaties, international conventions, and rules of engagement, and you observe and report on trials of U.S. personnel in foreign countries to ensure that their due process rights are respected. You know, I dare say, from your experience that our respect for the rule of law is important not only as an academic matter but also in practice.

There are many areas where emphasizing respect for rule of law as a central element of our foreign and security policy, while simultaneously taking steps to assure that our own conduct is consistent with our international obligations, will help us achieve our objectives. I would like to focus this morning on three different places where this issue is in play in different ways: (1) the treatment of detainees in the global war terrorists are currently fighting against us; (2) the situation in Iraq; and, (3) our attitude towards the International Criminal Court (ICC).

and United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (138 parties).

Treatment of Detainees in the Global War on Terror

The Bush administration's detainee policy and associated legal positions in the global war on terrorism remain a focus of international criticism. They complicate our diplomatic as well as our military efforts to achieve our foreign policy and national security objectives, and in particular instances have isolated us from friends and allies who could provide us with more help in fighting the terrorists. In the last three years we have offered a number of explanations for our treatment of detainees. Our arguments have not been frivolous, but most states have rejected, among other things, our position that the law of armed conflict applies to the war on terrorism and, as a consequence, they have found themselves in many instances unable to detain their own nationals who have engaged in it but committed no crime against their laws. For this reason, almost all the people who have been captured in the fight against al Qaeda are being held by the United States. Some states have also alleged that we have not properly complied with the law of armed conflict, even assuming it is applicable; questioned whether we have treated the detainees humanely, as they believe customary international law of war requires; and felt that the military commissions we have established fail to meet fundamental requirements of either the law of war or human rights law.

In addition, several U.S. court decisions on detainee issues, including from the Supreme Court,³ have set aside legal positions asserted by the administration and held that in a number of respects the executive branch has exceeded its authority. Our practice of adjusting our conduct only after a court requires it, combined with our restrictive interpretations of adverse decisions when rendered, has not enhanced our reputation for upholding the rule of law.

The fact is, of course, that neither the administration nor its critics have candidly acknowledged that the fight we are engaged in with al Qaeda does not fit the historical model of an armed conflict for which the Geneva Conventions were designed and then followed up by making serious proposals as to what to do about it. We have not felt able as a practical matter to comply strictly with the law of war. Our critics have not been able to accept that traditional law enforcement tools are totally

³ See *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

incapable of dealing with an organization in which thousands of people are engaged in military operations on a global scale. Instead, both the United States and our critics have tended to emphasize those elements of one or the other body of law that is being complied with or ignored without being able to show that either the law of war or human rights law is or even should be consistently applied in its totality.

The transition to President Bush's second term is an opportunity for the administration to revisit its legal policies and legal positions with respect to detainees, and craft diplomatic and legal strategies to repair and strengthen the relationships with other countries that are necessary to deal with terrorists effectively. A critical step in achieving this objective would be to develop a common international approach to the treatment of people captured in the global war on terrorism, one that is consistent with the principles of the Geneva Conventions and guarantees humane treatment to all detainees,⁴ but also recognizes the authority, traditional under the law of war, to detain terrorists who, if released, will rejoin al Qaeda or other organizations committed to killing not just our Soldiers, but any of our citizens whenever they can.

Also, the administration needs to address key outstanding legal concerns that have been raised publicly by the International Committee of the Red Cross (ICRC) and others regarding U.S. detention practices. These include allegations that the United States is holding detainees whose identities have not been declared to the ICRC, that it is operating undisclosed detention facilities and arranging unlawful transfers of detainees to third countries.⁵ There is no basis in the law of war, criminal law or human rights law for such practices. Nor is it tenable

⁴ Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁵ See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice Is Called Serious Breach of Geneva Conventions*, WASH. POST, Oct. 24, 2004, at A1; Dana Priest & Scott Higham, *At Guantanamo, a Prison Within a Prison, CIA Has Run a Secret Facility for Some Al Qaeda Detainees, Officials Say*, Dec. 17, 2004, WASH. POST, at A1.

after the Supreme Court's rulings last summer,⁶ for the United States to assert that persons detained by it have no legal rights of any kind, that they may not contest with the assistance of competent counsel of their own choosing the legal basis for their detention, that the government has complete discretion to determine the conditions of their detention, or that whether they are to be treated humanely or not is a question only of policy. The fact is that our well-publicized mistreatment of detainees, whether condoned by our policies or not, has badly undercut our entirely valid position that we have the right to keep them in custody when, if released, they would continue to fight us.

A comprehensive review of detainee policy is overdue. While no one, and certainly not the United States' critics, has all the answers to the hard questions raised by the issue of detainees in the global war being waged by terrorists against the civilized world, simply for the President to announce a comprehensive review of the administration's policy would greatly enhance the United States' credibility as a strong advocate of the rule of law at a time when this could be extremely useful in advancing our other foreign policy goals.

Situation in Iraq

I must say simply that, with regard to Iraq and our conduct in the conflict there, I find the criticism that the United States acted contrary to international law unjustified and, for that reason, particularly disappointing. Our government's actions and policy in Iraq have been and are entirely lawful though they have unquestionably been marred, as every government's policies are from time to time, by the conduct of individuals who failed to follow the rules for their behavior.

Operation Iraqi Freedom in 2003 was the final episode in a conflict initiated more than twelve years earlier by Iraq's wanton and unprovoked invasion of Kuwait on August 2, 1990.⁷ Almost immediately after that invasion, the Security Council adopted Resolution 660, the first of a series of resolutions condemning Iraq's actions and demanding Iraq's withdrawal from Kuwait.⁸ Since then and in the buildup to and

⁶ See *supra* note 3 (listing the relevant Supreme Court case law from 2004).

⁷ COLIN L. POWELL, *MY AMERICAN JOURNEY* 445 (1995).

⁸ S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/Res/660 (1990).

execution of Operation Iraqi Freedom in the last two years particularly, the United States has taken great care to assure that UN Security Council resolutions have authorized any actions we have taken in Iraq, including:

- United Nations Security Council Resolution (UNSCR) 1441, in which the Security Council afforded Iraq one final opportunity to comply with its obligations, an opportunity no one believes Iraq took advantage of in the time set out in the resolution;⁹
- UNSCR 1483, where the Security Council, in May 2003, put in place the legal structure for the period following the end of major combat operations;¹⁰
- UNSCR 1511, which in October 2003 authorized a multinational force, and provided a basis for continued military operations in Iraq;¹¹ and
- UNSCR 1546, adopted in the spring of 2004, which provided and still today provides the framework for Iraq's political transition to a democratic government and the legal basis for the operations being conducted by U.S. and other foreign armed forces there.¹²

While there have been arguments about what these resolutions mean, we have always acted consistent with our understanding of them, and we have never suggested that they could be disregarded, even if in particular instances we did not believe they were necessary. We should continue to emphasize that the legal basis for our actions in Iraq lies in the UN resolutions and assure that we act consistently with them. In this regard, I must say I find the remarks of the UN Secretary General challenging the lawfulness of our use of force in Iraq regrettable,¹³ insofar as they suggest that we willfully ignored the Security Council's authority. We

⁹ S.C. Res. 1441, U.N. SCOR, 58th Sess., 4644th mtg. at 3, U.N. Doc. S/Res/1441 (2002).

¹⁰ S.C. Res. 1483, U.N. SCOR, 54th Sess., 4761st mtg., pmb. 8(e), U.N. Doc. S/Res/1483 (2003).

¹¹ S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/Res/1511 (2003).

¹² S.C. Res. 1546, U.N. SCOR 58th Sess., 4987th mtg., U.N. Doc. S/Res/1546 (2004).

¹³ BBC News Interview with United Nations Secretary General Kofi Annan (Sept. 16, 2004), available at http://news.bbc.co.uk/1/hi/world/mid-dle_east/3661134.stm.

have never sought to diminish the Council's role in preserving peace in this way.

In addition to seeking and getting UN Security Council authorization for its actions in Iraq, the United States has worked hard to provide Iraq in the Transitional Administrative Law and the Coalition Provisional Authority directives a workable set of laws upon which it could build its democracy. How well Iraq lives up to the rule of law will be an important factor in the success of our Iraq policy with significance for our ability to conduct policy generally. There should be no doubt, however, that the rule of law, instead of a dictator, is exactly what we are committed to creating in Iraq. It is a worthy goal, and the course we have followed in pursuit of it has been consistent with the rule of law itself.

International Criminal Court (ICC)

There are many good reasons for our decision not to join the ICC and we are, of course, perfectly within our rights in not becoming a party to the Rome Statute (Statute).¹⁴ It is important to recall, however, what the basis for our decision not to join was and what it was not. Most emphatically, the United States' disagreement with parties to the ICC treaty is not with the principle of accountability.¹⁵ The United States has been, and remains, committed to ensuring that perpetrators of war crimes, crimes against humanity, and genocide are investigated and brought to justice. No state, in fact, has done more over the years in this regard, and I am not referring here just to our extensive support for tribunals prosecuting foreign nationals.

Nor is the United States' problem with the ICC, as it has sometimes been portrayed, that we want Americans to be exempt from criminal liability we would impose on others.¹⁶ Our statutes already impose

¹⁴ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, art. 11, 37 I.L.M. 999, 1010 [hereinafter Rome Statute], available at <http://www.un.org/law/icc/statute/romefra.htm>.

¹⁵ Marc Grossman, Under Secretary of State for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002), available at <http://www.state.gov/p/9949.htm>.

¹⁶ See, e.g., Sonni Efron, *Dispute Over ICC Hampers United Effort on Darfur*, L.A. TIMES, Feb. 26, 2005, at A6 (commenting that the United States "opposes the ICC

criminal penalties on Americans who commit war crimes, crimes against humanity, or genocide, and we have prosecuted these cases where appropriate.¹⁷ Our problem is with the way that the Statute purports to achieve accountability. The Statute seeks to supplant the appropriate role of the UN Security Council in determining threats to international peace and security by including within the ICC's jurisdiction—and planning to define—the crime of aggression.¹⁸ It creates a new and objectionable form of jurisdiction over the nationals of non-party states, even where their democratically-elected representatives have not agreed to become bound by the treaty.¹⁹ Also, the ICC prosecutor may commence investigations on his own initiative, without a referral from the UN Security Council or from states.²⁰ This creates a real possibility of inappropriate or politically-motivated prosecutions,²¹ and states like the United States that maintain an active involvement in military or peacekeeping activities are at particular risk of becoming targets of such prosecutions. Finally, by diverting responsibility and resources to the ICC, the incentive for states to develop adequate national processes and to themselves address unacceptable actions by their nationals is diminished, and this hinders the development of the rule of law in countries in transition. National reconciliation is a difficult process that experience shows states need to undertake in different ways—South Africa, Chile, Sierra Leone, Yugoslavia and Cambodia are simply not the same. A court sitting in The Hague may have a role to play in one or another of them, or in other situations that develop, but it just as likely will not. Whether to involve it in a particular case should be a matter for the Security Council, which has a responsibility for all aspects of maintaining international peace and security, of which accountability is, of course, an important one, but not the only one.

because it fears the court could be used to prosecute U.S. military personnel and government officials”).

¹⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(a)(3) discussion (2002) (referencing specifically the Geneva Convention Relative to the Protection of Civilian Persons in Time of War); R.C.M. 202(b) (proscribing jurisdiction for law of war offenses—personal jurisdiction); R.C.M. 203 (proscribing jurisdiction over law of war offenses).

¹⁸ Rome Statute, *supra* note 14, art. 5(1)(d).

¹⁹ *Id.* arts. 12, 13.

²⁰ *Id.* arts. 13, 15.

²¹ Jack Goldsmith, Editorial, *Support War Crimes Trials for Darfur*, WASH. POST, Jan. 24, 2005, at A15 (stating that the United States believes the ICC “is staffed by unaccountable judges and prosecutors who threaten politically motivated actions against U.S. personnel around the globe”).

In spite of these and other problems with the ICC and the availability of suitable alternatives in most situations, such as credible national judicial systems and ad hoc tribunals established by the UN Security Council, however, the ICC is here to stay. The United States needs, therefore, to find a way to talk about the ICC—and the underlying issues of war crimes, genocide, and crimes against humanity—that helps dispel the idea that our opposition to the ICC amounts to a rejection of the rule of law. It is essential, in this regard, that we avoid exaggerated statements that the ICC is somehow itself “illegal.” We also need to develop a positive agenda for dealing with issues potentially within the purview of the ICC, such as bringing to justice the perpetrators of genocide in Sudan. It is not enough to be against the ICC, which in at least a few instances may—let’s admit it—be precisely the right forum, unless we can present an alternative vision for dealing effectively with these difficult issues and those cases it is not well-suited to deal with. Most of the court’s work has no direct impact on the United States. If we simply try to obstruct it, we will look foolish when it does well and be blamed when it fails—a loser either way.

Dealing with these three issues, then, could provide important opportunities for us to enhance our reputation for abiding by international law and strengthening that key element underlying global security and prosperity. There are other opportunities, of course,—becoming a party to the Law of the Sea Convention²² comes to mind—and we should seize them too, but these stand out at the moment. We need a comprehensive review of our policy for the treatment of detainees in the global war on terrorism and some fundamental changes in the legal assumptions underlying our approach. We should continue to emphasize the legal bases for our actions in Iraq in the UN resolutions and assure that we act consistently with them. And we need to find a way to defuse the largely abstract confrontation with the European Union over the ICC.

Many of you have been or will be called upon in your careers as military lawyers to provide legal advice to military leaders in these and similar areas. Strong policy preferences will tempt your clients

²² Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/62-122 (1982); see also David B. Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, BROOKINGS INST. POL’Y BRIEF NO. 137, at 1 (Aug. 2004), available at <http://www.brookings.edu/comm/policybriefs/pb137.pdf>.

sometimes to give short shrift to the United States' legal responsibilities, but making the right choices in these contexts will be critical for strengthening our security and meeting our foreign policy objectives over the long run.

I encourage you, then, to remain committed to the rule of law as your guiding principle as you advise your military clients on what will surely be a wide range of interesting and difficult international and domestic issues. That commitment, together with your good judgment, integrity, and strong moral compasses, will help you preserve and even enhance the historic reputation and authority of our country in international law.

**THE TWENTY-FOURTH CHARLES L. DECKER LECTURE IN
ADMINISTRATIVE AND CIVIL LAW[†]**

DR. DAVID S.C. CHU*

General Black, distinguished guests, it is truly a privilege to join you this morning and to speak to the issue of transformation in our Department of Defense, as it affects our people.

A first question that is often asked when the subject of transformation is raised focuses on the definition: What exactly is “transformation?” How would we know it if we saw it? Drawing on my economics training background, I think there is a story that economists like to tell about themselves that illustrates the essence of transformation.

In this tale, an alumnus of a major graduate program comes back to his alma mater some years after he graduated to visit his favorite professor. He arrives at examination time to find that she is engaged in proctoring the exam, so he waits patiently in the back of the classroom. While he is waiting, he opens the exam booklet to see what questions are being posed and discovers, to his astonishment, that the questions she’s asking are the same questions that were asked twenty years earlier when

[†] This article is an edited transcript of a lecture delivered on 2 November 2004 by Dr. David S.C. Chu to members of the staff and faculty, distinguished guests, and officers attending the 53d Graduate Course at The Judge Advocate General’s Legal Center and School, Charlottesville, Virginia. The lecture is named in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General’s School, U.S. Army, in Charlottesville, and the twenty-fifth Judge Advocate General of the Army. Every year, The Judge Advocate General invites a distinguished speaker to present the Charles L. Decker Lecture in Administrative and Civil Law.

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Dr. Chu earlier served in government as the Director and then Assistant Secretary of Defense (Program Analysis and Evaluation) from May 1981 to January 1993. In that capacity, he advised the Secretary of Defense on the future size and structure of the armed forces, their equipment, and their preparation for crisis or conflict.

he was a student. When the students finish the exam, he goes up and greets her and asks immediately, “Isn’t it a little strange to ask the same questions? If you don’t change the questions, the students become too practiced in their answers. There is no real test of their underlying mastery of the material.” She smiles at him and says, “Remember, in economics we don’t change the questions, we just change the answers.”

That, I think, is the essence of what transformation is all about. It is about changing the answers to classic questions regarding how we organize, train, deploy, and utilize military forces on behalf of the United States and her security interests.

Of course, at the heart of any organization, be it military or civilian, stand the people of that enterprise. You see that today in the patience and fortitude of our Soldiers in confronting a very difficult insurgency halfway around the world. You saw that in 2003 in the march to Baghdad, executed with minimum force in an extraordinarily short period of time. You saw it fourteen years earlier in the performance of Americans in the first Persian Gulf War in ejecting Saddam Hussein’s forces from Kuwait.

As that set of historical antecedents illustrates, people, as the central element of the organization, are important, not only because they

From 1978 to 1981, Dr. Chu served as the Assistant Director for National Security and International Affairs, Congressional Budget Office, providing advice to the Congress on the full range of national security and international economic issues.

Dr. Chu began his service to the nation in 1968 when he was commissioned in the Army and became an instructor at the U.S. Army Logistics Management Center, Fort Lee VA. He later served a tour of duty in the Republic of Vietnam, working in the Office of the Comptroller, Headquarters, 1st Logistical Command. He obtained the rank of captain and completed his service with the Army in 1970.

Prior to rejoining the Department of Defense, Dr. Chu served in several senior executive positions with RAND, including Director of the Arroyo Center, the Army’s federally funded research and development center for studies and analysis, and Director of RAND’s Washington Office.

Dr. Chu received a Bachelor of Arts Degree, magna cum laude, in Economics and Mathematics from Yale University in 1964 and a Doctorate in Economics, also from Yale, in 1972. He is a fellow of the National Academy of Public Administration and a recipient of its National Public Senior Award. He holds the Department of Defense Medal for Distinguished Public Service with silver palm.

determine its performance, but because they also affect how society perceives that institution. The results of the first Persian Gulf War trumped the long national concern about its military forces that arose out of the Vietnam conflict. The military, post-Gulf War, became, as you are aware, the leading institution in terms of respect accorded by Americans in polls, when people are asked to rank institutions. Ever since that conflict and that extraordinarily fine performance, the American public has ranked the military number one, and that continues until the present day. Our reputation is a precious resource. Without that resource, it is very difficult to get quality young people like yourselves to decide to put on the nation's uniform and to serve her interests, often in very difficult circumstances.

What I would like to do today is speak to the changes that the Department seeks to make not only in how we recruit but, even more important, manage and employ the people of the Department. There are really, I would contend, four large personnel communities for which the Department of Defense is in some measure responsible. There are, first of all, privately employed personnel, contractors as they are often labeled, who support our operations. It is certainly true in Iraq today. There is a long set of issues attached to the use of contractor personnel—what is their role, should they carry weapons, what about the law of war and so on and so forth. I will not attempt to deal with those issues today because I want to concentrate on the other three communities to which we have a responsibility. Those are of course, the civilians, the federal employees in our ranks; the reserve forces of the United States, some of whose members are joining us in this audience; and the active military of the United States, who constitutes most of the attendance of this particular school.

In each of these areas, is a set of challenges the Department faces—challenges to which we have sought to respond by a series of proposals that we would argue are, in their essence, transformational in nature and that in many cases, indeed a majority of cases, require statutory action, changes in the law of the United States in order for the Department to proceed.

Now you might ask at the very start, “Why is so much in this regime, the personnel regime, imbedded in statute?” I remand that to the school and center here as an interesting subject of philosophical inquiry because I do think it is a good question. Why has the country decided over a period of many years to put so much detail about how we manage people

into permanent law? We don't do that for weapons systems. We buy a weapons system. When Congress authorizes a ship, it is up to the Department to decide what that ship will look like within some broad outlines and, absent contrary law, how we will go about buying it. But when it comes to people, we specify things down to the last dollar.

I raised this question with a long-time former staff director of the Armed Services Committee: "Why do you have to micromanage so much?" He said, "You think this is bad, let me show you the Appropriations Act for 1791." In that Act, Congress specified the pay of each Soldier by name, down to the individual. "So, okay, point taken. This is better than the alternatives." But I do think this question is one for the long term. It should be part of our strategic thinking. Does Congress have to specify as much as it does in the permanent authorities accorded to the Department?

Let me take each of the communities I mentioned in turn and very briefly summarize the challenges we face and then turn to what we are trying to do in the Department of Defense today to meet those challenges successfully.

First are the civilians, where we have two central problems. The first problem has to do with how we are perceived. We are not perceived well. That is not unique in the Department of Defense. As one installation manager put it, "The good young people in my state won't take my jobs." That's a devastating indictment. It is particularly devastating at the juncture in history at which the Department stands and at which other cabinets in the Department stand. Half our work force can retire in five years. Not all will retire in five years, but in ten years or so we will turn over much of the civil work force we have in this Department. We have to be able to recruit able, young Americans. When you look at poll results for how young Americans think about the government, you discover an astonishing fact. Young Americans, just like you, put public service as one of their preeminent career objectives. But when they are asked, "Where would you prefer that public service?" I regret to say that government is not the first choice on the list. That is a terrible indictment of how we are perceived in the civil community.

At the same time, we are not well-perceived by managers. You look at the behavior in the Department, when it comes to carrying out a mission task (and not just the Department of Defense, it is true of other cabinet departments as well). When it comes to carrying out a mission

task, the reaction of managers is not to ask, "How do I appoint additional federal civil servants?" The reaction is either to turn to military units or to turn to a contract organization. The reason, I think, is because managers do not see the civil service, as it has come through today, as a flexible, responsive, and effective instrument to meet our needs. That is not a criticism of the people who are civil servants; it is a criticism of the rules under which they are engaged and by which they are managed. I'll come back to this in discussing what we'd like to change.

Second is the reserve force of the United States. A generation ago, Secretary Melvin Laird announced it would be a total force. It was an announcement that did not characterize the reality of the time. The Department has worked very hard on making that a reality over the last generation. It has made enormous progress, but there is still room for substantial improvement, starting with the statutory foundation. When you look at the law on military forces, there are often separate provisions for the reserves, different from the provisions for the active forces. In many cases one has to ask, "Why do those differences exist?" They reflect, really, another time where the reserves were seen as a very different community—a community to which a nation would turn only in times of national emergency, not as the operational reserve our compliments have become today. And so, in that world, yes, sharp lines and divisions may have made sense. Our contention is they no longer are helpful. Indeed, they are harmful to our national interest in the present day.

Third are the active forces of the United States. There we have a different set of problems. Three, which I think are most important, are the focus of our efforts. The first of those problems has to do with the length of time that someone spends at his or her post, particularly flag officers. For a long time in this Department, our flag tenure was about two years. I barely won a small bet with the Secretary of Defense that it was two years. His bet was eighteen months. It came out exactly at twenty-one months, so I felt it was more of a victory for my side, although, he would argue that he won that engagement! This is too short. You look at how other organizations manage their senior executives; no one really hopes to be effective with executives who are in place for only two years. You cannot outline and see through to a successful conclusion the kinds of changes this Department must contemplate with such a short tenure. The problem, of course, is if we ask senior executives to stay longer in any one post, they are likely to stay for a longer career, and that raises questions of whether we can

manage promotions longer for the entire force, such that younger officers, like yourselves, can look forward to the rate of advancement that has characterized our military force in the Cold War and post-Cold War period. Can we have our cake and eat it too?

The second challenge we face for the active force is how we realize the full import of having moved to a volunteer force some years ago—how we strengthen the ability of people to identify for themselves what they would like to do so that they are more committed to the course of action that they must undertake. We have some progress, I would argue, on that front to report.

Third, for the active force, as it has changed, particularly in a volunteer army, what you might call the “social compact” needs to change as well. Thirty-one years ago we had a draft force. Largely in the junior ranks, single personnel. Now we have a force that is volunteer, all volunteer. It is largely a married force. There are a number of reasons for this outcome, but it also means that their desires, their needs, are different from the force of thirty-one years ago. Therefore, our responses need to differ as well. The sort of understandings between us and the people wearing the U.S. uniform need to change to respond to their life circumstances, which differ from those of their predecessors.

The Department has been through personnel transformations before. In fact, I have referred in the last few moments repeatedly to one of the most important—the decision to pursue an all volunteer force made by President Richard Nixon in 1973. It was a great leap into the unknown. At that time, no country maintaining an armed force of the size of that belonging to the United States attempted to create such a force exclusively through the use of volunteers. The British did have a volunteer army but it was much smaller in absolute magnitude, and relative to its population base, than that of the United States.

Indeed, the first ten years of this experiment were not happy. The volunteer force almost failed for a variety of reasons in the 1970s. Those reasons were addressed toward the end of that decade, and by the mid-1980s, the volunteer force was soundly on the road to the successful outcome we all know today, and to the point that no military leader in the United States today would welcome a return to conscription—Let me deal with that rumor, which I am sure you have all read as well. The President, the Secretary of Defense, every official of the Department, is

on record, including the senior military, as stating that we do not want conscription back in the United States. It would be a failed system returned if we were to take it back as our policy instrument.

But the transformation to a volunteer force was not the first such paradigm shift on the part of the American military. You can look at how the officers who led our country successfully in the Second World War brought the principles of the up or out promotion system to bear on the management of the officer corps very successfully in the post-World War II years, celebrated in the Defense Officer Personnel Management Act of the 1970s. You can look to an earlier era, when Elihus Root, Secretary of War, brought the school system notion—the idea of what other professions would now call “continuing education”—to the American Army, with great effect on the success of American arms in the Second World War.

On the civilian side, you can look back to the Pendleton Act in the 1880s, which settled the great battle between the Jacksonian and Jeffersonian schools of thought as to how civil servants should be selected. Jackson, of course, believed civil servants should be responsive to the political leaders who appoint them, which resulted in the excess of what some term the “spoils system.” Jefferson, of course, stood for the very principled idea that essentially won out in the Pendleton Act.

Let me take each of these challenges, starting with civilians, and review how the Department hopes to proceed if we are to be successful in meeting the new world reform. As I suggested, our civilian rules basically come from the late 19th Century. It is, therefore, not surprising that they would be somewhat outdated relative to the problems we now face. What was the largest activity of the U.S. federal government in the 1880s? It was paying the pensions of civil war personnel—a very different activity from being the sole surviving great power in the world— a very administrative activity, not a mission-oriented activity. There are three areas in particular that we have concluded need to be addressed if we are going to have the kind of civil service that we need for the future.

The first of these areas is what the personnel community routinely calls “staffing flexibilities.” This is a nice euphemism meaning how we hire people, how we pay people, and how we fire people. The bottom line is that the current processes are rigid and unresponsive. On average, it takes the Department three months to hire a civilian. That is not

competitive when you go to a college job fair and IBM at the next table is, quite literally, offering someone a job either on the spot, or within a week or two of the interview process. We have to say, “Wait for us. Fill out our forms. We’ll let you know in a few months. If you need a security clearance, it will take longer before we can tell you whether you have a job.” You can see how this will not be successful in repopulating the federal government for those who are soon going to leave our ranks.

Likewise is the issue of compensation. Compensation for civil servants is largely driven by tenure, not by performance. But it is performance that we care about, not how long an employee has been there. It is fortunate that the Department was given by the Congress, beginning in the late 1970s, authority to experiment with different kinds of civil service management, starting with China Lake, a laboratory out in California. We have tried a number of arrangements that allowed us to advance to the Congress in 2003 proposals to apply the most successful elements of these earlier experiments to the Department at large. Congress generously granted us that authority.

So in terms of hiring, we can move away from the rule of three—the rule that you must, as the manager, pick from one of the top three candidates that is given to you. You can not look at the whole list to do what we call in the personnel world, “categorical ranking,” meaning you can, much like officer promotions, you can put people in zones—best qualified, qualified, not qualified. You can pick whomever you like from the best qualified pool until that pool is exhausted.

Likewise, in terms of pay, one of the successful experiments at these first laboratories over the last twenty-five years was a notion of “pay bands,” moving away from the general schedule system, in which someone in the classification element of your human resource community decides essentially what you can pay someone, to a situation where you, the manager, can decide what you need to pay to be competitive in the marketplace. So an accountant in Houston may not be paid that same amount as an accountant in Denver, even though the duties are the same. You the manager need to be able to react to that reality.

Even more important, you need to be able to reward people who perform well with a larger increase than those who have performed weakly. Indeed, you need to be able to say to someone who has performed particularly badly, that you are taking some compensation

back until they improve their performance. This is a well-established principle in the private sector but not something we could do in the government up to this point. The solution is what people call “pay bands.” Let’s just say that instead of having a classification person establish a grade, which then attaches to a salary, you establish a few career fields, and you establish a range of compensation that applies to each career field. How many pay bands and career fields we will have in the Department is a subject of work by those designing the new system. We will have to wait and see what they conclude, but my hope is that they pick as few as possible to give managers maximum discretion in actually carrying out their mission.

The second area, in which we felt that we needed new authority, has to do with how we handle appeals when disciplinary action is taken against employees who have transgressed. The current system is very lengthy. It is, indeed, true that justice delayed is justice denied. It often takes a couple of years to adjudicate a case, and this delay is perceived by managers, not perhaps quite fairly, as unfriendly to their discretion. One of the most egregious cases involved an individual who tried to run her superior down with her automobile. We thought that was a grounds for dismissal, but that was not the conclusion of the merit system. The employee claimed it was an accident—that she just stepped on the accelerator by mistake.

Congress has given us the authority to work differently within the appeals system, as it now exists, in a manner that we think will be more effective, as well as an interesting option for the future. After a sunset period, we can go to an entirely different appeal board, if we so choose, than the Merit System Protection Board that now governs these issues.

The third area in which we thought we needed a new paradigm, as far as civil personnel management is concerned, involves our union partners. Under the previous construct for the Department of Defense, we had to bargain every issue at the local level. There are 1,366 locals in the Department of Defense. You can see how long it could take to deal with even the most straight-forward of propositions. And so years after we began the process of, for example, testing certain employees for drug usage, we are still, in the case of a few installations, bargaining over this question. Likewise, years after starting a process to ensure we could recoup monies from employees who abuse their federal credit cards, we are still bargaining with some locals over that issue.

The alternative, which Congress has sanctioned, is to go to national bargaining with unions when there are cross-cutting issues involved. In so doing, we hope to get a uniform system in the Department and to simplify the administration of the Department, thereby making it more effective. Now this may be a case, as the famous aphorism goes, "Be careful what you wish for, you might get it." There are downsides to national bargaining, and I think we are discovering some of that in the difficult process of actually getting to the full launch of the National Security Personnel System as we seek to roll it out.

A word or two on the statute, because I do think from a legal perspective, it is interesting how we proceed here. There was some discussion in the Department as to whether we should attempt to put the rules for defense civilians into Title 10 of the U.S. Code which governs this department. The conclusion at the end of the day was, no, let's revise Title 5, which is the part of the federal code that deals with civil servants. But, at the same time, let us provide the Department a series of waivers to provisions of Title 5 and specify a process by which those waivers might be employed. One of the most important elements of the process specified in this is a partnership between the Department of Defense and the Office of Personnel Management, which Congress believes will be watchful for the interests of the civil service. That process is now unfolding.

We have teams working on the different key elements that I have just described. They are beginning to bring to the table the draft regulations. We hope soon to publish those draft regulations, after appropriate consultation with our union partners. The objective is to launch the first part of the Department into this new system toward the middle of next year and to bring the entire Department under these revamped rules over a two to three year period of time.

We recognize that this is an evolving, living organism. You might argue that our judgment as to what rules are best is likely to change as we actually employ them and gain further experience. We are open to those changes. No one believes that anyone owns a monopoly of wisdom as to the best way to employ the broad discretion that Congress has given us within Title 5 of the U.S. Code.

We turn from the civilians to the reserve forces of the United States. As I argued a few moments ago, we think the central problem is the remaining barriers to making this truly a total force—one force—so that, as several people have reminded me in my visit here today, you should

not be able to tell from looking at someone whether he or she is a reservist or an active duty Soldier. The level of professionalism, the level of preparation, and the ability to perform ought to be the same once a Soldier is deployed into a theater of operations.

We have tried to subsume the changes in the rules that we need, many of which are statutory in character, under the phrase “continuum of service,” to underscore that it is a single unified force, and that we should not think of reservists as, some like to say, “weekend warriors,” and the active force as something different. So at any point in time, an individual reservist might be serving the classic thirty-nine days a year through weekend drills and two weeks in the summer time, or they might be serving some longer or shorter period during that particular year, going all the way up to the full-time service we expect of active duty persons.

We also intend the phrase “continuum of service” to speak to changes over a person’s career. The old model has been that if you leave active service you might go into the reserves, but you never really come back. It is very unusual to return to active service. Why is that? Why could not people whose personal circumstances change again make the 24/7 obligation that active service requires? Why couldn’t they step into a reserve role for a period of two or three years, with the focus on those issues in their lives that then need attention, and then return to join a different cohort on active service, assuming the individual maintains his or her professional preparation, readiness, and ability to serve the country? What is wrong with that? We’d like authority to move people back and forth in a seamless fashion, which is not entirely encouraged by the law. Indeed, we would like the authority to have auxiliaries in the Department of Defense, much like the Coast Guard, which interestingly enough was not something we could do without a statute. We now have important changes in these parameters of the reserve forces of the United States thanks to actions by Congress in this year’s authorization bill.

Let me call out three areas, in particular, from the reserve forces that I believe need emphasis and deserve our attention. First, perhaps most important from a political perspective, even if its legal implications are limited, is that Congress has adopted a new statement of purpose as to what the reserves are all about. This statement of purpose emphasizes, in effect, the degree to which the reserves have become the operational reserve of the United States and not just a strategic reserve, called up once a generation or two when the nation has its back to the wall. The

reserves have become, as they need to be, the surge capacity of the United States to conduct military action.

Second, there was a statutory rule that if you served on active duty for 180 days or more as a reservist, you counted against active end strength limitations. What the implementation of that rule led to was the unfortunate game of putting people on 179 day orders so they would never count as part of the active force. Take them off for a day, put them back on. This was very disruptive and did not allow for the kind of planning that was needed. This procedure certainly did not send the signal that it's one single force with this mechanism. That rule is gone. We can now have a reservist on active duty for any period that is useful to our country's situation. We do have to account for them and there is a ceiling, but we can live with those restrictions.

And third, perhaps most substantive in its effect, prior to this time, we could not bring a reservist to active duty simply because we felt his or her training needed improvement. We could—we are very thankful to the general counsel's office for this excellent ruling—bring someone to active duty in the current mobilization if his or her unit was going to be mobilized, and we discerned the training of the individual needed improvement. We could not proactively go out and look at our reserve units without a decision having been made that that unit was later to be mobilized. This prohibition impeded our ability to move to the paradigm of the future, which is that the reservists will be trained in peacetime so we can mobilize them and deploy them promptly when a crisis so requires. We cannot do with a long period of preparation before a reserve unit can be used overseas or in a difficult situation in the United States. The authority to mobilize, at least a certain number of reservists for training, is now something which is part of the Department's tool kit.

Finally, I return to the active forces of the United States. I mentioned several problems that we have, particularly the question of tenure, the question of how we strengthen volunteerism, and the question of what the social compact of the future should look like. The U.S. active force already possesses a tool kit with significant flexibility, and so we do not need quite as many statutory changes, but we do need some.

On the tenure question and the career length question, what we need is a set of solutions that enhance longer tenure and longer careers for some, but still allow us to encourage the prompt retirement of those who are not advancing to the very top, in order to avoid clogging the promotion system. We need greater flexibility about maximum age;

today, we cannot have an officer over sixty-two years of age on active duty, except for ten the President may so sanction at one time to the age of sixty-four.

We need to reward people who are willing to stay for longer periods of time with a more generous annuity so that they can provide for a surviving spouse, a real issue for many of our senior officers. We need the ability to waive various restrictions and statutes that require three years in grade in order to retire at that grade. I regret to say we may have less progress on this front, partly because the Department has not aggressively used the flexibility it already possesses and partly because Congress has yet to be convinced that this is all a good idea.

We intend to return to that debate in the year to come, and I am encouraged by the fact that we have succeeded with both the civilians and the reserves, after considerable investment in political capital. Further effort will likewise yield the kind of flexibility that will be helpful for our officers as well. A good deal of what I have described, in terms of officer tenure and careers, we can accomplish with tools currently at our disposal, but the additional flexibility would be valuable for our future effectiveness.

Second is volunteerism. Volunteerism depends ultimately on incentives. In other words, you need to be fair to people whom you are asking to do something more difficult, more arduous, and different from the rest of the force. One example that Congress gave us two years ago is what we call "assignment incentive pay," meaning the right to pay up to \$1500 a month for someone who accepts an assignment that is more difficult to fill than most. The Navy has been aggressively using this tool.

The Navy, essentially, is running an eBay site for difficult-to-fill assignments. They list the assignment, the credentials for that assignment, to include grade, skill, etc., and they say, "Fill in the blank with what it would take to persuade you that you would like to do this assignment." My only regret is that the Navy did not accept my suggestion to allow for negative numbers when this was unrolled, because, in fact, one of the most fascinating conclusions from this important experiment is that a major fraction of those bidding for these jobs have asked for zero additional compensation. Most just want the right to control more firmly their next assignment choice, which is enough to get a lot of people to step forward.

Some of you may be aware, if you were stationed in Korea, that we have offered the unaccompanied-tour-Soldier in Korea the chance to extend, and we will pay him a rather modest additional amount per month. I am pleased to say that we have 8,000 volunteers to stay longer under those circumstances. We would like additional authority in this regard. We would like to increase the levels of what is called “hardship duty pay.” Congress is reluctant to give us that discretionary authority. I think that is one point of difference between the executive and legislative branches. Congress is reluctant to give us this discretionary authority until we have made a more convincing case. Congress, in contrast, is eager to impart permanent authority across the board—changes that go to everyone, regardless of what the circumstances might be, over which the executive branch has no discretion. I point to the dialogue over imminent danger pay and family pay allowances cases as cases in point.

Third is the social compact, which is to say the needs and desires of military personnel today, particularly those with families which are different from those of a generation ago. We put a lot of our money into what was traditionally valued, and that is still important. But two of the issues today are not issues that were there a generation ago. Those issues are: “What career might my spouse enjoy?” and “What kind of education are my children going to receive?” In the draft era, the force did not tend to have a spouse by the rules of the game, in terms of how we conscripted people in the American military, except for the career force. So now we have a force that is largely married. Spousal careers matter and matter a lot. There are things we can do here, although often there are things we cannot do alone at the federal level. One is the issue of licensure—as a service member moves around, a professional spouse may have to be re-licensed in order to keep her job. In an unfortunate case at West Point, the spouse already had been accredited in California. New York’s rules were totally different. The spouse spent thousands of dollars getting the California license and would now have to spend thousands more and another year to get certified in New York.

We have challenged the National Governors’ Association to reconsider the states’ stance on this and to begin using some of the compacts that are out there. There is one for nurses, as an example, which essentially allows for some reciprocal recognition of licenses across state lines. That is part of the solution. But issues such as unemployment compensation remain. The rules of unemployment compensation are that you have to have been fired—that you must have lost the job for no reason accruing from your own self interest. Most

states rule that if you move with your military sponsor, you quit; you weren't fired. This holds true even in cases overseas where the spouse could no longer work if the military member moved back to the United States from Germany, for example.

Virginia is one of the toughest states. I do not mean to disparage our host state, but Virginia has ruled against military personnel upon spouses' return from Germany. Basically, the state has said that unemployment was a voluntary decision, even though the spouse could not continue to work because of the change of station. That is a difficult nut to crack, but we do know that military spouses suffer more unemployment and lower lifetime wages than other individuals of similar education and experience level in the civil sector. That is something we need to find a way to overcome. A fairer set of decisions on unemployment compensation is one way to proceed.

Education, of course, is a state and local issue, not a federal issue. This is proving to be one of our toughest challenges. You look outside the gate of too many of our posts, where the schools are not at the level of Fairfax County, Virginia. There are locations where we have chief petty officers in a major U.S. city paying private school tuition to send their kids to a better environment. The answer is not for us to pick up the checkbook and write a check. Often, it is not money that makes a difference; it is organization. The effectiveness of local school systems is an issue, and I think it is going to be one of our most difficult problems to address. But it is a problem we think we need to address if we are to be successful in sustaining this volunteer force over time.

What is at stake in all of this? What is at stake, I would argue, is really the future of our military force and its effectiveness. On the civil front, the stake is what the civil servant role will be. If we do not succeed in reforming civil service in the Department of Defense, it will, in my judgment, slowly shrink. We will be left with a personnel stool with fewer legs and less stability and less effectiveness than would otherwise be the case. What is at stake in the reserves, as I have argued, is our ability to meet national needs in an era ahead of us that is going to be very challenging. We need to sustain a volunteer force in that era and be able to have the kind of extraordinary surge capacity that the reserves have given the United States since September 11, 2001. What is at stake in the active force is nothing less than the excellence of the American military over the long term. It is the finest military in the world today.

I know there are many who would ask, “Why should you bother to change the rules of the game when you are doing so well?” One of the things I make myself do is to carry around my athletic gear bag, a bag from Pan American World Airways. Most people in this audience look too young to remember the heyday of Pan American World Airways. When I was a child, it was the finest airline in the world. It pioneered virtually every major international air route on the globe—but it does not exist today. And that is what is at stake for us in these kinds of changes. It is not just, “Do we do a good job?” It is ultimately the safety and security of the country, which depends on maintaining this as the finest military the world has ever seen.

**THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE
AND THE COURT-MARTIAL OF LIEUTENANT CALLEY¹**

REVIEWED BY MAJOR DEON M. GREEN²

His court-martial was about much more than whether Lieutenant Calley had committed murder. He had, and professional soldiers, horrified by the unprofessional way he had conducted himself at My Lai[], did their duty as jurors and convicted him. Americans could not accept their verdict, however, because it seemed to them like a condemnation of all the young men they had sent to fight in Vietnam and ultimately of themselves for sending them there.³

Ask a thousand different people what they think of when they hear the words “Vietnam War” and you will probably hear a thousand different answers. Ask an Army judge advocate what they think of when they hear those words and there is a good possibility they will refer to the trial of First Lieutenant (1LT) William L. Calley, Jr. The Army court-martialed 1LT Calley after a former U.S. Soldier brought to light the horrific tale of the slaughter of hundreds of Vietnamese citizens in a village called My Lai.⁴ It is from the relatively untapped perspective of a former military officer that Michal Belknap’s book, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*, delves into an exhaustively reported subject: America’s war in Vietnam. In this highly critical literary work, Belknap puts the U.S. military, U.S. government, military justice system, and American public on trial in relation to the media circus that surrounded 1LT Calley’s case.⁵ *The Vietnam War on Trial* is a step-by-step journey into the massacre at My Lai, the trial that resulted from those events, and the politics surrounding the trial. In the midst of these interdependent situations, the author poses

¹ MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* (2002).

² U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General’s Legal Center and School, U.S. Army, Charlottesville, Virginia.

³ BELKNAP, *supra* note 1, at 256.

⁴ *See id.* at 103.

⁵ *See id.* at 1-5.

the following questions: Who is responsible for crimes committed on the battlefield and who should be held accountable for them?⁶

This book serves as an eye-opening portal into a military justice system often described as cumbersome and self-serving.⁷ The author ventures deep into the realities of the struggles involved in a court-martial; that fact alone makes Belknap's book a must read for those who practice in military courtrooms. At the beginning of 2004, the world again was exposed to atrocities committed by members of the U.S. military during combat operations. The discovery of countless incidents of prisoner abuse at the Abu Ghraib detention facility in Iraq shocked the conscience of people around the world and elicited outrage much in the same vein as the My Lai massacre.⁸ Service members should read *The Vietnam War on Trial* to learn of the atrocities and their consequences in an effort to help train others to avoid similar problems in the future. Surely, reading one book could never serve as an immovable roadblock to prevent such atrocities, however, revisiting the issues addressed in *The Vietnam War on Trial* certainly serve as a reminder to keep ones moral compass pointed in the right direction.

Belknap graduated from the Army Reserve Officer's Training Program at UCLA. After entering onto active duty, the early stages of his military career virtually mirrored that of 1LT Calley.⁹ Although both men were in different sections, 1LT Calley and Belknap completed infantry officer's basic training at Fort Benning, Georgia, on the very same day and served as U.S. Army infantry officers during the Vietnam War.¹⁰ As someone who completed the same military training as 1LT

⁶ See *id.* at 2.

⁷ See KEVIN J. BARRY, *EVOLVING MILITARY JUSTICE* 117-18 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002) (explaining that the military justice system remains susceptible to criticism based on grounds of fairness as a result of the Tailhook incident and the court-martial of Command Sergeant Major Eugene McKinney); see also LUTHER C. WEST, *THEY CALL IT JUSTICE* xii (1977) (commenting on "the darker side of military justice," which the author claims includes "command-rigged verdicts and sentences and other legal atrocities committed in the name of military necessity").

⁸ See Richard A. Serrano, *The Conflict in Iraq: Interrogation Center Chief Created 'Chaotic Situation'*, L.A. TIMES, Aug. 27, 2004, at A10; see also Col. David Hackworth, *Fry the Big Fish, Too*, Feb. 1, 2005, at http://worldnetdaily.com/news/article.asp?ARTICLE_ID=42644 (contending that the Soldiers who committed the atrocities at Abu Ghraib disgraced the military on a scale that shames the United States equal to the massacre at My Lai).

⁹ See BELKNAP, *supra* note 1, at 2.

¹⁰ See *id.*

Calley, yet did not end up in the same predicament, Belknap's perspective adds legitimacy to his analysis of 1LT Calley's plight. By the time Belknap authored *The Vietnam War on Trial*, he was a professor at California Western School of Law,¹¹ and had published a book on political trials.¹² Accordingly, it is easy to understand why *The Vietnam War on Trial* has more references to comments made by presidents and congressmen than attorneys. Belknap's experience as a professor further explains why the premise of *The Vietnam War on Trial* is more akin to a question on a law school final exam than a literary thesis.

In addition to providing a vivid account of the Vietnam War itself, the author does a tremendous job of providing the reader with a comprehensive biography on the life and times of William "Rusty" Calley.¹³ Beginning with 1LT Calley's early childhood, proceeding all the way through his tour of duty as an Army officer in Vietnam, the author chronicles every step of 1LT Calley's educational and professional development, or lack thereof.¹⁴ In an effort to lend credence to his assertion that "Rusty Calley should never have been a [L]ieutenant[.]"¹⁵ Belknap pays a tremendous amount of attention to 1LT Calley's sub-par academic performance and how educational failures resulted in 1LT Calley erroneously being selected as an Army infantry officer.¹⁶ In *Lieutenant Calley: His Own Story*, by John Sack, 1LT Calley is quoted as follows: "[w]e did just about everything wrong in those days On our first operation out we even forgot the hand grenades."¹⁷ Such examples of ineptitude, from 1LT Calley himself, tend to validate Belknap's assertion that 1LT Calley was unqualified to serve as an infantry officer.

Belknap also contends that "education was the key" to avoiding combat-related jobs and, as 1LT Calley's educational record was so poor,

¹¹ See *id.* at outside cover. Belknap explains that a political trial occurs when the crime allegedly committed is "the product of political controversy," "was committed for political reasons," or is a trial that has a "major impact on the politics of its time." *Id.* at 3.

¹² MICHAL R. BELKNAP, *AMERICAN POLITICAL TRIALS* (1994).

¹³ See BELKNAP, *supra* note 1, at 27 (noting that 1LT Calley earned his nickname due to the reddish-brown color of his hair).

¹⁴ See *id.* at 27-36.

¹⁵ *Id.* at 23.

¹⁶ See *id.*

¹⁷ JOHN SACK, *LIEUTENANT CALLEY: HIS OWN STORY* 40 (1971) (referring to 1LT Calley's first missions when he arrived in Vietnam).

he was unable to escape that fate.¹⁸ The author claims that 1LT Calley's educational shortfalls similarly warrant titling him as a "loser."¹⁹ This negative characterization of America's fighting force is disconcerting and, though Belknap makes a valiant statistical effort at validation, not well supported.²⁰

The author's innate ability to take information from multiple sources and accurately piece it together into a sensible story is but one of the things that makes this book so compelling. Though there are times when Belknap repeats facts, his writing style actually adds emphasis to certain issues. One such instance is when the author discusses the intricate correlation between the incidents in Vietnam, to include the massacre at My Lai and the U.S. political climate of the 1950's, 60's, and 70's.²¹ In fact, *The Vietnam War on Trial* had much more to do with how members of the executive branch wedged themselves into what should have been a purely judicial process than 1LT Calley's actual court-martial itself.²²

Throughout the book, Belknap methodically outlines the struggle between hawks, those who saw the war in Vietnam as an "essential part of the global struggle against communism," and doves, anti-war activists strongly opposed to any enhanced war effort, and the manner in which 1LT Calley's case served as a soundstage for both groups.²³ Belknap

¹⁸ See BELKNAP, *supra* note 1, at 27.

¹⁹ See *id.* at 28. Unfortunately, by labeling 1LT Calley in this manner, the author effectively characterizes most every other draftee during the Vietnam era with the same title—notably those Soldiers in the infantry. See *id.* The author's negative characterization of America's fighting force, though backed by certain statistical data, is not well-supported due to the fact that Belknap fails to discuss whether other factors affected job placement. See *id.* at 23-27. Interestingly, Belknap also served as an infantry officer during the Vietnam conflict, forcing the reader to ponder whether the author is also a "loser" and, if so, does such a characterization detract from his credibility. See *id.* at 3.

²⁰ See *id.* at 23-27 (discussing the different ways education factored into why a person was selected for combat related positions, yet failing to mention whether any other factors, such as physical acumen or personal preference, were used to determine who would be assigned to those positions).

²¹ See *id.* at 3 (noting that 1LT Calley's court-martial became "one of the major political issues of 1970"), 7-22 (discussing the political considerations leading up to major U.S. offenses in Vietnam between 1952 and 1967), 122 (providing an overview of how the Pentagon dealt with the massacre at My Lai and the "public relations disaster" it threatened to become in 1969), 214-15 (citing President Nixon's unproductive effort to "exploit the powerful emotions unleashed by the court-martial of Lieutenant Calley").

²² See *id.* at 3.

²³ *Id.* at 21.

reports how America's military presence in Vietnam gradually increased from small groups of special forces Soldiers and political advisors in the mid-to-late 1950's, up to more than 500,000 troops in the late 1960's.²⁴ The author does an excellent job describing the event that led to congressional approval of the Vietnam War: the attack on the *U.S. Destroyer Maddox*.²⁵ Though based heavily on his personal opinion, Belknap's contention that President Lyndon B. Johnson inappropriately used the *Maddox* tragedy to further his war policy is downright chilling.²⁶

Belknap asks, "[s]hould those who go 'too far' in battle and violate the international law of war be placed on trial for their actions? Or should they be excused because they were simply doing their duty?"²⁷ The author leads readers down the path to answering this question using 1LT Calley's trial as a roadmap. Save the rather offensive reference to men who served their country on Vietnamese battlefields as "losers" and the fact that this opinion is sometimes given more deference than historical facts, Belknap's book is a wealth of information on both the Vietnam War and the military justice system. The author gives the reader a tremendous amount of background information in a clear and concise manner. Without one iota of prior knowledge of the Vietnam War or the political wrangling surrounding the conflict, Belknap provides readers more than enough information to ensure they

²⁴ See *id.* at 8-11.

²⁵ See *id.* at 11-12. In August of 1964, Vietnamese PT boats attacked the *U.S. Destroyer Maddox* as it patrolled the Gulf of Tonkin off the coast of North Vietnam. See *id.* at 11. Belknap highlights that the *Maddox* was patrolling in an area the United States knew the North Vietnamese considered to be a part of their territorial waters. *Id.* Moreover, the United States conducted its patrols in support of South Vietnamese commando raids as opposed to U.S. operations. *Id.* Approximately two days after the initial attack, the North Vietnamese allegedly attacked another U.S. ship, the *C. Turner Joy*. *Id.* President Lyndon B. Johnson used these incidents as a basis for retaliatory strikes against North Vietnamese military bases; however, he failed to tell Congress that the *Maddox* was in the Gulf of Tonkin supporting South Vietnamese commando raids and he failed to tell them that there was a territorial water issue that could have caused the North Vietnamese PT boats to attack. *Id.*

²⁶ See *id.* (surmising that President Johnson used the Gulf of Tonkin incident to obtain congressional approval of a resolution commissioned by the executive branch several months prior to the *Maddox* incident; alleging that President Johnson refused to present the resolution to Congress at an earlier date because "the time was not ripe to send it to Capitol Hill").

²⁷ See *id.* at 5.

comprehend the war itself, the mindset of Soldiers fighting the war, and the unfortunate culmination of events that led to the incident at My Lai.²⁸

The most stirring thing about *The Vietnam War on Trial* is the way the author traces the thin strand that ties the competing interests of political agendas to 1LT Calley's fight for freedom. It is a thread interwoven throughout every seam of the book. Belknap writes, "[t]he Nixon administration had no desire to upset the people by punishing Calley. Its principle concern was ensuring that reaction to the My Lai massacre did not erode public support for its Vietnam policy."²⁹ Another strength of the book is that Belknap is supremely apt at using information from President Nixon's political advisors and press releases to highlight the pawn-like manner in which everyone, from the President to the press, used 1LT Calley's plight to validate their political desires.³⁰

Belknap's book is a must read for judge advocates because of the author's innate ability to capture the turmoil that revolved around the trial and the attorneys involved in the proceedings.³¹ For judge advocates who have served as assistant defense counsel in a criminal trial, with a civilian attorney as lead counsel, the setting might be eerily familiar. Calley's detailed military defense counsel served as third-chair on a defense team with two civilian attorneys. One of those civilian attorneys had never appeared in front of a military panel and knew nothing about military law.³² Belknap explained that the ineptitude of that civilian attorney "proved surprisingly representative of [1LT] Calley's legal team."³³ The author goes on to discuss numerous rifts between the members of the defense team pertaining to strategy, tactics, and witness testimony.³⁴ The issues Belknap addresses in relation to the defense team are situations from which any trial defense counsel could learn.

²⁸ See *id.* at 257-68. The author augments the text with a user-friendly, twelve-page chronology that clarifies any lingering questions one might have concerning the timeline.

²⁹ *Id.* at 132.

³⁰ See *id.* at 210-11 (contending that Nixon was sure his intervention in the 1LT Calley case would "unite Americans behind his policies[;]" what resulted was an outcry from those who were advocating an immediate end to the war in Vietnam). *But see id.* at 243 (noting that the White House ceased responding to 1LT Calley's attorneys by the spring of 1974).

³¹ See *id.* at 149-50.

³² See *id.* at 148.

³³ *Id.* at 149.

³⁴ See generally *id.* at 168-85.

The author also outlines situations that may sound familiar to those who have served as trial counsel. For example, as is true in every case, the prosecutor is required to ensure that court-martial charges are filed in a timely manner. In 1LT Calley's case, the Army's Criminal Investigation Division completed their investigation of the My Lai incident on 4 August 1969.³⁵ At that point, the assigned trial counsel had the daunting task of insuring that any charges initiated against 1LT Calley were served on him in less than thirty-two days.³⁶ Increasing the pressure on the trial counsel was the fact that 1LT Calley's scheduled released date from active duty was 6 September 1969, after which time the Army would forfeit jurisdiction over the Soldier.³⁷ The author also provides riveting commentary on dialogue contained in a letter from the trial counsel to President Nixon, sent in response to the President's decision to intercede on 1LT Calley's behalf and allow him to remain in officer's quarters pending the outcome of his appeals, as opposed to being immediately placed in confinement.³⁸ The aforementioned commentary lends additional support to the author's contention that 1LT Calley's court-martial was, in fact, a political trial.

More than thirty-five years have passed since the massacre at My Lai.³⁹ However, *The Massacre at My Lai* was published in 2002. What caused the author to reopen a wound that should have healed many years ago? Belknap suggests:

³⁵ See *id.* at 261.

³⁶ See *id.* at 112 (evaluating the fact that the alleged victims were a world away and the case was more than a year old).

³⁷ See *id.* Belknap references the case of *Toth v. Quarles*, 350 U.S. 11 (1955). In *Toth*, the Court found the 1950 version of Article 3(a) of the Uniform Code of Military Justice invalid. See *id.* at 13. The article gave the military the ability to recall former service members back onto active duty to be prosecuted for offenses committed during a period of prior service. *Id.* Article 3(a) has since been revised and is now noted as a constitutionally valid exercise of power. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 3(a) (2002).

³⁸ See BELKNAP, *supra* note 1, at 203-06. After President Johnson directly intervened in the court-martial process and allowed 1LT Calley to remain in quarters pending his appeal, the trial counsel wrote to the President and explained that he was appalled that many of the political leaders in the United States were willing to compromise on moral issues for political purposes. See *id.* at 204. He went on to state that he was shocked at the President's intervention in the case and how the President's actions had damaged the military justice system and opened the American justice system up for criticism. *Id.* The author also notes that the trial counsel was in the process of leaving military service when he wrote his very condemnatory letter to the President, possibly explaining the boldness of the content and nature of the writing. See *id.* at 203-04.

³⁹ See *id.* at 60 (dating the My Lai massacre as 16 March 1968).

As the United States undertakes a war against the terrorists who slaughtered thousands of innocent civilians on 11 September 2001, it must address again the issue of who is responsible for such atrocities. Is it the individuals who look the victims in the eye and brutally take their lives? Is it the leaders who order their actions? Or is it the nation-states, or political or religious movements, for whom the killers fight?⁴⁰

In a similarly retrospective fashion, Major (MAJ) Jeffery F. Addicott and MAJ William Hudson, Jr. expressed similar sentiments more than a decade ago in an article recognizing the twenty-fifth anniversary of the My Lai massacre.⁴¹ The main premise espoused in *A Time to Inculcate the Lessons* is as follows:

Future My Lai's cannot be prevented unless the answers to the "why?" of My Lai are repeated over and over—that is, until they are inculcated into every warfighter in uniform On the other hand, precisely because of its horror and repulsiveness, My Lai is suited uniquely to serve as *the* primary vehicle to address the entire issue of adherence to the law of war, as well as the necessity for effective leadership in the modern era characterized by low intensity conflict environments.⁴²

The aforementioned authors' thought-provoking analysis of how 1LT Calley's troubled past has the potential to shed insight into the future proves more prophetic than imagined when viewed in light of the incidents at Abu Ghraib prison. Both *The Vietnam War on Trial* and *A Time to Inculcate the Lessons* mandate looking back at the My Lai incident to avoid future mishaps. Unfortunately, the similarities between My Lai and Abu Ghraib tend to show that American Soldiers still have a great deal to learn.⁴³

⁴⁰ *Id.* at 4.

⁴¹ Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153 (1993).

⁴² *Id.* at 185.

⁴³ That is not to say that the cases of My Lai and Abu Ghraib are exactly the same. Clearly, the incident at My Lai involved hundreds of deaths while those at Abu Ghraib did not. Nonetheless, the incidents have elicited similar criticisms. See generally Hackworth, *supra* note 8; Serrano, *supra* note 8, at A10.

Lieutenant Colonel (LTC) Steven L. Jordan, former commander of Abu Ghraib prison, has been described as both “a victim and a perpetrator,” just as Belknap described 1LT Calley.⁴⁴ Allegations exist that LTC Jordan was untrained, inexperienced, and ill-suited for the position in which he was placed—again, Belknap made similar statements concerning 1LT Calley.⁴⁵ Much like the situation with My Lai, many of those who are critical of the Abu Ghraib investigations attempt to point the finger of culpability at officials seated in high positions within the U.S. government.⁴⁶ More commonalities abound in the criminal justice arena. While investigations concerning the Abu Ghraib offenses are ongoing,⁴⁷ it is possible that the only Soldiers who will face criminal charges are the ones who actually worked in the prison. If so, the predicament of these Soldiers would be substantially similar to the plight of the select Soldiers who were prosecuted for My Lai. The My Lai cases that were brought to trial were predominantly those of Soldiers who actually walked in that village.⁴⁸ Obviously, there are countless reasons why one person is prosecuted while another is not. That fact notwithstanding, such an observation does little to diminish the aforementioned situational similarities.

The answer to the question of whether 1LT Calley is a victim, criminal, or permutation of both is debated throughout, and unresolved within, *The Vietnam War on Trial*.⁴⁹ The failure to formulate a definitive answer to the question is exactly what Belknap intended. Belknap’s premise is not as much to get the reader to comprehend the military justice process 1LT Calley endured as it is to get the reader to acknowledge the concept that whether a service member who kills during combat operations is a Soldier, warrior, murderer, or martyr is in the eye of the beholder. The same can be said concerning whether it is the actor or the person who gives the orders that should be held accountable for the end results. Quite frankly, the answer could be that both should be held liable. In the end, maybe that is the most equitable way to assess responsibility.

⁴⁴ See Serrano, *supra* note 8, at A10; see also BELKNAP, *supra* note 1, at 34-36.

⁴⁵ See Serrano, *supra* note 8, at A10; see also BELKNAP, *supra* note 1, at 34-36.

⁴⁶ See generally Hackworth, *supra* note 8; Serrano, *supra* note 8, at A10.

⁴⁷ *The Washington Post* has reported that approximately forty-five people have been identified as being involved in the abuse issues surrounds Abu Ghraib. See [washingtonpost.com: Abuse at Abu Ghraib, available at http://www.washingtonpost.com/wp-srv/nation/daily/graphics/prison_082604.html](http://www.washingtonpost.com/wp-srv/nation/daily/graphics/prison_082604.html) (last visited June 13, 2005).

⁴⁸ See BELKNAP, *supra* note 1, at 217.

⁴⁹ See *id.* at 255.

Service members would be well-served to use the following self-analysis Belknap poses to his law students:

For years, I wondered whether, if put in the same situation in which [1LT] Calley found himself, I would have done what he did. I don't think so, but it is something I ask my students to ponder. I also prod them to think about how they would have reacted had they found themselves in [1LT] Calley's combat boots.⁵⁰

Such reflection may provide insight as to "why good people do bad things,"⁵¹ and how some people react when placed in positions for which they are ill-prepared. What is also abundantly clear is that if society does not continue to reinforce the lessons learned from the My Lai massacre, future generations of troops could be doomed to repeat the failures of our ancestors, destined to commit offenses such as those that have been committed at Abu Ghraib, and are likely to have their fates decided by the military justice system.

⁵⁰ *Id.* at 2.

⁵¹ *Id.*

THE DARKEST JUNGLE¹REVIEWED BY MAJOR CHARLES C. ORMSBY, JR.²

From a harrowing storm-swept voyage aboard a Nineteenth Century man-of-war, to a treacherous march across the crocodile infested swamps of the Isthmus of Darién, *The Darkest Jungle* is a gripping tale of survival and leadership. The year was 1854, and Great Britain, France, and the United States were racing to be the first to traverse the Isthmus of Darién, the narrowest land mass separating the Atlantic and Pacific oceans (located in modern day Panama).³ A successful crossing would be a source of great national pride, and yield geographical data critical to determining the feasibility of constructing a strategic and lucrative shipping canal connecting the oceans.⁴ On 20 January 1854, the twenty-seven member U.S. Darién Exploring Expedition, led by a thirty-three year-old Navy Lieutenant (LT), Isaac Strain,⁵ was the first among the three competing nations to delve into the Darién jungle.⁶ Setting out with only ten days worth of rations, and a “sprint strategy”⁷ to cross the isthmus quickly, the journey quickly deteriorated into a grueling ninety-seven day struggle for survival.⁸ In the end, it was LT Strain’s extraordinary leadership which sustained his men, and prevented a much greater tragedy.

The Darkest Jungle reads less like a history book, and more like a modern thriller. Although some of the earlier chapters move a bit slowly, as they establish the historical and biographical context for the events to come, the story quickly picks up pace as Strain and his party set about preparing for their unprecedented journey. Author Todd Balf masterfully nurtures a subtle, but palpable, sense of impending doom.

¹ TODD BALF, *THE DARKEST JUNGLE, THE TRUE STORY OF THE DARIEN EXPEDITION AND AMERICA’S ILL-FATED RACE TO CONNECT THE SEAS* (2003).

² U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General’s Legal Center and School, U.S. Army, Charlottesville, Virginia.

³ See BALF, *supra* note 1, at 7, 21.

⁴ See *id.*

⁵ See *id.* at 8.

⁶ See *id.* at 109.

⁷ *Id.* at 110.

⁸ See *id.* at 216-18, 223. A successful rescue mission pulled the final surviving party members from the jungle after approximately two months, however, it was ninety-seven days before the survivors made it back to their ship. See *id.* at 223.

Balf foreshadows trouble early on,⁹ and increases the tension with each chapter. Before long these subtle hints of danger are realized, as the party faces the horrors of starvation, illness, and extreme exhaustion.¹⁰ Particularly frightening are the unpredictable actions of the indigenous Kuna Indians, who seem to materialize out of the jungle every so often to offer assistance to the desperate party, only to mysteriously vanish just as quickly and take actions to thwart the party's chances of survival. As the party approached one of the largest known Kuna villages, the tribe evidenced its hostility toward the party:

Strain had heard the "blows of axes" on his approach, but on arrival found yet another vacated village. The axe fells had been delivered to the only substantive item left behind: seven large dugout canoes, scuttled on a nearby shingle beach. The owners had made certain they would be impossible to repair and use. . . . He recognized the pattern. The Kuna's sacking of their own villages was a survival strategy that had its precedent during the conquest, and usually presaged a bloody battle.¹¹

Any concern by the reader for the members of the party is slightly undercut by the fact that, although Balf does an admirable job of providing biographical sketches of Strain and a handful of the other party leaders,¹² he fails to bring most of the characters to life. Only about one third of the twenty-seven member party are even named, and only three are fleshed out in any detail.¹³ With the possible exception of those three, there is scant detail about any of the others in terms of their

⁹ See, e.g., *id.* at 65 (sharing that the party attended a farewell gala on the eve of their departure and as they toasted to the upcoming journey, ominous "[h]eat lightning flashed on the distant horizon").

¹⁰ See, e.g., *id.* at 202, 218 (noting that when the last members of the party were rescued, "so emaciated were they, that, clothed in their rags, they appeared like specters...they were literally living skeletons, covered with foul ulcers and phlegmons. Their hair, matted and wild, fell to their shoulders.").

¹¹ *Id.* at 124-25. In another instance, heavily armed Indian guides offered to help the party navigate a short-cut through the jungle. *Id.* at 140. The Indian guides lead them away from the riverbank they had been carefully following and vanished mysteriously a few hours into the trek leaving the party to fend for itself. *Id.*

¹² The other party leaders include William Truxtun, a Navy midshipman, grandson of the first Commander of the U.S. Navy, and veteran of the first successful effort to map large portions of the ocean floor; and Jack Maury, a fearless and technically gifted naval officer with expertise in engineering and science. See *id.* at 50-54.

¹³ See, e.g., *id.*

personalities, histories, or even appearance, making it hard to feel anything for them. This minor shortcoming is not Balf's fault however, as he explains that such detailed information on members of the party, to include Strain to a certain extent, is simply lost to history.¹⁴

Although *The Darkest Jungle* reads like a thriller, at its heart, it is a lesson in leadership. Strain's seemingly instinctual ability to maintain the cohesion, morale and general welfare of his diverse party,¹⁵ despite the brutal toll of starvation, exhaustion, injury, and fear, is remarkable. Balf does an excellent job of noting particular aspects of Strain's leadership style, as well as the positive affects of those techniques. Strain led his men by example, and ensured that he and his fellow officers worked equally hard and received the exact same food ration and comfort items as the men they led.¹⁶ This attitude of equality in terms of workload and issued items was very rare at the time.¹⁷ Strain further gained the affection and respect of his men by making judicious use of what he termed a "war council."¹⁸ The war council was a forum in which Strain allowed all members of the party to cast equal votes in making important decisions.¹⁹ Such voting increased morale in the group at critical times, presumably because it gave each member a further sense of equality as well as control over their destiny.²⁰

Strain also knew that effectively leading men in desperate circumstances required giving them a sense of "hope."²¹ When hope seemed lost, Strain rallied his men around a new project or plan in order to relieve their suffering and assist in their progress through the jungle.²² Strain also employed less standard, but equally effective, leadership

¹⁴ *Id.* at 299-302.

¹⁵ *See id.* at 111 (noting that, in addition to a mix of military and non-military members, the party contained two representatives from the New Granadian government).

¹⁶ *See id.* at 120.

¹⁷ *See id.*

¹⁸ *See id.* at 140.

¹⁹ *See id.* (deciding what route they should take); *see also id.* at 177 (describing how the war council was called in contemplation of leaving behind a collapsed party member and to debate whether "the life of one man who could not survive many hours should be regarded before the lives of the fourteen now remaining").

²⁰ *See id.* at 141 (describing how voting at a war council revealed the group's unanimous desire to continue to follow the path of the river they were tracing, as opposed to simply following a westward compass heading or returning to their ship in failure—an idea that "revolted" the party's pride).

²¹ *See id.* at 149, 154.

²² *See id.* at 147, 154.

techniques when conditions became more desperate. When some party members dropped to the ground sobbing and demoralized from exhaustion and starvation, “Strain threatened to either flog or abandon them”²³ to get them to continue. Strain even used psychological techniques to promote the party’s survival. On one occasion, he and a companion began to hallucinate and lose touch with reality.²⁴ Balf describes that, “Attempting to pull them back into the present, Strain bombarded his companion with personal questions—about his travels, about his upbringing, anything that might keep him engaged.”²⁵

Balf’s vivid descriptions of the party’s trek through the Darién clearly reflect a personal interest in adventure. He is a former senior editor for *Outside* magazine, a contributing editor to *Men’s Journal*,²⁶ and the author of another “adventure-gone-bad” book, *The Last River*, which details the true story of a group’s ill-fated attempt to navigate an extremely dangerous river in a remote area of Tibet.²⁷ His enthusiasm for adventure is further evidenced by his personal journey, during his research for the book, across parts of the same dangerous Darién wilderness traversed by Strain’s party.²⁸

Perhaps because they both share a passion for adventure, it is apparent that Balf became a fan of Strain while writing the book. At times, this admiration seems to color Balf’s interpretation of important events. Almost without exception, Balf compliments Strain and supports his leadership decisions, regardless of the consequences. For example, during Strain’s initial beach landing on the Darién coast, there was extremely heavy surf.²⁹ Instead of waiting out the conditions, Strain decided to launch his entire landing party, complete with all of their gear.³⁰ The results were predictably disastrous, with the landing craft overturning and sinking and the party losing a significant amount of the “several tons of contents” aboard.³¹ Fortunately, no one was killed.

²³ *Id.* at 193.

²⁴ *See id.* at 197.

²⁵ *Id.*

²⁶ *Todd Balf Author Spotlight*, at <http://www.randomhouse.com/author/results.pperl?authorid=1269> (last visited June 13, 2005).

²⁷ TODD BALF, *THE LAST RIVER* (2001).

²⁸ BALF, *supra* note 1, at 283.

²⁹ *See id.* at 105.

³⁰ *See id.*

³¹ *See id.*

Balf's only commentary on this decision is that it was a "calculated gamble," and that Strain must have been "deeply mortified."³²

On another occasion, Strain authorized his twenty-seven-member party to break formation and scramble up a steep, jungle-covered hillside in any manner they chose.³³ The plan was that the party would reconvene in a designated streambed after the climb. During his ascent up the hill, Strain came across an Indian trail that he decided to follow instead. After shouting to his disorganized group to gather, he realized three of the party members were missing, to include the expedition's only doctor who had the bulk of their medical supplies.³⁴ Instead of continuing to the streambed to gather the missing party members, Strain fired shots in the air to signal a recall and then marked a new path with the thought that the missing party members would catch up.³⁵ The three missing members never found the main party and eventually returned to the ship.³⁶ Balf neither takes Strain to task for this blunder, nor hints that authorizing a twenty-seven-man, unorganized scramble up a steep hill in impenetrable jungle with no reliable way to communicate, and then changing direction half-way through the ascent, is not a wise leadership decision. Balf's only significant analysis of the event focuses on why each group may have misinterpreted the echoing sounds of the other's recall shots.³⁷

Balf acknowledges his "largely positive analysis of Strain's survival strategies,"³⁸ and cites information gained from modern-day survival experts to support his opinions.³⁹ In fact, Balf makes frequent reference

³² *Id.*

³³ *See id.* at 122.

³⁴ *Id.* at 123.

³⁵ *See id.*

³⁶ *See id.* at 149.

³⁷ *Id.* The separated party rightly blamed Strain for the mishap, noting that they were still operating under the guidance that the group would reconvene in the streambed, and had no way of knowing Strain would suddenly change course during the ascent. *See id.*

³⁸ *Id.* at 307.

³⁹ *See id.* In particular, Balf cites the opinion of Mr. Morgan Smith, founder of the U.S. Air Force's jungle survival school in Panama. *See id.* Although intending to demonstrate that Strain's decisions conform with modern-day survivalist thinking, Balf spends most of the text explaining how NASA hired Mr. Smith to train Apollo astronauts in survival techniques in preparation for a possible reentry landing in the jungle, as well as Mr. Smith's opinion on the most important items to salvage from a plane wreck in the jungle. *See id.* at 307-08. The only specific example Balf cites where Strain conformed with Mr. Smith's modern survival training is his recommendation to follow a river in the hopes of discovering a larger body of water and possible settlements. *See id.* at 307. Interestingly,

to modern events or information to illustrate or prove the validity of his points. Although illustrative, at times these modern-day references unexpectedly snap the reader out of the drama taking place under the thick canopy of the 1854 Darién jungle and disrupt the mood and flow of the story. For example, in the middle of a gripping description of Strain and his comrades stumbling through the jungle and experiencing vivid hallucinations of food brought on by advanced starvation, Balf suddenly shatters the image by breaking into a discussion of 1980s sports psychologists using mental imaging to enhance the performance of modern-day Olympic athletes.⁴⁰

Seeking further to validate and explain information in the book, Balf includes an extensive chapter-by-chapter notes section in the back of the book.⁴¹ At first glance, portions of these notes may strike the reader as defensive in their effort to explain why the sources utilized, as well as the conclusions, are reliable. However, upon further examination, the notes are a useful and interesting elaboration on the resources utilized to write the book. Balf clearly conducted extensive research and made use of varied sources, which include everything from old faded letters⁴² to interviews⁴³ to church records.⁴⁴ He also notes that Strain's original journals regarding the mission are missing, forcing Balf to rely on a presumably reliable secondary source that purports to recount the contents of the original journals.⁴⁵ As noted previously, Balf also gathered first-hand experience regarding the appearance and rigors of the Darién jungle by traveling it by foot himself.⁴⁶ His personal travels were

the final decision to follow the river was made by the war council, not just Strain. *See id.* at 141. In the final analysis, the party's decision to follow the wildly winding river was perhaps the singly most devastating decision they made. *See id.* at 142. By choosing to follow the tropical river, the party embarked on an unbelievably circuitous route through the jungle, which also possibly denied them the advantage of discovering a nearby path cut through the jungle by a previous party, as well as a strategically placed British food depot. *See id.*

⁴⁰ *See id.* at 197-98; *see also id.* at 192 (showing how Balf abruptly jumps into a commentary about the modern U.S. military's jungle warfare school in the midst of describing how Strain wrestled with an important decision regarding whether to continue trying to move the party via a raft in the river).

⁴¹ *Id.* at 297.

⁴² *See id.* at 302.

⁴³ *See id.* at 299.

⁴⁴ *See id.* at 301.

⁴⁵ *See id.* at 297-98.

⁴⁶ *See id.* at 283.

not nearly as extensive as Strain's, but serve to give his descriptions and accounts of the jungle heightened credibility.

The Darkest Jungle contains very little in terms of visual aids. Balf explains that there are no surviving photographs of the expedition's members.⁴⁷ There are also no photos from the journey itself, because the party decided not to be burdened with carrying the type of bulky camera that was available in 1854.⁴⁸ A map of the Darién region is provided at the start of the book, which outlines Strain's route as well as those of the other expedition parties identified in the text.⁴⁹ Although this map is sufficient for reference, more detailed maps identifying Strain's estimated progress throughout the book would be a welcome addition. Prior to the start of each chapter there is a textless page, presumably for aesthetical purposes, which is marked only by the faint artistic outline of portions of the previously provided map.⁵⁰ That space could more effectively be used to illustrate the estimated location of Strain's party within each chapter. Such an illustration would be valuable to the reader in understanding the particular landscape around the party, and help the reader chart the group's circuitous route through the dangerous terrain.

The Darkest Jungle has little competition in terms of other modern books detailing Strain's 1854 expedition.⁵¹ As such, *The Darkest Jungle* is a key resource for military officers interested in the dynamics of leadership on a small unit level. In particular, it illustrates methods by which a leader can guide a group through grueling hardships and still maintain order, discipline, and perhaps most importantly, hope, in order to sustain the group and accomplish the mission. Strain is an excellent example of a leader utilizing a variety of leadership techniques to help his group prevail against overwhelming odds. Equally important are the

⁴⁷ See *id.* at 8.

⁴⁸ *Id.*

⁴⁹ See *id.* at iv-v.

⁵⁰ See, e.g., *id.* at 108, 164.

⁵¹ For those interested in a comprehensive history of the Panama Canal, David McCullough's *Path Between the Seas: The Creation of the Panama Canal, 1870-1914*, is regarded by many as an excellent source. DAVID MCCULLOUGH, *PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL, 1870-1914* (1978); see also Powell's Books, *The Path Between the Seas: The Creation of the Panama Canal 1870-1914* by David McCullough, at <http://www.powells.com/cgi-bin/biblio?isbn=0671244094> (last visited June 13, 2005). Although *Path Between the Seas* addresses the 1854 expedition, it does not do so in nearly the detail of Balf's work. The lack of similar works may be due in part to the previously described difficulty in obtaining primary sources about the journey. See *supra* note 14 and accompanying text.

lessons that can be derived from Strain's failures and misjudgments, which arguably cost some of his men their lives. Such lessons on leadership are timeless and equally applicable to today's military officers as they were to those of the 1800s.

In the end, *The Darkest Jungle* is a well-written account of one man's heroic efforts to lead his twenty-seven member party across over forty miles of some of the most inhospitable and hostile jungle environment on earth. It is a story of survival, and the leadership techniques that made such a journey possible. Despite the minor drawbacks, those who enjoy stories of adventure and survival or those who seek to learn more about leadership will find *The Darkest Jungle* has much to offer.

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By Order of the Secretary of the Army:

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