Volume 189 **Fall 2006**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEW

Department of Army Pamphlet 27-100-189

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CONTENTS

ARTICLES

BOOK REVIEW

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MILITARY LAW REVIEW—VOLUME 189

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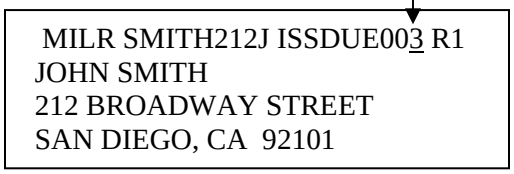

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MILITARY LAW REVIEW

Volume 189 **Fall 2006**

KILLING TIME: TWO DECADES OF MILITARY CAPITAL LITIGATION

Colonel Dwight H. Sullivan, USMCR[1]

I. Introduction

The military's death row is a pod in the U.S. Disciplinary Barracks' "Special Housing Unit." For the six men confined in that pod's cells, 24 January 2007 was just another Wednesday.[2] They probably neither knew nor cared that the day marked the twenty-third anniversary of the current U.S. military death penalty system. But this milestone suggests that the military death penalty system has operated long enough to allow a meaningful analysis of its performance.

This article offers such an analysis. This examination is positivist rather than normative, describing the military death penalty system as it

[1] Judge Advocate, United States Marine Corps Reserve. Presently assigned as the Chief Defense Counsel, Office of Military Commissions. The reader should be aware that the author litigated several of the cases discussed in this article as an appellate defense counsel. The author is grateful to Professor David C. Baldus; Lieutenant Commander (LCDR) Marcus N. Fulton, Judge Advocate General's Corps (JAGC), U.S. Navy (USN); LCDR Jason S. Grover, JAGC, USN; Professor Madeline Morris; Michael J. Navarre, Esq.; and Professor Detlev F. Vagts for reviewing, editing, and improving earlier drafts of this article. The author is particularly indebted to Mr. James W. Russell III, Assistant Chief, Military Justice Division, Air Force Legal Operations Agency, for providing information about Air Force capital practice and alerting the author to a previously unknown Air Force capital case.

[2] The six servicemembers on military death row on 24 January 2007 were Army Sergeant (SGT) Hasan Akbar, Army Specialist (SPC) Ronald A. Gray, Army Private (PVT) Dwight J. Loving, Marine Corps Lance Corporal (LCpl) Kenneth G. Parker, Marine LCpl Wade L. Walker, and Air Force Senior Airman (SrA) Andrew Witt. *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A. 63 (Winter 2007), *available at* http://www.naacpldf.org/content/pdf/pubsx/drusa/DRUSA_Winter_2007.pdf [hereinafter DEATH ROW U.S.A.].

actually works rather than suggesting how the system should operate. The article's focus is a survey of courts-martial that were tried capitally, the cases' outcomes, and the appeals of those cases that resulted in death sentences. A 2000 study of state death penalty systems[3] provides the methodology for this survey and allows a comparison of the military system with its civilian counterparts. The resulting data present some quantifiable measures of how the current military death penalty system has performed over its first two decades.

The article's survey of the military death penalty system yields this overview of capital punishment in the military:

- Military death sentences have rarely been sought and even more rarely been adjudged. Less than one-third (15/47) of known capital courts-martial have resulted in death sentences.

- In the few instances where servicemembers have been sentenced to death and appellate review is complete, the death sentence has been overturned on appeal 3.5 times more often than it has been affirmed (7 to 2).

- Overturned death sentences tend to be replaced with non-capital sentences. So far, no military death sentence that has been overturned on appeal has been reinstated.

- The military's capital reversal rate is far higher than the civilian average. In the military justice system, the direct appeal functions like a combined state direct appeal and post-conviction proceeding. The current direct appeal reversal rate of military death sentences is 77.78%,

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[3] The study produced two unpublished reports, both maintained online by the Columbia Law School: (1) James S. Liebman et al., A Broken System: Error Rates in Capital Cases, 1973-1995 (June 12, 2000), http://www2.law.columbia.edu/instructionalservices/liebman/ [hereinafter Liebman, *Broken System I*]; and (2) James S. Liebman et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It (Feb. 11, 2002), http://www2.law. columbia.edu/brokensystem2/ [hereinafter Liebman, *Broken System II*]. An abridged version of the first report was published in the *Texas Law Review*. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1840 (2000) [hereinafter Liebman, *Capital Attrition*]; *see also* Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004); James S. Liebman, *Rates of Reversible Error and the Risk of Wrongful Execution*, 86 JUDICATURE 78 (2002); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000).

while the aggregate state direct appeal plus post-conviction reversal rate (albeit for a somewhat different time span[4]) is 47%. But due to the extremely small number of military capital cases, the difference between the military system and the civilian system is not statistically significant. Thus, the difference between the military and civilian systems—though real—has limited predictive and explanatory value.

- No execution has occurred under the current military death penalty system and none is imminent.

- Military death penalty cases average more than eight years between sentencing and resolution of the direct appeal. The average capital appellate delay is longer in the military system than in the state systems.

To quote the familiar mutual fund disclaimer, "Past performance is no guarantee of future results."[5] But policymakers considering military justice revisions and convening authorities considering referral of potentially capital charges should be aware of the military death penalty system's track record as they make their decisions.

II. The Current Military Death Penalty System's Origins

The U.S. Supreme Court's 1972 *Furman v. Georgia*[6] decision effectively invalidated every state death penalty system that existed at the time. *Furman* featured a scant 206-word per curiam opinion briefly identifying the three death sentences at issue and holding "that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[7] Voting 5-4, each of the nine justices wrote a separate opinion concurring in or dissenting from this outcome.[8] Synthesizing the

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[4] This article examines the military death penalty system from 24 January 1984 through 31 December 2006. Professor Liebman and his colleagues examined state death penalty systems from 1973-1995. *See* Liebman, *Broken System I*, *supra* note 3, at 3.

[5] Lauren Young, *The Past As Forecast*, BUSINESS WEEK, Oct. 27, 2003, at 138.

[6] 408 U.S. 238 (1972) (per curiam).

[7] *Id.* at 239.

[8] *Id.* Justices Douglas, Brennan, Stewart, White, and Marshall were in the majority. Chief Justice Burger and Justices Blackman, Powell, and Rehnquist dissented.

justices' disparate opinions is difficult.[9] But *Furman* generally has been interpreted as holding that the Eighth Amendment requires that death penalty procedures "channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a 'wanton' and 'freakish' manner."[10]

In the four years that followed *Furman*, thirty-five states and the federal government revised their capital punishment systems.[11] In 1976, the Supreme Court held that the new Georgia, Florida, and Texas death penalty systems were constitutionally permissible.[12] The "modern era of capital punishment" in the United States had begun.[13] But neither Congress nor the President reformed the military death penalty system.[14] Instead, just as before *Furman*, in any case that resulted in a finding of guilty under Article 118(1) (premeditated murder) or 118(4) (felony murder), the members exercised unfettered discretion to choose between the only two congressionally authorized sentences: confinement for life and death.[15]

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[9] *See* Major John J. Pavlick, Jr., *The Constitutionality of the UCMJ Death Penalty Provisions*, 97 MIL. L. REV. 81, 85 (1982) ("The *per curiam* decision in *Furman* is a judicial nightmare of nine separate opinions, and the specifics of the opinions are of limited practical and precedential value.").

[10] Johnson v. Texas, 509 U.S. 350, 359 (1993) (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring)).

[11] Gregg v. Georgia, 428 U.S. 153, 179-80 (1976).

[12] *Id.*; Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). On the other hand, the Court struck down death penalty systems that made the death penalty mandatory for specified offenses. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

[13] WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 7 (1991) (observing that the *Gregg* decision marked the beginning of the era).

[14] *See* Captain Michael E. Pfau & Captain Eugene R. Milhizer, *The Military Death Penalty and the Constitution: Is there Life After* Furman?, 97 MIL. L REV. 35, 35-36 (1982) ("Congress has not amended the pertinent provisions of the Uniform Code of Military Justice . . . in the more than ten years which have passed since *Furman*.").

[15] *See* United States v. Gay, 16 M.J. 586, 596 (A.F.C.M.R. 1983) (en banc) (noting that under Article 118(1), UCMJ, "absolute discretion is permitted the sentencing authority, unchecked by articulated standards."), *aff'd*, 18 M.J. 104 (C.M.A. 1984). Since the modern era of capital punishment began in 1976, premeditated murder and felony murder are the only offenses that have resulted in military death sentences. The UCMJ establishes fifteen capital offenses, though some carry the death penalty only in times of war. *See* Captain Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 MIL. L. REV. 66, 115, 122 (2005) (noting that of the military's death penalty offenses, three are common law capital felonies and the other twelve are uniquely military offenses). *See generally* Dwight H. Sullivan, Jerry L. Brittain, Michael N. Knowlan & Cheryl Pettry,

Between 1979 and 1983, courts-martial sentenced seven servicemembers to death.[16] Each had been convicted of premeditated

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Raising the Bar: Mitigation Specialists in Military Capital Litigation, 12 GEO. MASON U. CIV. RTS. L.J. 199, 202 n.14 (2002) [hereinafter Sullivan et al., *Raising the Bar*] (discussing death eligible offenses under the UCMJ). The UCMJ also authorizes general courts-martial to "try any person who by the law of war is subject to trial by a military tribunal" and to "adjudge any punishment permitted by the law of war." UCMJ art. 18 (2005). The United States' longstanding view is that "[t]he death penalty may be imposed for grave breaches of the law" of war. U.S. DEP'T OF ARMY, FIELD MANUAL, THE LAW OF LAND WARFARE 182 (1956). *Ex parte* Quirin, 317 U.S. 1 (1942), is an example of a case where the United States executed individuals for, among other offenses, violating the law of war. *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL 78-79 (2003) (discussing execution of six of the convicted German saboteurs). In *Ex parte* Quirin, the Supreme Court noted that paragraph 357 of the 1940 "Rules of Land Warfare promulgated by the War Department for the guidance of the Army . . . provides that 'All war crimes are subject to the death penalty, although a lesser penalty may be imposed.'" *Quirin*, 317 U.S. at 34. Another example of the United States carrying out an execution for a law of war violation arose from the case of General Tomoyuki Yamashita. *See In re* Yamashita, 327 U.S. 1 (1946). *See generally* Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 22-37 (1973) (discussing the trial of General Yamashita and its aftermath).

For an interesting discussion of the applicability of capital punishment to war crimes today, see William A. Schabas, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Police on War Crimes and Crimes Against Humanity: War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733 (1997). Currently, Rule for Courts-Martial (RCM) 1004 provides that death may be adjudged for "a violation of the law of war" if "death is authorized under the law of war for the offense." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004(c)(10) (2005) [hereinafter MCM]. A proposed change to the *MCM* would instead authorize a death sentence if "the violation constitutes a grave breach of the law of war." Amendments to the Manual for Courts-Martial, United States (2002 ed.), 68 Fed. Reg. 48,886, 48,887 (proposed Aug. 11, 2003); *see also* 69 Fed. Reg. 13,816 (Mar. 24, 2004) (summary of public comments regarding proposed amendments). The proposed discussion accompanying the modification refers to the four Geneva Conventions to define grave breaches. 68 Fed. Reg. at 48,887. The drafters' analysis explains that the amendment is designed "to clarify which law of war violations may subject the accused to capital punishment." *Id.* But because Article 18 provides that a general court-martial trying an accused for a violation of the law of war "may adjudge any punishment permitted by the law of war," without further defining that phrase, the issue of whether, and to what extent, the law of war continues to authorize the death penalty would likely be the subject of litigation.

[16] Pfau & Milhizer, *supra* note 14, at 79 n.325. The seven cases, arranged by date of sentencing, were: United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (Army, sentence adjudged 3 July 1979); United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983), *rev'd*, 17 M.J. 154 (C.M.A. 1984) (Marine Corps, sentence adjudged 30 Jan. 1981); United States v. Redmond, 21 M.J. 319 (C.M.A. 1986) (Army, sentence adjudged 5 Mar. 1981); United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1981), *rev'd*, 18 M.J. 281 (C.M.A.) (summary disposition), *cert. denied*, 469 U.S. 981 (1984) (Marine Corps,

murder or both premeditated murder and felony murder.[17] In June of 1983, the Air Force Court of Military Review reversed the death sentence of Airman Robert M. Gay—the only member of the Air Force then on military death row.[18] The Air Force Court based this result on its

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sentence adjudged 22 June 1981); *Gay*, 16 M.J. at 586 (Air Force, sentence adjudged 15 Dec. 1981); United States v. Mustafa a/k/a Joseph N. Brown (Mustafa), 22 M.J. 165 (C.M.A.), *cert. denied*, 479 U.S. 953 (1986) (Army, sentence adjudged 1 July 1982); and United States v. Artis, 22 M.J. 15 (C.M.A.) (summary disposition), *cert. denied*, 479 U.S. 813 (1986) (Army, sentence adjudged 22 Feb. 1983).

[17] *Matthews*, 16 M.J. at 359 (premeditated murder); *Rojas*, 15 M.J. at 905 (premeditated murder); *Redmond*, 21 M.J. at 319-20 (premeditated murder); *Hutchinson*, 15 M.J. at 1059 (premeditated and felony murder); *Gay*, 16 M.J. at 587 (premeditated murder); *Mustafa*, 22 M.J. at 166 (premeditated and felony murder); United States v. Artis, No. 444056 (A.C.M.R. June 17, 1985) (premeditated murder). During the UCMJ era, one servicemember has been executed for rape. *See* United States v. Bennett, 21 C.M.R. 223 (C.M.A. 1956). *See generally* Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1, 1-3 (1994) [hereinafter, Sullivan, *Last Line of Defense*] (discussing litigation in Bennett's case and his ultimate execution). In *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion), the plurality noted that *Gregg* reserved judgment on "the constitutionality of the death penalty when imposed for [crimes other than] deliberate murder." *Id*. at 592 (citing *Gregg*, 428 U.S. at 187 n.35). The plurality observed, "That question, with respect to rape of an adult woman, is now before us." *Id*. The plurality then held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* Whether *Coker* prohibits imposition of the death sentence for all rapes, for only the rape of an adult woman, or for only the rape of an adult woman that does not involve maiming or attempted murder has been the subject of continued uncertainty. *See* United States v. Gonzales, 46 M.J. 667 (N-M. Ct. Crim. App. 1997) (declining to resolve whether military death penalty for rape is constitutional under *Coker*, 433 U.S. at 584); United States v. McReynolds, 9 M.J. 881 (A.F.C.M.R. 1980) (per curiam) (following *Coker* to hold that rape is not a capital offense); United States v. Clark, 18 M.J. 775, 776 (N.M.C.M.R.) ("[T]he capital aspect of punishment purportedly authorized under Article 120 has been effectively invalidated."), *petition denied*, 19 M.J. 23 (C.M.A. 1984); *Matthews*, 16 M.J. at 377 (noting that the death penalty "[p]robably . . . cannot be constitutionally effectuated in a case where the rape of an adult female is involved, *Coker v. Georgia*, 433 U.S. 584 (1977)—at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense."). *But cf*. State v. Wilson, 685 So. 2d 1063, 1070 (La. 1996) (holding that "the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old"), *cert. denied*, 520 U.S. 1259 (1997). *See generally* Simon, *supra* note 15, at 115-16 (questioning Article 120's constitutionality); Lieutenant Colonel Robert T. Jackson, Jr., *Death—An Excessive Penalty for Rape of a Child?*, ARMY LAW., Sept. 1986, at 37 (analyzing Article 120's constitutionality); Corey Rayburn, *Better Dead than Raped? The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1135-40 (2004) (discussing, *inter alia*, Article 120).

[18] *Gay*, 16 M.J. at 586. The Army and Navy-Marine Corps Courts of Military Review, on the other hand, ruled that the military death penalty was constitutional despite *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); *Matthews*, 13 M.J. at 501; *Rojas*, 15 M.J.

conclusion that *Furman* invalidated the military capital punishment system. Four months later, the Court of Military Appeals (COMA) reached a similar conclusion in the landmark case of *United States v. Matthews*.[19] *Matthews* was a bold opinion. It invalidated the existing military death penalty system, ultimately leading to the reversal of the death sentences of every inmate on military death row at the time.[20] It also proclaimed the COMA's power to hold congressional statutes unconstitutional, despite its status as an Article I court.[21] And in what was destined to become the most contentious portion of the decision, the majority opinion's decretal paragraph suggested that either "the President or Congress" could establish "constitutionally valid procedures" for the military death penalty system.[22]

On 24 January 1984, President Ronald Reagan signed Executive Order 12,460.[23] That Executive Order amended the 1969 (Revised) *Manual for Courts-Martial* (*MCM*) by establishing a new military death penalty system. With only minor modifications in wording, this new

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at 902; *Hutchinson*, 15 M.J. at 1056.

[19] 16 M.J. at 354.

[20] *See supra* note 16.

[21] *Matthews,* 16 M.J. at 364-68. Judge Fletcher declined to join this portion of the majority opinion, writing that "I do not find it necessary to reach the question of the authority of this Court to declare an act of Congress unconstitutional." *Id.* at 392 (Fletcher, J., concurring).

[22] *Id*. at 382. The decretal paragraph allowed for "a rehearing on sentence if constitutionally valid procedures are provided by the President or Congress within 90 days of the date on which the mandate in this case is issued." *Id.* Judge Fletcher declined to join this portion of the majority opinion as well, writing, "The question of whether the executive or the legislative branch may act to modify the present code so that it comports with Article 55 is not before the Court in this case." *Id.* at 392 (Fletcher, J., concurring). The President's decision to adopt aggravating factors for the military justice system ultimately led to the Supreme Court's opinion in *Loving v. United States*, 517 U.S. 748 (1996), rejecting a separation of powers challenge to the President's prescription of the military death penalty system. In the *Matthews* case, the COMA issued its mandate on 27 October 1983. United States v. Matthews, 17 M.J. 48 (C.M.A. 1983). The President revised the military death penalty system eighty-nine days later. *See* Exec. Order 12,460, 49 Fed. Reg. 3169 (Jan. 26, 1984) (note that 26 January 1984 is the date of the *Federal Register* in which Executive Order 12,460 appears; the order itself is dated 24 January 1984). Under the *Matthews* opinion, this allowed the government to seek a death sentence under the new procedures. But the Judge Advocate General of the Army referred the case to the ACMR, which substituted a sentence of confinement for life in place of the original death sentence. *See* United States v. Matthews, 17 M.J. 978 (A.C.M.R. 1984).

[23] 49 Fed. Reg. 3169 (Jan. 26, 1984).

system would become Rule for Courts-Martial (RCM) 1004 when the 1984 *MCM* went into effect on 1 August 1984.[24]

The system that Executive Order 12,460 established, as codified by the 1984 *MCM*, allowed the members[25] to adjudge a death sentence if three conditions were satisfied: (1) the accused was found guilty of an offense for which death was an authorized punishment;[26] (2) the

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[24] While the President issued Executive Order 12,460 after *Matthews*, the 1984 *MCM*'s drafters emphasized that the revised system was designed before the COMA's *Matthews* decision, as well as the Air Force Court of Military Review's *Gay* decision. The 1984 drafters' analysis explained:

> [RCM 1004] and the analysis were drafted before the COMA issued its decision in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) on 11 October 1983. There the court reversed the sentence of death because of the absence of a requirement for the members to specifically find aggravating circumstances on which the sentence was based. When this rule was drafted, the procedures for capital cases were the subject of litigation in *Matthews* and other cases. *See, e.g.*, *United States v. Matthews*, 13 M.J. 501 (A.C.M.R. 1982), *rev'd*, *United States v. Matthews*, *supra*; *United States v. Rojas*, 15 M.J. 902 (N.M.C.M.R. 1983). *See also United States v. Gay*, 16 M.J. 586 (A.F.C.M.R. 1982 [sic]), *a'ffd* [sic] 18 M.J. 104 (1984) (decided after draft MCM was circulated for comment).
>
> While the draft *MCM* was under review, following public comment on it (*see* 48 Fed. Reg. 23688 (1983)), the *Matthews* decision was issued. The holding in *Matthews* generated a necessity to revise procedures in capital cases. However, *Matthews* did not require substantive revision of the proposed R.C.M. 1004. The several modifications made in the rule since it was circulated for comment were based on suggestions from other sources. They are unrelated to any of the issues involved in *Matthews*.

MCM, *supra* note 15, app. 21, at A21-73.

[25] Pursuant to Article 18, UCMJ, and RCM 201(f)(1)(C), all capital courts-martial must be tried before members. Unlike the accused in a non-capital case, the accused in a death penalty case cannot elect to be tried by military judge alone. By contrast, in the federal civilian system, a judge can preside over a capital case if both the defendant and the United States consent and the judge approves the parties' request. *See* FED. R. CRIM. P. 23a. Military appellate courts have rejected constitutional challenges to the prohibition against judge-alone trials in capital cases. *See, e.g.*, United States v. Gray, 51 M.J. 1, 49 (1999); United States v. Curtis, 44 M.J. 106, 130 (1996), *rev'd on other grounds*, 46 M.J. 129 (1997); United States v. Loving, 41 M.J. 213, 291 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996); *Matthews*, 16 M.J. at 363.

[26] MCM, *supra* note 15, R.C.M. 1004(a)(1). All capital courts-martial are contested. In a case that has been referred capitally, Article 45(b) and RCM 910(a)(1) prohibit a plea of guilty to a death-eligible offense. Military appellate courts have rejected constitutional challenges to this prohibition. *See, e.g.*, *Matthews*, 16 M.J. at 362. One law review

members unanimously found beyond a reasonable doubt that one of the "aggravating circumstances" (later renamed "aggravating factors"[27]) set out in RCM 1004(c) existed;[28] and (3) the members unanimously found that any extenuating and mitigating circumstances were "substantially outweighed by any aggravating circumstances," including the "aggravating circumstances" (later renamed "aggravating factors") listed in RCM 1004(c).[29]

Since RCM 1004 was promulgated in 1984, the military death penalty system has been altered twice by statute[30] and six times by

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article states that only three jurisdictions—Arkansas, Louisiana, and New York—prohibit capital defendants from pleading guilty. Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 ALB. L. REV. 181, 181 (2001). According to the article,

> There are apparently no statutes or case law from other states, or the federal government, nor any existing rules or provisions against a competent criminal defendant from [sic] entering a knowing, voluntary, and unconditional guilty plea to a capital charge, in a murder case, or any other similar category of prosecutions.

Id. at 191. Article 45(b) of the UCMJ, however, is just such a statute.

[27] The 1986 *MCM* amendments adopted the phrase "aggravating factors" to describe the matters set out in RCM 1004(c), at least one of which must be proved to make a case death-eligible. *See* MCM, *supra* note 15, app. A21-74. The new phrase was adopted to "more clearly distinguish such factors from the aggravating circumstances applicable to any sentencing proceeding under R.C.M. 1001(b)(4), which may be considered in the balancing process in capital cases under R.C.M. 1004(b)(4)(B)." *Id.*

[28] *Id.* R.C.M. 1004 (b)(4)(A).

[29] *Id.* R.C.M. 1004(b)(4)(B).

[30] The first statutory change created the new military capital offense of espionage. Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 583, 634-35 (1985) (codified at UCMJ art. 106a (2005), 10 U.S.C. § 906a (2000)). *See generally* Major Carol A. DiBattiste, *Air Force Espionage: Two Recurring Issues*, 32 A.F. L. REV. 377 (1990). The second statutory change provided that, absent military exigencies, capital courts-martial must have at least twelve members. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (codified at UCMJ art. 25a, 10 U.S.C.A. § 825a (West Supp. 2006)) [hereinafter FY 2002 DOD Authorization Act]; *see generally* Jonathan Choa, Note, *Civilians, Service-Members and the Death Penalty: The Failure of Article 25a to Require Twelve-Member Panels in Capital Trials for Non-Military Crimes*, 70 FORDHAM L. REV. 2065 (2002). Two capital courts-martial have been tried since this statute took effect. The first, *United States v. Akbar*, had a fifteen-member panel. United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006); *see* Richard A. Serrano, *GI Sentenced to Death for Fatal Attack; Army Sgt. Hasan Akbar Apologizes for Killing Two American Officers and Wounding 14 Other Soldiers in Kuwait on the Eve of War*, L.A. TIMES, Apr. 29, 2005, at A11. The second, *United States v. Witt*, had a twelve-member

executive orders amending the *MCM*.[31] The resulting changes fall into three groups: (1) those broadening the death penalty's availability by creating a new capital offense or new aggravating factor;[32] (2) those providing additional procedural protections to the accused;[33] and (3) one resolving an ambiguity in the original RCM 1004.[34]

III. The Military Death Penalty at the Trial Level

Capital prosecutions under RCM 1004 have been rare, though no one knows precisely how many military capital cases have been tried since the current system took effect in 1984. The various services' recordkeeping on this issue is neither uniform nor complete. Further uncertainty arises because convening authorities have, on occasion, inadvertently authorized capital courts-martial for death-eligible charges

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panel. United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006); *see* Gene Rector, *Photos Debated in Double-Murder Trial*, MACON TELEGRAPH, Sept. 19, 2005, at F.

[31] *See* Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (Feb. 25, 1986); Exec. Order No. 12,767, 56 Fed Reg. 30,284 (July 1, 1991); Exec. Order No. 12,936, 59 Fed. Reg. 59,075 (Nov. 15, 1994); Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (October 12, 1999); Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 17, 2002); Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005).

[32] *See, e.g.*, Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 583, 634-35 (1985) (codified at UCMJ art. 106a (2005), 10 U.S.C. § 906a (2000); Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999) (adding the RCM 1004(c)(7)(K) aggravating factor for premeditated murder that the victim was under the age of fifteen); Exec. Order No. 12,936, 59 Fed. Reg. 59,075 (Nov. 15, 1994) (adding the RCM 1004(c)(7)(B) aggravating factor for premeditated murder that the murder was drug-related); Exec. Order No. 12,767, 56 Fed Reg. 30,284 (July 1, 1991) (adding the RCM 1004(c)(8) aggravating factor in Article 118(4) cases); Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (Feb. 25, 1986) (expanding the class of public officials whose premeditated murder constitutes an aggravating factor under RCM 1004(c)(7)(F) and adding RCM 1004(c)(11) to implement the statutory aggravating factors found in Article 106a).

[33] *See*, *e.g.*, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (generally requiring that panels in capital courts-martial include at least twelve members); Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005) (implementing twelve-member requirement); Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (Feb. 25, 1986) (promulgating RCM 1004(a)(2), requiring a unanimous vote on findings for a case to remain death eligible).

[34] *See* Exec. Order 12,936, 59 Fed. Reg. 59,075 (Nov. 15, 1994) (clarifying that the RCM 1004(c)(4) recklessly endangering aggravating factor applies even if only one person other than the victim is endangered and clarifying the types of injuries that qualify as "substantial physical harm" for purposes of the RCM 1004(c)(7)(I) aggravating factor).

such as rape.[35] Until recently, a death-eligible offense at a general court-martial was referred capitally unless the referral included express instructions precluding a death sentence.[36] So, for example, every premeditated murder, felony murder, rape, and willfully hazarding a vessel charge referred to a general court-martial was death-eligible unless the referral block contained an instruction indicating that the case was non-capital. Under a 2005 *MCM* amendment, a case is now referred non-capitally unless the referral block specifically indicates the convening authority's intent to make the case death-eligible.[37] This change better reflects the actual practice in which non-capital referrals are the norm and capital referrals are the exception.

Requests to the military services, LEXIS and WESTLAW searches, and interviews with academicians and military justice practitioners over a three-year period have identified forty-seven court-martial cases that were tried capitally from the inception of the current military death penalty system in 1984 to the end of this article's study period, 31 December 2006. For purposes of this analysis, a capital court-martial is defined as a case that remained death-eligible at the conclusion of the presentation of evidence on the merits. Many other cases that were initially referred capitally but, for various reasons including pretrial agreements, did not result in a death-eligible trial are not included in this survey, nor are known cases of inadvertent capital referrals. [38]

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[35] *See, e.g.*, United States v. Underwood, 50 M.J. 271, 273 (1999); United States v. Mason, No. 96-01793, 1998 CCA LEXIS 112 (N-M. Ct. Crim. App. Feb. 5, 1998), *aff'd*, 50 M.J. 229 (1998) (summary disposition).

[36] *See* MCM, *supra* note 15, R.C.M. 103(2) ("'Capital case' means a general court-martial to which a capital offense has been referred without an instruction that the case be treated as noncapital . . . ."); United States v. Clark, 35 M.J. 432, 433 n.1 (C.M.A. 1992) ("There must be a specific statement in the instructions that the case is referred as noncapital for the death penalty to be removed as the maximum punishment."), *cert. denied*, 507 U.S. 1052 (1993).

[37] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005) (amending RCM 103(2) and RCM 201(f)(1)(A)(iii)(b)).

[38] *See supra* note 35 and accompanying text.

Of the forty-seven known capital cases, ten were tried by the Air Force.[39] Eighteen were Army cases,[40] including both a capital trial in *United States v. Dock*[41] and a capital retrial[42] after the results of the original court-martial were set aside on appeal.[43] Thirteen of the forty-seven known capital cases were tried by the Marine Corps.[44] The

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[39] United States v. Anderson, 36 M.J. 963 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 431 (C.M.A.), *cert. denied*, 513 U.S. 819 (1994); United States v. Burks, No. 28760, 1991 CMR LEXIS 1155 (A.F.C.M.R. Aug. 26, 1991), *aff'd*, 36 M.J. 447 (C.M.A.), *cert. denied*, 510 U.S. 866 (1993); United States v. Hamilton, No. 31768, 1996 CCA LEXIS 243 (A.F. Ct. Crim. App. Aug. 9, 1996), *aff'd*, 47 M.J. 32 (1997), *cert. denied*, 522 U.S. 1052 (1998); United States v. Mobley, 28 M.J. 1024 (A.F.C.M.R. 1989), *rev'd*, 31 M.J. 273 (C.M.A. 1990); United States v. Neeley, 21 M.J. 606 (A.F.C.M.R. 1985), *aff'd,* 25 M.J. 105 (C.M.A. 1987); United States v. Poertner, No. 26640, 1988 CMR LEXIS 853 (A.F.C.M.R. Oct. 4, 1988), *petition denied*, 28 M.J. 287 (C.M.A. 1989); United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996), *rev'd*, 50 M.J. 1 (1998); United States v. Taylor, 41 M.J. 701 (A.F. Ct. Crim. App. 1995), *aff'd*, 44 M.J. 475 (1996); United States v. Willis, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 258 (1997); United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006).

[40] United States v. Roukis, 60 M.J. 925 (Army Ct. Crim. App.) (per curiam), *aff'd*, 62 M.J. 212 (2005) (summary disposition); United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293, *reconsideration denied*, 62 M.J. 210 (2005); United States v. Graves, 47 M.J. 632 (Army Ct. Crim. App. 1997), *aff'd*, 52 M.J. 375 (1999), *cert. denied*, 529 U.S. 1093 (2000); United States v. Kaspers, 47 M.J. 176 (1997); United States v. Loving, 41 M.J. 213 (1994), *aff'd*, 517 U.S. 748 (1996); United States v. Murphy, 36 M.J. 1137 (A.C.M.R. 1993) (en banc), *rev'd*, 50 M.J. 4 (1998); United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992) (affirming death sentence and denying petition for new trial), 37 M.J. 751 (A.C.M.R. 1993) (rejecting supplemental issues), *aff'd*, 51 M.J. 1 (1999), *cert. denied*, 532 U.S. 919, *reh'g denied*, 532 U.S. 1035 (2001); United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994); United States v. Franklin, 35 M.J. 311 (C.M.A. 1992); United States v. Meeks, 35 M.J. 64 (C.M.A. 1992); United States v. Curry, 31 M.J. 359 (C.M.A. 1990); United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989), *petition denied*, 32 M.J. 316 (C.M.A. 1991); United States v. Miller, 28 M.J. 998 (A.C.M.R. 1989), *aff'd*, 31 M.J. 247 (C.M.A. 1990); United States v. Strom, 28 M.J. 336 (C.M.A. 1989) (order denying petition for review); United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989); United States v. Whitehead, 26 M.J. 613 (A.C.M.R. 1988). Two cases are unreported: United States v. Chrisco, No. 8800382 (V Corps, tried 4 Feb. 1988, resulting in total acquittal) (record on file at Washington National Records Center, Suitland, Maryland); United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006). The author is grateful to the office of the Clerk of Court, U.S. Army Judiciary, Arlington, Virginia, for providing information on Army capitally-referred courts-martial.

[41] 35 M.J. at 625 (setting aside the findings and death sentence). Dock was subsequently retried and sentenced to confinement for life. *Id.* at 629.

[42] *Dock*, 35 M.J. at 640 (affirming sentence of confinement for life).

[43] *Id.* at 629 n.1.

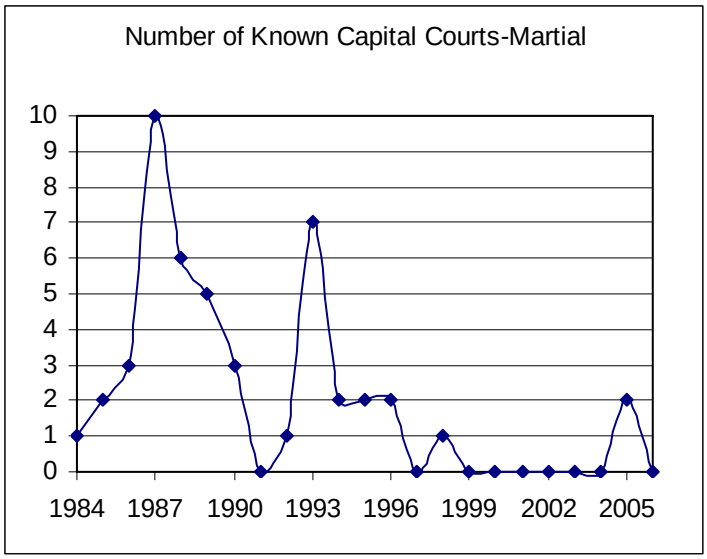
[44] United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006); United States v. Curtis, 52 M.J. 166 (1999) (per curiam) (affirming unreported NMCCA ruling setting aside death sentence); United States v. Schlamer, 47 M.J. 670 (N-M. Ct. Crim. App. 1997), *aff'd*, 52

remaining six were tried by the Navy.[45] No Coast Guard case has been referred for capital prosecution under the current military death penalty system, if ever.[46] The following chart depicts the annual number of known capital courts-martial, determined by the year in which the trial ended:

M.J. 80, *cert. denied*, 529 U.S. 1005 (2000); United States v. Holt, 46 M.J. 853 (N-M. Ct. Crim. App. 1997), *aff'd*, 52 M.J. 173 (1999); United States v. Levell, 43 M.J. 847 (N-M. Ct. Crim. App.), *aff'd*, 46 M.J. 160 (1996); United States v. Thomas, 43 M.J. 550 (N-M. Ct. Crim. App. 1995) (en banc), *rev'd*, 46 M.J. 311 (1997); United States v. Gibbs, 39 M.J. 378 (C.M.A. 1994) (summary disposition); United States v. Reliford, 27 M.J. 176 (C.M.A. 1988), *cert. denied*, 488 U.S. 1009 (1989); United States v. Parker, *appeal redocketed*, No. 9501500 (N-M. Ct. Crim. App. Dec. 23, 1997); United States v. Adams, No. 95 00397, 1996 CCA LEXIS 478 (N.M. Ct. Crim. App. May 14, 1996), *aff'd*, 46 M.J. 447 (1997); United States v. Walker, *appeal redocketed*, No. 9501607 (N.-M. Ct. Crim. App. Aug. 10, 1995); United States v. Clark, No. 86-4407, 1987 CMR LEXIS 610 (N.M.C.M.R. Sept. 4, 1987), *petition denied*, 27 M.J. 18 (C.M.A. 1988); United States v. Turner, No. 85 4044, 1986 CMR LEXIS 2275 (N.M.C.M.R. Aug. 8, 1986), *rev'd*, 25 M.J. 324 (C.M.A. 1987).

[45] United States v. Straight, 42 M.J. 244 (1995) (rape case tried capitally) (*see supra* note 17 concerning the constitutionality of applying capital punishment to the offense of rape); United States v. Gonzalez, No. 88 4472, 1992 CMR LEXIS 763 (N.M.C.M.R. Oct. 26, 1992), *aff'd*, 39 M.J. 459 (C.M.A.), *cert. denied*, 513 U.S. 965 (1994); United States v. Colon, No. 88 4988, 1990 CMR LEXIS 1203 (N.M.C.M.R. Oct. 31, 1990), *aff'd*, 32 M.J. 473 (C.M.A.) (summary disposition), *cert. denied*, 502 U.S. 821 (1991); United States v. Ameen, No. 872655, 1989 CMR LEXIS 422 (N.M.C.M.R. May 22, 1989), *petition denied*, 29 M.J. 302 (C.M.A. 1989); United States v. Jordan, No. 861006, 1987 CMR LEXIS 453 (N.M.C.M.R. June 30, 1987), *aff'd*, 29 M.J. 177 (C.M.A. 1989), *vacated*, 498 U.S. 1004 (1990); United States v. Garraway, No. 86 2199, 1987 CMR LEXIS 126 (N.M.C.M.R. Mar. 4, 1987), *petition denied*, 25 M.J. 484 (C.M.A. 1987).

[46] E-mail from Commander Jeffrey C. Good, USCG, Chief of the Office of Military Justice, to Col Dwight H. Sullivan, USMCR, Office of Military Commissions (Apr. 9, 2007, 12:21) (on file with author); *see also* GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 8 (1989) (noting that throughout its history, the Coast Guard has never carried out an execution resulting from a court-martial conviction). One federal execution has occurred at a Coast Guard base. On 17 August 1929, federal marshals carried out an execution at Coast Guard Base No. 6, near Fort Lauderdale, Florida. *See* Alderman v. United States, 31 F.2d 499 (5th Cir. 1929). James Horace Alderman had been convicted in U.S. District Court for the Southern District of Florida of two counts of murdering Coast Guard personnel after a U.S. Coast Guard patrol boat stopped him on the high seas while he was attempting to smuggle whisky into the United States. *Id.*; *see also* Charlie Reeves, Inside the National Archives Southeast Region, Premeditated Crime, http://www.archives.gov/southeast/exhibit/9.php (last visited Apr. 2, 2007) (displaying copies of original documents of the indictment and death warrant for James Horace Alderman); Sean Rowe, *The Gallows and the Deep; The Story of the Bloody, High-Seas Crimes and Execution of Smuggler Horace Alderman Is a Yarn Worthy of Joseph Conrad or Quentin Tarantino*, BROWARD-PALM BEACH NEW TIMES, Dec. 4, 1997. The author is grateful to LCDR (Ret.) Eugene R. Fidell, USCGR, for alerting him to this case and to the sources cited above.



The roster of capital trials reveals one particularly interesting trend. In 1996, the military tried two capital cases, both of which resulted in death sentences.[47] But from 1997 through the end of 2006, the military tried only three capital cases. The first was *United States v. Roukis*, an Army case that ended in a sentence of confinement for life in April 1998.[48] Then, following a seven-year period in which no capital case was tried, the military returned to the historic mean with two capital prosecutions in 2005[49] and exceeded the historic mean when both cases produced adjudged death sentences.

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[47] *Quintanilla*, 60 M.J. at 852; United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005).

[48] 60 M.J. 925 (Army Ct. Crim. App.) (per curiam), *aff'd*, 62 M.J. 212 (2005) (summary disposition). Roukis was found guilty of the premeditated murder of his wife. *Id*. at 929.

[49] United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006); United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006).

Several factors may have contributed to the seven-year hiatus in military capital prosecutions and the eight-and-a-half year gap in actual death sentences. One factor is our European allies' increasing opposition to the trial of capital courts-martial on their soil.[50] The United States

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[50] *See, e.g.*, United States v. Youngberg, 38 M.J. 635, 636 (A.C.M.R. 1993), *aff'd*, 43 M.J. 379 (1995) (finding in the 1993 proceeding that the "German authorities asserted immediate investigatory and prosecutorial control in this case and refused to release jurisdiction until they were assured in writing that the death penalty would not be an option at appellant's trial"); *see also* John E. Parkerson & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 MIL. L. REV. 41 (1990); Alyssa K. Dragnich, *Developments: Jurisdictional Wrangling: US Military Troops Overseas and the Death Penalty*, 4 CHI. J. INT'L L. 571 (2003); John E. Parkerson, Jr. & Steven J. Lepper, Case Report: Short v. Kingdom of the Netherlands, 85 AM. J. INT'L L. 698 (1991).

Tension between the United States and Germany over the military death penalty was particularly pronounced in *United States v. Murphy*. 56 M.J. 642 (Army Ct. Crim. App. 2001); *see also* Major Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals*, ARMY LAW., May 2000, at 107-09. United States Army SGT James T. Murphy was sentenced to death in a court-martial tried in the Federal Republic of Germany arising from his 1987 premeditated murder of his estranged wife, their twenty-one-month-old son, and her five-year-old son from a previous marriage. *Murphy*, 56 M.J. at 643. He bludgeoned his wife with a hammer, and then drowned her and the two boys in the bathtub of her apartment in Germany. *Id.* "The German Government, which opposes the use of the death penalty at the national level, sought assurances [from the United States] that Murphy would not be subjected to the death penalty and [was] told that the chances that an execution would be carried forward [were] remote . . . ." Richard J. Wilson, *Using International Human Rights Law and Machinery in Defending Borderless Crime Cases*, 20 FORDHAM INT'L L.J. 1606, 1617 (1997). Despite these concerns of West Germany's federal government, "German law permits a local prosecutor to surrender jurisdiction to the United States, which the local prosecutor did in [Murphy's] case." *Id*. The result was that Murphy was tried at a capital general court-martial in Germany. *See* United States v. Murphy, 30 M.J. 1040, 1048 (A.C.M.R. 1990) (en banc).

At his court-martial in 1987, Murphy was found guilty of, among other offenses, three specifications of premeditated murder. *Murphy*, 56 M.J. at 642. The members sentenced him to death. *Id.* That outcome caused diplomatic tensions. Parkerson & Stoehr, *supra*, at 50. "German Foreign Minister Hans-Dietrich Genscher wrote a personal plea to then-Secretary of State George Shultz in July 1988 expressing concern" about the *Murphy* case. *Id.* (citing Letter from Hans-Dietrich Genscher, Foreign Minister, Federal Republic of Germany**,** to George Shultz, Secretary of State (July 25, 1988), *quoted in* Telecommunications Message from Secretary of State to American Embassy, Bonn (unclassified) (Sept. 17, 1988)). The Court of Appeals for the Armed Forces (CAAF) set aside Murphy's death sentence in 1998. United States v. Murphy, 50 M.J. 4 (1998); *see also Murphy*, 56 M.J. at 642 (ordering *DuBay* hearing to determine whether ineffective assistance of counsel affected sentence only or findings and sentence).

European reluctance to facilitating capital courts-martial is consistent with similar European resistance to extraditing prisoners to face non-military capital trials in the United States. *See, e.g.*, Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989)

tried at least nine capital courts-martial in European countries from the current military death penalty system's creation in 1984 until 1989.[51] But since the 1989 capital retrial in *United States v. Dock* ended with a non-capital sentence, the United States has tried no known capital case in Europe. A second factor that helps explain the absence of capital courts-martial for the seven-year period appears to be rising litigation costs,[52] which may have deterred some capital prosecutions. A third factor is increased preparation time for capital trials. Had the length of preparation time remained stable, the two capital cases tried in 2005 would have been tried in earlier years.[53] Another important explanatory

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(holding that extradition of the applicant to the United States to stand trial for capital murder in Virginia would violate the European Convention on Human Rights' prohibition against "inhuman or degrading treatment or punishment."); *see also* William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 LOY. L.A. INT'L & COMP. L. REV. 581 (2003).

[51] *Murphy*, 36 M.J. at 1137; United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994) (retrial); United States v. Franklin, 35 M.J. 311 (C.M.A. 1992); United States v. Curry, 31 M.J. 359 (C.M.A. 1990); United States v. Miller, 28 M.J. 998 (A.C.M.R. 1989), *aff'd*, 31 M.J. 247 (C.M.A. 1990); United States v. Strom, 28 M.J. 336 (C.M.A. 1989) (order denying petition for review); United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989); United States v. Whitehead, 26 M.J. 613 (A.C.M.R. 1988); United States v. Poertner, No. 26640, 1988 CMR LEXIS 853 (A.F.C.M.R. Oct. 4, 1988), *petition denied*, 28 M.J. 287 (C.M.A. 1989).

[52] *See* Sullivan et al., *Raising the Bar*, *supra* note 15 (discussing use of civilian mitigation specialists in courts-martial); Major David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1 (2001). For example, the increasingly prevalent use of civilian experts, including mitigation specialists, in military capital cases raises the costs of litigating such cases.

[53] For example, in *United States v. Akbar*, two years passed between the date of the offenses (after which the accused was immediately apprehended) and the trial. *See* Serrano, *supra* note 30, at A11. In *Witt*, more than fourteen months passed between the accused's apprehension and opening statements at his court-martial. *See* Becky Purser, *Witt's Defender: Robins Killings Not Premeditated*, MACON TELEGRAPH, Sept. 20, 2005, at A; Becky Purser, *Witt's Oral Confession Recounted*, MACON TELEGRAPH, Sept. 22, 2005, at C (detailing that the murders were committed on 4 July 2004, Witt was apprehended on 5 July 2004, and opening statements commenced on 20 Sept. 2005). Earlier capital cases were tried far more quickly. For example, the offenses at issue in *United States v. Curtis* occurred on 13 April 1987 and the death sentence was imposed less than four months later, on 6 August 1987. United States v. Curtis, 44 M.J. 106, 117 (1996); *see also* United States v. Curtis, 38 M.J. 530, 530 (N.M.C.M.R. 1993). Similarly, in *Loving*, the offenses occurred on 11-12 December 1988, and the death sentence was adjudged less than four months later, on 3 April 1989. United States v. Loving, 41 M.J. 213, 229, 284 (1994). Even as late as 1996, military death penalty cases went to trial far more quickly than today. In the *Kreutzer* case, the date the offenses occurred was 27 October 1995. United States v. Kreutzer, 59 M.J. 773, 774 (Army Ct. Crim. App. 2004),

factor appears to be the availability of confinement for life without eligibility for parole for offenses committed after 18 November 1997.[54] The availability of this sentence may have led some convening authorities to refer cases non-capitally that, had the maximum non-capital sentence remained confinement for life *with* eligibility for parole, they would have referred capitally.[55]

While capital prosecutions are rare, death sentences are rarer still. Of the forty-seven capital prosecutions detailed above, the members adjudged a death sentence in only fifteen cases (31.91%).[56]

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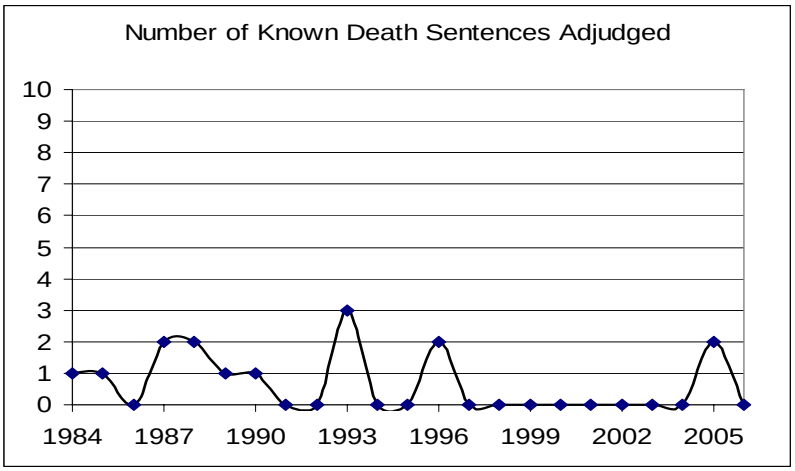
aff'd, 61 M.J. 293 (2005). Kreutzer was sentenced to death less than eight months later, on 12 June 2006. *See Fort Bragg Sniper Gets Death Penalty*, WASH. POST, June 13, 1996, at A17. The date of the offenses in *Quintanilla* was 5 March 1996. United States v. Quintanilla, 60 M.J. 852, 854-55 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006). Quintanilla was sentenced to death nine months later, on 5 December 1996. *Id.* at 852.

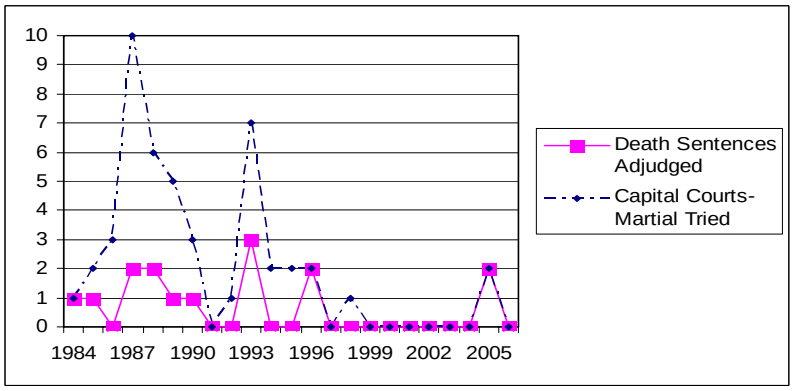
[54] *See* National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 581, 111 Stat. 1629, 1759 (1997) (codified at 10 U.S.C. § 856a (2000)). *See generally* United States v. Ronghi, 60 M.J. 83, *cert. denied*, 543 U.S. 1013 (2004) (holding that life without eligibility for parole is an authorized sentence for premeditated murders occurring after 18 November 1997, the effective date of the National Defense Authorization Act for Fiscal Year 1998).

[55] *Cf.* Liebman, *Broken System II*, *supra* note 3, at 404-05 (discussing analyses suggesting that the availability of confinement for life without parole reduces the number of death sentences imposed by civilian juries).

[56] Those fifteen cases, arranged by date of sentencing, are: United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989) (2 Apr. 1985); United States v. Curtis, 28 M.J. 1074 (N-M.C.M.R. 1989) (en banc), *rev'd in part*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 502 U.S. 1097 (1992) (6 Aug. 1987); United States v. Murphy, 36 M.J. 1137 (A.C.M.R. 1993) (en banc), *rev'd*, 50 M.J. 4 (1998) (17 Dec. 1987); United States v. Thomas, 43 M.J. 550 (N-M. Ct. Crim. App. 1995) (en banc), *rev'd*, 46 M.J. 311 (1997) (8 Nov. 1988); United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992) (affirming death sentence and denying petition for new trial), 37 M.J. 751 (A.C.M.R. 1993) (rejecting supplemental issues), *aff'd*, 51 M.J. 1 (1999), *cert. denied*, 532 U.S. 919, *reh'g denied*, 532 U.S. 1035 (2001) (4 Dec. 1988); United States v. Loving, 41 M.J. 213 (1994), *aff'd*, 517 U.S. 748 (1996) (3 Apr. 1989); United States v. Gibbs, 39 M.J. 378 (C.M.A. 1994) (summary disposition) (11 Jan. 1990); United States v. Walker, *appeal redocketed*, No. 9501607 (N.-M. Ct. Crim. App. Aug. 10, 1995) (2 July 1993); United States v. Parker, *appeal redocketed*, No. 9501500 (N-M. Ct. Crim. App. Dec. 23, 1997) (20 July 1993); United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996), *rev'd*, 50 M.J. 1 (1998) (22 July 1993); United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293, *reconsideration denied*, 62 M.J. 210 (2005) (12 June 1996); United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006) (6 Dec. 1996); United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006) (28 Apr. 2005); and United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006) (13 Oct. 2005). This list may not include



The graph above depicts the number of known military death sentences adjudged per year since 1984. The graph below superimposes the corresponding number of known capital courts-martial over the same period.



every death sentence adjudged under RCM 1004. In *United States v. Gibbs*, 39 M.J. 378 (C.M.A. 1994) (summary disposition), no court decision available on LEXIS or WESTLAW reveals that Gibbs was sentenced to death. That information can be obtained only by looking at the original record of trial. It is possible that in some post-*Matthews* military case other than *Gibbs* and *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)—another Marine Corps case in which a convening authority commuted an adjudged death sentence—a court-martial sentenced an accused to death but the convening authority commuted the sentence. However, almost certainly the list above includes every case in which an approved death sentence has gone on appeal under the current military death penalty system.

In two of the fifteen (13.33%) adjudged capital cases, the convening authority commuted the death sentence.[57] So among the population of known capital courts-martial, members adjudged a death sentence in just under one-third of the case (31.91%; 15/47), and the court-martial resulted in an approved death sentence in slightly more than one-fourth of the cases (27.66%; 13/47).

The roster of military capital cases also reveals enormous differences among the various military branches' capital practice. The Marine Corps—which includes less than 13% of all Defense of Department (DOD) active duty forces[58]—accounts for almost half (46.67%; 7/15) of the adjudged military death sentences. The Marine Corps is also unique in that a majority of capital cases it tried during the study period resulted in adjudged death sentences (7/13 or approximately 54%).[59] In the Army, one-third (6/18) of capital cases resulted in death sentences. The figure for the Air Force is just 20.00% (2/10), while no Navy capital case (0/6) resulted in a death sentence. These disparities among the branches are an interesting and unexplained phenomenon warranting further research.

IV. The Military Death Penalty at the Appellate Stage

During the study period (24 January 1984 through 31 December 2006), only thirteen cases with approved death sentences entered the military appellate system. That appellate system is unique. One unusual aspect is that the military justice system is one of only two jurisdictions in the United States that provides two levels of mandatory appeals for

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[57] *See Turner*, 25 M.J. at 324 (noting that the Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region "commuted the death sentence to life imprisonment plus a dishonorable discharge"); United States v. Gibbs, No. 910249 (2d Marine Division, Dec. 13, 1990) (record of trial on file at Washington National Records Center, Suitland, Maryland) (Commanding General, 2d Marine Division ordering that "so much of the sentence extending to death is changed to confinement for natural life.").

[58] The authorized active duty end strengths for 30 September 2006 were: Air Force, 357,400; Army, 512,400; Marine Corps, 179,000; and Navy, 352,700. National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, § 401(a), 119 Stat. 3136 (2005).

[59] But because of the two Marine Corps cases in which convening authorities disapproved death sentences, *see supra* note 57 and accompanying text, only 38.46% (5/13) of Marine Corps capital cases resulted in approved death sentences.

capital cases.[60] Defendants sentenced to death in United States district courts receive one appeal as a matter of right to one of the twelve geographic circuit courts of appeals.[61] Further review by the Supreme Court is discretionary.[62] Six of the thirty-eight[63] death penalty states have no intermediate courts of appeals.[64] In each of those states, death penalty cases fall within the state supreme court's mandatory jurisdiction.[65] In Oklahoma, the Court of Criminal Appeals exercises exclusive jurisdiction over all criminal appeals,[66] including capital cases.[67] In twenty-nine death penalty states, capital appeals bypass the

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[60] The other is Tennessee. TENN. CODE ANN. § 39-13-206(a)(1) (2003) (requiring its intermediate criminal appellate and supreme courts to hear death penalty appeals). *See infra* note 70 and accompanying text.

[61] *See* 28 U.S.C. § 1291 (2000).

[62] *See id.* § 1254.

[63] *See* DEATH ROW U.S.A., *supra* note 2, at 1. This publication lists thirty-eight states "with capital punishment statutes": Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id*. New York's continued status as a death penalty jurisdiction is questionable. In 2004, the New York Court of Appeals invalidated a portion of the New York death penalty statute and ruled that "under the present statute, the death penalty may not be imposed." *See* People v. LaValle, 817 N.E.2d 341, 367 (N.Y. 2004). In 2005, the New York legislature declined to revise the death penalty statute to cure the defects that the Court of Appeals identified in *LaValle*. *See* Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment; Accidental Execution of the Innocent Cited*, WASH. POST, Apr. 13, 2005, at A3. The Supreme Court observed that under the New York *LaValle* case (and another Kansas capital case), the death penalty "remains on the books, but as a practical matter it might not be imposed on anyone until there is a change of course in these decisions, or until the respective state legislatures remedy the problems the courts have identified." Roper v. Simmons, 543 U.S. 551, 580 (2005). This article will nevertheless treat New York as a death penalty jurisdiction in accordance with *Death Row U.S.A.*

[64] Those states are Delaware, Montana, Nevada, New Hampshire, South Dakota, and Wyoming. *See* Peter L. Murray, *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?*, 52 ME. L. REV. 43, 67 (2000).

[65] *See* DEL. CODE ANN. tit. 11, § 4209(g) (Michie Supp. 2004); MONT. CODE ANN. § 46-18-307 (2005); NEV. REV. STAT. ANN. § 177.055 (Michie 2003); N.H. REV. STAT. ANN. § 630:5.X (1996); S.D. CODIFIED LAWS § 23A-27A-9 (Michie 1998); WY. STAT. ANN. § 6-2-103(a) (LEXIS 2005).

[66] The Oklahoma Court of Criminal Appeals is a court of last resort. "In Oklahoma's bifurcated appellate system, the Oklahoma Supreme Court has final jurisdiction over civil appeals, and [the Court of Criminal Appeals] has final jurisdiction over criminal appeals." Hughes v. State, 868 P.2d 730, 734 (Okla. Ct. Crim. App. 1994). "[N]either Oklahoma court is obligated to adopt the reasoning of the other . . . ." *Id.*

[67] OKLA. STAT. ANN. tit. 21, § 701.13 (West 2002).

intermediate appellate court and are docketed directly with the state court of last resort for criminal cases.[68] Alabama treats capital appeals like all other criminal cases: the intermediate appellate court exercises mandatory jurisdiction and the Alabama Supreme Court exercises discretionary certiorari jurisdiction over those cases.[69] Tennessee, the

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[68] The twenty-nine bypass states are: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Washington. *See* ARIZ. REV. STAT. ANN. § 12-120.21 (West 2003); ARIZ. REV. STAT. ANN. § 13-703.04 (West 2005); ARK. CODE ANN. § 16-91-101 (LEXIS 2005); Ark. S. Ct. R. 1-2(a); CAL. CONST. art. 6, § 11(a); COL. REV. STAT. ANN. § 18-1.3-12.01(6)(a) (West 2004); CONN. GEN. STAT. ANN. § 53a-46b (West 2005); FLA. CONST. art. 5, § 3(h); GA. CONST. art. VI, § VI, ¶ III; GA. CODE ANN. § 15-3-3 (2005); IDAHO CODE § 19-2827 (Michie 2004); ILL. CONST. art. 6, § 4(b); IND. CODE ANN. § 35-50-2-9(j) (LEXIS 2004); KAN. STAT. ANN. § 21-627(a) (1995); KY. REV. STAT. ANN. § 532.075(1) (LEXIS 2003); LA. CONST. art. 5, § 5(D); MD. CODE ANN., CTS. & JUD. PROC. § 12-307 (LEXIS 2002); MISS. CODE ANN. § 9-4-3(1) (2002); MO. ANN. STAT. § 565.035.1 (West 1999); NEB. CONST. art. V, § 2; N.J. CONST. art. 6, § 5, ¶ 1; N.M. CONST. art. VI, § 2; N.Y. CRIM. PROC. LAW § 470.30.2 (McKinney 2004); N.C. GEN. STAT. § 7A-27(a) (2003); OHIO CONST. art. IV, § 2; OR. REV. STAT. § 138.012 (2003); 42 PA. CONS. STAT. ANN. § 9711(h)(1) (West 2005); S.C. CODE ANN. § 14-8-200(b) (West 2004); TEX. CONST. art. 5, § 5; UTAH CODE ANN. § 78-2-2(3) (2002); VA. CODE ANN. § 17.1-313-A (LEXIS 2003); WASH. REV. CODE ANN. § 10.95.100 (West 2002). Before 1995, death penalty appeals in Ohio were heard by the Ohio Court of Appeals, from which an appeal as of right could be taken to the Ohio Supreme Court. However, a 1994 amendment to Article IV, § 2(c) of the Ohio Constitution provided that for offenses that occurred after 1 January 1995, a death penalty appeal would go directly to the Ohio Supreme Court. *See* State v. Yarbrough, 767 N.E.2d 216, 224 n.1 (Ohio), *cert. denied*, 537 U.S. 1023 (2002). In Texas, the state criminal court of last resort is the Texas Court of Criminal Appeals. Like Oklahoma, Texas has a separate Supreme Court and Court of Criminal Appeals. In Texas, however, intermediate appellate courts have jurisdiction over most criminal appeals, and the Texas Court of Criminal Appeals exercises discretionary jurisdiction over those decisions. *See* TEX. CONST. art. V, § 5. Capital appeals bypass the intermediate courts of appeals and are heard directly by the Court of Criminal Appeals. *Id.* For a fascinating discussion of the development of Texas appellate courts' jurisdiction, see Joe R. Greenhill, *The Constitutional Amendment Giving Criminal Jurisdiction to the Texas Courts of Civil Appeals and Recognizing the Inherent Power of the Texas Supreme Court*, 33 TEX. TECH. L. REV. 377 (2002).

[69] Until 19 May 2000, certiorari was automatic in Alabama death penalty cases. *See Ex parte* Jackson, 836 So.2d 979, 981 & n.1 (Ala. 2002). However, effective on that date, the Alabama Supreme Court amended Rule 39 of the Alabama Rules of Appellate Procedure to provide that the review of death penalty cases would be discretionary. *Id.* The Alabama Court of Criminal Appeals has noted that the "primary responsibility for reviewing all death-penalty convictions and sentences is with this Court." Jenkins v. State, No. CR-97-0864, 2005 Ala. Crim. App. LEXIS 236, at *22 (Ala. Crim. App. Nov. 23, 2005).

sole remaining capital jurisdiction, is the only state that provides two levels of mandatory appellate review for capital cases.[70]

In the military, like in Tennessee, the intermediate appellate courts have mandatory jurisdiction over capital cases.[71] But unlike other cases, where the Court of Appeals for the Armed Forces (CAAF) exercises discretionary jurisdiction absent a certificate of review filed by a Judge Advocate General,[72] Congress requires the CAAF to review every case in which a court of criminal appeals has affirmed a death sentence.[73]

The courts of criminal appeals apply a broad scope of review that requires them to independently assess both the appropriateness of the sentence and the factual sufficiency of the evidence.[74] While the intermediate military appellate courts' factual sufficiency review is probably unique,[75] their sentence appropriateness review is not unusual among capital appellate systems. In more than half of the death penalty states, courts evaluate adjudged death sentences under some form of comparative proportionality review.[76] While "[t]here is no single model

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[70] Since 1992, Tennessee has required its Court of Criminal Appeals to hear death penalty cases and has required its Supreme Court to hear an appeal of any case in which the Court of Criminal Appeals affirms a death sentence. TENN. CODE ANN. § 39-13-206(a)(1) (2003). Before 1992, Tennessee death penalty cases bypassed the Tennessee Court of Criminal Appeals and were automatically heard by the Tennessee Supreme Court. *See* TENN. CODE ANN. § 39-13-206(a)(1) (1991). *See generally* Lee Davis & Bryan Hoss, *Tennessee's Death Penalty: An Overview of Procedural Safeguards*, 31 U. MEM. L. REV. 779 (2001).

[71] UCMJ art. 66(b) (2005) ("The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—(1) in which the sentence, as approved, extends to death . . . .").

[72] *Id.* art. 67(a).

[73] *Id*. art. 67(a)(1).

[74] *Id.* art. 66(c); *see also* Colonel Francis A. Gilligan, *The Bill of Rights and Service Members*, ARMY LAW., Dec. 1987, at 3, 10 (noting that the intermediate military appellate courts' "scope of review is much broader than their civilian counterparts'. Unlike a civilian appellate court, the courts of military review have plenary authority to correct errors. They can review de novo factual findings and legal holdings.").

[75] *See* United States v. McAllister, 55 M.J. 270, 277 (2001) ("The Courts of Criminal Appeals are unique in that they are charged with 'the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency.' *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).").

[76] According to Professor Timothy V. Kaufman-Osborn, twenty-two death penalty states apply some form of comparative proportionality review in capital cases. Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 792 (2004). Such proportionality review has produced mixed results. Professors David C. Baldus and George Woodworth point to Florida and New Jersey as two examples of appellate

of comparative proportionality review to which all state appellate courts adhere," proportionality review involves three fundamental steps: (1) "a court must select the universe of cases to be considered when such reviews are conducted"; (2) "a court must choose the pool of cases deemed 'similar' to a specific case on appeal"; and (3) "a court must decide whether a specific case is proportionate when measured against the pool of similar cases."[77]

Interestingly, despite the intermediate military appellate courts' broad powers to grant relief on grounds of factual insufficiency and inappropriateness of the sentence, the CAAF has proven far more likely than the courts of criminal appeals to set aside death sentences. The intermediate military appellate courts have affirmed the death sentence in six of the nine capital cases they have considered.[78] In four of those six cases, the CAAF reversed the intermediate appellate court and set aside the death sentence.[79] In only one case has the CAAF reversed a portion of a court of criminal appeals' ruling favoring an accused in a capital case, and even in that case the CAAF still affirmed the portion of the lower court's decision setting aside the death sentence.[80] In the remaining two capital cases, the CAAF affirmed the relief granted by the intermediate appellate court.[81]

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proportionality review systems that have focused death sentences on the most highly aggravated cases. David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections of the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1460-64 (2004). They also point to Nebraska as another successful proportionality review system, *id*., though Nebraska is the only state where proportionality review occurs at the trial level. *Id*. at 1459 n.184.

[77] Kaufman-Osborn, *supra* note 76, at 792 (footnotes omitted).

[78] Those six cases were: United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996) (en banc); United States v. Thomas, 43 M.J. 550 (N-M. Ct. Crim. App. 1995) (en banc); United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992); United States v. Loving, 34 M.J. 956 (A.C.M.R.), *reconsideration denied*, 34 M.J. 1065 (A.C.M.R. 1992); United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990) (en banc); United States v. Curtis, 28 M.J. 1074 (N.M.C.M.R. 1989) (en banc). *See also* United States v. Gray, 37 M.J. 751 (A.C.M.R. 1993) (rejecting supplemental issues).

[79] United States v. Curtis, 46 M.J. 129 (1997); United States v. Thomas, 46 M.J. 311 (1997); United States v. Simoy, 50 M.J. 1 (1998); United States v. Murphy, 50 M.J. 4 (1998).

[80] United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part*, 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006).

[81] *See* United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989); United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005).

In some ways, the military capital review system provides less protection for those sentenced to death than do civilian systems. The most significant departure from the civilian norm concerns the vehicle for collaterally attacking the court-martial's results. "All States provide some form of post-conviction review, which may be denominated 'habeas corpus,' '*coram nobis*,' 'postconviction relief,' 'relief from restraint,' or the like."[82] Similarly, Congress has authorized post-conviction hearings for defendants convicted in federal district courts.[83] "The scope of postconviction review, and the procedures by which it may be sought, vary widely from State to State."[84] But these collateral proceedings typically allow convicted defendants to present facts from outside the record to attack their convictions or sentences.[85] Extra-record facts are often necessary to advance claims such as ineffective assistance of counsel[86] or the prosecutor's violation of discovery duties that may not be apparent on the face of the trial transcript. In state systems, these collateral attacks usually begin only after the direct appeal is complete. They generally begin in a trial court, followed by an appeal within the state system and an opportunity to seek discretionary review from the United States Supreme Court.[87] For ineffective assistance of counsel claims in the civilian federal system, the Supreme Court has expressed a

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[82] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 190 (4th ed. 2001). For additional background information, see generally *id.* §§ 1-5 & 3-2. *See also* DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF 16 (2001) ("In every American state there is at least one principal postconviction remedy and usually one or more secondary, alternative remedies that supplement the primary remedy and may be used when, for one reason or another, the principal remedy is unavailable or inappropriate or inapplicable.").

[83] 28 U.S.C. § 2255 (2000).

[84] HERTZ & LIEBMAN, *supra* note 82, at 190.

[85] *See* Andrew Hammell, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Habeas Corpus*, 39 AM. CRIM. L. REV. 1, 73 (2002) (noting that state post-conviction review usually involves "an initial fact-finding proceeding in the trial court followed by review in the state supreme court.").

[86] *See* Massaro v. United States, 538 U.S. 500, 505 (2003) (calling the district court "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial").

[87] *See* Ronald F. Wright & Marc Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 662-63 (1986); Geraldine Szott Moohr, Note, Murray v. Giarratano: *A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 770 n.32 (1990); Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520 (1988); *see also* HERTZ & LIEBMAN, *supra* note 82, at 191.

preference for resolving the issue through a post-conviction proceeding initiated in a district court rather than on direct appeal.[88]

Several states have adopted "unitary review" systems in which a post-conviction proceeding at the trial level follows the capital trial almost immediately and the appeal from that post-conviction proceeding is combined with the direct appeal of the initial trial.[89] Federal law formerly defined "unitary review" as "a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of

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[88] *Massaro*, 538 U.S. at 504 ("[I]n most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance.").

[89] While courts and commentators disagree over precisely which states have unitary review systems, collectively they have identified five such states: California, Colorado, Idaho, Ohio, and Texas. *See generally* Hoffman v. Arave, 236 F.3d 523, 534 n.18 (9th Cir. 2001) ("Currently, only three [states other than Idaho]—California, Colorado, and Texas—employ a unitary scheme consolidating the post-conviction and appellate procedures into a single petition for review by the state's highest court."); Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 393 (2003) ("So-called unitary review systems . . . are currently in force in Colorado, Texas, Ohio, and Idaho . . . ."). *See also* Calderon v. Ashmus, 523 U.S. 740, 743 n.1 (1998) ("It is undisputed here that California is a unitary review State, which is a State that allows prisoners to raise collateral challenges in the course of direct review of the judgment, such that all claims may be raised in a single state appeal."); Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 469, 496-502 (2000) (discussing California's and Idaho's unitary review systems); Alexander Rundlet, *Opting for Death: State Responses to AEDPA's Opt-in Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 669-72 (1999) (discussing California's unitary review system); COL. REV. STAT. ANN. § 16-12-201 to -206 (West 1998 & West Supp. 2005); COLO. R. CRIM. P. 32.2(c)(1); Kappler, *supra*, at 527-28 (discussing Colorado's unitary review system); IDAHO CODE ANN. § 19-2719 (LEXIS 2004); Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho's Flawed Process*, 2 J. APP. PRAC. & PROCESS 85 (2000); OHIO REV. CODE ANN. § 2953.21(A)(2) (LEXIS 2003); TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon 2005); Julie B. Richardson-Stewart, Note, *One Full Bite at the Apple: Defining Competent Counsel in Texas Capital Post-Conviction Review*, 9 TEX. WESLEYAN L. REV. 221 (2003) (discussing Texas's unitary review system). At least three other jurisdictions adopted unitary systems at some point. In 1996, after Missouri had operated under a unitary system for eight years, the Missouri Supreme Court adopted a rule of criminal procedure reverting to a system of post-conviction review following completion of the direct appeal. *See* Fisher, *supra*, at 111-14. The supreme courts of Florida and Pennsylvania invalidated legislation adopting unitary systems of review in those states. Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000); *In re* Suspension of Capital Unitary Review Act, 722 A.2d 676 (Pa. 1999); *see also* Fisher, *supra*, at 114-16; Hammel, *supra*, at 394.

the judgment, such claims as could be raised on collateral attack."[90] For example, in Idaho, a capital defendant generally must file any request for post-conviction relief within forty-two days of being sentenced to death.[91] The district court must resolve the post-conviction claim within ninety days.[92] The appeal of the post-conviction proceeding is then consolidated with the direct appeal.[93]

In practice, the military appellate system functions as a unitary review jurisdiction. Ineffective assistance of counsel, *Brady* violations, and other claims relying on evidence from outside the record are routinely raised on direct appeal.[94] The extra-record evidence to support these claims is usually introduced into the appellate system through the simple mechanism of a motion to attach an affidavit.[95]

Another, more formal procedure also exists to raise issues relying on extra-record evidence. As an alternative to a writ of error *coram nobis*,[96] Congress authorized a military accused to file a petition for a new trial within two years of the convening authority's action.[97] These petitions can be based on either newly discovered evidence or fraud on the court. In practice, such petitions have been rare[98] and have been largely

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[90] 28 U.S.C. § 2265 (2000), *repealed by* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, tit. v, § 507, 120 Stat. 192, 250 (2006).

[91] IDAHO CODE ANN. § 19-2719(3) (LEXIS 2004).

[92] *Id.* § 19-2719(7).

[93] *Id.* § 19-2719(6).

[94] *See* Captain Scott A. Hancock, *The Advocate for Military Defense Counsel: Ineffective Assistance of Counsel: An Overview*, ARMY LAW., Apr. 1986, at 41, 42 (discussing the procedures for raising ineffective assistance of counsel claims on appeal); Major LeEllen Coacher, *Discovery in Courts-Martial*, 39 A.F. L. REV. 103 (1996) (discussing numerous cases in which military appellate courts ruled on discovery issues on direct appeal).

[95] *See* Lieutenant Colonel James Kevin Lovejoy, *The CAAF at a Crossroads: New Developments in Post-Trial Processing*, ARMY LAW., May 1998, at 25, 35 n.112.

[96] *See Hearings Before a Subcomm. of the Comm. on Armed Services on H.R. 2498, 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*, 81st Cong., 1st Sess. 211 (1949) [hereinafter *Hearings on H.R. 2498*] (statement of Felix Larkin) (explaining that the UCMJ's drafters designed the Article 73 petition for new trial "to combine what amounts to a writ of error coram nobis with the motion for a new trial on newly discovered evidence.").

[97] UCMJ art. 73 (2005).

[98] *See* EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 189 (11th ed. 2003) ("new

displaced by an alternative judicially created framework for resolving appellate issues relying on extra-record facts.[99] But among the many differences between the military petition for new trial and the civilian post-conviction process, one is paramount: while the state post-conviction proceeding and its federal counterpart[100] are typically initiated at the trial court level, a petition for new trial is not. Military death row inmates do not have access to the same procedural mechanisms available to civilian defendants who litigate their post-conviction reviews at the trial level.

Military petitions for a new trial are filed with the Judge Advocate General, who will refer the petition to any court in which a direct appeal is pending.[101] Because the statute of limitations for such petitions is two years from the date of the convening authority's action,[102] in practice a petition for new trial in a capital case will always be referred to one of the military justice system's appellate courts. There, the standard course has been to combine consideration of the petition for new trial with consideration of the direct appeal.[103]

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trial petitions are rarely filed . . . and even more rarely granted."), *available at* http://www.nimj.org/documents/MILAPP.pdf.

[99] *See* United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967) (remanding case for an evidentiary hearing); *see also* United States v. Ginn, 47 M.J. 236 (1997) (circumscribing the courts of criminal appeals' authority to resolve factual conflicts created by competing affidavits and generally requiring remand for a *DuBay* hearing where the competing affidavits concern a material fact); Captain David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c), UCMJ*, 38 A.F. L. REV. 63 (1994).

[100] *See* 28 U.S.C. § 2255 (2000).

[101] UCMJ art. 73 (2005); *see also* MCM, *supra* note 15, R.C.M. 1210(e), (g)(2).

[102] UCMJ art. 73; *see also* MCM, *supra* note 15, R.C.M. 1210(a). The CAAF has held that this two-year period can be equitably tolled. United States v. Van Tassel, 38 M.J. 91, 93 (C.M.A. 1993) (suspending deadline for filing petition for new trial due to appellant's mental incompetence).

[103] *See* FIDELL, *supra* note 98, at 188 ("Ordinarily the Court will consider a new trial petition and the merits of a case before it under Article 67(a)(3) at the same time."). Similarly, the Courts of Criminal Appeals generally resolve petitions for new trial together with the Article 66 appeal. *See*, *e.g.*, United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006); United States v. Hildebrandt, 60 M.J. 642 (N-M. Ct. Crim. App. 2004); United States v. Cuento, 58 M.J. 584 (N-M. Ct. Crim. App. 2003), *aff'd in part, rev'd in part*, 60 M.J. 106 (2004); United States v. Diaz, 56 M.J. 795 (Army Ct. Crim. App. 2002), *rev'd*, 59 M.J. 79 (2003); United States v. Guest, 46 M.J. 778 (Army Ct. Crim. App. 1997), *petition denied*, 49 M.J. 132 (1998); United States v. Hill, 46 M.J. 567 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 242 (1998); United States v. Denier, 43 M.J. 693 (A.F. Ct. Crim. App. 1995), *aff'd*, 47 M.J. 253 (1997).

After the direct appeal is complete, the President of the United States must decide whether to approve the death sentence.[104] The President's role is somewhat analogous to that of governors in some death penalty states that require the chief executive to issue death warrants,[105] though presidential review is not merely a ministerial act but rather is "conducted as a matter of clemency."[106] If the President fails to act, then the death sentence remains unapproved and no execution can be carried out.[107] The presidential approval requirement adds an additional layer of protection for an accused in the military death penalty system.[108] No President has acted on a military capital case since 1962, when President John F. Kennedy commuted a Sailor's death sentence.[109] Since then, only two military death sentences have been finally affirmed on appeal. The first was that of Army Private First Class Dwight Loving, whose death sentence became ripe for presidential action in 1996, when the Supreme Court affirmed his death sentence.[110] The second was that of Army Specialist Ronald Gray, whose death sentence became ripe for

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[104] UCMJ art. 71(a) ("If a sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President."). *See also* Dwight H. Sullivan, *Executive Branch Consideration of Military Death Sentences*, *in* EVOLVING MILITARY JUSTICE 137 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002) [hereinafter Sullivan, *Executive Branch Consideration*].

[105] *See, e.g.*, FLA. STAT. ANN. § 922.052 (LEXIS 2001) ("The sentence shall not be executed until the Governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing the warden to execute the sentence at a time designated in the warrant."); 61 PENN. STAT. ANN. § 3002(a) (West 1999) ("After the receipt of the record pursuant to 42 PA. CONST. STAT. § 9711(i) (relating to sentencing procedure for murder of the first degree), unless a pardon or commutation has been issued, the governor shall, within ninety days, issue a warrant specifying a day for execution which shall be no later than sixty days after the date the warrant is signed.").

[106] S. REP. No. 98-53, 98th Cong., 1st Sess. 24 (1983); *see generally* Loving v. United States, 62 M.J. 235, 247 (2005).

[107] The UCMJ drafters intended the system to operate in just this way. During the House hearings, Felix Larkin, the Assistant General Counsel of the Office of the Secretary of Defense and chairman of the UCMJ drafters' "working group," explained that a military death sentence "is in effect suspended from the very beginning until [the President] in his own good time does approve it." *See Hearings on H.R. 2498*, *supra* note 96, at 199. Army Colonel John P. Dinsmore, who was also a member of the working group, noted that if the President wants additional time to review a death sentence, "all the President has to do is to defer action until he makes up his mind what he wants to do. The execution date can't be fixed until after the President has acted." *Id.*

[108] *See* Sullivan, *Executive Branch Consideration*, *supra* note 104, at 137 ("This requirement is an important protection for condemned servicemembers. Since the UCMJ took effect in 1951, the military has carried out twelve executions while in fourteen cases a condemned servicemember's death sentence was commuted by the president.").

[109] *See id*. at 138.

[110] Loving v. United States, 517 U.S. 748 (1996).

presidential action in 2001, when the Supreme Court denied his certiorari petition seeking review of the CAAF decision affirming his findings and sentence.[111] Both cases remained pending presidential action at the end of the study period.[112]

If a President were to approve a military death sentence, the case would be eligible for habeas corpus review by an Article III court. Specific congressional statutes govern federal habeas review of state death sentences and post-conviction review of federal death sentences.[113] Those statutes, however, omit any reference to the statute under which Article III courts hear military habeas petitions, including in capital cases.[114] No military death row inmate has filed a habeas petition with

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[111] United States v. Gray, 51 M.J. 1 (1999), *reconsideration denied*, 53 M.J. 242, *second reconsideration denied*, 54 M.J. 223 (2000), *cert. denied*, 532 U.S. 919, *reh'g denied*, 532 U.S. 1035 (2001).

[112] A May 2005 newspaper article reported that the Secretary of the Army had forwarded both the *Loving* and *Gray* cases to the DOD. Andrew Tilghman, *U.S. Military Executions Draw Closer*, HOUSTON CHRON., May 1, 2005, at A1. On 1 September 2005, the *Gray* case was forwarded from the DOD to the White House. Memorandum, Colonel Flora D. Darpino, Judge Advocate, Chief, Criminal Law Division, Office of The Judge Advocate General of the Army, to the Office of the Secretary of the Army, subject: Forwarding of Death Penalty Case to the President of the United States (Sept. 1, 2005). Rule for Courts-Martial 1204(c)(2) provides that in cases where the Court of Appeals for the Armed Forces has affirmed a sentence requiring the President's approval, the Judge Advocate General will provide the record, military appellate court decisions, and a recommendation "to the Secretary concerned for the action of the President." During the Eisenhower Administration, service secretaries began to forward the case to the Secretary of Defense before submission to the President. *See* Sullivan, *Executive Branch Consideration*, *supra* note 104, at 138. Since 1953, the Justice Department has also given a recommendation to the President in military death penalty cases. *Id.* Executive Branch consideration of the *Loving* case may have been delayed to some extent by a series of petitions for extraordinary relief filed on his behalf. *See generally* Loving v. United States, 62 M.J. 235 (2005) (dismissing petitions for writs of error coram nobis and describing procedural history of case). On 29 September 2006, the Court of Appeals for the Armed Forces ordered a *DuBay* hearing to address allegations of ineffective assistance of counsel that Loving raised in a post-direct appeal habeas petition. Loving v. United States, 64 M.J. 132 (2006).

[113] *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 192, 230 (codifed at 18 U.S.C.A. § 3599 (West Supp. 2006)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101, 110 Stat. 1214 (Apr. 24, 1996).

[114] *See* Sullivan, *Last Line of Defense*, *supra* note 17, at 49 (discussing omission of 28 U.S.C. § 2241—the statutory provision under which military sentenced prisoners seek habeas relief from Article III courts—from the habeas counsel right provisions of the Anti-Drug Abuse Act of 1988, which are now codified at 18 U.S.C. § 3599). Similarly, the Antiterrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2255, the provision under which federal prisoners seek post-conviction review, and § 2254, the

an Article III court since 1961,[115] long before Congress adopted the statutes that now govern habeas review of civilian death sentences. So great uncertainty surrounds the scope of review that Article III courts will apply when conducting habeas review of military death penalty cases, and, consequently, the extent to which such habeas review will be meaningful.[116]

The military capital review system varies so much from its civilian counterparts that it seems useless to analyze whether it is more or less procedurally protective than the typical state system. But one conclusion is clear. As the next section demonstrates, the rate at which the military

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provision under which state prisoners seek federal habeas review. But the statute makes no mention of § 2241, the analogous statute for military prisoners challenging sentences imposed by court-martial. *See also* 28 U.S.C. § 2261(a) (2000) ("This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence."). In 2006, the USA PATRIOT Improvement and Reauthorization Act of 2005 moved the Anti-Drug Abuse Act of 1988's habeas counsel provisions from Title 21 to Title 18 of the U.S. Code. *See* Pub. L. No. 109-177, § 222, 120 Stat. 192, 230. This statute, like its predecessor, also referred to habeas cases arising under 28 U.S.C. §§ 2254 and 2255 with no mention of habeas cases brought under 28 U.S.C. § 2241. Congress appears to have consistently overlooked that there is a class of death-sentenced prisoners—those who were tried in the court-martial system—who seek Article III habeas review under 28 U.S.C. § 2241. *See also* John K. Chapman, Note, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 VAND. L. REV. 1387 (2004).

[115] *See* Bennett v. Cox, 287 F.2d 883 (10th Cir. 1961); *see also* Sullivan, *Last Line of Defense*, *supra* note 17, at 3.

[116] *See generally* Sullivan, *Last Line of Defense*, *supra* note 17, at 11-25 (discussing scope of review for Article III habeas review of court-martial cases). The Tenth Circuit, whose case law governs the United States Disciplinary Barracks and thus military death row, articulated the scope of review in habeas cases arising from court-martial convictions in *Roberts v. Callahan*, 321 F.3d 994 (10th Cir.), *cert. denied*, 540 U.S. 973 (2003). The Tenth Circuit held:

> If the grounds for relief that Petitioner raised in the district court were fully and fairly reviewed in the military courts, then the district court was proper in not considering those issues. Likewise, if a ground for relief was not raised in the military courts, then the district court must deem that ground waived. The only exception to the waiver rule is that a petitioner may obtain relief by showing cause and actual prejudice.

Id. at 997 (internal citations omitted). *See generally* United States *ex rel.* New v. Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006) (discussing applicable standards for collateral review of courts-martial), *cert. denied*, 75 U.S.L.W. 3286 (U.S. Apr. 23, 2007) (No. 06-691).

capital review system invalidates death sentences is higher than the comparable figure for the state death penalty systems.

V. A Comparison with Civilian State Death Penalty Systems

In June 2000 and February 2002, Columbia Law School Professor James S. Liebman and a group of his colleagues issued a pair[117] of influential[118]—and controversial[119]—reports on state capital punishment

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[117] *See* Liebman, *Broken System I*, *supra* note 3; Liebman, *Broken System II*, *supra* note 3.

[118] The *Broken System II* report is cited in a Supreme Court concurring opinion and two federal circuit court opinions. Ring v. Arizona, 536 U.S. 584, 616, 618 (2002) (Breyer, J., concurring); House v. Bell, 311 F.3d 767, 778 (6th Cir. 2002) (en banc); Depew v. Anderson, 311 F.3d 742, 750 n.1 (6th Cir. 2002), *cert. denied*, 540 U.S. 888, 938 (2003). The *Broken System I* report is cited in three federal circuit court decisions. Comer v. Schriro, 463 F.3d 934, 949 (9th Cir. 2006); Rompilla v. Horn, 359 F.3d 310, 311 (3d Cir.), *cert. denied*, 125 S. Ct. 27 (2004); Summerlin v. Stewart, 341 F.3d 1082, 1110 n.11, 1123 (9th Cir. 2003), *rev'd*, 542 U.S. 348 (2004). Both reports were discussed in a prominent, though quickly reversed, federal district court opinion holding the Federal Death Penalty Act unconstitutional. United States v. Quinones, 205 F. Supp. 2d 256, 268 (S.D.N.Y.), *rev'd*, 313 F.3d 49 (2d Cir. 2002), *cert. denied*, 540 U.S. 1051 (2003). The reports were also discussed in a subsequent federal district court opinion concluding that the Federal Death Penalty Act "will inevitably result in the execution of innocent people," but nevertheless upholding its constitutionality. United States v. Sampson, 275 F. Supp. 2d 49, 57-58 (D. Mass. 2003); *see also id*. at 77, 81 (discussing *Broken System* reports). The *Broken System I* report was also cited in a recent federal district court opinion noting "the anguish of death penalty lawyers who believe the death penalty system as broken." Barbour v. Haley, 410 F. Supp. 2d 1120, 1136 & 1136 n.29 (M.D. Ala. 2006).

[119] The authors of the *Broken System* reports have engaged in a remarkable series of exchanges with their critics. *See* Joseph L. Hoffmann, *Violence and the Truth*, 76 IND. L.J. 939 (2001); Valerie West, Jeffrey Fagan & James S. Liebman, *Look Who's Extrapolating: A Reply to Hoffmann*, 76 IND. L.J. 951 (2001); Adam L. VanGrack, Note: *Serious Error with "Serious Error": Repairing a Broken System of Capital Punishment*, 79 WASH. U. L. Q. 973 (2001); *Editor's Note*, 80 WASH. U. L.Q. 415 (2002); Jeffrey Fagan, James S. Liebman & Valerie West, *Misstatements of Fact in Adam VanGrack's Student Note: A Letter to the Editors of the Washington University Law Quarterly*, 80 WASH. U. L.Q. 417 (2002); Adam L. VanGrack, *Elevating Form Over Substance: A Reply to Professors James Liebman, Jeffrey Fagan and Valerie West*, 80 WASH. U. L.Q. 427 (2002); Jeffrey Fagan, James S. Liebman & Valerie West, *VanGrack's Explanations: Treating the Truth as a Mere Matter of "Form"*, 80 WASH. U. L.Q. 439 (2002); Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64 (2000); James S. Liebman, Jeffrey Fagan & Valerie West, *Death Matters: A Reply to Latzer and Cauthen*, 84 JUDICATURE 72 (2000); Barry Latzer & James N.G. Cauthen, *The Meaning of Capital Appeals: A Rejoinder to Liebman, Fagan, and West*, 84 JUDICATURE 142 (2000); Jeffrey Fagan, James S. Liebman & Valerie West, *Death Is the Whole Ball Game*, 84 JUDICATURE 144 (2000); Barry Latzer & James N.G. Cauthen**,** *Another Recount:*

systems. The first of these reports, *A Broken System: Error Rates in Capital Cases, 1973-1995*, analyzed "all 4,578 capital sentences that were finally reviewed by state direct appeal courts and all 599 capital sentences that were finally reviewed by federal habeas corpus courts between 1973 and 1995."[120] The report also provided national aggregates. The result is a remarkable long-term statistical depiction of state death penalty systems' performance. The report, however, examined neither the federal civilian nor military death penalty systems.[121]

A. Findings Concerning State Death Penalty Systems

The *Broken System* reports' major findings include the following:

● *Overall execution rate*: "Between 1973 and 1995, approximately 5,760 death sentences were imposed in the United States. Only 313 (5.4%; one in [nineteen] of those resulted in execution during the period."[122]

● *Direct appeal reversal rate*: "Of the 5,760 death sentences imposed in the study period, 4,578 (79%) were finally reviewed on

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Appeals in Capital Cases, PROSECUTOR**,** Jan./Feb. 2001, at 25 (arguing that the *Broken System* study overstates the death penalty reversal rate and that the *Broken System* study indicates that the actual relief rate is 20% for capital convictions, plus another 32% of capital cases in which the relief is limited to setting aside the death sentence). A collection of criticism of and rebuttals to the *Broken System* reports is available at http://www.prodeathpenalty.com/Liebman/Liebman.htm.

[120] Liebman, *Capital Attrition, supra* note 3, at 1844.

[121] The *Broken System* study "considers only state, not federal, death sentences." Liebman, *Broken System I*, *supra* note 3, at 128 n.30.

[122] Liebman, *Capital Attrition*, *supra* note 3, at 1846. By 2 April 2007, the number of post-*Furman* executions had risen to 1,069. *See* Death Penalty Information Center, Executions By Year, *available at* http://www.deathpenaltyinfo.org/article.php?scid=8&did=146. Through the end of 2005, a total of 7,320 individuals had been sentenced to death since *Furman*. *See* TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2005, at 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf (printed by the Bureau of Justice Statistics and labeled: NCJ 215083). Also through the end of 2005, a total of 1,004 post-*Furman* executions had occurred in the United States. So between the end of the Broken System reports' study period in 1995 and 2005, the overall execution rate more than doubled, from 5.4% to 13.7%.

'direct appeal' by a state high court."[123] In 1,885 (41%) of those cases, the death sentence was reversed.[124]

● *State post-conviction reversal rate*: In the twenty-eight states in the *Broken System* reports' post-conviction study group, approximately 6% (248/4,364) of adjudged death sentences that completed final review were reversed at the state post-conviction level.[125]

● *Federal habeas review reversal rate*: In the twenty-eight-state group, approximately 21% of adjudged death sentences that completed final review were reversed during federal habeas corpus proceedings.[126]

● *Overall reversal rate*: Including death sentences reversed at any point in the review process, "[n]ationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%."[127] The *Broken System* reports' authors caution, however, that because they consistently used methodologies that would avoid overstating the amount of reversible error in the system, the overall reversal rate may actually be (and probably is) higher.[128]

● *Disposition following reversal*: For those individuals in the twenty-eight-state group whose death sentences were reversed and whose post-reversal outcome is known, "82% (247 out of 301) of the capital judgments that were reversed were replaced on retrial with a sentence *less* than death, or *no* sentence at all."[129] This includes 7% (22/301) of

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[123] Liebman, *Capital Attrition*, *supra* note 3, at 1847; *see also* Liebman, *Broken System II*, *supra* note 3, at 8.

[124] Liebman, *Capital Attrition*, *supra* note 3, at 1847.

[125] *Id*. at 1851, 1852. The *Broken System* reports calculate the state post-conviction reversal rate not on the basis of all death sentences adjudged during the study period, but only those adjudged in the twenty-eight death penalty systems in which a case had progressed through the entire review system, including federal habeas review, by 1995. *See* Liebman, *Broken System I*, *supra* note 3, at 29. This twenty-eight-state group consists of Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

[126] Liebman, *Capital Attrition*, *supra* note 3, at 1851, 1852; *see also* Liebman, *Broken System II*, *supra* note 3, at 8.

[127] Liebman, *Capital Attrition*, *supra* note 3, at 1850; *see also* Liebman, *Broken System II*, *supra* note 3, at 8, 11.

[128] Liebman, *Broken System II*, *supra* note 3, at 14.

[129] Liebman, *Broken System I*, *supra* note 3, at 7.

reversed cases that "resulted in a determination on retrial that the defendant was *not guilty* of the capital offense."[130]

● *Comparison with non-capital reversal rate*: "Reversals occurred far more often in the capital cases studied than . . . in non-capital cases."[131] While information concerning the non-capital reversal rate is "sparse," the *Broken System II* report estimates that "the reversal rate in non-capital cases is less than 10% and probably less than 5%. Capital verdicts are 7 to 14 times more likely to be reversed than non-capital ones**.**"[132]

● *Delay in the capital review process*: "[A]bout five years elapse between sentence and [completion of] the *first* direct appeal."[133] For cases that resulted in reversal during federal habeas corpus review, "[i]t took an average of 7.6 years after the defendant was sentenced to [death] to complete federal habeas corpus consideration . . . ."[134] These findings are generally consistent with a Bureau of Justice Statistics report's conclusion that for all of the state and federal "prisoners executed between 1977 and 2005, the average time between the imposition of the most recent sentence received and execution was more than 10 years."[135] While the amount of delay has ebbed and flowed over the years, the general trend is toward greater delay.[136] In 2005, the most recent year for which statistics are available, the average delay reached a record length of twelve years, three months.[137]

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[130] *Id.* In the more recent *Persistent Patterns of Reversals* article, Professor Liebman and his colleagues state that "death-row inmates were found not guilty on retrial" in 9% of the studied cases reversed during state post-conviction review. Gelman et al., *supra* note 3, at 221.

[131] Liebman, *Broken System II*, *supra* note 3, at 11.

[132] *Id*. at 11-12. When referring to "capital verdicts," the study's authors appear to mean death sentences. In other words, these appear to be the rates at which sentences are reversed, not necessarily their underlying verdicts—though reversal of an underlying verdict is a sufficient, but not necessary, basis for reversal of a sentence.

[133] Liebman, *Capital Attrition*, *supra* note 3, at 1862 n.68.

[134] *Id.* at 1856.

[135] SNELL, *supra* note 122, at 10.

[136] *See id.* at 11, tbl. 11.

[137] *Id.*

B. Comparable Findings for the Military Death Penalty System

1. Defining the Population of Military Cases to be Surveyed

This subsection provides military data corresponding to the *Broken System* reports' data for the eight categories listed in the previous subsection. This survey, however, uses a somewhat different study period than did the *Broken System* reports. Those reports analyzed capital sentences that were finally reviewed between 1973 and 1995. This survey of military death sentences, on the other hand, begins its analysis in 1984, when the current military death penalty system came into effect. Excluding the seven military death sentences imposed between 1973 and 1983—all of which were reversed as a result of *United States v. Matthews*[138]—is consistent with the *Broken System* reports' approach. The *Broken System* reports' analysis for each state began only after it had adopted a *Furman*-compliant death penalty system.[139] The military death penalty was not reformed in light of *Furman* until President Reagan issued Executive Order 12,460 on 24 January 1984.[140] Also, this article's goal is to analyze the current military death penalty system. The seven death sentences that were set aside by *Matthews* and its progeny[141]—all of which were adjudged before the current military death penalty procedures took effect in 1984—tell us nothing about the current system's operation. Accordingly, the relevant starting date for an empirical analysis of the military death penalty system is 1984, not 1973.

The *Broken System* reports' end date of 1995 is also ill-suited to an analysis of the military death penalty. Only one military death penalty case—*United States v. Dock*[142]—completed direct review from 1984 to 1995. Ending the study period in 1995 would produce a misleading—

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[138] 16 M.J. 354 (C.M.A. 1983); *see supra* notes 16, 20, and accompanying text.

[139] *See* Liebman, *Broken System II*, *supra* note 3, at 18; Gelman et al., *Persistent Patterns of Reversals*, *supra* note 3, at 214.

[140] *See supra* note 23 and accompanying text.

[141] *See supra* notes 16-22 and accompanying text.

[142] 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989). While the Court of Appeals for the Armed Forces affirmed *Loving*'s death sentence in 1994, *see* 41 M.J. 213 (1994), that case remained pending at the Supreme Court in 1995. Because the Supreme Court had granted certiorari in 1995, *see* Loving v. United States, 515 U.S. 1191 (1995), but did not rule in the case until 1996, the *Broken System* reports' rules for determining the population of cases studied would have excluded *Loving*. *See* Liebman, *Capital Attrition*, *supra* note 3, at 1844 ("If the Supreme Court instead granted certiorari in a case but did not decide the case before or during 1995, the case is omitted from the study because the Supreme Court's action withdrew the finality of the decision.").

and virtually meaningless—100% reversal rate (1/1). Since 1995, eight more capital cases have completed direct review, including two—*Loving* and *Gray*—in which the death sentences were affirmed. Thus, to present a more meaningful analysis of the military capital punishment system's actual performance, this survey evaluates data from January 1984 through 31 December 2006.

2. Cases in This Survey's Population

Nine of the thirteen military death penalty cases that have been appealed under the current system completed direct appellate review during the study period. In two of those cases (*Gray* and *Loving*), the death sentences were affirmed. In the remaining seven (*Dock*, *Curtis*, *Murphy*, *Thomas*, *Simoy*, *Kreutzer*, and *Quintanilla*), the death sentences were reversed. Four cases (*Walker*,[143] *Parker*,[144] *Witt*,[145] and *Akbar*[146]) remained on direct appeal at the end of the study period. Those four cases are excluded from this analysis. Excluding them is consistent with the *Broken System* study's exclusion of cases that were not yet final at the time the data were collected.[147]

3. A Comparison of the Military Cases and the Broken System Study

The nine cases included in this survey, in order of sentencing, are *Dock*, *Curtis*, *Murphy*, *Gray*, *Thomas*, *Loving*, *Simoy*, *Kreutzer*, and *Quintanilla*.

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[143] *See generally* Walker v. United States, 60 M.J. 354 (2004) (granting in part petition for extraordinary relief concerning the appointment and composition of the NMCCA panel hearing Walker's appeal).

[144] *See generally* Parker v. United States, 61 M.J. 63 (2005) (ordering that "the matter is remanded to the United States Navy-Marine Corps Court of Criminal Appeals to consider the continued availability of the sentence of death in light of" evidence concerning Parker's possible mental retardation). *See also* Parker v. United States, 60 M.J. 446 (2005) (order).

[145] United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006).

[146] United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006)

[147] *See* Liebman, *Broken System I*, *supra* note 3, at 25.

● *Overall execution rate*: The military has not carried out an execution since 1961.[148] So the military's execution rate for the study period was 0% compared to 5.4% (313/5,760) for the state death penalty systems.[149] The military is one of six American death penalty jurisdictions that have not carried out a post-*Furman* execution.[150]

● *Direct appeal reversal rate*: The military's direct appeal death sentence reversal rate was 77.78% (7/9)[151] for capital cases tried since 1984 and finally resolved by 31 December 2006, compared to 41% (1,885/4,578) for civilian cases that completed direct appeal between 1973 and 1995.[152] But three of the military death sentence direct appeal reversals—*Curtis*, *Murphy*, and *Kreutzer*—were based at least in part on ineffective assistance of counsel, an issue that is typically raised during state post-conviction challenges in the civilian system. Therefore, a more meaningful comparison is the military direct appeal reversal rate versus the civilian direct appeal *plus* state post-conviction reversal rate.

● *Post-conviction reversal rate*: The state post-conviction proceeding has no direct military justice counterpart. The military justice system instead operates as a unitary system in which claims based

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[148] Turney, *supra* note 50, at 104 n.13.

[149] *See supra* note 122. By 2005, however, the civilian systems' execution rate had risen substantially. *See id.*

[150] The other five are Kansas, New Hampshire, New Jersey, New York, and South Dakota. *See* DEATH ROW U.S.A., *supra* note 2, at 8-9.

[151] In two military capital cases decided during the study period, *Dock* and *Kreutzer*, the appeal resulted in reversal of the contested findings as well as the sentence. In *Murphy*, proceedings are ongoing to determine whether the ineffective assistance of counsel that led to the reversal of the death sentence also tainted the findings. The military judge who conducted the *DuBay* hearing concluded that the ineffective assistance affected the sentence only. Memorandum of Decision, United States v. Murphy, United States Army Trial Judiciary, Fourth Judicial Circuit (17 Oct. 2005) (on file with author), in Record, United States v. Murphy, *appeal redocketed*, No. 8702873 (Army Ct. Crim. App. Nov. 8, 2005). The ACCA is now reviewing that ruling. In the remaining six capital cases, the findings and sentence were affirmed in two (*Loving* and *Gray*), the findings were affirmed but the death sentence reversed in three (*Curtis*, *Thomas*, and *Simoy*), and the death sentence was reversed without a final ruling on the findings in one (*Quintanilla*). *See* United States v. Loving, 41 M.J. 213 (1994), *aff'd*, 517 U.S. 748 (1996); United States v. Gray, 51 M.J. 1 (1999), *cert. denied*, 532 U.S. 919, *reh'g denied*, 532 U.S. 1035 (2001); United States v. Curtis, 46 M.J. 129 (1997); United States v. Thomas, 46 M.J. 311 (1997); United States v. Simoy, 50 M.J. 1 (1998); United States v. Quintanilla, 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006). Accordingly, excluding *Murphy* and *Quintanilla* from the analysis, the findings reversal rate was 22% (2/7).

[152] *See supra* notes 123-24.

on new evidence are raised as part of the direct appeal.[153] The military death sentence direct appeal reversal rate, including post-conviction-type claims, is 77.78% (7/9). In the twenty-eight states included in the Broken System reports' post-conviction study group, the civilian death sentence reversal rate for direct appeals plus post-conviction proceedings is approximately 47% (2,030/4,364).[154] The military reversal rate is far higher than the comparable average for the death penalty states. But because of the extremely small number of military death penalty cases, the difference is not statistically significant.[155] One state, Wyoming, actually has a direct appeal plus post-conviction reversal rate equal to the military's reversal rate.[156]

● *Federal habeas review reversal rate*: No military death penalty case has entered Article III habeas review since the present military death penalty system was adopted in 1984.

● *Overall reversal rate*: The overall civilian death sentence reversal rate, including direct review, state post-conviction review, and federal habeas review, is 68%.[157] The overall death sentence reversal rate for the military is unknown, since no military death penalty case has even begun

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[153] *See supra* note 94 and accompanying text.

[154] Liebman, *Broken System I*, *supra* note 3, at 31, 37, 144 n.156.

[155] "Social scientists use tests of statistical significance to test the probability that some random process . . . could have generated an observed result. The significance or '*p*-value' for a result indicates the likelihood that the observed result could have happened by chance." Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 782 n.59 (1998). *See generally* Liebman, *Broken System II*, *supra* note 3, at 85, 109-10 (defining and explaining statistical significance). "Most social scientists accept results with a *p*-value of .05 or less as 'significant' or meaningful." Merritt, *supra*, at 782 n.59. A comparison of the military reversal rate with the direct appeal plus state post-conviction reversal rate for the Broken System reports' twenty-eight-state post-conviction study group yields a *p*-value of approximately .06. Because one of the values used in the chi square analysis is less than five and the chi-square analysis was performed using a two-by-two matrix, some statistical analysis experts would recommend employing Yates' correction for continuity. *See generally* Kristopher J. Preacher, *Calculation for the Chi-Square Test* (Apr. 2001), *available at* http://www.psych.ku.edu/preacher/chisq/chisq.htm. The reader should note that the chi-square analyses presented in this footnote were calculated using, among other sources, this website's chi-square calculator. The Yates' *p*-value is approximately .12. Under either analysis, the difference between the results of the military system and the twenty-eight states is not statistically significant.

[156] Liebman, *Broken System I*, *supra* note 3, at 58, A-121. Wyoming's direct appeal plus state post-conviction reversal rate is 77.78% (7/9). The next highest reversal rate is Maryland's (77.19%; 44/57). *See id*. at A-61.

[157] *See supra* note 127 and accompanying text.

Article III habeas review. But for the group of military capital cases that has completed direct review, any ultimate Article III habeas review (or post-direct appeal military habeas review, such as in *Loving v. United States*[158]) can only add to the reversal rate. Accordingly, we know that the ultimate death sentence reversal rate for that group will be at least 77.78%. The reversal rate would climb even higher if either Loving or Gray were to obtain habeas relief.

- *Disposition following reversal*: In the military justice system, three of the seven accused whose death sentences have been set aside (Murphy, Kreutzer, and Quintanilla) have yet to be retried.[159] In the remaining four cases (*Dock*, *Curtis*, *Simoy*, and *Thomas*), the original death sentence was replaced with a sentence of confinement for life.[160] So 100% (4/4) of those who were resentenced (or, in the case of Curtis, whose sentence was reassessed) avoided the death penalty. The comparable figure for the civilian system is 82% (247/301).[161]

- *Comparison with non-capital reversal rate*: The military appellate reversal rate for non-capital sentences is unknown, but it is certainly far less than 77.78%. A recent analysis concluded that the Air Force, Army, and Navy-Marine Corps Courts of Criminal Appeals "took action affecting the findings or sentence" in "less than three percent (3%)" (<350/>12,000) of BCD special court-martial appeals decided

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[158] Loving v. United States, 64 M.J. 132 (2006).

[159] *See* United States v. Murphy, 56 M.J. 642 (Army Ct. Crim. App. 2001) (ordering *DuBay* hearing); United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005); United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006).

[160] Dock was retried in a capitally-referred case that resulted in a sentence of confinement for life. United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994). After the CAAF reversed Curtis' sentence due to ineffective assistance of counsel, the NMCCA substituted a sentence of confinement for life. United States v. Curtis, 52 M.J. 166 (1999) (per curiam) (affirming unpublished Navy-Marine Corps Court ruling setting aside death sentence). After Thomas' and Simoy's death sentences were reversed due to similar instructional errors, military judges resentenced both to confinement for life. United States v. Thomas, 60 M.J. 521 (N-M. Ct. Crim. App. 2004); United States v. Simoy, 2000 CCA LEXIS 183 (A.F. Ct. Crim. App. July 7, 2000), *aff'd*, 54 M.J. 407 (2001). Thomas entered into a unique agreement that, for all practical purposes, resulted in a sentence of confinement for life without parole. *See Thomas*, 60 M.J. at 523-24. A subsequent CAAF opinion suggests that this agreement violated RCM 705(c)(1)(B)'s prohibition against pretrial agreement terms that "deprive[] the accused of . . . the complete and effective exercise of post-trial and appellate rights." United States v. Tate, 64 M.J. 269 (2007).

[161] *See supra* note 129 and accompanying text.

during fiscal years 1998-2002.[162] An earlier analysis found that "the Army Court of Military Review (ACMR) affirmed 92.6% of all Army court-martial sentences eligible for appellate review during calendar year 1990."[163] In that same calendar year, the COMA granted relief in less than 1% of all Army cases in which a petition was filed.[164] So, as in the civilian system,[165] the military justice system's reversal rate for death sentences greatly exceeds that for non-capital sentences.

- *Delay in the capital review process*: In the civilian system, "about five years elapse between sentence and [completion of] the *first* direct appeal."[166] For cases that resulted in reversal during federal habeas corpus review, "[i]t took an average of 7.6 years after the defendant was sentenced to die to complete federal habeas corpus consideration . . . ."[167] The military death penalty review system's progress is even slower.

During the 1949 House hearings on the UCMJ, a colloquy between Representative Overton Brooks, the subcommittee's chairman, and Army Colonel John P. Dinsmore indicated their expectation that appellate review of military death penalty cases would be completed "within 3 or 4 months."[168] During the UCMJ's early years, military capital appeals were resolved with remarkable speed, though never as quickly as the House hearings predicted. Consider, for example, the cases of two Soldiers who were hanged on the same day at the United States Disciplinary Barracks. On 1 April 1953, Private Thomas J. Edwards was sentenced to death for the premeditated murder of a woman in West Germany. On 15 July 1953—just 105 days after sentencing—an Army

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[162] Major Jeffrey D. Lippert, *Automatic Appeal Under UCMJ Article 66: Time for a Change*, 182 MIL. L. REV. 1, 17 (2004). Interestingly, "In two-thirds of the BCD special cases in which the service court took action affecting the findings or sentence, the accused had pled guilty." *Id.* at 17 n.101. Of course, in military death penalty cases, the accused may not plead guilty. *See supra* note 26 and accompanying text.

[163] Army Defense Appellate Division, DAD Notes, ARMY LAW., Oct. 1991, at 32, 34.

[164] *Id.* at 35.

[165] *See supra* notes 131-32.

[166] Liebman, *Capital Attrition*, *supra* note 3, at 1862 n.68.

[167] *Id.* at 1856.

[168] During the House hearings, Felix Larkin, the Assistant General Counsel of the Office of the Secretary of Defense, asked Colonel Dinsmore, "[D]o you have a guess as to how long it takes to complete the review of a death sentence now?" *Hearings on H.R. 2498*, *supra* note 96, at 1213. Colonel Dinsmore replied, "It varies, depending on the difficulty of the questions involved, but I would say a matter of only a few months." *Id*. Chairman Brooks suggested that such cases would be "completed, say within 3 or 4 months." *Id.* Colonel Dinsmore agreed and added, "[I]t would be an extremely unusual case, Mr. Chairman, that would take a year." *Id*.

Board of Review affirmed the findings and sentence.[169] Ten months later, the COMA affirmed the Army Board of Review's ruling.[170] The case of Private Winfred D. Moore went through the system even more quickly. Moore was sentenced to death on 19 August 1953, for the murder and robbery of a taxicab driver in Fayetteville, North Carolina.[171] On 16 November 1953—a mere 89 days later—an Army Board of Review affirmed his findings and sentence.[172] On 2 July 1954—less than eleven months after Moore was sentenced—the COMA affirmed as well.[173] But it would not be until February 1957 that the Army carried out the two Soldiers' executions.[174]

Such speed is a thing of the past. For the nine military capital cases that completed direct appeal during the study period, an average of 3,116 days—more than eight-and-a-half years—elapsed between sentencing and the completion of direct appellate review. The military justice system's direct appeal of capital cases, on average, has taken more time than the 1973-1995 civilian average for direct appeal, state post-conviction review, and federal habeas review combined. Like the civilian system,[175] the military justice system's review of capital cases is becoming even slower over time. The two Marines whose cases were

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[169] United States v. Edwards, 11 C.M.R. 350 (A.B.R. 1953), *aff'd*, 15 C.M.R. 299 (C.M.A. 1954).

[170] *See* United States v. Edwards, 15 C.M.R. 299 (C.M.A. 1954). At the time, the Supreme Court did not have certiorari jurisdiction over the COMA's decisions. *See* Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, *in* EVOLVING MILITARY JUSTICE 149-60 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

[171] *See* United States v. Moore, 13 C.M.R. 311 (A.B.R. 1953), *aff'd*, 16 C.M.R. 56 (C.M.A. 1954).

[172] *Moore*, 13 C.M.R. at 319.

[173] United States v. Moore, 16 C.M.R. 56 (C.M.A. 1954).

[174] *See Two Go to Gallows at Military Prison*, LEAVENWORTH TIMES, Feb. 14, 1957, at 1. The delay between COMA's affirming the death sentences and the ultimate executions resulted from the Executive Branch's consideration of the cases. President Eisenhower did not approve the two death sentences until 20 November 1956. *See* Information Relating to Death Cases Considered by the President (undated), John F. Kennedy Library, White House Central Files, Subject File, Box 606, Folder: ND 9-6-1/A-C.

[175] *See* Liebman, *Broken System II*, *supra* note 3, at 91 ("All verdicts finally reviewed on federal habeas during the study period spent much more time under review in state and federal court in later years than in earlier years—rising from about *5½ years* on average from sentence to final habeas review for verdicts finally reviewed in 1981, to *12 years* for verdicts finally reviewed in 1995.").

still pending their first level of direct appeal at the end of the study period (Parker and Walker) were sentenced in July 1993.[176]

One recent military capital decision discussed appellate delay. The case of *United States v. Quintanilla* was decided by the Navy-Marine Corps Court of Criminal Appeals (NMCCA) more than eight years after the sentence was adjudged and more than six years after the case was docketed with the court.[177] The NMCCA concluded that "the delay in appellate review has been excessive."[178] The court blamed this excessive delay principally on appellate defense counsel's "'revolving-door' mentality."[179] The court explained that "appellate defense counsel consciously or subconsciously deferred writing a brief in this case until they transferred or left active duty, when the case would be turned over to a successor appellate defense counsel."[180] The court noted that these appellate defense counsel "faced the daunting task of reading and digesting thousands of pages of transcript and exhibits, then preparing a brief in this capital case"—a task made even more difficult "when those counsel had many other assigned cases that required their attention."[181] Nevertheless, the court emphasized, "upon entering an appearance, each of these attorneys had an obligation to read the record and file a brief in a timely manner."[182] But finding no prejudice resulting from the excessive delay, the court declined to provide relief.[183]

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[176] Some of the appellate delay in each of those cases arose because the Navy-Marine Corps Court remanded both cases for new convening authority actions by a different command than that which took the original action. *See* Walker v. United States, 60 M.J. 354, 355 (2004) (discussing Navy-Marine Corps Court's earlier remand); Parker v. United States, 60 M.J. 446, 447 (2005) (Crawford, J., dissenting). Petitions for extraordinary relief filed in each of these cases further delayed the completion of their first level of review. *See generally Walker*, 60 M.J. 354; Parker v. United States, 61 M.J. 63 (2005) (ordering that "the matter is remanded to the United States Navy-Marine Corps Court of Criminal Appeals to consider the continued availability of the sentence of death in light of" evidence concerning Parker's possible mental retardation).

[177] United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part*, 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006).

[178] *Id.* at 867.

[179] *Id*. at 868.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

With appellate delay persisting in the military justice system in general,[184] and in capital cases in particular,[185] similar issues will continue to arise in military death penalty cases.

4. Analysis

a. Overview

The seven military capital cases in which the death sentence was finally reversed on appeal during the study period fall into four categories. The first category is limited to *Dock*, where the ACMR set aside the death sentence because it concluded that Dock's pleas of guilty to both unpremeditated murder and robbery were the functional equivalent of a plea of guilty to the capital offense of felony murder.[186] This violated the UCMJ's prohibition of a guilty plea to a death-eligible offense.[187] The COMA later affirmed the Army court's decision.[188]

The second category of cases in which the death sentence was reversed on direct appeal consists of two cases of instructional error concerning the procedures for voting on the sentence in a capital case. In *United States v. Thomas*,[189] the military judge's sentencing instructions were confusing and internally inconsistent.[190] One portion of the instructions directed the members to "vote on the aggravating circumstances, then you vote on the sentence of death. If it is not by unanimous vote, then you turn to the consideration of the other applicable portions of the sentence worksheet."[191] The CAAF unanimously held that this portion of the instruction, which erroneously conflicted with the proper procedure of voting on the lightest proposed

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[184] *See*, *e.g.*, United States v. Moreno, 63 M.J. 129 (2006); United States v. Oestmann, 61 M.J. 103 (2005); Toohey v. United States, 60 M.J. 100 (2004); Diaz v. Judge Advocate General of the Navy, 59 M.J. 34 (2003).

[185] *See supra* note 176 and accompanying text.

[186] United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988), *aff'd*, 28 M.J. 117 (C.M.A. 1989).

[187] UCMJ art. 45(b) (2005); *see also supra* note 26.

[188] United States v. Dock, 28 M.J. 117 (C.M.A. 1989).

[189] 46 M.J. 311 (1997).

[190] *See* United States v. Thomas, 43 M.J. 550, 582 (N-M. Ct. Crim. App. 1995) (en banc) (quoting military judge's sentencing instructions), *rev'd*, 46 M.J. 311 (1997).

[191] *Id.* Another portion of the sentencing instructions properly told the members to vote on the lightest proposed sentence first. *Id.*

sentence first, rose to the level of plain error.[192] The year after it decided *Thomas*, the CAAF unanimously reversed the death sentence in *Simoy* due to a similar instructional error.[193]

A third category of military death penalty cases reversed on direct appeal consists of cases featuring an inadequate defense. In *Curtis*, the CAAF reversed the death sentence due to ineffective assistance of counsel at the sentencing stage.[194] In *Murphy*, a three to two decision, the CAAF set aside the sentence on ineffective assistance of counsel grounds due in part to the trial defense counsel's failure to develop evidence that Murphy had suffered from severe mental disease and organic brain damage.[195] In *Kreutzer*, the Army Court of Criminal Appeals (ACCA) reversed both the death sentence and the contested findings.[196] A two-judge majority of the panel set aside the contested findings because the military judge had denied a defense request for a mitigation specialist to investigate Kreutzer's background.[197] All three judges agreed that ineffective assistance of counsel required the reversal

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[192] *Thomas*, 46 M.J. at 312-16. *See generally* Lieutenant Colonel Donna M. Wright, *Annual Review of Developments in Instructions—1997*, ARMY LAW., July 1998, at 39, 50.

[193] United States v. Simoy, 50 M.J. 1, 2-3 (1998). While the *Thomas* instruction was internally inconsistent, in *Simoy* the military judge repeatedly instructed the members to vote on a death sentence first, rather than voting on the least severe proposed sentence first, as the law required. *Id*. at 2.

[194] United States v. Curtis, 46 M.J. 129 (1997) (per curiam). *See also* United States v. Curtis, 48 M.J. 331, 331 (1997) (Cox, J., concurring in denial of reconsideration). *See generally* Major Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of* United States v. Curtis, 174 MIL. L. REV. 1 (2002).

[195] United States v. Murphy, 50 M.J. 4, 15-16 (1998). The Court of Appeals for the Armed Forces remanded the case to the Army court to consider whether the ineffective assistance prejudiced Murphy for sentencing purposes only or for both findings and sentencing purposes. *Id*. at 16. The Army court then ordered a hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to determine "[w]hether a different verdict as to findings might reasonably result" in light of the mental disease evidence that was discovered after the trial. United States v. Murphy, 56 M.J. 642, 648 (Army Ct. Crim. App. 2001) (quoting *Murphy*, 50 M.J. at 16). The military judge presiding over the *DuBay* hearing determined that the ineffective assistance of counsel did not affect the findings. Memorandum of Decision, United States v. Murphy, United States Army Trial Judiciary, Fourth Judicial Circuit (17 Oct. 2005) (on file with author), in Record, United States v. Murphy, *appeal redocketed*, No. 8702873 (Army Ct. Crim. App. 2005) (concluding, "A different verdict as to findings would not reasonably result in light of the post-trial evidence."). At the end of the study period, that issue remained pending before the ACCA.

[196] United States v. Kreutzer, 59 M.J. 773, 784 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005).

[197] *Id.* at 775-80.

of Kreutzer's sentence.[198] One judge thought the ineffective assistance of counsel also required reversal of the findings.[199] The CAAF later affirmed the majority's decision.[200]

United States v. Quintanilla[201] represents a final category in which the death sentence was reversed because of the military judge's erroneous application of case law limiting the removal of members from capital cases based on moral or religious qualms about the death penalty.[202]

Aggregating these outcomes reveals that ineffective assistance of counsel was found in 33% (3/9) and instructional error was found in 22% (2/9) of all military death penalty cases that have completed direct appeal. These two types of error are also common in civilian death penalty systems, though it is impossible to determine exactly how common. The *Broken System* reports identify 351 death sentences that were reversed during state post-conviction review in 26 states[203] from 1973 to April 2000.[204] Approximately 33% of those reversals (116/351) were based on ineffective assistance of counsel.[205] Instructional error was the basis for relief in almost another 17% (58/351) of cases reversed at this stage.[206]

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[198] *Id.* at 780-84, 785 (Currie, J., concurring), 801 (Chapman, S.J., concurring in part, dissenting in part). *See generally* Major Robert Wm. Best, *2003 Developments in the Sixth Amendment: Black Cats on Strolls*, ARMY LAW., July 2004, at 55, 74-77.

[199] *Kreutzer*, 59 M.J. at 793-98 (Currie, J., concurring).

[200] United States v. Kreutzer, 61 M.J. 293 (2005).

[201] 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006).

[202] *See* Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. 412, 423 (1985).

[203] Those states are the same as the twenty-eight-state post-conviction study group with the exception of Delaware and Washington, for which the reports' authors could not obtain data concerning causes for post-conviction relief. *See* Liebman, *Broken System II*, *supra* note 3, at C-1. The twenty-eight states in the post-conviction study group are listed at *supra* note 125.

[204] Liebman, *Broken System II*, *supra* note 3, at C-4.

[205] *Id*. The *Broken System* reports' authors were able to identify the basis for state post-conviction relief for 299 of the 351 death sentences that were reversed at this stage. *Id.* Ineffective assistance of counsel was the basis for relief in 39% (116/299) of the cases with a known basis for relief. *Id*.

[206] *Id*. Instructional error was the basis for relief in 19% (58/299) of the cases with a known basis for relief. *Id.*

But the *Broken System* reports do not identify the raw number of civilian cases that became final in those twenty-six states during that time period. Therefore, it is not possible to determine the percentage of all civilian capital cases that resulted in relief on those bases. The *Broken System* data do reveal that the number of cases reversed for ineffective assistance of counsel during state post-conviction review is a mere 4% (116/2,606) of the death penalty cases that became final in those twenty-six states from 1973 through 1995.[207] The same statistic for instructional errors is approximately 2% (58/2,606). But even these numbers do not provide a direct apples-to-apples comparison between the military and civilian systems. Ineffective assistance of counsel claims are typically litigated during post-conviction review in state systems.[208] Some death penalty cases reversed on other bases during direct appeal might have produced viable ineffective assistance claims that never became the subject of post-conviction review.[209] Additionally, some cases were almost certainly reversed on direct appeal due to erroneous instructions. Thus, the true frequency of these two types of error in the civilian death penalty system is not only unknown, but probably unknowable.

What is certain is that the reversible error rate is far higher in capital than non-capital court-martial appeals. Numerous factors no doubt contribute to this phenomenon. Possible explanations include the fact that all capital cases are contested, thus providing more opportunities for reversal than would occur in a guilty plea case. Capital courts-martial also produce disproportionately large records of trial,[210] again reflecting

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[207] This fraction's numerator appears at *Broken System I*, *supra* note 3, at C-4. The denominator was calculated by adding the number of cases in the twenty-six-state group that were reversed on direct appeal, reversed on post-conviction, reversed on federal habeas review, or upheld on federal habeas review. *See Broken System I*, *supra* note 3, at A-13 to A-122. The *Broken System* reports do not identify the number of cases upheld on state post-conviction review, so the only death sentences that the reports definitively indicate were finally upheld are those that remained following federal habeas review.

[208] John F. Fatino, *Ineffective Assistance of Counsel: Identifying the Standards and Litigating the Issues*, 49 S.D. L. REV. 31, 35 (2003) ("[M]ost ineffective assistance of counsel claims are . . . usually resolved in a post-conviction relief action . . . .").

[209] Cases reversed on direct appeal comprise two-thirds (1,764/2,606) of the known final death penalty cases from the twenty-six jurisdictions. *See* Broken System II, *supra* note 3, at C-4. The numerator and denominator for this fraction were calculated by adding the relevant numbers from the *Broken System I* report's "State Report Cards" for each of the twenty-six-state group. *See Broken System I*, *supra* note 3, at A-13 to A-122.

[210] *See, e.g.*, United States v. Quintanilla, 60 M.J. 852, 865 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part*, 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006) ("The record

greater opportunities for error. And both trial and appellate defense counsel litigating capital cases no doubt raise more issues and pursue relief with greater zeal than in non-capital cases.[211] But military death penalty appeals point to two factors that seem particularly salient in explaining the far higher reversal rate in capital than non-capital case. First, trial-level litigators and military judges in capital cases make errors due to their unfamiliarity with death penalty practice. Second, military appellate courts subject capital cases to more exacting scrutiny than non-capital cases, leading judges to find reversible error in some instances where they would affirm if the same issue were to arise in a non-capital context.

b. Trial-Level Counsel's and Military Judges' Unfamiliarity with Death Penalty Procedures

A common thread runs through the seven military cases in which the death sentence was reversed during the study period: the reversal occurred due to the military judge's and/or counsel's apparent unfamiliarity with death penalty practice. For example, apparently neither the military judge nor the counsel in *Thomas* or *Simoy* fully understood the correct instructions for voting on the sentence in a capital case. The hypothesis that unfamiliarity with death penalty practice has contributed to the relatively high reversal rate in military capital cases is consistent with an observation made by a group of military justice experts. The privately-sponsored Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice,[212] chaired by Senior Judge Walter T. Cox III of the CAAF, concluded, "Inadequate counsel is a serious threat to the fairness and legitimacy of capital courts-martial, made worse at court-martial by the fact that so few military lawyers have experience in defending capital cases."[213] The Commission explained, "The paucity of military death penalty referrals, combined

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of trial in this capital case includes 3091 pages and hundreds of prosecution, defense, and appellate exhibits.").

[211] *See id.* (noting that "appellant's brief and assignments of error alone numbers 408 pages").

[212] *See* Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. MICH. ST. U.-DETROIT.C.L. 57, 84-86 (discussing commission background and composition). The Commission, commonly referred to as the "Cox Commission," was sponsored by the National Institute of Military Justice.

[213] *Id.* at 110 (reprinting with commentary the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice § IIIC (May 2001)).

with the diversity of experience that is required of a successful military attorney, leaves the military's legal corps unable to develop the skills and experience necessary to represent both sides properly."[214] Given that judge advocates typically stay in a position for no more than three years,[215] it is unlikely that any participant in a capital court-martial will have experience performing his or her duties in a death penalty case.

c. The Military's "Death Is Different" Jurisprudence

A second factor also appears to contribute to the relatively high reversal rate in military capital cases. Some types of trial error are more likely to result in reversal in capital cases than in non-capital cases.

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[214] *Id.* In an article generally critical of the Cox Commission's report, two Air Force attorneys attempted to rebut this point. They argued:

> [W]hile the courts should be ever vigilant to ensure a fair trial, particularly in a death penalty case, the court has never reversed a military death penalty conviction based on inadequate military counsel. It is vital that counsel be qualified in every criminal case, and we believe that the court is best qualified to examine whether the counsel that are practicing before it are competent. While additional training may be a good idea, neither training nor experience guarantee a counsel will be competent.

Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "The Cox Commission"*, 52 A.F. L. REV. 233, 258-59 (2002). The article failed to note that when it was published, two military death sentences had been set aside due to ineffective assistance of counsel. United States v. Curtis, 46 M.J. 129 (1997); United States v. Murphy, 50 M.J. 4 (1998). In the latter case, the Court of Appeals for the Armed Forces had directed further proceedings to determine whether the ineffectiveness also tainted the findings, *id.* at 16, and the Army court had remanded the case for a *DuBay* hearing to determine the ineffective assistance of counsel's effect on the findings. United States v. Murphy, 56 M.J. 642 (Army Ct. Crim. App. 2001). The *DuBay* hearing ultimately concluded that the ineffective assistance of counsel had not affected the sentence and that ruling remains on appeal. *See supra* note 195. Since that article was published, another military death sentence has been set aside, in part, on ineffective assistance of counsel grounds. United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005).

[215] *See* Major Gretchen A. Jackson, *The Lawyer's Myth: Reviving Ideals in the Legal Profession*, 179 MIL. L. REV. 228, 234 (2004) (book review) ("Military lawyers rotate duty positions every one to three years.").

In its 2005 *Loving v. United States*[216] opinion, the CAAF emphasized that "'Death is different' is a fundamental principle of Eighth Amendment law."[217] The CAAF explained, "This legal maxim reflects the unique severity and irrevocable nature of capital punishment, infuses the legal process with special protections to insure a fair and reliable verdict and capital sentence, and mandates a plenary and meaningful judicial review before the execution of a citizen."[218]

Thomas[219] and *Simoy*[220] demonstrate how this "death is different" principle yields a higher reversal rate in capital than non-capital cases. In both *Thomas* and *Simoy*, despite the absence of defense objection at trial, the CAAF reversed the death sentence because the sentencing instructions did not make clear that the members should vote on the lightest proposed sentence first.[221] But in *United States v. Fisher*[222]—a non-capital case—the COMA concluded that the military judge's failure to instruct the members to vote on the lightest proposed sentence first was erroneous, but did not constitute "plain error justifying reversal in spite of the lack of timely objection."[223] In both *Thomas* and *Simoy*, the Court of Criminal Appeals found error, but relied on *Fisher* in concluding that the instructions did not rise to the level of plain error.[224] But in *Thomas*, the CAAF reversed, concluding that *Fisher* was inapplicable because it was not "a death penalty case."[225] The court also cited the Supreme Court's *Mills v. Maryland*[226] decision for the proposition that heightened procedural reliability is necessary in capital cases.[227] In *Simoy*, the CAAF followed *Thomas* in holding that "[t]he

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[216] 62 M.J. 235 (2005).

[217] *Id.* at 236 (quoting, *inter alia*, Ring v. Arizona, 536 U.S. 584, 605-06 (2002), "[T]here is no doubt that 'death is different.'").

[218] *Id.*

[219] United States v. Thomas, 46 M.J. 311 (1997).

[220] United States v. Simoy, 50 M.J. 1 (1998).

[221] *Thomas*, 46 M.J. at 315; *Simoy*, 50 M.J. at 2-3.

[222] 21 M.J. 327 (C.M.A. 1986).

[223] *Id.* at 329. The COMA nevertheless reversed Fisher's sentence because it gave him the benefit of the case law as it existed at the time of his trial, which treated a military judge's failure to instruct the members to vote on the lightest sentence first as per se reversible. *Id.* (applying, *inter alia*, United States v. Johnson, 40 C.M.R. 148 (C.M.A. 1969)).

[224] United States v. Thomas, 43 M.J. 550, 582-83 (N-M. Ct. Crim. App. 1995) (en banc), *rev'd*, 46 M.J. 311 (1997); United States v. Simoy, 46 M.J. 592, 614 (A.F. Ct. Crim. App. 1996) (en banc), *rev'd*, 50 M.J. 1 (1998).

[225] United States v. Thomas, 46 M.J. 311, 315 (1997).

[226] 486 U.S. 367, 383-84 (1988).

[227] *Thomas*, 46 M.J. at 315.

failure to give the instruction requiring voting on the lightest proposed sentence first is a plain, clear, obvious error that affected the substantial rights of appellant."[228] So, comparable errors produced differing results depending on whether the case was capital or non-capital.

VI. Conclusion

The military justice system retains the death penalty and Congress and the President have periodically expanded its reach. Yet cases in which a convening authority seeks a death sentence are rare. The members actually adjudged a death sentence in less than one-third of that already-small group of cases. Over the last two decades, most of the select few cases that resulted in approved death sentences have been reversed on appeal. The military has not carried out an execution since 1961. And with the inevitability of Article III habeas challenges following any presidential approval of a military death sentence,[229] no military execution is likely to occur for years.

Writing in 1989, Professor Gary D. Solis summed up the military death penalty system with the observation: "The Death Penalty in the Armed Forces: Yes But No."[230] More than two decades after the current death penalty system came into force, this remains a compelling description of capital punishment in the military.

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[228] *Simoy*, 50 M.J. at 2.
[229] *See* Sullivan, *Last Line of Defense*, *supra* note 17, at 7-13.
[230] SOLIS, *supra* note 46, at 7.

OCCUPATION LAW, SOVEREIGNTY, AND POLITICAL TRANSFORMATION: SHOULD THE HAGUE REGULATIONS AND THE FOURTH GENEVA CONVENTION STILL BE CONSIDERED CUSTOMARY INTERNATIONAL LAW?

MAJOR NICHOLAS F. LANCASTER*

I. Introduction

Has customary international occupation law changed as a result of actions taken by the Coalition Provisional Authority (CPA) in Iraq under authority of United Nations (UN) Security Council Resolution 1483?[1] The CPA legislated extensively in the areas of government and economics, using its authority under Resolution 1483.[2] Although justified by the goals expressed by the UN Security Council in Resolution 1483, much of this legislation is inconsistent with existing customary international occupation law as reflected in the Hague Regulations[3] and the Geneva Convention.[4] This article argues that

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[1] S.C. Res. 1483, U.N. SCOR, 57th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003) [hereinafter UNSCR 1483].

[2] *See generally* David J. Scheffer, *Agora (continued): Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003); Michael Ottolenghi, Note: *The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 FORDHAM L. REV. 2177 (2004).

[3] Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV].

[4] Geneva Convention (IV) for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

customary international occupation law has changed as a result of state practice, culminating in the Coalition occupation and administration of Iraq. Customary international law no longer requires adherence to the principle that an occupier is a mere trustee, without authority to transform the occupied state's form of government and economy to reflect democratic values, particularly when the transformative goals are authorized by the UN Security Council.

This article discusses the relevant international agreements and treaties considered to make up the conventional international law of occupation. It then discusses the ways international rules become part of customary law, before citing two examples of occupations since 1949, one where customary international law is thought to apply, and another where the rules were dictated by the UN Security Council. There is a brief discussion of what portions of Hague and Geneva might reflect customary as well as conventional international law on occupations. Lastly, this article argues that customary international law has changed as a result of state practice culminating in the UN sanctioned coalition occupation of Iraq.

II. Background

Before the late nineteenth century, when one country defeated another in battle, the contested territory and its people belonged to the victor.[5] As the concept of state sovereignty emerged in the 1800s, rules developed to govern the victor's behavior upon occupying another's land. The Hague Convention of 1907 is the baseline document codifying customary occupation law.[6] The Fourth Geneva Convention of 1949 supplements the Hague Convention where it pertains to occupation law.[7] The Additional Protocols of 1977 add to the protections for civilian populations contained in the Fourth Geneva Convention.[8] Although the United Nations Charter does not address occupation law, its terms have

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[5] GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 7 (1957) [hereinafter VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY].

[6] Hague IV, *supra* note 3.

[7] GC IV, *supra* note 4, art. 154.

[8] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 16 I.L.M. 1492 [hereinafter AP II].

provided the primary justification for most occupations since its creation in 1945.[9]

A. Hague Regulations of 1907

In 1899 and 1907, two international conferences were held at The Hague for the purpose of creating agreements to prevent wars in the future.[10] The conferences also codified the rules of warfare, in the event that prevention failed.[11] The documents that resulted from these conferences are known as the Hague Conventions and include annexed Regulations respecting the Laws and Customs of War on Land.[12] Convention IV and its annexed Regulations, adopted by the 1907 Convention, are virtually identical to Convention II adopted in 1899.[13] The Hague Regulations codified the core of customary international law respecting armed conflict, and include a section devoted to occupation law entitled: Military Authority Over the Territory of the Hostile State.[14]

The Hague Convention of 1907 reflects its drafters' purpose to maintain state sovereignty in the wake of battlefield defeat. The convention is a product of its times, where states fought mainly limited wars with minimal impact on civilian populations.[15] The idea was that although an army might be defeated in battle, the sovereign still existed and would sue for peace, reaching some negotiated settlement whereby the occupied territory would return to the status quo ante.[16]

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[9] U.N. Charter.

[10] 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 671 (Rudolph Bernhardt ed., 1995) [hereinafter EPIL].

[11] *Id.*

[12] Hague IV, *supra* note 3.

[13] EPIL, *supra* note 10, at 671.

[14] *Id.* at 674.

[15] Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 IDF L. REV. 19, 20 (2003). The most famous expression of this idea was the statement of King William of Prussia on 11 August 1870, "I conduct war with the French soldiers, not with the French citizens." *Id*. at 20. This is also known as the Rousseau-Portales doctrine, according to which "wars were directed against sovereigns and armies, not against subjects and civilians." NISUKE ANDO, SURRENDER, OCCUPATION, AND PRIVATE PROPERTY IN INTERNATIONAL LAW 35 (1991).

[16] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 11 (1993).

This idea of state sovereignty is reflected in Article 43 of the Hague Regulations of 1907:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[17]

The power of the occupant to legislate is clearly restricted by Article 43 to those areas that affect its security. In fact, not only is the occupant's power to legislate restricted, but he is also required to respect the laws already in force in the occupied area, the laws of the rightful sovereign.[18]

Occupation is seen as a temporary condition, where the occupant functions almost like a trustee of the occupied territory and population until the sovereign can return.[19] Article 55 of the Hague Regulations continues the emphasis on fiduciary duties of an occupier, calling the occupier an "administrator and usufructuary" of most public property and requiring the preservation of natural resources.[20] The clear import of these provisions is that the occupier may not change the existing laws in the main to reflect his will, let alone change the form of government in the occupied nation.[21]

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[17] Hague IV, *supra* note 3, art. 43.

[18] *Id.* art. 43.

[19] VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY, *supra* note 5, at 31; BENVENISTI, *supra* note 16, at 6.

[20] Hague IV, *supra* note 3, art 55. The complete Article reads: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Usufruct is defined as "the right of enjoying all the advantages derivable from the use of something that belongs to another, as far as is compatible with the substance of the thing not being destroyed or injured. A usufructuary is a person who has a usufruct property." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998).

[21] COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 303-308 (Jean S. Pictet et al. eds. 1958) [hereinafter GC COMMENTARY]; Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS 104, 113 (1978); ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 5 (1978).

In addition to the two provisions cited above, the Hague Regulations contain rules governing the occupier's use of property[22] and protecting the civilian population from abuse.[23] The occupier may generally seize state property that can be used for military purposes, but may not seize private property, even of a military character, without paying compensation.[24] The occupier may collect the normal taxes due in the occupied territory, but must collect them in the manner provided for by their own law, and use the proceeds for the purpose of governing the area.[25] If the occupier levies additional funds or even services from the population, they must be used only for the needs of the occupying force.[26] Protections for the civilian population include forbidding oaths of allegiance to the occupier,[27] rules for respecting private property and family honor,[28] and a prohibition against pillage.[29]

The Hague Regulations provided a baseline codification of customary international law pertaining to armed conflict. However, they failed to prevent the wide-spread suffering sustained by civilian populations in the first half of the 20th century.

B. Geneva Conventions of 1949

The impetus behind the Fourth Geneva Convention of 1949 was the suffering of civilian populations in World War I (WWI) and World War II (WWII), and the desire to prevent such suffering in future conflicts.[30] The Hague Regulations had proven inadequate to regulate the behavior of states in the conduct of total war.[31] As discussed previously, the Hague Regulations were drafted at a time when war was still considered a discrete event, fought by soldiers, with minimal effect on the civilian population.[32] The advent of the world wars, with widespread use of tactics implicating civilian populations, changed understanding of the concept of war itself, and highlighted the need to protect civilians during

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[22] Hague IV, *supra* note 3, arts. 46, 47, 53, 54, and 56.
[23] *Id.* arts. 45 and 46.
[24] *Id.* arts. 46, 53.
[25] *Id.* art. 48.
[26] *Id.* art. 49.
[27] *Id.* art. 45.
[28] *Id.* art. 46.
[29] *Id.* art. 47.
[30] VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY, *supra* note 5, at 16.
[31] BENVENISTI, *supra* note 16, ch. 4.
[32] *See* discussion *infra* Part II.A. (discussing the Hague Regulations of 1907).

armed conflict.[33] After WWII, the International Committee of the Red Cross called for a conference, held in Geneva from 21 April to 12 August 1949, entitled the Diplomatic Conference for Establishment of International Conventions for the Protection of Victims of War.[34] This conference resulted in the four Geneva Conventions of 1949. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) deals specifically with the protection of civilians in armed conflict. [35]

The Fourth Geneva Convention reflects an emphasis on the civilian population itself, rather than the state.[36] There are few rules granting authority to the occupier, and many provisions enumerating the occupier's obligations to the civilian population. This reflects the overarching purpose of the Fourth Geneva Convention to protect the civilian population from harm during periods of armed conflict and occupation.[37] It also reflects a shift in the way the concept of sovereignty is understood. Instead of sovereignty vested in the government or state, there seems to be an emphasis on sovereignty vested in the population itself. This concept of popular sovereignty, along with the principle of self-determination, had taken center stage in the United Nations Charter, created four years earlier.[38]

One way the Geneva Conventions' drafters tried to protect civilians was to increase the scope of the Conventions to cover more situations and more persons who could be affected by war.[39] Under the Hague Regulations, the rules only applied between states who had signed the Regulations, and even then, only to signatories when all parties to the conflict had signed.[40] The Hague Regulations also do not contain a provision stating when they will apply.[41] The assumption was that the Regulations would apply during wartime, and that wartime would be

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[33] GC COMMENTARY, *supra* note 21, at 3.
[34] VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY, *supra* note 5, at 16.
[35] GC IV, *supra* note 4.
[36] BENVENISTI, *supra* note 16, at 6.
[37] GC COMMENTARY, *supra* note 21, at 3.
[38] U.N. Charter art. 1. Article 1 states in pertinent part, "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.*
[39] GC COMMENTARY, *supra* note 21, at 17-21.
[40] Hague IV, *supra* note 3, art. 2. This is known as a *si omnes*, or "general participation" clause.
[41] GC COMMENTARY, *supra* note 21, at 17.

defined by a declaration of some kind by the parties.[42] Experience subsequent to the Hague Regulations showed that there were many circumstances where hostilities were not preceded by a declaration, and yet there was still a need for protection of civilian populations.[43] This effort to broaden the scope of protections in the law of war is evident in Article 2 common to all four Geneva Conventions of 1949.[44] Common Article 2 says that the Geneva Conventions will apply to all cases of armed conflict between states, even if not declared, and also in all cases of occupation, even where the occupation is unopposed.[45] Common Article 2 also says that the Convention will apply to all signatories, even if there is a party to the conflict that is not a signatory.[46]

The Fourth Geneva Convention contains many provisions concerning food,[47] medical care,[48] and overall treatment of the civilian population.[49] In contrast, there are few provisions related to legislation by the occupant, aside from changes to the penal laws.[50] One explanation for why there is little discussion of the powers of the occupant is that the Fourth Geneva Convention was not intended to replace the Hague Regulations, but rather to supplement its provisions.[51] This is explicit in Article 154 of the Fourth Geneva Convention, which

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[42] *Id.*
[43] *Id.*
[44]

> In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

GC IV, supra note 4, art. 2.
[45] *Id.*
[46] *Id.*
[47] *Id.* art. 55.
[48] *Id.* arts. 55-57.
[49] *Id.* arts. 27, 29, 31, 32.
[50] *Id.* arts. 64-77.
[51] GC COMMENTARY, *supra* note 21, at 274.

says the Convention supplements Sections II (Hostilities) and III (Military Authority over the Territory of the Hostile State) of the Hague Regulations.[52] The general editor of the International Committee of the Red Cross Commentary on the Geneva Conventions of 1949, Jean S. Pictet,[53] explains the relationship between the Hague Regulations and the Fourth Geneva Convention by saying the Fourth Geneva Convention basically "amplifies" the provisions contained in the Hague Regulations.[54]

The Fourth Geneva Convention uses the term "protected person" to describe persons in the occupied territory that do not qualify for treatment under one of the other three Conventions.[55] The Fourth Geneva Convention does not use or define the word civilian.[56] Article 3, common to all four Geneva Conventions, lays out the minimum standard for treatment of all noncombatants.[57] Common Article 3 calls for the

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> In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

GC IV, *supra* note 4, art. 154.

[53] GC COMMENTARY, *supra* note 21, at 1.

[54] *Id*. at 274.

[55] GC IV, *supra* note 4, art. 4.

[56] The word "civilian" is not defined until Article 50 of AP I in 1977. AP I, *supra* note 8, art. 50. Even then, it is defined by exception, as "any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." Basically, a "civilian" is anyone who does not fall into one of the categories loosely defined as "combatants." *See* discussion *infra* Part I.C. (discussing the 1977 Additional Protocols to Geneva Convention of 1949).

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> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

wounded and sick to be collected and cared for,[58] and prohibits violence, murder, torture, hostage taking, humiliating treatment, and executions in the absence of conviction by a regular court.[59]

Part II of the Fourth Convention contains provisions that apply to the entire populations of the nations in conflict, and is concerned mainly with the protection of the wounded, sick, aged, mothers, and children.[60] Part III of the Fourth Convention details protections that apply depending on the nationality of the person and where they are located.[61] Within Part III, Sections I and III apply specifically to occupied territories.[62]

Provisions in Section III list specific obligations of the occupier with regard to public health,[63] religion,[64] children,[65] labor conditions,[66] and relief shipments.[67] There is a provision specifically addressing relief of judges and other public officials,[68] and several provisions devoted to changes the occupier may make in the penal laws in force in the

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> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id. art. 3.

[58] *Id.*

[59] *Id.*

[60] *Id.* pt. II.

[61] *Id.* pt. III.

[62] *Id.* pt. III, sec. III.

[63] *Id.* arts. 55-57.

[64] *Id.* art. 58.

[65] *Id.* art. 50.

[66] *Id.* arts. 51, 52.

[67] *Id.* arts. 59-63.

[68] *Id.* art. 54.

occupied land.[69] Of particular interest is Article 54 devoted to relief of judges and public officials. Article 54 states in part,

> The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience. This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.[70]

This is consistent with Article 43 of the Hague Convention, in cautioning the occupying power that it must preserve the status quo in the occupied territory as much as possible.

Similarly, the Geneva Convention provisions related to the penal laws in force in the occupied territories also focus on preserving the legal system already in place, rather than allowing the occupier to substitute its own system.[71] Article 64 says the penal laws remain in force, and the regular criminal courts still function, subject only to change when necessary for the occupier's security.[72]

Article 64 also contains a paragraph analogous to Article 43 of the Hague Regulations, limiting the occupier's authority to enact legislation in the occupied state. The third paragraph of Article 64 reads:

> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and

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[69] *Id.* arts. 64-77.
[70] *Id.* art. 54.
[71] *Id.* arts. 64-77.
[72] *Id.* art. 64.

> likewise of the establishments and lines of communication used by them.[73]

Any penal laws enacted by the occupier may not apply retroactively.[74] Additionally, imposition of the death penalty is greatly restricted.[75] The death penalty may only be imposed on persons eighteen or older,[76] for espionage,[77] "serious acts of sabotage against the military installations of the Occupying Power or of intentional offenses which have caused the death of one or more persons,"[78] and only if those crimes carried the potential of death prior to the occupation.[79] The occupier must also observe certain criminal due process norms including the rights to present evidence,[80] consult with an attorney,[81] call witnesses,[82] and appeal any sentence.[83] To this end, a sentence of death may not be executed until at least six months after trial.[84]

The Geneva Conventions of 1949 expanded the scope of protections for civilian populations beyond that provided by the Hague Regulations in 1899. In 1977, the Protocols further extended those protections by supplementing the Geneva Conventions, with a focus on protecting the victims of armed conflict.

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[73] *Id.* Pictet says article 64 limits the occupier to legislating in three areas:

> (a) It may promulgate provisions required for the application of the Convention in accordance with the obligations imposed on it by the latter in a number of spheres: child welfare, labour, food, hygiene and public health etc.
> (b) It will have the right to enact provisions necessary to maintain the "orderly government of the territory" in its capacity as the Power responsible for public law and order.
> (c) It is, lastly, authorized to promulgate penal provisions for its own protection.

GC COMMENTARY, *supra* note 21, at 337.
[74] GC IV, *supra* note 4, art. 65.
[75] *Id.* arts. 68, 71, 75.
[76] *Id.* art. 68.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* art. 72.
[81] *Id.*
[82] *Id.*
[83] *Id.* art. 73.
[84] *Id.* art. 75.

C. 1977 Additional Protocols to the Geneva Conventions of 1949

By the 1970's, there was general agreement in the international community on the need for future development of rules on the conduct of combatants and protection of civilian populations from the effects of hostilities.[85] This concern culminated in the Swiss government convening the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. This took place in four sessions between 1974 and 1977.[86] The products of these four sessions are called the Additional Protocols of 8 June, 1977 to the Geneva Conventions of 12 August, 1949 (AP I and AP II).[87]

Protocols I and II go further than the Geneva Conventions in shifting the focus of occupation law from the state to the civilian populations in occupied territory.[88] By 1977, when the Protocols were drafted, political theories for the sovereignty of civilian populations independent of their former state alignments were fully developed.[89] Article 1 of Protocol I indicates that it applies to international armed conflict, including "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . ."[90] National liberation movements and the

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[85] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949, General Introduction (Yves Sandoz, et al. eds. 1987) [hereinafter AP COMMENTARY].

[86] *Id.*

[87] AP I, *supra* note 8; AP II, *supra* note 8.

[88] *Id.*

[89] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970) (codifying the principle of equal rights and self-determination of peoples). *See also* S.C. Res. 2160, U.N. SCOR, 20th Sess., 1482d mtg., U.N. Doc. S/RES/2160 (1966) ("Reaffirming the right of peoples under colonial rule to exercise their right to self-determination and independence and the right of every nation, large or small, to choose freely and without any external interference its political, social and economic system.").

[90]

> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those conventions.
>
> 4. The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of

principle of self-determination enshrined in the United Nations Charter clearly affected the drafters' efforts at constraining potential occupiers.[91]

Seemingly, the concept of sovereignty has shifted from a focus on states and their governments, to the idea of popular sovereignty expressed as the will of people in the exercise of their right of self-determination.[92] Even so, the guiding principle of occupation law remains the "inalienability of sovereignty through the actual or threatened use of force."[93] Whether the focus is on the defeated government, or the population of an occupied territory, current occupation law calls for the occupier to behave as if it has a fiduciary duty with regard to the occupied.[94]

The US has not signed or ratified either Protocol of 1977. However, the United States does consider the majority of their provisions to reflect customary international law.[95] The Protocols, as they pertain to occupation law, supplement the Fourth Geneva Convention of 1949, primarily by defining the term "civilian"[96] and by adding additional protections for civilian populations. Protocol I defines the term "civilian" in the negative, as any person who does not qualify as a combatant.[97] Article 51 explains the general protection from attack

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> International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

AP I, *supra* note 8, art. 1.

[91] AP COMMENTARY, *supra* note 85; Benvenisti, *supra* note 16, at 32-34.

[92] G.A. Res. 2625, *supra* note 89; s*ee also* S.C. Res. 2160, *supra* note 89.

[93] BENVENISTI, *supra* note 16, at 5.

[94] *Id.* at 6; VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY, *supra* note 5, at 31.

[95] *See* Michael J. Matheson, Remarks, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, *in* 2 AM. UNIV. J. INT'L L. & POL'Y 419 (Fall 1987). Michael J. Matheson was the Deputy Legal Advisor, U.S. Department of State at the time he made these remarks at a workshop convened by the American Red Cross and the Washington College of Law in 1987. *Id.*

[96] AP I, *supra* note 8, art. 50.

[97]

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Id. Article 4(A)(1), (2), (3), and (6) of the Third Geneva Convention reads:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 43 of AP I reads:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to

enjoyed by civilians, stating, "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[98] The article goes on to stress the principles of discrimination, distinction, military necessity, and proportionality, when considering a military attack.[99] Article 75 of Protocol I is analogous to Common Article 3 of the Geneva Conventions, setting a baseline for treatment of all persons during conditions of international armed conflict.[100] Protocol II supplements and expands the guarantees of humane treatment expressed in Common Article 3 of the Geneva Conventions.[101]

D. United Nations Charter

Written nearly contemporaneously with the Geneva Conventions, the United Nations Charter[102] does not mention occupation at all. However, it does provide the framework for most of the military interventions since WWII that have resulted in occupation.[103] The overarching purpose of the UN Charter is to ban the use of force except in cases of self-defense and to provide a mechanism for nations to work together in preserving international security.[104] Under the UN Charter, there are only two instances in which nations may resort to the use of force. First, a country may use force in self defense under Article 51 of the Charter.[105] Second, a country may use force when operating under authority of the UN Security Council as expressed in Chapter VII of the Charter.[106] The

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participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

AP I, *supra* note 8, art. 43.
[98] *Id.* art. 51.
[99] *Id.*
[100] *Id.* art. 75; GC IV, *supra* note 4, art. 3.
[101] AP II, *supra* note 8, art. 75; GC IV, *supra* note 4, art. 3.
[102] U.N. Charter.
[103] Ottolenghi, *supra* note 2, at 2177; Adam Roberts, *What Is a Military Occupation?*, 54 BRIT. Y.B. INT'L L. 249 (1985).
[104] U.N. Charter pmbl.
[105] *Id.* art. 51.
[106] *Id.* ch. VII.

Charter also contains a supremacy article that says obligations under the Charter are superior to any other international agreement.[107]

Article 51 of the UN Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[108] This is the justification for the use of force offered by most countries when resorting to military action against another.[109] Self defense under Article 51 was the justification for the US invasion of Afghanistan in 2001.[110]

Other provisions of Chapter VII empower the Security Council to determine when there has been a breach of the peace and decide what action should be taken by the world community as a result.[111] The Security Council may decide on a wide range of options, from mere condemnation, all the way up to the use of military force in attempting to restore peace and security.[112] A Security Council resolution under Chapter VII provided the mandate for the Coalition occupation of Iraq beginning in April 2003.[113]

Article 103 of the UN Charter operates as a supremacy clause, at least with regard to statutory international law.[114] Article 103 reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[115] Though, as stated in Article 103, UN Security Council resolutions take precedence over other international treaties, it is not clear whether such resolutions also trump customary international law.

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[107] *Id.* art. 103.
[108] *Id.* art. 51.
[109] *Id. See generally* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004) (discussing use of force in self-defense, including pre-emptive self-defense, and arguing for a cost-benefit approach focused on the goals of the international system, rather than a strict doctrinal approach based on the UN Charter).
[110] *Letter of 7 October 2001 from the Permanent Representative of the United States of America to the President of the Security Council*, U.N. SCOR, 56th Sess., U.N. Doc. S/2001/946 (2001).
[111] U.N. Charter arts. 39-42.
[112] *Id.* arts. 41, 42.
[113] UNSCR 1483, *supra* note 1.
[114] U.N. Charter art. 103.
[115] *Id.*

E. Customary International Law

There are two basic types of international law, conventional and customary. Conventional international law is that which is contained in various treaties and international agreements.[116] Customary international law, in contrast, comes from the practices of states over time, out of a sense of legal obligation.[117] The sense of legal obligation is known as *opinio juris*.[118] When states conduct themselves consistently over a period of time, the rules that govern their actions can be recognized as customary international law, so long as states follow the rules because they believe they have a legal obligation to do so.[119] If states follow a rule because it is convenient, or simply out of habit, it does not necessarily become customary international law.[120] Rules do not become customary international law until they are followed because states believe they are legally obligated to do so.[121] That being said, states do not have to state publicly that they are following a rule out of legal obligation; the existence of *opinio juris* may be inferred from their actions.[122]

Although there are generally only two types of international law, conventional and customary, there are at least four significant sources of international law:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) [J]udicial decisions and the teachings of the most highly

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[116] GERHARD VON GLAHN, LAW AMONG NATIONS 13 (6th ed., 1992) [hereinafter VON GLAHN, LAW AMONG NATIONS].

[117] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 (1987) [hereinafter RESTATEMENT]. *See generally* Jean-Marie Henckaerts et al., *Introduction* to CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxi-xliv (2005) (State practice includes both physical acts and verbal acts. Verbal acts include military manuals, court decisions, and other manifestations of state positions on rules of international law).

[118] *Id.*

[119] RESTATEMENT, *supra* note 117, § 102.

[120] *Id*.

[121] *Id*.

[122] *Id*.

> qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[123]

Within the category of general principles of law, there are also peremptory norms of general international law, defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[124] These peremptory norms are called *jus cogens*.[125] The importance of rules with the status of *jus cogens* is that they cannot be abrogated by treaty,[126] and states cannot avoid them through persistent objection.[127] The concept of *jus cogens* is generally accepted in the international community; however, there is little agreement on which particular rules have achieved that status.[128] An example of rules that are generally accepted as *jus cogens* are the principles contained in the United Nations Charter that prohibit the use of force except in self-defense.[129]

In many cases, customary international law becomes conventional international law, as states codify their customary behavior in treaties.[130]

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[123] Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945). *See generally* VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 12-24.

[124] Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, 8 I.L.M. 679, May 23, 1969 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

[125] RESTATEMENT, *supra* note 117, at § 102.

[126] Article 64 of The Vienna Convention on the Law of Treaties states: **"**If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Vienna Convention, *supra* note 124, art. 64.

[127] Through persistent objection, a state intentionally violates a purported rule of international law for the purpose of preventing the rule from being recognized as binding customary international law. Although the term persistent objection is not used, the concept is discussed in the Restatement of Foreign Relations as follows: "in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures." RESTATEMENT, *supra* note 117, § 102. A related concept is the idea that in order to change customary international law that has been codified, a state must violate the conventional international law in an attempt to forge a new state practice and *opinio juris*, which over time could ripen into new customary law. *See* Jonathan I. Charney, *May the President Violate Customary International Law?: The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 A.J. INT'L L. 913 (1986).

[128] RESTATEMENT, *supra* note 117, § 102.

[129] *Id*; VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 583.

[130] *Id.* at 13.

In other cases, a few countries sign a treaty, which over time is observed by most other countries, until its provisions become, through force of state practice, customary international law.[131] The Hague Regulations are an example of statutory international law that codified mainly existing customary law.[132] The first three Geneva Conventions also codified mainly existing international law.[133] The Fourth Geneva Convention and the Protocols are examples of statutory international law that contain many provisions which have become customary law over time. [134]

Presumably, if the behavior of nations changes, then customary international law may also change to reflect changing state practice.[135] In the same way, states may repudiate or amend various treaties to change conventional international law.[136] States may change customary international law that has become memorialized in a statute simply by amending the statute, so long as the changes do not impact rules considered *jus cogens*.[137]

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131 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.

132 1 Trial of the Major War Criminals 254 (1947)[Can't access this citation. Citation form looks OK.]; VON GLAHN, *supra* note 116, at 13; Hague IV, *supra* note 3, pmbl.

133 Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 364 (1987).

134 *Id*; *see* Matheson, *supra* note 95.

135 VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 20; H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 132 (1972).

136 VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 13.

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> Customary law and law made by international agreement have equal authority as international law. Unless the parties evince a contrary intention, a rule established by agreement supercedes for them a prior inconsistent rule of customary international law. However, an agreement will not supercede a prior rule of customary law that is a peremptory norm of international law; and an agreement will not supercede customary law if the agreement is invalid because it violates such a peremptory norm.

RESTATEMENT, *supra* note 117, § 102.

F. Occupations since 1949 (Customary Law of Occupation v. UN Security Council Resolutions)

No occupant since 1949 has recognized either Hague or Geneva as explicitly binding under customary international law, although most occupiers have honored at least the fundamental humanitarian provisions relating to care for civilian populations.[138] Most occupiers prefer not to characterize their behavior as classic belligerent occupation both because of the negative connotation of the term, and more importantly, because they do not want to abide by the restraints on their actions inherent in strict compliance with Hague and Geneva.[139]

Occupations since 1949 can be divided into two categories, those that occur under UN mandate, and those outside UN supervision.[140] The best example of the latter is the Israeli occupation of territory captured in the 1967 War. A good example of the former is the UN sanctioned and supervised occupation of East Timor.

1. The Israeli Occupied Territories

The most prominent example of an occupation conducted without UN authorization or participation is the Israeli occupation of the Golan Heights, the West Bank, Gaza, and the Sinai in 1967.[141] The Israeli occupation began immediately following the six day war in June 1967, and continues in the Golan Heights and the West Bank today.[142] The Israeli government has never recognized the *de jure* application of Hague or Geneva,[143] although it has consistently followed most of their provisions on a *de facto* basis.[144]

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138 *See* BENVENISTI, *supra* note 16, chs. 5, 6.

139 *Id.* at 107.

140 BENVENISTI, *supra* note 16, at 107; Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990) [hereinafter Roberts].

141 BENVENISTI, *supra* note 16, at 107; Roberts, *supra* note 140, at 58-60.

142 Roberts, *supra* note 141, at 44. Israel withdrew from the Sinai in 1979, and from Gaza in 2005.

143 BENVENISTI, *supra* note 16, at 109; Roberts, *supra* note 141, at 62.

144 Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 266 (1971). Meir Shamgar served as the Israeli Attorney General and later as the President of the Israeli Supreme Court. *See* Nissim Bar-Yaacov, *The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip*, 24 IS. L. REV. 487-8 (1990).

The Israeli government takes distinct positions regarding Hague and Geneva, respectively, stemming from the status of each as customary international law. The Israeli Supreme Court has stated, "Customary international law is automatically incorporated into Israeli law, and becomes part of it except when it is in direct conflict with enacted Israeli law, in which case, Israeli law takes precedence."[145] This means that, if the Hague Regulations are considered customary international law, the Hague Regulations apply to the territories occupied by Israel after the six day war in 1967 unless in direct conflict with Israeli law. The court also said, however, "Conventional international law does not become part of Israeli law through automatic incorporation, but only if it is adopted or combined with Israeli law by enactment of primary or subsidiary legislation from which it derives its force."[146] Therefore, if Geneva is not considered customary international law, but merely treaty law, and has not been explicitly incorporated into Israeli law, then the Geneva Conventions do not apply to the occupied territories. In any event, the Israeli government has consistently denied the *de jure* application of both Hague and Geneva to the occupied territories, while generally conducting the occupations in accordance with the dictates of Hague and the humanitarian provisions of Geneva on a *de facto* basis.[147]

Israel maintains the Hague Regulations and Geneva Conventions do not apply by law to the West Bank and Gaza because there was no existing sovereign government at the time of the 1967 war.[148] The West Bank was administered by Jordan beginning in 1948, and even purportedly annexed in 1950. Few countries, however, recognized the annexation.[149] Gaza was occupied by Egypt from 1948 until 1967, but Egypt never officially claimed it as part of its territory.[150] The Hague Regulations apply by their own terms only to contracting parties,[151] and since Jordan and Egypt were not recognized as the sovereigns in the West Bank and Gaza, respectively, there could be no contracting parties

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[145] H.C. 69/81, Bassil Abu Aita v. The Regional Commander of Judea and Samaria, 37(2) P.D. 197, 201.

[146] *Id.*

[147] BENVENISTI, *supra* note 16, at 114; Roberts, *supra* note 141, at 62-3; Bar-Yaacov, *supra* note 144, at 485-6.

[148] BENVENISTI, *supra* note 16, at 109; VON GLAHN, *supra* note 116, at 771; Roberts, *supra* note 141, at 64.

[149] BENVENISTI, *supra* note 16, at 108; David John Ball, Note: *Toss the Travaux?: Application of the Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)assessment*, 79 N.Y.U. L. REV. 990, 996 (2004).

[150] BENVENISTI, *supra* note 16, at 108.

[151] Hague IV, *supra* note 4, art. 2.

within the meaning of the Hague Regulations. Similarly, since Article 2 common to the Geneva Conventions says "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance,"[152] the West Bank and Gaza had no sovereigns cognizable as High Contracting Parties under the Conventions.[153] This Israeli interpretation has been criticized as a strained reading of the Conventions,[154] since Common Article 2 also states "the present convention shall apply to all cases of declared war or of any other armed conflict. . . ."[155] Israel's arguments do not apply to the Golan Heights or the Sinai, since Israel has never denied that these were areas belonging to Syria and Egypt before 1967.[156] However, Israel did not recognize in the case of the Sinai, and does not recognize in the case of the Golan Heights, the de jure application of Hague or Geneva.[157]

Although not conceding the *de jure* application of Hague and Geneva, one way in which the Israeli government has conducted the occupations *de facto* in accordance with the Hague Regulations is the maintenance of whatever law existed in the territories at the time of the occupation, subject to security considerations.[158] This means, for example, that even though Israel did not recognize Jordan's claims to the West Bank, Jordanian law applied there so long as not inconsistent with Israeli security.[159]

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[152] GC IV, *supra* note 4, art. 2. See text quoted *supra* note 44.

[153] This is known as the "missing reversioner" argument, i.e., occupation law anticipates that an occupied country will "revert" back to the sovereign when the occupation is over. According to this argument, there was no legitimate sovereign in Gaza or the West Bank before the six day war, since the land was actually seized from Israel in 1948. Therefore, the Geneva Conventions do not apply. Kathleen A. Cavanaugh, *Theoretical and International Framework: Selective Justice: The Case of Israel and the Occupied Territories*, 26 FORDHAM INT'L L.J. 934, 944 (2003). *See also* Y. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

[154] BENVENISTI, *supra* note 16, at 109; Dinstein, *supra* note 21, at 107; Roberts, *supra* note 141, at 66.

[155] GC IV, *supra* note 4, art. 2.

[156] BENVENISTI, *supra* note 16, at 110.

[157] *Id.* at 110; Roberts, *supra* note 141, at 66.

[158] BENVENISTI, *supra* note 16, at 114.

[159] The military commander of the West Bank issued Proclamation No. 2 the day Israel entered the occupied territories. It states:

> The law which existed in the area on the 7th of June, 1967, shall remain in force in so far as there is nothing therein, repugnant to this proclamation, any other proclamation or order which will be enacted by me, and subject to such modifications as may result from the

Another area where the Israeli occupation has arguably been in compliance with Hague Article 43 has been in the economic arena.[160] At the beginning of the occupation, Israel was faced with two choices regarding economic development of the occupied territories. It could either operate them as independent economies, or treat them as part of the Israeli economy as a whole.[161] Treating them independently would likely mean economic stagnation, as there were few resources or engines of economic growth located in the territories, and the overall standard of living was lower than in Israel.[162] Linking the territories to the greater Israeli economy would raise the standard of living and presumably benefit the people living under the occupation,[163]thereby enhancing "public order and safety" in accordance with Hague Article 43. Of course, there were also economic benefits to Israel in taking this approach, namely a source of labor,[164] a market for consumer goods,[165] and later on, a source of tax revenue.[166] At the same time, since the territories were occupied but never annexed, the Israeli government never suffered the burden of caring for the population in the way it had to care for Israeli citizens.[167]

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establishment of the rule of the I.D.F. in the area.

> All powers of government, legislation, appointment, and administration in relation to the area or its inhabitants shall henceforth vest in me alone and shall be exercised by me or by whomsoever shall be appointed by me in that behalf or act on my behalf.

Shamgar, *supra* note 144, at 267.

[160] BENVENISTI, *supra* note 16, at 124.

[161] *Id.* at 141.

[162] *Id.* at 124.

[163] *Id.* at 141.

[164] *Id.* at 127.

[165] *Id.* at 142.

[166] *Id.* at 125.

[167] Ball, *supra* note 149, at 997. If Israel were to annex the occupied territories, then presumably the rights of citizenship would be extended to the inhabitants, including government healthcare and employment benefits. An additional reason Israel would not want to annex the occupied territories is the fact that Israelis would be a minority to Palestinians in the territories. *See id.*

2. East Timor

Indonesia annexed East Timor in 1975 after nearly 400 years of Portuguese rule as a colony.[168] The population did not entirely welcome the annexation, and fighting between Indonesian occupation forces and groups seeking an independent East Timor continued throughout the occupation until 1999.[169] In May 1999, the governments of both Portugal and Indonesia asked the United Nations for assistance in ending the fighting and settling the future governance of the province.[170] The United Nations first conducted a referendum to determine whether the population would prefer independence or autonomy within Indonesia.[171] After autonomy was rejected in favor of independence, pro-Indonesia militia groups initiated a campaign of violence, resulting in several hundred refugees and thousands of civilian deaths.[172] Under significant international pressure, Indonesia consented to the intervention of a UN-authorized multinational force sent to end the violence.[173]

On 15 September 1999, the UN authorized the deployment of a multinational peacekeeping force under Chapter VII to "restore peace and security, protect UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance . . . ."[174]. Roughly a month later, on 25 October 1999, the Security Council passed Resolution 1272, establishing the United Nations Transitional Administration in East Timor (UNTAET) to administer the province during the transition to independence.[175] The resolution also created a special representative vested with the power to "enact new laws and regulations and suspend or repeal existing ones."[176] The first regulation promulgated by UNTAET designated applicable law as "the laws applied in East Timor prior to 25

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[168] United Nations, *East Timor—UNTAET Background*, *at* http://www.un.org/peace/etimor/UntaetB.htm (last visited May 2, 2005) [hereinafter UNTAET Web Site]; Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1102 (2001).

[169] UNTAET Web Site, *supra* note 168; Beauvais, *supra* note 168, at 1102.

[170] S.C. Res. 1236, U.N. SCOR, 53rd Sess., 3998th mtg., U.N. Doc. S/RES/1236 (1999); Beauvais, *supra* note 168, at 1102.

[171] UNTAET Web Site, *supra* note 168.

[172] *Id*; Beauvais, *supra* note 168, at 1102.

[173] UNTAET Web Site, *supra* note 168.

[174] S.C. Res. 1264, U.N. SCOR, 53rd Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999).

[175] S.C. Res. 1272, U.N. SCOR, 53rd Sess., 4057th mtg., U.N. Doc. S/RES/1272 (1999) [hereinafter UNSCR 1272].

[176] *Id*.

October 1999."[177] Presumably this law was chosen in recognition of the fact of twenty-four years of Indonesian occupation immediately preceding the establishment of UNTAET.[178] These laws were to be applied only where they did not conflict with international standards of human rights and where they complied with the goals of the transitional administration as laid out in Resolution 1272.[179] This reliance on existing law is reminiscent of the requirements of Hague Regulation 43, although neither the Hague Regulations nor the Geneva Conventions are mentioned in Resolution 1272.[180]

There are interesting parallels between the UN-sanctioned occupation of East Timor in 1999 and the Coalition occupation of Iraq in 2003. In both cases, the stated objective was the transformation and establishment of representative government.[181] In both Iraq and East Timor, the structures of government had virtually ceased to exist.[182] In East Timor, most government ministries evaporated when the Indonesian military began to pull out right after the independence referendum.[183] In Iraq, the government ceased to function after Baghdad was taken by coalition forces, and was fatally attrited by the de-ba'athification order[184] issued by the CPA, resulting in the ineligibility of most experienced government bureaucrats to remain in their positions.[185]

Another similarity was the UN designation of a Special Representative holding all executive, legislative, and judicial authority as

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[177] United Nations, *Regulation No. 1999/1 On the Authority of the Transitional Administration in East Timor*, 27 Nov. 1999, *available at* http://www.un.org/peace/etimor/untaetR/etreg1.htm.

[178] Beauvais, *supra* note 168, at 1151.

[179] *Id*.

[180] UNSCR 1272, *supra* note 175.

[181] *Id*; UNSCR 1483, *supra* note 1.

[182] "The population that emerged from the conflagration of August, 1999 had a literacy rate of thirty percent and included only about sixty lawyers, thirty-five doctors, and a handful of engineers." Beauvais, *supra* note 168, at 1137. *See also* Trudy Rubin, *Move over, Hawaii—Now We've Got a New State, Named Iraq*, PHIL. INQ., June 1, 2003, at C05.

[183] *See* Beauvais, *supra* note 168, at 1137.

[184] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 1, De-Ba'athification of Iraqi Society*, 16 May 2003, *at* http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf [hereinafter *CPA Ord. 1*].

[185] *See* Peter Slevin, *U.S. Bans More Iraqis From Jobs; Move Called Necessary to Purge Party Members*, WASH. POST, May 17, 2003, at A01.

the Transitional Administrator in East Timor.[186] This pattern was followed by the Coalition in forming the CPA[187] and designating L. Paul Bremer as the Administrator, vested with preeminent authority.[188] Although these parallels existed, there were two primary differences in the two situations. First, UNTAET occupied and administered East Timor at the invitation of Portugal and Indonesia,[189] whereas the Coalition occupied and administered Iraq following invasion.[190] Second, and more germane to this article, the authority for the occupation of East Timor was solely Chapter VII of the UN Charter,[191] and the customary international law of occupation was never mentioned,[192] whereas the resolution authorizing the administration of Iraq explicitly referenced the Hague Regulations and Geneva Conventions.[193]

III. The CPA and the Occupation of Iraq

The United States, Great Britain, and the coalition of the willing, invaded Iraq on 21 March 2003, for the purposes of eliminating weapons of mass destruction (WMD) and liberating the Iraqi people from the vicious regime of Saddam Hussein.[194] By the end of April 2003, Saddam Hussein's government and army had deteriorated to the point where President George W. Bush declared the end of active hostilities on 1 May 2003.[195] The coalition invasion was officially justified by the U.S. as enforcing a series of previous UN resolutions whose terms had never been complied with satisfactorily by Iraq following the first Gulf war in

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[186] UNSCR 1272, *supra* note 175; UNTAET Web Site *supra* note 168.

[187] *Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council*, UN Doc. S/2003/538 (2003) [hereinafter 1483 Letter].

[188] Coalition Provisional Authority, *Coalition Provisional Authority Regulation Number 1*, 16 May 2003, *available at* http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf [hereinafter *CPA Reg. 1*].

[189] UNTAET Web Site, *supra* note 168.

[190] White House, Office of the Press Secretary, *Global Message* (Mar. 21, 2003), *available at* http://www. whitehouse.gov/news/releases/2003/03/20030321.html (announcing the beginning of Operation Iraqi Freedom).

[191] U.N. Charter ch. VII.

[192] UNSCR 1272, *supra* note 175.

[193] UNSCR 1483, *supra* note 1.

[194] President's Radio Address, White House, Office of the Press Secretary, *President Discusses Beginning of Operation Iraqi Freedom* (Mar. 22, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/print/20030322.html.

[195] *President: 'The Battle of Iraq Is One Victory in a War on Terror'*, USA TODAY, May 2, 2003, at 2A.

1991.[196] As soon as coalition troops advanced into Iraq, the international law of occupation applied by its own terms, at least to areas controlled by the coalition.[197] However, the legal framework for the occupation was firmly established by UN Security Council Resolution 1483, adopted on 22 May 2003.[198]

A. United Nations Security Council Resolution 1483

United Nations Security Council Resolution 1483 is the mandate for the coalition occupation of Iraq. The resolution generally tracks previous UN resolutions authorizing transitional administrations.[199] However, it is unusual in specifically calling for the United States and Great Britain to comply with the law of occupation as reflected in Hague and Geneva.[200]

Prior to the adoption of Resolution 1483, the United States and Great Britain circulated a letter styled "Letter from the Permanent Representatives of the UK and US to the UN addressed to the President of the Security Council, dated May 8, 2003."[201] This letter laid out the objectives of the Coalition in Iraq and officially informed the Security Council of the creation of the CPA as the organization responsible "to exercise powers of government temporarily, and, as necessary, to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction."[202] The letter also stated, "The States participating in the Coalition will strictly accept their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq."[203] The letter never uses the word "occupation," nor does it mention the Hague Regulations or the Geneva Conventions.[204] The stated goal of the Coalition was the creation of "an

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[196] *U.S. Cites 1991 U.N. Cease-Fire Resolution as the Legal Basis for Its Invasion*, L.A. TIMES, Mar. 21, 2003, at 18; *see* S.C. Res. 660, U.N. SCOR, 44th Sess., 2932nd mtg., U.N. Doc. S/RES/660 (1990); S.C. Res. 678, U.N. SCOR, 44th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990); S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991); S.C. Res. 1441, U.N. SCOR, 56th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

[197] GC IV, *supra* note 4, art. 2.

[198] UNSCR 1483, *supra* note 1.

[199] *See, e.g.*, UNSCR 1272, *supra* note 175.

[200] UNSCR 1483, *supra* note 1.

[201] 1483 Letter, *supra* note 187.

[202] *Id.*

[203] *Id*.

[204] *Id.*

environment in which the Iraqi people may freely determine their political future."[205] The end of the letter welcomes the appointment of a special coordinator by the UN Secretary General, with responsibility to coordinate the efforts of UN agencies with the CPA.[206]

Resolution 1483 refers explicitly to international law three times in the first two pages of the resolution. First, it takes notice of the letter from the United States and Great Britain and recognizes "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command."[207] Second, under the subheading:

> Acting under Chapter VII of the Charter of the United Nations,
>
> 4. Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;
>
> 5. Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.[208]

This is unusual and unprecedented because previous occupations operated under either customary international occupation law or UN supervision, but not both. For the first time, in Resolution 1483, the UN called specifically for the application of customary international occupation law alongside measures specifically authorized by the Security Council.[209] On the one hand, this inclusion of specific reference to Hague and Geneva is confusing, since the document itself authorizes

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[205] *Id.*
[206] *Id.*
[207] UNSCR 1483, *supra* note 1.
[208] *Id*.
[209] BENVENISTI, *supra* note 15, at 36.

measures that conflict with both the Hague Regulations and the Geneva Conventions.[210] On the other hand, it could be read to mean that the CPA must comply with the strictly humanitarian provisions of Hague and Geneva, those most likely accepted as customary international law, while allowing deviation from those provisions not considered customary, namely those provisions regarding government transformation.

Resolution 1483 begins by "reaffirming the sovereignty and territorial integrity of Iraq,"[211] and "stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources."[212] The resolution then recognizes the status of the United States and Great Britain as occupying powers (the "Authority")[213] and calls on the Secretary General to appoint a UN special representative for Iraq[214] to work with the Authority to assist the people of Iraq.[215] Among the duties UNSCR 1483 assigns to the special representative are "working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq,"[216] and "encouraging international efforts to promote legal and judicial reform."[217] These are clearly not merely restorational goals, but rather, transformational.

Resolution 1483 is not unusual in calling for transformational change in government. Previous resolutions contain similar language.[218] What is unusual is its calling for political transformation and self-

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[210] UNSCR 1483, *supra* note 1; BENVENISTI, *supra* note 15, at 19; Ottolenghi, *supra* note 2, at 2177; Scheffer, *supra* note 2, at 842. *See* Brett H. McGurk, *Essay, Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA J. INT'L L. 451, 460 (2005) (describing UNSCR 1483 as inherently contradictory).

[211] UNSCR 1483, *supra* note 1.

[212] *Id*.

[213] *Id*.

[214] S.C. Res. 1483, U.N. SCOR, 57th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003). Although the special representative, Sergio Vieira de Mello, was in fact appointed, the UN mission in Iraq was devastated and never fully recovered following the bombing of its headquarters building in Baghdad on 19 Aug. 2003. United Nations, *Top UN Envoy Sergio Viera de Mello Killed in Terrorist Blast in Baghdad*, Aug. 19, 2003, *at* http://un.org/av/photo/unhq/demello.htm.

[215] UNSCR 1483, *supra* note 1.

[216] *Id*.

[217] *Id*.

[218] *See, e.g.*, UNSCR 1272, *supra* note 175.

determination while using the language of occupation and urging compliance with the Hague Regulations and Geneva Conventions.

Two other significant provisions in Resolution 1483 provide for the dissolution of the UN Oil for Food program within six months, and note the establishment of the Development Fund for Iraq.[219] The Development Fund for Iraq contained money from seized Iraqi funds[220] and was to be used "in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the Iraqi people."[221]

B. The CPA Orders and Regulations

The CPA was established in May 2003, as the successor to the Office of Reconstruction and Humanitarian Assistance (ORHA), the organization originally charged with the administration of Iraq following the invasion.[222] L. Paul Bremer, former ambassador-at-large for counter-terrorism, was appointed to head the organization, with the title of Administrator of the CPA.[223] The CPA immediately began administering Iraq through the issuance of orders and regulations.[224] Strikingly, although in compliance with the stated goals of UNSCR 1483, many CPA actions contradict provisions of the Hague Regulations and Geneva Conventions.[225] Examples of CPA actions in conflict with Hague and Geneva, further discussed below, include legislation coming into force before publication,[226] restrictions on employment opportunity,[227]

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[219] UNSCR 1483, *supra* note 1.

[220] *Id.* Seized Iraqi funds were Iraqi funds frozen in other countries, including money stashed by Saddam Hussein and his officials in anticipation of the coalition invasion.

[221] *Id.*

[222] L. ELAINE HALCHIN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES, RL 32370, at CRS 1-3 (2004).

[223] Press Release, White House, Office of the Press Secretary, *President Names Envoy to Iraq* (May 6, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html (last visited Mar. 14, 2005).

[224] *See* Coalition Provisional Authority, *CPA Official Documents*, *at* http://www.iraqcoalition.org (last visited Mar. 14, 2005).

[225] Ottolenghi, *supra* note 2, at 2177.

[226] *CPA Reg. 1*, *supra* note 188.

significant economic reform,[228] and fundamental changes in government institutions.[229]

1. Effective Date of Legislation

The CPA issued its first regulation, *Coalition Provisional Authority Regulation Number 1*,[230] (*CPA Reg. 1*) on 16 May 2003. *CPA Reg. 1* lays out the legal authority of the CPA and its administrator, describes the law applicable during the occupation, and explains how the CPA will issue regulations and orders from time to time in carrying out its authority for the administration of Iraq.[231] *Coalition Provisional Authority Reg. 1* begins with the following statement: "Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war, I hereby promulgate the following: . . . ."[232] This opening statement clearly recognizes legal authority coming from both the UN Security Council Resolution and the customary laws of war, although the words "occupation," "Hague," and "Geneva" are notably absent. The first numbered paragraph reads:

> The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and

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[227] *CPA Ord. 1*, *supra* note 184; Coalition Provisional Authority, *Coalition Provisional Authority Order Number 2, Dissolution of Entities*, 23 May 2003, *available at* http://www.iraq.coalition.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_ Annex_A.pdf [hereinafter *CPA Ord. 2*].

[228] *See, e.g.*, Coalition Provisional Authority, *Coalition Provisional Authority Order Number 39, Foreign Investment*, 19 Sept. 2003, *at* http://www.iraqcoalition.org/regulations/20031220_CPAORD_39_Foreign_ Investment_.pdf [hereinafter *CPA Ord. 39*].

[229] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 13, The Central Criminal Court of Iraq (Revised)(Amended)*, 22 Apr. 2004, *at* http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_The_Central_Criminal_Court_of_Iraq_(Revised)_(Amended).pdf [hereinafter *CPA Ord. 13*].

[230] *CPA Reg. 1*, *supra* note 188.

[231] *Id*.

[232] *Id*.

> local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.[233]

This paragraph states the general goals of the CPA, and identifies some level of political and economic transformation as among them. The second numbered paragraph states the legal authority for the CPA, reading: "The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator."[234] Under the heading "The Applicable Law,"[235] *CPA Reg. 1* says:

> Unless suspended or replaced by the CPA or superceded by legislation issued by *democratic institutions* of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA. [236]

This is another example of evidence that the CPA goals are transformational in nature, citing potential legislation by *democratic institutions* of Iraq, which did not exist at the enactment of this regulation.

Coalition Provisional Authority Reg. 1 also contains a provision describing the brief process required for promulgation of CPA orders and regulations.[237] Coalition Provisional Authority orders and regulations

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[233] *Id.*
[234] *Id*.
[235] *Id*.
[236] *Id*. (emphasis added).
[237] *Id*. The complete text of paragraph 2 of section 3 of CPA REG 1 states:

> The promulgation of any CPA Regulation or Order requires the approval or signature of the Administrator. The Regulation or Order shall enter into force as specified therein, shall be promulgated in the relevant languages and shall be disseminated as widely as possible. In the case of divergence, the English text shall prevail.

require only "the approval or signature of the Administrator"[238] to be valid, and enter into force whenever the particular order or regulation says it will.[239] The provision also calls for the documents to be translated into "the relevant languages,"[240] presumably Arabic and Kurdish, and widely disseminated, although the controlling language will remain English. The reference to legislation becoming effective is important because Article 65 of GC IV says: "The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive."[241] Though the use of the word "penal" might lead one to believe that this article only applies to the criminal law, Pictet's commentary makes clear that the intent of the drafters was to prevent the imposition of ex post facto laws by an occupier.[242] In fact, virtually all CPA orders and regulations contain a final section titled "Entry into Force," that says, "This Order shall enter into force on the date of signature."[243] This means that, in almost all cases, CPA orders and regulations were in effect long before they had been translated into Arabic or Kurdish, and certainly before they had been published anywhere other than on the CPA website.[244] Clearly the inhabitants of Iraq were seldom on notice with regard to CPA legislation in a timely fashion.[245]

Id.

[238] *Id*.

[239] *Id*.

[240] *Id*.

[241] GC IV, *supra* note 4, art. 65.

[242] GC COMMENTARY, *supra* note 21, at 339, 341.

[243] *See, e.g.*, *CPA Reg. 1*, *supra* note 188; *CPA Ord. 1*, *supra* note 184.

[244] An early analysis by Amnesty International found long delays between CPA Administrator signature on Orders and their posting in Arabic on the CPA website, one of only two methods of publicizing CPA legislation. The other method was periodic printing in a hardcopy compilation of laws known as the Iraqi Gazette. Examples of long lag time between signature and publication included the following: CPA Order 10, "Management of Detention and Prison Facilities," signed 8 June 2003, posted in Arabic on CPA website on 29 Oct. 2003 (143 days); CPA Order 13, "The Central Criminal Court of Iraq," signed 18 June 2003, posted to the website in Arabic on 2 Sept. 2003 (44 days); CPA Order 15, "Establishment of the Judicial Review Committee," signed 23 June 2003, posted on the website in Arabic on 29 Oct. 2003 (126 days); CPA Regulation 6, "Governing Council of Iraq," signed on 13 July 2003, posted on the CPA website in Arabic on 2 Sept. 2003 (50 days). Amnesty International, *Iraq, Memorandum on Concerns Related to Legislation Introduced by the Coalition Provisional Authority*, 4 Dec. 2003, *available at* http://web.amnesty.org/library/index/ENGMDE141762003.

[245] *See id*.

2. Economic Reforms

Restriction of employment opportunity illustrates another area of conflict between CPA orders and international law. The second paragraph of Article 52, GC IV reads: "All measures aimed at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited."[246] Inarguably, the CPA contributed to unemployment on a massive scale, through the disbanding of the Iraqi Army and other entities of the Iraqi government tainted by misconduct during Saddam Hussein's regime,[247] as well as the effort to remove former members of the Ba'ath Party.[248] The CPA initiative privatizing Iraqi state-owned enterprises also contributed to unemployment, by removing workers from the protection of state employment.[249] Though the stated purpose of these orders was never to induce Iraqi citizens to work for the CPA, the effect was to increase unemployment at a time when the CPA was hiring for Iraqi security forces.[250] Although the CPA orders did not expressly seek an increase in unemployment, the CPA began recruiting heavily for the New Iraqi Army, Police, and other security forces shortly after the orders' implementation.[251] In fact, *CPA Order 2*, "Dissolution of Entities," actually contains a section describing a "New Iraqi Corps" as the first step in building a new army.[252]

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[246] GC IV, *supra* note 4, art. 52.
[247] *CPA Ord. 2*, *supra* note 227.
[248] *CPA Ord. 1*, *supra* note 184.
[249] David Bacon, *The Bush Administration War Against Iraqi Workers and Unions*, L.A. TIMES, Nov. 9, 2003, *available at* http://reclaimdemocracy.org/articles_2003/iraqi_workrs_unions.html.
[250] *CPA Ord. 1*, *supra* note 184; *CPA Ord. 2*, *supra* note 227.
[251] *See Bremer: Stakes 'Extremely High' in Iraq*, WASH. POST, Aug. 27, 2003, at A20; John Daniszewski, *Hundreds Line Up to Join New Iraqi Army*, L.A. TIMES, July 22, 2003, at 11; Eric Schmitt, *U.S. Is Creating an Iraqi Militia to Relieve G.I.'s*, N.Y. TIMES, July 21, 2003, at A5.
[252] Section 5 of *CPA Ord. 2*, entitled "New Iraqi Corps," states:

> The CPA plans to create in the near future a New Iraqi Corps, as the first step in forming a national self-defense capability for a free Iraq. Under civilian control, that Corps will be professional, non-political, militarily effective, and representative of all Iraqis. The CPA will promulgate procedures for participation in the New Iraqi Corps.

CPA Ord. 2, *supra* note 227.

An area that received significant attention in the media during the occupation was privatization of Iraqi state-owned industries, and foreign investment in Iraq.[253] The starting point for any discussion of the legality of CPA legislation is Article 43 of the Hague Regulations, stating the occupier must maintain the laws in force in the occupied territory "unless absolutely prevented from doing so.[254] The Iraqi Constitution as it existed in 2003 prohibited foreigners from owning Iraqi businesses and did not permit private ownership of key industries.[255] All this changed, however, in *CPA Order 39*, signed by the Administrator on 19 September 2003.[256] *Coalition Provisional Authority Order 39* states up front that its provisions are consistent with

> the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect.[257]

The order "replaces all existing foreign investment law,"[258] and allows foreign investors to acquire interests in Iraqi companies to the same extent as Iraqi investors.[259] The only apparent limits are prohibitions on acquiring private real property and "ownership of the natural resources sector involving primary extraction and initial processing."[260] Also, the order does not apply to banking and insurance investments.[261]

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[253] *See* Robert D. Tadlock, *Comment, Occupation Law and Foreign Investiment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations*, 39 U.S.F. L. REV. 227 (Fall 2004)(discussing the limited role for foreign investment in customary occupation law, and arguing for an approach that allows foreign investment in ways and at levels similar to nearby countries with similar social structures).

[254] Hague IV, *supra* note 3, art. 43.

[255] IRAQI CONSTITUTION art. 18 (1990 interim version).

[256] *CPA Ord. 39*, *supra* note 228.

[257] *Report of the Secretary General Pursuant to Paragraph 24 of Security Council Resolution 1483 (2003*), July 17, 2003, S/2003/715 [hereinafter Paragraph 24 Report].

[258] *CPA Ord. 39*, *supra* note 228.

[259] *Id.*

[260] *Id*.

[261] *Id*.

Along with the general limits on occupier legislation contained in Article 43 of the Hague Regulations, Article 55 specifically constrains the occupier with regard to public property. Article 55 of the Hague Regulations states: "The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."[262] Basically, this means the CPA is a mere caretaker of Iraqi public property, and although it may use the products generated by the natural resources in Iraq, the CPA may not sell or otherwise dispose of Iraqi public property.[263] *Coalition Provisional Order 39*, however, clearly evinces an intent to allow Iraqi state-owned enterprises to be sold to private interests.[264]

In addition to legislation affecting unemployment and privatization, the CPA promulgated other rules in the economic arena that represent significant changes in the Iraqi economic system. These rules include *CPA Order 51*, suspending the Iraqi State Company or Water Transportation's monopoly as "the exclusive maritime agent in Iraqi ports,"[265] and several orders affecting the Iraqi system of taxation.[266]

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[262] Hague IV, *supra* note 3 art. 55.

[263] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 402 (18 July 1956) (Change 1, 15 July 1976).

[264] *CPA Ord. 39*, *supra* note 228.

[265] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 51, Suspension of Exclusive Agency Status of Iraqi State Company for Water Transportation*, 14 Jan. 2004, *at* http://www.iraqcoalition.org/regulations/20040114_CPAORD51_Suspension_of_Exclusive_Agency_Status_of_Iraqi_State_Company_for_Water_Transportation.pdf.

[266] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 40, Bank Law with Annex*, 19 Sept. 2003, *available at* http://www,uraqcoalition.org/regulations/20030919_CPAORD40_Bank_Law_with_ Annex.pdf, rescinded by Coalition Provisional Authority, *Coalition Provisional Authority Order Number 94, Banking Law of 2004*, 7 June 2004, *available at* http://www.iraqcoalition.org/regulations/20040607_CPAORD94_Banking_Law_of_2004_with_Annex_A.pdf; Coalition Provisional Authority, *Coalition Provisional Authority Order Number 49, Tax Strategy for 2004 with Annex A and Explanatory Notes*, 19 Feb. 2004, *at* http://www.iraqcoalition.org.regulations/20040220_CPAORD_49_Tax_Strategy_of_2004_with_Annex_and_Ex_Note.pdf, amended by Coalition Provisional Authority, *Coalition Provisional Authority Order 84 Section 3*, 30 April 2004, *available at* http://www.iraqcoalition.org/regulations/20040430_CPAORD_84_Amendments_of_CPA_Order_37_and_49.pdf; Coalition Provisional Authority, *Coalition Provisional Authority Order Number 37, Tax Strategy for 2003*, 19 Sept. 2003, *available at* http://www.iraqcoalition.org/regulations/20040220_CPAORD_

3. Institutional Changes

In general terms, there is a broad prohibition on occupying powers changing the fundamental nature and institutions of government.[267] This prohibition is expressed by Hague Article 43[268] and GC IV Article 47.[269] Despite these prohibitions, the CPA engaged in widespread changes in institutions during the occupation of Iraq.[270] In fact, the primary goal of the occupation was the transformation of Iraq from dictatorship to democracy.[271] Consistent with the change in political system was the plan to transform the economy from a command directed to a free-market system.[272] Some of the economic initiatives pursued by the CPA were discussed earlier. Two examples of how the CPA went about transforming the Iraqi political system are the creation of the Central Criminal Court of Iraq,[273] and the change from centralized government to a more federal system.[274]

The Central Criminal Court of Iraq was created by *CPA Order 13*.[275] This was not a military court created by the CPA as part of its security apparatus, but rather an Iraqi court created by the CPA to try Iraqis accused of serious offenses against Coalition forces and the provisional government, and to serve as a model for the rest of Iraq.[276] Article 64 of the Fourth Geneva Convention says the courts in the occupied state will continue to function, and apply their own law, although the occupier can

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37_Tax_Strategy_for_2003.pdf, amended by Coalition Provisional Authority, *Coalition Provisional Authority Order 84 Section 3*, 30 April 2004, *available at* http://www.iraqcoalition.org/regulations/20040430_CPAORD_84_Amendments_of_CPA_Order_37_and_49.pdf.

[267] GC COMMENTARY, *supra* note 21, at 303-8; Dinstein, *supra* note 21, at 113; GERSON, *supra* note 21, at 5; *see* Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195 (2005) (referring to the limited powers of occupiers as the "conservationist" principle of the customary international law of occupation).

[268] Hague IV, *supra* note 3, art. 43.

[269] GC IV, *supra* note 4, art. 47.

[270] Sir Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L. & COMP. L.Q. 27 (Jan. 2005); Scheffer, *supra* note 2, at 842; Ottolenghi, *supra* note 2, at 2177.

[271] UNSCR 1483, *supra* note 1.

[272] Paragraph 24 Report, *supra* note 156.

[273] *CPA Ord. 13*, *supra* note 229.

[274] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 71, Local Governmental Powers*, 6 Apr. 2004, *available at* http://www.iraqcoaltion.org/regulations/ 20040406_ CPAORD_71_ Local_ Governmental_Powers.pdf [hereinafter *CPA Ord. 71*].

[275] *CPA Ord. 13*, *supra* note 229.

[276] *Id.*

step in where existing law contradicts provisions of the Convention itself.[277] The occupier may also set up its own courts where the local judges have quit for reasons of conscience, although the applicable law remains that of the occupied state.[278] By creating the Central Criminal Court of Iraq, the CPA exceeded the bounds set forth in Geneva Article 64, since the predicates for displacing indigenous courts and law did not exist.[279]

Coalition Provisional Order 71 lays out the powers of the local governments for the first time since the invasion. The document explains

> that the system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates (also known as provinces), municipalities, and local administrations and that each Governorate shall have the right to form a Governorate Council, name a Governor and form municipal and local councils and that regions and governorates shall be organized on the basis of the principle of de-centralization and the devolution of authorities to municipal and local governments.[280]

This is a sweeping change in a country that has only experienced centralized government in the recent past. Under Saddam, virtually all government authority and certainly decision-making power came directly from Baghdad. Therefore, the CPA transformation contradicts the Hague and Geneva prohibitions on changing the fundamental nature and institutions of government.

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[277] GC IV, *supra* note 4, art. 64.
[278] *Id*; *see also* GC COMMENTARY, *supra* note 21, at 335-6.
[279] *But see* John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. & POL'Y 7, 17 (Fall 2004) (arguing "[b]y the end of World War II, state practice had established the authority of an occupying power to implement fundamental changes in the laws and government of an occupied country.").
[280] *CPA Ord. 71*, *supra* note 274.

IV. What Qualifies as Customary International Occupation Law?

Customary international law is determined by looking to multiple sources to determine norms that are respected by most if not all nations.[281] Customary law is found in treaties, court decisions, military manuals, and documents generated by occupation administrations.[282] If something considered customary is abrogated often enough, it can lose its status as customary international law. In fact, while conventional international law can be changed by amending treaties, the only way to change customary international law is to judiciously violate its rules until the rules are considered to have changed.[283]

Though occupation law is generally accepted to consist of the Hague Regulations and Geneva Conventions, some provisions have been followed more than others. A broad recitation of the provisions of Hague and Geneva considered customary could only include those portions actually respected through state practice since the Regulations and Conventions were adopted.[284] The provisions actually honored by states are those generally related to human rights. Provisions seldom if ever honored include those related to transformation of governments and economies of occupied countries.[285]

Complicating the issue of what portions of occupation law should be considered customary is UN guidance in some occupations. Most occupations since 1949 have avoided this issue by being conducted under either customary international law[286] or UN supervision,[287] but not both. The Coalition occupation of Iraq, however, complicates the issue

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[281] VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 17; RESTATEMENT, *supra* note 117, § 102.

[282] *See* Meron, *supra* note 133, at 362; Davis P. Goodman, Note: *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985); RESTATEMENT, *supra* note 117, § 102.

[283] Charney, *supra* note 127, at 914.

[284] Meron, *supra* note 133, at 348; Goodman, *supra* note 282, at 1573.

[285] *See* discussion *infra* Part II. (section on Israeli occupied territories). For an extensive discussion of the tension between the conservationist principle of occupation law and the transformative goals of many occupations since 1945, *see also* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM .J. INT'L L. 580 (2006).

[286] *See* discussion *infra* Part II.F.1 (discussing the the UN supervised occupation of East Timor and the Israeli occupied territories).

[287] *See* discussion *infra* Part II.F.2 (pertaining to the UN supervised occupation of East Timor).

because the UN authorized the occupation and set the transformational goals to be achieved, yet also cited contradictory, customary law of occupation as applicable.[288] Therefore, this is an appropriate time to recognize that portions of the Hague Regulations and Fourth Geneva Convention are no longer reflective of customary international law.

Not all provisions of the Hague and Geneva Conventions should be considered customary international law, in the wake of nearly fifty years of being "honored mainly in the breach,"[289] capped by the Coalition occupation of Iraq in 2003. The provisions aimed mainly at the humanitarian concerns of the civilian population should still be considered valid expressions of conventional and customary international law. However, provisions dealing more specifically with the economic and political conditions of the occupied population, striving to maintain the status quo ante, have never been fully honored, and should not be considered customary international law.

Current occupation practice, evidenced by the recent experience of the CPA in Iraq, governed by both customary international law and Security Council Resolution 1483, allows for much wider scope of legislation than permitted by the language of the Hague Regulations and Fourth Geneva Convention. Article 43 of the Hague Regulations, calling for maintenance of the status quo ante, only binds states to the extent that changes in the law have a negative effect on civilian populations.[290] Similarly, Article 64 of the Fourth Geneva Convention, limiting the legislative authority of an occupier, constrains the occupier only in legislation detrimental to the occupied population.[291] Current occupation practice indicates that provisions of the Hague Regulations and Fourth Geneva Convention restricting the authority of an occupier to legislate in the economic and political arenas, while still valid as conventional international law, should no longer be considered reflective of customary international law.

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[288] UNSCR 1483, *supra* note 1.
[289] BENVENISTI, *supra* note 16, at 34.
[290] Hague IV, *supra* note 3, art. 43.
[291] GC IV, *supra* note 4, art. 64.

V. Conclusion

Customary international occupation law has changed as a result of state practice, culminating in the Coalition occupation and administration of Iraq. Customary international law should no longer reflect adherence to the principle that an occupier is a mere trustee, without authority to transform the occupied state's form of government and economy to reflect democratic values, particularly when the transformative goals are authorized by the UN Security Council.

THE RULE OF LAW: A PRIMER AND A PROPOSAL

CAPTAIN DAN E. STIGALL*

I. Introduction

Since the attacks of 11 September 2001 and the realization that weakened states and dictatorships serve as potential sources of terrorist violence and other threats to national security, U.S. foreign policy has shifted to incorporate state-building as a means to build democracy and eliminate potential threats.[1] A key focus of this new strategy is the development of the rule of law abroad.[2]

Today in Iraq, according to the Department of State Office of the Inspector General, there are at least nineteen entities engaged in what have been termed "rule-of-law activities."[3] In discussing such activities,

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1 *See* Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INTL L. & POL'Y 389 (2004) (noting, "Since September 11, American policy at home and abroad has centered on engineering transitions from political contexts that spawn hatred and violence to those that promote peace and the rule of law.").

2 *See* President George W. Bush, State of the Union Address, 31 Jan. 2006, *available at* http://www.cspan.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2006.

> Our offensive against terror involves more than military action. Ultimately, the only way to defeat the terrorists is to defeat their dark vision of hatred and fear by offering the hopeful alternative of political freedom and peaceful change. So the United States of America supports democratic reform across the broader Middle East. Elections are vital, but they are only the beginning. Raising up a democracy requires the rule of law, and protection of minorities, and strong, accountable institutions that last longer than a single vote.

Id.

3 *See* Testimony of Howard J. Krongard, Inspector General, U.S. Department of State and Broadcasting Board of Governors, October 18, 2005, *available at* http://oig.state.gov/documents/organization/55371.pdf [hereinafter Krongard Testimony].

the report of the Inspector General notes that there is no commonly agreed upon definition for the rule of law.[4] In fact, a solid definition of the rule of law remains elusive for practitioners and academics alike. As one scholar noted, "Invocations of the Rule of Law are sufficiently meaningful to deserve attention, but today are typically too vague and conclusory to dispel lingering puzzlement."[5]

In spite of the confusion as to its meaning, the use of the phrase "rule of law" has been on the increase in recent years. Professor Brian Tamanaha, a scholar on the subject, has noted that the rule of law stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement on precisely what it means.[6] International actors seeking to implement the rule of law in other countries, however, must have a solid definition and established criteria by which to assess to their progress, or lack thereof, in this endeavor. Such a definition and criteria must be capable of objective analysis and must also be functional in a variety of legal and cultural settings.

This article addresses the various definitions and conceptualizations of the rule of law as articulated by legal scholars and rule of law practitioners. The article goes on to discuss the rule of law as defined by government entities engaged in activities involving the rule of law, thereby demonstrating dissonance in opinion as to what the rule of law actually means. Finally, the article proposes a framework for a single, uniform definition of the rule of law, one which can be used by a variety of governmental actors engaged in rule of law development in a variety of countries with varying legal systems.

> OIG was aware of some 19 entities including U.S. Government agencies, NGO's, and private contractors, as well as foreign countries and multinational organizations, that were contributing in one form or another to rule-of-law activities in Iraq. We set out to create an inventory of such activities, to identify overlaps and duplication, and to find gaps that might exist.

Id.

[4] *Id.*

[5] Richard H. Fallon, Jr., *The "Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 56 (1997).

[6] *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW 5 (2004).

II. Defining the Rule of Law

Before one can effectively implement the rule of law, it is logical to first ascertain what the term means. There is no adequate method of measuring its growth or discerning its presence without defining what it is. However, such a task is deceptively complex. The burgeoning literature on this topic reveals a plurality of competing definitions. As a result, any discussion about the meaning of the phrase reveals the great difficulty that exists in concisely revealing the true nature of this important idea.

Professor John V. Orth, when discussing the origins of the rule of law, noted that "[A]lthough the general idea of a rule-based state is as old as the Romans, the specific phrase 'the Rule of Law' was first popularized only in the last half of the nineteenth century by [an Oxford academic named] A.V. Dicey."[7] Dicey declared that two features characterized the political institutions of England: the supremacy of the central government, and what he called "the Rule of Law."[8] Dicey viewed the rule of law as consisting of three principal ideas: (1) no one can be punished or assessed damages for conduct not definitely forbidden by law; (2) all legal rights and liabilities are determined by the ordinary court system; and (3) all individual rights are derived from the ordinary law of the land rather than a written constitution. In that regard, Dicey considered the English Constitution to be the product of courts rather than the source of the courts' jurisdiction.[9]

Since Dicey's initial discussion of the concept, legal scholars have expounded on the idea and various conceptions or definitions of the rule of law have been formulated. In theoretical terms, scholars maintain a formalist view and a substantive view of the rule of law. The formalist definition is procedural in nature, viewing the rule of law as a situation in which a government acts in accordance with predetermined rules or laws.[10] The focus of the formalist conception of the rule of law is on the form and source of laws and the state's conformance therewith. The

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[7] John V. Orth, *Exporting the Rule of Law*, 24 N.C.J. INT'L L. & COM. REG. 71, 72 (1998).
[8] *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179-201 (7th ed. 1908).
[9] *Id.*
[10] *See* TAMANAHA, *supra* note 6, at 97 ("When rules exist and are honored by the legal system, formal legality operates.").

substance of those laws is of secondary (if any) concern.[11] Therefore, from a purely formalist perspective, it is incorrect to conflate democracy or any substantive human right with the rule of law. The rule of law exists when laws are in place and governments obey them.

Scholars in this school of thought have noted that certain elements must exist within the legal system of any government in order for the rule of law to exist. Laws must be prospective, general, clear, public, and relatively stable. Laws must not require the impossible and there must be consistency between the existing rules and the actual conduct of governmental actors. Likewise, the government must have an independent judiciary, open and fair hearings without bias, and review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law.[12]

The formalist definition of the rule of law meets the most basic understanding of the modern view of the concept: the state is "subject to a cordon of constraints" that is embodied in the law.[13] Although this basic tenet is not argued by those holding more substantive conceptualizations of the rule of law, the purely formalistic view is

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[11] *Id.* at 93 (quoting Joseph Raz, *The Rule of Law and its Virtue*, 93 L.Q. REV. 195, 201 (1977)).

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of more enlightened Western democracies. . . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.

Id.

[12] *Id.* (discussing the writings of Fuller, Hayek, Raz, and Unger). *See* LON L. FULLER, THE MORALITY OF LAW ch.2 (New Haven: Yale Univ. Press) (2d rev. ed., 1969). *See also* Joseph Raz, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW 212-213 (Oxford: Clarendon Press 1979); *see also* F. HAYEK, 3 LAW, LEGALISM, AND LIBERTY 41-46 (Chicago: Univ. of Chicago Press 1979); s*ee also* ROBERTO M. UNGER, LAW IN MODERN SOCIETY (New York: Free Press 1976).

[13] *See* MARTIN LOUGHLIN, SWORD AND SCALES, AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS 3 (2000) ("For implicit in the global success of capitalist liberal democracy is the recognition that politics is subject to a cordon of constraints. To invoke a well-used shorthand, the conduct of politics must be subject to the "rule of law.").

criticized for being morally neutral or so devoid of substance that is always in danger of collapsing into tyranny.[14]

Substantive definitions of the rule of law, on the other hand, begin from the same premise as the formalist view, that the government must abide by its rules, but also incorporate certain substantive requirements such as human rights or democratic principles.[15] Tamanaha notes that the Declaration of the 1990 Conference on Security and Cooperation in Europe, which had representatives from many Western European countries as well as the United States, expressly stated:

> [T]he rule of law does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based upon the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expressions. . . . [D]emocracy is an inherent element in the rule of law.[16]

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[14] *See* TAMANAHA, *supra* note 6, at 96. The author wrote:

> The emptiness of formal legality, to make a broader point, runs contrary to the long tradition of the rule of law, the historical inspiration of which has been the restraint of tyranny by the sovereign. Such restraint went beyond the idea that the government must enact and abide by laws that take on the proper form of rules, to include the understanding that there were certain things the government or sovereign could not do. The limits imposed by law were substantive, based on natural law, shared customs, Christian morality, or the good of the community. Formal legality discards this orientation. Consistent with formal legality, the government can do as it wishes, so long as it is able to pursue those desires in terms consistent with (general, clear, certain, and public) legal rules declared in advance. If the government is moved to do something not legally permitted, it must simply change the law first, making sure to meet the requirements of the legal form.

Id.

[15] *Id.* at 102 ("All substantive versions of the rule of law incorporate the elements of the formal rule of law, then go further, adding on various content specifications. The most common substantive version includes individual rights within the rule of law.").

[16] *Id.* at 111.

From a practice-based perspective, definitions can be divided into "ends based" and "institutional" definitions of the rule of law.[17] Ends-based definitions of the rule of law focus on the desired results of the rule of law and measure success accordingly. Rachel Kleinfeld, co-director of the Truman National Security Project, lists those desired results under the rubrics of Government Bound by Law; Equality Before the Law; Law and Order; Predictable, Efficient Justice; and Lack of State Violation of Human Rights.[18]

The perceived advantage of defining the rule of law by its ends is a greater focus on the attainment of certain societal goals—an emphasis of the ends over the means. However, a focus on the desired ends to the neglect of the institutions can pose practical problems as, for the most part, the ends sought by rule of law reform can only be attained through building effective institutions. Adopting a definition of the rule of law which is too rigorously "ends-based" is akin to planning a journey to Paris without focusing on the plane tickets. If one wants to arrive at the destination, one must first find the proper vehicle to get there.

Further, international actors must be careful when incorporating into their definitions of the rule of law such nebulous concepts as "human rights." There is existing disagreement on which human rights are universal and as to what constitutes a human right.[19] Even if a certain

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[17] *See* RACHEL KLEINFELD, COMPETING DEFINITIONS OF THE RULE OF LAW, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 33-34 (2006). Kleinfeld stated:

> Thus, there are two very different ways of defining the rule of law that are being discussed in parallel conversations. The first style or definition enumerates the goods that the rule of law brings to society. A society with the rule of law is a society that instantiates these goods or ends, such as law and order, a government bound by law, and human rights. The ends are the reason we value the rule of law and are what most people mentally measure when determining the degree to which a country has the rule of law. Another type of definition describes the institutions a society must have to be considered to possess the rule of law. Such a society would have certain institutional attributes such as an efficient and trained judiciary, a noncorrupt police force, and published, publicly known laws.

Id.

[18] *Id.* at 36-44.

[19] *See* Erik Roxstrom, Mark Gibney, & Terje Einarsen, *The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection*, 23 B.U. INT'L L.J. 55 (2005) ("The idea of human rights is extremely abstract and leaves

right is agreed to be a universal human good, it must be remembered that cultural, ethnic, and legal differences in various countries can impact the way in which such a right is accepted and interpreted.[20] Accordingly, attention should be paid to how such terms are used, how they are incorporated into any operational definition of the rule of law, and how such ideas can be practically implemented across a broad range of legal systems. In this regard, it should be emphasized that, based on the nature of the work, the majority of operations involving rule of law development will take place in the Middle East and elsewhere—places that do not necessarily share the same intellectual history or cultural mores as Western countries.

In contrast to the ends-based definition of the rule of law, the institutional approach focuses on the governmental institutions which a society must possess to obtain the rule of law. Generally, these institutions are broadly categorized as law, a judiciary, and a force

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plenty of room for good faith disagreements about what might be considered to be a human right and what a specific human right means in certain contexts.").

[20] *See* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 A.J.I.L. 38 (2003). Carozza states:

> Any statement of a human right when abstractly proposed can be said to be fundamental and universal to the extent that it expresses part of the requirements of justice and human dignity for every human being, that is, to the extent that it expresses in the language of rights some aspect of the common good. In that case, it is "fundamental" in the sense that it is *necessary* to the realization of human dignity and the common good, and it is "universal" because it is necessary to the realization of human dignity and the common good in *every* society. Butt cannot be supposed that the accidents of culture, language, history, institutional and political circumstance, economic organization, and the myriad other differences that separate any one society from another across time and space are irrelevant to putting even fundamental and universal principles into practice. Even if an abstract notion like a "human right" can reasonably be said to be necessary to the realization of the common good in all societies, the specification of that concept of "right" will depend on varying conceptions of who the holders of the right and the correlative duty are, or the conditions under which the right claim is lost or waived, and so on. Thus, even when a right can properly be termed fundamental and universal, it may still, and probably will, differ in its instantiation in positive law in a given context.

Id.

capable of enforcing laws.[21] However, the institutional approach recognizes that there is an archipelago of supporting institutions that are necessary for the proper functioning of the basic three and which must share the focus of development.[22] For instance, Kleinfeld notes:

> Laws are supported by institutions ranging from legislatures to land cadastres and notary publics. The judiciary is reliant on magistrates' schools, law schools, bar associations, clerks and administrative workers, and other supporting groups. Police require prisons, intelligence services, bail systems, and cooperative agreements with border guards and other law enforcement bodies, among other institutions. As new supporting institutions are discovered and deemed to be essential, they are added to the list of areas in need of reform."[23]

The advantage of conceptualizing the rule of law as institutional in nature is the concreteness of the object to be built, measured, or reformed. It is easier to gauge the functioning of a court or a police force than it is to measure the progress of a society in achieving potentially abstract social ends such as equality before the law. Further, achieving such social goals can take far longer than institutional reform. However, the danger of such a view is to lose focus altogether of the desired results the rule of law is supposed to attain—viewing the institutions as their own ends. Such a narrow focus can be counterproductive and can even undermine the rule of law. Though institutions are critical to the successful implementation of the rule of law, in the end it is not institutions that achieve the rule of law, but the use thereof.

III. The United States: Three Definitions

As the Department of State Office of the Inspector General has noted, the United States has yet to adopt a definition of the rule of law.[24]

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[21] *Id.* at 47 (noting that this tripartite formulation dates back to the writing of John Locke).

[22] *Id.* at 48.

[23] *See* RACHEL KLEINFELD BELTON, COMPETING DEFINITIONS OF THE RULE OF LAW: IMPLICATIONS FOR PRACTITIONERS (Carnegie Endowment 2005), *available at* http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf.

[24] *See* Krongard Testimony, *supra* note 3. Krongard stated:

However, there are numerous government entities that focus on the work of rule of law and rule of law reform. Each entity defines the rule of law differently, depending on the entity's focus.

The United States Institute of Peace (USIP), a nonpartisan institution funded by Congress, stated in a Special Report on the rule of law in Iraq that the rule of law means not only the provision of effective police, courts, and prisons, but also the concept of addressing human rights violations and crimes committed during and prior to the war.[25] Based upon this view, USIP noted that establishing the rule of law in Iraq required a two-track process: (1) administering justice for past atrocities and ridding the Iraqi government of those implicated in the abuses of the regime, and (2) rebuilding the justice system to establish law and order and protect the rights of all Iraqis.[26]

> While there is no commonly agreed upon definition for the rule of law, we take it to mean a broad spectrum of activities including a constitution, legislation, a court system and courthouses, a judiciary, police, lawyers and legal assistance, due process procedures, prisons, a commercial code, and anticorruption activities.

Id.

[25] *See* UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO. 104, ESTABLISHING THE RULE OF LAW IN IRAQ (Apr. 2003), *available at* http://www.usip.org/pubs/specialreports/sr104.html. The report states:

> For Ashdown, "rule of law" meant the provision of effective police, courts, and prisons. Beyond these immediate core elements, establishing the rule of law in post-conflict societies also involves dealing with human rights violations and crimes committed during and prior to the war. The relatively rapid arrest, trial, and punishment of regime officials and military officers who have committed major abuses are important to achieving a sense of justice. It is also important to remove fear from the society and to deter individuals from seeking revenge. In addition, there is a long-term need for a mechanism or forum that allows people who have suffered to describe their experiences publicly, assign blame, and have their statements recorded as part of the formal history of the conflict.

Id.

[26] *Id.*

A review of the Special Report makes it clear that, for USIP, the rule of law means the existence of functioning institutions, such as a judiciary and a police force that are capable of maintaining law and order.[27] In providing security, stability, and personal safety, the government should also provide assurance that transparent law enforcement and judicial processes provide the same protections and penalties for all citizens.[28] Therefore, the USIP view of the rule of law is one that is mainly institutional in nature. It focuses on criminal law apparatus of the state, but with an additional focus on the safeguarding of human rights and an emphasis on transitional justice.

The United States Army Peacekeeping and Stability Operations Institute (PKSOI), an organization that exists under the rubric of the U.S. Army War College, held a Rule of Law Conference in 2004 in which the rule of law was defined by the following statement:

> The rule of law in the context of peace operations incorporates international and municipal legal obligations and standards applicable to all parties involved in the peace process. As a principle it includes the application of the Charter of the United Nations, international humanitarian law, human rights law, military law, criminal law and procedure, and constitutional law. It also incorporates principles that govern civil and criminal accountability for management and conduct of peace operations (peacekeepers). It also allows for follow up mechanisms to ensure that complaints made against peacekeepers are investigated, and where necessary, appropriate enforcement action is taken. The rule of law includes standards by which national institutions of the host country may be held

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[27] *Id.* (noting as we have learned from previous peace operations, the most important objective in the initial phase of the post-conflict period is to establish the rule of law. In his pre-departure press conference on 17 December 2000, Bernard Kouchner, the senior UN official in Kosovo, said the "lesson of Kosovo" was that "peacekeeping missions need to arrive with a law-and-order kit made up of trained police, judges, and prosecutors and a set of draconian security laws. This is the only way to stop criminal behavior from flourishing in a post-war vacuum of authority" (citation ommitted). Such a judicial package must be supported by effective military forces that can quickly subdue armed opposition, disarm opposing forces, perform basic constabulary tasks, and ensure that civilian law enforcement officers and administrative officials can perform their functions in an atmosphere of relative security.).

[28] *Id.*

> accountable for their failure to comply with universal legal principles and rules. The rule of law is also the framework that governs the relationship between intervening forces and the local community; and the basis upon which the local population may be held accountable for their actions prior to, and following, the intervention.[29]

Therefore, for PKSOI, the rule of law is mainly a substantive concept, focusing on the contents of the legal rules and specifying which substantive elements the target legal system must possess in order for the rule of law to exist. The PKSOI definition also emphasizes the accountability of government actors, but does so by viewing accountability as a substantive requirement rather than by focusing on the institutions that would enforce accountability. It is also worth noting that the PKSOI definition holds the host country accountable for failure to comply with "universal legal principles and rules" while the adherence to domestic legislation finds no mention.

The Inspector General for the United States State Department has expressed another view.

> While there is no commonly agreed upon definition for the rule of law, we take it to mean a broad spectrum of activities including a constitution, legislation, a court system and courthouses, a judiciary, police, lawyers and legal assistance, due process procedures, prisons, a commercial code, and anticorruption activities. To successfully implement an emerging rule of law, these activities must proceed somewhat sequentially and not randomly.[30]

Thus, at least one element of the State Department has espoused a heavily institutional conceptualization of the rule of law, focusing on judicial apparatus with an additional focus on a commercial code and anticorruption activities. However, it should be noted that the definition, as articulated by the Inspector General, almost conflates legal

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[29] *See* UNITED STATES ARMY PEACEKEEPING AND STABILITY OPERATIONS INSTITUTE, RULE OF LAW CONFERENCE REPORT (June 2004), *available at* http://www.carlisle.army.mil/usacs1publications/webruleoflaw.pdf.

[30] *Id.*

reconstruction with rule of law development—focusing on the rebuilding of the legal apparatus without mention of the creation of a government that remains subordinate to a cordon of rules and legal constraints.

IV. A Proposed Operational Definition

The problems with the definitions of the rule of law are manifold. However, a key problem is that they tend to incorporate notions and ideas that, while perhaps desirable, are not necessarily critical to the rule of law. As noted above, sometimes the phrase is used to mean legal reconstruction—an endeavor that often assists in developing the rule of law, but which is conceptually different. The result is a definitional drift that serves to efface the central meaning of the rule of law, lending to it a certain nebulousness, and complicating matters for those seeking to develop it.

An operational definition of the rule of law must be one that is capable of enactment and measurement. Those seeking to effect its implementation must have defined criteria that can be used to assess the progress or regression of the rule of law. However, the operational definition of the rule of law must also be one that is capable of export—not containing unrealistic substantive requirements that do not comport with the target nation's legal system.[31]

The need for an exportable definition of the rule of law requires that those seeking to develop it adopt a more formalist definition. This is because one of the keys to success in implementing any kind of rule of law program is to foster "local ownership" of laws and legal institutions.[32] When laws and institutions are transplanted into (or grafted onto) the legal system of a target nation without proper consideration for the organic legal culture or native laws, legal reforms can lack legitimacy and the rule of law can then be undermined.[33]

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[31] *See* Orth, *supra* note 7, at 82 ("Encouraging the development of local legal culture is more important in the long run than improving foreign observation. Legal culture is not so readily exportable as scientific culture, in which the medium is the universal language of mathematics and experiments are reproducible abroad. Law is inevitably more local.").

[32] *See* WADE CHANNELL, LESSONS NOT LEARNED ABOUT LEGAL REFORM IN PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 137-41 (2006).

[33] *Id.* at 139.

Definitions of the rule of law that rigidly demand substantive requirements cannot be applied to a broad class of countries. Rather, substantive requirements for each country should be determined based upon a detailed study of that country's legal system and an individual analysis that takes into consideration particular legal histories, needs, demands, circumstances. Otherwise, local populations will resist or ignore the legal regime imposed in the name of rule of law reform.[34] Such resistance is inimical to the rule of law.

The International Commission of Jurists posited an interesting formalist definition of the rule of law, which defined it as,

> The principles, institution and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries in the world, often themselves having varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.[35]

This definition is helpful because it allows for flexibility with regard to legal cultures and diverse legal structures. Further, it emphasizes the principal aim of the rule of law, which is to protect the individual from arbitrary government. However, the definition is problematic in that it is too vague and lacks criteria by which the rule of law can be assessed.

To alleviate this deficiency, therefore, international actors seeking to implement the rule of law in failed states should look to the scholarship

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> The "hasty transplant syndrome" is a critical problem in legal reform assistance. It involves using foreign laws as a model for a new country, without sufficient translation and adaptation of the laws into the local legal culture. In some egregious cases, reformers simply translate a law from one language into another, change references to the country through search-and-replace commands, and then have the law passed by a compliant local legislature. The result is generally an ill-fitting law that does not "take" in its new environment as evidenced by inadequate implementation.

Id.

[34] *Id.*

[35] *See* INTERNATIONAL COMMISSION OF JURISTS, THE DYNAMIC ASPECTS OF THE RULE OF LAW IN THE MODERN AGE, REPORT ON THE PROCEEDINGS OF THE SOUTH-EAST AND PACIFIC CONFERENCE OF JURISTS, BAGKOK, THAILAND 17 (Feb. 15-19, 1965).

regarding the formalist view of the rule of law. In that regard, there are nine principal elements that comprise this concept: laws must be prospective, general, clear, public, and relatively stable. Laws must not require the impossible and there must be consistency between the rules of the actual conduct of legal actors. To support and maintain these fundamental elements of the rule of law, the government must have an independent judiciary, open and fair hearings without bias, systematic review of legislative and administrative officials, and limitations on the discretion of state actors.[36] These basic requirements ensure that the government remains subordinate to a system of rules and, importantly, are relatively capable of objective assessment. Thus, a proposed operational definition of the rule of law would entail the concept as articulated by the International Commission of Jurists and incorporate the following criteria:

1. General laws: In order for the rule of law to prevail in any given government, laws should be drafted in such a way that they apply to the population as a whole rather than to a specific person or a particular party.[37] Those seeking to measure the generality of legislation can do so by observation and analysis of the legislation in force. If the legislation is written so as to apply to a broad class of crimes or situations, then it will meet the basic standard of generality. If the legislation is written so as to apply to an individual case, then the legislation fails the test of generality.

2. Clear laws: An equally important feature of a legal system is clarity. Clarity in legislation is capable of measurement by observation and analysis of enacted or proposed laws. If the legislation is sufficiently clear that its plain meaning may be determined by its language, then it meets the basic standard of clarity. If the legislation is so oracular or confusing that it cannot be understood – that the citizenry cannot

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[36] *Id.*

[37] *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS ch. 3 (1764).

> The sovereign, as the representative of society, may only frame laws in general terms which are binding on all members. He may not rule on whether an individual violated the social pact, because that would divide the nation into two parts: one, represented by the sovereign, who asserts the violation of the contract, and the other, represented by the accused, who denies it..).

Id.

understand what rights they are entitled or what conduct is prohibited – then it fails the test of clarity.[38]

3. Public laws: The question of whether or not laws are public can be assessed by looking to see if information regarding proposed or enacted legislation is being disseminated to the general population. If the public is being informed of what laws are being enacted, informed of the substance of those laws, and told how those laws will impact their lives, then laws are sufficiently public. If laws are being enacted in secret or if the public is not informed of what laws are being proposed or enacted, then the laws are not sufficiently public.[39] It is for this reason that commentators since the Enlightenment have endorsed printed publications of laws such as Codes, etc.[40]

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[38] *Id.* ch. 5.

> If interpretation of the laws is an evil, it is obvious that the obscurity which makes interpretation necessary is another. And it is the greatest of evils if the laws be written in a language which is not understood by the people and which makes them dependant upon a few individuals because they cannot judge for themselves what will become of their freedom or their life and limbs, hindered by a language which turns a solemn and public book into what is almost a private and family affair. . . . The more people understand the sacred code of laws and get used to handling it, the fewer will be the crimes, for there is no doubt that ignorance and uncertainty of punishment opens the way to the eloquence of the emotions.).

Id.

[39] *Id.*

> Once consequence of the foregoing thoughts is that, without the written word, a society will never arrive at a fixed form of government, in which power derives from all members and not just from a few, and in which laws are unalterable except by the general will, are not corrupted as they make their way through the throng of private interests.

Id.

[40] *Id.* (noting "Thus we see how useful the printing press is, which makes the general public, and not just a few individuals, the repository of the holy laws. And we see how it drives out the shady propensity to cabal and intrigue, which vanishes when confronted with the enlightenment and knowledge that its followers ostensibly despise but really fear.").

4. Stable laws: The stability of the laws is equally susceptible of objective evaluation. If a society's laws are sufficiently stable that the citizenry can consistently know their rights and limitations, then the rule of law can exist. However, if laws are in such constant tumult that the population cannot reasonably be expected to know what today's legal regime entails, then the basic test of stability fails. This stability must exist not only in legislative enactments of law, but in judicial interpretation.[41] Achievement of such legal stability serves the desired end of predictable, efficient justice.

5. Reasonable laws: Whether or not the law demands the impossible is another aspect which is capable of objective evaluation by analysis of legislative texts. If the law places upon the citizenry obligations or expectations with which they can not reasonably be expected to comply, then the law's demands are unreasonable and there can be no rule of law.[42]

6. Governmental conformity to law: Additionally, there must be consistency between the rules of the actual conduct of legal actors. Such consistency may be evaluated by effective monitoring of judges, prosecutors, and law enforcement agents to ensure that their decisions and conduct are in line with enacted law as well as prescribed rules and regulations. When judges, without a solid legal rationale, rule contrary to legislation, then the rule of law disintegrates into disorganized legal chaos.[43] Likewise, when law enforcement agents disregard legal rules,

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[41] *Id.* ch. 4.

> In this way, citizens can acquire that sense of security which is just, because it is the reason men join together in society, and which is useful, because it allows them to evaluate exactly the drawbacks of wrongdoing. It is also the case that they will acquire a spirit of independence, but not the kind that will lead them to shake off the laws or defy the supreme magistrates, but the kind that will allow them to stand up to those who have dared to sully the name of virtue by describing with that name their weakness in giving in to their self-interested and capricious opinions.

Id.

[42] *See* CHARLES DICKENS, OLIVER TWIST 489 (1838) ("If the law supposes that," said Mr. Bumble, . . the law is a ass—a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is that his eye may be opened by experience—by experience.").

[43] *See* BECCARIA, *supra* note 37, ch. 4.

standards of behavior, and limits on their authority to act, then the rule of law does not exist.

7. Independent judiciary: In order to maintain and support a legal system that enshrines the rule of law, certain institutional aspects must also exist, principally an independent judiciary. When judges attain full independence from other branches of government, then the judiciary serves as a check against illegal and *ultra vires* conduct by the government. It ensures that no other part of the developing government disregards the law. As Orth noted, "The goal must be the creation of a strong local legal culture that supports and encourages judicial independence. To paraphrase Madison, the judges' ambition must be made to counteract the corrupt, selfish, and short-sighted ambition of other government officials. The successful export of the Rule of Law means the end of the need for threats and blandishments; once fully functional, the Rule of Law is self-perpetuating and self-policing."[44]

8. Open and fair hearings: Just as the judiciary must be independent, it must also have open and fair hearings without that are without bias. This transparency feature of the judiciary serves to ensure that it remains independent and capable of monitoring and assessment. When judicial proceedings are closed behind doors of secrecy, then there is no way for the citizenry (or the international community) to ensure that the law is being upheld or applied fairly.[45] Transparency also serves to

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> When a fixed code of laws, which must be followed to the letter, leaves the judge no role other than that of enquiring into citizens' actions and judging whether they conform or not to the written law, and when the standards of just and unjust, which ought to guide the actions of the ignorant citizen as much as those of the philosopher are not a matter of debate but of fact, then the subjects are not exposed to the petty tyrannies which are the crueler the smaller the distance between him who inflicts and him who suffers.).

Id.

[44] *See* Orth, *supra* note 7, at 82.

[45] *See* BECCARIA, *supra* note 37, ch. 4.

> Verdicts and the proof of guilt should be public, so that opinion, which is perhaps the only cement holding society together, can restrain the use of force and the influence of the passions, as so that the people shall say that they are not slaves but are protected, which is a sentiment to inspire courage and as valuable as a tax to a sovereign who knows his true interests.

remind judges that they are subject to monitoring and assessment.[46] It also grants a certain power to the public, who may observe and analyze the fairness and legitimacy of the proceedings.[47] The transparency or "openness" of the judiciary, like the existence of bias in a court's rulings, is capable of measurement through simple observation of judicial proceedings. Fostering an open and bias-free judiciary also serves the desired end of achieving equality before the law.

9. Limitations on state actors: It is also key that there be defined limitations on the discretion of state actors and review of legislative and administrative officials so that when governmental actors step outside that cordon of legal constraints, their action can be corrected and, if necessary, the offending actor may be disciplined. Without such a mechanism, a legal system would be hard pressed to ensure that the law remains preeminent. The presence or absence of such rules is capable of objective assessment by a simple review of what legal safeguards are in place and how they are enforced. When these limitations are enshrined in a legal system, it serves the desired end of attaining a government which is bound by law.

The advantage of adopting such a modified formalist definition is that it allows for the flexibility to accommodate different legal systems in areas which are culturally, ethnically, and legally diverse. However, while maintaining that legal flexibility, it would incorporate nine formal factors that must exist (and which are capable of objective evaluation) in any system where the rule of law is to prevail. Although it does not contain substantive elements, international actors would still be free to push for the enactment of such measures where appropriate and practical. However, in determining whether or not the rule of law exists in any particular polity, it is best not to confuse the core meaning of the concept with other aspirations.

Id.

[46] *See* Orth, *supra* note 7, at 81 ("Legal officials must be encouraged to make their decision process as transparent as possible. The judges must know someone is watching, but the scrutiny must be principled and fair. Decisions must be examined with respect to consistency with pre-existing law, adequacy of the factual record, and correct application of the law to the facts. The judicial decision-maker must expect criticism for mistakes, but also praise for correct and heroic decisions. Critics must operate within a professional culture that values and supports honest opinions, even (or especially) those with which they disagree.").

[47] *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 195-228 (1977) (noting that the public's ability to observe served not only to exercise power over those observed, but those doing the observing).

V. Conclusion

The rule of law is, at its core, a simple concept. As it has ascended in importance, it has, however, become the victim of a certain definitional drift. Redefined multiple times for a multitude of purposes, it is often articulated as a concept which contains elements that have nothing to do with a government's conformance with the law or the ability of the law to serve as a restraint on the actions of the state. However, in spite of the extant definitional fog, international actors seeking to develop the rule of law in failed states must view the concept with clarity and establish a workable definition and normative criteria which can be used to assess progress or regression. In that regard, the definition of the rule of law posited by the International Commission of Jurists, supplemented by the nine criteria derived from formalist scholarship, provides a flexible and measurable definition that is unencumbered by substantive requirements. Such a definition is capable of objective assessment and is flexible enough to be applicable in a variety of differing legal cultures.

The rule of law should not be confused with legal reconstruction or human rights. Its definition should not be warped so that it is conflated with a certain set of familiar substantive requirements, no matter how worthy or needed those substantive requirements might be. This is not to say that such substantive laws should never be introduced into failed or failing states. As it is determined that certain substantive laws and rights are appropriate or desired, international actors or the local populace may strive for their enactment, but to require certain substantive elements for all polities in all circumstances is to lose sight of the world's legal and cultural diversity.

The core concept of the rule of law does not implicate substantive requirements, but refers to that situation in which the state is subject to a cordon of constraint that is embodied in the law—a condition of legal preeminence that serves to curb government action and abuse. International actors seeking to implement the rule of law must understand it as a concept separate from other related concepts and must settle on a workable, exportable definition that contains measurable criteria and focuses on the basic precepts of the idea, unadulterated by substantive elements that may not necessarily apply in all circumstances.

To paraphrase Shakespeare, the rule of law is not the rule of law when it is mingled with regards that stand aloof from the entire point.[48]

[48] WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 1; *see also* Van Horn v. Van Horn, 393 F. Supp. 2d 730 (N.D. Iowa 2005) (noting, "King Lear recounts the events surrounding the aging King Lear's decision to divvy up his kingdom among his three daughters, Cordelia, Regan and Goneril. Looking for his progeny to bask him in love, Lear decides he will bequeath the greatest riches upon whichever daughter makes the most sycophantic incantation of devotion and adoration. When his favorite daughter, Cordelia, fails to be sufficiently obsequious in the eye of the King, he disowns her. The King immediately realizes he has made a mistake of grave proportions as Regan and Goneril proceed to undermine the scant authority the King retained. Unable to deal with the betrayal, King Lear goes insane. Much treachery, stabbing, poisoning, and hanging ensue, and the quartet ends up dead by the closing act." Cordelia's response to Lear's inquiry in the opening scene demonstrates that a concept must be viewed in its purity and cannot be adulterated by other unrelated though desirable elements, lest tragedy befall.).

COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ[1]

REVIEWED BY MAJOR DANIEL J. SENNOTT[2]

> *A journey through the war's hidden history demonstrates why American and allied forces are still at risk in a war the president declared all but won on May 1, 2003.*[3]

I. Introduction

Through primary-source documents and contemporaneous interviews, Michael Gordon and General (GEN) (Retired) Bernard Trainor provide a thought-provoking look into one of the most contentious and defining events of our time: the war in Iraq. The authors' main thesis, notably that "[t]here is a direct link between the way the Iraq war was planned and the bitter insurgency the American-led coalition subsequently confronted,"[4] is developed through a detailed look at the "foreign policy strategy, generalship, and fighting" of this polarizing conflict.[5] But the authors go beyond the oft-repeated mantras of the war's many critics, providing an interesting study of the background to the conflict, the personalities behind the plan, and even a lesson in Army values.

As fascinating as it is, however, *Cobra II* does possess a significant flaw. Although the authors promise from the outset a "contemporary history of the entire conflict with all of its complexity,"[6] by the epilogue, the reader is left wondering if history, like revenge, is a dish best served cold.[7] The authors have endeavored to write a definitive history of the

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[1] MICHAEL R. GORDON & BERNARD E. TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ (2006).

[2] U.S. Army. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] GORDON & TRAINOR, *supra* note 1, at xxxii.

[4] *Id.* at 498.

[5] *Id.* at xxxi.

[6] *Id*.

[7] Although the original source of this phrase is unclear, some attribute it to Pierre Choderlos de LaClos, who wrote it in his book *Les Liasons Dangeruses* in 1782. *See* The Phrase Finder, Revenge is a Dish Best Served Cold, http://www.phrases.org.uk/bulletin_board/9/messages/813.html (last visited Apr. 9, 2007).

war before it has ended, an account so close in time to the actual events that the authors are unable to draw on much of the newly-emerging information available on the conflict.[8] In addition, the authors' version of history is decidedly one-sided and limited. This is due in large part to their sources: Soldiers who were interviewed immediately after their return from the war, while their prejudices were still on the surface. Finally, the book is tainted by the authors' own biases. Gordon, who was an embedded reporter with the 3rd Infantry Division during the war, tends to favor certain units and Soldiers over others.

This review provides an overview of the book, then analyzes some of the lessons that can be drawn from the stories recited in it, and finally identifies some of the flaws contained in the book. While *Cobra II* provides a previously unpublished glimpse into the preparation for the war in Iraq, as this review will point out, it is not a definitive history. What the authors do provide, however, is an edgy snapshot of the conflict through the eyes of those who fought it.

II. Transformation: The "Official Ideology"

The authors use the negotiations and debates surrounding the plan to liberate Iraq, code-named *Cobra II*, as a showcase for the various characters involved in that plan. Namely, the authors describe GEN Tommy Franks, commander of the U.S. Army Central Command (CENTCOM), as the aggressive but anti-intellectual general who oversaw the war. Lieutenant General (LTG) David McKiernan, the Coalition Forces Land Component Commander during the war, is the "taciturn and unflappable"[9] officer who was responsible for coordinating the highly successful push to Baghdad. These two officers are pitted against an enemy force controlled by Saddam Hussein, a paranoid

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[8] The book was written without the benefit of two important documents relating to pre-war intelligence. Both of these reports are definitive resources on the intelligence community's actions prior to the war. *See* SELECT COMMITTEE ON INTELLIGENCE, 109TH CONG., REPORT ON POSTWAR FINDINGS ABOUT IRAQ'S WMD PROGRAMS AND LINKS TO TERRORISM AND HOW THEY COMPARE WITH PREWAR ASSESSMENTS (2006), *available at* http://intelligence.senate.gov/phaseiiaccuracy.pdf [hereinafter POSTWAR FINDINGS]; SELECT COMMITTEE ON INTELLIGENCE, 109TH CONG., REPORT ON THE USE BY THE INTELLIGENCE COMMUNITY OF INFORMATION PROVIDED BY THE IRAQI NATIONAL CONGRESS, (2006), *available at* http://intelligence.senate.gov/phaseiiinc.pdf.

[9] GORDON & TRAINOR, *supra* note 1, at 75.

dictator who was out of touch with the reality of his inevitable defeat.[10] And finally, looming over the entire cast of characters is then-Defense Secretary Donald Rumsfeld. He is portrayed as an authoritarian who is determined to transform the cumbersome "legacy"[11] military created during the Cold War into a "leaner, more lethal force."[12] Eager to prove that the transformation was viable, Secretary Rumsfeld used the operations in Afghanistan and Iraq as the test bed for what became his "official ideology."[13]

The authors take issue with Secretary Rumsfeld's ideology of "transformation," arguing that the seeds of the insurgency were sown in the initial days of the war when U.S. forces, operating with limited resources, bypassed several key cities on their way to Baghdad. In their effort to conduct the war "on the cheap," the administration jettisoned the Powell doctrine of "overwhelming force" in favor of a smaller "transformation" force with a goal of flexibility and maneuverability.[14] But, in their effort to make the Army more flexible, the Department of Defense (DOD) actually eliminated many of the resources that allow a force to quickly react to an ever-changing enemy. This shortfall in resources, combined with intelligence failures at all levels,[15] made for significant challenges. Although conventional wisdom and U.S. intelligence suggested that forces would meet with minimal resistance in Southern Iraq, the Marines and Army experienced protracted battles in the southern cities of Samawah and Nasiriyah.[16] This intelligence failure

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[10] *See, e.g.*, *id.* at 121. The authors rely heavily on a then-classified report by Joint Forces Command that used interviews of captured Iraqi officials to reconstruct the Iraqi war planning process. This report was subsequently released by the Joint Forces Command on 24 March 2006. KEVIN M. WOODS ET AL., U.S. JOINT FORCES COMMAND, IRAQI PERSPECTIVES PROJECT: A VIEW OF OPERATION IRAQI FREEDOM FROM SADDAM'S SENIOR LEADERSHIP (2006), *available at* http://www.jfcom.mil/newslink/storyarchive/2006/ipp.pdf. *See* Kevin Woods, et al., *Saddam's Delusions: The View from the Inside*, FOREIGN AFFAIRS, May-June 2006, at 2 (providing a fascinating discussion of the findings of the report).

[11] GORDON & TRAINOR, *supra* note 1, at 8.

[12] *Id.* at 3.

[13] *Id.* at 8.

[14] *See, e.g.*, *id.*

[15] *See, e.g.*, GORDON & TRAINOR, *supra* note 1, at 203 ("In the wake of the CIA's poor showing in the opening days of the war, Army and Marine field commanders' faith in the agency was shaken."). *See Postwar Findings*, *supra* note 7 (providing a more complete discussion of the CIA pre-war intelligence failures).

[16] GORDON & TRAINOR, *supra* note 1, at 216, 255. A captured Iraqi officer revealed during interrogation that "his men had been apprehensive about facing U.S. forces, but when they ambushed the wayward 507th [Maintenance] Company, they thought they had

soon led to a leadership failure, as the DOD was unable to adapt to the changing battlefield. For instance, after Baghdad fell earlier than anticipated, many believed that an additional U.S. Army division "would have assisted greatly with the initial occupation."[17] Instead, the United States had insufficient troops to provide security and basic services, thus exposing a "chink in the victor's armor" that could be exploited by insurgents.[18] Had Secretary Rumsfeld adhered to the Powell doctrine, the authors argue, the insurgents may never have been able to gain a foothold.

III. Application to Current Issues

Aside from the evident application to the ongoing battle in Iraq, *Cobra II* highlights other contemporary issues that continue to be a source of debate among the military. The authors tackle a recurring problem in time of war: how much civilian involvement is too much? As one officer explained, the military often prefers limited civilian involvement: "give the military the task, give the military what you would like to see them do, and then let them come up with [the solution]."[19] But Secretary Rumsfeld openly quarreled with what he coined "the Pentagon establishment," reportedly joking that "the Army's problems could be solved by lining up fifty of its generals in the Pentagon and gunning them down."[20] In a less extreme way, he does address this perceived problem by cutting the Joint Chiefs of Staff out of the war-planning process and working directly with the like-minded combatant commander, GEN Franks.[21] The authors argue that the Secretary's unrelenting micro-management of the war, along with his refusal to heed advice on increased troop requirements, caused the United States' woeful unpreparedness to fight a post-war insurgency. For his part, GEN Franks would not challenge the troop reductions because of his desire to please the Secretary and his desire to replicate

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won the first round in the American attempt to take their city and were encouraged to keep up their resistance." *Id*. at 254. Iraqi forces attacked the 507th and captured Private First Class Jessica Lynch and several others. *Id.* at 240.

[17] *Id.* at 496.

[18] *Id.* at 506.

[19] *Id.* at 4.

[20] *Id.* at 8. *But cf.* Andrew Bacevich et al., *Rummy and His Generals*, ARMED FORCES J., June 2006, at 36 (arguing that the tension between civil and military authorities has existed for many years, and is not necessarily attributable to Secretary Rumsfeld).

[21] *Id*. at 5.

the highly successful combat operations in Afghanistan.[22] As a result, the final operations plan left ground commanders with 140,000 Soldiers—230,000 less than the original plan.[23]

Although their criticism may be justified, the authors fail to acknowledge the necessary role of politics in war. As counterinsurgency expert David Galula points out, "no operation can be strictly military or political, if only because they each have psychological effects that alter the over-all situation for better or for worse."[24] To successfully fight the enemy, the political power must be heavily involved in planning all aspects of the war, particularly the post-war phase. Although many now argue the current insurgency should be fought by the military without political interference, such bifurcation misses the essence of counterinsurgency warfare. In fact, "the armed forces are but one of the many instruments of the counterinsurgent, and what is better than the political power to harness the nonmilitary instrument, to see that appropriations come at the right time to consolidate the military work, that political and social reforms follow through?"[25] As a result, the political power must play the lead role in war making, while simultaneously respecting the expertise of the military in planning war.

As the nation debates whether or not it is appropriate for retired and active duty officers to criticize their leadership, *Cobra II* also illustrates the importance of the Army value of personal courage: demonstrating the moral courage to do the right thing.[26] The book is replete with senior officers, both retired and active duty, who are now willing to offer their condemnation of the war plan. However, many of these officers had the opportunity to lodge their objections or address the deficiencies in the plan as it was being developed, but opted not to do so. First, LTG Greg Newbold, the Chief Operations Officer for the Joint Chiefs of Staff, recounted how during one planning session with Secretary Rumsfeld, the Secretary was frustrated with the large number of troops proposed for the operation. Lieutenant General Newbold later recalled that his "regret is that at the time I did not say, 'Mr. Secretary, if you try to put a number on a mission like this you may cause enormous mistakes,' . . . I was the

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[22] *See*, *e.g.*, *id.* at 29.
[23] *Id.* at 28, 168.
[24] DAVID GALULA, COUNTERINSURGENCY WARFARE THEORY AND PRACTICE 88 (Hailer Pub. 2005) (1964).
[25] *Id.* at 89.
[26] Corps of Discovery, United States Army, The Seven Army Values, http://www.army.mil/cmh-pg/LC/The%20Mission/the_seven_army_values.htm (last visited Apr. 9, 2007).

junior military guy in the room, but I regret not saying it."[27] Lieutenant General Newbold's disappointment with his failure to address a fatal flaw in the plan illustrates the importance of consistently showing the moral courage to voice one's concerns.[28]

In addition, GEN Zinni, the predecessor to GEN Franks at CENTCOM, recalled that OPLAN 1003-98, the initial plan for a potential invasion of Iraq, was created and refined throughout Zinni's tenure as CENTCOM commander from 1997-2000. According to the authors, however, it was clear even then that "[t]here was a gaping hole in the occupation annex of the plan."[29] General Zinni directed a war game to test the overall plan but failed to refine the post-war phase. In *Cobra II*, GEN Zinni attributed the failure to Franks, his subordinate at the time. "If I had to point to one person who was deeply involved in 1003-98 it was Tommy Franks."[30] However, in his own book, *The Battle for Peace*,[31] GEN Zinni portrayed the original plan as complete, and blames Secretary Rumsfeld for changing it at the last minute. He states, "I knew that plan and the ten years of planning and assessment that had gone into it . . . . It not only took into account defeating Iraq's military forces, it took into account the aftermath."[32] Regardless of which version is accurate, it is clear that the post-war phase was a major weakness of the plan from its infancy. Lieutenant General Newbold's failure to express his misgivings on the war plan and GEN Zinni's failure to insist on a workable post-war plan demonstrate the decision-making difficulties encountered by even the highest levels of military leadership. These difficulties, however, reinforce the need for leaders at all levels to demonstrate the personal courage to disagree with their superiors and correct faulty assumptions as they are identified.

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[27] GORDON & TRAINOR, *supra* note 1, at 4. Newbold eventually retired and was one of six generals to call for Rumsfeld's resignation. *See* Lieutenant General Greg Newbold (Ret.), *Why Iraq Was a Mistake; A Military Insider Sounds Off Against the War and the "Zealots" Who Pushed It*, TIME, Apr. 17, 2006, at 42.

[28] As one author points out, "[t]he military leader who does not hesitate to say, 'I've heard what you said, Mr. President, and I must say I don't agree without you at all' while standing in the Oval Office exemplifies . . . professionalism . . . . Where such frank advice is given, whether welcome or not, military professionalism is at its height." James H. Baker, *A Normative Code for the Long War*, JOINT FORCES Q., 1st Quarter 2007, at 69, 71.

[29] *Id.*

[30] *Id.*

[31] GENERAL TONY ZINNI & TONY KOLTZ, THE BATTLE FOR PEACE (2006).

[32] *Id.* at 27.

IV. The Weaknesses of *Cobra II*

The major flaw of *Cobra II* is that instead of a "contemporary history of the entire conflict,"[33] the book is actually a rather biased account, a flaw which acts to limit the scope of the work. First, the authors interviewed many of the characters immediately after the battles, when their accounts were colored by personality conflicts, grudges, and, in some cases, embarrassment. Rather than offering these recollections as one view of the war, the authors offer them as the basis for sweeping generalizations. For instance, the authors argue that a series of poor decisions, including rotating out experienced units immediately after major combat operations, led to the insurgency. As evidence, they rely on statements made by Major General (MG) Buff Blount, the Commander of 3rd Infantry Division. Major General Blount recalled that after the occupation of Baghdad, he asked LTG Sanchez, the senior commander in Iraq, for permission to stay in Iraq to exploit "the inroads his soldiers had made with the Iraqi population . . . . "[34] His request was denied. In retrospect, MG Blount felt that "[f]or a period of time we were perceived as and acted like liberators, but as more and more combat troops came, there was a shift to an occupation or fortress mentality."[35] Blount, along with other commanders of the initial ground force, felt that new leadership and units flowing in after the main attack were not well-suited to the mission.

Major General Blount's pride in his unit is not surprising given their exceptional work during major combat operations. However, his view is not without bias. In fact, in records relegated to *Cobra II*'s appendix, John Sawyers, the chief British diplomat in Iraq, partially blamed Blount's unit for the insurgency. Sawyers viewed Blount's Soldiers as too heavy-handed in their treatment of the occupation like a full-on war. The British diplomat reported to British officials in May 2003 that "3rd Inf Div are sticking to their heavy vehicles and combat gear, and are not inclined to learn new techniques."[36] Although the truth may lie somewhere in the middle between Blount's and Sawyers' opinions, the *Cobra II* authors' uneven treatment of these opinions illustrate the perils of making generalizations based on one view.

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[33] GORDON & TRAINOR, *supra* note 1, at xxxi.
[34] *Id.* at 492.
[35] *Id.* at 495.
[36] *Id.* at 575.

The authors' personal biases also impair the book's credibility. Although the authors interviewed "hundreds of participants of all ranks," they overemphasize the role of certain people and units to the detriment of others, which a cursory glance of the acknowledgements confirms. Michael Gordon was a *New York Times* imbedded correspondent with 2nd Brigade, 3rd Infantry Division during the majority of major combat operations. He is thus understandably protective of the Soldiers he grew to know so well, and this favoritism is evident in his analysis. Although the authors spoke with Soldiers from numerous units, they dedicate a significant portion of the book to the actions of 2nd Brigade, while sacrificing detail on the major actions of other units.[37] In addition, the authors eagerly point out that "[s]ome government and military officials chose not to cooperate," including Secretary Rumsfeld, GEN Franks, and Vice President Cheney.[38] While it is not clear whether they would have received more favorable treatment from *Cobra II*'s authors had they cooperated, it does call into question whether personal opinion colored the authors' version of history.

The authors' attempt to write a complete historical account of the war in Iraq is also thwarted by the fact that the conflict is not over. While that fact alone does not necessarily create a fatal flaw, recent history does not always make for accurate history. Even the authors have discovered that the truth can change over time. For instance, GEN Trainor was an adjunct senior fellow at the Council on Foreign Relations during the initial push to Baghdad. In that capacity, he granted several interviews regarding his observations on the preparation and execution of the war. In an interview on 18 March 2003, when Trainor was asked to speculate on the upcoming fight, he predicted that "[t]here will be spotty resistance. . . . But the chances of heavy casualties are low on the scale of probability because I don't think the Iraqis are going to fight that hard."[39] On 10 April 2003, just days after troops entered Baghdad, Trainor stated: "This has been just an extraordinary military operation," and "[t]he speed

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[37] For instance, almost an entire chapter is devoted to 2nd Brigade, 3rd Infantry Division's heroic "Thunder Runs." However, less than two pages are devoted to the 1st Brigade's Herculean efforts to take the Baghdad airport, and only one paragraph is written on the heroic actions of 1st Brigade's Sergeant First Class Paul Smith, the first Soldier to receive a Medal of Honor for Operation Iraqi Freedom. *Id.* at 359.

[38] *Id.* at 511.

[39] Interview by Bernard Gwertzman, Consulting Editor, Council on Foreign Relations, with Lieutenant General (Ret.) (U.S. Marine Corps) Bernard E, Trainor, Former Marine Corps General Bernard Trainor Worries About U.S. Force Level and Lack of a Northern Front in Advance of Iraq War, Council on Foreign Relations (Mar. 18, 2003), http://www.cfr.org/publication/5721/.

and flexibility of U.S. forces heading to Baghdad were enormously impressive."[40] Co-author Michael Gordon was an embedded reporter in Iraq when Baghdad fell on 9 April 2003. In a *New York Times* article appearing the next day, Gordon opined that "[i]f there is a single reason for the allied success in toppling President Saddam Hussein's government, it is the flexibility the American military demonstrated in carrying out its campaign."[41] However, three years later, Trainor and Gordon have changed their views, now arguing that the march to Baghdad was almost derailed by paramilitary groups who fought with more intensity than expected.[42] This was an example, they argue, of how "Rumsfeld and his generals misread their foe . . . ."[43] In addition, the authors argue that one of the major failures of the war was the military leadership's "failure to adapt to developments on the battlefield,"[44] an assertion which is similarly inconsistent with their previous declarations. While it is natural for reporters to change their views of the war with the passage of time and emergence of additional evidence, these inconsistencies do illustrate the dangers of writing about a war before it has ended.

V. Conclusion

Cobra II is a provocative and fascinating account of the planning and initial execution of the conflict in Iraq. The first-hand accounts and numerous sources reveal a cast of complex characters that show both exceptional resolve and surprising lapses in judgment. In addition, the lessons that can be drawn from the book are beneficial to all leaders. However, the book is not without its flaws. While the book is worth reading as a part of a larger study of the conflict, it should not be considered an authoritative history. It is but one version of a multi-faceted and extraordinarily complex story. But taken as such, the book has earned its place in the ever-expanding library of critical thought on the conflict in Iraq.

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[40] Interview by Bernard Gwertzman, Consulting Editor, Council on Foreign Relations, with Lieutenant General (Ret.) (U.S. Marine Corps) Bernard E, Trainor, Trainor Says Iraq War Rapidly Ending and Calls It an 'Extraordinary Military Operation' for Coalition Forces (Apr. 10, 2003), http://www.cfr.org/publication/5839/

[41] Michael R. Gordon, *A Nation at War: The Plan; Speed and Flexibility*, N.Y. TIMES, Apr. 10, 2003, at A1.

[42] GORDON & TRAINOR, *supra* note 1, at 258.

[43] *Id.* at 498.

[44] *Id.* at 500.