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MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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ARTICLES

BOOK REVIEWS

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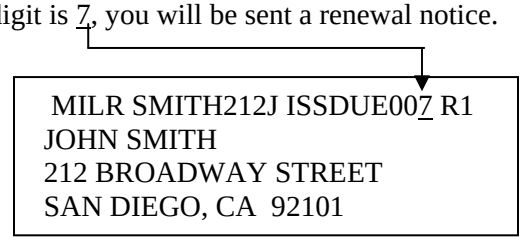

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MILITARY LAW REVIEW

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A RIGHT WAY AND A WRONG WAY: REMEDYING EXCESSIVE POST-TRIAL DELAY IN LIGHT OF *TARDIF*, *MORENO*, AND *TOOHEY*

MAJOR WILLIAM J. NELSON*

I. Introduction

Since the inception of the Uniform Code of Military Justice (UCMJ), military courts have struggled with the problem of excessive post-trial delay. Delays at every stage of the post-trial process, from transcribing the record and obtaining final action from the convening authority to getting a convicted servicemember's appeals decided by both tiers of the military appellate system, have plagued the military justice system. In response, the U.S. Court of Appeals for the Armed Forces (CAAF), and

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its predecessor in name, the U.S. Court of Military Appeals (COMA), have tried various approaches to address this problem over the years—some more aggressive and proactive and some more conservative.

At the heart of this problem is the question of jurisdiction for the military courts. Specifically, Article 59(a) of the UCMJ prohibits CAAF or the lower service courts of criminal appeal from granting relief to a servicemember on the grounds of a legal error unless there has been "material prejudice to a substantial right."[1] Historically, this prohibition has limited the ability of the courts to deter excessive post-trial delays because appellants cannot usually demonstrate that they were materially prejudiced by the delay. In 2001, however, CAAF decided the case of *United States v. Tardif*, in which it held that the service courts of criminal appeal could grant sentence relief for post-trial delay, even in the absence of prejudice, by virtue of their power to determine an appropriate sentence under Article 66(c), UCMJ.[2] In 2006, CAAF decided the case of *United States v. Moreno*, which mandated a new methodology for review of post-trial delay cases.[3] Using a balancing test it adopted from the Sixth Amendment speedy trial case of *Barker v. Wingo*, CAAF held that a finding of prejudice is not an absolute requirement, but merely one of four factors to be considered in determining whether to grant relief for a violation of due process.[4] Additionally, the court set forth benchmarks for various steps of the post-trial process, violations of which would trigger a presumption of unreasonableness. Shortly after the opinion in *Moreno*, CAAF decided *United States v. Toohey*, in which it found sentence relief warranted for unreasonable post-trial delay despite specifically finding that there was no prejudice stemming from the delay.[5]

Unfortunately, CAAF's decisions in *Tardif*, *Moreno*, and *Toohey* run afoul of the jurisdictional limitation imposed on the military courts by Article 59(a). Unreasonable post-trial delay is unquestionably a legal error. As such, it cannot be remedied absent material prejudice to a substantial right. While either Congress or the President could reform the post-trial processing system, CAAF's limited jurisdiction precludes it from the type of judicial rulemaking in which it engaged in *Moreno*.

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[1] UCMJ art. 59(a) (2008).
[2] United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002).
[3] United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).
[4] *Id.* at 136 (citing Barker v. Wingo, 407 U.S. 514 (1972)).
[5] United States v. Toohey, 63 M.J. 353 (C.A.A.F. 2006).

Instead, this author proposes that the President reduce problems with the current system of post-trial processing through amendments to the Rules for Courts-Martial (RCM) and Department of Defense (DoD) regulations. Specifically, the President should amend the RCM to include a method for a convicted servicemember to address pre-action delay issues with the convening authority, as well as a provision that mandates a specific time limit for transmitting the record of trial from the convening authority to the service court of criminal appeals after action and that sets forth remedies for violations of that time limit. Additionally, the President should direct that current DoD regulations be amended to allow a convicted servicemember awaiting appeal to receive an interim DD Form 214 and to allow servicemembers in confinement to be eligible for clemency and parole consideration even before final action has been taken on their cases by the convening authority.[6] These minor changes would help address some of the more easily correctible causes of post-trial delay, as well as take away the most frequent sources of harm to servicemembers awaiting appeal of their cases.

Part II of this article will review the history of the military appellate process and the development of military case law dealing with the issue of post-trial delay and how the courts have chosen to address the problem given the statutory limitations on their jurisdiction. Part III will discuss why CAAF's attempt to give the service courts of criminal appeal authority to remedy excessive post-trial delay not resulting in prejudice was unlawful in light of the plain text of Articles 59(a) and 66(c), the legislative history thereof, and commonly-accepted rules of statutory interpretation. Part IV will discuss why CAAF's mandated methodology in *Moreno* is flawed and why CAAF's holdings in *Moreno* and *Toohey*, allowing itself to grant relief for post-trial delay without a specific showing of actual prejudice, violate the jurisdictional limitation of Article 59(a). Finally, Part V will lay out two proposed amendments to the RCM which will help expedite post-trial processing and two proposed regulatory changes which will limit harm caused to servicemembers awaiting appeal.

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[6] The Department of Defense (DD) Form 214, Certificate of Release or Discharge from Active Duty, is given to a servicemember upon discharge from active service and indicates, inter alia, the characterization of the servicemember's discharge and the total time served on active duty.

II. Historical Background

A. History of Military Criminal Appeals

It may seem counterintuitive, but nowhere does the U.S. Constitution guarantee the right to a criminal appeal. Appellate rights are purely a function of Congress and the various state legislatures granting these rights through specific legislation. In the first years of our nation's existence, the legislatures universally granted appellate rights to civilian convicts to ensure the propriety of the underlying convictions.[7] The military was different, however. Military justice was always seen as a tool of the commander to maintain discipline in his ranks, and the extreme need for such discipline when fighting wars, combined with the isolation and mobility of armies in the field, made it necessary for justice to be dispensed with more quickly and efficiently. As John Adams wrote in 1777, "There can be no liberty in a commonwealth where the laws are not revered and most sacredly observed, nor can there be happiness or safety in an army for a single hour when discipline is not observed."[8] Thus, even before the declaration of our nation's independence, the Continental Congress passed Articles of War which authorized George Washington to convene courts-martial with minimum process, and with sentences that could be carried out immediately upon Washington's approval of the court-martial's findings.[9]

When our Constitution was created, the idea of having a separate military justice system was preserved. Article I, Section 8 of the Constitution provides that "[t]he Congress shall have the power . . . [t]o make rules for the government and regulation of the land and naval forces;" for the next one hundred and fifty years, very little was changed from the original Articles of War passed by Congress in 1775 and 1776.[10] With the exception of cases involving general officers, the dismissal of any commissioned officer, or sentences of death in time of

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[7] *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[8] JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES 1775–1980, at 3 (2001).

[9] The Continental Congress approved Articles of War in 1775, which were based on the British Articles of War, and which similarly, placed virtually all authority for military justice with the commander in the field. An amended version was adopted in 1776. *Id.* at 1–3; *see also* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 10–11 (William S. Hein & Co., Inc. 1993) (1975) [hereinafter THE ARMY LAWYER].

[10] U.S. CONST. art. I, § 8, cl. 14.

peace, commanders still had non-reviewable authority to approve and execute courts-martial sentences.[11] In 1917, a number of black soldiers rioted in Houston, Texas, after being taunted by white civilians, resulting in significant property damages and a number of deaths.[12] Fully complying with the existing Articles of War, the commanding general immediately convened courts-martial for all of the black soldiers—thirteen of whom were given the death penalty and hanged the day after the courts-martial.[13] Given the swiftness of the executions in this controversial case, the War Department issued a directive that in the future, no executions could be carried out until the case was reviewed by the Office of The Judge Advocate General to ensure that the court-martial was conducted legally, and shortly thereafter, Congress created Boards of Review, composed of lower-ranking Judge Advocates, who were to review cases and give nonbinding recommendations regarding the legal sufficiency thereof.[14]

By World War II, military justice was still viewed as being harsh and inconsistent, with the unfettered discretion of commanders to influence and approve courts-martial leading to sometimes outrageous results. Perhaps the most notorious case in this regard was that of Private (PVT) Eddie Slovik. While tens of thousands of servicemembers deserted during World War II, many of whom received only light punishment and a discharge, PVT Slovik was the only one executed for his offense.[15] The circumstances of PVT Slovik's offense were no worse than those in a typical desertion case, but General Eisenhower chose to approve the execution as a deterrent for all of the thousands of other servicemembers who were deserting.[16] Cases such as this contributed to a basic mistrust of the military justice system by the millions of servicemembers who were drafted during the war. After the war, there was a strong movement for change.

Congress immediately took up the call to lessen the perceived unjust and arbitrary nature of military justice and amended the Articles of War

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[11] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 459–65 (1920 ed.) (discussing Articles of War 105, 106, and 108).
[12] LURIE, *supra* note 8, at 40; *see also* United States v. Bauerbach, 55 M.J. 501, 503 (A. Ct. Crim. App. 2001) (citing THE ARMY LAWYER, *supra* note 9).
[13] *Id.*
[14] *Id.* at 40-41; *see also Bauerbach*, 55 M.J. at 503 (citing Article of War 50½, Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 797-99).
[15] WILLIAM B. HUIE, THE EXECUTION OF PRIVATE SLOVIK 8 (1970).
[16] *Id.* at 9.

in 1948 to create, above the Boards of Review, judicial councils composed of three general officer Judge Advocates which would have the authority to review cases for legal sufficiency and to make recommendations as to the fairness of the sentence.[17] Like the lower Boards of Review, the recommendations of the legal council were nonbinding and could be overridden by the Secretary of the Army. Under the amended articles, The Judge Advocate General, the Secretary of the Army, and the President all had the power to mitigate or remit portions of sentences.[18] Despite this rapid change, there was still a strong sentiment that more needed to be done to improve and standardize military justice across all branches of the military. To that end, Secretary of Defense James Forrestal created a joint service working group in 1949 to propose a new uniform code of military justice to be submitted to Congress.[19] Rather than merely amend the old Articles of War, the new code essentially started over and developed a more comprehensive system of military justice which added significant procedural protections for servicemembers at all stages of the criminal process. Among these new protections was, for the first time in the military justice system, a mechanism for independent judicial review of courts-martial, to include the creation of a new civilian Court of Military Appeals. Despite the sweeping nature of the changes proposed by Forrestal's working group, the new Uniform Code of Military Justice (UCMJ) was passed by both houses of Congress with relatively few alterations and was signed into law in 1950.[20]

Under the new UCMJ, a servicemember convicted by a court-martial had a three-step review process. The first step in the process was the traditional review of the court-martial by the convening authority, who could, as always, approve or disapprove any or all portions of the findings and sentence adjudged by the court-martial.[21] The UCMJ added, inter alia, a requirement that the convening authority's staff judge advocate provide a nonbinding recommendation as to the court-martial's legal sufficiency and as to an appropriate disposition of the charges and sentence before the convening authority could take action on the case.[22] The second step of the new process was appellate review by revamped

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[17] *See* LOUIS F. ALYEA, MILITARY JUSTICE UNDER THE 1948 AMENDED ARTICLES OF WAR, 32–43 (1949) (text and commentary regarding amended Articles of War 48 through 51).
[18] *Id.* at 42–43.
[19] LURIE, *supra* note 8, at 90.
[20] Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).
[21] UCMJ art. 60.
[22] *Id.* art. 60(d).

Boards of Review (later renamed courts of criminal appeal). Unlike the old Boards of Review, which could only offer recommendations as to legal sufficiency, the new Boards were given binding authority to reverse cases for legal errors, as well as to review the record to ensure that there was enough evidence to support the findings of guilt (i.e., factual sufficiency).[23] Additionally, given the existing concern over the harshness and inconsistency of sentences in the military, the Boards of Review were granted the power to review cases to ensure that the sentences were fair in light of the facts and circumstances of the case.[24] This authority of an appellate court to consider the fairness of a sentence was, and is, unique in American criminal law. The final step of the review process was the creation of the U.S. Court of Military Appeals (COMA) (now the U.S. Court of Appeals for the Armed Forces (CAAF)), which was composed of civilian judges appointed by the President, and which was given the authority to review cases heard by the Boards of Review.[25] Unlike the Boards of Review, however, the COMA was only authorized to review cases for legal sufficiency.[26]

B. Post-Trial Delay Cases

While the UCMJ created a new system of appellate review for servicemembers with considerable due process protections, it was basically silent as to how quickly a case was to undergo the three-step review process. This left it to the military courts to develop their own jurisprudence on the matter. The first case in which the then-COMA addressed the issue of post-trial delay was that of *United States v. Tucker*.[27] In *Tucker*, the accused's original court-martial was fraught with errors, to include having the accuser serve as the court reporter, having a legally incomplete specification, and admitting improperly prejudicial evidence.[28] Following affirmation by the Board of Review, the results of the review were, inexplicably, not served upon Tucker for more than a year, which delayed his petition to the COMA.[29] The COMA found that Tucker was entitled to a rehearing due to the errors in his case, but because of the delays in the appellate process, the court

[23] *Id.* art. 66.
[24] *Id.*
[25] *Id.* art. 67.
[26] *Id.*
[27] United States v. Tucker, 26 C.M.R. 367 (C.M.A. 1958).
[28] *Id.* at 368 (1950).
[29] *Id.* at 369.

instead dismissed the only charge facing Tucker. The court stated, "Unexplained delays of the kind presented here should not be tolerated by the services, and they will not be countenanced by this Court."[30] Unfortunately, the opinion in *Tucker* was quite short and had no further discussion regarding the court's methodology in considering the post-trial delay issue.

Two years after *Tucker*, the COMA again addressed the issue of post-trial delay in *United States v. Richmond*.[31] This time, however, the court discussed the issue in greater length. The court observed that while the Sixth Amendment to the Constitution guarantees a speedy trial, to ensure both rapid resolution of charges against those whom are presumed innocent and that an accused's ability to prepare a defense is not hampered by the passage of time, neither the Sixth Amendment nor Article 10, UCMJ, applied to the appellate process.[32] The court continued:

> It can be argued that some of the disadvantages we mention above may devolve upon accused persons if the appellate processes are unduly delayed, but that is a bare possibility under present-day military procedure and in a given situation, if the accused is prejudiced, relief can be granted him.[33]

The opinion then discussed the fact that the relief that had been granted in *Tucker* was due to the "multitude of other errors which prejudiced the accused and made further proceedings undesirable."[34] The holding in *Richmond* is significant for two reasons. First, the COMA acknowledged for the first time that there is no independent right to a speedy appellate process in the military. Second, to the extent there is a problem with post-processing delay, the relevant inquiry is not the length of the delay, but rather, the specific prejudice to the accused.

In *United States v. Prater*, the Court of Military Appeals went even further.[35] Not only did the court indicate that there was no specific constitutional or statutory right to speedy appellate review, it also held

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[30] *Id.*
[31] United States v. Richmond, 28 C.M.R. 366 (C.M.A. 1960).
[32] *Id.* at 369.
[33] *Id.*
[34] *Id.* (citing *Tucker*, 26 M.J. at 367).
[35] United States v. Prater, 43 C.M.R. 179 (C.M.A. 1971).

that even the general protections of the Fifth Amendment due process clause did not apply to appellate delay in the military. Specifically, the court stated:

> Although this Court has declared that constitutional safeguards apply to military trials except insofar as they are made inapplicable expressly or by necessary implication (*United States v Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960)), the Court has not held that the due process clause of the Fifth Amendment applies *ex proprio vigore* to appellate review of military trials. Speedy trial issues have been decided on the basis of military due process. *United States v Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964). In *United States v Clay*, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74 (1951), the Court commented on military due process that: "For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress." Congress has legislated safeguards to the right of a speedy trial (Articles 10 and 33, Uniform Code of Military Justice, 10 USC §§ 810 and 833), but there are no statutory limitations on the period of appellate review other than those imposed on this Court by Article 67 of the Code.[36]

While a holding that denies application of the Fifth Amendment to the military may seem odd to modern military practitioners, one should remember that the UCMJ was barely twenty years old at the time of this opinion. Before that, there was no real right to judicial appellate review in the military justice system at all. Accordingly, the view that appellate rights come solely from Congress and not from the Constitution is not so surprising.

The *Prater* court, however, did not foreclose all potential relief for unreasonable post-trial delay, holding that

> [w]here error has occurred in the conduct of a court-martial proceeding, some combinations of sentences and delays can result in cases requiring relief if a review for

[36] *Id.* at 182.

> errors of law under Article 67, [UCMJ], is not to become a completely inane exercise. Unexplained appellate delays may demand a dismissal if prejudicial errors have occurred.[37]

The view that specific prejudice was required to remedy post-trial delay was reaffirmed two years later in *United States v. Timmons*.[38] After discussing the various cases which had required prejudice before granting relief, to include *Richmond* and *Prater*, the *Timmons* court concluded, "Whatever reason might exist to deplore post-trial delay generally, we are loath to declare that valid trial proceedings are invalid solely because of delays in the criminal process after trial."[39]

The case of *Rhoades v. Haynes* involved a petition for extraordinary relief filed by a Marine, Sergeant Rhoades, in whose case action had not yet been taken four months after he was sentenced.[40] In commenting on its supervisory jurisdiction, the court held,

> When, upon application of a petitioner, a prima facie case of unreasonable delay in the appellate processes appears in a case over which we may obtain jurisdiction, this Court will take appropriate action to protect its power to grant meaningful relief from any error which might appear upon our ultimate review of the record of trial pursuant to Article 67(b)(3), [UCMJ]. In such an instance we will not determine responsibility for the delay, nor assess its impact upon substantial rights. Rather, except in the most extraordinary case, we limit our action to the removal of the impediment and direct completion of the appellate processes. Depending on the convening authority's action, assessment of the delay is deferred until the case is reviewed by the Court of Military Review [now Court of Criminal Appeals] or by this Court, pursuant to Articles 66 and 67 [UCMJ].[41]

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[37] *Id.* at 183.
[38] United States v. Timmons, 46 C.M.R. 226 (C.M.A. 1973).
[39] *Id.* at 227–28.
[40] Rhoades v. Haynes, 46 C.M.R. 189 (C.M.A. 1973).
[41] *Id.* at 190 (citing *Prater*, 43 C.M.R. at 179).

The court then ordered the convening authority to complete his action and file a copy with the clerk of court within seventeen days of the date of the opinion and, if the case required review by the CMR, that the record of trial be delivered to that court by the same date.[42] The power of the military courts to take action to stop post-trial delay before the normal appellate review process becomes significant when considering later cases.

In 1974, the COMA decided *Dunlap v. Convening Authority*, a case that has maintained considerable notoriety within the field of post-trial processing jurisprudence, but strangely enough seems to rest its holding on the premise that it may not actually be a post-trial delay case.[43] In a mixed plea case,[44] Private First Class (PFC) Dunlap was convicted by a court-martial in Bamberg, Germany, and immediately transferred to the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas.[45] The staff judge advocate noted several errors in his post-trial advice to the convening authority, to include not having a sufficient number of enlisted members on the court-martial panel, and recommended that the convening authority only approve the findings to which Dunlap pled guilty and that there be a rehearing as to the sentence with a properly constituted panel.[46]

The convening authority requested that the Commanding General at Fort Leavenworth convene a rehearing as to the sentence rather than have Dunlap sent back to Germany. The legal staff at Fort Leavenworth, however, concluded that the improperly constituted panel rendered the entire court-martial invalid and that Fort Leavenworth would have to conduct a full rehearing for both findings and sentence, but that they could only do so if the original convening authority in Germany amended his action to provide for such a rehearing.[47] The original convening authority amended his action accordingly and sent a request to Fort Leavenworth that they assume jurisdiction and retry Dunlap. The amended action and request for the assumption of jurisdiction was received by Fort Leavenworth ten months after Dunlap's original

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[42] *Id.*
[43] Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974).
[44] A mixed plea case is one in which the accused pleads guilty to some offenses and the government tries the accused on remaining offenses to which the accused plead not guilty.
[45] *Dunlap*, 48 C.M.R. at 752.
[46] *Id.*
[47] *Id.*

conviction.[48] Dunlap filed a petition in the U.S. District Court for the District of Kansas requesting that the charges against him be dismissed for violation of his right to a speedy trial, but the district court stayed action until the COMA had an opportunity to address Dunlap's petition on the matter.[49]

In a two-to-one decision, the COMA directed that the charges against Dunlap be dismissed. The Government argued that *Rhoades* had established that, in responding to a writ petition for relief, the court was limited to "'removal of the impediment' and [directing] 'completion of the appellate processes,' with deferment of consideration of whether delay was prejudicial to the accused 'until the case is reviewed' on appeal."[50] In response to this argument, the court attempted to distinguish the earlier cases regarding post-trial delay by finding that the convening authority's approval of the findings and sentence should actually be considered more as part of the trial process, rather than the post-trial process. Specifically, the court stated,

> [O]ur earlier cases in this area have proceeded on the unarticulated assumption that action by the convening authority on a record of conviction is the equivalent of appellate review, and such time is not generally included for purposes of calculating the period of delay in the prosecution. We have, however, recognized that the convening authority has "hybrid" functions. Some of his powers are of the kind associated with appellate review, but he has others affecting the findings of guilty and sentence that have the attributes of a trial court.
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> In the federal civilian criminal justice system, finality of verdict and sentence is established in the trial court. It has been held that sentence is an essential part of trial so that delay in its imposition may cause a deprivation of the right to a speedy trial. In military law, the ultimate legal effect of the findings of guilty determined by the court-martial and the sentence imposed upon it depends upon the action of the convening authority. . . . In significant ways, therefore, the functions of the court-

[48] *Id.*
[49] *Id.*
[50] *Id.* at 753 (quoting Rhoades v. Haynes, 46 C.M.R. 189, 190 (C.M.A. 1973)).

> martial and those of the convening authority in the determination of guilt and in the imposition of sentence are so connected that they can be regarded as representing, for the purpose of speedy disposition of the charges, a single stage of the proceedings against the accused.[51]

The court then noted that Article 10, UCMJ, requires that when an accused is arrested or confined before trial, "immediate steps shall be taken . . . to try him or to dismiss the charges and release him" and that "[t]o effectuate this congressional command for speedy disposition of a case, we vivified 'a presumption of an Article 10 violation . . . when pretrial confinement exceeds three months.'"[52] The logical conclusion of this line of reasoning followed: "The interrelationship between the court-martial trial and the convening authority's action gives arguable color to a construction of Article 10 that includes the convening authority's action as one of the steps required in the trial of the accused."[53]

After making its lengthy argument for why a convening authority's action is conceptually part of the trial process, the court oddly backed away from that argument and held that it was unnecessary to rely upon Article 10 in order to grant relief. Instead, it took a completely different tack. The court noted that Article 67(c), UCMJ, required the COMA to respond to petitions filed with it within thirty days, and because of this, the court concluded that "Congress has left no doubt that it desires that all proceedings in the military criminal justice system be completed as expeditiously as the circumstances allow. This Court is obligated to preserve and protect the integrity of its mandate for timely justice."[54] Using its newfound mandate, the court put forth a new rule that "a presumption of a denial of a speedy disposition of the case will arise when the accused is continuously under restraint after trial and the

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[51] *Id.* (internal citations and quotations omitted).

[52] *Id.* (quoting UCMJ art. 10 and United States v. Burton, 44 C.M.R. 166, 172 (C.M.A. 1971)).

[53] *Id.*

[54] *Id.* at 754. Article 67(c) is a relatively minor administrative provision which merely requires that, when an appellant petitions CAAF (or the then-Court of Military Appeals) to review his or her appeal, the court must indicate whether it intends to review the case or deny the petition within thirty days. To conclude that this one requirement regarding a single step in the administrative processing of an appeal evidences a broad mandate from Congress for the court to correct processing deficiencies at every stage of the criminal proceedings was a leap of gargantuan proportions.

convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial."[55] Although such presumption was rebuttable by the Government, "this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed."[56]

Dunlap is significant both for what it did and did not do. First of all, *Dunlap* did not dispose of the requirement that there be prejudice in order to grant relief, but rather, merely borrowed a rebuttable presumption of prejudice standard commonly found in pretrial Article 10 speedy trial cases. Additionally, although the opinion purported to rely upon a broad grant of authority from Congress to expedite the entire military criminal justice system and impose new standards for processing, it ultimately only affected delays occurring before the convening authority's action. The rather lengthy discussion of why a convening authority's action and the court-martial are effectively "a single stage of the proceedings," the use of a presumption of prejudice standard previously only found in pretrial delay jurisprudence, and the heavy reliance on language from *Burton* was evidence that this holding was more grounded in pretrial Article 10 concepts than the court cared to admit. In fact, four years later, the court acknowledged just that.

In *United States v. Green*, the court drew a clear distinction between pre-action delay and appellate delay and held that a showing of actual prejudice was still required to obtain relief for appellate delay.[57] In distinguishing *Dunlap*, the court observed:

> The Court, [in *Dunlap*,] held that unexplained delay by the convening authority in reviewing a conviction required dismissal of the charges. However, that determination was predicated upon the provisions of Article 10, [UCMJ], which requires dismissal as the sanction for unreasonable delay at the court-martial level, and the applicability of that article to the convening authority because of the conjunction of his responsibilities with those of the court-martial. *Dunlap* did not, therefore, invalidate *Timmons* and its progeny; it

[55] *Id.*
[56] *Id.* (quoting *Burton*, 44 C.M.R. at 172).
[57] United States v. Green, 4 M.J. 203 (C.M.A. 1978).

> only established their inapplicability to the delay occurring prior to the convening authority's action. The present case involves a delay at the appellate level, and the doctrine of *Timmons* still controls.[58]

It is important to note that in the brief span of time between *Dunlap* and *Green*, the entire makeup of the COMA had changed due to the death or retirements of the judges on the *Dunlap* court.[59] The new judges were not committed to the questionable logic upon which the *Dunlap* opinion was based, and thus, only five years after the *Dunlap* rule was established, the court reversed itself and completely overruled *Dunlap* in *United States v. Banks*.[60]

The issue certified in *Banks* was

> whether the rule established in [*Dunlap*] required automatic dismissal of charges in this case "where the accused received a fair trial free from error, was found guilty beyond a reasonable doubt, and where the delay of 91 days in the review of the conviction by the convening authority caused him to suffer absolutely no prejudice."[61]

Noting that "[t]he certified question expresses the frustration of the services over the inflexibility of the *Dunlap* rule," the *Banks* court concisely but diplomatically did away with the *Dunlap* rule:

> Upon full examination of the Uniform Code of Military Justice; the decisions of this Court preceding *Dunlap v. Convening Authority*; and with deference to the former members of this Court who formulated the *Dunlap* requirement, inflexible application of the rule to cases such as are included in the certified question shall not be required from and after the date of this decision.
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[58] *Id.* at 204.
[59] *See* LURIE, *supra* note 8, at 295–96, 321–25.
[60] United States v. Banks, 7 M.J. 92 (C.M.A. 1979).
[61] *Id.* at 92.

> [I]n cases tried subsequent to this opinion, applications for relief because of delay of final action by the convening authority will be tested for prejudice.[62]

Rather than attack the logic relied upon by the then-deceased or retired members of the court, the opinion merely stated,

> No useful purpose would be served by reviewing the many cases and circumstances which convinced the *Dunlap* Court concerning the need for the rule announced therein. It will suffice to note that *Dunlap* came in response to a problem which frequently manifested itself where the convening authority delayed his final action.[63]

Thus, with little commentary, the *Dunlap* rule was gone as quickly as it appeared.

III. *United States v. Tardif*

Following *Banks*, post-trial delay jurisprudence stabilized for the next twenty years, and the courts reviewed delay for unreasonableness on the part of the Government with the ultimate requirement that there be actual prejudice in order for an appellant to be granted any relief for an unreasonable delay.[64] Just because they did not find prejudice, however, the courts did not stop chastising the Government for inexcusable delays and urging the Government to take steps to correct this recurrent problem. For example, in the case of *United States v. Bell*, CAAF specifically noted:

> We continue to be troubled by cases such as appellant's, where unexplained delays have occurred between the court-martial and the action of the convening authority. Nevertheless, our dissatisfaction with this aberrational military justice practice does not warrant setting aside a servicemember's punitive discharge when he or she was not substantially harmed. . . . In the future, however,

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[62] *Id.* at 92–93 (citing United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973)).
[63] *Id.* at 92 (citations omitted).
[64] *See, e.g.*, United States v. Jenkins, 38 M.J. 287, 288 (C.M.A. 1993).

> those responsible for prompt action in the military justice system must take better care to perform their duties as Congress and the President have directed.[65]

Unfortunately, without a showing of actual prejudice, these exhortations lacked any enforcement mechanism and apparently went unheeded. Losing patience with its inability to deter increasingly slow post-trial processing, one panel of the Army Court of Criminal Appeals (ACCA) finally decided to do something about it.

In 2000, a three-judge panel of the ACCA decided the case of *United States v. Collazo*.[66] *Collazo* involved a delay of ten months from trial until the convening authority's final action in a case with a 519-page record of trial. The court wasted no time in expressing its frustration with recurrent cases such as this.

> The increasing number and regularity of other post-trial processing errors heighten our concern. These errors indicate a lack of attention to detail, a lack of understanding as to proper post-trial processing requirements, or a lack of urgency because the case is "post-trial" and there are no meaningful sanctions for tardy or sloppy work. Whatever the reason, this attitude has to change.[67]

Although the court noted that previous cases required prejudice in order to grant relief and that Collazo had not demonstrated prejudice, it found that "fundamental fairness dictates that the government proceed with due diligence to execute a soldier's regulatory and statutory post-trial processing rights and to secure the convening authority's action as expeditiously as possible . . . ."[68] Citing its own authority under Article 66(c), UCMJ, to affirm only such findings of guilty and the sentence it determines should be approved, the court held: "In our judgment, this is an appropriate case to exercise that authority. We will grant relief in our decretal paragraph in the form of a reduction to the sentence to confinement by four months."[69] The court, however, did not explain

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[65] United States v. Bell, 46 M.J. 351, 354 (C.A.A.F. 1997).
[66] United States v. Collazo, 53 M.J. 721 (A. Ct. Crim. App. 2000).
[67] *Id.* at 725 n.4.
[68] *Id.* at 727.
[69] *Id.*

how its exercise of this authority complied with the limitations of Article 59(a), UCMJ, in the absence of material prejudice to the accused.[70]

Shortly after the decision in *Collazo*, the Government argued that the court had no authority to grant relief for post-trial delays in the absence of prejudice. In *United States v. Bauerbach*, the same panel of the Army court which issued *Collazo*, explained its rationale in detail.[71] Noting that the Government questioned its ability to grant relief without prejudice, the court responded that "[t]he government's position suggests a misunderstanding of this court's responsibility and authority to determine sentence appropriateness under Article 66(c)."[72] The court started with a detailed recitation of the history of the UCMJ and the reasons why Congress chose to grant the service courts of criminal appeal broad powers of review under Article 66(c), UCMJ.[73] After quoting from Article 66(c) that the service court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact, and determines, on the basis of the entire record, should be approved," the court broke this authority into its three conceptual components, i.e., that of determining legal sufficiency, factual sufficiency, and sentence appropriateness.[74]

The court then conceded that Article 59(a), which provides that "[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused," limited the authority of the court to reverse the sentence for an error of law, but held that this limitation did not apply to the court's ability to determine an appropriate sentence.[75] Moreover, because CAAF's jurisdiction is limited to questions of law under Article 67, the court held that any relief the service court granted in determining an appropriate sentence was final and nonreviewable.[76] In the final step of its reasoning, the court held that it could use its "highly discretionary power" to determine what sentence should be

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[70] *See* UCMJ art. 59(a).
[71] United States v. Bauerbach, 55 M.J. 501 (A. Ct. Crim. App. 2001).
[72] *Id.* at 502.
[73] *Id.* at 502–03.
[74] *Id.* at 504.
[75] *Id.*
[76] *Id.* at 505.

approved to grant sentence relief in cases where there is no material prejudice or error of law.[77]

Despite the fact that the *Bauerbach* court asserted that the power to grant relief for a nonprejudicial error of law had always existed within its Article 66 authority, the other service courts of criminal appeals did not follow its lead in exercising this newly discovered, but supposedly latent, authority. Indeed, even another panel of the ACCA attempted to limit the scope of *Collazo* and *Bauerbach*.[78] The Navy-Marine Corps Court of Criminal Appeals (NMCCA) and the Coast Guard Court of Criminal Appeals (CGCCA) specifically disagreed with the *Collazo/Bauerbach* interpretation of Article 66(c). In an unpublished opinion, the Navy-Marine court observed that in *Collazo*, the ACCA "broke new ground" by granting relief for an excessive post-trial delay where there was no showing of prejudice.[79] While acknowledging the temptation to follow the Army court's lead, the NMCCA noted that its own case law continued to require prejudice in order to grant sentence relief for an error of law, and that

> we recognize that the granting of a reduction of confinement when no prejudice has been demonstrated merely gives a windfall to an otherwise undeserving appellant, because someone tasked with the preparation and forwarding of either the record, recommendation, or action has not fulfilled his or her duty in a timely fashion. Rather than accord a windfall to an appellant, other deterrence against dilatoriness may be the appropriate remedy.[80]

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[77] *Id.* at 505–06. The court also stated that "[t]he government's interpretation of Article 59(a), UCMJ, would limit our sentence appropriateness authority to situations involving a prejudicial error of law and would undermine our authority to reduce sentences that we found to be legal but inappropriate." The court, however, did not explain how the government's position would possibly limit the ability of the court to grant relief for a sentence that was too harsh for reasons unrelated to any errors of law.

[78] United States v. Harms, 56 M.J. 755, 756 (A. Ct. Crim. App. 2002) ("To read [*Collazo* and *Bauerbach*] as establishing a judicial remedy for unreasonable post-trial delay, even in the absence of any prejudice to the appellant, is to accord them too broad a meaning.").

[79] United States v. Schell, 2001 CCA LEXIS 332 (N-M. Ct. Crim. App. Dec. 18, 2001) (unpub.).

[80] *Id.* (citing United States v. Khamsouk, 54 M.J. 742 (N-M. Ct. Crim. App. 2001)).

Similarly, in *United States v. Greening* and *United States v. Tardif*, the CGCCA refused to follow the Army court's lead.[81] In *Tardif*, not only did it take almost eight months for the convening authority to take action following the court-martial, but there was an unexplained delay of four months in the routine administrative task of transmitting the record to the CGCCA.[82] Despite finding the delay to be both "unexplained and unreasonable," the court noted that "the Court of Appeals for the Armed Forces has repeatedly determined that an appellant must show that the delay, no matter how extensive or unreasonable, prejudiced his substantial rights."[83] While Tardif argued that the court should follow the Army court's opinion in *Collazo*, the Coast Guard court declined and stated that it would continue to follow the precedents from CAAF which required prejudice.[84] This was not the end of the matter, however, as Tardif appealed the decision of the Coast Guard court and CAAF granted the petition to consider the case.

On appeal, a 3–2 majority of CAAF adopted the Army court's reasoning from *Collazo* and *Bauerbach* and held that the service courts had the power to grant relief for nonprejudicial post-trial delay under their Article 66(c) authority to determine an appropriate sentence.[85] The majority opinion first noted the long line of cases holding that an accused has the right to a timely review of his case.[86] After citing some of the cases that had held that relief for post-trial delay would not be granted absent a showing of prejudice under Article 59(a), the court found that those cases merely pertained to its own authority to grant relief under Article 67 and in no way related to the question of whether a service court of criminal appeals could grant relief under Article 66(c).[87] In distinguishing the authority of the service courts, the opinion quoted from both the congressional legislative history regarding Article 66 and

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[81] United States v. Greening, 54 M.J. 831, 832 (C.G. Ct. Crim. App. 2001); United States v. Tardif, 55 M.J. 666 (C.G. Ct. Crim. App. 2001).
[82] *Tardif*, 55 M.J. at 668.
[83] *Id.* at 668–69 (citing United States v. Banks, 7 M.J. 92 (C.M.A. 1979); United States v. Jenkins, 38 M.J. 287 (C.M.A. 1993); United States v. Hudson, 46 M.J. 226 (C.A.A.F. 1997)).
[84] *Id.* at 669.
[85] United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002).
[86] *Id.* at 222 (citing United States v. Tucker, 26 C.M.R. 367, 369 (C.M.A. 1958); United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971); Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974)).
[87] *Id.* (citing United States v. Williams, 55 M.J. 302 (C.A.A.F. 2001); United States v. Hudson, 46 M.J. 226 (C.A.A.F. 1997); United States v. Jenkins, 38 M.J. 287 (C.M.A. 1993); and United States v. Banks, 7 M.J. 92 (C.M.A. 1979)).

the U.S. Supreme Court case of *Jackson v. Taylor*, both of which indicated that the military service courts may set aside any part of a sentence "either because it is illegal or because it is inappropriate."[88] Then, following the rationale from the *Bauerbach* court, the majority held that, of the service courts' three-part authority to determine legal sufficiency, factual sufficiency, and an appropriate sentence, Article 59(a) only affected the first, and that a service court could consider nonprejudicial post-trial delays in determining an appropriate sentence.[89]

In a strongly-worded dissent, Chief Judge Susan Crawford started:

> The majority interprets Article 66(c) and 59(a) in a manner that is contrary to the principles of statutory construction and legislative intent, as well as inconsistent with 50 years of established practice and case law. . . . Because the majority is engaging in broad judicial rulemaking by amending the Code to expand Article 66(c) and contract Article 59(a), and thereby essentially creating a power of equity in the court below, I must respectfully dissent.[90]

Chief Judge Crawford noted that the historical reasons for granting of broader powers to the then-Boards of Review in the UCMJ was to curb command influence and establish uniformity of sentences, not to grant windfalls due to technical errors.[91] She also observed that in the fifty years since the creation of the UCMJ, neither CAAF nor any of the lower service courts had ever interpreted the Article 66(c) authority in the way that the *Collazo* court had.[92] Finding that the court lacked the authority to create new rules regarding post-trial processing, Judge Crawford asserted that any such rules needed to be created by Congress or the President.

Senior Judge Sullivan also issued a separate dissent in which he joined in criticizing the majority's "judicial activism" and the creation of

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[88] *Id.* at 223 (quoting S. REP. No. 98-486, at 28 (1949); Jackson v. Taylor, 353 U.S. 569, 576–77 (1957)).
[89] *Id.* at 224.
[90] *Id.* at 225–26 (Crawford, C.J., dissenting).
[91] *Id.* at 226.
[92] *Id.* at 227.

a "new equity-type supervisory power for the Courts of Criminal Appeals."[93] He went on to state,

> Article 66(c) was not intended by Congress as a means for a subordinate court to evade or avoid unpopular legal precedent of this Court. This is neither the letter nor the spirit of Article 66(c), UCMJ, nor is it what the Supreme Court meant by the "power to determine sentence appropriateness." In my view, the service appellate court abuses its discretion when it exercises its sentence approval authority in deliberate derogation of our legal precedents. . . . The sentence approval powers given to the service appellate courts are indeed unique, but it is equally clear that Congress did not envision them as a standardless supervisory remedy for judicially perceived inequities in the military justice system.[94]

Despite the vigorous dissents from the two senior-most judges on the court and the disagreement of the other service courts, the majority in *Tardif* sided with the view of the Army court in *Collazo* and *Bauerbach* and essentially held that Article 59(a) did not apply to the service courts with respect to their sentencing authority.

It is well known by both students of the law and legal practitioners that judges sometimes resort to strained interpretations of the law and questionable logic to reach the results they desire. There is no doubt that dilatory post-trial processing has plagued the military since the passage of the UCMJ and that the courts became increasingly frustrated at their inability to do anything about it in most cases due to the fact that, inexcusable as it was, delay at the appellate level rarely caused material prejudice to an appellant. Accordingly, when the *Collazo/Bauerbach* courts came upon a new, seemingly logical way of interpreting Article 66(c) so as to allow the service courts to stop these negligent practices, CAAF endorsed it. The problem is that the train of logic relied upon by both the Army court and CAAF is flawed and contains gaps which were overlooked, whether intentionally or otherwise.

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[93] *Id.* at 228 (Sullivan, S.J., dissenting).

[94] *Id.* at 230 (citing Jackson v. Taylor, 353 U.S. 569, 576 (1957) (other citations omitted)).

There are three basic steps to the *Collazo/Tardif* line of reasoning. The first is that Article 66(c) permits a service court to reduce a sentence either due to an error of law or because it is inappropriate.[95] The second step is that, in exercising its authority to determine an appropriate sentence, a service court may consider the fact that the post-trial processing was unreasonably slow. The final step is the assertion that, because the service court is reducing the sentence because it is inappropriate and not because of legal error, the limitation of Article 59(a) does not apply. At first glance, this reasoning may appear to be sound, and the first step in the train of logic (i.e., that a service court may reduce a sentence "either because it is illegal or because it is inappropriate") is unquestioned.[96] Unfortunately, the next two steps in the process are not so firmly rooted.

Unreasonable post-trial delay is undeniably a legal error (i.e., a violation of due process), whether there is prejudice or not.[97] While neither CAAF nor the Army court explicitly stated as much, the view that a service court can consider unreasonable post-trial delay as a factor in determining an appropriate sentence rests on the implicit premise that a service court can, in addition to reducing a sentence because it is either illegal or inappropriate, find that a sentence is inappropriate *because* it is illegal. It is here where the logic starts to break down and the *Collazo/Tardif* holdings start to depart from the established jurisprudence. Both CAAF in *Tardif* and the Army court in *Bauerbach* acknowledged that the authority of the service courts to grant relief due to an error of law is separate and distinct from their authority to determine an appropriate sentence.[98] Yet, inexplicably, neither court explains how you can merge these two separate and distinct authorities or how stating that a court may grant relief by finding a sentence inappropriate due to a legal error rather than granting relief for the legal error itself is anything other than a purely semantic difference. If a court reduces a sentence because it is inappropriate due to a legal error (i.e.,

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[95] Note that while both CAAF and the Army court referenced the service courts' authority to review for factual sufficiency, the doctrine of factual sufficiency actually only applies to affirmation of the findings of guilty and not to sentencing. To the extent the facts of the case may make a sentence seem excessive, those facts would be part of the traditional sentence appropriateness analysis.

[96] *See, e.g.*, S. REP. No. 98-486, at 28 (1949); *Jackson*, 353 U.S. at 576–77.

[97] Both civilian and military jurisprudence view excessive post-trial delay as a violation of due process. *See* United States v. Toohey, 60 M.J. 100, 102 (C.A.A.F. 2004) (citing Campiti v. Matesanz, 186 F. Supp. 2d 29 (D. Mass. 2002)).

[98] *Tardif*, 57 M.J. at 223; United States v. Bauerbach, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001).

unreasonable post-trial delay), then it is granting sentence relief on the ground of an error of law, regardless of how one chooses to characterize it.

Significantly, neither the legislative history, nor in the long line of cases regarding the authority of a service court to determine an appropriate sentence under Article 66(c), is there any indication that the sentence appropriateness function included a consideration of nonprejudicial legal errors. Keeping in mind the historical background behind the passage of the UCMJ, the purpose in giving the service courts the authority to determine an appropriate sentence was to help alleviate the often harsh and inconsistent sentences that plagued the pre-UCMJ military justice system, such as that of PVT Eddie Slovik. In the report prepared by the Forrestal committee on the draft UCMJ, which was later incorporated into both the House and Senate reports on the Code, the analysis of Article 66 notes that "[t]he Board [of Review] may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces."[99]

Similarly, the military courts have always treated the authority to review a sentence for appropriateness as being separate and distinct from granting relief due to a legal error, and case law regarding the power of the service courts to determine an appropriate sentence never discussed consideration of nonprejudicial errors (or any legal errors) as one of the factors to be used in a sentence appropriateness analysis. Rather, "[s]entence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves."[100] As the COMA stated in *United States v. Snelling*, "Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'"[101] In interpreting the provision of Article 66(c) which states that the courts shall determine

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[99] UNIFORM CODE OF MILITARY JUSTICE: TEXT, REFERENCES AND COMMENTARY BASED ON THE REPORT OF THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE 94 (1949); S. REP. No. 98-486, at 28 (1949); H. REP. No. 98-491 (1949); *see also Tardif*, 57 M.J. at 226 (Crawford, C.J., dissenting) (quoting Committee report).

[100] United States v. Healy, 26 M.J. 394 (C.M.A. 1988).

[101] United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) (quoting United States v. Mamaluy, 27 C.M.R. 176, 180–81 (C.M.A. 1959)).

which part of the sentence, "on the basis of the entire record," should be approved, the COMA in *United States v. Fagnan* upheld the decision of the Board of Review to refuse to consider matters pertaining to the appellant's good behavior in confinement and a psychiatric report prepared after trial.[102] Instead, the Board of Review held, "We consider that the sentence in this case is fully warranted 'by the circumstances of the offense and *the previous record of the accused*.'"[103] Clearly, the court concluded that events occurring post-trial should not be made part of the sentence appropriateness analysis.

Even after its decisions in *Collazo* and *Bauerbach*, the ACCA has continued to apply these same precedents in cases not involving post-trial delay. In *United States v. Mack*, the court discussed its process as follows:

> In determining sentence appropriateness, we must give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" The appellant "should not receive a more severe sentence than otherwise generally warranted by the offense, the circumstances surrounding the offense, his acceptance or lack of acceptance of responsibility for his offense, and his prior record."
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> Regardless of how sympathetic we may be, or how severe the collateral consequences of the appellant's dismissal, we are compelled to reiterate an earlier point: even though a case may cry out for clemency, we are powerless to grant it. Similarly, we are unwilling to cloak an emotional, equitable clemency argument in legal terms to achieve a particular result.[104]

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[102] United States v. Fagnan, 30 C.M.R. 192 (C.M.A. 1961).
[103] *Id.* at 194 (quoting Board of Review and citing United States v. Lanford, 20 C.M.R. 87, 99 (C.M.A. 1955)).
[104] United States v. Mack, 56 M.J. 786, 791–92 (A. Ct. Crim. App. 2002) (quoting *Snelling*, 14 M.J. at 268; *Mamaluy*, 27 C.M.R. at 180–81) (internal citations omitted).

Despite the fact that Mack raised several legal errors on appeal, the court did not consider these as part of its sentence appropriateness analysis, and, in fact, rejected one of the asserted legal errors, in part because Mack had not made a "colorable showing of possible prejudice."[105] Indeed, as one commentator has noted, even in post-trial delay cases after *Collazo* the Army court continued to analyze sentence appropriateness separately and then granted relief for nonprejudicial post-trial delay with absolutely no discussion of how it may have affected the fairness of the sentence.[106] In fact, in one case, the court found the sentence to be appropriate but went on to issue relief for post-trial delay anyway.[107] If the court were truly considering the post-trial delay as part of its sentence appropriateness analysis and not just granting relief for a nonprejudicial legal error, one would have expected that the court would have mentioned the post-trial delay as part of its sentence appropriateness discussion rather than bifurcating the two issues.[108]

The interplay between the authority to reduce a sentence due to a legal error or because it is inappropriate was discussed by the COMA in *United States v. Suzuki*.[109] In noting the distinct nature of these two authorities, the court stated:

> We start from the premise that, when a Court of Military Review [now-Court of Criminal Appeals] reassesses a sentence because of prejudicial error, its task differs from that which it performs in the ordinary review of a case. Under Article 66, [UCMJ], the Court of Military Review must assure that the sentence adjudged is appropriate for the offenses of which the accused has been convicted; and, if the sentence is excessive, it must reduce the sentence to make it appropriate. However, when prejudicial error has occurred in a trial, not only must the Court of Military Review assure that the

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[105] *Id.* at 791 (quoting United States v. Wheelus, 49 M.J. 283, 289 (C.A.A.F. 1998)).
[106] Major Timothy C. MacDonnell, United States v. Bauerbach*: Has the Army Court of Criminal Appeals Put "*Collazo *Relief" Beyond Review?*, 169 MIL. L. REV. 154, 163–64 (2001) (citing United States v. Sharp, No. 9701883 (A. Ct. Crim. App. Apr. 16, 2001) (unpub.); United States v. Hansen, No. 20000532 (A. Ct. Crim. App. May 10, 2001) (unpub.)).
[107] *Id.* at 164 (citing *Hansen*, No. 20000532).
[108] *See id.*
[109] United States v. Suzuki, 20 M.J. 248 (C.M.A. 1985).

> sentence is appropriate in relation to the affirmed findings of guilty, but also it must assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. Only in this way can the requirements of Article 59(a), UCMJ, be reconciled with the Code provisions that findings and sentence be rendered by the court-martial.[110]

This discussion is notable is several respects. First, where there is prejudicial error, the court indicates that the service court should ensure that the sentence is appropriate in light of the offenses, and then ensure that the prejudicial errors have been properly remedied so that the sentence is no higher than would have been imposed but for the errors. This two-step process makes perfect sense. If one merged the sentence appropriateness determination and remedies for legal error, one could have incongruous results. For example, if there were a case with a legal error which caused definite and objective harm (e.g., failure to grant pretrial confinement credit), but the sentence was otherwise light, could the court refuse to grant sentence relief because the sentence was still appropriate even with the legal error? Certainly not. Obviously, the logical course of action is to determine the appropriate sentence in light of all of the circumstances of the offense, then separately determine whether any legal errors need to be remedied and reduce the sentence accordingly.

Note also that the *Suzuki* opinion discusses the consideration of *prejudicial* errors. Under the *Collazo/Tardif* line of reasoning, however, the use of the qualifier "prejudicial" would be superfluous, as the sentence appropriateness analysis could necessarily include all legal errors, whether prejudicial or not. And because the sentence appropriateness determination could consider all legal errors, prejudicial or otherwise, it would be exempt from the limitation of Article 59(a), UCMJ. Obviously, however, the *Suzuki* court was operating under the assumption that nonprejudicial errors were not part of a service court's consideration of an appropriate sentence and that remedies for legal error are subject to Article 59(a). This runs counter to the implication of the Army court in *Bauerbach* that the ability to consider nonprejudicial errors had always existed within its Article 66(c) sentence

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[110] *Id.*

appropriateness authority.[111] Additionally, the *Suzuki* court reaffirms the view that the sentence appropriateness determination is a consideration of the fairness of the sentence in light of the offenses committed and not a carte blanche power to reduce the sentence for whatever reasons a court views as justified.

Assuming, arguendo, that a service court does have the general authority to reduce a sentence because of unreasonable post-trial delay as part of its determination of an appropriate sentence, does not explain how such authority could be exercised without regard to the limitation of Article 59(a). For purposes of statutory interpretation, it is helpful to review the text of Articles 66(c) and 59(a) side-by-side. Article 66(c) provides:

> In cases referred to it, the Courts of Criminal Appeals . . . may affirm only such findings of guilty and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.[112]

Article 59(a) provides:

> A finding or sentence of court-martial may not be held to be incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.[113]

The question, then, is how to relate these two articles. It is a fundamental rule of statutory interpretation that, when interpreting two statutory provisions, one should normally interpret them in such a way as to give maximum effect to both.[114] The easiest way to accomplish that goal with respect to Articles 66(c) and 59(a) is merely to put the word "but" or "however" between them. This results in the rule that a service court may only affirm a sentence that is legally correct and which it deems to be appropriate, but that it may not reduce the sentence due to an

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[111] *See* United States v. Bauerbach, 55 M.J. 501, 502–04 (A. Ct. Crim. App. 2001).
[112] UCMJ art. 66(c) (2008).
[113] *Id.* art. 59(a).
[114] Rockbridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1971) (citing Richards v. United States, 369 U.S. 1 (1962) ("It is a cardinal principle of statutory construction that whenever possible statutes are to be given such effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.")).

error of law that did not materially prejudice the substantial rights of the accused.

The *Collazo/Tardif* interpretation of these articles, however, is that Article 59(a) does not apply to the service courts at all if the court indicates that it is reducing a sentence for legal error because it does not believe that the sentence should be approved, even if there is no prejudice to the accused. Obviously, an interpretation which essentially negates one of the statutory provisions in question does not accord with the basic rules of statutory interpretation. Moreover, as Judge Crawford noted in her dissent in *Tardif*, the fact that no court had ever put forth such an interpretation in the fifty years since the passage of the UCMJ is a strong indication that it is not the proper one.[115] In fact, just four years before the *Tardif* decision, CAAF explicitly supported the interpretation that Articles 66(c) and 59(a) should be read together to "bracket" the authority of the service courts, to wit:

> [W]hile the Courts of Criminal Appeals are not constrained from taking notice of otherwise forfeited errors, they are constrained by Article 59(a), because they may not reverse unless the error "materially prejudices the substantial rights of the accused." Articles 59(a) and 66(c) serve to bracket their authority. Article 59(a) constrains their authority to reverse; Article 66(c) constrains their authority to affirm.
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> . . . .
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> Article 59(a) limits military appellate courts from reversing a finding or sentence for legal error "unless the error materially prejudices the substantial rights of the accused."[116]

Clearly, this interpretation does not jibe with that from *Tardif* that Article 59(a) does not constrain the ability of a court of criminal appeals to grant relief for nonprejudicial legal error.

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[115] United States v. Tardif, 57 M.J. 219, 227 (C.A.A.F. 2002) (Crawford, C.J., dissenting).
[116] United States v. Powell, 49 M.J. 460, 464–65 (C.A.A.F. 1998).

One should remember, as well, that the breaking down of the Article 66(c) authority into its three components is a purely conceptual one, based upon a parsing of the fairly simple language contained within the article. Nowhere does Article 66(c) specifically say that there is a separate authority to determine an appropriate sentence; rather, Article 66(c) says that the court "may affirm only such findings of guilty and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[117] The conceptual authority to determine sentence appropriateness stems from the language "determines, on the basis of the entire record, should be approved." If one assumes that there is unlawful post-trial delay and that the court wishes to grant sentence relief for the legal error, stating the relief in Article 66(c) terms one would say that "the court is affirming part of the sentence because the original sentence is not correct in law (due to the unlawful post-trial delay) and that the court determines, accordingly, that it should only approve a reduced sentence." Whether there exists material prejudice, which would limit the ability of the court to actually reduce the sentence on this ground, would be a separate analysis.

Now, once again using the language from Article 66(c), if one assumes that there is unlawful post-trial delay and the court wishes to grant relief, but for sentence appropriateness reasons, one would say that "the court is affirming part of the sentence because the original sentence is not correct in law (due to the unlawful post-trial delay) and that the court determines, accordingly, that it should only approve a reduced sentence." Note that, in Article 66(c) terms, the language used would be identical. Even if the court is relying upon its conceptual sentence appropriateness authority, it could not say that the sentence is correct in law because of the existence of the unlawful post-trial delay. The fact that Article 59(a) may ultimately limit the court's ability to grant relief due to the lack of prejudice does not change how the relief would be stated for Article 66(c) purposes. This use of the plain text only further illustrates that point that finding a sentence inappropriate due to unreasonable post-trial delay is merely another way of saying that the sentence should not be approved on the ground of an error of law. The authority of a court to grant sentence relief should not hinge on the playing of conceptual word games and the breaking apart of otherwise plain language.

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[117] UCMJ art. 66(c).

Additionally, there is no indication whatsoever in the legislative history of the UCMJ that Congress intended to exempt the service courts from Article 59(a). Because the UCMJ was such a dramatic change in the field of military justice and was creating a myriad of new procedural protections for servicemembers, there was understandable concern that all of these new rules may create legal loopholes and undeserved windfalls for criminals. Felix Larkin, a key member of Secretary Forrestal's committee on the UCMJ, testified regarding Article 59(a):

> MR. BROOKS. And in reference to the term "error materially prejudices," exactly how far does that go?
> MR. LARKIN. Well, it is provided that there will not be a setting aside of a finding of guilty for technical reasons or for minor errors of law which do not prejudice the rights of the accused.
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> . . . .
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> I think it is a common rule in civil practice and it has been generally applied in courts-martial. You can't try a case—the finest trial judge probably can't try a case—without making some technical error occasionally, but the error is so inconsequential that the substantial rights of the accused have not been prejudiced at all and there is no reason why the verdict should be set aside by virtue of minor or technical errors. If you have a substantial error or an error that prejudices his substantial rights, why then of course it should be set aside.
>
> We have taken this from the statute and have emphasized it because we have as you have noticed made the trial of a case and the review of a case more legal in that we have required lawyers and we have required instructions to the court on the record.
>
> Now we feel that it is progress to do that, but on the other hand we do not feel that anything is gained by making the system so technical that you can have reversals for minor technical errors. We feel strongly

> that you should not have reversals for errors of that character.[118]

Just two years after the passage of the UCMJ, the COMA observed:

> It is clear, however, that Article 59(a), as well as other similar federal and state legislation, grew out of a widespread and deep conviction concerning the general course of review in American criminal cases, and the fear that our appellate courts in criminal cases had become in truth "impregnable citadels of technicality."[119]

Allowing the courts of criminal appeal to grant sentence relief for errors that do not materially prejudice a substantial right of the accused runs clearly against congressional intent in avoiding the creation of windfalls for accuseds who have not been harmed by legal errors in the processing of their case. Nowhere do the *Collazo* or *Tardif* courts indicate why this policy does not apply to the service courts or where there is any indication in either the legislative history or fifty years of jurisprudence that the service courts had an exemption from the limitation of Article 59(a).

The simple answer is that neither the Army court nor CAAF actually believed that the service courts had carte blanche authority to grant relief for nonprejudicial errors, but they used this reasoning as a pretext to justify taking measures against the increasing flow of post-trial delay cases. Strong evidence for this is the fact that no court, either before or since *Tardif*, has used its sentence appropriateness authority to correct any nonprejudicial legal error other than post-trial delay. Logically speaking, there is no reason why the rationale from *Collazo* and *Tardif* should not apply to any legal error. If a service court can grant relief for nonprejudicial post-trial delay as part of its determination of an appropriate sentence, then why not grant relief for any other legal error without requiring prejudice? Certainly, there is nothing special about post-trial delay as a legal error to give it a special exception to the requirements of Article 59(a), other than the fact that the judges became

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[118] *Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 1174–75 (1949).

[119] United States v. Lee, 2 C.M.R. 118, 122 (C.M.A. 1952) (quoting Kotteakos v. United States, 328 U.S. 750, 759–60 (1946)).

impatient with their inability to correct it. Despite the lack of a logical distinction, however, the courts have continued to require a showing of prejudice in order to grant sentence relief for all other legal errors.

In *United States v. Wheelus*, CAAF set forth the standards for determining whether an accused is entitled to relief regarding an error in the staff judge advocate's post-trial recommendation.[120] While noting a service court's "broad power to moot claims of prejudice," CAAF held:

> The applicable statutory and Manual provisions, as well as our prior cases, establish the following process for resolving claims of error connected with the convening authority's post-trial review. First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity.
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> . . . .
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> Lastly, there are those cases where an appellant has not been prejudiced, even though there is clearly an error in the post-trial proceedings. If that be the case, then the Court of Criminal Appeals preferably should say so and articulate reasons why there is no prejudice.[121]

Despite the holding of *Tardif*, which would allow the courts of criminal appeals to grant relief for such an error regardless of the lack of prejudice, *Wheelus* continues to be followed as the proper standard for reviewing post-trial error cases.[122]

An interesting case is that of *United States v. Fagan*, decided a year and a half after *Tardif*.[123] In *Fagan*, the appellant alleged cruel and unusual punishment at the confinement facility and submitted an affidavit regarding the alleged abuses, which was rebutted by affidavits from the Government.[124] Rather than remand the case back to the

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[120] United States v. Wheelus, 49 M.J. 283 (C.A.A.F. 1998).
[121] *Id.* at 288–89.
[122] *See, e.g.*, United States v. Capers, 62 M.J. 268, 269 (C.A.A.F. 2005); United States v. Rosenthal, 62 M.J. 261 (C.A.A.F. 2005).
[123] United States v. Fagan, 59 M.J. 238 (C.A.A.F. 2004).
[124] *Id.* at 240.

convening authority for a fact-finding hearing, the Army court, in a move reminiscent of the *Collazo* case, decided to grant sentence relief under its "broad power to moot claims of prejudice."[125] In rejecting this generous grant of relief, CAAF stated,

> The exercise of the "broad power" referred to in *Wheelus* flowed from the existence of an acknowledged legal error or deficiency in the post-trial review process. It is not a "broad power to moot claims of prejudice" in the absence of an acknowledged error or deficiency, nor is it a mechanism to "moot claims" as an alternative to ascertaining whether a legal error or deficiency exists in the first place. . . . However "broad" it may be, the "power" referred to in *Wheelus* does not vest the Court of Criminal Appeals with authority to eliminate that determination and move directly to granting sentence relief to Fagan. Rather, a threshold determination of a proper factual and legal basis for Fagan's claim must be established before any entitlement to relief might arise.[126]

Therein lies the problem. If, as according to *Tardif*, a service court's authority to determine an appropriate sentence under Article 66(c) is distinct from its authority to correct errors of law, and if a service court can use its sentence appropriateness authority to correct a nonprejudicial post-trial legal error merely out of a sense of fairness, then why can it not find a sentence inappropriate to moot a possible, but unresolved, Eighth Amendment violation? Moreover, as the Army court indicated in *Bauerbach*, a service court's determination of an appropriate sentence is final and should not be subject to review by CAAF due to the limitations of Article 67, even if the ultimate basis of the service court's determination is an error of law.[127] How then, did CAAF even have jurisdiction to question the Army court's granting of sentence relief in *Fagan*? Simple—CAAF recognized that granting sentence relief for an error of law *is* different than granting relief for an inappropriate sentence, and that granting relief for an error of law is subject to review. It should, therefore, also be subject to Article 59(a), UCMJ.

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[125] *Id.* at 244 (quoting *Wheelus*, 49 M.J. at 288).
[126] *Id.*
[127] *See* United States v. Bauerbach, 55 M.J. 501, 505 (A. Ct. Crim. App. 2001).

The bottom line is that the holding in *Tardif* appears to have been an expedient to allow the service courts to curb the problem of unreasonable post-trial delay and was based on questionable logic and a rejection of fifty years of precedent. Yes, it is true that the service courts have broad authority to determine an appropriate sentence, and it is equally true that such determination is generally not subject to Article 59(a) when the reasons for the determination are a consideration of the individualized factual circumstances of an accused's offenses and whether the sentence is fair. But it is an entirely different matter to say that a sentence is inappropriate because of a legal error (in this case, unreasonable post-trial delay). In such a case, the court is not really determining an appropriate sentence in the traditional sense under the established jurisprudence, but rather, it is remedying a legal error. Regardless of whether the court says it is granting relief because the sentence is inappropriate due to the legal error or whether it is granting relief for the legal error, the end result is that the court is reversing a sentence "on the ground of an error of law," as specifically prohibited by Article 59(a), UCMJ. The fact that the courts have relied upon this faulty logic to correct only post-trial delay errors is just more evidence that the purported reasons for the holding are not genuine and that the *Tardif* opinion may have only been a means to an end.

IV. *United States v. Moreno* and *United States v. Toohey*

The *Tardif* opinion did not solve the problems with post-trial processing delay. Just because CAAF said that the service courts had the discretionary authority to remedy unreasonable post-trial delay, even without a showing of prejudice, did not mean that the service courts would choose to exercise this authority. This was particularly true of the service courts that had previously held that they did not actually have the authority to remedy post-trial delay without a showing of prejudice. Accordingly, CAAF started to explore ways in which it could remedy the problem of post-trial delay itself, notwithstanding the fact that it was, unlike similar service courts, still subject to the limitation of Article 59(a), UCMJ. Over the next five years, CAAF would decide a series of cases, which taken together, would dramatically change the landscape of post-trial delay jurisprudence.

In 2003, CAAF decided the case of *Diaz v. The Judge Advocate of the Navy*, which involved a petition for extraordinary relief on the part of

Diaz, who was still waiting for his appeal to be heard by the NMCCA.[128] Like the earlier case of *Rhoades v. Haynes*, discussed *supra*, Diaz used the extraordinary writ process seeking to expedite the post-trial review of his case.[129] Having unsuccessfully sought relief from the Navy-Marine court, Diaz petitioned CAAF because his assigned appellate defense counsel had possessed his case for a year and a half, but had yet to submit a brief to the Navy-Marine court, citing an excessive caseload as the reason behind her continued requests for enlargements of time in which to file.[130] After his original appellate counsel received eleven enlargements of time, Diaz was appointed a new appellate defense counsel, who indicated to the court that there was "little hope of [Diaz's] case being exhaustively read and the appellate issues briefed anytime soon given the present workload of the current Appellate Defense Counsel."[131] The new appellate defense counsel also indicated that the average workload of counsel at the Navy-Marine Corps Appellate Defense Division was "70 cases comprising [an] average total of 18,100 pages of trial transcript."[132]

Noting that Diaz had a legal right to Government-provided appellate counsel under Article 70, UCMJ, and that he had a constitutional right to prompt appellate review under the Due Process Clause of the Fifth Amendment, CAAF found that Diaz was "not being afforded an appellate review of his findings and sentence that comports with the requirements of Article 66 and Article 70. These rights must be recognized, enforced, and protected by the Government, by the appellate attorneys, by the Court of Criminal Appeals, and by this Court."[133] Accordingly, CAAF ordered that the Navy-Marine court expeditiously review Diaz's appeal, that it take appropriate action to ensure that the pleadings in the case are filed in a timely fashion, and that it submit a report to CAAF within sixty days indicating the steps it had taken to comply with CAAF's orders.[134]

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[128] Diaz v. The Judge Advocate of the Navy, 59 M.J. 34 (C.A.A.F. 2003). Diaz actually filed a Motion for Appropriate Relief, but CAAF considered it as a properly-styled Petition for Extraordinary Relief. *Id.* at 35.
[129] *See* Rhoades v. Haynes, 46 C.M.R. 189 (C.M.A. 1973), discussed *supra* notes 40–42 and accompanying text.
[130] *Diaz*, 59 M.J. at 35.
[131] *Id.* at 36.
[132] *Id.* at 36–37.
[133] *Id.* at 37–39 (citing Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994); Evitts v. Lucey, 469 U.S. 387 (1985); United States v. Antoine, 906 F.2d 1379 (9th Cir. 1990); United States *ex rel.* Green v. Washington, 917 F. Supp. 1238 (N.D. Ill. 1996)).
[134] *Id.* at 40.

Shortly after the decision in *Diaz*, another servicemember awaiting review of his case by the Navy-Marine court filed a Petition for Extraordinary Relief.[135] Almost six years had passed since Marine Staff Sergeant (SSgt) Toohey's court-martial, and his appeal had still not been decided by the NMCCA.[136] Staff Sergeant Toohey's case was a model of how not to process a case post-trial, with excessive delays at virtually every step of the process—from the transcription of the record, the preparation of the staff judge advocate's recommendation and the convening authority's action to the normally routine task of forwarding the completed record to the service court of criminal appeals.[137]

In ruling on Toohey's petition, CAAF found that the Due Process Clause of the Fifth Amendment guaranteed the right to a speedy post-trial review and noted that several federal courts of appeal had taken the same position.[138] In resolving claims of post-trial appellate delay, the federal courts use a modified version of the four-part test, adopted from the pretrial speedy trial case of *Barker v. Wingo*, which considers: "(1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant."[139] Then, quoting a case from the U.S. Court of Appeals for the Sixth Circuit regarding the length of the delay, CAAF wrote, "Second, if the constitutional inquiry has been triggered, the length of the delay is itself balanced with the other factors and may, in extreme circumstances, give rise to a strong 'presumption of evidentiary prejudice' affecting the fourth *Barker* factor."[140] Rather than apply these factors to the case at hand, however, CAAF chose to remand the case back to the Navy-Marine court to determine whether SSgt Toohey's Fifth Amendment

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[135] *See* United States v. Toohey, 60 M.J. 100 (C.A.A.F. 2004).
[136] *Id.* at 101.
[137] *Id.*
[138] *Id.* at 102 (quoting Campiti v. Matesanz, 186 F. Supp. 2d 29, 43 (D. Mass. 2002) ("Although the Supreme Court has not addressed appellate delay in the due process context, seven of the Courts of Appeal have held that an appellate delay may constitute a due process violation under some circumstances.")). Actually, as will be discussed *infra*, there appear to be nine federal courts of appeal that have taken this position, not counting CAAF.
[139] *Id.* (citing Barker v. Wingo, 407 U.S. 514, 530 (1972); United States v. Hawkins, 78 F.3d 348, 350 (8th Cir. 1996); Hill v. Reynolds, 942 F.2d 1494, 1497 (10th Cir. 1991); United States v. Antoine, 906 F.2d 1379 (9th Cir. 1990); Simmons v. Reynolds, 898 F.2d 865, 868 (2d Cir. 1990); Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1981); United States v. Johnson, 732 F.2d 379, 381–82 (4th Cir. 1980)).
[140] *Id.* (quoting United States v. Smith, 94 F.3d 204, 209 (6th Cir. 1996) (quoting Doggett v. United States, 505 U.S. 647, 657 (1992)).

right to due process had been violated.[141] The reasons given by CAAF for remanding the case are worthy of note, as the court indicated:

> A second reason why we should allow the Navy-Marine Corps Court to resolve this issue arises from that court's unique powers under Article 66(c). Prejudice is a clear requirement for an Article III [civilian] court to provide relief for unreasonable post-trial delay. Our review involves a determination of whether a prejudicial error of law occurred. The Courts of Criminal Appeals, however, possess broader powers. They may issue relief upon a finding that lengthy delay following a court-martial conviction renders some portion of the findings or sentence inappropriate. Even if it finds that the delay in this case does not rise to the level of a prejudicial error of law—a matter about which we express no opinion—the Navy-Marine Corps Court has the authority to nevertheless conclude that some form of relief is appropriate.[142]

Following its decision in *Tardif*, this holding may not seem so surprising. The court observes, correctly, that the civilian federal courts all require a showing of actual prejudice before granting relief for post-trial delay, that its own review is limited to errors of law and is subject to the limitation of Article 59(a), UCMJ, but that the service court has discretionary authority to give sentence relief for nonprejudicial post-trial delay in light of *Tardif*. This holding, however, and the assumptions contained therein will dramatically change when SSgt Toohey's case returns to CAAF in the regular course of the appellate review process and following CAAF's intervening opinion in *United States v. Moreno*.

Also of interest is CAAF's statement regarding a lengthy delay, in extreme circumstances, creating a "strong 'presumption of evidentiary prejudice,'" which is an indirect quote from the U.S. Supreme Court case of *Doggett v. United States*.[143] The CAAF also uses this exact quote one year later in the case of *United States v. Jones*.[144] While this quote ended

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[141] *Id.* at 104.
[142] *Id.* at 103–04 (citing United States v. Luciano-Mosquera, 63 F.3d 1142, 1158 (1st Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1563–64 (10th Cir. 1994)).
[143] *Id.* at 102 (quoting *Smith*, 94 F.3d at 209).
[144] United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005). In *Jones*, CAAF grants relief for unreasonable post-trial delay, but does so upon a finding of actual prejudice.

up not being of much significance in responding to SSgt Toohey's petition or in *Jones*, it provides some insight into CAAF's desire to find a way to have a presumptively prejudicial delay without the requirement for proving actual prejudice. This becomes significant in future cases, and thus warrants some further discussion.

Doggett was a Sixth Amendment pretrial speedy trial case involving a delay of eight and a half years between Doggett's indictment and his arrest and subsequent trial.[145] Even though Doggett could point to no specific prejudice caused to him by the delay, the U.S. Supreme Court, in a 5–4 decision, reversed his conviction, finding the delay to be presumptively prejudicial and a violation of his Sixth Amendment right to a speedy trial.[146] The majority reached its decision due to concerns that such a long delay "presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify," and that "time's erosion of exculpatory evidence and testimony 'can rarely be shown.'"[147]

The CAAF cites the Sixth Circuit case of *United States v. Smith* for the proposition that the *Doggett* presumption of prejudice can be applied in a post-trial delay context.[148] Of the nine circuits that have considered appellate post-trial issues, the Sixth Circuit is the only one that has applied *Doggett* to the post-trial context, and even it has recently backed away from that position.[149] Furthermore, in *Smith*, the Sixth Circuit found that "the presumptive prejudice arising out of the three-year delay in this case, if any, is negligible at best. . . . Moreover, we conclude that the prejudice does not even make it as far as the balancing test, because the government has successfully rebutted any discernible presumption in this case: there can be no doubt that Smith's ability to defend himself at resentencing has remained wholly unimpaired."[150] This is important because it shows that not only did the Sixth Circuit view the *Doggett* presumption of prejudice as being subject to rebuttal by the Government if it could show that there was no way that the accused would be prejudiced at a rehearing, but the court's rationale shows that the *Doggett*

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[145] *Doggett*, 505 U.S. at 650.
[146] *Id.* at 531–32.
[147] *Id.* at 530–31 (quoting Barker v. Wingo, 407 U.S. 514, 532 (1972)).
[148] *Toohey*, 60 M.J. at 102 (quoting *Smith*, 94 F.3d at 209).
[149] *See* United States v. Gray, 52 Fed. Appx. 650, 654 (6th Cir. 2002) (unpub.) ("[N]one of the decisions of this or any other circuit applying *Barker* to the appellate context has granted a due process speedy appeal motion absent a significant showing of prejudice.").
[150] *Smith*, 94 F.3d at 212.

presumption should only come into play if there actually is a need for a rehearing or retrial.

In the 1994 case of *Harris v. Champion*, the Tenth Circuit Court of Appeals recognized the theoretical possibility that a *Doggett* presumption could come into play in extreme circumstances, but stated that, "we agree with the Ninth Circuit that, ordinarily, a petitioner must make some showing on the fourth factor—prejudice—to establish a due process violation."[151] Like the Sixth Circuit, however, the Tenth Circuit has recently backed away from the use of any *Doggett* presumption, finding that the *Barker* analysis changes following a conviction:

> We observed in *Perez* that once a defendant has been convicted, the rights of society increase in proportion to the rights of the defendant. Post-conviction prejudice therefore "must be substantial and demonstrable."
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> . . . .
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> Additionally, we have indicated the necessity of showing substantial prejudice dominates the *Barker* balancing test once a defendant has been convicted.[152]

The Ninth Circuit Court of Appeals has stated it even more pointedly:

> In short, we are not persuaded that extreme appellate delay generally threatens to prejudice a defendant's ability to defend himself on retrial "in ways that [he] cannot prove or, for that matter, identify." In this respect, we deem *Doggett* inapposite, and therefore conclude that it would be inappropriate to afford all appellate delay claimants the benefit of an automatic presumption of prejudice.[153]

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[151] Harris v. Champion, 15 F.3d 1538, 1559, 1565 (10th Cir. 1994) (citing United States v. Tucker, 8 F.3d 673, 676 (9th Cir. 1993)).

[152] United States v. Yehling, 456 F.3d 1236, 1245 (10th Cir. 2006) (quoting Perez v. Sullivan, 793 F.2d 249, 256 (10th Cir. 1986)).

[153] United States v. Mohawk, 20 F.3d 1480, 1488 (9th Cir. 1994) (quoting United States v. Doggett, 505 U.S. 647, 657 (1992)); *see also* Elcock v. Henderson, 28 F.3d 276, 279 (2d Cir. 1994) (*Doggett* inapplicable to claims of appellate delay).

Thus, we can see that CAAF's application of the *Doggett* presumption to an appellate context was without support, as the only two circuits that even gave the presumption lip service either noted it as merely an extreme possibility or allowed it to be rebutted by a clear showing that there was, in fact, no actual prejudice. Regardless, as noted above, both circuits appear to have since given up on *Doggett* altogether. As we will soon see, CAAF itself appears to back away from the use of *Doggett*, only to find other ways of attacking the problem of excessive post-trial delay.

The next step in the evolution of CAAF's post-trial delay jurisprudence was the case of *United States v. Moreno*.[154] Corporal Moreno was convicted of rape and sentenced to confinement for six years, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.[155] In addition to his assertion that one of his panel members was unlawfully biased, Moreno argued that the 1688 days that it took from his conviction until a decision was issued by the NMCCA constituted unreasonable post-trial delay for which he should be given relief.[156] In analyzing Moreno's assertion of post-trial delay, CAAF again turned to the modified Barker factors it espoused in *Toohey*: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice."[157] Citing *Barker*, CAAF stated:

> Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation.
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> . . . .
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> No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.[158]

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[154] United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).
[155] *Id.* at 132.
[156] *Id.* at 135.
[157] *Id.* (citing United States v. Toohey, 60 M.J. 100, 102 (C.A.A.F. 2004); United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)).
[158] *Id.* at 136 (citing Barker v. Wingo, 407 U.S. 514, 533 (1972); Simmons v. Reynolds, 898 F.2d 865, 868 (2d Cir. 1990)). The cite and parenthetical from *Simmons* was slightly disingenuous because four years later, the Second Circuit explicitly held that a showing

The significance of this quote should be readily apparent, as prejudice is one of the four factors in the *Barker* analysis.

The court then turned to analyzing the case under the four factors. Regarding the length of the delay, CAAF stated that "[w]e conduct a case-by-case analysis to determine if a given delay is facially unreasonable," and then concluded that the 1688-day delay in Moreno's case was facially unreasonable.[159] During this discussion, CAAF dropped the following footnote:

> In the speedy trial context, "extreme cases of delay would produce a strong presumption of prejudice to the ability of the party to defend itself at trial . . . ." Circuit courts have split on whether the Doggett presumption of prejudice is applicable to a due process appellate delay analysis.[160]

As discussed *supra*, however, to say that there was a "split" between the circuits was a bit of a stretch given that only two of the nine circuits applying the modified Barker factors to the post-trial context had ever recognized even a possibility of applying the *Doggett* presumption of prejudice and both the *Smith* and *Harris* cases cited by CAAF seriously limited the application thereof. Moreover, both circuits have since backed away from use of *Doggett* in appellate delay cases, although in defense of CAAF, the Tenth Circuit's apparent rejection of the use of *Doggett* did not occur until after *Moreno* was decided.[161] As it turns out, however, CAAF's reference to the *Doggett* presumption of prejudice will not be relevant to CAAF's ultimate resolution of the post-trial delay issue.

Turning to the next *Barker* factor, the reasons for the delay, CAAF stated that it would examine each step of the post-trial period separately to determine what reasons the Government had for the delay.[162] In this

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of actual prejudice is required to a establish a due process violation for appellate delay. *See Elcock*, 28 F.3d at 279.

[159] *Moreno*, 63 M.J. at 136.

[160] *Id.* at 136 n.8 (citing United States v. Smith, 94 F.3d 204, 211 (6th Cir. 1996). *Compare Smith* and Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), *with* United States v. Mohawk, 20 F.3d 1480 (9th Cir. 1994)).

[161] *See* United States v. Yehling, 456 F.3d 1236, 1245 (10th Cir. 2006); United States v. Gray, 52 Fed. Appx. 650, 654 (6th Cir. 2002) (unpub.).

[162] *Moreno*, 63 M.J. at 136.

case, the court noted that the 490 days between the end of the trial and the convening authority's action, the seventy-six days between action and docketing the case with the court of criminal appeals, and the 925 days between docketing of the case and the completion of appellate briefs were all excessive.[163] Most interestingly, CAAF concluded that the entire delay at the briefing stage was ultimately attributable to the Government, despite the fact that appellate defense counsel requested eighteen enlargements of time (almost two years).[164] Citing its opinion in *Diaz*, the court found that burdensome appellate caseloads are the responsibility of the Government and that the Government must, therefore, be held responsible for any delays caused by such.[165]

As to the third factor, the appellant's assertion of his right to a timely review, the court found that Moreno did not object to any delay, but held that "[w]e do not believe this factor weighs heavily against Moreno under the circumstances of this case. The obligation to ensure a timely review and action by the convening authority rests upon the Government and Moreno is not required to complain in order to receive timely convening authority action."[166] Continuing, the court stated:

> We also recognize the paradox of requiring Moreno to complain about appellate delay either to his appellate counsel who sought multiple enlargements of time because of other case commitments or to the appellate court that granted the enlargements on a routine basis. While this factor weighs against Moreno, the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay.[167]

Turning to the final factor of prejudice, the court adopted the modified standard for examining prejudice taken by the federal appellate courts from the analysis in *Barker*, to wit:

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[163] *Id.* at 136–37.
[164] *Id.*
[165] *Id.* at 138.
[166] *Id.*
[167] *Id.*

> In the case of appellate delay, prejudice should be assessed in light of the interests of those convicted of crimes to an appeal of their conviction unencumbered by excessive delay. We identify three similar interests for prompt appeals: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in the case of reversal and retrial, might be impaired.[168]

The first sub-factor (i.e., oppressive incarceration pending appeal) is fairly simple. As CAAF explained, "[t]his sub-factor is directly related to the success or failure of an appellant's substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive."[169] Essentially, this sub-factor just considers the obvious injustice to an appellant who has to suffer through unreasonable delay before being granted relief for an actual legal error. Unless an appellant prevails on an asserted legal error other than simply the issue of post-trial delay, this sub-factor is not triggered. Similarly, the third sub-factor (i.e., impairment of one's ability to present a defense at a rehearing) cannot be triggered unless the appellant is successful in the assertion of substantive legal error and there is, in fact, a rehearing or retrial. Additionally, "[i]n order to prevail on this factor an appellant must be able to specifically identify how he would be prejudiced at rehearing due to the delay."[170]

While the first and third sub-factors in this prejudice analysis reflect obvious harm to an appellant who prevails upon appeal after an extended and unnecessary delay, the second sub-factor (i.e., minimization of anxiety and concern of those awaiting appeal) is far more amorphous. CAAF noted that the federal circuits were taking different approaches with respect to this sub-factor, with the Third, Ninth, and Tenth Circuits requiring a showing of some form of detailed or particularized anxiety related to the post-trial processing of the case, and the Second Circuit affirming district court cases finding this sub-factor to be triggered

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[168] *Id.* at 138–39 (quoting Rheuark v. Shaw, 628 F.2d 297, 303 (5th Cir. 1981), citing United States v. Hawkins, 78 F.3d 348, 351 (8th Cir. 1996); Coe v. Thurman, 922 F.2d 528, 532 (9th Cir. 1990); Harris v. Champion, 15 F.3d 1538, 1547 (10th Cir. 1994)).
[169] *Id.* at 139 (citing Cody v. Henderson, 936 F.2d 715, 720 (2d Cir. 1991)).
[170] *Id.* at 140 (citing United States v. Mohawk, 20 F.3d 1480, 1487 (9th Cir. 1994)).

merely by the existence of an unusually long delay.[171] The court then observed that, "[w]hile some circuits require that an appellant have a meritorious appeal to prevail on this sub-factor, *see id.*, others have recognized anxiety arising from excessive delay regardless of whether the appellant prevails on a substantive issue."[172]

Ultimately, CAAF held that

> the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. This particularized anxiety or concern is thus related to the timeliness of the appeal, requires an appellant to demonstrate a nexus to the processing of his appellate review, and ultimately assists this court to "fashion relief in such a way as to compensate [an appellant] for the particular harm." We do not believe that the anxiety that an appellant may experience is dependent upon whether his substantive appeal is ultimately successful.[173]

The court then went on to find that Moreno had suffered a constitutional level of anxiety for purposes of this sub-factor because he had been forced to register as a sex offender upon his release from confinement—anxiety which was exacerbated by the excessive post-trial delay and the fact that Moreno was ultimately granted a rehearing due to the meritorious implied bias error found with respect to his panel composition.[174] Based upon its finding of prejudice, when balanced with the other *Barker* factors, CAAF determined that Moreno's constitutional right to due process was violated and, as relief, decreed that the

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[171] *Id.* at 139-40 (citing United States v. Antoine, 906 F.2d 1379, 1383 (9th Cir. 1990); Coe v. Thurman, 922 F.2d 528, 532 (9th Cir. 1990); Burkett v. Fulcomer, 951 F.2d 1431, 1447 (3d Cir. 1991); *Harris*, 15 F.3d at 1565; Yourdon v. Kelly, 969 F.2d 1042 (2d Cir. 1992) (table decision), *aff'g* 769 F. Supp. 112, 115 (W.D.N.Y. 1991); Snyder v. Kelly, 972 F.2d 1328 (2d Cir. 1992) (table decision), *aff'g* 769 F. Supp. 108, 111 (W.D.N.Y. 1991)). Whether the Second Circuit cases cited actually stand for the proposition which CAAF claims they do is another matter which will be discussed *infra*.

[172] *Moreno*, 63 M.J. at 140 (citing *Snyder*, 769 F. Supp. at 111). It is not entirely clear to which case(s) CAAF is citing by its "*see id.*," but it appears to be the Third, Ninth, and Tenth Circuit cases cited *supra* note 171.

[173] *Id.* (quoting *Burkett*, 951 F.2d at 1447).

[174] *Id.*

convening authority could not approve any portion of the sentence exceeding a punitive discharge if Moreno were convicted at his retrial.[175]

This was not the end of the story, however. Having conceptually expanded its own authority to review and remedy excessive post-trial delay, CAAF opted to take the next step and promulgate objective standards to be used in considering future post-trial delay cases. The court pointed to the fact that, in *Dunlap*, it had previously adopted a "presumption of a denial of speedy disposition of the case" for failure of a convening authority to take action within ninety days of trial.[176] It then quoted part of the decision in *Banks*, reversing *Dunlap*, which indicated the court's belief, at that time, that "convicted service persons now enjoy protections which had not been developed when *Dunlap* was decided. . . . Thus, the serviceman awaiting final action by the convening authority may avail himself of remedies during the pendency of his review which were not clear when *Dunlap* was decided."[177] CAAF then noted that the extra protections cited by the *Banks* court had done little to stem the flow of excessive post-trial delay, implying that the use of strict *Dunlap*-like rules was again appropriate.[178] Thus, CAAF found a way to invoke the authority from the brief and oft-criticized *Dunlap* era in order to take more aggressive measures against the problem of post-trial delay.

There are, of course, two major flaws with this line of reasoning. First, it assumes that the only reason the *Banks* court overruled *Dunlap* was because of the intervening administrative protections and not because the holding in *Dunlap* was based upon a misapplication of Sixth Amendment jurisprudence. As discussed herein *supra*, such an assumption is probably not a wise one. More importantly, however, CAAF ignores the fact that *Dunlap* explicitly limited its strict measures to activities occurring before convening authority action because the entire holding of the case was premised on the theory that delay occurring before action was not actually post-trial delay, but rather should be considered as pretrial delay so as to invoke the stricter Sixth Amendment pretrial standards. Consequently, invoking *Dunlap* as precedent for imposing rigid rules regarding *post-trial* delay is misguided and overlooks the actual legal rationale upon which *Dunlap* was based.

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[175] *Id.* at 141, 144.
[176] *Id.* at 141 (quoting Dunlap v. Convening Authority, 48 C.M.R. 751, 754 (C.M.A. 1974)).
[177] *Id.* at 141–42 (quoting United States v. Banks, 7 M.J. 92, 93 (C.M.A. 1979)).
[178] *Id.* at 142.

Regardless, CAAF found that "some action is necessary to deter excessive delay in the appellate process and remedy those instances in which there is unreasonable delay and due process violations," and held accordingly:

> For courts-martial completed thirty days after the date of this opinion, we will apply a presumption of unreasonable delay that will serve to trigger the Barker four-factor analysis where action of the convening authority is not taken within 120 days of the completed trial. We will apply a similar presumption of unreasonable delay . . . where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action.
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> . . . .
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> For those cases arriving at the service Courts of Criminal Appeals thirty days after the date of this decision, we will apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals. These presumptions of unreasonable delay will be viewed as satisfying the first Barker factor and they will apply whether or not the appellant was sentenced to or serving confinement.[179]

At first glance, these deadlines appear to be disturbingly rigid, but the court immediately made it clear that these presumptions are not dispositive per se: "It is important to note that the presumptions serve to trigger the four-part Barker analysis—not resolve it. The Government can rebut the presumption by showing the delay was not unreasonable."[180] Assuming that after reviewing the four *Barker* factors, an appellate court finds a denial of due process with respect to post-trial processing, the appellate court "should 'tailor an appropriate remedy, if any is warranted, to the circumstances of the case.'"[181]

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[179] *Id.*
[180] *Id.*
[181] *Id.* at 143.

Moreno was a significant case in the area of post-trial delay jurisprudence, but not for the reasons that many immediately assumed. The new temporal guidelines did not actually change anything except for requiring an appellate court to analyze the case using the *Barker* factors—something it was already required to do, even if a court did not explicitly set forth its analysis. The court's holding, however, signaled its extreme displeasure at the continuing trend of lengthy post-trial processing and served as an implied threat of even stronger measures that might be forthcoming. Indeed, the court stated not so subtly:

> We believe that adopting the Doggett presumption of prejudice is unnecessary at this point. We can deter these delays and address the systemic delays we see arising in post-trial and appellate processing through less draconian measures. *See Simmons*, 898 F.2d at 869. Although we do not foreclose the possibility that presumptions of prejudice may yet prove necessary, we do not believe it is necessary to adopt such a presumption at this juncture. [182]

The fact that the court obviously believed that it could impose a presumption of prejudice if it so desired, and the court's statements that none of the *Barker* factors (of which prejudice is one) were dispositive to resolution of a due process claim, were far more problematic because they indicated that CAAF did not view itself to be constrained any longer by the traditional limit of Article 59(a), UCMJ, which requires a finding of prejudice before relief can be granted. As it turned out, *Moreno* set the stage for CAAF's next step in the direction of avoiding Article 59(a), and that step was taken a mere three months after the decision in *Moreno*, when the court reconsidered the *Toohey* case during the normal course of its appeal.

As discussed *supra*, CAAF had remanded Toohey's case back to the NMCCA to consider whether the excessive post-trial delay in that case amounted to a violation of the Fifth Amendment.[183] As noted above, the remand had been prompted by CAAF's acknowledgement that, at least post-*Tardif*, a service court of criminal appeals had greater authority to remedy non-prejudicial post-trial delay. In the two years that passed between Toohey's original writ petition and the decision on regular

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[182] *Id.* at 142.
[183] *See supra* notes 141–42 and accompanying text.

appeal, CAAF's view regarding the role of prejudice with respect to a post-trial due process violation had evolved, and similarly, so did their deference to the service courts' "unique powers." During its review, the Navy-Marine court found that Toohey had not been prejudiced by the excessive delay in the processing of his appeal so that there was no legal error, and that there were not sufficiently extraordinary circumstances to warrant finding his sentence to be inappropriate.[184] As it turns out, however, CAAF no longer viewed either of these points to be an obstacle.

Three months after its decision in *Moreno*, CAAF issued its decision in *United States v. Toohey*—a decision which seemed to affirm the old adage that "bad facts make bad law."[185] The facts regarding the delay in Toohey's case were certainly egregious. Although it was a contested trial, the transcription and authentication of the record took a relatively long 379 days.[186] It was another 265 days before the convening authority took action, and inexplicably, yet another 161 days from action until the record was delivered to the NMCCA.[187] Processing of the case while it was docketed at the Navy-Marine court was no model of efficiency either:

> The Navy-Marine Corps Court of Criminal Appeals granted eleven motions for enlargement of time to Toohey's appellate defense attorney before the defense brief was filed on March 28, 2002 (1,323 days after trial and 518 days after docketing). The Government filed an answer brief on December 6, 2002 (1,576 days after trial and 253 days from submission of Toohey's brief). Toohey filed a reply brief on February 6, 2003 (1,638 days after trial). The Court of Criminal Appeals issued a published opinion on September 30, 2004 (601 days after the completion of briefing). Six years, one month and seventeen days (2,240 days) elapsed between the completion of trial and the completion of Toohey's appeal of right under Article 66, UCMJ, 10 U.S.C. § 866 (2000).[188]

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[184] United States v. Toohey, 60 M.J. 703 (N-M. Ct. Crim. App. 2004).
[185] *See* United States v. Toohey *(Toohey II)*, 63 M.J. 353 (2006).
[186] *Id.* at 357.
[187] *Id.*
[188] *Id.*

On remand following SSgt Toohey's petition for an extraordinary writ, the Navy-Marine court had concluded that, while the delay was excessive, there was no violation of due process because Toohey had not demonstrated any prejudice from the delay and that an adjustment of the sentence using the court's sentence-appropriateness authority under Article 66(c) was not warranted because there were not "extraordinary circumstances" present.[189]

During its review under Article 67, however, CAAF took a different view. The court analyzed the case using the modified *Barker* test set forth in *Toohey I* and *Moreno*. Given the unusual and excessive nature of the delay, it is no surprise that the court found that the delay was excessive under the first *Barker* factor and that there was not sufficient justification for the delay under the second *Barker* factor.[190] Regarding the third factor (i.e., assertion of the right to a timely review and appeal), the court found that SSgt Toohey had repeatedly complained about the delay, to include writing to The Judge Advocate General of the Navy, requesting additional appellate defense counsel, and asserting the issue before both the NMCCA and through his earlier petition to CAAF.[191]

Rather than attempting to resort to mental gymnastics, CAAF forthrightly acknowledged that SSgt Toohey had not shown any prejudice from the delay under the final *Barker* factor. Unlike Moreno, Toohey did not prevail on a claim of other substantive legal error, so he was not able to show that his ability to defend himself upon a rehearing was prejudiced because, quite simply, there was no rehearing at which he could be prejudiced.[192] Similarly, the court did not find that SSgt Toohey experienced any "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision."[193] Upon balancing the sub-factors, the court concluded that "[t]his prejudice factor therefore weighs against Toohey."[194] Normally, a finding of no prejudice would have been fatal to an assertion of legal error during CAAF's Article 67 review of the case due to the limitation of Article 59(a). In this case, however, CAAF turned back to the precedent it established in *Moreno* and observed that "no single factor [is] required to find that post-trial delay constitutes a due-process

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[189] *Toohey*, 60 M.J. at 709–10.
[190] *Toohey II*, 63 M.J. at 359–60.
[191] *Id.* at 360.
[192] *Id.* at 361.
[193] *Id.* (quoting United States v. Moreno, 63 M.J. 129, 140 (C.A.A.F. 2006)).
[194] *Id.*

violation."[195] The court found that the first three Barker factors weighed in Toohey's favor and that "[t]he weight of these factors leads to the conclusion that the delay in Toohey's case is egregious. Balancing these three factors against the absence of prejudice, we hold that SSgt Toohey was denied his due process right to speedy review and appeal."[196]

Before addressing whether Toohey was entitled to relief for this legal error, the court turned to the issue of whether the Navy-Marine court had abused its discretion by not granting relief under Article 66(c). The CAAF took exception with the position of the Navy-Marine court that it should only grant Article 66(c) sentence relief under "the most extraordinary of circumstances."[197] Finding there to be no such constraint upon the ability of a service court to adjust a sentence, CAAF held that the Navy-Marine court applied an erroneous standard of review, and thus abused its discretion.[198] Moreover, CAAF found that the service court erred by conducting its sentence appropriateness review with the view that no due process violation had occurred. The CAAF also chastised the lower court for citing Article 59(a), UCMJ, in its discussion of when to exercise its sentence appropriateness authority, because "[a]s we made clear in *Tardif*, the Court of Criminal Appeals' responsibility to affirm only so much of the sentence as should be approved 'do[es] not implicate Article 59(a).'"[199] In all fairness to the NMCCA, however, that court had specifically acknowledged that *Tardif* had given authority to grant sentence relief under Article 66(c) in the absence of actual prejudice.[200] The reference to Article 59(a) in that context was likely a reflection of the Navy-Marine court's view that granting sentence relief for nonprejudicial legal error should not be a common occurrence—if granting such relief is even legal in the first place. Regardless, CAAF wasted no time in issuing a firm reminder that Article 59(a) was to play no part in the decision of whether to grant relief for unreasonable post-trial delay.

Having earlier found that there was a constitutional due process violation, CAAF turned back to the question of whether any constitutional error was harmless beyond a reasonable doubt. The court

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[195] *Id.* (quoting *Moreno*, 63 M.J. at 136).
[196] *Id.* at 362.
[197] *Id.* (quoting Navy-Marine court in United States v. Toohey, 60 M.J. 703, 710 (N-M. Ct. Crim. App. 2004)).
[198] *Id.*
[199] *Id.* at 363 (quoting United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)).
[200] *Toohey*, 60 M.J. at 710.

found that the egregious delay in the case, with "the adverse impact such delays have upon the public perception of fairness in the military justice system," combined with the fact that the Navy-Marine court's opportunity to grant meaningful relief may be impacted by SSgt Toohey having already completed his sentence to confinement, making it impossible for him to "be confident beyond a reasonable doubt that this delay has been harmless."[201] Accordingly, the court ordered that the case be remanded back to the Navy-Marine court to consider meaningful relief for the due process violation and to reassess the appropriateness of the sentence.[202] This is important because CAAF found that sentence relief for the post-trial delay could be remedied either through use of the sentence appropriateness authority of Article 66(c) as established in *Tardif*, or by remedying the due process violation directly. What CAAF did not explain is how directly remedying a legal error which the court itself expressly found to be nonprejudicial does not violate Article 59(a). Effectively, this opinion took the final step in removing Article 59(a) as an impediment to granting relief for post-trial processing delay and informed the service courts that CAAF would not defer to the service courts' unique equitable authority under Article 66 if the courts did not remedy egregious, albeit nonprejudicial, error. Whether CAAF, a court of law, even has jurisdiction to tell a service court how to exercise equitable relief is another matter.

As it currently stands, CAAF is the only federal court with criminal jurisdiction that believes that it can remedy excessive post-trial delay when the appellant has not been prejudiced thereby. To practitioners familiar with the differences between the civilian and military justice systems, this fact will likely be seen as highly ironic. First of all, unlike the civilian federal courts, CAAF does not have a blanket supervisory authority under the All Writs Act, 28 U.S.C. § 1651(a). As the Supreme Court of the United States made clear in *Clinton v. Goldsmith*, CAAF's jurisdiction, unlike that of the Article III courts, is strictly limited by its jurisdictional grant from Congress.[203] Moreover, unlike federal civilian courts, the military courts are expressly forbidden by Congress to grant relief for legal errors when there has not been material prejudice to a substantial right by virtue of Article 59(a), UCMJ. Accordingly, the fact that the military courts, which are the only federal courts whose jurisdiction explicitly excludes the ability to grant relief absent prejudice,

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[201] *Toohey II*, 63 M.J. at 363.
[202] *Id.*
[203] *See* Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999).

are the only federal courts that are actually remedying excessive post-trial delay without a showing of prejudice is ironic, indeed.

Almost as disturbing as the result in these cases is the reasoning used by CAAF in making the argument for why prejudice was no longer an absolute requirement to granting relief. As discussed before, the attempt by the majority in *Moreno* and the *Toohey* cases to portray a "split" between the civilian federal courts regarding the requirement for prejudice was disingenuous at best. [204] Even the Sixth Circuit Court of Appeals, which CAAF cited as supporting the use of a *Doggett* presumption of prejudice, observed a truth which CAAF was conveniently trying to deny:

> Although the Supreme Court held in *Barker* that no single factor of the four could be deemed "either a necessary or sufficient condition," none of the decisions of this or any other circuit applying *Barker* to the appellate context has granted a due process speedy trial motion absent a significant showing of prejudice.[205]

Similarly, the use of quotes from *Dunlap* as precedent for the establishment of the post-trial processing standards in *Moreno* overlooked the obvious fact that, not only was the legal reasoning in *Dunlap* heavily criticized throughout the military legal community, the questionable authority created in *Dunlap* was limited to activities occurring before the convening authority's action.[206]

The CAAF's treatment of the *Barker* factors in order to make it easier for an appellant to prevail upon a due process claim is also problematic. Holding the Government accountable for defense-requested delays during the appellate process is truly novel. There is little doubt that the staffing of the defense appellate divisions is controlled by the Government and that severely understaffing the divisions could create unfair delays, but as the court indicated in *Diaz v. The Judge Advocate of*

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[204] *See supra* notes 148–52 and accompanying text (discussing United States v. Smith, 94 F.3d 204 (6th Cir. 1996), Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994)).

[205] United States v. Gray, 52 Fed. Appx 650, 654 (6th Cir. 2002) (unpub.) (quoting Barker v. Wingo, 407 U.S. 514, 533 (1973)). In all fairness to the judges on CAAF and their respective legal clerks, this was an unpublished decision, but one that should have been found merely by shepardizing *Smith*.

[206] *See* United States v. Moreno, 63 M.J. 129, 141 (C.A.A.F. 2006) (quoting Dunlap v. Convening Authority, 48 C.M.R. 751, 754 (C.M.A. 1974)).

the Navy, appellants already had the ability to challenge poor staffing of their case through filing an extraordinary writ petition, and the service courts had the authority to order more expeditious briefing or else remedy any failures at that point.[207] To create a de facto rule, however, that the Government is responsible for all delays by appellate defense counsel only serves to create a paradox whereby appellate defense counsel are actually encouraged to delay briefing a case because any delay has the potential to result in sentence relief for their client. The service courts are then put in a position of having to guess whether defense-requested delays are due to a genuine need for more time by appellate defense counsel or whether the defense is merely trying to create a due process issue.

Similarly, CAAF's attempt to allow a finding of prejudice under a *Barker* analysis with a showing of an actual adverse impact on an appellant's appeal or on any retrial or rehearing is based on shaky precedent. As the court itself acknowledged in *Moreno*, an appellant cannot prove prejudice under two of the three *Barker* grounds unless he has prevailed on another substantive legal issue requiring relief, or has been impaired in his ability to litigate his appeal or any retrial or rehearing.[208] Such grounds would obviously constitute material prejudice to a substantial right and, if present, would easily satisfy the limitation of Article 59(a). The last of the *Barker* grounds (i.e., minimizing anxiety and concern) is somewhat more subjective, however. While CAAF did not directly hold that an egregious delay in itself could be deemed to have caused the "particularized anxiety or concern" necessary to constitute prejudice, it did try to imply that there was another "split" in the federal circuits regarding this point by stating that "[t]he Second Circuit has affirmed district court decisions which found anxiety-based prejudice that arose solely from the length of the delay."[209] This statement, however, was something of a red herring.

The *Yourdon* and *Snyder* cases cited by CAAF were both state criminal cases in which the petitioners were seeking a federal writ of habeas corpus due to excessively long post-trial processing.[210] While both of the district court opinions (issued on the same day and virtually

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[207] *See* Diaz v. The Judge Advocate of the Navy, 59 M.J. 34 (C.A.A.F. 2003).
[208] *See Moreno*, 63 M.J. at 139–41.
[209] *Id.* at 139 (citing Yourdon v. Kelly, 969 F.2d 1042 (2d Cir. 1992) (table decision), *aff'g* 769 F. Supp. 112, 115 (W.D.N.Y. 1991); Snyder v. Kelly, 972 F.2d 1328 (2d Cir. 1992) (table decision), *aff'g* 769 F. Supp. 108, 111 (W.D.N.Y. 1991)).
[210] *Yourdon*, 769 F. Supp. at 115; *Snyder*, 769 F. Supp. at 111.

identical in their holdings) did, in fact, indicate that the court felt that the anxiety created by an extensive delay could constitute legal prejudice, the court held that it could not grant relief unless the petitioners' appeals had actually been tainted by the delay.[211] The court denied both petitioners' requests for writs of habeas corpus, and instead suggested that a civil suit for damages under 42 U.S.C. § 1983, would be the more appropriate avenue for relief.[212] The table decisions of the Second Circuit Court of Appeals cited by the *Moreno* court merely affirmed the dismissals of the petitions by the district court and contained no discussion themselves. While CAAF slipped in a footnote stating that "[t]hose district courts and the Second Circuit have found that the more appropriate remedy for anxiety-based prejudice arising from excessive delay is an action for damages under 42 U.S.C. § 1983 . . .," this statement, too, is misleading because it implies that the courts believed that they could have granted relief if they had found it more appropriate.[213] In *Cody v. Henderson*, the Second Circuit made it clear, however, that the federal courts could not grant the requested relief (i.e, a writ of habeas corpus) unless the appeal "has been tainted" by the delay.[214] While not dispositive to the *Moreno* case, CAAF's use of misleading citations to get a foot in the door with respect to further lowering the bar for the prejudice requirement is troubling.

The unfortunate bottom line is that CAAF used whatever means was necessary to achieve the end of remedying post-trial delay, even in the absence of prejudice. It couched the service courts' authority in sentence appropriateness terms even though the post-*Tardif* cases remedying post-trial delay never seem to actually go through the traditional analysis of whether the sentence is fair given all of the facts of the case. Indeed, even when finding that the Navy-Marine court abused its discretion by not granting relief in *Toohey*, CAAF never discussed the circumstances of SSgt Toohey's offenses and whether his overall sentence was relatively harsh or light.[215] If granting sentence relief for unusual post-trial delay were truly part of the service court's determination of an

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[211] *Yourdon*, 769 F. Supp. at 115; *Snyder*, 769 F. Supp. at 111.
[212] *See* 42 U.S.C. § 1983 (2000) (providing a civil cause of action for those whose constitutional rights have been violated by government officials).
[213] *Moreno*, 63 M.J. at 139 n.16 (citing Cody v. Henderson, 936 F.2d 715, 720 (2d Cir. 2000)).
[214] *Henderson*, 936 F.2d at 720. Note that the *Henderson* court did approve of the use of a conditional writ directing completion of a pending appeal that was taking too long similar to that issued by CAAF in *Diaz*.
[215] *Toohey II*, 63 M.J. at 353.

appropriate sentence rather than merely remedying a legal error, one would expect to see at least some discussion of whether the sentence was actually fair and "should be approved."[216] As it is, this supposed ground for granting relief appears to be merely pretext and semantics. As for its own authority to grant relief under Article 67, CAAF's refusal to acknowledge that no other federal court had ever granted relief for appellate delay in the absence of actual prejudice, and its failure to explain how it could order relief in *Toohey II* despite specifically finding there to be no prejudice to the appellant just demonstrates that it no longer views the Article 59(a) requirement for prejudice to be a significant obstacle.

V. Proposed Changes

There is no doubt that the problem of excessive post-trial delay is a difficult one which needs to be fixed. There should also be little doubt that the military courts lack the jurisdiction to fix post-trial delay that does not cause actual prejudice to an appellant. This does not mean, however, that the problem cannot be alleviated to some degree. An obvious solution would be to increase staffing of personnel responsible for the post-trial process, from court-reporters to appellate counsel, but given limited resources and the primary mission of the U.S. military to fight wars around the world, such increases may not be entirely feasible. There are easier administrative changes that would help reduce some obvious causes of post-trial delay and ameliorate some of the difficulties faced by servicemembers awaiting appeal.

A. Amendments to the Rules for Courts-Martial

As Judge Crawford noted in her dissent to *Moreno*, the President is the appropriate authority to promulgate rules for processing courts-martial by virtue of Article 36, UCMJ.[217] Unlike the military courts,

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[216] *See* MacDonnell, *supra* note 106 (providing an excellent discussion of post-*Collazo* cases purporting to rely upon Article 66(c) to grant relief for post-trial delay).

[217] *Moreno*, 63 M.J. at 144 (Crawford, J. dissenting) (citing UCMJ art. 36 (2005)). Article 36, UCMJ, provides:

> Pre-trial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts

which do not have a general supervisory authority, Congress specifically empowered the President, as Commander-in-Chief, with the authority to administer the military justice system. The Rules for Courts-Martial are the result of that grant of authority. The President could, if he so desired, mandate certain processing deadlines and provide for specific penalties in case the deadlines were not met. Once again, however, the establishment of rigid rules for a military justice system which must operate in very fluid and difficult environments may not be the wisest course of action. The ultimate goal should be rules which expedite post-trial processing, prevent cases from getting lost in a proverbial post-trial limbo, and which reduce potential harm to appellants caused by delays but still allow for the flexibility required by the military.

One of the most common sources of post-trial delay is in the transcription and authentication of the record of trial. Obviously, the services should explore the use of new technologies, such as voice recognition software, to speed the transcription of records, but at the end of the day, there is currently no effective way for a convicted servicemember to complain about excessively slow transcription and authentication or to ascertain whether there are legitimate reasons behind any delay. Neither the convening authority nor the servicing office of the staff judge advocate is required to give an explanation as to why a record of trial has not been completed.

Rule for Courts-Martial 1104 covers the preparation and authentication of the record of trial.[218] Subsection (e) of the rule currently provides:

> *Forwarding*. After every court-martial, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action, provided that in the case of a special court-martial in which a bad-conduct discharge

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> of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

UCMJ art. 36.

[218] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1104 (2008) [hereinafter MCM].

> or confinement for one year was adjudged or a general court-martial, the convening authority shall refer the record to the staff judge advocate or legal officer for recommendation under R.C.M. 1106 before the convening authority takes action.[219]

Given the recurring problems at this stage of post-trial processing, the following language should be added to subsection (e):

> The accused shall be provided with written notice when the authenticated record is forwarded to the convening authority, staff judge advocate, or legal officer for review under this section. If the accused has not received notice by 120 days from the date the sentence was adjudged at court-martial, the accused may, at any time thereafter, request that the convening authority explain the reasons behind the delay. Within ten days of service of this request, the convening authority shall respond in writing and specifically indicate why the record of trial had not been authenticated and when it is expected that the record will be authenticated.

While not a dramatic addition, this change would accomplish two goals. First, the convening authority will be reminded that the processing of the court-martial record has passed a certain milestone and will be forced the address the fact that authenticating the record is taking a significant amount of time. If the reason for the delay is justified, the convening authority can so indicate and nothing else needs to be done. If there is no good reason for the delay, then the convening authority can direct the staff judge advocate or legal officer to expedite the processing. Secondly, the written response creates a contemporaneous record documenting the reasons behind the delay, which will aid an appellate court in determining whether any delay at that stage of the processing was unreasonable.

The cost of this provision would be relatively small. The servicing office of the staff judge advocate or legal officer responsible for preparing the record would merely have to prepare a short memorandum explaining the cause of any delay, which the convening authority would endorse if satisfied with the reasons. While not an onerous requirement,

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[219] *Id.* R.C.M. 1104(e).

the simple fact that the staff judge advocate or legal officer will be required to inform the convening authority about the status of the processing will help deter cases from just sitting unattended. In extreme cases of delay, the convening authority's response could be used as evidence in a petition for extraordinary relief before a service court of criminal appeals.

Another provision should be added to the RCM regarding transmittal of the record to the service court of criminal appeals following action. In theory, the process should be fairly simple. Following action by the convening authority, the promulgating order is prepared, copies are made of the record of trial and, when there is a right to appeal, the documents are mailed to the service court of criminal appeals.[220] Despite the routine administrative nature of this procedure, inexplicable delays often occur. For example, in *Toohey*, it took 146 days from the convening authority's action for the case to be docketed at the NMCCA and in *Moreno*, it took 76 days.[221] As the court aptly noted, "[D]elays involving this essentially clerical task have been categorized as 'the least defensible of all' post-trial delays."[222]

The military justice system seeks to balance the needs of a dynamic military with the rights of a criminal accused, but in some cases, there is relatively little military necessity to justify reducing due process rights. Absent unusual circumstances, given today's modern technology and transportation, there is no reason why copies cannot be made of a record of trial and the record mailed from anywhere in the world to arrive at the service court in a reasonably short period of time. Accordingly, the following subsection should be added to RCM 1201(a):

> (3) Absent military exigency or extraordinary circumstances beyond the control of the government, if the record of the court-martial is not received by the Court of Criminal Appeals twenty calendar days from the date the convening authority takes action in the case, the Court of Criminal Appeals shall grant one day of sentence credit, or the equivalent, for each day past twenty days until the record is received. The Court of

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[220] *Id.* R.C.M. 1111(a)(1), 1114, 1201(a).
[221] *Toohey II*, 63 M.J. 353, 360 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 136–37.
[222] *Moreno*, 63 M.J. at 137 (quoting United States v. Dunbar, 31 M.J. 70, 73 (C.M.A. 1990)); *Toohey II*, 63 M.J. at 360.

> Criminal Appeals shall have the sole discretion to determine whether sufficient military exigency or extraordinary circumstances exist to justify any delay in receipt.[223]

By its terms, this rule would allow late delivery to be excused for reasons of military exigency, e.g., the unit is in the midst of military maneuvers or the command is aboard a vessel at sea. Similarly, unusual circumstances such as natural disasters or civil disturbances could serve as justification for a delay. In such a way, the rule would not be so rigid as to compel a windfall to an appellant just because the unit happened to be engaged in a mission essential to national security, but would otherwise force legal offices to perform the "essentially clerical" task of copying and mailing the record of in an expeditious manner. While CAAF does not have the authority to create a rule with a specific processing deadline, notwithstanding the holding in *Moreno*, there is no doubt that the President does have such authority, and this is one instance where the exercise of that authority would be appropriate.

B. Regulatory Changes

In some cases, post-trial processing will necessarily take a longer period of time due to the length of the record or complex legal issues. The Government can, however, alleviate some of the unnecessary burdens that inflexible bureaucratic provisions place on servicemembers awaiting appeal. For example, a servicemember who has completed his sentence to confinement before the appellate process has been completed may be precluded from applying for certain jobs because he does not receive a Department of Defense (DD) Form 214, Certificate of Release or Discharge from Active Duty, until his conviction is final. While this may seem to be a tenuous ground for granting relief for a post-trial delay, even before *Moreno* and *Toohey*, the military courts found prejudice for Article 59(a) purposes in cases where a servicemember could demonstrate that his failure to have a DD 214 hurt his chances of getting civilian employment.

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[223] *See* MCM, *supra* note 218, R.C.M. 1201(a). Rule for Court-Martial 1201(a) requires The Judge Advocate General to forward cases subject to appellate review to the court of criminal appeals. In reality, cases are generally mailed from the unit directly to the service court. *See, e.g.*, U.S. DEPT. OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-46(a) (16 Nov. 2005).

It has never been disputed that in cases involving unreasonable post-trial delay, an appellant can be granted relief when he demonstrates material prejudice to a substantial right. In *United States v. Bruton* and in *United States v. Sutton*, the then-COMA set aside the findings and sentence and dismissed all charges in both cases due to the appellants' unrebutted assertions that they were prejudiced because they did not have DD 214s while on appellate leave.[224] More recently, in *United States v. Jones*, CAAF granted relief on the same grounds based upon affidavits from prospective employers who indicated that the appellant was not considered for employment simply because he lacked a DD 214.[225] As the court observed, "[r]egardless of whether Appellant's potential employer *should* have required a DD-214 as a condition of employment, it appears that the potential employer *did*. The unreasonable delay in this case prevented Appellant from satisfying that requirement."[226] Having found that Jones thereby demonstrated prejudice for purposes of Article 59(a), the court set aside Jones's bad-conduct discharge.[227]

It is perfectly understandable why the services do not currently give servicemembers who are awaiting appeal a DD 214. The DD 214 is titled Certificate of Release or Discharge from Active Duty and a servicemember is not officially discharged until finalization of his appellate process, per Article 71, UCMJ.[228] While the case is pending appellate review, a servicemember is placed in an excess leave status.[229] Department of Defense Instruction (DODI) 1336.1, which sets forth the procedures for preparing the DD 214, indicates that the DD 214 will provide "[t]he Service member with a brief, clear-cut record of the member's active service with the Armed Forces at the time of transfer, release, or discharge, or when the member changes status or component while on active duty."[230] In addition to servicemembers who are discharged, the form is also issued to servicemembers who transfer components, reservists who complete tours of active duty, and enlisted persons upon reenlistment or promotion to a warrant or commissioned

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[224] United States v. Bruton, 18 M.J. 156 (C.M.A. 1984); United States v. Sutton, 15 M.J. 235 (C.M.A. 1983).
[225] United States v. Jones, 61 M.J. 80, 84 (C.A.A.F. 2005).
[226] *Id.* at 85.
[227] *Id.* at 86.
[228] UCMJ art. 71 (2008).
[229] *Id.* art. 76a.
[230] U.S. DEP'T OF DEFENSE, INSTR. 1336.1, CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY (DD FORM 214/5 SERIES) para. 2.2.2. (6 Jan. 1989) [hereinafter DODI 1336.1].

officer.[231] The form lists not only the discharge date and type, but also the length of active duty service and any awards and special training the servicemember may have received.[232] Given that the form concisely and officially summarizes a servicemember's time in service, it is no surprise that some employers may require a DD 214 from applicants they know to have military service.

The solution to this problem could be remarkably simple—give interim DD 214s to convicted servicemembers who have completed their sentence to confinement and are being put on excess leave. If servicemembers who are reenlisting are issued DD 214s, then why not allow the same for a convicted servicemember awaiting appeal? Of course, the DD 214 would have to indicate that the punitive discharge has not actually been executed, but that would be a relatively simple matter. In the remarks section of the form, the following caveat could appear:

> Member was adjudged a [bad conduct][dishonorable] discharge by a [special][general] court-martial on [date]. Member is on excess leave status pending the completion of appellate review under the UCMJ. Adjustments to length of service and any changes in the nature of the discharge will be made by DD 215 upon execution of the discharge.

Once the sentence is executed, the DD 214 would then be amended by the issuance of a DD Form 215, Correction to DD Form 214, which is routinely used to reflect changes to a previously issued DD 214.[233]

Changing DODI 1336.1 to allow for this process could be done through a directive from the President or simply upon the order of the Secretary of Defense. This minor regulatory change would only require military personnel offices to issue DD 214s earlier than they otherwise would and to issue a short, one-page DD 215 upon execution of the sentence. The DD 214 itself would not purport to reflect an executed discharge, but could be used by a servicemember to provide a prospective employer with official confirmation of the servicemember's status, length of service, awards, and training and would effectively

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[231] *Id.* paras. 3.2.2, 3.2.3.
[232] *Id.* para. 3.4.
[233] *Id.* para. 3.5.3.

remove the prejudice cited by *Jones*, *Bruton*, and *Sutton* as the basis of setting aside otherwise proper sentences.

Another source of potential prejudice argued by appellants is the fact that servicemembers are not eligible to be considered for clemency or parole by the services' review boards until the convening authority has taken action on the case. Congress has authorized the Secretary of Defense, through Title 10, United States Code, Chapter 48, to establish a system for granting clemency and parole.[234] This authority is exercised through DoD Directive (DODD) 1325.4 and DODI 1325.7.[235] Paragraph 6.16.6 of DODI 1325.7 provides:

> Clemency and Parole Boards shall normally consider an individual for clemency, restoration to duty or reenlistment when the court-martial convening authority has taken action on the sentence; the individual's case has been reviewed by a confinement facility disposition board or by an appropriate Federal correctional or probation official; and the individual meets the eligibility criteria.[236]

With respect to parole, the instruction provides that one of the grounds for eligibility is that "[t]he prisoner has an *approved* unsuspended punitive discharge or dismissal or an approved administrative discharge or retirement."[237] The instruction, however, does state that "[w]hen exceptional circumstances exist or for other good cause, a Clemency and Parole Board may waive any prisoner's parole eligibility requirement with the exception of [death sentences]."[238]

Over the years, many appellants have raised the fact that they were precluded from clemency and parole consideration by delays in the convening authority taking action in their cases. In *United States v. Hawkins*, the then-ACMR set aside the findings and sentence and

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[234] 10 U.S.C. §§ 953–954 (2000); *see also* UCMJ art. 74.
[235] U.S. DEP'T OF DEFENSE, DIR 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (17 Aug. 2001); U.S. DEP'T OF DEFENSE, INSTR 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (17 July 2001) [hereinafter DODI 1325.7].
[236] DODI 1325.7, *supra* note 235, para. 6.16.6.
[237] *Id.* para. 6.17.1.1 (emphasis added).
[238] *Id.* para. 6.17.7.

dismissed all charges upon finding that the delay in action and transmittal of the record to the confinement facility prejudiced Hawkins by delaying his consideration for clemency—which he was ultimately granted.[239] Many other cases have addressed similar claims, but in most cases, the courts conclude that the claims of prejudice regarding the denial of the opportunity for clemency or parole are too speculative given that the appellant cannot usually prove that he would have been granted relief by the review board.[240]

Regardless of whether an appellant can show that he likely would have been granted clemency or parole, the current regulations clearly deprive some servicemembers of the opportunity to even be considered.[241] This results in an incongruous situation where, in the case of two prisoners convicted of similar offenses with similar sentences, one will be considered for clemency and parole and the other will not, simply because the convening authority has taken longer in approving the latter's court-martial findings and sentence. There is no legal reason why a servicemember cannot be considered for clemency and parole before action. While there may be some reluctance to step on the toes of a convening authority who still maintains jurisdiction over a case, the Secretary of Defense's grant of authority under §§ 952 and 953 of Title 10 is not predicated on there being an approved sentence. Indeed, in *United States v. Bigelow*, the Government argued, and CAAF agreed, that the appellant was not legally precluded from applying for parole in that case even without an approved sentence—presumably relying on the possibility of receiving a waiver under DODI 1325.7.[242]

Similarly, there may be some reluctance to consider a servicemember for clemency or parole because the convening authority could eventually approve a sentence different from the one adjudged or could even disapprove the entire sentence. The problem there is that, under Article 60, UCMJ, the convening authority cannot approve a sentence that is greater than that adjudged.[243] The fact that a

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[239] United States v. Hawkins, 49 C.M.R. 57 (A.C.M.R. 1974).

[240] *See, e.g.*, United States v. Hudson, 46 M.J. 226, 227 (C.A.A.F. 1997); United States v. Agosto, 43 M.J. 853 (N-M. Ct. Crim. App. 1996); United States v. Due, 2007 CCA LEXIS 207 (A.F. Ct. Crim. App. May 30, 2007) (unpub.).

[241] While DODI 1325.7 does provide for a possible waiver for "exceptional circumstances or other good cause," it is not clear how difficult those standards are to meet.

[242] United States v. Bigelow, 57 M.J. 64, 69 (C.A.A.F. 2002).

[243] UCMJ art. 60(c)(2) (2008).

servicemember's sentence may yet be reduced by the convening authority should have no logical bearing on whether clemency and parole can be considered and, if anything, should actually encourage early consideration of cases whose adjudged sentences may be unduly harsh. The military justice system is designed to promote clemency and fairness with many opportunities for a sentence to be reduced that do not exist in the civilian justice system. Removing one of these opportunities because a servicemember's case is being processed slowly only exacerbates the already considerable problems caused by dilatory post-trial processing practices and adds a potential for prejudice where one need not exist. There is no logical reason why prisoners should be treated differently based upon the status of their post-trial processing. Consequently, DODI 1325.7 should be amended to remove the prohibitions on servicemembers being considered for clemency or parole simply because their sentences have not been approved by the convening authority.

VI. Conclusion

Unexplained and unreasonable post-trial delay has plagued the military justice system since the inception of the UCMJ. Despite repeated warnings from the military courts, the problem only seems to have gotten worse. It is, therefore, understandable that CAAF would become increasingly frustrated and seek ways to remedy this problem itself. Unfortunately, Congress explicitly limited the jurisdiction of the military courts to preclude them from remedying legal errors that do not result in material prejudice to a substantial right. Accordingly, CAAF's attempts to find a way around the limitation of Article 59(a) are, quite simply, unlawful. Relying on semantics to give the service courts apparent authority to grant relief under Article 66(c), or simply ignoring Article 59(a) altogether, as in *Toohey*, does not change the fact that the military courts are now reducing sentences on the ground of an error of law without the required showing of prejudice.

The President, and to a lesser extent, the Secretary of Defense, do have the authority to improve the current system. Amending the Manual for Courts-Martial as proposed would help to expedite the early stages of post-trial processing, which are the sources of most unexplained delay. Changing DoD regulations regarding clemency, parole, and the preparation of DD 214s would also help to reduce common sources of

prejudice to servicemembers awaiting appeal of their cases. If the services take other steps, such as increasing personnel in the appellate divisions and using more efficient techniques of transcription, the problem of dilatory post-trial processing can be quickly and lawfully ameliorated without having to resort to questionable legal holdings.

CROSSING THE LINE: RECONCILING THE RIGHT TO PICKET MILITARY FUNERALS WITH THE FIRST AMENDMENT

MAJOR JOHN LORAN KIEL, JR.*

You might think you can pass laws that stop us from preaching at the funerals of your Godless brats, but it isn't going to happen. The Messengers of God do not stop preaching the truth just because you pass laws. Here's a little secret. Kansas has had funeral picketing laws for years and we still picket funerals in Kansas!!![1]

I. Introduction

When Albert Snyder arrived at the St. John's Roman Catholic Church in Westminster, Maryland to bury his only son—Matthew, a Marine Lance Corporal who died in Iraq a few days earlier—he was greeted by a group of protestors carrying signs that read "Semper Fi Fags" and "You're Going to Hell."[2] The protestors were members of the Westboro Baptist Church (WBC) headquartered in Topeka, Kansas.[3] Snyder sued the church for invading his privacy and for intentionally inflicting emotional distress on him during the funeral service.[4] A federal jury ultimately agreed with Mr. Snyder and awarded him $2.9 million in compensatory damages, $6 million in punitive damages for

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[1] GODHATESAMERICA.com, God Hates America—A Warning to the USA, http://www.godhatesamerica.com/index.html [hereinafter GODHATESAMERICA.com] (last visited Oct. 23, 2008).

[2] Brendan Kearney, *Marine's Father, Church Members Testify*, DAILY RECORD, Oct. 23, 2007, *available at* http://www.internetlawyer.com/article.cfm?id=3141&type=UTTM.

[3] *Id.*

[4] *Id.*

invasion of privacy, and $2 million for emotional distress.[5] The lawsuit was the first of its kind filed against the WBC and it is unlikely to be the last.

Members of the WBC have gained notoriety over the past several years by staging protests at a number of high-profile funerals throughout the country. The WBC first gained national attention in 1998 when it conducted an antigay rally at the funeral of Matthew Sheppard, a University of Wyoming student who was brutally murdered because he was gay.[6] Since then, WBC members have protested memorial services for victims of 9/11,[7] memorial services for victims of the Columbine massacre,[8] and the funerals of twelve miners who suffocated in a coal mine in Sago, West Virginia.[9] They also publicly celebrated the deaths of five young Amish girls who were savagely executed by a pedophile at their elementary school in Pennsylvania.[10] Members of the group even protested the funeral of America's beloved Mister Rogers.[11]

While the church generally garners a few disparaging headlines from protesting these high-profile memorials, it has managed to heap almost universal condemnation upon itself for picketing the funerals of fallen servicemembers. More than thirty-eight states have introduced legislation banning protests at military funerals and twenty-nine have

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[5] *Church Ordered to Pay $10.9 Million for Funeral Protest*, CNN.com, Oct. 31, 2007, http://www.cnn.com/2007/US/law/10/31/funeral.protests.ap/.

[6] Kathryn Wescott, *Hate Group Targeted by Lawmakers*, BBC NEWS, May 25, 2006, http://news.bbc.co.uk/1/hi/world/americas/5015552.stm.

[7] Brian Goodman, *Funeral Picketers Sued By Marine's Dad*, CBS NEWS.COM, July 28, 2006, http://www.cbsnews.com/stories/2006/07/27/national/main1843396.shtml.

[8] Dr. Clarissa Pinkola Estès, *Virginia Tech Protection Needed: As with Columbine Funerals and Memorial Services, Pastor Fred is Coming to Spread His Screed at VT*, MODERATE VOICE, Apr. 18, 2007, http://the moderate voice.com/religion/12273/Virginia-tech-protection-needed-as-with-columbine-funerals-and-memorial-services-pastor-fred-is-coming-to-spread-his-screed-at-vt/.

[9] Goodman, *supra* note 7.

[10] Sara Bonisteel, *Anti-Gay Kansas Church Cancels Protests at Funerals for Slain Amish Girls*, FOX NEWS.com, Oct. 4, 2006, http://www.foxnews.com/story/0,2933,217760,00.html. The Westboro Baptist Church had originally intended to protest the funerals of the five young victims in Lancaster County, Pennsylvania, but decided to accept the offer of a radio talk show host to publicize their message over the radio instead of at the funeral. The WBC accepted the free airtime in exchange for abandoning the protests. *Id.*

[11] Philip Elliott, *Radicals to Protest at Funeral*, FREE REPUBLIC, Jan. 8, 2006, http://www.freerepublic.com/focus/f-news/1554039/posts. Members of the group protested Rogers's funeral claiming that as a Presbyterian minister he failed to adequately condemn gay people. *Id.*

already approved such measures.[12] In 2006 President Bush signed the Respect for America's Fallen Heroes Act (RAFHA), banning funeral protests at national cemeteries under the federal government's control. [13] Generally, these statutes aim to diminish funeral picketing in a couple of ways. Some make it a crime to shout, whistle, yell, or wave signs for a certain period of time before and after a funeral service is held.[14] Others incorporate buffer zones ranging from 100 to 2000 feet that bar any activity within a certain distance of the ingress or egress of a church, funeral home, or cemetery where a funeral service or memorial is taking place.[15]

This article examines the constitutionality of funeral picketing laws at the state and federal level. Although the article focuses on funeral protest forums in the state of New York, the legal tests and standards discussed therein apply to funeral picketing laws in every state. This article focuses on New York because it presents a unique opportunity to demonstrate how state funeral picketing laws and the RAFHA apply to the many private and national cemeteries located within the state, and how the Supreme Court would apply a distinct set of laws to cemeteries located on military installations like West Point, New York.

The article will explore these funeral picketing laws in a number of different contexts. First, it will examine two distinct funeral picketing bills originally considered by the New York Senate and State Assembly before the governor signed the Senate version into law in 2008. After thoroughly analyzing both bills under the First Amendment, the article will conclude that the Assembly bill impermissibly favored certain forms of expression over others and its buffer zone restriction stifled protected speech. The Senate's buffer restriction, embodied in the current statute, is lawful but its disorderly conduct provisions are unconstitutionally vague. Second, the article will propose a model statute that addresses these shortcomings and incorporates some of the best features of other states' funeral picketing laws. Third, the article will examine the RAFHA and conclude that most of the statute comports with the First Amendment except for its untenable buffer zone restrictions. Lastly, the

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[12] Anti-Defamation League.org, Fred Phelps and the Westboro Baptist Church: In Their Own Words, http://www.adl.org/special_reports/wbc/default.asp (last visited Oct. 23, 2008).
[13] 38 U.S.C.S. § 2413 (LexisNexis 2008).
[14] *See infra* notes 156–57 and accompanying text.
[15] Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 KAN. L. REV. 575, 580 (2007). The most common buffer zone is 300 feet. *Id.*

article will explain how the Supreme Court has made it virtually impossible to stage protests on military installations, especially for groups like the Westboro Baptist Church.

II. The Westboro Baptist Church

It is almost impossible to understand the philosophy of an organization like the Westboro Baptist Church without understanding something about its founder, Fred Waldron Phelps Sr. Phelps had "as normal and beautiful a home life as anyone ever wanted" according to one of his relatives.[16] Phelps's mother died of throat cancer when he was five years old, leaving him and his younger sister to be cared for by their maternal aunt when his father was away on business.[17] Phelps's aunt later died in a car crash, robbing him of the influence of the two most prominent women in his life.[18] Despite his incredible loss, Phelps excelled in grade school and ended up ranking sixth in his graduating high school class.[19] Phelps's stellar grades enabled him to fulfill a dream that he had been working for all of his young life—accepting an appointment to the United States Military Academy (USMA).[20] Phelps was only sixteen when he graduated high school so he could not enter West Point until after his next birthday.[21] He spent most of the next year preparing to attend West Point.[22] A few months before he was eligible to report, Phelps attended a religious revival at a local Methodist Church that would forever change the direction of his life.[23]

Phelps abandoned his dreams of attending West Point and instead became an ordained Southern Baptist minister, or "Primitive Baptist preacher" as he describes himself.[24] Phelps's first brush with controversy came in 1947 when he conducted a religious revival to convert a large group of Mormons living in Vernal, Utah.[25] His

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[16] Joe Taschler & Steve Fry, *The Transformation of Fred Phelps*, TOPEKA CAP.-J., http://www.cjonline.com/webindepth/phelps/stories/080394_phelps01.shtml (last visited Oct. 27, 2008).
[17] *Id*.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id*.
[23] *Id.*
[24] *Id.*
[25] *Id.*

preaching angered the crowd so much that they rushed the platform and tried to yank him from the stage.[26] In 1951, *TIME* magazine ran a story about him preaching to groups of college students about the "sins committed on campus by students and teachers," sins that included profanity, filthy jokes, and lusting after the flesh.[27] Shortly after that, in 1955, Phelps and his wife moved to Topeka, Kansas where he launched the WBC.[28]

There are approximately seventy-five members of the WBC, most of whom are related to Phelps.[29] One reporter who visited the church observed that the building itself "feels like a bunker—from its chain-link fence to its sign pockmarked from gunshots and the enormous American flag hanging at half staff and upside down in front of the building."[30] Another reporter noted that inside the church the "fluorescent lights shine on no crosses or paintings or statues, just a world map and a few signs. 'Thank God for Maimed Soldiers,' reads one."[31] Members of the church are expected to pay ten percent of their earnings to the church, live a secluded lifestyle, and travel around the country spreading the church's inflammatory message.[32] Members of the WBC have taken part in over 25,000 protests since they picketed the funeral of Matthew Shepard in 1998.[33] Most of the WBC's protests center on one topic—homosexuality. Phelps's campaign against homosexuality intensified when Democratic politicians started courting gay voters.[34] Phelps started protesting locally in Topeka against people that he suspected were gay and against local businesses he suspected employed gay people.[35] Members of the WBC even protested the funerals of people Phelps suspected had died of AIDS.[36]

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[26] *Id.*
[27] *Id.*
[28] Kerry Lauerman, *The Man Who Loves to Hate*, MOTHER JONES, Mar./Apr. 1999, *available at* http://www.motherjones.com/news/feature/1999/03/lauerman.html.
[29] Matt Sedensky, *The Kansas Preacher's Message of Hate*, ASSOCIATED PRESS, June 4, 2006, *available at* http://www.azstarnet.com/sn/byauthor/132099.
[30] Lauerman, *supra* note 28.
[31] Sedensky, *supra* note 29.
[32] *Id.*
[33] *Id.*
[34] Lauerman, *supra* note 28. Interestingly, Phelps has dabbled in politics as a democratic candidate for a number of offices. He unsuccessfully ran for governor of Kansas in 1990, 1994, and 1998. He also lost a bid for the U.S. Senate in 1992. *Id.*
[35] *Id.*
[36] *Id.*

After fifteen years of campaigning against homosexuality, Phelps's congregation began to fix their sights on the funerals of servicemembers killed in Iraq and Afghanistan. Members of the church began protesting military funerals in the summer of 2005.[37] The church's decision to picket Soldiers' funerals is as perplexing as it is disturbing. Apparently Phelps and his followers believe that God is killing American Soldiers because they defend a government policy that supports and condones homosexuality.[38] One might suspect that the "don't ask, don't tell"[39] policy would factor into the WBC's disdain for the military, but the group has never gone on record as saying so. Nevertheless, WBC members have conducted hundreds of military funeral protests over the past two and a half years.[40] Members of the group typically chant and carry signs that read "Thank God for Dead Soldiers," "God Hates Fag Soldiers," "Thank God for IEDs," and "God Blew Up the Soldier," among other slogans.[41]

While the WBC has garnered significant media publicity from protesting high profile funerals, it has also drawn unwanted attention from a number of states and the federal government. The U.S. Congress and thirty-eight states have passed funeral protest laws designed to curb the WBC's practice of picketing military funerals.[42] A number of other states are currently in the process of enacting similar legislation, New York being the most recent among them. The next two sections of this article will outline the process the Supreme Court has established for analyzing speech restrictions under the First Amendment. Section III will examine some peripheral considerations likely to impact funeral picketing laws like the fighting words and captive audience doctrines.

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[37] Sedensky, *supra* note 29.
[38] Goodman, *supra* note 7.
[39] In 1993, Congress enacted the controversial "don't ask, don't tell" policy which makes it a crime for servicemembers to engage or attempt to engage in homosexual acts, to publicly state that they are a practicing homosexual or bisexual, or to marry or attempt to marry a person of the same biological sex. *See* 10 U.S.C. § 654 (2000).
[40] GODHATESAMERICA.com, *supra* note 1.
[41] *Id.*
[42] *See* McAllister, *supra* note 15, at 579. Section IV of Mr. McAllister's article provides a table of states that have passed funeral protest statutes along with their respective code citations, to include Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. States currently considering similar legislation are Connecticut, Maine, New Hampshire, New York, Nevada, North Dakota, Oregon, Rhode Island, and West Virginia.

Both have the potential to become decisive issues in these types of cases because if the Court finds one or the other applicable, it can terminate its constitutional inquiry there. Section IV will examine the principles and standards of review traditionally applicable to free speech cases and will apply them to the provisions of the New York funeral-picketing statute.

III. Peripheral Considerations and Speech Restrictions

A. Protected and Unprotected Speech

In order to assess the constitutionality of a regulation that purports to burden free speech, the Court must first determine if the regulation is content-neutral or content-based. [43] Generally, a content-based regulation is one where the government seeks to restrict speech because it disagrees with the ideas or views of the speaker's message.[44] On the other hand, a regulation that imposes incidental restrictions on speech without referencing the views or ideas of the speaker's message is generally considered content-neutral.[45] The distinction between the two can be difficult to discern and is often crucial in determining a regulation's survivability. Content-based regulations are subject to strict scrutiny,[46] while content-neutral regulations are subject to intermediate level review.[47] Strict scrutiny requires a state to demonstrate that its regulation is narrowly tailored to achieve a compelling government interest.[48] Intermediate review, however, requires that the regulation serve a significant government interest, that it be narrowly tailored, and that it leave open alternative channels of communication.[49]

In analyzing whether a regulation is content-based , it is important to remember that not all speech is protected under the First Amendment. The Supreme Court has noted on more than one occasion that "the right of free speech is not absolute at all times and under all circumstances."[50]

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[43] *E.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[44] *E.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994) (citing Burson v. Freeman, 504 U.S. 191, 197 (1992)).
[45] *E.g.*, *id*. (citing City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).
[46] Texas v. Johnson, 491 U.S. 397, 412 (1989).
[47] *Id*. at 407.
[48] Frisby v. Schultz, 487 U.S. 474, 481 (1988).
[49] Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).
[50] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (citing Schenck v. United States, 249 U.S. 47 (1919), and other related cases).

Certain categories of speech are of such little social value that the Court affords them no constitutional protection at all. These categories include speech that incites imminent lawless behavior, obscenity, child pornography, defamation, false advertising, and fighting words.[51] Of these categories, fighting words is the only one remotely applicable to funeral picketing cases, as the following cases demonstrate.[52]

B. Fighting Words

The Supreme Court established the fighting words doctrine in the case of *Chaplinsky v. New Hampshire*.[53] Walter Chaplinsky was convicted under a breach of peace statute for standing on a public sidewalk and calling the town marshal a "God damned racketeer" and a "damned fascist."[54] The facts indicate that Chaplinsky had been denouncing other religions prior to the police showing up, that some local residents complained about it, and that Chaplinsky got into a shouting match with a police officer who arrived on scene. In deciding the case, the Court explained that fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[55] The Court also observed that fighting words "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[56] Finally, the Court concluded that "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[57] The Court ultimately upheld the statute because its primary intent was to curtail expression that tended to breach the peace.[58]

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[51] JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW HORNBOOK SERIES 1131–32 (7th ed. 2004).

[52] Imminent lawless behavior has thus far played no role in funeral picketing cases because the protests have not been directed at inciting or producing such behavior or action. The mere fact that funeral picketing has the potential to breach the peace is insufficient for such a finding. Texas v. Johnson, 491 U.S. at 409 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

[53] 315 U.S. 568 (1942).

[54] *Id*. at 569.

[55] *Id*. at 572.

[56] *Id*.

[57] *Id*.

[58] *Id.* at 573–74.

In subsequent fighting words cases, it is interesting to note that the Supreme Court has either substantially narrowed the doctrine or ignored it altogether. Today the Court seems to focus on two particular aspects of fighting words cases. First, it will try to determine whether the speech can be construed as a direct personal insult to the listener or an invitation for him to exchange blows with the speaker.[59] Next, the Court will consider the speech's impact on the audience and whether the speech tended to stir them to anger or incite them to violence.[60]

Two seminal cases define the fighting words doctrine as it is currently understood. The first is *Texas v. Johnson*.[61] Gregory Lee Johnson attended a political demonstration in front of the Dallas City Hall where he pulled a flag out of his pants and burned it in the middle of a crowd of onlookers.[62] Even though the gesture was offensive, the Court rejected the notion that such a symbolic act amounted to fighting words because "[n]o reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange in fisticuffs."[63] In *Cohen v. California*,[64] the other seminal case, Paul Robert Cohen was convicted for breaching the peace when he wore a jacket into a municipal courthouse that read "Fuck the Draft" on the back.[65] Much like the decision in *Texas v. Johnson*, the Court reasoned that "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[66] The reasoning of these two decisions have led some critics to argue that the Court has simply reduced the fighting words doctrine to words that are directed to a particular individual during a face-to-face confrontation.[67]

What *Cohen* and *Johnson* also make very clear is that the Court will closely examine the actual circumstances surrounding the utterance of the expression, asking if it "is directed to inciting or producing imminent

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[59] Texas v. Johnson, 491 U.S. 397, 409 (1989).
[60] Cohen v. California, 403 U.S. 15, 20 (1971).
[61] 491 U.S. 397.
[62] *Id*.
[63] *Johnson*, 491 U.S. at 409. Johnson burned the flag as a form of personal protest against some of the Reagan administration's policies. *Id.*
[64] 403 U.S. 15.
[65] *Id*.
[66] *Id*. at 20.
[67] GEOFFREY STONE ET AL., THE FIRST AMENDMENT 88 (2d ed. 2003).

lawless action and is likely to incite or produce such action."[68] The Court draws a distinction between speech that simply stirs people to anger and speech that is intended to incite violence. In *Terminello v. Chicago*[69] the Court held that

> a function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose when it induces a condition of unrest, creates a dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[70]

The Court reversed Johnson's flag burning conviction in part after noting that no serious breach of the peace or explosive audience reaction took place when he unfurled the flag and burned it in front of several hundred onlookers, even though many witnesses were seriously offended.[71] Similarly, the Court set aside Mr. Cohen's conviction partly because no one reacted violently to his jacket and because Cohen did not intend to incite potential onlookers to violence or urge them to commit other lawless acts.[72]

When it comes to protesting military funerals, it is unlikely that the fighting words doctrine will ever be used as a basis to uphold funeral picketing laws. Most judges will be hard-pressed to conclude that expressions like "God Hates America," "God Bless the IED," and "God Hates Fag Soldiers" are specifically directed at individual funeral attendees, and in particular members of the deceased's family. Additionally, when funeral picketers conduct their protests several hundred feet away from cemetery exits and entrances as they have in the

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[68] *Johnson*, 491 U.S. at 409 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
[69] 337 U.S. 1 (1949).
[70] *Id*. at 4.
[71] *Johnson*, 491 U.S. at 401.
[72] Cohen v. California, 403 U.S. 15, 20 (1971).

past, the likelihood of an actual face-to-face confrontation with an angry family member is substantially diminished. To date, there have been no reported instances of protestors being attacked or assaulted by angry family members or other funeral attendees. Those two factors—the lack of violence coupled with the fact that the messages being expressed do not target specific individuals—are likely to convince most judges that the protestors' expressions do not constitute fighting words and are therefore constitutionally protected. Furthermore, it is interesting to note that the Supreme Court has not upheld a fighting words conviction since the *Chaplinsky* decision in 1942.[73]

C. The Captive Audience

Even though the Court is extremely hesitant to suppress speech that seriously offends an audience or arouses it to anger, the Court has been willing in certain circumstances to protect unwitting listeners from unwanted expression.[74] For instance, in *Frisby v. Schultz*[75] the Court upheld the convictions of a group of pro-life protestors who picketed the residence of an abortion doctor, noting that the group's picketing activity forced the doctor to become a captive audience in his home despite the significant privacy interests he enjoyed there.[76] The *Frisby* decision confirmed the Court's willingness to distinguish between offensive messages that take place within the walls of one's home from those that take place outside it.[77]

When expression takes place in public, the Court has consistently observed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[78] The *Cohen* case is a good example. There the Court rejected the notion that unwitting onlookers who had been momentarily subjected to the offensive language on Mr. Cohen's jacket had become captive to his message. It reasoned that onlookers who found Mr. Cohen's jacket offensive could have avoided it by simply averting their eyes to another part of the courthouse.[79]

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[73] STONE, *supra* note 67, at 88.
[74] *Cohen*, 403 U.S. at 21.
[75] 487 U.S. 474 (1988).
[76] *Id*. at 486–87.
[77] *Id.* at 486–88.
[78] Rowan v. Post Office Dep't, 397 U.S. 728, 738 (1970).
[79] Cohen v. California, 403 U.S. 15, 21–22 (1971).

The *Cohen* Court also established a test to determine when the government may protect unwitting observers from unwanted speech: "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[80] In the funeral picketing context, the question becomes whether a family's right to grieve rises to the level of a substantial privacy interest. Since funeral picketing statutes are so new, courts have yet to fully consider the issue. The Supreme Court did note in an unrelated case that "family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."[81] In 2006, a federal judge in Kentucky made a similar observation:

> A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event. . . . [T]he Court will assume that the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid.[82]

Most judges considering the legality of funeral picketing laws will recognize that families have a substantial privacy interest in mourning the loss of a loved one at a funeral service. They may also likely conclude that singing, whistling, chanting, and silently holding signs do not invade those interests in an essentially intolerable manner. That of course, depends on the facts of each case. In some, the circumstances may indicate that the funeral service was so closely located to the protest

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[80] *Id*.

[81] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004). The Court in this case was referring to the privacy interest of former White House counsel Vincent Foster's family, who sought to prevent the release of photographs pertaining to Mr. Foster's suicide as part of a Freedom of Information Act request.

[82] McQueary v. Stumbo, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006).

that the captive audience doctrine may very well apply. In others, courts may conclude that the protestors were far enough away from the funeral that attendees could have simply averted their eyes and ears away from unwelcome expression. Because the captive audience doctrine is so fact-driven, judges will continue to shy away from it and opt to strike down funeral protest statutes on other, more traditional grounds. The next section of the article will address the principles and standards of review that apply in almost every speech case, and in particular to the funeral picketing bills that were proposed by the New York Legislature.

IV. State Funeral Protest Laws: Analyzing New York's Legislation

It is sometimes difficult to tell whether a regulation restricting speech is content-neutral or content-based simply by looking at its language. In *Ward v. Rock Against Racism*,[83] the Court held that "the principle inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[84] One way a court can determine the government's motive for enacting a particular regulation is to consider the regulation's legislative history.

A. Legislative History

New York Assembly Bill A02779 intended to make it a crime to protest within 300 feet of any building or parking lot where a funeral service or memorial takes place.[85] It further sought to ban singing, chanting, whistling, or other loud noises without first seeking authorization from the deceased's family members or from the person conducting the funeral service.[86] Pertinent sections of the bill can be found in Appendix A. The justification memo accompanying the bill referenced the WBC without specifically mentioning the group by name.[87] The bill's sponsors were particularly concerned with the "repeated instances within the past few years of extremist hate groups

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[83] 491 U.S. 781 (1989).
[84] *Id*. at 791.
[85] Assem. B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A02779&sh=t.
[86] *Id.*
[87] A02779 Memo, N.Y. Assem. B. A02779, *available at* http://assembly.state.ny.use/leg/?bn=A02779 [hereinafter A02779 Memo].

using the funerals of slain United States service members as an opportunity to harass the surviving family members and express their views that these fallen troops somehow 'deserved' their fate."[88] The memo further acknowledged the right of Americans to express even the most loathsome ideas and carefully explains that its purpose is not to proscribe any particular point of view, but rather to "provide a measure of protection and tranquility to the mourners."[89] It concluded by reiterating the legislature's desire to protect the sanctity of funeral services for every citizen of New York, regardless of religious affiliation or belief.[90]

The New York statute, as embodied in the original Senate bill, makes it a crime to protest within 100 feet of a funeral service or memorial with the intent to disrupt the service or cause annoyance to any of its attendees.[91] Appendix B contains the full text of the Senate bill as enacted. The Senate's justification memo accompanying the bill cautiously observes:

> In the past couple years a number of state legislatures as well as Congress have passed legislation prohibiting funeral disturbances. These new laws were enacted in response to protests that occurred at the funerals of Iraq and Afghanistan War Veterans. There is no greater sacrifice that an individual can make than to give his or her life for this country. Because of this disgusting conduct, proposals like this one are necessary.[92]

The Senate memo concludes by expressing its desire to "prohibit the disturbance of a funeral or memorial service while also preserving an individual's right to free speech and expression."[93] Even though one of the motives behind the Senate bill is to quell the WBC's "disgusting" conduct, that in itself is not enough to make the statute content-based. In *United States v. O'Brien*,[94] the Court had to consider the constitutionality

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[88] *Id.*
[89] *Id*.
[90] *Id*.
[91] S.B. 56-A, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://public.leginfo.state.ny.us/menugetf.cgi (enter "S56-A" in the box next to "Bill No.," then select "2007" from the drop-down menu and check "Text").
[92] *Id*. (check "Sponsors Memo").
[93] *Id*.
[94] 391 U.S. 367 (1968).

of the Universal Military Training and Service Act of 1948, which made it a crime to destroy Selective Service draft cards.[95] The appellants were convicted of burning their draft cards and asserted that because Congress was motivated by a desire to suppress free speech, the statute was unconstitutional.[96] The Court rejected that argument and reiterated that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[97] The Court cautioned that trying to uncover a legislature's motive is often hazardous, because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."[98] As long as the government's predominant intent is unrelated to suppressing free speech, the Court will likely determine that its motive was content-neutral.[99]

After considering the New York Senate and State Assembly's justifications for their funeral picketing bills, it appears that their primary motive was to provide a measure of "protection and tranquility" to funeral-goers, and not to suppress certain messages because the state disagrees with their content. At first blush, both bills appear to have been appropriately content-neutral; however, inquiring into the legislature's stated justifications is only one aspect of discovering predominant intent.[100] The other is to examine the key provisions reflected in the statute's text.[101] This article will next examine the key provisions of the New York funeral picketing statute and the State Assembly bill to determine whether they are content-based or content-neutral regulations. It will then apply the appropriate standard of review to determine whether the Assembly bill and the subsequent picketing statute could survive constitutional scrutiny.

B. Buffer Zone Restrictions

The concept of buffer zone restrictions was brought to the Court's attention in a series of abortion clinic cases from the 1990s. In *Madsen*

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[95] *Id*.
[96] *Id*. at 382–83.
[97] *Id*. at 383.
[98] *Id*.
[99] Renton v. Playtime Theaters, 475 U.S. 41, 48 (1986).
[100] *See, e.g.*, McQueary v. Stumbo, 453 F. Supp. 2d 975, 983 (E.D. Ky. 2006).
[101] *Id*.

v. Women's Health Center, Inc.,[102] the Court was asked to decide whether buffer zones around a Florida abortion clinic were constitutionally permissible.[103] After a number of troubling disturbances at a handful of Florida clinics, a state judge imposed a thirty-six foot buffer around clinic entrances and driveways.[104] The Court upheld the buffer zone on the grounds that the state had a legitimate interest in protecting clinic access and ensuring that the driveway leading to the clinic entrance remained unobstructed.[105] The Court also observed that a previous injunction failed to protect those interests precisely because it lacked buffer zone restrictions.[106] Finally, the Court noted that the buffer zone was narrowly tailored enough at thirty-six feet to enable protestors standing outside of it to easily communicate with their intended audience.[107]

The *Madsen* Court was also asked to decide whether a court-imposed 300-foot buffer zone around clinic employee residences was lawful.[108] For that determination, it relied on the holding in *Frisby v. Schultz*,[109] where the Court upheld a ban on targeted picketing directly in front of a residence.[110] *Frisby* dealt with a group of pro-life demonstrators who picketed the home of an abortion doctor.[111] The Court considered the anti-picketing ordinance to be a valid time, place, or manner regulation.[112] It also asserted that the government's interest in protecting the home against intrusions is of the "highest order"[113] and that the right to avoid intrusions into one's home is "a special benefit of the privacy all citizens enjoy within their own walls."[114] Relying on the rationale in *Frisby*, the *Madsen* Court maintained that while the government has a substantial interest in protecting the privacy of one's home, the 300-foot

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[102] 512 U.S. 753 (1994).
[103] *Id*.
[104] *Id.* at 759–61.
[105] *Id*. at 769.
[106] *Id*. at 770.
[107] *Id*.
[108] *Id.* at 774–75.
[109] 487 U.S. 474 (1988) (upholding a provision making it unlawful to engage in targeted picketing directly in front of a residence or individual; there was no fixed buffer zone in that case).
[110] *Id*.
[111] *Id.*
[112] *Id.* at 488.
[113] *Id*. at 484.
[114] *Id*. at 484–85.

buffer zone around clinic employees' homes went too far.[115] The Court deemed the buffer zone unconstitutional partly because it barred other forms of protected speech that could potentially take place within it.[116] For instance, individuals participating in an unrelated cause who happened to walk or march in front of one of the residences protected by the ordinance could also be arrested.[117] Finally, the Court noted that there were other ways to protect employees' homes without curtailing protected speech, such as by limiting the time, duration, and number of such pickets.[118]

The last buffer zone restriction the Court had to address in *Madsen* dealt with a 300-foot buffer around the clinic itself. The Court struck it down because there was no evidence that the protestor's message contained fighting words, threats of violence, or other forms of unprotected speech.[119] It noted that "[a]s a general matter . . . our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[120] Preventing offensive and outrageous speech from encroaching into one's home of course is the exception, but this particular provision had nothing to do with residences. Thus, the Court struck it down in keeping with the Court's prior holding in *Cohen v. California*.[121]

In *Schenk v. Pro Choice Network*,[122] a subsequent abortion clinic case, the Court was asked to uphold a fifteen foot buffer zone surrounding clinic driveways, parking lots, and doorway entrances on the ground that significant government interests were involved. The significant government interests included "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services."[123] There the Court determined that given the repeated harassment by protestors in impeding clinic access, the

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[115] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 775 (1994).
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*. at 774.
[120] *Id*.
[121] 403 U.S. 15 (1971).
[122] 519 U.S. 357 (1997).
[123] *Id*. at 376.

fifteen foot buffer was appropriately tailored and reasonable under the circumstances.[124]

The *Schenk* Court did strike down what it referred to as a "floating" buffer zone around people and vehicles.[125] Under the statute, protestors wishing to communicate or hand out literature to patients, staff, and vehicles entering or leaving the clinics had to maintain a distance of at least fifteen feet.[126] The Court held that the floating buffer zone burdened more speech than necessary because it barred appellants from conversing about topics of public interest and from handing out leaflets to individuals walking on sidewalks, which are traditional public forums.[127] The Court also noted that the fifteen-foot buffer hindered the speaker's ability to communicate at a "normal conversational distance."[128] With regard to vehicles, the floating buffer was overly broad in the sense that it would bar protestors from expressing themselves along a sidewalk or curb should a vehicle happen to pass within fifteen feet of their location.[129] The Court was also concerned for the safety of the appellants who in some instances would have to endanger themselves by trying to comply with the buffer restrictions.[130]

The final case dealing with buffer zones and abortion clinics was *Hill v. Colorado.*[131] In that case, the State of Colorado made it a crime for any individual within 100 feet of a health care facility to knowingly approach within eight feet of another person without her consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[132] The Court ultimately held that the 100-foot buffer zone was a valid time, place, or manner regulation because the State of Colorado had a substantial interest in protecting patients and their relatives from

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[124] *Id*.
[125] *Id*. at 377.
[126] *Id*. at 367.
[127] *Id*. at 377.
[128] *Id*.
[129] *Id.* at 380.
[130] *Id*. at 378. This is a somewhat weaker argument. The Court articulates its concerns with individuals having to walk backwards in some instances to comply with the buffer and not being able to pay sufficient attention to fellow passersby and traffic in other instances. Short of keeping a yardstick handy, the Court notes that it would be difficult to maintain an exact distance of fifteen feet at all times. *See id.*
[131] 530 U.S. 703 (2000).
[132] *Id*. at 707.

unwanted speech outside of health care facilities.[133] "Hospitals, after all, are not factories or mines or assembly plants."[134] They are places that are supposed to promote a "restful, uncluttered, relaxing, and helpful atmosphere" to patients and families.[135]

While the Court's rationale for supporting the 100-foot fixed buffer was somewhat meager, it did feel compelled to more fully justify the eight-foot floating buffer zone contained within it.[136] The Court argued that the eight-foot buffer would allow appellants to speak and hold their signs at a "normal conversational distance."[137] The statute also permitted speakers to hold up signs or hand out leaflets within eight feet of the buffer zone, and it allowed them to remain in one place without causing the speakers to violate the statute.[138] In other words, the eight-foot restriction provided ample opportunity for appellants to communicate their message and was certainly less restrictive than the total ban on targeted picketing the Court upheld in the *Frisby* case.[139]

Another case worth briefly mentioning is *Grayned v. City of Rockford*.[140] In *Grayned*, Rockford, Illinois enacted an ordinance banning picketing within 150 feet of primary or secondary schools in session.[141] The Court determined that the 150-foot buffer restriction was a valid time, place, or manner regulation due to the significant interest the state had in protecting a child's education.[142] It reasoned that "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse."[143] The Court also upheld the Rockford ordinance on the grounds that it did not specifically target unpopular expression and it did not invite selective enforcement on behalf of city officials.[144]

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[133] *Id*. at 728.
[134] *Id*.
[135] *Id*. at 728–29.
[136] *Id.* at 726–27.
[137] *Id.*.
[138] *Id*. at 727.
[139] *Id*. at 729–30.
[140] 408 U.S. 104 (1972).
[141] *Id.* at 107.
[142] *Id*. at 117–18.
[143] *Id*. at 119.
[144] *Id*. at 113.

With regard to funeral picketing, it remains unsettled how courts will treat buffer zone restrictions around cemeteries, churches, and other places where military funerals are routinely conducted. There is little doubt that most judges will find that a family's right to grieve a fallen loved one is a significant privacy interest worth protecting. Some variation of fixed buffer zones should be permissible, given the fact that funeral-goers have no ability to avoid offensive messages because they cannot control the location of the funeral service. This bodes well for the buffer zone contained in the New York funeral picketing statute, as it only bans disorderly conduct within 100 feet of a funeral service or memorial.[145] The statute is in keeping with the thirty-six-foot buffer zone the Court upheld in *Madsen* and the 100-foot buffer zone it implicitly approved in *Hill v. Colorado*. Interestingly enough, the WBC has decided not to challenge funeral picketing laws containing buffer zones of 100 feet or less.[146] In 2005, the group posted a memo on its website warning legislatures that

> [t]he rule of law you must abide by is that you cannot remove people with a message from their intended audience. So stop all the chatter about distances like 2000 feet. Anything more than about 100 feet will go too far, in most locations, so they will be subject to challenge. We are going to deliver this message to people going to these events . . . and you don't have the constitutional ability to remove us from our audience.[147]

Unlike the recently enacted statute's buffer restriction, the State Assembly bill would not have survived a constitutional challenge. That bill provided for a 300-foot fixed buffer zone around funeral services, burials, and funeral home viewings.[148] Given that the Supreme Court struck down two 300-foot buffer zone restrictions in the *Madsen* case,[149] the likelihood that another 300-foot buffer provision would ever survive is unimaginable in most instances. Judges would have little difficulty

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[145] 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis).
[146] *See* GODHATESFAGS.com, A Message from Westboro Baptist Church (WBC) to Lawmakers on Legislation Regarding Her Counter-Demonstrations at Funerals of Dead Soldiers, http://www.godhatesfags.com/written/letters/20051212_legislation-message.pdf [hereinafter GODHATESFAGS.com] (last visited Oct. 23, 2008).
[147] *Id*.
[148] Assem. B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A02779&sh=t.
[149] *See* 512 U.S. 753 (1994).

concluding that such a large buffer zone will impinge on other forms of protected speech, as the Supreme Court pointed out in *Madsen*. After all, if the Court was willing to find that 150 feet is enough to prevent protestors from disrupting students engaged in school work,[150] it will certainly conclude that the sanctity of a funeral service can be preserved at the same or shorter distances. In fact, in 2006 a federal judge struck down a 300-foot buffer zone restriction in Kentucky's funeral picketing statute after noting the substantial difference between it and the thirty-six-foot buffer the Court approved in the *Madsen* case.[151] The judge also expressed concern that a buffer that big would encompass other forms of protected speech and in some instances restrict a private property owner's ability to express himself on his own property.[152]

The Assembly bill also provided for a 300-foot floating buffer zone around funeral processions.[153] That restriction is much different than the version the court upheld in the *Hill* case. The eight-foot floating buffer zone in *Hill* did not apply to protestors already standing outside the fixed buffer zone surrounding clinic entrances.[154] The Assembly bill would have subjected protestors to arrest if a funeral motorcade happened to come within 300 feet of their location, even if the protestors were there first. Such a large floating buffer zone would have also restricted other forms of protected speech. If, for example, the same motorcade traveled on a route near a public park where another group was engaged in an unrelated protest, members of that group could be arrested if the motorcade happened to pass within 300 feet of their location. For these reasons alone, floating buffer zones will undoubtedly get struck down by the Court. Fixed buffer zones appear to be permissible in certain circumstances, and funeral picketing is probably one of those circumstances, but the Court would likely disapprove any restriction greater than 150 feet.

C. Disorderly Conduct and Noise Restrictions

Another feature common to the funeral picketing statute and the Assembly bill is a provision barring disorderly conduct. The statute

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[150] *See* Grayned v. Rockford, 408 U.S. 104 (1972).
[151] McQueary v. Stumbo, 453 F. Supp. 2d 975, 996 (E.D. Ky. 2006).
[152] *Id*.
[153] Assem. B. A02779.
[154] *See* Hill v. Colorado, 530 U.S. 703 (2000).

simply prohibits "unreasonable noise or disturbance" at a funeral service.[155] The Assembly provision is slightly more complex. It contained three related restrictions, the first of which makes it a crime to sing, chant, whistle, shout, yell, or use amplification equipment, including a bullhorn or car horn, without first securing permission from the deceased's family or from the funeral officiant.[156] The second restricts "other sounds or images observable to or within earshot of" funeral attendees, and the third prohibits making "any utterance, gesture, or display designed to outrage the sensibilities" of funeral-goers.[157]

Since noise ordinances like these typically regulate traditional forms of speech, courts will scrutinize them closely. One of the first factors a court will examine is where the expression takes place. There are three categories of forums that the Supreme Court has recognized—traditional public forums, designated public forums, and nonpublic forums.[158] Sidewalks,[159] streets,[160] and parks[161] are generally considered traditional public forums. A designated public forum is property that the government has decided to open to the public for various activities, as when the public is invited to a local high school for a school board meeting.[162] A nonpublic forum is one where a speaker has little to no expectation of speech, such as private property,[163] a county jail,[164] or a military installation.[165] Funeral picketers, in particular the WBC, stage most if not all of their protests on public sidewalks and streets in keeping with their strategy of making it more difficult for states to defend their funeral picketing laws.[166]

As some of the cases have already illustrated, the government will never admit regulating speech because it disagrees with the content of a

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[155] 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis).
[156] Assem. B. A02779.
[157] *Id*.
[158] NOWAK & ROTUNDA, *supra* note 51, at 1140.
[159] *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); *see also* United States v. Grace, 461 U.S. 171 (1983) (holding that public sidewalks surrounding the Supreme Court building are public forums).
[160] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939).
[161] *Id*.
[162] *See* Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976).
[163] *See* Adderly v. Florida, 385 U.S. 39, 47 (1966).
[164] *Id.*
[165] *See* Greer v. Spock, 424 U.S. 828 (1976).
[166] *See* GODHATESFAGS.com, *supra* note 146.

particular message.[167] Instead, the government will try to convince the Court that it was simply regulating the time, place, or manner of such expression. Time, place, or manner regulations are appropriate to restrict speech in a public forum so long as they are content neutral, narrowly tailored to achieve a significant government interest, and able to leave open alternative channels of communication.[168] The Supreme Court outlined this three part test in *Ward v. Rock Against Racism*.[169] In *Ward*, appellants challenged the constitutionality of a New York City ordinance restricting sound volume at band shell concerts in Central Park.[170] The City had received a number of complaints from park users about the loud noise emanating from the concerts.[171] In response to these complaints, the City decided to retain an independent sound technician to provide high quality sound equipment for future concerts.[172] The City argued that its primary motive for enacting the ordinance was simply to prevent noise from intruding into surrounding residences and more secluded parts of the park.[173] Based on that justification, the Court held that the ordinance was content-neutral and went on to decide if it was narrowly tailored to achieve a significant government interest.[174]

In determining what constitutes a significant government interest, the Court recalled that the government always has "a substantial interest in protecting its citizens from unwelcome noise."[175] In fact, protecting people from unwanted noise inside their homes is one of government's greatest interests.[176] "[G]overnment may [also] act to protect even such traditional public forums as city streets and parks from excessive noise."[177] The Court ultimately determined that New York City had a significant government interest in protecting some of its citizens from

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[167] *See supra* notes 59–60. In *Texas v. Johnson*, the state argued that it was simply trying to prevent a breach of the peace and to protect the flag as a national symbol. In *Cohen v. California*, the state argued that it was trying to protect unsuspecting viewers from having Mr. Cohen's distasteful expression suddenly thrust upon them.
[168] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[169] *Id*.
[170] *Id.* at 784.
[171] *Id*. at 785.
[172] *Id.* at 787.
[173] *Id*. at 792.
[174] *Id*.
[175] *Id*. at 796 (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984)).
[176] *Id*. (citing Frisby v. Schultz, 487 U.S. 474, 484 (1988)).
[177] *Id*. (citing Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949)).

loud, unwanted noise in a city park.[178] It also determined that the ordinance was narrowly tailored to achieve that interest.[179] Narrow tailoring means that the government's ability to promote a substantial government interest is less effective without the regulation.[180] The fact that another, less restrictive alternative is available is not enough to render the regulation invalid.[181] The Court reasoned that the City's decision to hire a sound technician to control the mixing board during concerts effectively protected its substantial interest in limiting sound volume.[182] Leaving appellants to their own devices was a less effective means of protecting the City's interest because appellants had previously refused to control the sound such that it did not intrude on people trying to enjoy other areas of the park.[183] The City also easily satisfied the last requirement of a time, place, or manner regulation because the ordinance left open alternative channels of communication.[184] Appellants could still hold concerts in the band shell without any effect on the content of their message. The Court also observed that there had been no showing that the noise ordinance would have any impact on the size of the crowds attending appellants' concerts.[185]

In *Madsen v. Women's Health Center, Inc.,* the Court dealt with a noise ordinance almost identical to the one proposed by the New York Assembly.[186] As discussed earlier, *Madsen* dealt with an injunction prohibiting protestors from engaging in certain activities near abortion clinics.[187] The Court upheld a provision barring protestors from "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the clinic."[188] The first thing the Court considered was the place where the restrictions

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[178] *Id.* at 800.
[179] *Id*. at 796.
[180] *Id*. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).
[181] *Id*. at 800.
[182] *Id*.
[183] *Id*.
[184] *Id.* at 802.
[185] *Id*.
[186] Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).
[187] *See supra* notes 102–20. In *Madsen*, a Florida judge permanently enjoined pro-life picketers from protesting within 300 feet of an abortion clinic entrance, from entering a thirty-six-foot buffer zone around the property line of a clinic, from protesting within 300 feet of the homes of clinic staff, and from making certain types of noise within earshot of patients inside an abortion clinic.
[188] *Madsen*, 512 U.S. at 772.

applied.[189] The Court reasoned that just as noise ordinances around public schools were appropriate,[190] so too were similar restrictions around hospitals because patients and their families need a peaceful place to recover physically and emotionally after surgery.[191] The Court observed that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[192] If sound amplification equipment is used to "assault the citizenry," the government may rightfully restrict their use.[193] This was especially so for patients within earshot of abortion clinics and other medical facilities.

In *Kovacs v. Cooper*,[194] the Court upheld a similar ordinance barring the use of sound trucks, loud speakers, and other types of amplification devices that made "loud and raucous" noise on city streets, alleys, or thoroughfares.[195] There the Court held that "[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people."[196]

The *Madsen* Court also reviewed a disorderly conduct provision restricting "images observable" to patients inside the clinic.[197] Had the ordinance simply banned "threats" to patients and their families in whatever form, the restriction would have probably survived.[198] Instead, it banned all speech observable to clinic patients and therefore burdened more speech than necessary.[199] Unlike the sound emitted from amplification devices, patients could avoid intrusive or offensive messages observable from inside the clinic by simply averting their eyes.[200] The Court reasoned that "it is much easier for the clinic to pull

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[189] *Id*.
[190] *Id*. (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)).
[191] *Id*. (citing NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783–84 (1979)).
[192] *Id*. at 772–73.
[193] *Id*. at 773 (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).
[194] 336 U.S. 77 (1949).
[195] *Id*. at 78.
[196] *Id*. at 83.
[197] *Madsen*, 512 U.S. at 773.
[198] *Id*.
[199] *Id*.
[200] *Id*.

its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic."[201]

The last disorderly conduct provision the *Madsen* Court addressed required protestors to secure permission from clinic visitors prior to engaging them in conversation.[202] The Court asserted that unless the protestor used fighting words or some other type of menacing or threatening language, the state could not enact a ban on all uninvited approaches.[203] The Court held that the "consent" requirement alone rendered the provision unconstitutional because its attempt to ensure clinic access and prevent patient intimidation burdened more speech than necessary.[204]

In 2006, a federal judge struck down a number of similar provisions contained in a Kentucky funeral picketing law.[205] The judge struck down Kentucky's "images observable" restriction on the ground that funeral attendees could simply avert their eyes from intrusive observable images when attending a funeral service outdoors, and when attending one indoors, they could simply draw the curtains.[206] The judge also invalidated a provision prohibiting the unauthorized distribution of literature.[207] The restriction barred handing out literature "anywhere" during a funeral.[208] He reasoned that since the provision failed to describe a fixed geographical boundary, it burdened more speech than necessary to prevent disruption of the funeral service.[209] Lastly, the judge struck down a requirement that protestors seek authorization from the deceased's family or from the funeral officiant prior to engaging in picketing activities.[210] The judge noted that such a requirement is overly broad, especially where there is no "evidence that the protestor's speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm."[211]

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[201] *Id*.
[202] *Id.* at 773–74.
[203] *Id.* at 774.
[204] *Id*.
[205] 453 F. Supp. 2d 975 (E.D. Ky. 2006).
[206] *Id*. at 996.
[207] *Id.*
[208] *Id.*
[209] *Id*.
[210] *Id.* at 995–96.
[211] *Id*. at 995.

The judge also struggled with terms contained in the Kentucky statute like "outrageous," "disruptive," and "tend to obstruct" or "interfere" with a funeral.[212] He was asked to consider them unconstitutional under the vagueness doctrine.[213] The vagueness doctrine posits that when a law is so vague that a person of "common understanding must necessarily guess at its meaning and differ as to its application," a court should invalidate it.[214] The Court further explained the doctrine in *Grayned v. City of Rockford*:

> Vague laws offend several important values . . . because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.[215]

In *Grayned*, the Court was asked to determine whether an ordinance banning "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of schools was impermissibly vague.[216] The Court used a number of principles of statutory interpretation for making such a determination. First, the Court noted that legislatures are not expected to use language with "mathematical certainty" when drafting statutes.[217] Second, the Court examined the statute "as a whole" to determine what expression it restricted.[218] Third, the Court looked at how the state's highest court interpreted similar terms in other statutes.[219] Fourth, the Court considered the particular context for which the statute was written.[220] After considering all of those factors, the Court determined that the words contained in the phrase had been defined with specificity by the state supreme court in another case, and that the

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[212] *Id*. at 997.
[213] *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385 (1926). Elaborating on the vagueness doctrine, the *Connally* Court famously noted that the "crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *Id.* at 393.
[214] *Id.* at 391.
[215] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
[216] *Id*. at 107–08.
[217] *Id*. at 110.
[218] *Id*.
[219] *Id*. at 111–12.
[220] *Id*. at 112.

restrictions were confined to the context of protecting students from intrusion *only* when school was in session.[221]

The Court established another useful axiom in *Kovacs v. Cooper*.[222] In *Kovacs*, the Court had to decide whether the phrase "loud and raucous" noise was unjustifiably vague.[223] The Court ultimately upheld the phrase after noting that sometimes words, even abstract ones like loud and raucous, "have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."[224]

Given the holdings in *Madsen* and in the Kentucky case it appears that three of the four disorderly conduct and noise restrictions in the Assembly bill would have been unconstitutional.[225] The "images observable" restriction is overly broad in that it burdens more speech than necessary to protect funeral-goers from picketers.[226] Funeral attendees can easily avert their eyes away from messages they find offensive, especially when they are outside. Funeral-goers attending services indoors can simply close the curtains.

The provision requiring protestors to seek authorization from the deceased's family prior to engaging in picketing activities would also be invalid.[227] Aside from rendering the Assembly bill a content-based regulation, this provision burdened more speech than necessary. For instance, if members of the WBC held signs supporting 2008 President-elect Barack Obama, they would have violated the statute even though their demonstration had nothing to do with the funeral service and their presence was largely unfelt. The ban on distributing literature regardless of location would similarly be invalid.[228] Under the provision, picketers could be arrested for handing out flyers even if they were ten miles away from the funeral service.

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[221] *Id*. at 111–12.
[222] 336 U.S. 77 (1949).
[223] *Id*. at 79.
[224] *Id*.
[225] *See* Assem. B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A02779&sh=t.
[226] *Id.*
[227] *Id.*
[228] *Id.*

The only Assembly bill provision that would have likely been upheld is the one barring yelling, chanting, whistling, and using amplification devices "within earshot" of funeral-goers, but even then that would be on a case-by-case basis.[229] It is much easier for a funeral participant to avert her eyes away from a protestor displaying a sign than for her to avert her ears from a protestor screaming into a bullhorn. For example, if a funeral service were to take place next to the entrance of the cemetery where protestors were assembled, attendees would invariably find it impossible not to be distracted by the noise. No judge would expect the funeral party to pack up and head to another location in order to avoid the disruption under those circumstances.

Curiously enough, the Assembly bill was so specific about what activities were barred that it would have survived a vagueness challenge.[230] The only questionable phrase dealt with conduct designed to "outrage the sensibilities" of funeral-goers.[231] That definition would have hinged on a judge's subjective determination of what she considered to be "outrageous." The bill itself failed to provide examples and there is nothing in the justification memo that provided assistance either. The determination would also hinge on whether New York's highest court had interpreted the term in other statutory contexts.

While the Assembly bill may have been safe from a vagueness challenge because it was so detailed, New York's current picketing statute could run into trouble for precisely the opposite reason. Regulations must be crafted carefully enough that a man of ordinary intelligence could reasonably know what is expected of him.[232] New York's entire funeral picketing statute consists of one paragraph:

> A person is guilty of disruption or disturbance of a religious service, funeral, burial or memorial service when he or she makes unreasonable noise or disturbance while at a lawfully assembled religious service, funeral, burial or memorial service, or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.[233]

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[229] *Id.*; *see* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).
[230] *See* Connally v. Gen. Constr. Co., 269 U.S. 385 (1926).
[231] Assem. B. A02779.
[232] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
[233] 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis).

Funeral picketers would undoubtedly have a difficult time figuring out what activities are proscribed under this statute. For instance, does "unreasonable" noise or disturbance mean that members of the group can yell and shout but not use amplification equipment? Can they hold up signs in silence? What if the group intends to express its message to passers-by and *not* to funeral participants? If they happen to create a disturbance, can they escape prosecution because it was not their intent to disturb the deceased's family and friends? A court may however, consider the term sufficiently clear given the content and meaning it has acquired through normal, everyday use.[234]

D. Summary of New York's Funeral Picketing Law

After examining the text of the funeral picketing law and its primary motivation as expressed in the Senate justification memo, it is clear that the statute is content-neutral. The legislature's primary purpose for enacting it was to prohibit disruptions at funeral services and nothing more.[235] The statute does not specifically target the WBC or any other group staging protests at military funerals based on the content of their messages. Similarly, it does not favor certain messages over others as the Assembly bill did. Because the picketing statute is content-neutral, it satisfies the first requirement of a time, place, or manner regulation.[236]

The second condition requires that the statute be narrowly tailored to achieve a significant government interest.[237] As previously explained, protecting a family's right to grieve for their fallen loved ones constitutes a significant government interest.[238] The narrow tailoring requirement for a content-neutral regulation is different from the one required for a content-based regulation.[239] Strict scrutiny requires that government use the least intrusive means to promote its interests; intermediate scrutiny does not.[240] If the government can show that it cannot effectively protect its interests absent the regulation, it satisfies the narrow tailoring requirement of intermediate scrutiny.[241] The statute's 100-foot buffer

[234] Kovacs v. Cooper, 336 U.S. 77, 79 (1949).
[235] *See supra* notes 87–90 and accompanying text.
[236] *See supra* notes 168–74.
[237] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[238] *Supra* notes 81–82 and accompanying text.
[239] *Ward*, 491 U.S. at 798–99.
[240] *Id*. at 797.
[241] *Id*. at 799.

zone effectively protects funeral-goers from intrusion, it burdens no more speech than necessary, and it is similar to the buffer zone restrictions upheld in previous Supreme Court decisions.[242] The terms barring "unreasonable noise or disturbance" may lend themselves to a vagueness challenge, however, because they fail to articulate what types of protest activities are prohibited under the regulation.[243] Failing to specify what activities are restricted arguably violates the requirement that people be given a reasonable opportunity to comport their conduct with the requirements of the law.[244] Because the provisions are so nebulous, and because funeral attendees will have varying opinions as to what constitutes unreasonable conduct, a judge will likely invalidate the current statute on vagueness grounds or alternatively find that it is not narrowly tailored enough to satisfy the requirements of a time, place, or manner regulation.[245]

The Assembly bill would not have survived a First Amendment challenge either. While the bill's primary justification may have been content-neutral, its text was not. The bill would have required the WBC to seek permission from the deceased's family before engaging in any activity within 300 feet of a funeral. That provision was a clear attempt to shield families from objectionable messages, thus rendering it content-based. For example, military families sometimes ask members of the motorcycle group Patriot Guard[246] to shield them from funeral protesters. Under the Assembly bill, the Patriot Guard could have sung, shouted, yelled, and revved their motorcycle engines inside the buffer zone while picketers would have been forced to watch in silence over 300 feet away.

Content-based regulations such as this must be narrowly tailored to achieve a compelling government interest.[247] While protecting a family's right to grieve may constitute a significant government interest, judges might hesitate to consider it a compelling one. Even so, the real

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[242] *See supra* notes 131–35.

[243] *See* 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis); *see also* Connally v. Gen. Constr. Co., 269 U.S. 385 (1926).

[244] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[245] *See e.g.*, *Grayned*, 408 U.S. at 108; *Ward*, 491 U.S. 781.

[246] Patriot Guard is a group of service veterans who are motorcycle enthusiasts. *See* Patriot Guard Riders, www.patriotguard.org (last visited Nov. 19, 2008). Families of fallen servicemembers frequently ask the group to scare off or at least drown out the WBC's protests. The group will surround WBC protesters with a wall of flags and rev their engines to drown out the group's message. *See id.*

[247] Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 406 U.S. 37, 45 (1983) (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

problem for the Assembly bill was that it failed to employ the least restrictive means to protect funeral-goers from unwelcome messages. The 300-foot buffer zone would have burdened more speech than necessary to promote the state's interest in protecting funeral-goers. The Supreme Court shot down two 300-foot buffer zones in the *Madsen* case because they were too large.[248] The *Hill* and *Grayned* decisions also seem to indicate that buffer zones greater than 150 feet are not narrowly tailored enough to satisfy the requirements of strict scrutiny review.[249]

None of the other restrictions were narrowly tailored for the primary reason that they would have required protestors to seek authorization from the deceased's family before the protestors could display signs or make any type of noise. Such a requirement would have impermissibly allowed the family to favor certain messages over others. A judge would have little difficulty concluding that there are less restrictive methods for quelling "observable" images and noise "within earshot" of funeral-goers, like dropping the authorization requirement and simply enforcing the buffer zone restriction.[250]

Appendix D contains a model statute that may serve as New York's best chance of protecting its citizens from the tumult of funeral protests should the current statute be ruled unconstitutional. The model statute proposes a fixed buffer zone no more than 150 feet from the ingress and egress of funeral sites. There are two reasons for such a proposal. First, the Supreme Court has already upheld a 100-foot buffer restriction in the *Hill* case and a 150-foot buffer restriction in the *Grayned* case.[251] Second, the WBC has admitted that it will not challenge buffer zone restrictions 100 feet or less[252] and the statute presumes that they and others like them would not incur the expense of litigating the issue over an additional fifty feet.

The model statute also specifies the types of activities that are prohibited within the buffer zone, like singing, whistling, shouting, and yelling, with or without the aid of amplification devices like bullhorns or auto horns. It contains no "within earshot" provision, as it would likely burden other forms of protected expression in most cases. With regard to

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[248] *See* Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).
[249] *See* Hill v. Colorado, 530 U.S. 703 (2000); *Grayned*, 408 U.S. 104.
[250] *See, e.g.*, *Madsen*, 512 U.S. at 772–73.
[251] *See Hill*, 530 U.S. 703; *Grayned*, 408 U.S. 104.
[252] *See* GODHATESFAGS.com, *supra* note 146.

displaying images, the model statute does away with any reference to "images observable" for the same reasons—the provision is too vague and restricts more speech than necessary. Instead, the model statute lawfully prohibits displaying images designed to inflict emotional distress or that attempt to convey real or veiled threats of any kind. Arguably, the statute could even prohibit the use of fighting words as the term was defined in section III of this article. Lastly, the model statute eliminates any provision requiring protestors to get the permission of the deceased's family before engaging in protest activities of any kind. That restriction alone would render the entire statute content-based and subject it to the most rigid scrutiny, which means a court would invariably render it invalid.

The next section of this article deals with the federal response to military funeral protests. As this section will demonstrate, the RAFHA does a decent job of specifying what the law prohibits, and does not contain most of the problematic provisions of the New York Assembly bill. Its buffer zone restrictions, however, make the statute likely to run afoul of the First Amendment.

V. Federal Funeral Protest Laws: The Respect for America's Fallen Heroes Act

In response to the WBC's practice of picketing Soldiers' funerals, Congress passed the RAFHA.[253] The RAFHA only applies to Arlington National Cemetery and other cemeteries under control of the National Cemetery Administration,[254] including the six located in New York State.[255] Picketers may not demonstrate within 300 feet of the cemetery if it impedes the access or egress of funeral-goers, and they may not demonstrate within 150 feet of any road, path, or other route leading to the ingress or egress of such cemetery property.[256] The restrictions are enforceable up to an hour before a funeral service begins and an hour after it ends.[257] The full text of the Act is at Appendix C. The following activities constitute a "demonstration" under the RAFHA:

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[253] 38 U.S.C.S. § 2413 (LexisNexis 2008). The RAFHA was signed into law on 29 May 2006.
[254] *Id.*
[255] *See* U.S. Dep't of Veterans Affairs—Burial & Memorials, http://sss.cem.va.gov/cem/listcem.asp#NY (last visited Oct. 23, 2008).
[256] 38 U.S.C.S. § 2413.
[257] *Id.*

> (1) Any picketing or similar conduct.
> (2) Any oration, speech, use of sound amplification equipment or device, or similar conduct that is not part of a funeral, memorial service, or ceremony.
> (3) The display of any placard, banner, flag, or similar device, unless such a display is part of a funeral, memorial service, or ceremony.
> (4) The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral, memorial service, or ceremony.[258]

The determination of whether the RAFHA is content-neutral or content-based depends on Congress's primary motive for passing the statute.[259] The legislative history of the RAFHA is replete with stories from many of the Act's supporters concerning "extremist protestors" interrupting servicemembers' funerals and inflicting trauma on their families.[260] While the history does not specifically mention the WBC by name, it does make references to supporters carrying signs with slogans such as "Thank God our Soldiers are Dead,"[261] which is one of the WBC's trademarks. One Representative urged his colleagues to pass the bill in order to quell the "radical, hateful agenda" of funeral protestors because in his opinion, their conduct is "reprehensible" and "disgusting."[262] Though it is clear that some members of Congress specifically had the WBC in mind when enacting the RAFHA, that alone is not enough to render the statute content-based.[263] As noted earlier, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."[264]

Representative Mike Rogers, one of RAFHA's sponsors, noted in a floor speech that the Act was created to give servicemembers' families the right "which they so richly deserve, to grieve in peace and have the dignity and the honor to lay their loved ones to rest in peace."[265] While

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[258] *Id*.
[259] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
[260] 109 CONG. REC. H2199 (daily ed. May 9, 2006) (statements of Reps. Rogers, Reyes, Buyer, Baca, and Chabot).
[261] *Id*. (statement of Rep. Buyer).
[262] *Id*. (statement of Rep. Kennedy).
[263] *See* United States v. O'Brien , 391 U.S. 367, 383 (1968).
[264] *Id*.
[265] 109 CONG. REC. H2199 (daily ed. May 9, 2006) (statement of Rep. Rogers).

Representative Rogers's justification is undoubtedly content-neutral, a court will also examine the Act's text to determine whether it targets a particular viewpoint.[266] The RAFHA, unlike the New York Assembly bill, does not concern itself with the impact of the protestor's message on unwitting listeners. The Assembly bill tried to shield funeral-goers from messages they might disagree with by requiring picketers to get authorization from the deceased's family prior to staging a protest. The RAFHA contains no such provision. In fact, nothing in the text of the Act demonstrates that it targets a specific type of expression or viewpoint. It bans *everyone* from demonstrating within 300 feet of a national cemetery or within 150 feet of the roads or paths leading to it. Even then, the 300-foot buffer only applies when protestors block the ingress and egress of the cemetery. Therefore, a court would likely consider the RAFHA to be a content-neutral time, place, or manner regulation.[267]

As discussed earlier, the constitutionality of a regulation will largely depend on the forum where the speech is regulated.[268] The RAFHA is particularly interesting because it regulates speech both on and off of cemetery grounds.[269] Because funeral picketers have traditionally staged their pickets on sidewalks and streets just outside of the cemetery, this article will now focus on how the RAFHA impacts their ability to use these traditional public forums. As the *Ward* case highlighted, a time, place, or manner regulation that restricts speech in a public forum must pass a three-part test: it must be content-neutral, it must be narrowly tailored to achieve a significant government interest, and it must leave open alternative channels of communication.[270]

The RAFHA is content-neutral for at least two reasons. First, Congress's primary motive for enacting it was simply to ensure that military families could mourn for their loved ones in private and in peace. Second, the statute does not discriminate on its face against certain viewpoints. Although it will obviously have an impact on the ability to protest military funerals at national cemeteries, that effect is secondary and therefore constitutionally permissible. Congress's primary motive for enacting the RAFHA also satisfies the requirement

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[266] *See* McQueary v. Stumbo, 453 F. Supp. 2d 975, 983 (E.D. Ky. 2006).
[267] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[268] *See supra* notes 158–65 and accompanying text.
[269] 38 U.S.C.S. § 2413 (LexisNexis 2006).
[270] *Ward*, 491 U.S. at 791 (citing Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 293 (1984)).

that the regulation achieve a significant government interest. In deciding the constitutionality of Kentucky's funeral picketing law, the judge determined that the government has a significant interest in protecting a family's right to grieve at a funeral service.[271] The Supreme Court also acknowledged a family's right to grieve in *National Archives and Records Administration v. Favish*,[272] discussed previously in section III.

With the exception of the 150- and 300-foot fixed buffer zone restrictions, the RAFHA is also narrowly tailored. It contains a ban on noises that "tend to disturb the peace or good order" of the funeral which includes the use of amplification devices, similar to the New York Assembly bill.[273] But unlike the New York Assembly bill, funeral protestors are not required to secure authorization from the deceased's family or from the funeral officiant prior to demonstrating outside of the cemetery. Protestors would have to obtain the cemetery director's permission in order to demonstrate *on* a national cemetery, which is discussed in the next section. There is no ban on noise within "earshot" of funeral-goers, nor on "images observable" to funeral-goers, so the issues addressed in the Assembly bill are of no concern to the RAFHA. The ban on distributing literature applies within the buffer zones, so it has an appropriate geographic restriction, unlike the Assembly bill.

The 300-foot fixed buffer zone around the cemetery is problematic for all of the reasons addressed previously. The Supreme Court has never approved a buffer zone that large, nor is it likely to given its holding in the *Madsen* case.[274] The Court did uphold a 150-foot buffer in *Grayned* and the 100-foot buffer in *Hill*, but those were much smaller than the 300 feet provided for in the RAFHA.[275] Even though the RAFHA's 300-foot buffer only applies when it impedes ingress or egress from the cemetery, the zone is still so large that it will end up burdening more speech than necessary and is thus not narrowly tailored enough. The 150-foot buffer zone looks appropriate at first blush, but the Court may have to decide its validity on a case-by-case basis. For instance, assume that road *X*, a five-mile road, is the only entrance and exit to the cemetery. Theoretically, under the RAFHA protestors five miles away from the cemetery could violate the statute if they were to protest within

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[271] *McQueary*, 453 F. Supp. 2d at 992.
[272] 541 U.S. 157 (2004).
[273] *See* Assem. B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007).
[274] Madsen v. Women's Health Center, 512 U.S. 753, 773–75 (1994).
[275] *See* Hill v. Colorado, 530 U.S. 703 (2000); Grayned v. City of Rockford, 408 U.S. 104 (1972).

150 feet of the road. In a case like that, the restriction will likely be invalidated.

A related problem with the buffer zones is that they fail to leave open alternative channels of communication. Funeral picketers will have a more difficult time communicating with their intended audience at a distance of over 300 feet away than they would at something more reasonable like 100 to 150 feet. If Congress amended the buffer zone to 100 or 150 feet, the RAFHA would satisfy each of these requirements and survive a constitutional challenge.

In the unlikely event that one of these groups tries to picket *on* one of New York's national cemeteries, it must secure the permission of the cemetery director first.[276] The picketers will likely argue that the requirement constitutes an impermissible prior restraint, but it does not.[277] The United States Court of Appeals for the Federal Circuit dealt with this very issue in *Griffin v. Secretary of Veterans Affairs*.[278] In *Griffin*, a group of veterans sued the Secretary of Veterans Affairs over the right to display a confederate flag at Point Lookout National Cemetery in Maryland, where approximately 3300 Confederate Civil War Soldiers are buried.[279] The group argued that the Veterans Administration (VA) was granted unbridled discretion in making decisions regarding national cemeteries such that it amounted to an unconstitutional prior restraint.[280]

In rendering its decision, the court first noted that national cemeteries are a nonpublic forum.[281] The court held that government regulations in a nonpublic forum are held to a lesser standard than the time, place, or manner test applicable to restrictions in a public forum.[282] It noted that "restrictions in nonpublic for[ums] may be reasonable if they are aimed at preserving the property for the purpose to which it is dedicated."[283] The court also observed that "selectivity and discretion are some of the

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[276] 38 U.S.C.S. § 2413 (LexisNexis 2006).
[277] *See* Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002).
[278] *Id.*
[279] *Id*. at 1314.
[280] *Id*. at 1318.
[281] *Id*. at 1322. The court made this determination because both parties agreed that VA cemeteries are nonpublic forums and another federal case concluded the same. *Id.* (citing Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1291 (S.D. Fla. 1999)).
[282] *Id*. at 1323.
[283] *Id*. (citing Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 50–51 (1983)).

defining characteristics of the nonpublic forum."[284] In looking at the nature of national cemeteries, the court concluded that the very reason for their existence was to serve "commemorative" and "expressive" roles.[285] The court was also impressed by the duty of the VA to "maintain those cemeteries as national shrines in perpetuity as a final tribute of a grateful Nation to honor the memory and service of those who served in the Armed Forces."[286]

The court had little trouble legitimizing the discretion of national cemetery directors to maintain control over their respective cemeteries. After all, the court concluded,

> national cemeteries are not interstate highway rest areas. The nature and function of the national cemetery make the preservation of dignity and decorum a paramount concern, and the government may impose restraints on speech that are reasonable in that pursuit . . . we conclude that the discretion vested in VA administrators . . . is reasonable in light of the characteristic nature and function of national cemeteries.[287]

It is probably safe to conclude that a federal court in New York would likely uphold the VA's discretion under the RAFHA to disallow funeral picketing on any of its national cemeteries given their special nature and function. That brings us to our last potential funeral protest forum in New York, the West Point Cemetery at the United States Military Academy.

VI. Funeral Picketing on Military Installations: The West Point Example

It is important to note at the outset that the VA has no control over the West Point Cemetery even though it is, in a sense, a national cemetery. Because the cemetery is located on a military installation and controlled by the Army, it is subject to a unique set of laws. The West

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[284] *Id*.
[285] *Id*. at 1324.
[286] *Id*.
[287] *Id*. at 1325.

Point Cemetery was officially designated a military cemetery in 1817.[288] Before that, it served as a burial ground for Soldiers who died in the Revolutionary War.[289] Some of the most famous people in our nation's history are buried there, including Generals Winfield Scott, Robert Anderson, Daniel Butterfield, and George Custer.[290] General William Westmoreland, commander of United States Forces in Vietnam, was buried there in 2005.[291] The cemetery continues to expand as it inters some of the Academy's most recent graduates, young lieutenants and captains who lost their lives fighting in Iraq and Afghanistan. Curiously, funeral protestors have never picketed a funeral at USMA despite its high profile. Members of the WBC, however, did protest outside the gates of the United States Naval Academy before the funeral service of Corporal Snyder, the Marine mentioned in the article's introduction.[292]

Should funeral protestors ever decide to picket a military funeral service at West Point, they will encounter great difficulty. The cemetery actually sits on the installation facing the Hudson River and is inaccessible from the three main gates. Washington Gate is the closest entrance to the cemetery but is still more than a mile away.[293] Because of the distance, protestors will inevitably demand that they be permitted to demonstrate within a reasonable distance of their intended audience. That means they would have to secure permission from the Garrison Commander. The likelihood of that happening is almost nonexistent, thanks to the Supreme Court's holding in *Greer v. Spock*.[294]

The *Greer v. Spock* case dealt with a group of political candidates who wanted to conduct a town hall meeting and hand out campaign literature to Soldiers and their families on the Fort Dix military

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[288] The West Point Cemetery, http://www.usma.edu/cemetery/ (last visited Nov. 19, 2008).
[289] *Id.*
[290] The West Point Cemetery, http://www.usma.edu/Cemetery/descriptions.htm (last visited Nov. 19, 2008).
[291] *Westmoreland to be Buried at West Point*, USATODAY.com, July 23, 2005, http://www.usatoday.com/news/nation/2005-07-23-westmoreland-burial_x.htm.
[292] Gina Davis, *At Carroll Funeral, A National Protest*, BALTIMORESUN.com, Mar. 11, 2006, http://www.baltimoresun.com/news/local/carroll/balte.md.marine11mar11.0.2364189.story?coll=bal-local-carroll.
[293] The author taught at West Point from 2005–2007 and frequently ran the route leading from Washington Gate to the West Point cemetery.
[294] 424 U.S. 828 (1976).

reservation.[295] They sent a letter to the Commanding General expressing their intent to campaign on the installation.[296] The General promptly wrote back, denying them access to the installation for a number of reasons.[297] First, Army regulations prevented Soldiers from participating in partisan political campaign events and from attending public demonstrations in uniform.[298] Second, the General pointed out that his mission was to train the 15,000 Soldiers assigned to Fort Dix for combat operations and that permitting political campaigning on post would interfere with that mission.[299] Third, inviting appellants on the base to talk to Soldiers and their families would give the improper impression that the military endorsed their candidacies.[300] Displeased with the General's response, the candidates obtained an injunction enjoining him from enforcing Fort Dix's regulations against them.[301] The injunction enabled the candidates to conduct one campaign rally on Fort Dix before the Supreme Court decided to hear the government's appeal.[302]

The Supreme Court immediately took issue with one of the cases that the appellate court relied on in granting the injunction. That case, *United States v. Flowers*,[303] was a prior Supreme Court case dealing with a man who was arrested for handing out flyers on a city street that ran through the middle of the Fort Sam Houston military reservation in Texas.[304] The Supreme Court reversed Flowers's conviction on the ground that the city street was a public forum and the government, by allowing people to hand out flyers there in the past, had abandoned its claim to the road.[305] The Court held that *Flowers* was distinguishable from the *Greer* case because the military had never abandoned its claim to regulate political activities on Fort Dix.[306] In reversing the appellate court's decision, Justice Stewart famously noted:

> One of the very purposes for which the Constitution was ordained and established was to provide for the common

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[295] *Id.* at 832–33.
[296] *Id.*
[297] *Id.* at 833.
[298] *Id*. at 833 n.3.
[299] *Id*.
[300] *Id*.
[301] *Id*. at 834.
[302] *Id*.
[303] 407 U.S. 197 (1972).
[304] *Id*. at 835 (citing Flowers v. United States, 407 U.S. 197 (1972)).
[305] *Id*. at 835–36.
[306] *Id*. at 837.

> [defense], and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensible. In short, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.[307]

A similar case arose in May of 2007 when a group of 1,000 antiwar protestors sought permission to enter West Point to protest Vice President Cheney's commencement address to graduating cadets.[308] Both the federal district court and the Second Circuit Court of Appeals denied the group's request.[309] The Second Circuit Court noted that Academy officials had never permitted any group to engage in political activities, including protests, on West Point.[310] In relying on *Greer*, the court held that military installations are not like traditional public forums where private citizens enjoy the right to freely assemble and express their views.[311] It also noted that the "mere presence" of the Vice President did not convert West Point into a public forum, and it certainly did not "serve as an open invitation for 1,000 or more outsiders to engage in freewheeling and potentially distracting . . . acts of political expression."[312]

Freewheeling and distracting would be a good way to describe some of the WBC's funeral protests. Given the Academy's mission to train cadets to become future Army leaders and to prepare them for combat operations upon graduation, no judge would buck precedent and ignore the *Greer* holding. Besides, USMA leaders have never admitted any member of the public or other group to engage in political activities on the installation.[313] Even though the Academy permits members of the public on the installation to view its historic facilities, that alone is not

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[307] *Id*. at 837–38 (citing in part Toth v. Quarles, 350 U.S. 11, 17 (1955)).
[308] John Doherty, *Eagles, Doves Clash at Academy Protest*, TIMES HERALD-RECORD, May 27, 2007, http://www.recordonline.com/apps/pbcsdll/article?AID=/20070527/NEWS/705270338.
[309] Sussman v. Crawford, 488 F.3d 136 (2007).
[310] *Id*. at 140–41.
[311] *Id*. at 140 (quoting Greer v. Spock, 424 U.S. 828, 838 (1976)).
[312] *Id*. at 141.
[313] *Id.* at 140–41.

enough to turn West Point into a public forum. Funeral picketers can only hope to demonstrate outside of West Point's gates during funeral services and even then, they must still abide by the restrictions contained in whatever funeral protest statute the New York Legislature ends up passing.

VIII. Conclusion

This article calls for a sounder method of enacting funeral protest statutes. As a number of states are likely to find out, passing a funeral picketing law that is constitutionally impregnable is not as easy as it may initially appear. The relevant case law demonstrates that legislatures must carefully craft statutes in such a way that they do not unduly limit or restrict other forms of protected speech. The model statute in Appendix D addresses this concern with regard to the two most prevalent features of funeral picketing laws—buffer zone and disturbing the peace restrictions. It incorporates a buffer zone no larger than 150 feet in keeping with the Court's decisions in the *Grayned*, *Hill*, and *Madsen* cases. The "disturbing the peace" provision eliminates any references to "images observable" and noises "within earshot" of funeral attendees. The former restricts perfectly lawful speech and even expressions of sympathy for the deceased, while the latter is only workable on a case-by-case basis.

New York's funeral picketing statute is constitutionally sound, for the most part. The 100-foot buffer restriction is clearly within parameters established by the Court; New York could have even gotten away with enacting a slightly larger buffer as proposed by the model statute . The unreasonable noise or disturbance provision of the statute should have specified the types of activities that it prohibits before a court will ever validate it. The model statute outlines what those activities are and drops the requirement that protestors seek permission from the deceased's family prior to engaging in any of them, as was originally proposed in the Assembly bill. In effect, the statute is a time, place, or manner regulation, capable of surviving a constitutional challenge under the First Amendment.

The RAFHA could be an effective tool to regulate funeral picketing near national cemeteries if it contained smaller buffer zone restrictions. The 300-foot buffer around the ingress and egress of a cemetery where access is impeded or obstructed is simply too large. Additionally, the

150-foot buffer along roads leading into or out of the cemetery is impractical and unconstitutional in a number of instances.[314] The "disturbing the peace" provisions, however, are constitutional and mirror some of the recommendations proposed in the model statute. Overall, the RAFHA was a good attempt at legislative craftsmanship, but the buffer zone restrictions will render the statute unlawful.

That brings us to the West Point example. The Supreme Court has made perfectly clear that the military plays by a different set of rules, and for good reason. As the Court noted in *Greer v. Spock*, the purpose of a military installation is to train troops to fight in combat, not to provide a venue for political protest.[315] Therefore, funeral protestors should never expect to picket funerals on military posts. The most they can expect is to challenge shoddily drafted and hastily enacted picketing laws cobbled together by state legislatures in response to high profile, emotionally charged funeral protests. The New York Legislature appears to have resisted that urge settling instead on a carefully crafted statute that is well poised to withstand the scrutiny of any future constitutional challenge.

[314] *See supra* Part IV and accompanying text.
[315] Greer v. Spock, 424 U.S. 828, 837–38 (1976).

Appendix A

Bill Text A02779[316]
2007–2008 Regular Sessions
IN ASSEMBLY
January 19, 2007

AN ACT to amend the penal law, in relation to criminal interference with funeral services

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The section heading, subdivision of 1 and the closing paragraph of section 240.70 of the penal law, as added by chapter 635 of the laws of 1999, are amended to read as follows:

Criminal interference with health care services, FUNERAL SERVICES, or religious worship in the SECOND degree.

1. A person is guilty of criminal interference with health services, FUNERAL SERVICES, or religious worship in the second degree when:

(a) this section omitted for illustrative purposes
(b) this section omitted for illustrative purposes
(c) this section omitted for illustrative purposes
(d) this section omitted for illustrative purposes
(e) With intent to prevent or disrupt a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, when he or she:

(I) Blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted; or

(II) Congregates, pickets or demonstrates within three hundred (300) feet of an event specified in this subdivision; or

(III) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:

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[316] A.B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A02779&sh=t. This appendix is a direct copy of the assembly bill.

(1) sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment, or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or
(2) does or makes any utterance, gesture, or display designed to outrage the sensibilities of the group attending the funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person; or
(3) distributes literature or any other item.

Appendix B

NEW YORK 231ST ANNUAL LEGISLATIVE SESSION
2007–2008 Regular Sessions

CHAPTER 566

ASSEMBLY BILL 2385

2008 N.Y. ALS 566; 2008 N.Y. LAWS 566; 2007 N.Y. A.N. 2385[317]

AN ACT to amend the penal law and the civil rights law, in relation to the crime of disturbance of a funeral, burial or memorial service

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 240.21 of the penal law, as added by chapter 614 of the laws of 1967, is amended to read as follows:

Section 240.21 Disruption or disturbance of a religious service, funeral, burial or memorial service.

A person is guilty of disruption or disturbance of a religious service, funeral, burial or memorial service when he or she makes unreasonable noise or disturbance while at a lawfully assembled religious service, funeral, burial or memorial service, or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.

Disruption or disturbance of a religious service, funeral, burial or memorial service is a class A misdemeanor.

Enacted September 25, 2008

[317] 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis). This appendix is a direct copy of Section 1 of the statute, available at the LexisNexis commercial database.

Appendix C

RESPECT FOR AMERICA'S FALLEN HEROES ACT[318]
38 U.S.C.S. § 2413

§ 2413. Prohibition on certain demonstrations at cemeteries under control of the National Cemetery Administration and at Arlington National Cemetery

(a) Prohibition. No person may carry out--

(1) a demonstration on the property of a cemetery under the control of the National Cemetery Administration or on the property of the Arlington National Cemetery unless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located; or

(2) with respect to such a cemetery, a demonstration during the period beginning 60 minutes and ending 60 minutes after a funeral, memorial service, or ceremony is held, any part of which demonstration-

(A) (i) takes place within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery property; and

(ii) includes, as part of such demonstration, any individual willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony; or

(B) is within 300 feet of such cemetery and impedes the access to or egress from such cemetery.

(b) Demonstration. For purposes of this section, the term "demonstration" includes the following:

(1) Any picketing or similar conduct.

(2) Any oration, speech, use of sound amplification equipment or device, or similar
conduct that is not part of a funeral, memorial service, or ceremony.

(3) The display of any placard, banner, flag, or similar device, unless such a display is part of a funeral, memorial service, or ceremony.

(4) The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral, memorial service, or ceremony.

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[318] 38 U.S.C.S. § 2413 (LexisNexis 2008). This appendix is a direct copy of the RAFHA.

Appendix D

§ 240.21. Disorderly Conduct at a Funeral or Memorial Service

(1) The General Assembly finds that over the past few years certain groups have picketed the funerals of fallen service members. As a result, a number of state legislatures and the Congress passed laws prohibiting funeral disturbances. The purpose of this Act is to protect the privacy of grieving family members and friends of the deceased who assemble to mourn at a funeral or memorial service in the State of New York.

(2) For Purposes of this Section:

(a) "Funeral" means a ceremony or memorial service held in connection with the burial or cremation of a person who has died.[319]

(b) "Funeral" does not include a funeral procession or motorcade.[320]

(c) "Funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place at which a funeral is conducted or scheduled to be conducted.[321]

(3) A person is guilty of aggravated disorderly conduct when he or she with intent to prevent or disrupt a funeral or memorial service:

(a) blocks, obstructs, or interferes with the ingress or egress of a funeral site in which a funeral or memorial service is being conducted;

(b) engages, with knowledge of the existence of a funeral site, in any loud singing, playing music, chanting, whistling, yelling, or noisemaking with or without noise amplification, including, but not limited to, bullhorns, auto horns, and microphones within 150 feet of any ingress or egress of a funeral site, where the volume of such singing, music, chanting, whistling, yelling, or noisemaking is likely to be audible and disturbing to the funeral site.[322]

(c) displays with knowledge of the existence of a funeral site and within 150 feet of the ingress or egress of a funeral site, any visual image

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[319] ARK. CODE ANN. § 5-71-230 (2008).

[320] *Id*. Arkansas wisely eliminated funeral processions from the scope of its statute and thus avoids the problems associated with floating buffer zones as discussed in Madsen v. Women's Health Center, Inc, 512 U.S. 753 (1994).

[321] ILL. COMP. STAT. ANN. 5/26-6 (2008). This definition includes most, if not all forums for funeral services and memorials.

[322] Section 3(a) is from the New York Assembly bill. Section 3(b) comes from the Illinois law cited in note 320. It eliminates the problems associated with the "within earshot of" language discussed in section IV. The 150-foot buffer zone restriction complies with the *Grayned* and *Madsen* decisions and is only fifty feet larger than the 100-foot buffer that the WBC acknowledges is legally acceptable.

designed to convey fighting words or actual or veiled threats against another person or to inflict emotional distress on a person attending a funeral.[323]

[323] This section also comes from the Illinois funeral picketing law cited in note 320. Unlike the New York Assembly bill, it contains no "images observable" provision and thus eliminates the possibility of restricting other forms of protected speech. Instead it only addresses images that threaten or inflict emotional distress on funeral-goers.

LEX LATA OR *LEX FERENDA*? RULE 45 OF THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

Major J. Jeremy Marsh[*]

The Study is a still photograph of reality, taken with great concern for absolute honesty, that is without trying to make the law say what one wishes it would say. I am convinced that this is what lends the study international credibility.[1]

I. Introduction

In 2005, the International Committee of the Red Cross (ICRC)[2] issued its 5000-page study, *Customary International Humanitarian Law*[3]

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[1] Yves Sandos, *Introduction* to JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. I: RULES xvii (2005) [hereinafter RULES].

[2] The ICRC's unique and important role in promoting the development, implementation, and dissemination of international humanitarian law is well-documented. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-l, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Oct. 2, 1995).

[3] The Study is divided into two volumes. The first volume is an articulation of the Study's 161 rules, the second is a two-part and roughly 4000-page discussion of the practice that supports the rules. The Study's two leaders, Jean-Marie Henckaerts, the current legal advisor for the ICRC, and Louise Doswald-Beck, former head of the ICRC's legal division, are listed as authors of the first volume and editors of the second volume. RULES, *supra* note 1; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL II: PRACTICE (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter PRACTICE]. For a thorough summary of the Study and its rules, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED

(the Study), examining what the U.S. military refers to as the law of war or law of armed conflict.[4] The ICRC's press release accompanying the Study states that the organization took the process very seriously, spending more than eight years to research and consult with experts, and touts the project as "the most comprehensive and thorough study of its kind to date."[5] Unfortunately, one need not spend much time reading the Study before concluding that there are serious flaws in its authors' method of determining what is and what is not customary international law (CIL).[6] These methodological flaws led its authors to declare as rules of CIL what can only be described as *lex ferenda* (what the law should be) as opposed to *lex lata* (what the law is), diluting the credibility of the final product. This is unfortunate, as international and operational law practitioners certainly could have benefitted from an authoritative reference on customary international humanitarian law. The Study, however, fails to deliver because too many of its rules represent *lex ferenda* rules with insufficient evidence of state practice or *opinio juris*,[7] the two requirements for the formation of CIL.[8] Much of

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CROSS 175, 178 (2005) [hereinafter Henckaerts, *Study on Customary International Humanitarian Law*].

[4] The U.S. Department of Defense (DoD) defines the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the 'law of armed conflict.'" U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 3.1 (9 May 2006). The ICRC defines international humanitarian law as "a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts." Advisory Serv. on Int'l Humanitarian Law, Int'l Comm. of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003), http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. By contrast, the ICRC defines international human rights law as "a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments." *Id.*

[5] Press Release, Int'l Comm. of the Red Cross, Customary International Humanitarian Law: Questions and Answers (Aug. 15, 2005) [hereinafter ICRC Press Release], *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/6BPK3X.

[6] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (c)(2) (1987) [hereinafter RESTATEMENT]. See *infra* text accompanying notes 21–31 for a more complete discussion of the nature of CIL.

[7] "For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law." RESTATEMENT, *supra* note 6, § 102(c)(2) cmt. c. For more discussion of the *opinio juris* requirement of CIL, see *infra* text accompanying notes 36–48.

[8] RESTATEMENT, *supra* note 6, § 102(c)(2).

the Study, therefore, is not an accurate still photograph of reality, but rather, represents the ICRC's idealistic notion of what states should consider customary international humanitarian law.

Rule 45 of the ICRC Study, the main subject of this article, is a *lex ferenda* rule. This article will consider Rule 45 because it well illustrates the *lex ferenda* nature of the Study and is a good means by which to highlight the Study's main flaws. Rule 45 states that "[t]he use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon."[9] The first part of this rule is taken from Articles 35(3) and 55(1) of Additional Protocol I to the Geneva Conventions (AP I).[10] The Study recognizes the United States, France, and the United Kingdom as "persistent objectors"[11] with respect to all or

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[9] RULES, *supra* note 1, at 151.

[10] Protocol I on the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. Article 35(3) states, "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment." *Id.* art. 35, para. 3. Article 55(1) states,

> Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

Id. art. 55, para. 1. One might ask why the drafters felt the need for two articles addressing protection of the natural environment in armed conflict. According to the ICRC Commentary on Protocol I, while "Article 35(3) broaches the problem from the point of view of methods of warfare, Article 55 concentrates on the survival of the population, so that even though the two provisions overlap to some extent, and their tenor is similar, they do not duplicate each other." COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 663 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987) [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS]. Based on this description, Michael Schmitt has characterized Article 35(3) as "Hague law" and Article 55(1) as "Geneva law," Hague law being that which regulates means and methods of war and Geneva law being that which protects victims of war. Michael N. Schmitt, *Humanitarian Law and the Environment*, 28 DENV. J. INT'L. L. & POL'Y 265, 275 (2000).

[11] "Although customary law may be built by the acquiescence as well as by the actions of states . . . and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound

part of this rule.[12] Based on their unorthodox analysis of state practice and *opinio juris*, the Study's authors nevertheless determined that the rule has ripened into CIL not only in international armed conflict,[13] but also, arguably, in non-international armed conflict.[14]

Rule 45 is a paradigmatic example of the ways the Study's authors failed in this monumental and otherwise laudable project. Rule 45 showcases the Study's modern approach to CIL by elevating aspiration over empirical proof of actual state practice.[15] The ICRC's discussion of the state practice that forms the basis for this rule is symptomatic of its faulty methodological approach to achieve a *lex ferenda* result. As Rule 45 demonstrates, the Study's authors assigned inordinate weight to verbal "practice" such as military manuals and resolutions of the U.N. General Assembly.[16] In addition, Rule 45 demonstrates the Study's skewed understanding of the role of *opinio juris*. Its authors seem to conclude that if there is enough mention of the "rule" in military manuals and other questionable sources of verbal practice, then the *opinio juris* prong of CIL is also met.[17] Finally, Rule 45 illustrates that the Study

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by that rule even after it matures." RESTATEMENT, *supra* note 6, § 102 cmt. d; see *infra* text accompanying notes 220–35 for a discussion of persistent objection.

[12] RULES, *supra* note 1, at 151.

[13] "Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war." JEAN S. PICTET, COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (1952) (commenting on Article 2 common to the four Geneva Conventions, which states the international armed conflict trigger for the application of the conventions).

[14] RULES, *supra* note 1, at 156–57. The Commentary to the Additional Protocols describes non-international armed conflict as follows: "non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory." COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 10, at 1319.

[15] For a discussion of the traditional and modern approaches to CIL, see generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AMER. J. OF INT'L L. 757 (2001).

[16] Verbal practice, which is derived from statements or claims, can be distinguished from physical practice, which is derived from the actual, physical actions of states on the battlefield. ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971) (arguing that a claim is not an act and though it may articulate a legal norm, it cannot constitute the material element of custom). See *infra* text accompanying notes 31–34 for a discussion of the state practice prong of CIL.

[17] See *infra* text accompanying notes 73–78 for a discussion of the Study authors' approach to *opinio juris*.

paid insufficient heed to two important CIL doctrines, specially affected states[18] and persistent objection, in developing its rules of customary international humanitarian law.

Because a comprehensive analysis of the methodology used by the Study's authors could easily fill a book,[19] this article will focus on Rule 45 as a lens through which one may assess the methodological approach employed by the Study. The article begins with a brief discussion of CIL. It is impossible for one to critically analyze the Study without some discussion of what CIL is, how it is formed, and why it is both important and controversial. After discussing CIL, the article will discuss the Study as a whole, particularly how the authors described their methodology. Then it will consider the authors' application of their stated approach to Rule 45, discussing first their description of the rule and second the evidence they provided in its defense. The article will conclude by analyzing the three principal flaws inherent in the authors' methodological approach to Rule 45: (1) marginalizing traditional CIL doctrines, (2) overemphasizing verbal practice of unclear and dubious weight, and (3) promoting *lex ferenda*. This analysis will demonstrate that not only Rule 45 but perhaps the rest of the Study's 161 rules should be viewed with suspicion by anyone seeking an authoritative statement of customary international humanitarian law.[20]

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[18] The ICJ acknowledged the importance of specially affected states in the *North Sea Continental Shelf Cases*:

> [A]n indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 43 (Feb. 20). The Restatement uses the terms "particularly involved" and "important" states to capture the same idea. RESTATEMENT, *supra* note 6, § 102 cmt. b. See also *infra* text accompanying notes 67–69 and 229–42 for a discussion of the specially affected states doctrine.

[19] *See, e.g.*, PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susan Breau eds., 2007) [hereinafter PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW].

[20] Unfortunately, there are few good alternatives for anyone seeking an authoritative statement of CIL, as by definition, it is unwritten law. The lack of good alternatives to the Study has caused one commentator to conclude that the Study is bound to become the

II. Customary International Law (CIL) and the ICRC Study

A. Customary International Law

No single definition of CIL exists. Article 38 of the Statute of the International Court of Justice (ICJ) lists custom as a source of international law, describing it as "evidence of a general practice accepted as law."[21] The Restatement (Third) of Foreign Relations Law of the United States describes it as "resulting from a general and consistent practice of States followed by them from a sense of legal obligation."[22] Both of these descriptions contain what the international community recognizes as the two elements of CIL: the "objective" or "material" element of state practice, and the "subjective" or "psychological" element of *opinio juris.*[23]

There is little disagreement over the basic description of CIL as stated above; there is a great deal of disagreement, however, over exactly how to characterize and consider its two elements.[24] As one of the Study's authors, Jean-Marie Henckaerts, acknowledged, "the exact meaning and content of these two elements have been the subject of much academic writing."[25] At the heart of debates over the elements of

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authoritative source on customary international humanitarian law over time as judges and lawyers find it too hard to resist the temptation to cite it authoritatively in their practice. *See* Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 247–48 (2006–07).

[21] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945) (recognizing that the International Court of Justice can use "evidence of a general practice accepted as law" to decide disputes that come before it). Two notable commentators have characterized CIL as "the collection of international behavioral regularities that nations over time come to view as binding as a matter of law." Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116 (1999). Karol Wolfke wrote "[a]n international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law." KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 53 (2d ed. 1993)

[22] RESTATEMENT, *supra* note 6, § 102(2).

[23] Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L. L. 115, 123 (Fall 2005); Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L L. 177, 177 (1995).

[24] Guzman, *supra* note 23, at 123.

[25] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 178; *see also* Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT'L L. 5, 6–7 (2003) ("The literature on CIL is a daunting one that could fill many Alexandrian libraries.").

CIL is what has been described as their inherent circularity.[26] This quality becomes evident when considering that CIL is only law if the *opinio juris* element is met, meaning states *believe* it is the law.[27] But why would a state believe something is the law unless the law already contained the required sense of legal obligation?[28] "So it appears that *opinio juris* is necessary for there to be a rule of law, and a rule of law is necessary for there to be *opinio juris*."[29]

Another controversial issue associated with CIL formation is one of proof. What suffices as evidence of state practice? How do we determine what states recognize as *opinio juris*? As will be seen, the Study's answer to these questions is to consider a wide variety of sources, including both physical and verbal acts of states, when analyzing state practice and *opinio juris*. The approach the Study's authors used, however, tends to conflate the two elements; if there are enough sources of physical and especially verbal "practice"—the sources cataloged in Volume II of the Study—then a state is deemed to believe that the "custom" is in fact legally obligatory.[30] To follow this approach is to stray from CIL orthodoxy, which requires a separate showing of general and consistent state practice and *opinio juris*.[31]

The state practice element of CIL requires generality and consistency of practice between states and is the element upon which CIL traditionalists tend to focus. [32] The traditional approach to CIL

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[26] RESTATEMENT, *supra* note 6, § 102 Reporters Notes 2 ("[H]ow, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured?"). For a discussion of the circularity inherent in determining CIL, see also D'AMATO, *supra* note 16, at 55, 66.

[27] Guzman, *supra* note 23, at 124.

[28] *Id.*

[29] *Id.*

[30] In their introduction, Henckaerts and Doswald-Beck state, "When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*." RULES, *supra* note 1, at xl.

[31] RESTATEMENT, *supra* note 6, § 102 cmts. b, c. The Restatement addresses each element in separate paragraphs, beginning with state practice. It should be noted that the Restatement says "*opinio juris* may be inferred from acts or omissions." *Id.*

[32] *Id.* § 102. The commentary to the Restatement states:

> A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of

emphasizes empirical, objective proof of state practice over normative statements, which may or may not establish what states collectively believe the law is or should be.[33] This approach is empirical, objective, and inductive: custom is derived from specific instances of state conduct.[34] What is interesting about the ICRC Study is that it labels its evidence, almost all of which is statement-based rather than physical, as state practice.[35] It almost seems as if the Study's authors are cloaking their statement-based, modern approach to CIL in the language of tradition, perhaps to be seen as being more traditional in their approach to CIL formation than they actually are.

Rooted in the notion of state consent,[36] the *opinio juris* element of CIL requires states to accept the practice as a positive legal duty for it to

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> important states to adopt a practice can prevent a principle from becoming general customary law.

Id. § 102 cmt. b. Because practice implies physical action, a focus on physical practice is sometimes referred to as the traditional approach to CIL formation. Roberts, *supra* note 15, at 758.

[33] Roberts, *supra* note 15, at 758; *see also* Guzman, *supra* note 23, at 149. This "traditional" approach can be contrasted with the more modern approach identified by Michael Akehurst, who described state practice as follows:

> State practice means any act or statement by a State from which views about customary law can be inferred; in includes physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national laws, national judgments and omissions. Customary international law can also be created by the practice of international organizations and (in theory, at least) by the practice of individuals.

Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT Y.B. INT'L L. 1, 53 (1974–75). As will be seen below, the Study's authors are clearly proponents of Akehurst's expansive view of state practice.

[34] Roberts, *supra* note 15, at 758.

[35] *See generally* PRACTICE, *supra* note 3.

[36] The notion of state consent is at the heart of international law. Guzman, *supra* note 23, at 141–42. If one holds to consent as a touchstone of international law, then *opinio juris* requires that there be both general acceptance of a rule as well as acceptance by affected states. *Id.* The idea that consent is at the heart of international law stems from Grotian view that CIL encompasses voluntary law, as opposed to natural law, and rests on the tacit agreement or consent of nations. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 509 (2000). That a state must accept the rule to be bound by it is the basis for the doctrine of persistent objection, which holds that a state may in essence opt out of being bound by a rule by objecting to it at its formation and persistently when confronted with it later. See *supra* note 11 for the Restatement's definition of persistent objection.

become CIL,[37] and is the element upon which modernists tend to focus. The modern approach to CIL formation—the one actually employed by the Study's authors—focuses on normative statements, not acts.[38] As such, the modern approach is viewed as emphasizing *opinio juris* over state practice.[39] Under this approach, rules may be deduced from statements of rules, such as treaties[40] or the declarations of international forums, rather than deduced from specific instances of state conduct.[41] The modern approach is therefore the one that gets criticized for being a statement of *lex ferenda*, what its proponents wish the law would be, as opposed to *lex lata*, what the law actually is.[42] Its concern is substantive normativity rather than descriptive accuracy, which is the concern of traditionalists.[43]

Identifying proof of *opinio juris* is problematic because determining when a state subjectively believes it is obligated to follow a rule of law is difficult if not impossible.[44] Therefore, one must attempt to cull belief from the actions and statements of states.[45] While state actions are likely better indicators of belief, at least when it is unclear what the state believes regarding the customariness of the norm, unfortunately, they are seldom on point.[46] For example, with Rule 45, does the lack of any examples of "severe, widespread, and long-term" destruction of the natural environment mean that states refrain from such action out of a sense of legal obligation?[47] Probably not. Hence, with Rule 45 and

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[37] The Restatement says, "[I]t must appear that the states follow the practice from a sense of legal obligation." RESTATEMENT, *supra* note 6, cmt. c.
[38] Roberts, *supra* note 15, at 763.
[39] *Id.*
[40] It should be noted that treaties are *lex lata* for states who are parties to the treaty. *See id.*
[41] *Id.* Michael Akehurst wrote that State practice, in order to create a customary rule, "must be accompanied by (or consist of) statements that certain conduct is permitted, required, or forbidden by international law . . . ." Akehurst, *supra* note 33, at 53.
[42] Roberts, *supra* note 15, at 763.
[43] *Id.* at 762–63.
[44] Guzman, *supra* note 23, at 146.
[45] *Id.*
[46] *Id.*
[47] Using the lack of examples of "severe, widespread, and long-term" destruction of the environment during armed conflict to demonstrate state practice is like trying to prove a negative. Just because States have not engaged in such conduct does not mean that they believe they cannot as a matter of law or custom. As Maurice Mendelson noted, the problem with omissions is that they are ambiguous. Absent evidence of *opinio juris*, there is no way of knowing the reasons why a state is refraining from certain conduct. Mendelson, *supra* note 23, at 199.

many other rules, one must rely on statements about such acts to establish what a state believes it is obligated (or not obligated) to do. Though there are numerous problems associated with giving so much weight to statements, many would agree with the Study's authors who believed that doing so was necessary to determine the *opinio juris* of states.[48]

B. The ICRC Study

The ICRC began its study of customary international humanitarian law at the behest of the participants of the 26th International Conference of the Red Cross and Red Crescent, who met in December of 1995.[49] The Conference requested the ICRC carry out the Study to identify and facilitate the application of existing rules of customary international humanitarian law in international armed conflict and non-international armed conflict.[50] As such, the Study's authors claimed that the end product does not create new rules of international humanitarian law, but rather "seeks to provide the most accurate snapshot of existing rules of international humanitarian law."[51]

In an article summarizing the Study, one of its two authors, Jean Marie Henckaerts, said that its purpose was "to overcome some of the problems related to the application of international humanitarian treaty law."[52] In particular, he singled out AP I. According to Henckaerts, despite ratification by more than 160 states,[53] AP I is of limited efficacy because many states that have been involved in international armed conflict since its creation in 1977 are not parties.[54] The Study's "first

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[48] *See* Guzman, *supra* note 23, at 146 ("Though there are myriad problems with using statements as evidence of a state's beliefs, the majority view is that they may be used in this way."). *See generally* Akehurst, *supra* note 33.

[49] ICRC Press Release, *supra* note 5.

[50] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 176.

[51] ICRC Press Release, *supra* note 5.

[52] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 177.

[53] As of 11 March 2008, there are 167 states party to AP I. *States Party to the Following International Humanitarian Law and Other Related Treaties as of 11-Jul-2008* (July 11, 2008) [hereinafter *States Party*], http://www.icrc.org/eng/party_ccw.

[54] RULES, *supra* note 1, at xxviii. The following twenty-eight states are not parties to AP I: Afghanistan, Andorra, Azerbaijan, Bhutan, Eritrea, Fiji, India, Indonesia, Iran, Iraq, Israel, Kiribati, Malaysia, The Marshall Islands, Morocco, Myanmar, Nepal, Niue,

purpose" was therefore to determine which rules of international humanitarian law now apply to all parties to a conflict regardless of whether they have ratified the treaties from which these rules originate.[55]

Secondly, the Study's authors aimed to plug the gap that they believe exists between international armed conflict and non-international armed conflict.[56] According to the Study, there is insufficient treaty law regulating the latter type of armed conflict, the type that exists most often today.[57] Thus, for each of the 161 rules of customary international humanitarian law in the Study, the authors stated whether the rule also applies in non-international armed conflict. In the case of Rule 45, they concluded that the rule "arguably" applies in non-international armed conflict, a conclusion they also reached with 146 of the Study's 160 other rules.[58]

1. Authors' Description of Their Methodology

The Study's authors identified their methodological approach in the Study's introduction.[59] The description is noteworthy for its brevity and its adherence to tradition.[60] The problem, as will be seen, is one of application. The authors began their discussion of methodology by positing that state practice must be considered from two angles: selection of state practice and assessment of the selected practice.[61] Regarding selection, they claim both physical and verbal acts can

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Pakistan, Papua New Guinea, Philippines, Singapore, Somalia, Sri Lanka, Thailand, Turkey, Tuvalu, and the United States. *States Party*, *supra* note 53.

[55] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 177.

[56] RULES, *supra* note 1, at xxviii.

[57] *Id.* From 1997–2006, only three conflicts were fought between states: Eritrea-Ethiopia, India-Pakistan, and Iraq-United States and coalition forces. The other thirty-one major armed conflicts (defined as a conflict including at least one state resulting in at least 1,000 battle deaths in one year) recorded for this period were fought within states and concerned either governmental power or territory. Lotta Harbom & Peter Wallensteen, *Patterns of Major Armed Conflicts, 1997–2006*, *in* STOCKHOLM INT'L PEACE RES. INST. YEARBOOK 2007: ARMAMENTS, DISARMAMENT, AND INTERNATIONAL SECURITY (2007), *available at* http://www.sipri.org/contents/conflict/YB07%20079%2002Asm.pdf.

[58] *See* RULES, *supra* note 1, at 156–57; *see also* Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 198–212.

[59] RULES, *supra* note 1, at xxxi–xlv.

[60] See *supra* text accompanying notes 32–35 for a discussion of the traditional approach to CIL formation.

[61] RULES, *supra* note 1, at xxxii.

contribute to the formation of CIL.[62] Physical acts include battlefield behavior and the use of certain weapons; verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, diplomatic communiqués, opinions of official legal advisors, pleadings before international tribunals, statements in international forums, and government positions on resolutions adopted by international organizations.[63]

Once state practice is identified, "[it] has to be weighed to assess whether it is sufficiently 'dense' to create a rule of CIL."[64] Quoting from the *North Sea Continental Shelf Cases*, the authors stated that the practice must be "virtually uniform, extensive and representative."[65] Virtually uniform means that different States must not have engaged in substantially different conduct.[66] Furthermore, while it is not necessary that every state sign on or even that there be a certain percentage of states, acceptance of the norm must be of a certain quality to meet the "extensive and representative" test.[67] "[I]t is not simply a question of how many States participate in the practice, but also which States."[68] The Study's authors thus acknowledged that specially affected states carry extra weight in the equation used to assess State practice. "[I]f specially affected states do not accept the practice, it cannot mature into a rule of customary international law . . . ."[69] The Study is agnostic regarding the doctrine of persistent objection to CIL norms, taking no official view and noting that some doubt the concept's validity.[70] The authors concluded their introductory discussion of practice by stating that there is no time frame for establishment of a new CIL norm.[71] Rather, the accumulation of a practice of sufficient density, in terms of

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[62] *Id.*
[63] *Id.*
[64] *Id.* at xxxvi.
[65] *Id.* (quoting North Sea Continental Shelf Cases, *supra* note 18).
[66] *Id.* at xxxvi (quoting Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (Jun. 27).).
[67] *Id.* at xxxviii.
[68] *Id.*
[69] *Id.*
[70] *Id.* at xxxix. Henckaerts and Doswald-Beck cite Maurice Mendelson as the authority who questions the validity of the doctrine of persistent objection. Maurice H. Mendelson, *The Formation of Customary International Law*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 227–44 (1998).
[71] RULES, *supra* note 1, at xxxix.

uniformity, extent and representativeness, is what determines whether it is customary.[72]

Though it is seldom separately examined in the Study in connection to its rules, the authors did discuss *opinio juris* separately when identifying their methodological approach.[73] *Opinio juris*, they wrote, "refers to the legal conviction that a particular practice is carried out 'as of right.'"[74] The form in which both the practice and this legal conviction are expressed may differ depending on the nature of the rule and whether it contains a prohibition, an obligation, or a right to behave in a certain manner.[75]

Regarding *opinio juris*, the Study's authors found it difficult to separate the elements of practice and legal conviction because, as they stated, the same act, be it verbal or physical, may reflect both practice and legal conviction.[76] Interestingly, in an article written in *The International Review of the Red Cross*, Henckaerts singled out military manuals, perhaps the evidence most relied on to establish the Study's 161 rules, as an example of this phenomenon. He argued that "verbal acts, such as military manuals, count as State practice and often reflect the legal conviction of the State involved at the same time."[77] Thus, he concluded, if the practice is dense enough, *opinio juris* is usually contained in the practice, making it unnecessary to separately establish that element.[78]

The final notable aspect of the authors' discussion of methodology concerns their consideration of multilateral treaties in determining whether a norm has reached customary status. Pointing to the *North Sea Continental Shelf Cases*, in which the International Court of Justice considered the degree of ratification of a treaty as relevant to the assessment of CIL,[79] the Study's authors defended the decision to include

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[72] *Id.*; *see also* RESTATEMENT, *supra* note 6, § 102 cmt. b.
[73] RULES, *supra* note 1, at xxxix–xlii.
[74] *Id.* at xxxix.
[75] *Id.*
[76] *Id.* at xl.
[77] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 182.
[78] RULES, *supra* note 1, at xl. For more discussion of *opinio juris* and the Study's authors' failure to adequately consider it, see *infra* text accompanying notes 207–18.
[79] *Id.* at xliii. In the *North Sea Continental Shelf Cases*, the ICJ stated that "the number of ratifications and accessions so far secured [thirty-nine] is, though respectable, hardly sufficient," especially where practice outside the treaty contradicted that called for by the

the ratification, interpretation, and implementation of treaties in the Study.[80] They described the Study's approach to treaty analysis as "cautious," such that "widespread ratification is only an indication and has to be assessed in relation to other elements in practice, in particular the practice of States not party to the treaty in question."[81] The Study's authors believed, however, that to limit its consideration to the practice of non-party states would violate the requirement that CIL be based on widespread and representative practice.[82] Therefore, the assessment of state practice with respect to, for example, paragraphs Articles 35(3) and 55(1) of AP I, took into account that AP I had, at the time of writing, been ratified by 162 States.[83]

2. Initial Critiques of the Study, Its Methodology, and Rule 45

Comment on the Study has been relatively minimal to date, most likely due to its recent publication and extensive scope. A few notable commentators have written critiques,[84] however, and their criticism has been relatively uniform thus far. All the early commentators seem to agree that while the Study represents a laudable effort in nature and scope, it has a number of fatal flaws, chief among them being the proof upon which it relies in establishing its 161 rules.[85] In particular, these

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treaty. North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 42 (Feb. 20).

[80] RULES, *supra* note 1, at xlii–xliii.

[81] *Id.* at xliv.

[82] *Id.*

[83] *Id.* ("[T]he assessment of the existence of customary law takes into account the fact that, at the time of writing, Additional Protocol I has been ratified by 162 states . . . ."). There are currently 167 state parties to AP I. *See States Party*, *supra* note 53. See *infra* note 169 for a discussion of significant reservations to AP I.

[84] *See, e.g.*, PERSPECTIVES ON THE ICRC STUDY, *supra* note 19. Sixteen different international humanitarian law scholars contributed critiques to this work. *Id.*

[85] *See, e.g.*, Yoram Dinstein, *The ICRC Customary International Law Study*, *in* THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE (Anthony M. Helm ed., Naval War College 2006) [hereinafter Dinstein, *Customary International Law Study*]; Letter from John B. Bellinger III, Legal Advisor, U.S. Department of State, and William J. Haynes, II, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross (Nov. 3, 2006) [hereinafter Letter to Dr. Kellenberger] (on file with author), *reprinted in* John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007), *available at* http://www.icrc.org/Web/eng/siteeng0nsf.html all/review-866-p443/$File/irrc_866_Bellinger.pdf; Press Release, American Forces Press Service, DoD, State Department Criticize Red Cross Law of War Study (Mar. 28, 2007)

commentators are troubled by the Study's extensive reliance on military manuals, as well as on non-binding resolutions of international bodies such as the United Nations General Assembly and statements of non-governmental organizations such as the ICRC.[86]

For example, Israeli lawyer Yoram Dinstein wrote that the gamut of admissible statements considered by the Study's authors was too great.[87] American law of war scholar W. Hays Parks likened the authors' proof to the results of an Internet search with no analysis of the applicability or accuracy of the results.[88] Other flaws identified by these and other commentators include: the tendency to combine the state practice and *opinio juris* prongs of CIL under a "density of practice" approach;[89] over-reliance on verbal practice at the expense of examples of actual operational practice;[90] citing practice that stems from treaty obligations on the part of signatory states and not from a sense of legal obligation;[91] confusion regarding the doctrines of specially affected states and persistent objection;[92] the tendency to oversimplify complex and nuanced rules of international humanitarian law;[93] the apparent presumption that rules customary in international armed conflict are also customary in non-international armed conflict;[94] and the apparent presumption that most of the provisions of AP I and Additional Protocol II to the Geneva Conventions[95] (AP II) have crystallized into CIL.[96]

[hereinafter Press Release, DoD, State Department Criticize Red Cross Law of War Study], *available at* http://www.defenselink.mil/news/ newsarticle.aspx?id=3308.

[86] *See* Letter to Dr. Kellenberger, *supra* note 85, at 2.

[87] Dinstein, *Customary International Law Study*, *supra* note 85, at 103.

[88] *See* Press Release, DoD, State Departement Criticize Red Cross Law of War Study, *supra* note 85.

[89] Letter to Dr. Kellenberger, *supra* note 85, at 3.

[90] Dinstein, *Customary International Law Study*, *supra* note 85, at 101–02.

[91] *Id.*

[92] *Id.* at 108–09.

[93] Letter to Dr. Kellenberger, *supra* note 85, at 4.

[94] *Id.*

[95] When President Reagan transmitted the 1977 AP II to the United States Senate for advice and consent in January of 1987, he said the following regarding AP I in his letter of transmittal: "Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war." President Reagan went on to say that the United States would work with its allies to incorporate the positive provisions of AP I into the rules that govern U.S. military operations, and as customary international law. PRESIDENT RONALD REAGAN, LETTER OF TRANSMITTAL, PROTOCOL ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON 10 JUNE 1977, S. TREATY DOC. NO. 2, 100th Cong., at 7 (1987), *reprinted in* 81 AM. J. INT'L L. 910, 910–12 (1987).

The only state that has officially commented on any portion of the Study thus far has been the United States. In a five-page letter (with a twenty-two page attachment) to the President of the ICRC, U.S. Department of State Legal Advisor John Bellinger and U.S. Department of Defense General Counsel William Haynes provided the U.S. government's "initial reactions" to the ICRC Study.[97] Echoing the criticism of other commentators, they wrote, "We are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules."[98] Therefore, they continued, "The United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law."[99] The letter went on to list a number of the same criticisms noted above: that state practice listed was insufficiently dense; that the type of practice listed was questionable; that the authors did not adequately consider specially affected states; and that they overvalued

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[96] Letter to Dr. Kellenberger, *supra* note 85, at 4; *see also* Dinstein, *Customary International Law Study*, *supra* note 84, at 110. While it is undisputed that many provisions of AP I and II have crystallized into CIL (see *Remarks of Michael J. Matheson* 2 AM. U.J. INT'L. L. & POLICY 419 (1987) [hereinafter *Matheson Remarks*]), there remain controversial provisions which have kept the remaining twenty-eight states from becoming parties. Regarding this issue, Dinstein concluded:

> On the whole, as regards international armed conflicts, I am afraid that the Study clearly suffers from an unrealistic desire to show that controversial provisions of API are declaratory of customary international law (not to mention the occasional attempts to go even beyond API). By overreaching, I think that the Study has failed its primary mission. . . . [T]here is a need to persuade non-Contracting Parties that they must comply with a large portion of API: not because it is a treaty but because it is general custom. I do not think that non-Contracting Parties will be persuaded by the conclusions of the Study. Thus, the authors missed a golden opportunity to bring Contracting and non-Contracting Parties to API closer together.

Dinstein, *Customary International Law Study*, *supra* note 85, at 110.

[97] Letter to Dr. Kellenberger, *supra* note 85, at 1; Attachment to Letter from John B. Bellinger, III, Legal Advisor, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, "Illustrative Comments on Specific Rules in the Customary International Humanitarian Law Study" (Nov. 3, 2006) (on file with author) [hereinafter Attachment to Letter to Dr. Kellenberger] *reprinted in* Bellinger & Haynes, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, *supra* note 85.

[98] Letter to Dr. Kellenberger, *supra* note 85, at 1.

[99] *Id.*

sources such as military manuals, which are not statements of *opinio juris* or state practice, but rather statements of policy and training guides.[100]

The attachment to the Bellinger-Haynes letter examines four of the rules contained in the Study.[101] Among those commented on is Rule 45. Bellinger and Haynes wrote that while Rule 45's prohibition against "widespread, long-term, and severe damage to the natural environment" is desirable as a matter of policy, "the Study fails to demonstrate that [R]ule 45, as stated, constitutes customary international law in international or non-international armed conflicts, either with regard to conventional weapons or nuclear weapons."[102]

Bellinger and Haynes gave several reasons for their conclusion that Rule 45 is not CIL. First, they claimed that the United States, France, and the United Kingdom are all specially affected states with respect to both conventional and nuclear weapons, not just nuclear weapons as the Study's authors contended.[103] This alone, they wrote, is enough to prevent formation of CIL.[104] Second, they argued that with respect to this rule, the Study's authors principally relied on the wrong sources: the U.S. Army's *Operational Law Handbook*[105] and the Air Force *Commander's Guide*.[106] What they should have relied on, according to Bellinger and Haynes, are the United States' and France's instruments of ratification to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW),[107] which clearly articulate both states' objections to this exact rule. The authors should have also relied on the remarks of Michael J. Matheson,[108] which

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[100] *Id.* at 1–4.
[101] *See* Attachment to Letter to Dr. Kellenberger, *supra* note 97.
[102] *Id.* at 7.
[103] *Id.* at 7–8.
[104] *Id.* at 8–9; see *infra* text accompanying notes 229–40 for a discussion of the specially affected states doctrine.
[105] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (1993) [hereinafter OPERATIONAL LAW HANDBOOK].
[106] U.S. DEP'T OF AIR FORCE, PAM. 110-34, COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT para. 1.14 (25 July 1980) [hereinafter AFP 110-34].
[107] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1324 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter CCW].
[108] *Matheson Remarks*, *supra* note 96.

similarly state the United States' objections.[109] Bellinger and Haynes faulted the Study authors' tendency to equate the verbal practice of states which are parties to AP I, many of whom have engaged in minimal armed conflict, to that of non-party states, many of whom have engaged in significant armed conflict since the Protocols came into existence.[110] Finally, they concluded by noting the complete lack of examples of any actual operational practice that would implicate Rule 45, demonstrating one of the unique aspects of this rule, and its complements, which we will now consider in greater depth.[111]

III. The Natural Environment: Rule 45 and its Complements

A. The Complements: Rules 43 and 44

Rule 45 is the third of three rules relating to the natural environment in a chapter dedicated to the topic. The first of the rules, Rule 43, states that the general principles on the conduct of hostilities—distinction, military necessity, and proportionality—apply to the natural environment.[112] There are three parts to the rule:

> A. No part of the natural environment may be attacked, unless it is a military objective.
> B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
> C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.[113]

Rule 43 recognizes the civilian status of the environment and thus would appear to be uncontroversial, at least in the context of international armed conflict.[114] However, the Study's authors added language to this

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[109] Attachment to Letter to Dr. Kellenberger, *supra* note 97, at 7–8.
[110] *Id.* at 10.
[111] *Id.* at 11.
[112] RULES, *supra* note 1, at 143.
[113] *Id.*
[114] The civilian status of the environment is enshrined in Article 55 of AP I. Protocol I, *supra* note 10, art. 55. There were no reservations to this idea nor any negative treatment

rule that has given some commentators pause: the word "part."[115] Inclusion of this notion that every "part" of the environment is protected has no precedent in the law of war.[116] It is unclear why the Study's authors felt the need to include the term as they neither defined it nor defended its use.[117] While one can venture guesses as to why they would include it,[118] the authors would have been wise to stick with the language of established international law. By adding new, more protective language in Rule 43, the authors instead opened themselves up to a charge that can be made regarding several aspects of their three natural environment rules: that they overreached and stated the law as they wished it was, rather than as it is.

Rule 44 requires states to give "due regard" to the natural environment in the conduct of hostilities and is stated as follows:

> Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.[119]

This is, like Rule 43, a novel construction of a rule that finds its genesis in Article 55 of AP I.[120] Article 55(1), however, states the obligation as: "Care shall be taken in warfare to protect the natural environment against

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given to it in Matheson's remarks. *See Matheson Remarks*, *supra* note 96. The authors state that Rule 43 is a norm of CIL in non-international armed conflict as well. By contrast, Rules 44 and 45 are, according to the authors, "arguably" norms applicable in non-international armed conflict. RULES, *supra* note 1, at 143, 147, 151.

[115] Karen Hulme, *Natural Environment*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 19, at 210.

[116] *Id.*

[117] *Id.*

[118] One example would be to demonstrate that the environment is not just one entity, but includes smaller entities, such as lakes, forests, and deserts. Hulme, *supra* note 115, at 210. This decision may also recognize the unique protections given under environmental law to certain parts of the environment, to include air, marine resources, flora and fauna. *Id.*

[119] RULES, *supra* note 1, at 147.

[120] Hulme, *supra* note 115, at 218.

widespread, long-term, and severe damage."[121] Why the authors felt the need to change the wording from "care" to "due regard," a term used primarily in naval contexts,[122] is unclear. In addition, Rule 44 requires not merely protection of the natural environment, but also "preservation," thus going beyond Article 55 of AP I.[123] As with the word "part" in Rule 43, use of the words "due regard" and "preservation" in Rule 44 is neither defined nor defended.[124] Here too, the authors would have been better off with language already enshrined in international humanitarian law: respect and protect.[125] Instead, they chose to stretch the limits, resulting in a questionable "rule" of customary international humanitarian law.

B. Rule 45: Volume I's Description of the Rule

Rule 45, the shortest but perhaps most complicated of the three rules in the natural environment chapter, is stated as: "The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon."[126] The authors identified Rule 45 as a norm of CIL in international armed conflict and, arguably, in non-international armed conflict.[127] Because Rule 45's first and second sentences contain

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[121] Protocol I, *supra* note 10, art. 55, para. 1.

[122] The formulation adopted in Rule 44 is similar to the one contained in paragraph 44 of the San Remo Manual, which reads: "Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited." SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) *available at* http://www.icrc.org/ihl.nsf/FULL/560?OpenDocument (last visited Dec. 2, 2008).

[123] *See, e.g.*, United Nations Convention on the Law of the Sea, pmbl., arts. 21, 56, 147, 235, Dec. 10, 1982, 1833 U.N.T.S. 397.

[124] Hulme, *supra* note 115, at 218–19.

[125] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[126] RULES, *supra* note 1, at 151.

[127] *Id.* The authors relied on military manuals and national legislation which do not separately discuss or distinguish international armed conflict and non-international armed conflict. They also relied on statements condemning acts destructive to the natural environment which were general in nature and which did not make distinguish international and non-international armed conflict. Recognizing the problems with announcing the customariness of this rule in non-international armed conflict, the authors concluded: "Even if it's not yet customary [in non-international armed conflict], present

different prohibitions, the authors considered them separately. This article will introduce Parts 1 and 2 of Rule 45, as described in Volume I of the Study, in the next two sections. A thorough review of the Study's evidence for Rule 45, as identified in Volume II, will follow.

1. Part 1: Widespread, Long-Term, and Severe Damage

Part 1 of Rule 45 states an absolute prohibition against means and methods intended or expected to cause widespread, long-term, and severe damage to the natural environment.[128] It is adapted almost verbatim from Article 35(3) and Article 55(1) of AP I, both of which the Study acknowledges were new when adopted in 1977.[129] In its summary of Rule 45, the Study also contains the following statement regarding persistent objection to the rule: "It appears that the United States is a 'persistent objector' to the first part of this rule. In addition, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to nuclear weapons."[130]

Nevertheless, the authors claimed "significant practice" in support of their finding that this relatively short-lived and persistently objected-to rule has become customary.[131] The first "significant practice" cited by the authors is telling: military manuals.[132] They write, "This prohibition is set forth in many military manuals."[133] The authors go on to highlight the following other practice in support of their finding: that the offense of ecocide is an offense under the legislation of many states, to include

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trends mean . . . it's likely these will become customary in due course." *Id.* They argued that this is particularly true because major damage to the environment rarely respects international frontiers and because acts which cause widespread, long-term, and severe damage to the environment may violate other rules, where the application to non-international armed conflict is not in question. *Id.* at 157.

[128] *Id.* at 151.

[129] *Id.* at 152. The word "environment" had never been used in any treaty on the law of war prior to 1976 and 1977. Adam Roberts, *The Law of War and Environmental Damage*, *in* THE ENVIRONMENTAL CONSEQUENCES OF WAR 50 (Jay E. Austin & Carl E. Bruch eds., 2000).

[130] RULES, *supra* note 1, at 151.

[131] *Id.* at 152.

[132] *Id.*

[133] *Id.* The authors listed the relevant portions of several of these military manuals in Volume II of the Study. See *infra* notes 177 and 182 and accompanying text for a list and discussion of the military manuals that the authors cited in support of Rule 45.

non AP I party states;[134] that several state submissions to the International Court of Justice in the *Nuclear Weapons* case[135] indicated their belief that this provision of AP I is customary;[136] policy statements of Israel and the United States, both non-parties to AP I;[137] the almost universal condemnation of certain acts of destruction of the environment, such as Iraq's burning of oil fields in the first Gulf war;[138] the ICRC's published Guidelines on the Protection of the Environment in Times of Armed Conflict, broadly endorsed in a resolution by the United Nations General Assembly;[139] and the statute of the International Criminal Court (ICC), which criminalizes conduct referred to in Part I of Rule 45.[140]

The Study acknowledges that a certain amount of practice indicates doubt regarding the customary nature of this AP I rule. The authors pointed particularly to the submissions to and findings of the International Court of Justice in the *Nuclear Weapons* case.[141] Both the United Kingdom and the United States claimed in their submissions to the court that Articles 35(3) and 55(1) of AP I were not customary.[142] And, as the authors reluctantly acknowledged, the court "appeared" to agree, stating in its advisory opinion that these provisions only apply to "States having subscribed to [them]."[143] Finally, the authors admitted that both France and the United States made statements of interpretation upon ratification of the CCW indicating that neither believed Articles 35(3) or 55(1) of AP I, the substance of which were contained in the preamble of the CCW, were customary.[144]

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[134] *Id.*

[135] *Id.* The authors listed the oral pleadings and written statements of New Zealand, the Solomon Islands, Sweden, and Zimbabwe, and the written statements, comments or counter memorials of India, Lesotho, the Marshall Islands, and Samoa. The authors acknowledged that both the United Kingdom and the United States said in their written statements to the ICJ that Articles 35(3) and 55(1) of AP I are not customary. *Id.* at 153.

[136] RULES, *supra* note 1, at 152–53.

[137] *Id.* at 153.

[138] *Id.* See *infra* text accompanying notes 171–73, 196–200, and 284–87 for a discussion of the Guidelines.

[139] RULES, *supra* note 1, at 153.

[140] See *infra* note 169 and accompanying text for a discussion of how the Statute of the International Criminal Court criminalizes this conduct.

[141] RULES, *supra* note 1, at 153.

[142] *Id.*

[143] *Id.* at 153–54; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 282 (July 8).

[144] RULES, *supra* note 1, at 153–54. The fourth paragraph of the preamble to the CCW states: "Also recalling that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to

The persistent objection of three states—France, the United Kingdom, and the United States, states that many would argue are specially affected for purposes of this rule[145]—is definitely a problem for the authors. The authors even acknowledged that the customary law nature of Rule 45 turns on the positions of these three states.[146] Henckaerts and Doswald-Beck tackled this problem by distinguishing conventional and nuclear weapons, a distinction not made by the objectors.[147] Only by concluding that each of the three states' practice with respect to conventional weapons indicated acceptance of the rule could the authors find that the rule is customary.[148] The Study concludes that because these three states are not specially affected states for purposes of conventional weapons, their "contrary practice is not enough to have prevented the emergence of this customary rule."[149] The Study's authors did, however, see these three states as specially affected with respect to nuclear weapons, based on their persistent objection over time and that none of the states' practice with respect to nuclear weapons contradicted their objections to the rule. Thus, they concluded: "[I]f the doctrine of 'persistent objection' is possible in the context of humanitarian rules, these three States are not bound by this specific rule

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the natural environment . . . ." CCW, *supra* note 107, pmbl. France made the following reservation upon ratification of the CCW: "[France] [c]onsiders that the fourth paragraph of the preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, which reproduces the provisions of article 35, paragraph 3, of Additional Protocol I, applies only to States parties to that Protocol." *Id.* at Declarations, Reservations and Objections. The United States stated a similar understanding:

> The United States considers that the fourth paragraph of the preamble to the Convention, which refers to the substance of provisions of article 35 (3) and article 55 (1) of additional Protocol I to the Geneva Conventions for the Protection of War Victims of August 12, 1949, applies only to States which have accepted those provisions.

Id.

[145] See *infra* text accompanying notes 224–35 for more discussion of the meaning of these three states' persistent objection to Rule 45.

[146] RULES, *supra* note 1, at 154.

[147] *Id.*

[148] *Id.*

[149] *Id.* The authors stated that the contrary practice of France, the United Kingdom, and the United States was not consistent. In particular, they said: "Their statements in some contexts that the rules are not customary contradict those made in other contexts (in particular military manuals) in which the rule is indicated as binding as long as it is not applied to nuclear weapons." *Id.*

as far as any use of nuclear weapons is concerned."[150] This would suggest that other states are bound by Rule 45 with respect to nuclear weapons, even though the relevant provisions of AP I were never meant to apply to such weapons.[151]

One of the main reasons why these distinctions are so important has to do with the absolute nature of both Parts 1 and 2 of Rule 45. Unlike most other rules that involve civilian objects, Rule 45 makes no allowance for military necessity or proportionality.[152] The Study's authors stated that the rule is designed as an absolute partly because of its high threshold.[153] One will note that to trigger the rule, damage to the natural environment must be widespread, long-term, *and* severe.[154] Moreover, it is important to point out that long-term was understood by those states involved in the conferences surrounding AP I, and is acknowledged in Volume I, to mean "decades."[155]

2. Part 2: Destruction of the Natural Environment as a Weapon

Part 2 of Rule 45 states simply, "Destruction of the natural environment may not be used as a weapon."[156] The authors began their discussion of this part of Rule 45 as follows: "There is extensive State practice prohibiting deliberate destruction of the natural environment as a form of weapon. ENMOD prohibits the deliberate modification of the environment in order to inflict widespread, long-lasting, or severe effects as a means of destruction, damage, or injury to another State party."[157] As the above sentence indicates, it is clear that the authors based this second part of Rule 45 on the United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD),[158] which they admitted may not yet

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[150] *Id.* at 155.
[151] *See, e.g.*, *infra* note 169.
[152] RULES, *supra* note 1, at 157; c*f. id.* at 127–42 (discussing Rules 38–42 of the Study).
[153] *Id.*
[154] *Id.* at 151.
[155] *Id.* at 157.
[156] *Id.* at 151.
[157] *Id.* at 155.
[158] United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333 (entered into force Oct. 5, 1978) [hereinafter ENMOD]. Article 1, paragraph 1 of ENMOD states that parties to the convention undertake "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting, or severe effects

be customary.[159] What is strange is that Rule 45 at best only hints at ENMOD by not using the same language. A plain reading of Part 2 of Rule 45 actually indicates a prohibition already contained in this chapter of the Study: destruction of the environment itself, the focus of the AP I provisions on the natural environment.[160] As commentator Karen Hulme wrote, "Although [Volume I] is relatively clear on this issue of environmental modification within ENMOD, the authors invite confusion simply by using ENMOD as evidence for a rule on environmental destruction . . . ."[161] This is so because the rule clearly appears to relate to destroying the environment, whereas ENMOD concerns using the environment as a means of destruction.[162] Thus, as Hulme concluded, it is unclear exactly how and why the Study's authors used ENMOD.[163] It almost seems as if, knowing that ENMOD cannot yet be considered customary, the authors tried to imply that it was customary by connecting it to the idea that destruction of the natural environment is prohibited. Whatever the case may be, by using ENMOD as their main proof for Part 2 of Rule 45, the authors cast a shadow of doubt on both their approach and their results. Further examination of the evidence cited in support of Rule 45 in Volume II unfortunately does nothing to quell this doubt.

C. Evidence Cited by Volume II in Support of Rule 45

Volume II of the Study is subtitled "Practice." More than 4000 pages long, it catalogs all the examples that may, under the Study's broad definition of practice, be considered such. For each rule in the Study, the cited practice is broken up into the following subcategories: treaties and other instruments, national practice, practice of international organizations and conferences, practice of international judicial and

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as the means of destruction, damage or injury to any other State party." *Id.* at 336. There are currently seventy-three states party to ENMOD. *States Party*, *supra* note 53.

[159] RULES, *supra* note 1, at 155.

[160] *Id.* Part 1 of Rule 45 as well as Rules 43 and 44 all prohibit destruction of the natural environment. *Id.*; *see also* Roman Reyhani, *Protection of the Environment During Armed Conflict*, 14 MO. ENVTL. L. & POL'Y REV. 323, 330 (2007) ("ENMOD and Additional Protocol I have different applications, purposes, and thresholds, with no substantive overlap. Additional Protocol I focuses on the natural environment regardless of the weapon used. On the other hand, the ENMOD Convention aims to prevent hostile use of environmental modification techniques.").

[161] Hulme, *supra* note 115, at 237.

[162] *Id.* at 237–38.

[163] *Id.* at 238.

quasi-judicial bodies, practice of the International Red Cross and Red Crescent movement, and other practice.[164] The section on practice supporting Rule 45 is thirty-six pages long, the bulk of which is devoted to national practice, specifically military manuals.[165] Unfortunately, as has been alleged, the practice reads much like an Internet search.[166] There is no interpretive guidance or comment on the weight to be accorded each item, and the further down one goes, the less relevant the "search results" become. That said, this article will now highlight the main elements of practice listed by the Study in support of Rule 45, Parts 1 and 2, beginning with treaty law.

1. Treaty Law and Other Instruments

The treaty law section of Volume II is relatively straightforward, as it is simply a list of the treaty provisions discussed in Volume I.[167] Thus, for Part 1 of the Rule, the authors list Articles 35(3) and 55(1) of AP I, the preamble to the CCW, and the Rome Statute of the ICC criminalizing acts prohibited by Articles 35(3) and 55(1) of AP I.[168] The authors also reference the understandings of France, Ireland, and the United Kingdom to AP I,[169] and those of France and the United States to the CCW.[170] One

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[164] *See, e.g.*, PRACTICE, *supra* note 3, at 876–912.
[165] *See id.*
[166] Press Release, DoD, State Departement Criticize Red Cross Law of War Study, *supra* note 85.
[167] *See* PRACTICE, *supra* note 3, at 876–78, 903–04; *cf.* RULES, *supra* note 1, at 151–52, 155.
[168] PRACTICE, *supra* note 3, at 876–78; see *supra* note 144 for the text of the preamble to the CCW. Article 8.2(b)(iv) of the Rome Statute of the International Criminal Court (ICC) makes the following a war crime:

> Intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct military advantage anticipated.

Rome Statute of the International Criminal Court, July 17, 1998, art. 8.2(b)(iv), U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998).
[169] PRACTICE, *supra* note 3, at 877. Upon ratification, France stated that "the risk of damaging the natural environment which results from the use of certain means or methods of warfare . . . shall be examined objectively on the basis of information available at the time of its assessment." Upon its ratification, Ireland declared "that nuclear weapons, even if not directly governed by [AP I], remain subject to existing rules of international law . . . ." Finally, upon its ratification, the United Kingdom stated that

noteworthy "other instrument" listed in this section is the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict,[171] an instrument which was promulgated by the ICRC and endorsed in a non-binding resolution by the United Nations General Assembly.[172] The Guidelines are the only instrument besides ENMOD listed under the treaties and other instruments section of Rule 45, Part 2. Hence, Volume II affirms that the authors viewed Part 2 of Rule 45 solely as a reflection of ENMOD, a treaty containing language it does not mirror.[173]

2. National Practice[174]

The national practice portion of Volume II for Rule 45 is dominated by a list of several states' military manuals containing out-of-context references to the rule in question.[175] The military manuals section is not only the longest but the first aspect of national practice listed, suggesting it is of primary importance.[176] For Part 1 of Rule 45, the authors identifed the manuals of twenty states, nineteen of which are parties to AP I.[177] One is therefore not surprised to see references in those manuals to the rules as stated in AP I and mirrored in Part 1 of Rule 45. The

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"the risk of environmental damage falling within the scope of [Articles 35(3) and 55(1)] arising from such means and methods of warfare is to be assessed objectively on the basis of information available at the time." Protocol I, *supra* note 10, Declarations, Reservations and Objections.

[170] PRACTICE, *supra* note 3, at 878; see *supra* note 144 for the text of the applicable reservations and understandings to the CCW.

[171] *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, 311 INT'L REV. RED CROSS 230 (2005) [hereinafter *Guidelines*], *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JN38.

[172] G.A. Res. 49/50, ¶ 11 U.N. Doc. A/RES/49/50 (Dec. 9, 1994). To read an excerpt from the UN Resolution urging states to incorporate the Guidelines into their military manuals, see *infra* text accompanying note 197.

[173] PRACTICE, *supra* note 3, at 903–04.

[174] National practice is the term used by the Study's authors to discuss a particular form of state practice. The national practice section examines military manuals, national legislation, and what is termed "other national practice." *See id.* at 879–98.

[175] *See* PRACTICE, *supra* note 3, at 879–83, 904–07.

[176] *Id.* at 879.

[177] *Id.* at 879–83. The Study references the military manuals of the following twenty states: Argentina, Australia, Belgium, Benin, Canada, Columbia, France, Germany, Italy, Kenya, the Netherlands, New Zealand, Russia, Spain, Sweden, Switzerland, Togo, the United Kingdom, and the United States. *Id.* The United States is the only one of these states that is not a party to AP I. *See States Party*, *supra* note 53.

authors identified the military manuals of only one state that is not a party to AP I: the United States.[178] The manuals identified to show U.S. acceptance of Part 1 of this rule were the 1993 Army *Operational Law Handbook*,[179] produced by The Judge Advocate General's Legal Center and School, and the Air Force *Commander's Handbook* on the Law of Armed Conflict, produced in 1980 for Air Force commanders by the Air Force Judge Advocate General's Department.[180] While both manuals reference the "new" rule against widespread, long-term, and severe damage to the natural environment contained in AP I, neither manual claims that the United States recognizes this requirement as CIL.[181]

For Part 2 of Rule 45, the authors identified the manuals of ten states, seven of whom are parties to ENMOD.[182] The text of these manuals shows that the authors chose them to demonstrate state practice in support of the ENMOD prohibition against modifying the environment as a means of destruction.[183] Interestingly, there is no explicit mention of the kind of behavior actually contemplated by Part 2 of Rule 45: destruction of the natural environment as a weapon. The manuals of the

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[178] PRACTICE, *supra* note 3, at 882–83.

[179] OPERATIONAL LAW HANDBOOK, *supra* note 105, at Q-182. Referring to the Operational Law Handbook, the Study contains the following quote: "[T]he following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity . . . (i) using weapons which cause . . . prolonged damage to the natural environment." PRACTICE, *supra* note 3, at 883.

[180] AFP 110-34, *supra* note 106, at para 6-2. Referring to this handbook, the Study contains the following quote:

> Weapons that may be expected to cause widespread, long-term, and severe damage to the natural environment are prohibited. This is a new principle, established by [AP I]. Its exact scope is not yet clear, though the United States does not regard it as applying to nuclear weapons. It is not believed that any presently employed conventional weapon would violate this rule.

Id.

[181] *See* OPERATIONAL LAW HANDBOOK, *supra* note 105, at Q-182, AFP 110-34, *supra* note 106, para. 6-2.

[182] PRACTICE, *supra* note 3, at 904–07. The Study references the military manuals of the following ten states: Australia, Canada, France, Germany, Indonesia, Israel, South Korea, New Zealand, Russia, and Spain. *Id.*

[183] For example, the 1994 Australia Defence Force Manual cited by the Study states: "Australia, as a signatory to [ENMOD], has undertaken not to engage in any military or hostile use environmental modification techniques which would have widespread, long lasting, or severe effects as the means of destruction, damage, or injury to any other state which is a party to the Convention." PRACTICE, *supra* note 3, at 905.

seven ENMOD party states and the three non-party states, France, Indonesia, and Israel, indicate each state's support for the rule against modifying the environment as a means of warfare.[184]

The next item of national practice listed is legislation. For Part 1 of Rule 45, the authors list, Internet search-style in alphabetical order, the legislation of thirty-three states which variously criminalize either intentional acts that create widespread, long-term, and severe damage to the natural environment or "ecocide."[185] All but one of these states, Azerbaijan, are parties to AP I, making it quite predictable that they would have such legislation on their books.[186] While noteworthy, Azerbaijan's law making the "widespread, long-term, and severe damage to the natural environment"[187] a war crime is, on its own, quite neglible proof of a customary norm of international law. There is no legislation listed for Part 2 of Rule 45 and no domestic case law listed for either Part 1 or Part 2 of the Rule.[188]

Under the heading "other practice," the authors list a variety of other sources, to include: letters exchanged between states or between states and international organizations regarding destruction of the natural environment;[189] statements condemning acts harmful to the natural environment such as Iraq's burning of Kuwaiti oil fields;[190] pleadings of states in the *Nuclear Weapons* case;[191] and the "Matheson remarks," providing the U.S. State Department view of various provisions of AP I to include Articles 35(3) and 55(1).[192] Though it comes last, this section is probably the most interesting and helpful under the heading "national practice" because such practice seems more likely to demonstrate what

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[184] *Id.* at 904–07.
[185] *Id.* at 883–87. The Study references the national legislation of the following thirty-three states: Argentina, Australia, Azerbaijan, Belarus, Bosnia and Herzegovina, Burundi, Canada, Columbia, Congo, Croatia, El Salvador, Estonia, Georgia, Germany, Ireland, Kazakhstan, Kyrgyszstan, Mali, Moldova, the Netherlands, New Zealand, Nicaragua, Norway, Russia, Slovenia, Spain, Tajikistan, Trinidad and Tobago, Ukraine, the United Kingdom, Vietnam, and the Federal Republic of Yugoslavia. *Id.*
[186] *See States Party*, *supra* note 53.
[187] PRACTICE, *supra* note 3, at 883.
[188] *Id.* at 887, 907.
[189] *Id.* at 887–98.
[190] *Id.* at 888–89.
[191] *Id.* at 887.
[192] *Id.* at 894–95; *see also Matheson Remarks*, *supra* note 96, at 424, 436 (stating that the prohibition contained in Articles 35(3) and 55(1) of AP I is "too broad and ambiguous and is not a part of customary law").

states actually believe about purported or emerging customs. This type of practice, however, may also be the most difficult to interpret or weigh, which is perhaps why the authors placed it last. The only notable "other practice" listed under Part 2 of Rule 45 concerns the Second ENMOD Review Conference.[193] At the conference, certain non-party states expressed disatisfaction with the vague terms of the ENMOD Convention, demonstrating some degree of support for the principles contained in ENMOD, but not for the wording.[194]

3. International Practice

Volume II lists a variety of international practice, starting with the practice of international organizations and conferences, progressing to the actions of international judicial and quasi-judicial bodies, and concluding with actions of the International Red Cross and Red Crescent Movement.[195] It would seem that this order is purposeful, but the authors do not confirm this anywhere in Volume I or II. For both Parts 1 and 2 of Rule 45, the international practice section begins with mention of a 1994 U.N. General Assembly Resolution in support of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict.[196] In support of a Decade of International Law resolution and without a vote of its members, the General Assembly invited

> all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to military personnel.[197]

[193] PRACTICE, *supra* note 3, at 907–08.
[194] *Id.* at 909–10.
[195] *Id.* at 898–903.
[196] *Id.* at 898, 910.
[197] *Id.* at 898; see *infra* note 279 and text accompanying notes 279–80 for a discussion of the binding effect of United Nations General Assembly resolutions.

The second international practice listed for Parts 1 and 2 of the rule is simply a reaffirmation of the first: in 1996, another U.N. General Assembly resolution, also adopted without a vote, reaffirmed the invitation made to states in 1994 to disseminate the ICRC's Guidelines and incorporate them into their military manuals.[198] Notably, these guidelines are cited more than once in Volume I as support for the notion that Rule 45 is a customary norm of international law.[199] This is interesting inasmuch as it demonstrates that the ICRC is driving the train here rather than states, whose consent is required in order for any rule to become customary.[200]

"Other" international practice described in the international practice section includes, for Part 1: statements of the Council of Europe;[201] a report of the working group that drafted Articles 35(3) and 55(1) of AP I;[202] the advisory opinion of the International Court of Justice in the *Nuclear Weapons* case, which said that Articles 35(3) and 55(1) of AP I were "powerful constraints for all the States having subscribed to these provisions";[203] the final report to The International Criminal Tribunal for Yugoslavia, which concluded that the rules expressed in these two AP I articles "may reflect" CIL;[204] and, finally, the fact that, "[t]o fulfill its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that 'it is prohibited to use weapons of a nature to cause . . . widespread, long-term and severe damage to the natural environment.'"[205] The only other international practice described in a rather short section dedicated to such practice for Part 2 of Rule 45 is a 1974 conference of government experts on weapons that may cause unnecessary suffering.[206] This conference discussed, among other things, geophysical warfare, and voiced concerns that were later validated by the ENMOD treaty.[207]

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[198] *Id.* at 898.
[199] *See, e.g.*, RULES, *supra* note 1, at 153, 155.
[200] See *supra* note 35 for a discussion of the role of consent in CIL formation.
[201] PRACTICE, *supra* note 3, at 899.
[202] *Id.* at 900.
[203] *Id.* at 900–01.
[204] *Id.* at 901.
[205] *Id.*
[206] *Id.* at 911.
[207] *Id.*

IV. Analysis: Flawed Methodology Produces a Flawed Rule

A. Flaw #1: The Marginalization of Traditional CIL Doctrines

The above discussion has revealed some of the flaws in methodology evident in the Study, and particularly Rule 45. This article will now address these flaws in greater depth, beginning with the Study's marginalization of three important CIL doctrines: *opinio juris*, persistent objection, and specially affected states.

The failure to separately consider *opinio juris* was one of the main flaws of the Study highlighted in the Bellinger-Haynes letter:

> A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules.[208]

Indeed, as Bellinger and Haynes recognized, the authors' actual approach to the *opinio juris* element of CIL was far from the "classic" or conservative approach to CIL formation described in the Study's introduction.[209] The text of the Study instead shows that the authors borrowed heavily from certain international law thinkers, such as

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[208] Letter to Dr. Kellenberger, *supra* note 85, at 4. Bellinger and Haynes concluded:

> In this regard, the practice volumes generally fall far short of identifying the level of positive evidence of *opinio juris* that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.

Id.

[209] See *supra* text accompanying notes 59–83 for a discussion of the authors' stated approach to CIL formation. The degree to which the Study's authors strayed from their stated conservative approach caused one commentator to conclude: "From a legal perspective, the ICRC has upturned the basis upon which customary law rests and its methodology reflects a radical departure from canonical law." Nicholls, *supra* note 20, at 243.

Frederic Kirgis and M.H. Mendelson, whose approach to CIL formation could only be described as unorthodox.[210]

Frederic Kirgis developed what is known as the sliding scale formula for CIL.[211] The Kirgis formula evaluates *opinio juris* and state practice along a sliding scale and posits that it is acceptable to infer *opinio juris* from state practice, provided certain conditions are met.[212] M.H. Mendelson, who chaired the committee that wrote the International Law Association (ILA) *Statement on Principles Applicable to the Formation of General Customary International Law*,[213] believes that *opinio juris* need not always be shown for a norm to become CIL.[214] The ILA Statement, which concludes that the subjective element of *opinio juris* is only sometimes necessary for CIL to form, reflects Mendelson's belief.[215] Nevertheless, both Kirgis and the ILA Statement contain notable caveats to their ideas. Kirgis wrote, "On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent."[216] The ILA Statement,

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[210] Iain Scobbie, *The Approach to Customary International Law in the Study*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 19, at 24 [hereinafter Scobbie, *Approach to Study*]. Frederic Kirgis is known for his sliding scale formula for CIL (see *infra* text accompanying notes 210–11), and Maurice Mendelson is known for an approach to CIL formation that holds that *opinio juris* need only be shown in certain circumstances (see *infra* text accompanying notes 212–13).

[211] *See* Frederic L. Kirgis Jr., *Custom on a Sliding Scale*, 81 AM J. INT'L L. 146 (1987).

[212] *Id.* at 148–49.

[213] *Statement of Principles Applicable to the Formation of General Customary International Law*, *in* THE INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-NINTH CONFERENCE 737 (Professor A.H.A. Soons & Christopher Ward eds., 2000) [hereinafter *Statement of Principles*].

[214] Mendelson has written that *opinio juris sive necessitatis* is a "phrase of dubious provenance and uncertain meaning." For this reason, he argued that *opinio juris* need not be separately proven "in the standard type of case, where there is a constant, uniform, and unambiguous practice of sufficient generality, clearly taking place in a legal context and unaccompanied by disclaimers . . . ." Mendelson, *supra* note 23, at 208. By contrast, because it refers to the reason why a nation acts in accordance with a behavioral regularity, Goldsmith and Posner describe *opinio juris* as "the central concept of CIL." Goldsmith & Posner, *supra* note 21, at 1116.

[215] *Statement of Principles*, *supra* note 213, at 743–53.

[216] Kirgis, *supra* note 211, at 149. Kirgis concluded,

> [e]xactly how much state practice will substitute for an affirmative showing of an *opinio juris*, and how clear a showing will substitute for consistent behavior, depends on the activity in question and on the reasonableness of the asserted rule. It is instructive here to focus on

which acknowledges that the committee's view of *opinio juris* is "contrary to a substantial body of doctrine," also indicates that *opinio juris* must be examined if there is reason to believe that practice does not count towards the formation of CIL.[217] The Study's authors clearly adopted a Kirgis/Mendelson approach; however, they failed to apply it faithfully. As the authors acknowledged, there was ample reason to believe that the practice of the United States, France, and United Kingdom did not count toward the formation of Rule 45. Therefore, using their adopted approach, the authors were obliged to carefully and separately consider *opinio juris*, a task they simply chose not to do.

Jean-Marie Henckaerts responded directly to the Bellinger-Haynes letter in an article published in the *International Review of the Red Cross*.[218] Regarding their critique of the Study's analysis of *opinio juris*, or lack thereof, Henckaerts wrote:

> Although the commentaries on the rules in Volume I do not usually set out a separate analysis of practice and *opinio juris*, such an analysis did in fact take place for each and every rule to determine whether the practice attested to the existence of a rule of law or was inspired merely by non-legal considerations of convenience, comity, or policy.[219]

What Henckaerts seems to be saying is "trust me." If the goal of the Study is to set forth rules of CIL binding on all states, then "trust me" is an insufficient answer. Whatever analysis of practice and *opinio juris*

> rules that restrict governmental action. The more destablilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision-makers will substitute one element for the other, provided that the asserted restricted rule seems reasonable.

Id.

[217] *Statement of Principles*, *supra* note 213, at 745. Elsewhere, Mendelson has written that the kind of case where *opinio juris* need not be shown is one where there is no evidence of opposition by "a group of states sufficiently important to have prevented a general rule from coming into existence at all." Mendelson, *supra* note 23, at 208.

[218] Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INT'L REV. RED CROSS 473, 483 (2007), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-866-p473/$File/irrc_866_Henckaerts.pdf.

[219] *Id.* at 483.

took place with respect to these "rules" of CIL needed to be completely transparent for this project to be a success.

Another CIL doctrine that the Study's authors chose to marginalize is that of persistent objection. Instead of acknowledging this important doctrine, the authors chose not to take a position on the possibility of being a persistent objector in the Study's introduction.[220] This expressed agnosticism was apparently in recognition of the doubts of some "authorities," such as Maurice Mendelson, regarding the doctrine's continued validity.[221] Interestingly, this view (or non-view) directly contradicts the view of persistent objection expressed by Dr. Abdul G. Koroma in the Study's foreword.[222] Dr. Koroma wrote: "it is widely accepted that general customary international law binds states that have not persistently and openly dissented in relation to a rule while that rule was in the process of formation."[223]

Not knowing what to expect after reading such mixed messages in the introduction, it is perhaps with surprise that one reads in the Study that the United States, France, and the United Kingdom are all persistent objectors to Rule 45 with respect to nuclear weapons, and that the United States "appears" to be a persistent objector with respect to conventional weapons.[224] The big difference between these three states with respect to this rule is that France and the United Kingdom are parties to AP I, albeit with significant reservations,[225] and the United States is not. All three states have made clear that they do not view the AP I provisions as applying to nuclear weapons.[226] Furthermore, none of them has explicitly acknowledged that the rule applies to conventional weapons. Desiring to prove otherwise, the Study's authors listed relevant portions of all three states' military manuals to show practice in support of the Rule's applicability to conventional weapons.[227] The authors were hesitant to conclude that U.S. practice showed support for the rule's applicability to conventional weapons—hence, the United States

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[220] RULES, *supra* note 1, at xxxix.
[221] *Id.*
[222] Abdul G. Koroma, *Foreword* to RULES, *supra* note 1, at xii.
[223] *Id.* at xii.
[224] *Id.* at 151.
[225] *See supra* note 169.
[226] *See* PRACTICE, *supra* note 3, at 882–83.
[227] *Id.* at 880, 882–83.

"appears to be" a persistent objector.[228] The authors, however, did not hesitate to conclude that the practice of France and the United Kingdom demonstrated the Rule's applicability to conventional weapons.

Finding consistent practice in support of Rule 45's inapplicability to nuclear weapons on the part of France, the United Kingdom, and the United States, the Study's authors identified all three states to be not only persistent objectors, but also specially affected states.[229] In making this unusual connection, the authors turned CIL doctrine on its head. If these three states are persistent objectors regarding the applicability of this rule to nuclear weapons, it means that the otherwise customary rule against using nuclear weapons to cause widespread, long-term, and severe destruction to the natural environment does not apply to them.[230] However, if they are specially affected states, it means, almost certainly, that this rule against using nuclear weapons to cause widespread, long-term, and severe destruction to the natural environment cannot even exist.[231] Which is it? According to Yoram Dinstein, the Study completely missed the mark in its application of these two doctrines to Rule 45:

> When three nuclear powers . . . have taken the position that Rule 45 does not reflect customary international law, there is no doubt that they act as "States whose interests are specially affected." By arriving at the conclusion that (at the most) the three Powers can only be viewed as "persistent objectors"—and that, therefore, they will not be bound by the custom which has emerged—the Study gets the law completely wrong. . . . Surely, as "States whose interests are specially affected," the three countries cannot be relegated to the status of persistent objection. By repudiating the putative custom protecting the environment from all means of warfare, the three nuclear States have not merely removed themselves from the reach of such a custom: they in fact

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[228] Scobbie, *Approach to Study*, *supra* note 210, at 35–36. It was apparently a close enough call with respect to the United States for the authors to conclude that "it appears" the United States is a persistent objector to this rule.
[229] RULES, *supra* note 3, at 154–55.
[230] Dinstein, *Customary International Law Study*, *supra* note 85, at 109; *see also* Hulme, *supra* note 115, at 234–35.
[231] Dinstein, *Customary International Law Study*, *supra* note 85, at 109; *see also* Hulme, *supra* note 115, at 234.

> managed to successfully bar its formation (as a minimum, with respect to the employment of nuclear weapons).[232]

Notably, in his response to the Bellinger-Haynes letter, and without acknowledging Dinstein's critique that the Study "got the law wrong," Henckaerts recognized that Rule 45 is not customary law with respect to nuclear weapons.[233] His concession is remarkable in view of how the rule is worded and defended both in the Study and elsewhere.[234] Henckaerts is now on record that Rule 45 as currently stated in the Study is incorrect.[235]

The cause of this embarrassing concession—an incorrect view of the specially affected states doctrine—shows how little the Study's authors value this important doctrine. Even though they acknowledged the existence of the doctrine in their introduction,[236] the authors appeared to do everything they could to minimize its impact in the development of these rules. Labeling specially affected states "persistent objectors" is a perfect example. Why might the authors be hesitant to apply this doctrine faithfully? First, doing so prevents the formation of new

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[232] Dinstein, *Customary International Law Study*, *supra* note 115, at 109.

[233] Henckaerts, *supra* note 218, at 482. His response was:

> [W]ith respect to Rule 45 . . . the Study notes that France, the United Kingdom, and the United States have persistently objected to the rule being applicable to nuclear weapons. As a result, we acknowledge that with respect to the employment of nuclear weapons, Rule 45 has not come into existence as customary law.

Id.

[234] At the "launch conference" which took place at George Washington University, Henckaerts said: "Since the adoption of Additional Protocol I, [Rule 45, Part I] has received such extensive support in state practice that it has crystallized into customary law, even though some states have persistently maintained that it does not apply to nuclear weapons." Jean-Marie Henckaerts, *Assessing the Laws and Customs of War: The Publication of Customary International Humanitarian Law*, 13 HUM. RTS. BRIEF, AM. UNIV. WASH. C.L., Winter 2006, at 8, 10.

[235] In view of this concession, Rule 45 should read: "The use of *conventional* methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon." Such a rule might not be worth the effort of printing it, however, as most states, as well as Henckaerts, recognize the virtual impossibility of violating this rule with conventional weapons. *See*, *e.g.*, *supra* note 180; *see also infra* note 247.

[236] RULES, *supra* note 1, at xxxviii–xxxvix.

customary norms. Second, the specially affected states doctrine is undemocratic and tends to favor major powers.[237] While the ultimate determination of who merits specially affected state status depends on the circumstances, as the ILA Statement concluded, the major powers will often be specially affected by a practice or rule.[238] The ICRC seems to think this reality anathema and prefer a one state, one vote approach to CIL. The Bellinger-Haynes letter critiqued the Study for this very tendency: "[T]he Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience . . . ."[239] It simply makes no sense to assign the practice of Lesotho the same weight as that of France, or the United Kingdom, or the United States, which is what the Study appears to do in its discussion of Rule 45.[240] If the Study's authors did weigh these states differently, there is no clear indication.

Henckaerts did, as discussed, ultimately acknowledge the meaning of France's, the United States' and the United Kingdom's specially affected state status with respect to the applicability of Rule 45 to nuclear weapons: that no such rule could form.[241] In so doing, however, he conceded as little as possible:

> The Study did duly note the contribution of states that have had "a greater extent and depth of experience" and have "typically contributed a significantly greater quantity and quality of practice". . . . the United States, in particular, has contributed a significant amount of practice to the formation of customary international humanitarian law. . . . Hence, it is clear that there are states that have contributed more practice than others because they have been "specially affected" by armed conflict. Whether, as a result of this, their practice

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[237] *Statement of Principles*, *supra* note 213, at 737.
[238] *Id.* Karol Wolfke acknowledged what he called "the role of the great powers" in his book. With respect to law-creation in international society, he wrote that one must remember that "the share of states in the evolution of international law is not, and even cannot be, the same." He claimed that factors such as power, wealth, and sheer size play an important role in the evolution of international customs. WOLFKE, *supra* note 21, at 78.
[239] Letter to Dr. Kellenberger, *supra* note 85, at 2–3.
[240] *See* PRACTICE, *supra* note 3 at 891–95.
[241] *See supra* text accompanying notes 233–35.

> *counts more* than the practice of other states is a separate question. The statement of the International Court of Justice in respect to the need for the practice of "specially affected" states to be included was made in the context of the law of the sea—and in particular in order to determine whether a rule in a (not widely ratified) treaty had become part of customary international law. Given the specific nature of many rules of humanitarian law, it cannot be taken for granted that the same considerations should automatically apply. Unlike the law of the sea, where a state either has or does not have a coast, with respect to humanitarian law any state can potentially become involved in armed conflict and become "specially affected." Therefore, all states would seem to have a legitimate interest in the development of humanitarian law.[242]

While it is true that all states might have a legitimate interest in the development of humanitarian law, it is not true that all states are on an equal footing as it develops, at least in the CIL realm. This is so because states differ so widely in the degree to which they participate in, and are affected by, practice relevant to the formation of norms. As Karol Wolfke pointed out in *Custom in Present International Law*, "the share of states in the evolution of international law is not, and even cannot be, the same."[243] When forming CIL, one must therefore assign weight to states based on the quantity and quality of their practice and not on the mere fact of statehood. This is the essence of the doctrine of specially affected states. In his response to the Bellinger-Haynes Letter, Henckaerts tried to distinguish the specially affected states doctrine and, by so doing, marginalize it. He would be much better off, and the Study would be a better product, if he and his co-author simply applied it faithfully.

B. Flaw #2: Overemphasizing Verbal Practice of Unclear and Dubious Weight

Flaw #2 is in some ways a continuation of Flaw #1, in that it implicates another key doctrine of CIL: state practice. There are more

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[242] Henckaerts, *supra* note 218, at 481–82.
[243] WOLFKE, *supra* note 21, at 78; *see also supra* note 238.

than 4000 pages of content that the Study's authors label "Practice." And yet, despite its volume, commentators have greatly criticized this portion of the Study for its focus on verbal practice of unclear and dubious weight.[244] Professor Dinstein characterized the study as a good example of the adage that sometimes "more is less."[245] W. Hays Parks called it an unfiltered "compilation of statements" that lacks any sense of context or frame of reference.[246] He stated, "Although [the Study] acknowledges the importance of state practice, it focuses only on statements to the exclusion of acts and relies only on a government's words rather than deeds. Yet, war is the ultimate test of law. Government-authorized actions in war speak louder than peacetime government statements."[247]

Unfortunately, there is a paucity of government-authorized actions in wartime to draw from in determining norms of CIL, especially with respect to a rule like Rule 45 that is almost impossible to violate.[248] Hence, as the ILA Statement and the Restatement agree, some reliance on verbal statements is necessary.[249] The question is, which verbal statements are admissible as evidence of CIL and how much weight does each deserve? The Study, though its authors claim otherwise, seemed to employ the "any tendency" standard of the basic relevance rule[250] for admissibility without engaging in any analysis of how much weight to accord the verbal statements. Moreover, despite their protestations to the contrary, the authors appeared to accord a state's practice in support of a treaty obligation the same as if that state were not a party to the treaty.[251] As will be shown below, these are serious flaws.

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[244] *See, e.g.*, Dinstein, *Customary International Law Study*, *supra* note 85, at 101–02; W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 AM. SOC'Y INT'L L. PROC. 208–10 (2005); Letter to Dr. Kellenberger, *supra* note 85, at 2.
[245] Dinstein, *Customary International Law Study*, *supra* note 85, at 101.
[246] Parks, *supra* note 244, at 208, 212.
[247] *Id.* at 210.
[248] Henckaerts, *supra* note 218, at 482 ("[W]ith regard to conventional weapons . . . the rule may not actually have much meaning as the threshold of the cumulative conditions . . . is very high.").
[249] *Statement of Principles*, *supra* note 213, at 725–26 ("Verbal acts, and not only physical acts, of States count as state practice"); RESTATEMENT, *supra* note 6, at Reporters Notes 2 ("[P]ractice . . . takes many forms.").
[250] "'Relevant evidence' means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2005).
[251] *See, e.g.*, PRACTICE, *supra* note 3, at 879–98.

The ILA explained in its statement that conduct which is wholly referable to a state's treaty obligations does not count as state practice.[252] Specifically it stated, "What states do in pursuance of their treaty obligations is prima facie referable only to the treaty itself and therefore does not count for the formation of a customary rule."[253] This notion is based on the ICJ's holding in the *North Sea Continental Shelf Cases*.[254] In these cases, the ICJ ruled that the practice of contracting parties in support of a treaty rule, the customariness of which is at issue, must be set aside and the focus must be placed on non-contracting states.[255] If evidence of practice in pursuit of a treaty obligation is in fact inadmissible evidence, as the ILA Statement and *North Sea Continental Shelf Cases* appear to require, then most of the national practice section of Rule 45 should be deleted. Or, if not deleted, the authors should at least state that less weight should be accorded to the statements of nineteen of the twenty military manuals listed in that section.

In his response to the Bellinger-Haynes letter, Henckaerts acknowledged that using the practice of Contracting parties to establish a customary law is "difficult."[256] Nevertheless, this did not prevent Henckaerts and Doswald-Beck from trying to do so using what they described in the Study's introduction as a "cautious approach."[257] The approach they actually used, however, is neither cautious nor conservative. It is the approach used by the ICJ in the much-criticized *Nicaragua* case vice the more cautious approach described by the ICJ (and followed by the ILA Statement authors) in the *North Sea Continental Shelf Cases*.[258] If the authors truly desired to take a cautious approach to CIL formation, they would have stuck to the stringent requirements of the *North Sea Continental Shelf Cases*.[259] Had they done so, however, it is far less likely that Rule 45, and perhaps many other rules, would have made the cut on the final list of rules. By considering practice in support of treaty obligations in this manner, the authors instead appear to be trying to circumvent the requirements of express

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[252] *Statement of Principles*, *supra* note 213, at 757.
[253] *Id.* at 759.
[254] *Id.* at 757–59; *see also* North Sea Continental Shelf Cases, *supra* note 18, at 43–44.
[255] *Id.*
[256] Henckaerts, *supra* note 218, at 480.
[257] *Id.*; *see also* RULES, *supra* note 1, at xliv.
[258] Scobbie, *Approach to Study*, *supra* note 210, at 29.
[259] *Id.*

consent for a state to be bound to a treaty.[260] Their argument that they must consider the practice of Party states based on the requirement that customary law be widespread and uniform is, as one commentator concluded, "circular, masking an assumption that customary norms should conform to the provisions of the Protocols, and thus privileging the views of State parties who are, in any case, bound conventionally."[261]

The "national practice" section of the Rule 45 discussion in Volume II is not only dominated by the verbal practice of treaty parties, but specifically by the military manuals and national legislation of treaty parties. Were these two sources of practice to be removed, the authors would have almost no "national practice" left to list.[262] The problem with military manuals is not so much their admissibility as much as their weight. Yoram Dinstein commended the authors for relying on military manuals in their explication of rules in Volume I; however, he also stated that their reliance was excessive and that they failed to consider whether the manuals upon which they were relying were "authentic."[263] For example, he said the Israeli manual upon which they relied and with which he is very familiar, is not an "authentic" manual but rather "merely a tool used to facilitate instruction and training, and has no binding or even authoritative standing."[264] He informed the authors of this fact before publication but was ignored.[265] Bellinger and Haynes also faulted the authors for excessive reliance on military manuals:

> We are troubled by the Study's heavy reliance on military manuals. We do not agree that *opinio juris* has been established when the evidence of a State's sense of legal obligation consists predominately of military manuals. Rather than indicating a position expressed out of a sense of customary legal obligation, in the sense pertinent to customary international law, a State's military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party. . . . Moreover, States often include guidance in

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[260] Daniel Bethlehem, *The Methodological Framework of the Study*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 19, at 8 [hereinafter, Bethlehem, *Framework*].
[261] Scobbie, *Approach to Study*, *supra* note 210, at 29.
[262] *See supra* text accompanying notes 175–94.
[263] Dinstein, *Customary International Law Study*, *supra* note 85, at 103.
[264] *Id.*
[265] *Id.*

> their military manuals for policy, rather than legal, reasons.[266]

In particular, Bellinger and Haynes complained that the Study accorded more weight to two narrowly-focused U.S. military instructional manuals, the Army *Operational Law Handbook* and the Air Force *Commander's Guide on the Laws of Armed Conflict*, than to other forms of "verbal practice" such as the U.S statement in its instrument of ratification to the CCW and Secretary Matheson's remarks.[267]

One of the problems with using these two military manuals to defend Rule 45 is that they were not written with an international audience in mind. The 1995 Army *Operational Law Handbook* is prefaced with the following statement: "[This] is a 'how to' guide for Judge Advocates practicing operational law."[268] The Air Force *Commander's Handbook* is also clearly intended for instructional purposes only.[269] Such products are more akin to the internal memoranda discussed in the ILA Statement in that they lack the elements of "claim and response" necessary for the formation of CIL.[270] In other words, neither manual is intentionally responding to a claim of CIL or even to an emerging customary norm. That said, this does not mean that such a manual cannot be considered as evidence of a state's subjective attitude towards an emerging norm.[271]

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[266] Letter to Dr. Kellenberger, *supra* note 85, at 3.

[267] Attachment to Letter to Dr. Kellenberger, *supra* note 97, at 8.

[268] The first paragraph of the preface to the 1995 edition of the Operational Law Handbook reads as follows: "The Operational Law Handbook is a "how to" guide for Judge Advocates practicing operational law. It provides references, and describes tactics and techniques for the conduct of the operational law practice. . . . The Operational Law Handbook is not a substitute for official references. . . ." INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK at iii (1995). The 1995 edition is used here because the 1993 edition that the Study's authors used was unavailable.

[269] The opening sentences of the Air Force Commander's Handbook on the Law of Armed Conflicts read: "This pamphlet informs commanders and staff members of their rights and duties under the law of armed conflict. It applies to all Air Force activities worldwide, and implements DoD Directive 5100.77, 10 July 1979." AFP 110-34, *supra* note 106.

[270] *Statement of Principles*, *supra* note 213 at 726 ("For a verbal act to count as State practice, it must be public . . . it must be communicated to at least one other State. . . . Internal memoranda are therefore not, as such, forms of State practice. . . . [A]n internal memoranda [*sic*] which is not communicated to others is not a claim or response.").

[271] *Id.* The instructors at The Judge Advocate General's Legal Center and School who author the *Operational Law Handbook* are therefore not immune from affecting the international community's perception of the United States' subjective attitude towards an emerging rule.

Using domestic legislation as a source of state practice invites many of the same. As with military manuals, there is no "claim and response." As with military manuals, much of the legislation simply mirrors what states are obligated to do by treaty. And, as with military manuals, the weight of such practice may be negligible and will depend on a variety of factors, all of which must be considered in the context of the entire writing. For example, as Bellinger and Haynes pointed out in their letter, ten of the examples of domestic legislation listed in the Study for Rule 45 exactly mirror the ICC Statute language prohibiting widespread, long-term, and severe damage to the natural environment.[272] The ICC Statute language, however, only prohibits such conduct when it is excessive in relation to the concrete and direct military advantage expected.[273] This is a big difference, but the authors failed to mention it.[274] Nor did the authors find it noteworthy that all but one of the thirty-three examples of domestic legislation they list pertaining to Rule 45 were those of states party to AP I.[275] Their failure to mention these important caveats leads to one conclusion regarding the weight of the military manuals and legislation listed: dubious.

The international practice the authors list for Rule 45 is also of unclear and dubious weight. Some of it, arguably, is not even worthy of admission as evidence of a customary rule. Yoram Dinstein, for example, stated that ICRC reports, communications, press releases and the like "are simply not germane to customary international law, unless and until they actually impact on state practice."[276] He concluded that at best, the ICRC "practice" quoted in the Study proved itself to be irrelevant.[277] Henckaerts responded to this criticism by pointing to the ICRC's international legal personality and its mandate from states to "work for the faithful application of international humanitarian law."[278] He affirmed that ICRC "practice" was never used as primary evidence but only to reinforce conclusions.[279]

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[272] Attachment to Letter to Dr. Kellenberger, *supra* note 97, at 10.
[273] *Id.*
[274] *See* PRACTICE, *supra* note 3, at 878, 883–87.
[275] *See id.*
[276] Dinstein, *Customary International Law Study*, *supra* note 85, at 102.
[277] *Id.* at 102–03.
[278] Henckaerts, *supra* note 218, at 478.
[279] *Id.*

Leaving aside the practice of the ICRC, a more debatable question concerns the admissibility and weight of resolutions of the U.N. General Assembly. In their letter, Bellinger and Haynes stated:

> We are also troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.[280]

Henckaerts responded to this critique as well, stating that the authors weighed each resolution according to its content and that the results of this weighing process were never used to "tip the balance" toward a finding of CIL.[281]

Neither the ILA Statement nor the Restatement denies that it was appropriate for the Study's authors to consider resolutions of the U.N. General Assembly.[282] The Restatement, however, points to a variety of factors that must enter into the analysis in determining what weight to give a resolution, many of which the Study apparently chose to ignore.[283] For example, in discussing both Parts 1 and 2 of Rule 45, the Study relies heavily on the *Guidelines for the Protection of the Environment in Times of Armed Conflict*.[284] Although the ICRC drafted the Guidelines, the Study includes them under the U.N. section, tying them to a Decade of International Law resolution urging states to consider including them in their military manuals.[285] What is not stated in the Study in reference to

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[280] Letter to Dr. Kellenberger, *supra* note 85, at 2. Karol Wolfke wrote that non-binding General Asssembly resolutions, "being merely verbal postulates, proposals, or declarations of principles, etc., do not constitute acts of conduct described in their content, nor, even multiplied, any conclusive evidence of any practice." WOLFKE, *supra* note 21, at 84.

[281] Henckaerts, *supra* note 218, at 478.

[282] *Statement of Principles*, *supra* note 213, at 765–76; RESTATEMENT, *supra* note 6, at Reporters Notes 2.

[283] These factors include "the subject of the resolution, whether it purports to reflect legal principles, how large a majority it commands and how numerous and important are the dissenting states, whether it is widely supported (including in particular the states principally affected), and whether it is later confirmed by other practice." RESTATEMENT, *supra* note 6, at Reporters Notes 2.

[284] *See* PRACTICE, *supra* note 3, at 898, 910.

[285] *Id.*

the Guidelines is that they were neither voted on nor formally approved by the United Nations.[286] None of the factors that the Restatement authors thought important—for example, formal approval, declaration of customary status, and unanimity—is present, and yet the authors do not hesitate to give substantial weight to the Guidelines, especially with respect to Part 2 of Rule 45.[287] Again, the only appropriate word to describe such "practice" is dubious.

C. Flaw #3: The Promotion of *Lex Ferenda*

The use of dubious practice to defend the Study's new, black-letter rules of customary international humanitarian law points to the last of the Study's three main flaws: the promotion of *lex ferenda*. The Study promotes *lex ferenda* instead of codifying *lex lata* by: (1) announcing formulations of rules which do not yet represent *lex lata*, thus creating uncertainy as to the state of CIL; and (2) failing to adequately defend the Study's formulations, thus eroding their credibility.

Part 2 of Rule 45 exemplifies how the promotion of *lex ferenda* creates uncertainty. This part of the Rule is anchored to the provisions of Articles I and II of ENMOD, yet the Rule's formulation in no way mirrors that of the treaty.[288] As stated earlier, the ENMOD treaty prohibits weaponization of the environment by its modification, whereas Part 2 of Rule 45 prohibits the weaponization of the environment by its destruction. This is an important difference, and prompts the question whether the Study's authors were creating a new rule or simply did not understand ENMOD very well. By fashioning new, independent rules, purposefully or not, the Study's authors not only engage in law creation—elevating *lex ferenda* to *lex lata*—they also cast into doubt the meaning of certain treaty provisions.[289] Instead of looking for a compromise between parties and non-parties to a multilateral treaty such as AP I or ENMOD, the authors transcend the treaties, which are *lex lata* for parties, and move into the realm of *lex ferenda* for both parties and non-parties.[290] This only creates confusion over the requirements of customary international humanitarian law, confusion that may

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[286] *See id.* at 4374.
[287] *Id.* at 910; *see also supra* text accompanying notes 195–200.
[288] *See* PRACTICE, *supra* note 3, at 903.
[289] Bethlehem, *Framework*, *supra* note 260, at 10, 13.
[290] Dinstein, *Customary International Law Study*, *supra* note 85, at 108.

compromise the protections afforded war victims.[291] One thing is certain: thanks to the Study's new formulations and its failure to properly explain and defend them, determining "the normative center"[292] of potential "rules" of CIL has become even more difficult.

The *lex ferenda* nature of the Study also damages its credibility. In his introduction to the Study, recognizing the link between honesty in process and credibility, Yves Sandoz wrote that the Study's "great concern for absolute honesty" is what lends it international credibility.[293] No doubt the Study's authors approached this monumental task with a concern for honesty; however, perhaps due to the project's enormous scope or its authors' ambitious intentions, the final product lacks the very credibility they claim. There are likely several reasons for this, one of which may be bound up in the project's charter. In his foreword, Dr. Kellenberger listed three reasons for the Study, the first of which was to achieve the universal application of principles of international humanitarian law, and notably those enshrined in AP I.[294] This purpose may have doomed the Study from its start. At the very least, the authors needed to be very cautious about doing this. Engaging in the crystallization of custom with the object of remedying the problem of non-participation of states in a treaty regime can easily look like an attempt to get around the non-application of the treaty to certain states.[295] Further, using different language to fashion such rules without explaining why does not avoid the problems associated with announcing that norms of treaties such as AP I or ENMOD are now customary rules.[296] This is especially true when considering the importance and experience of many states who are non-parties to AP I.[297] Yoram Dinstein initially praised the ICRC's effort to complete the Study as a perfect means to bridge

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[291] Bethlehem, *Framework*, *supra* note 260, at 10, 13 (arguing that the Study's new formulations may create uncertainty as to how one should read treaty rules "supplanted" by the new formulations).
[292] *Id.* at 12.
[293] Sandoz, *Introduction*, *supra* note 2, at xvii.
[294] Jakob Kellenberger, *Foreword* to RULES, *supra* note 1, at x; *see also* George Aldrich, *Customary International Humanitarian Law—An Interpretation on Behalf of the International Committee of the Red Cross*, 76 BRIT. Y.B. INT'L L. 503, 506 (2005) ("It is the failure of key States to become parties to Protocol I that justified this effort.").
[295] Bethlehem, *Framework*, *supra* note 260, at 7.
[296] *Id.* at 10.
[297] *Id.* at 7 (referring to states not party to AP I as a "Who's Who" of many of the states that have been involved in armed conflict during the past thirty years).

what he called "the great schism" between AP I parties and non-parties.[298] After reading the Study, however, he concluded:

> I am afraid the Study clearly suffers from an unrealistic desire to show that controversial provisions of [AP I] are declaratory of customary international law (not to mention the occasional attempt to go even beyond [AP I]). By overreaching, I think the Study has failed in its primary mission. After all, there is no practical need to persuade Contracting Parties to [AP I] that it is declaratory of customary international law.[299]

The lack of transparency inherent in *lex ferenda* also detracts from the Study's credibility. One commentator, Daniel Bethlehem, has likened the Study to an encyclical whereby rules emanate from a "black box" into which only the authors can see.[300] Bethlehem posited that the Study's authors would have been better off entitling their study, "State practice and *Opinio Juris* in the Interpretation and Application of International Humanitarian Law."[301] The affirmative approach they adopted, announcing black-letter rules in a commentary purporting to be of equivalent weight and authority as Pictet's commentary on the Geneva Conventions,[302] instead invites a great deal of skepticism and doubt.[303] Bethlehem concluded, "[T]here are too many steps in the process of the crystallization and formation of the black letter customary rules that are insufficiently clear, even by reference to the accompanying two volumes of practice."[304] Indeed, partly because customary law formation is controversial and contextual, its elucidation demands greater transparency and more thorough analysis than even this ten year effort could accomplish. Bethlehem said it well: "[A]bove all, in the context of the identification of customary international law, the credibility of the law dictates that we must be able to see inside the black box."[305] By promoting *lex ferenda* from their "black box," the authors compromised the Study's honesty and eroded its credibility.

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[298] Dinstein, *Customary International Law Study*, *supra* note 85, at 100.
[299] *Id.* at 110.
[300] Bethlehem, *Framework*, *supra* note 260, at 6.
[301] *Id.* at 4.
[302] *See, e.g.*, PICTET, *supra* note 13. Pictet's four volume commentary is viewed by practitioners as an authoritative source on the provisions of all four Geneva Conventions.
[303] Bethlehem, *Framework*, *supra* note 260, at 4.
[304] *Id.* at 5.
[305] *Id.* at 6.

V. Conclusion

This article has criticized the ICRC's Customary International Humanitarian Law Study and its authors for elevating a *lex ferenda* principle—absolute protection of the environment against widespread, long-term, and severe destruction—to a *lex lata* rule. Rule 45 is one of the most controversial and least understood of the 161 rules contained in the Study. Therefore, one should not assume that every rule in the Study is similarly flawed. It should be noted that most commentators agree that the Study was largely accurate and worthy of serious regard.[306]

The monumental project that culminated in the Study could have been more successful, though, had the authors stuck to their stated approach and faithfully applied traditional CIL doctrines. Instead, as Rule 45 makes clear, the authors failed to do so by assigning inordinate weight to verbal "practice" such as military manuals and resolutions of the United Nations General Assembly; by neglecting to meaningfully consider *opinio juris*, one of the two requirements for the formation of CIL; and by either ignoring or misapplying the CIL doctrine of specially affected states. This flawed methodology may not have doomed every rule in the Study, but, for a contested rule like Rule 45, it was fatal.

The Study's authors stated that their goal was an accurate "snapshot" of customary international humanitarian law.[307] One wonders whether accurate snapshots are possible considering the malleable and dynamic nature of CIL formation. It almost seems as if the lighting is too dim and the action too fast to get a sharp and accurate photograph. There are measures, however, that the photographer can take to remedy these problems: acquire a better lens, more light, and, when circumstances are really dire, compose a different shot altogether. With respect to Rule 45, the authors published a blurry snapshot, perhaps knowing that it was so, but believing that it was better than a less-exciting sharp one or none at all. This was a mistake. For all of the reasons explained in this article, the Rule 45 "snapshot" should have been left on the darkroom floor.

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[306] *See, e.g.*, Dinstein, *supra* note 85, at 99 (calling the Study an important landmark that no scholar or practitioner can afford to ignore); Bethlehem, *Framework*, *supra* note 260, at 3 ("[The Study] is a significant contribution to the learning on, and the development of, international humanitarian law.").

[307] ICRC Press Release, *supra* note 5.

ONE "GET OUT OF JAIL FREE" CARD: SHOULD PROBATION BE AN AUTHORIZED COURTS-MARTIAL PUNISHMENT?

MAJOR TYESHA E. LOWERY*

I. Introduction

First Afghanistan. Then Iraq. Now Iraq . . . again. He was distraught—not because of the hardships of yet another deployment—that's what Soldiers do. He could handle another deployment, but his wife could not . . . not for fifteen months. His wife responded just like he thought she would. She left. She left him alone to take care of their two young children. With no friends and family to leave them with, he feared what would happen to his children. Maybe he should get out of the Army for lack of a family care plan? But he loved the Army, and his achievements reflected it. Maybe he could stay in the rear. No, as a team leader, he would not feel right staying behind while his men were in the fight. Plus, his command frowned upon such requests as a sign of cowardice although they never stated such. Believing that he had no other recourse, he absented himself without leave. When he returned three months later, he was court-martialed. His only sentence was a bad-conduct discharge with a recommendation from the military judge to the convening authority that the discharge be suspended.

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Some say he got off easy. After all, he did not have to go back to Iraq. But he stood ready to serve. His record was otherwise unblemished. What was the likelihood that the convening authority would suspend his bad-conduct discharge? Slim to none? But what if the military judge had the option of sentencing him to probation instead of only making a recommendation to the convening authority to suspend his sentence?[1]

Today, the only authorized punishments that a court-martial (special courts-martial[2] and general courts-martial[3]) may adjudge are a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, and a punitive discharge.[4] While this list initially sounds expansive, affording the military judge or panel much room for creativity in fashioning an appropriate sentence for a particular accused, a military

[1] Although this story is fictitious, it represents a not-uncommon scenario in military justice practice.

[2] A "special court-martial may try any person subject to the code for any noncapital offense made punishable by the code and, as provided in this rule, for capital offenses." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(2) (2008) [hereinafter MCM]. The maximum punishment that it may adjudge is one year confinement, hard labor without confinement for three months, two-thirds forfeiture of pay for twelve months, a reprimand, reduction to the lowest pay grade, and a fine. *Id*. A special court-martial empowered to adjudge a bad-conduct discharge may adjudge the aforementioned punishments as well as a bad-conduct discharge. *Id*. Today, most special courts-martial are empowered to adjudge a bad-conduct discharge. Last year, the Army tried 535 special court-martials. Of those, 526 were empowered to adjudge a bad-conduct discharge. U.S. Army Judiciary, Office of the Clerk of Court, Army Wide Statistics for FY 2007 (2008) (Excel spreadsheet) [hereinafter Army Wide Statistics].

[3] A general court-martial may try any person subject to the Uniform Code of Military Justice (Code) for any offense under the Code. MCM, *supra* note 2, R.C.M. 201(f)(1). It may adjudge the maximum prescribed punishment for any offense under the Code including a reprimand, total forfeitures of all pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, punitive separation, and, in some cases, death. *Id*. Last year, the Army tried 1269 general court-martials. Army Wide Statistics, *supra* note 2.

[4] MCM, *supra* note 2, R.C.M. 1003(b).

judge or panel is not authorized to adjudge probation. When one considers that probation is the most common criminal sentence adjudged in U.S. federal and state courts today,[5] but is not available for the convicted servicemember, this expansive list suddenly seems more restrictive.

Then, when one considers the rapid rate that the military is allowing ex-convicts to enter the military under moral waivers, the question becomes even more perplexing. Since October 2006, "more than 8,000 of the roughly 69,000 recruits have been granted waivers for offenses ranging in seriousness from misdemeanors such as vandalism to felonies such as burglary and aggravated assault."[6] Almost twelve percent of new active duty and Army Reserve troops in 2007 received "moral waivers."[7] With the prolonged wars in Iraq and Afghanistan, and others potentially brewing, do these numbers really reflect a belief that these individuals have been rehabilitated or do they reflect the amount of risk the Army is willing to accept to satisfy the simple economic principle of supply versus demand?[8]

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[5] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE STATISTICS, *available at* http://www.ojp.usdoj.gov/bjs/pandp.htm (last visited Dec. 3, 2008) [hereinafter BUREAU OF JUSTICE STATISTICS]. The U.S. Department of Justice collects all probation and parole data nationwide annually. For yearend 2006, 463 agencies including "the federal system, 33 central State reporters, the District of Columbia, and 428 separate State country, or court agencies" responded to the Department of Justice Annual Probation Survey. *Id.* According to those statistics, of the 7,211,400 individuals under correctional supervision, 4,237,023 were sentenced to probation. *Id.*; *see also* JOAN PETERSILIA, REFORMING PROBATION AND PAROLE IN THE 21ST CENTURY 1 (2002) (stating that "[p]robation is the most common form of criminal sentencing in the United States" in 2002).

[6] Bryan Bender, *Entering Army with Criminal Records*, BOSTON GLOBE, July 13, 2007, at A1, *available at* http://www.boston.com/news/nation/washington/articles/2007/07/13/more_entering_army_with_criminal_records/. These are only the Army's statistics concerning the number of moral waivers granted in 2006.

[7] *Id.*

[8] *See Criminal Force: The Military Is Admitting More Ex-Convicts*, PITTSBURG POST-GAZ., Feb. 16, 2007, at B-6, *available at* http://www.post-gazette.com/pg/07047/762556-192.stm [hereinafter *Criminal Force*].

Though we publicly claim that the increase in moral waivers is not based on mission accomplishment,[9] public sentiment favors the latter—criticizing the armed forces for "scraping the bottom of the barrel"[10] to meet recruitment needs. But does motive really matter? At the end of the day, we must all agree that "[a] volunteer army—even one including ex-convicts—will fight . . . ."[11]

Why is the military willing to give civilian ex-convicts[12] a chance to prove that they have indeed been rehabilitated, yet we have no such formal system that affords a convicted accused the same opportunity? Why does the Army take more risks on others than on its own Soldiers? This article argues for empowering a court-martial to sentence a convicted accused to probation, a form of punishment that provides a meaningful opportunity to rehabilitate while satisfying the simple principle of supply versus demand.[13]

Since a formal probation system would be new in the military, section two of this article begins with an overview of the civilian probation system. Section three examines the current military justice system—the derivation of authorized punishments and their competing objectives. Section four addresses the pros and the cons of implementing a formal probation system in the military. Section five discusses how to empower a court-martial to adjudge a sentence that includes probation. Finally, section six suggests an alternative to empowering courts-martial to adjudge probation—empowering courts-martial to suspend punishment.

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[9] Bender, *supra* note 6 (quoting a statement from the Army Recruiting Command, Fort Knox, Ky., that "[t]he Army does not rehabilitate enlistees who receive waivers; they have already overcome their mistakes"); *see also* Frank Main, *Army Recruits Have Records: Number Allowed in with Misdemeanors More Than Doubles*, CHI. SUN-TIMES, June 19, 2006 (quoting S. Douglas Smith of the Army's Recruiting Command as stating, "the rising number of misdemeanor and medical waivers has occurred randomly and was not set into motion by any Army policies that have relaxed qualifications for recruits. . . . [A]pproval of waivers is not based on mission accomplishment.").

[10] *See Criminal Force*, *supra* note 8.

[11] *Id*.

[12] The term "ex-convict" refers to those that have been convicted of either a misdemeanor or a felony.

[13] While this article argues that a court-martial should be empowered to adjudge probation in lieu of any of the permissible punishments, it is contemplated that probation is the most viable alternative in lieu of extended confinement and a punitive discharge.

II. The U.S. Federal Probation System[14]

A. The Road to the Modern-Day Federal Probation System

In August 1841, Boston boot maker John Augustus, a religious and wealthy man, posted bail for a man accused of drunkenness.[15] Augustus urged the Boston Police Court to defer sentencing the man for three weeks.[16] Augustus, having had experience working with alcoholics, also urged the court to release the man into his custody in the meantime.[17] Augustus called the act "probation," derived from the Latin term *probatio*, which means "period of proving or trial."[18] Despite the brevity of his probationary period, the man convinced the judge that he had been rehabilitated and was ordered only to pay a fine at the end of his probation.[19]

Over the next fifteen years, Augustus similarly assisted more than 1900 individuals.[20] Augustus did, however, screen his applicants—mainly assisting "those who were indicted for their first offense, and whose hearts were not wholly depraved, but gave promise of better

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[14] Surprisingly, there are no national guidelines or uniform structure concerning state probation systems. Hence, this article is primarily limited to a discussion of the federal probation system only. *See* PETERSILIA, *supra* note 5, at 36, 50 (quoting the National Institute of Corrections); *see also* CAROL MELLOR, CRIMINAL DEFENSE TECHNIQUES: DECISION TO GRANT OR DENY PROBATION § 47.03 (2008) ("The mechanics of adjudication of a sentence of probation are not uniform between, or sometimes, within jurisdictions.").

[15] CHARLES CHUTE & MAJORIE BELL, CRIMES, COURTS, AND PROBATION 36–38 (1956); *see also* PETERSILIA, *supra* note 5, at 17–18.

[16] PETERSILIA, *supra* note 5, at 17–18.

[17] *Id*. Augustus was a member of the Washington Total Abstinence Society. CHUTE & BELL, *supra* note 15, at 38. It is likely that Augustus was at the Boston Police Court "to promote temperance and to reclaim drunkards." *Id*. For the first year of his charitable work, he limited his assistance to males only. Charles Linder, *John Augustus, Father of Probation, and the Anonymous Letter*, FED. PROBATION NEWSL. (Dec. 2006), *available at* http://www.uscourts.gov/fedprob/June_2006/augustus.html. But then, Augustus' "attention was called to claims of women who were common inebriates" as well as children and others accused of petty crimes. *Id.* Augustus was also involved in the anti-slavery movement and other reform groups. CHUTE & BELL, *supra* note 15, at 39.

[18] PETERSILIA, *supra* note 5, at 17–18.

[19] *Id.*

[20] ANDREW R. KLEIN, ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS, AND PROBATION 68 (1997).

things."[21] In addition to making an impartial report to the court, Augustus helped his charges with housing, employment, and education.[22]

Augustus' probationers performed remarkably well and seemingly reformed their lives.[23] Even then, Augustus frustrated law enforcement officials "who wanted the offenders punished, not helped."[24] Nevertheless, it was difficult to argue with his success and his ideas spread.[25] "In 1878, Massachusetts was the first state to adopt a formal probation law for juveniles."[26] By 1910, twenty-one states had probation statutes[27] and "[b]y 1956, all states had adopted adult and juvenile probation laws."[28]

In 1925, Congress passed the Federal Probation Act which authorized courts of original jurisdiction to place a convicted defendant on probation when it found "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved."[29] The Act

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[21] PETERSILIA, *supra* note 5, at 17 (quoting Augustus in 1939); *see also* CHUTE & BELL, *supra* note 15.

> Great care was observed of course, to ascertain whether the prisoners were promising subjects for probation, and to this end it was necessary to take into consideration the previous character of the person, his age, and the influences by which he would in future be likely to be surrounded, and although these points were not rigidly adhered to, still they were the circumstances which usually determined my action.

Id. at 40 (quoting Augustus also).

[22] PETERSILIA, *supra* note 5, at 17. Augustus completely shaped the structure of today's probation system by giving modern-day probation the basic ideas of presentence reports, supervised conditions, social casework, and probation revocation. *Id.* at 18.

[23] MICHAEL D. BURKHEAD, THE TREATMENT OF CRIMINAL OFFENDERS 36 (2007); *see also* PETERSILIA, *supra* note 5, at 17.

[24] PETERSILIA, *supra* note 5, at 17; *see also* CHUTE & BELL, *supra* 15, at 44.

[25] According to an anonymous letter entitled "The Labors of Mr. John Augustus, the Well-Known Philanthropist, From One Who Knows Him," Augustus is praised for "raising the fallen—reforming the criminal," and "that, out of nearly two thousand persons for whom he was responsible, only ten have proved ungrateful for his goodness, and by absconding suffered him to be defaulted and to be sued (four times, I believe,) for the amounts for which he had become bail." Linder, *supra* note 17.

[26] PETERSILIA, *supra* note 5, at 18; *see also* KLEIN, *supra* note 20, at 68.

[27] DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 20 (1959).

[28] PETERSILIA, *supra* note 5, at 18; *see also* NEIL COHEN, THE LAW OF PROBATION AND PAROLE 1-8 (1999).

[29] Federal Probation Act of 1925, 18 U.S.C. §§ 724–727 (1925), *available at* http://heinonline.org/HOL/Page?colletion=statute&handle=hein.statute/sal043&id=1293.

gave great discretion to the court—allowing the court to fashion the terms and conditions of probation "for such period and upon such terms and conditions as they may deem best."[30] Furthermore, the Act allowed the court to modify the terms of probation or revoke probation with no parameters.[31] Probation officers were charged with informing the court of the probationers' compliance of the imposed conditions.[32] Though the Act mandated that probation officers serve free of charge,[33] it gave probation officers a great deal of power over probationers, giving them the power of arrest without a warrant and authorizing them to "use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition."[34]

The Federal Probation Act of 1925 also provided that the defendant's offense could not be punishable by imprisonment for life or death. *Id*.

[30] *Id*.

[31] *Id*. *See* Burns v. United States, 287 U.S. 216, 220 (1932). In *Burns*, the trial court sentenced Burns to imprisonment for a year on one count, to pay a $2000 fine on the second count, and to a suspended sentence of five years imprisonment in favor of probation on the third count. *Id*. at 217. The court subsequently received information that Burns had absented himself from jail for a couple of hours over the course of several days in violation of his probation conditions. *Id*. at 218. The court summarily revoked his probation and the Circuit Court of Appeals affirmed the revocation. *Id*. at 219. On appeal to the Supreme Court, Burns alleged that he was entitled to notice of his alleged probation violation and to a hearing. The Court held that the Act did not provide "limiting requirements as to the formulation of the charges, notice of the charges, or manner of hearing or determination" and affirmed his probation revocation. *Id.* at 221.

[32] 18 U.S.C. §§ 724–727 (1925).

[33] *Id*.

> All such probation officers shall serve without compensation except that in case it shall appear to any such judge that the needs of the service require that there should be a salaried probation officer, such judge may appoint one such officer and shall fix the salary of such officer subject to the approval of the Attorney General in each case.

Id. Apparently, the Act contemplated that probation officers serve out of a heart of genuine goodwill for the rehabilitation of their neighbor. *Cf.* PETERSILIA, *supra* note 5, at 18 (stating that the only criteria that Augustus required from those that volunteered to assist him in his philanthropic endeavors was that the individual "just needed to have a good heart").

[34] 18 U.S.C. §§ 724–727 (1925).

Concerned with the virtually unfettered discretion granted to federal trial courts under the Federal Probation Act of 1925, the National Commission on Reform of Federal Criminal Laws (National Commission) began urging in 1971 for greater certainty and uniformity in sentencing and for a more comprehensive sentencing law.[35] On March 3, 1983, Senator Kennedy presented a proposal to the Subcommittee on Criminal Law, based in part on the National Commission's recommendations.[36] That proposal, the Sentencing Reform Act of 1983 (SRA), [37] later became "the first comprehensive sentencing law for the federal system."[38] A discussion of the impact of the SRA on our modern-day federal probation system follows.

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[35] S. REP. NO. 98-225, at 37–38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220–3221. *See generally* Gary Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993) (providing a counter argument for less uniformity in sentencing).

[36] S. REP. NO. 98-225, at 37. The committee noted the following:

> [E]very day Federal judges mete out unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. . . . These disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance . . . .

Id. at 38.

[37] Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.) The SRA is part of the Comprehensive Crime Control Act of 1984.

[38] S. REP. NO. 98-225, at 37.

B. The Modern-Day Federal Probation System[39]

One of the most noteworthy achievements of the SRA[40] is that it created the United States Sentencing Commission, an independent

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[39] In modern-day terms, probation is defined as "[a] court-ordered disposition alternative through which an adjudicated offender is placed under the control, supervision, and care of a probation staff member in lieu of imprisonment, so long as the probationer meets certain standards of contact." PETERSILIA, *supra* note 5, at 3 (quoting the DICTIONARY OF CRIMINAL JUSTICE TERMS, AMERICAN CORRECTIONAL ASSOCIATION (1998)). In discussing modern-day federal probation, it is important to note several things. First, probation is not synonymous with a suspended sentence. Probation entails supervision while a suspended sentence does not.

> The law distinguishes the suspension of a sentence from the imposition of probation. Both probation and suspension of sentence involve the trial court's discretionary, and conditional, release of a convict from the service of a sentence within the penal system; however, a probated sentence is served under the supervision of probation officers, whereas a suspended sentence is serviced without such supervision, but on such legal terms and conditions as are required by the sentencing judge.

21A AM. JUR. 2D *Criminal Law* § 904 (2007). It is also important to note that parole is not synonymous with probation. Parole is defined as "the release from jail, prison or other confinement facility after actually serving part of sentence." BLACK'S LAW DICTIONARY 1116 (6th ed. 1990); COHEN, *supra* note 28, at 1–4 (describing parole as an administrative procedure, as opposed to a judicial procedure like probation, where a parole board allows an offender to serve the rest of his sentence in the community under conditions). Note also that the SRA repealed parole for the federal system. 18 U.S.C.S. § 3551 Notes (LexisNexis 2008). Congress abolished federal parole to create "honesty in sentencing" so that an offender would actually serve his adjudged time. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 intro. cmt. (1990). But since 1987, Congress has continued to extend federal parole for those who were serving under parole before the SRA's implementation. *See* § 3551 Notes; Pub. L. No. 101-650, § 316, 104 Stat. 5115 (1990); Parole Commission Phaseout Act of 1996, Pub. L. No. 104-232, § 2(a), 110 Stat. 3055, 18 U.S.C.S. § 4202 Notes; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11017(a), 116 Stat. 1758 (2002); Pub. L. No. 109-76, § 2, 119 Stat. 2035 (2005). Parole has been replaced with supervised release which is beyond the scope of this paper. *See* U.S. SENTENCING GUIDELINES MANUAL § 5D1.1 (1987) [hereinafter 1987 U.S. SENTENCING GUIDELINES MANUAL].

[40] The SRA made several other notable changes. The SRA clearly delineated the goals of federal sentencing. Section 3553 (a) states that:

> The court shall impose a sentence sufficient, but not greater than necessary . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training . . . or other

commission within the judicial branch, to establish sentencing policies, practices, and guidelines for federal courts.[41] The other particularly noteworthy thing that the SRA did was to make the application of the Federal Sentencing Guidelines (Guidelines) binding on federal courts.[42]

> correctional treatment in the most effective manner . . . .

Id. It also established a number of mandatory factors that every federal court had to consider in deciding what punishment to impose. The sentencing courts were obligated to consider the following:

> (1) [T]he nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed . . . ; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

§ 3553(a)(2).

[41] *See* Pub. L. No. 98-473, 98 Stat. 2018; 28 U.S.C.S. § 992 (LexisNexis 2008). The Sentencing Commission consists of eight members, seven voting members and one non-voting member. The Sentencing Commission's guidelines are to:

> [A]ssure the meeting of the purposes of sentencing set forth in *section 3553 (a)(2) of Title 18, United States Code*; provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.

28 U.S.C.S. § 991; *see also* United States Sentencing Commission, Overview of the United States Sentencing Commission, *available at* http://www.ussc.gov/general/USSC_Overview_Dec07.pdf (last visited Dec. 3, 2008).

[42] § 3553(b).

> [T]he court *shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a

Though the SRA marked great change in federal sentencing as a whole, there are several things provided under the Federal Probation Act of 1925 that still ring true today under the SRA, the Guidelines,[43] and recent Supreme Court decisions.

1. The Probation Officer and the Presentence Report

Similar to the Federal Act of 1925, the SRA relies heavily on probation officers to make modern-day probation work. Beginning at the point of arrest, a probation officer is appointed to a defendant to conduct a presentence investigation and report.[44] The presentence report must identify the applicable Guidelines, the defendant's offense level and criminal history category, the sentencing range and the sentences available, matters relating to the appropriate sentence, and matters such as the defendant's history, characteristics, and financial condition.[45] Except in very limited instances, a judge may not impose a sentence, probation or otherwise, unless a presentence report is conducted.[46] A

> circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2).

Id. (emphasis added). *See generally* United States v. Minstretta, 488 U.S. 361 (1989) (holding that the Federal Sentencing Guidelines are binding on courts). But note that in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that 18 U.S.C. § 3553(b)(1) violated the Sixth Amendment and that the Federal Sentencing Guidelines were advisory only. The impact of *Booker* on federal probation will be discussed in section two under this subheading.

[43] The Guidelines were effective November 1, 1987. 1987 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 39, § 1A1.1 cmt. n.1. Computation of the Sentencing Guidelines could be a thesis in itself. "The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal basis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment." U.S. SENTENCING GUIDELINES MANUAL § 5A cmt. n.1 (2007) [hereinafter 2007 U.S. SENTENCING GUIDELINES MANUAL]; *see also* INGA PARSONS, US NITA COMMENTARY ON FED. R. CRIM. P. 32.1 (LEXIS 2008) (stating that "[i]n its most basic form the federal guideline range is the result of a fact-generated assessment of the defendant's offense characteristics charted against the defendant's criminal history.").

[44] § 3602; FED. R. CRIM. P. 32; *see* PETERSILIA, *supra* note 5, at 25–26.

[45] FED. R. CRIM. P. 32(d).

[46] *Id.* 32(c)(1)(A). The Federal Rules of Criminal Procedure require that a presentence report be submitted to the court before sentencing unless: "18 U.S.C. § 3593 (c) or

probation officer must serve a copy of the presentence report on the defendant, his attorney, and the prosecutor at least thirty-five days before sentencing.[47] The court can order the probation officer not to disclose his recommendation to anyone except the court.[48]

2. Making the Decision

Despite the SRA's goal of uniformity in sentencing, probation is still a matter of the court's discretion though that discretion is no longer completely unfettered. According to the SRA, a court may not sentence a defendant to probation in cases involving a Class A or B felony, in cases where probation is expressly precluded as an authorized sentence by the nature of the offense, or in cases where the defendant is sentenced to imprisonment at the same time for the same or a different offense.[49] The Guidelines, in conformity with the SRA, reiterate this provision but also provide further guidance to sentencing courts, specifically authorizing, but not requiring, probation in cases where the minimum imprisonment specified in the guideline range is in Zone A (zero months).[50] In cases where the minimum imprisonment specified in the guideline range is in Zone B (between one month and six months), the Guidelines authorize probation if the court imposes conditions of community confinement, home detention, or intermittent confinement.[51] In cases where the minimum term of imprisonment is in Zone C or D (eight months or more), probation is not authorized under the Guidelines.[52]

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another statute requires otherwise; or the court finds that the information enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record." *Id.* Interestingly enough, a defendant cannot waive a presentence report. *See* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 6A.1.1(b); *see also* MOORE'S FEDERAL PRACTICE § 632.02 *Presentence Investigation and Report* (2007) (providing a synopsis of the presentence investigation and report).

[47] FED. R. CRIM. P. 32 (e); 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 6A1.2(a).

[48] *Id.*; *see* ROGER HAINES ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 1679–80 (2008) (citing United States v. Humphrey, 154 F.3d 668 (7th Cir. 1998); United States v. West, 15 F.3d 119 (8th Cir. 1994); United States v. Baldrich, 471 F.3d 1110 (9th Cir. 2006)).

[49] 18 U.S.C. § 3561 (a), *in accord with* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 5 B1.1(b).

[50] *See* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 5B1.1(a) cmt. n.1.

[51] *Id.*

[52] *See id.* § 5B1.1(a) cmt. n.2.

Up until 12 January 2005, the application of the Guidelines was mandatory.[53] However, in *United States v. Booker*[54] the Supreme Court held that "the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing,"[55] and that the Guidelines violated the Sixth Amendment because the Guidelines required judges to increase a defendant's maximum sentence based on facts not proven to a jury beyond a reasonable doubt.[56] The Court then concluded that the best remedy was to simply excise section 3553(b) (1) of the SRA, the provision that makes the Guidelines mandatory, instead of invalidating the entire SRA.[57] With this excision, the Guidelines become advisory instead of mandatory.[58] The Court also held that appellate courts would review sentences for "unreasonableness."[59] On December 10, 2007, the Supreme Court applied its holding in *Booker* to *Gall v. United States*,[60] a

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[53] *See* 18 U.S.C. § 3553(b).

[54] 543 U.S. 220 (2005). In *Booker*, the jury found that Booker possessed 92.5 grams of crack cocaine with the intent to distribute. *Id*. at 227. Based on these facts and Booker's criminal history, Booker's guideline range was between 210 months and 262 months imprisonment. *Id*. In a post-trial sentencing proceeding, the judge found by a preponderance of the evidence that Booker possessed 566 grams of crack cocaine. *Id*. As such, the Guidelines mandated that judge the sentence Booker between 360 months imprisonment and life imprisonment. The Supreme Court granted review to determine

> Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a conviction) that was not found by the jury or admitted by the defendant.

Id. at 230. The Court relied on its holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), wherein it held that "the statutory maximum for *Apprendi* purposes is the maximum sentence that a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Booker*, 543 U.S. at 232. Hence, the Court ruled that the Guidelines had to be advisory to satisfy the Sixth Amendment. *Id*. at 264.

[55] *Booker*, 543 U.S. at 245.

[56] *See id*. at 228.

[57] *Id*. at 264.

[58] *Id*.

[59] *Id*. at 261 (excising § 3742 (e) to create a reasonableness standard for appellate review). Note also that in *Rita v. United States*, 127 S. Ct. 2456 (2007), the Court held that appellate courts could, but were not required to, apply a presumption of reasonableness when sentence was within the Guidelines but that such a presumption was not binding. 127 S. Ct. at 2463. The Court also held that a "reasonableness" standard equated to an abuse of discretion standard. *Id*. at 2465.

[60] 128 S. Ct. 586 (2007). As a college student, Gall and his friend agreed to distribute ecstasy. *Id*. at 592. Two months later he withdrew from the conspiracy. *Id.* He graduated from college, got a job, and never used drugs again. *Id.* Three years after his

case involving a sentence to probation.[61] The Supreme Court upheld the trial court's sentence of thirty-six months probation despite the Guidelines' advisory range of thirty months imprisonment for his offense.[62]

So what is the practical implication of *Booker* on federal probation?[63] Essentially, federal courts are back to where they started—using their discretion, as they did before the SRA, in deciding to sentence a defendant to probation.[64] Federal judges now have almost unfettered discretion[65] in sentencing a defendant to probation. But two years after

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distribution, Gall was indicted for conspiracy to distribute controlled substances. *Id.* He pled guilty to conspiracy. *Id.* The district judge sentenced Gall to thirty-six months probation. *Id.* at 593. The court of appeals reversed the district judge's sentence stating that probation in Gall's case was a "100% downward departure" and that probation was "extraordinary" in light of the thirty months imprisonment advised by the Guidelines. *Id*. at 594 (quoting *Gall*, 446 F.3d 884, 889 (2006)). The Supreme Court rejected the Government's argument that there needed to be "extraordinary circumstances" to vary from the advisory Guidelines. *Id*. at 595. The Supreme Court applied an abuse of discretion standard and reversed the Court of Appeal's decision. *Id*. at 597, 602; *see also* Nicholas Rudman, Casenote: *A "Galling" Approach to Reasonableness Review: The Eight Circuit's Sentencing Review in* United States v. Gall *Exemplifies the Agony (and Ecstasy) Facing the Post*-Booker *Federal Judiciary*, 40 CREIGHTON L. REV. 353 (2007) (highlighting the complexities brought about in sentencing by *Booker*).

[61] *Gall*, 128 S. Ct. at 593.

[62] *Id*. at 602.

[63] 18 U.S.C.S. section 3551(b)(1) Note has not been amended to reflect the Supreme Court's decision in *Booker*. *See* 18 U.S.C.S. § 3551(b)(1). In 2006, Chairman of the House Judiciary Committee F. James Sensenbrenner stated that "[u]nrestrained judicial discretion [referring to the Court's holding in Booker] has undermined the very purposes of the Sentencing Reform Act." *Sentencing Experts Navigate a Post*-Booker *World*, CHI. LAW. (June 2006), at 20032. He further stated that the Judiciary Committee "intends to pursue legislative solutions to restore America's confidence in a fair and equal federal criminal justice system." *Id*. Nevertheless, federal courts are applying the Supreme Court's holding. *See* United States v. Crobsy, 397 F.3d 103 (2d. Cir. 2005) (applying *Booker* but noting that the Guidelines, while not mandatory, have not been discarded); United States v. Boone, 2005 U.S. App. LEXIS 16868 (11th Cir. 2005) (finding that appellant's Sixth Amendment rights had been violated but that the error was harmless beyond a reasonable doubt).

[64] *See* Erica Hashimoto, Symposium*: Sentencing Guidelines Law and Practice in a Post-*Booker *World: Reactions to* Booker*: The Under-Appreciated Value of Advisory Guidelines*, 37 MCGEORGE L. REV. 577, 582 (2006) (stating, "In light of the Court's conclusion that the current guidelines scheme is unconstitutional if mandatory, Congress is back to where it was in 1984 . . . .").

[65] Probation is granted by statute and is not a constitutional right. *See* Burns v. United States, 287 U.S. 216, 220 (1932) (stating that probation is "conferred as a privilege and cannot be demanded as a right."); *see also* COHEN, *supra* note 28, at 2–3 ("It is widely held that there is no constitutional right to probation."). Hence, Congress can effectively

Booker, reality tells a different story. Most judges, unlike the judge in *Gall*, are still adhering to the Guidelines.[66] Nevertheless, the important point for judges is that they need not feel reluctant to adjudge probation because *Booker* has given them their power back. For practitioners, particularly defense counsel, the important point is that *Booker* again opens the possibility of probation that the Guidelines had previously foreclosed; and counsel should craft their arguments accordingly.[67]

3. Setting and Enforcing the Conditions

If the judge decides to grant probation, the next step is determining what conditions to impose. The SRA provides a list of mandatory conditions that a sentencing judge must impose once he has determined that probation is appropriate. At a minimum, a defendant must be instructed that he must (1) commit no other crimes; (2) possess no controlled substances; (3) attend rehabilitation, in the case of domestic violence crimes; (4) submit to drug testing unless determined to be a low risk for substance abuse; (5) make restitution and pay an assessment when required by statute; (6) notify the court of any change in financial conditions; (7) comply with the Sex Offender Registration and

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preclude a class of offenses or offenders from being eligible for consideration of probation. *Booker* did not invalidate the SRA. It only excised the aforementioned sections. Consequently, it appears to this author that judges are still precluded by the SRA, and not the Guidelines, from granting probation to those listed under the SRA at 18 U.S.C. § 3561(a): (1) those individuals convicted of a Class A felony (maximum sentence is life imprisonment) or a Class B felony (maximum sentence is twenty-five years or more), see 18 U.S.C. § 3559; (2) those cases where the offense listed in the Federal Criminal Code precludes consideration of probation; and (3) those cases where "the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense." *Id.* Therefore, though judges have broad discretion under *Booker*, their discretion is not totally unfettered.

[66] *See* United States Sentencing Commission, Overview of the United States Sentencing Commission, *available at* http://www.ussc.gov/general/USSC_Overview_Dec07.pdf (last visited Dec. 3, 2008). According to these statistics, judges' sentences both pre-*Booker* and post-*Booker* have been consistent. *See also Sentencing Experts Navigate a Post-*Booker *World*, *supra* note 63. According to U.S. District Judge Paul Cassell of Utah, "Since the Supreme Court's decision in United States v. Booker, the most notable fact about the federal system is how little things have changed." *Id*.

[67] *See* Alan Ellis, *Federal Sentencing*, 21 CRIM. JUST. 36 (2007). Allan Ellis, a nationally recognized authority in sentencing, conducted an interview with Tess Lopez, a mitigation specialist with a national practice. *Id.* Lopez was a probation officer for thirteen years. *Id*. In that interview, Lopez noted that "[u]nfortunately, the data indicate that federal sentences are not lower post-*Booker*. Once again, it is up to the defense bar to bring about change through creative advocacy." *Id.*

Notification Act and/or the DNA Analysis Backlog Elimination Act of 2000, if required; and (8) pay any court-ordered fines.[68]

Again, similar to the provisions of the Federal Probation Act of 1925, the SRA grants sentencing judges great discretion in fashioning probation conditions; a court may "impose such other condition[s]"[69] as appropriate. However, additional conditions must meet two requirements under the SRA. First, the condition must reasonably relate to the specified factors delineated under section 3553(a)(1) and (a)(2).[70] Second, the condition can involve "only such deprivations of liberty or property as are reasonably necessary" to carry out the purposes of sentencing set forth in section 3553 (a)(2).[71] In February 2007, the Court of Appeals for the Fourth Circuit examined the constitutionality of a discretionary probation condition in *United States v. Midgette*.[72] The court held that "a warrantless search by police conducted pursuant to the conditions of his probation and supported by reasonable suspicion satisfied the Fourth Amendment."[73] Despite public ridicule, other appellate courts have upheld probation conditions that allow warrantless

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[68] 18 U.S.C.S. § 3563(a) (LexisNexis 2008); 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 5B1.3. Under § 3563 (a)(2) a judge is also required to impose at least one of three conditions in felony cases unless extraordinary circumstances exist. Those conditions are to pay restitution to a victim, to give notice to a victim if required by statute, or to restrict a defendant from a specified area. *Id*.

[69] 18 U.S.C.S. § 3563(b)(22).

[70] THOMAS HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 1439 (2008) (distilling 18 U.S.C. § 3563(b) into a two-part test).

[71] *Id*. The SRA also provides a list of twenty-three discretionary conditions. The list is rather exhaustive but includes conditions such as supporting dependents, working a suitable job, refraining from a particular job, refraining from drinking alcohol, remaining home during non-working hours, reporting to probation officer as directed, answering inquiries by probation officer, and satisfying any other conditions that the court may impose, etc. *Id*. Note also that the Guidelines provide a list of fourteen recommended "standard" conditions. *See* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 5B1.3(c).

[72] 478 F.3d 616 (4th Cir. 2007). Midgette pled guilty to resisting a public officer and was sentenced to thirty-six months probation. *Id*. at 619. As part of the terms of his probation, Midgette had to submit to warrantless searches by his probation officer. *Id*. In addition to other conditions, Midgette was also ordered to refrain from possessing a firearm. *Id*. During one of his probation visits, the probation officer directed a police officer to search Midgette's vehicle. *Id.* The officer found ammunition in Midgette's vehicle. *Id*. The officer then recommended to the probation officer that they search Midgette's home. *Id*. Upon searching Midgette's home, the officer found multiple firearms and marijuana. *Id.* at 620. Midgette filed a motion to suppress the evidence claiming that the search violated his Fourth Amendment rights. *Id*.

[73] *Id.* (quoting United States v. Knight, 534 U.S. 112, 122 (2001)).

searches,[74] that limit a probationer's right to procreate,[75] that require a probationer to submit to computer monitoring,[76] and that require a probationer to submit to DNA collection.[77] Once the judge sentences a defendant to probation and delineates his conditions, probation begins immediately.[78]

Who supervises the probationer and enforces these conditions? Like the Federal Probation Act of 1925, the SRA places the sole responsibility for the supervision and enforcement of probation conditions on the probation officer.[79] However, since 1925, the probation officer's primary duties have shifted. In the formative years of probation, "It was envisaged that a probation officer would supervise the daily life of an offender but would also befriend him and give him good counsel."[80] While it is still true that probation seeks to steer probationers down the right path and to "normalize"[81] them, normalizing practices (i.e., probation conditions) have to be enforced to be the most effective.[82] Consequently, the probation officer, once "a friend," should probably more aptly be referred to today as "the enforcer."[83] A probation officer's

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[74] *See* David Reindl, *Bargain or Unconstitutional Contract? How Enforcement of Probation Orders as Contract Could Take the Reasonableness out of Probation Searches*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 123 (2007). *See generally* Matthew Roberson, *Don't Bother Knockin' . . . Come on In!: The Constitutionality of Warrantless Searches as a Condition of Probation*, 25 CAMPBELL L. REV. 181 (2003) (citing several cases where warrantless searches of probationers as a probation condition was upheld)..

[75] *See* Devon A. Corneal, *Limiting the Right to Procreate:* State v. Oakley *and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447 (2003).

[76] *See* United States v. Lifshitz, 369 F.3d 173 (2d Cir. 2004).

[77] *Id*. at 187 (citing to Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992)).

[78] 18 U.S.C.S. § 3564 (LexisNexis 2008). Note also that the maximum authorized terms of probation are between one and five years in felony cases, not more than five years in misdemeanor cases, and not more than one year for infractions. *Id.* § 3561.

[79] *Id.* § 3601.

[80] CYNDI BANKS, PUNISHMENT IN AMERICA 68 (2005).

[81] *Id*. at 67 (quoting DAVID GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES 238 (1985), that "Probation and community supervision has been described as 'normalizing practices,' that is, their aim was the inculcation of definite norms and practices, and in this sense they sought (and continue to seek) to refashion an offender into a good citizen.").

[82] *See* KLEIN, *supra* note 20, at 355 (stating that "[v]igorous enforcement of alternative sentences can lessen recidivism.").

[83] *See* PETERSILIA, *supra* note 5, at 30.

duties are many,[84] and his powers are broad.[85] One of the most important, and probably less desirable, duties is to inform the court when a probationer fails to comply with the terms of probation.[86]

4. Probation Revocation

One thing that the Federal Probation Act of 1925 failed to provide that the SRA does provide is a procedure for revocation hearings.[87] Under the Federal Probation Act of 1925, probation was "considered an act of grace that could be given and taken away with equal ease . . . ."[88] In the 1940s, commentators began clamoring for a "re-examination of the revocation process."[89] The Supreme Court first began by re-examining the parole revocation process. In *Morrissey v. Brewer*,[90] the Supreme Court held that a parolee is entitled to notice of his alleged parole violation, disclosure of the evidence against him, opportunity to be heard and to present evidence in his favor, a limited right to cross-examine witnesses, a hearing by a "neutral and detached" body, and a written decision.[91] The Court also ruled that the hearing should be held within a reasonable time and should be flexible enough to consider

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[84] *See* 18 U.S.C.S. § 3603 (delineating the ten duties of a federal probation officer which include supervising the probationer, keeping informed of his compliance of probation conditions, and keeping a record of his work with the probationer, etc.)

[85] Under § 3603(3), a probation officer may "use all suitable methods, not inconsistent with the conditions specified by the court to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition." Title 18 U.S.C. § 3604 specifically grants a probation officer the authority to arrest a probationer with or without a warrant.

[86] § 3603(8)(B); *see also* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 7B1.2.

[87] *See* § 3565.

[88] KLEIN, *supra* note 20, at 319.

[89] COHEN, *supra* note 28, at 18-8.

[90] 408 U.S. 471 (1972). Morrissey was convicted of drawing or uttering false checks and was placed on parole after serving some amount of confinement. *Id*. at 472. His parole was revoked seven months after his release from confinement primarily on the basis that he had purchased a vehicle under false pretenses. *Id*. His parole was revoked without a hearing, and Morrissey subsequently filed a habeas corpus petition. *Id.* at 474.

[91] *Id*. at 489. The Court began with the proposition that "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Id.* at 480. The Court further stated that "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on the observance of special parole restrictions." *Id*.

evidence ordinarily not admissible during a criminal trial.[92] The following year, the Supreme Court in *Gagnon v. Scarpelli*[93] extended those same rights to probationers.[94] As a result, once a court has been notified that a probationer has violated the conditions of probation, the court must conduct a probation revocation hearing.[95]

The SRA embodies the Supreme Court's decisions in *Morrissey* and *Scarpelli* and requires a hearing before probation can be revoked.[96] If the judge is "reasonably satisfied"[97] that the probationer has violated the conditions of his probation, then he must consider the goals of sentencing and the factors set forth under section 3553(a)[98] and determine whether to continue his probation, with or without modification of his terms or conditions or to revoke his probation and resentence him.[99] While there are limited instances where probation *must* be revoked,[100] the SRA leaves

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[92] *Id*. at 488.

[93] 411 U.S. 778 (1973). Scarpelli was convicted of armed robbery and placed on probation for seven years. *Id*. at 779. Scarpelli was caught in the actual commission of a burglary. *Id*. at 780. His probation was revoked without a hearing. *Id*. Three years after the revocation, he submitted a writ of habeas corpus to the district court. *Id*. The district court held that Scarpelli was denied due process, and the court of appeals affirmed. *Id*.

[94] *Id*. at 782. *Scarpelli* went a step further than *Morrissey* in that it extended the right to counsel on a case-by-case basis when required for fundamental fairness. *Id*. at 790.

[95] *Id*. at 782; *see also* KLEIN, *supra* note 20, at 319.

[96] 18 U.S.C.S. § 3565; *see also* FED. R. CRIM. P. 32.

> Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question, any adverse witness unless the court determines that the interest of justice does not require the witness to appear; (D) notice of the person's right to counsel or to request that counsel be appointed if the person cannot obtain counsel; and opportunity to make a statement and present any information in mitigation.

Id.

[97] The SRA does not provide an evidentiary standard in determining if a violation has been committed. *See* § 3565(a) ("If the defendant violates . . . ."). Most, if not all, jurisdictions apply a "reasonably satisfied" standard. *See* MOORE'S FEDERAL PRACTICE, *Revocation Hearing* § 632.1.05 (2007).

[98] *See supra* note 39.

[99] 18 U.S.C. § 3565(a).

[100] *Id*. § 3565(b). Probation revocation is mandatory if the defendant

> (1) possesses a controlled substance in violation of the condition set forth in section 3563(a)(3) . . . (2) possesses a firearm . . . in

the matter of revocation largely in the judge's discretion, stating that he *may* revoke probation after the probationer has been afforded a revocation hearing.[101] According to Department of Justice statistics, each year a number of probationers fail to successfully complete their probationary period.[102] Some judges are opting to revoke their probation and incarcerate them,[103] causing critics to ask, "Does probation work?"[104]

C. Criticism of the U.S. Probation System

In assessing the pragmatism of the probation system, studies often look at the rate of recidivism among probationers.[105] Some studies have concluded that probation is successful, while others have concluded that probation is unsuccessful.[106] No study has reported a one hundred

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> violation of Federal law, or otherwise violates a condition of probation prohibiting the defendant from possessing a firearm . . . (3) refuses to comply with drug testing, thereby violating the condition imposed by section 3563(a)(4) . . . or (4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year . . . .

Id.; *see also* MOORE'S FEDERAL PRACTICE, *supra* note 97, § 632.1.105 (2007). For these reasons stated in note 65 *supra*, this provision raises no *Booker* implications.

[101] 18 U.S.C. § 3565(a). While the Guidelines address probation revocation under Guideline § 7B1.3, it addresses probation revocation as a policy statement when even the Commission, at the time that it drafted the Guideline, intended that Guideline to be advisory only. *See* HAINES ET AL., *supra* note 48, at 1783 (stating that "[t]hese policy statements will provide guidance . . ."). Hence, *Booker* at this time has no implication on probation revocation proceedings. *But see* PARSONS, *supra* note 43 (stating that "[a]lthough the entire Chapter 7 is promulgated as policy statements and therefore only advisory, given the roller coaster ride of *Booker*, it would be prudent for attorneys to state for the record any objection to the application of probation or supervised release in the event the law changes if there is an application of a provision that requires mandatory revocation"). Note also that either the government or defendant may appeal a sentence to probation (including the conditions of the probation sentence) or the revocation of a sentence to probation under § 3742.

[102] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 5. According to these statistics, "[n]early 1 in 5 probationers who exited from supervision in 2006 were incarcerated." *Id*.

[103] *Id.*

[104] *See* PETERSILIA, *supra* note 5, at 55.

[105] *Id*.

[106] *See id.* (contrasting the studies of the Manhattan Institute's Center for Civic Innovation, which found probation to be unsuccessful, with those of a study conducted by Clear and Braga, which found that "up to 80 percent of all probationers complete their terms without arrest.").

percent recidivism rate.[107] The Bureau of Justice statistics indicate that probation is at least moderately successful.[108] Statistics are subject to debate and criticism, but the bottom line is, no jurisdiction has abolished probation.[109] The inference is that a significant number of probationers are being rehabilitated.

Even casting aside the argument that some individuals are indeed being rehabilitated, probation has merit if for no other reason than the simple economic principle of supply versus demand. Our prisons are full to capacity,[110] and each year the United States spends billions of dollars housing these prisoners.[111] We have neither the capacity nor the funding to provide for probationers if probation were abolished. American society recognizes the benefit of a probation system—granting individuals the opportunity to rehabilitate while addressing the need of supply versus demand. Perhaps the military justice system should recognize the benefits of a formal probation system as well.

III. The Military Justice System

In 1950, Congress approved the Uniform Code of Military Justice (UCMJ),[112] "the sole statutory authority embodying both the substantive

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[107] *See id.*

[108] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 5. According to these statistics, only "nine percent [of the probationers who exited supervision] were incarcerated due to a rule violation and [only] four percent were incarcerated because of new offense." *Id*. Almost sixty percent either completed their probationary period or were released early. *Id*.

[109] *Id.*; *see* COHEN, *supra* note 28, at 1-37.

[110] *See* Drug War Facts: Prisons, Jails, and Probation—Overview, http://www.drugwarfacts.org/prison.htm (last visited Dec. 3, 2008) (citing Bureau of Justice statistics that "[a]t yearend 2006, 23 States and the Federal system operated at more than 100% of their highest capacity. Seventeen States operated between 90% and 99% of their highest capacity. The Federal prison system was operating at 37% above its rated capacity at yearend 2006.").

[111] *Id*.

> The average daily cost per state prison inmate per day in the US is $67.55. State prisons held 249,400 inmates for drug offenses in 2006. That means it cost states approximately $16,846,970 per day to imprison drug offenders, or $6,149,144,050 per year.

Id. (quoting the American Corrections Association).

[112] DAVID SCHLUETER, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE 33 (1999). Congress enacted the UCMJ pursuant to its power "to raise and support Armies," "to provide and maintain a Navy," "to provide for calling forth the Militia to execute the

and procedural law governing military justice and its administration."[113] Like the SRA, and as its name implies, the UCMJ was enacted by Congress to create uniformity among the services in courts-martial procedure.[114] The UCMJ applies to the entire armed forces[115] and mandates certain procedural protections for servicemembers.[116] Under Article 36 of the UCMJ, Congress has authorized the President to prescribe "pretrial, trial, and post-trial procedures, including modes of

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Laws of the Union" and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . . ." U.S. CONST. art I, § 8, cl. 12, 13, 14, 18; *see also* Honorable Walter Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 3 (1987). Judge Cox originally delivered this article on the development of the military justice system as a speech during the celebration of the Bicentennial of the Constitution.

[113] INDEX AND LEGISLATIVE: HISTORY UNIFORM CODE OF MILITARY JUSTICE 1950–2000, at 599 (William S. Hein & Co. 2000).

[114] *Id.* at 600.

> There will be the same law and the same procedure governing all personnel in the armed services. . . . In the same way that all persons in this country are subject to the same Federal laws and triable by the same procedure in all Federal courts, so it will be in the armed forces.

Id. War World II left many Americans disgruntled with the military justice system. *See* John Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 1, 2. It is estimated that over sixteen million men and women served during World War II. *Id.* (citing John Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 MIL. L. REV. 39 (1972)). But it is also estimated that there were over two million courts-martial. *Id*. To many that served, "[t]he system appeared harsh, arbitrary, with too few protections for the individual and too much power for the commander." *Id.*

[115] Article 2, UCMJ provides:

> The following persons are subject to this chapter: Members of a regular component of the armed forces . . . . Cadets, aviation cadets, and midshipmen. Members of a reserve component while on active-duty training, but in the case of members of the Army National Guard of the United States of the Air National Guard of the United States only when in Federal service. Retired members of a regular component of the armed forces who are entitled to pay. . . . Persons in custody of the armed forces serving a sentence imposed by a court-martial. . . . Prisoners of war in custody of the armed forces. In time of war, persons serving with or accompanying an armed force in the field . . . .

UCMJ art. 2 (2008).

[116] SCHLUETER, *supra* note 112, at 7. For example, Article 31 provides that no servicemember may be questioned without informing him of his alleged violation and of his right to remain silent when he is suspected of an offense. UCMJ art. 31.

proof" for courts-martial.[117] Based on his delegated powers, the President has promulgated the Manual for Courts-Martial (MCM) mandating "specific Rules for Courts-Martial (RCM), maximum punishments, and rules for imposition of nonjudicial punishment"[118] which limit the punishments that may be adjudged on rehearings, new trials, and other trials.[119]

According to RCM 1003 (b), the only authorized punishments that a court-martial may adjudge are a reprimand,[120] forfeiture of pay and allowances,[121] a fine,[122] reduction in grade,[123] restriction to specified

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[117] UCMJ art. 36; *see* SCHLUETER, *supra* note 112, at 7.
[118] SCHLUETER, *supra* note 112, at 7.
[119] *Id.* at 713 (referencing MCM, *supra* note 2, R.C.M. 810(d)(1)).
[120] "A reprimand adjudged by a court-martial is a punitive censure." MCM, *supra* note 2, R.C.M. 1003(b)(1) discussion.
[121] "A forfeiture deprives the accused of the amount of pay (and allowances) specified as it accrues." Allowances are only subject to forfeiture when the sentence includes forfeiture of all pay and allowances. *Id.* R.C.M. 1003(b)(2). "Forfeitures accrue to the United States." *Id.* R.C.M. 1003(b)(2) discussion. Generally speaking, both adjudged and automatic forfeitures begin fourteen days after an adjudged sentence or when the convening authority approves the sentence, whichever is earlier. UCMJ art. 57. Note that automatic forfeitures are not part of an authorized punishment but occur by operation of law under Article 58b. MCM, *supra* note 2, R.C.M. 1003(b)(2) discussion. If a general court-martial adjudges both confinement and a punitive discharge or adjudges only confinement but the confinement is greater than six months, total forfeitures automatically result under Article 58b during confinement. *Id.* There are no automatic forfeitures under Article 58b if only a punitive discharge is adjudged. *Id.* If a special court-martial adjudges both confinement and a punitive discharge or adjudges only confinement but the confinement is greater than six months, automatic forfeitures of two-thirds pay only result during confinement. *Id*. Similar to a general court-martial, there are no automatic forfeitures under Article 58b if only a punitive discharge is adjudged at a special court-martial. *Id*. Note also that even without automatic forfeitures, an accused may still be subject to adjudged forfeitures. *Id.* Under Articles 57 and 58b (b), UCMJ, an accused may request a deferment of automatic and adjudged forfeitures as well as a waiver of automatic forfeitures for a period of six months. UCMJ art. 57 (a)(2).
[122] "A fine is in the nature of a judgment, and when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence." MCM, *supra* note 2, R.C.M. 1003(b)(3) discussion. A fine is different from restitution because the money inures to the benefit of the United States. *Id*. Restitution is not an authorized punishment but may be the subject of a pretrial agreement. *See* David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as An Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 NAVAL L. REV. 1, 4 (2005). A court-martial should adjudge a fine only when an accused has been unjustly enriched. MCM, *supra* note 2, R.C.M. 1003(b)(3) discussion.
[123] "Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade." MCM, *supra* note 2,

limits,[124] hard labor without confinement,[125] confinement, punitive separation,[126] and death.[127] Most of the court-martial sentences authorize punishment "as a court-martial may direct,"[128] affording the military judge or panel great discretion in rendering its sentence.

R.C.M. 1003(b)(4). Note that similar to forfeitures, a reduction to the lowest enlisted grade may result by operation of law. According to Army regulation,

> Reduction to the lowest enlisted pay grade will be automatic only in a case in which the approved sentence includes, whether or not suspended, either—[a] dishonorable or bad-conduct discharge, or *confinement in excess of 180 days (if the sentence is awarded in days) or in excess of 6 months (if the sentence is awarded in months.)*

U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-29(e) (16 Nov. 2005) [hereinafter AR 27-10] (emphasis added.). Generally speaking, reduction in pay grade begins fourteen days after an adjudged sentence or when the convening authority approves the sentence, whichever is earlier. UCMJ art. 57 (a)(2).

[124] A court-martial may sentence the accused to restriction to specified limits "for no more than 2 months for each month of authorized confinement and in no case for more than 2 months." MCM, *supra* note 2, R.C.M. 1003(b)(5). An accused may still be required to perform his military duties even when restricted to specified limits. *Id*. R.C.M. 1003(b)(5) discussion. A court-martial may not specify the details of the performance of hard labor. *Id.* R.C.M. 1003(b)(6). The immediate commander typically prescribes the conditions of the hard labor without confinement. *Id*.

[125] A court-martial may adjudge confinement subject to the jurisdictional limits of the court and that authorized for a particular offense under the *MCM*. SCHLUETER, *supra* note 112, at 712 (stating that "[t]he maximum permissible punishment will generally be the lowest of the jurisdictional limits of the court-martial hearing the case, the nature of the proceeding, or the maximum punishments authorized in the Manual for Courts-Martial for the offense.").

[126] A court-martial may adjudge one of three types of punitive separation depending on the jurisdiction of the court and the status of the accused. Only a general court-martial may sentence a commissioned officer, a commissioned warrant officer, a cadet, or a midshipman to a dismissal. MCM, *supra* note 2, R.C.M. 1003(b)(8)(A). Only a general court-martial may sentence either an enlisted person or a warrant officer who is not commissioned to a dishonorable discharge. *Id.* R.C.M. 1003(b)(8)(B). Either a special court-martial or general court-martial may sentence an enlisted member to a bad-conduct discharge. *Id.* R.C.M. 1003(b)(8)(C) (stating "[a] bad-conduct discharge is less severe than a dishonorable discharge and is designed as punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and who punitive separation appears to be necessary.").

[127] A general court-martial may adjudge death only when specifically authorized under part IV of the *MCM* or when authorized under the law of war. *Id.* R.C.M. 1003(b)(9), 1004(a)(1) .

[128] *See* Parker v. Levy, 417 U.S. 733, 750 (1974).

The Preamble to the MCM states that "the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[129] The Court of Appeals of the District of Columbia aptly stated, "The provision of the Uniform Code of Military Justice with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of justice, on the one hand, with the demands for an efficient, well-disciplined military on the other."[130] It is the competing interests of promoting justice while ensuring a well-disciplined military that makes sentencing in courts-martial difficult.

The only guidance given to military judges and panels in balancing these competing interests is found in the Military Judge's Benchbook instruction:

> In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.[131]

According to United States Army Trial Judge (Colonel) James L. Pohl,[132] "The hardest thing that judges do is sentencing because the range is so

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[129] MCM, *supra* note 2, pt. I, para. 3.

[130] SCHLUETER, *supra* note 112, at 3 (quoting Curry v. Sec'y of Army, 595 F.2d 873, 877 (D.C. Cir. 1979)).

[131] U.S. DEP'T OF THE ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 2-5-21 (1 July 2003); *see also* Captain Denise Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 n.5 (1986).

[132] Telephone Interview with Colonel James L. Pohl, U.S. Army, Trial Judge (Jan. 8, 2008) [hereinafter Pohl Telephone Interview]. Judge Pohl has been in the U.S. Army for

large. We have to balance the individual's needs with the needs and interests of the command and then arrive at a number."[133] Panels seem to struggle particularly hard with deciding whether to sentence an accused to a punitive discharge.[134]

Despite the agony that a panel or military judge may endure in determining an appropriate sentence for an accused, a court-martial's sentence is simply a "recommendation" to the convening authority[135] and "is merely the upper limit on the sentence which is ultimately imposed."[136] Article 60, UCMJ allows the convening authority, "in his sole discretion,"[137] to dismiss any charge or any specification of a charge with or without cause or change a finding of guilty to an offense to a finding of guilty to a lesser-included of that offense with or without cause.[138] "The convening authority may for any or no reason disapprove a legal sentence in whole or part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased."[139]

In addition to his power to approve or disapprove or reduce any finding of guilty, the convening authority also has the absolute discretion

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twenty-seven years and has been a military judge for eight years. He is currently the trial judge at Fort Stewart, Georgia. Judge Pohl has tried between 400 and 500 cases, many of them in a deployed environment.

[133] *Id.*

[134] *Id.*

[135] Bridging the Gap Session with Lieutenant Colonel (Retired) Donna Wilkins, Bamberg, Germany (2001). A "bridging the gap session" is a term used for a mentoring session that a military judge holds with counsel after a case has concluded. The military judge makes recommendations to counsel to help them improve in future trials without revealing his or her specific deliberative process.

[136] Vowell, *supra* note 131, at 105.

[137] UCMJ art. 60(b)(3) (2008).

> [The convening authority] in his sole discretion may dismiss any charge or specification by setting aside a finding of guilty thereto; or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

Id.

[138] *Id.*

[139] Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 172 (2000) (referencing MCM, *supra* note 2, R.C.M. 1107(c), R.C.M. 1007(d)(1)).

to suspend any part or all of adjudged punishment except death.[140] "Suspension grants the accused a *probationary period*." [141] Should an accused successfully complete his probationary period, his punishment is remitted.[142] Neither a court-martial nor military appellate courts have the power to suspend punishment.[143]

The convening authority must specify his conditions in writing and a copy must be served upon the accused.[144] At a minimum, the convening authority should specify that the accused will not engage in any criminal activity under the UCMJ. [145] Any condition imposed cannot be unreasonably long.[146] When the period of suspension expires, the suspended portion of any sentence must be remitted unless earlier vacated.[147] The UCMJ affords an accused the right to a revocation proceeding before the convening authority may vacate his suspension.[148]

IV. The Pros and Cons of a Probation System in the Military

The military could benefit from a probation system. First, similar to the civilian system, a formal probation system in the military could help with supply versus demand. According to the Government Accountability Office's testimony before the Subcommittee on Tactical Air and Land Forces on 4 April 2006:

> The Army has made some progress meeting modular personnel requirements in the active component by shifting positions from its noncombat force to its operational combat force but faces significant challenges reducing its overall end strength while increasing the size of its modular combat force. . . . [T]he Army plans to increase the number of Soldiers in its combat force

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[140] MCM, *supra* note 2, R.C.M. 1108(c).
[141] *Id.* R.C.M. 1108(a) (emphasis added). Note that as used in this article, the term "probation" entails supervision, and is therefore used in a different manner than the term "probationary period" in the Rules for Courts-Martial. *See* 21A AM JUR. 2D *Criminal Law* § 904 (2007).
[142] MCM, *supra* note 2, R.C.M. 1108(a).
[143] *See* UCMJ art. 72(a); *see also* SCHLUETER, *supra* note 112, at 817.
[144] MCM, *supra* note 2, R.C.M. 1108(c)(1).
[145] *Id.* R.C.M. 1108(c)(3).
[146] *Id.* R.C.M. 1108(d).
[147] *Id.* R.C.M. 1108(e).
[148] *Id.* R.C.M. 1109.

> from approximately 315,000 to 355,000 in order to meet the increased personnel requirements of its new larger modular force structure.[149]

Senator Chuck Hagel, a Republican from Nebraska, accurately stated what most of America realizes: "the war in Iraq has stretched U.S. forces to the breaking point." [150] In December 2006, Senator Hagel sat on a board with Senator Ben Nelson, a Democrat from Nebraska and also a member of the Senate Armed Services committee, and Senator Jack Reed, a Democrat from Rhode Island, which proposed legislation increasing the size of the Army by 30,000 Soldiers and the Marine Corps by 5000 Marines. [151] When asked about the increase, Senator Nelson stated that "I don't *think* we're anywhere near looking at a draft situation." [152] He also stated that "the military could remain an all-volunteer force *if* recruitment and retention goals are met."[153]

"*If* recruitment and retention goals are met"[154] fails to assure Americans that the United States will not revert to a draft. One of the lessons learned from Vietnam was that "an unpopular war waged by draftees will come to a bitter, messy end quickly."[155] Even the most adamant supporters of the war in Iraq would likely withdraw their

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[149] *Force Structure Capabilities and Cost of Army Modular Force Remain Uncertain: Gov't Accountability Office Testimony Before the Subcomm. on Tactical Air and Land Forces of the H. Comm. on the Armed Services* (2006) (statement of Janet St. Laurent, Director, Defense Capabilities and Management). According to the testimony, the Army has personnel challenges in manning its new force structure. *Id*. To meet the challenges, the Army planned to convert several positions ordinarily held by servicemembers to positions filled by civilians. *Id*. However, there was uncertainty that the initiative would work.

> If the Army is unable to transfer enough active personnel to its combat forces while simultaneously reducing its overall end strength, it will be faced with a difficult choice. The Army could accept the increased risk to its operational units or nonoperational units that provide critical support, such as training. Alternatively, the Army could ask DOD to seek an end strength increase and identify funds to pay for additional personnel . . . .

Id.

[150] *Senator Blasts $99.7B Supplemental Request*, ASSOC. PRESS, Dec. 21, 2006, *available at* http://www.armytimes.com/legacy/new/1-292925-2437653.php.

[151] *Id.*

[152] *Id.* (emphasis added).

[153] *Id.* (emphasis added).

[154] *Id.*

[155] *Criminal Force*, *supra* note 8.

support if a draft were instituted.[156] Establishing a probation system increases the likelihood that Soldiers can be rehabilitated and retrained, and will help meet retention aims, thereby decreasing the likelihood of a potential draft.[157]

Second, establishing a formal probation system may increase Soldiers' perception of fairness in the military justice system and give them a meaningful opportunity to rehabilitate after a conviction. In describing the interplay between the military justice system and military discipline, General John Galvin, then Commanding General of VII Corps, stated, "Most importantly, morale and discipline are enhanced when the troops understand that they are being treated with dignity, fairness, and equality under the law. For lack of a better description, it is the 'American' way of doing things." [158]

More and more, the "American" way of doing things seems to favor "forgiving" civilians for their convictions and waiving them into military ranks. In 2006, the Army granted 8129 moral waivers—901 for felony convictions. That same year, the Marine Corps granted 20,750 moral waivers, 511 for felony convictions.[159] The Army and Marine Corps are not alone. In 2006, the Navy granted 3502 waivers and the Air Force granted 2095 waivers. [160] Why are Soldiers not granted the same "forgiveness" as recruits? Do Soldiers believe that they are afforded the same opportunity to prove that they have been rehabilitated? At least one convicted Soldier does not believe so. He urges, "[T]he military judge should have the option to establish or adjudge a probationary sentence to a defendant since most court-martials deal with first time offender[s]. The reality that most accuseds do not become repeat offenders should be a consideration for this authorization."[161]

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[156] *Id.* (stating that "[t]he Bush administration knows full well that if it restarts the draft, that will spell the end to its war in Iraq").

[157] A number of Soldiers would potentially be salvaged. In FY 2007, of the 624 Soldiers found guilty at special courts-martial, 366 received a sentence that included a bad-conduct discharge. In FY 2007, of the 779 Soldiers found guilty by general courts-martial, 562 received a sentence that included a punitive discharge. Army Wide Statistics, *supra* note 2. These are only the Army's statistics.

[158] Cox, *supra* note 112, at 29 (citing General John Galvin, then Commanding General of VII Corps.)

[159] Rick Maze, *Rise in Moral Waivers Troubles Lawmaker*, ARMY TIMES, Feb. 20, 2007, *available at* http://www.armytimes.com/news/2007/02/apWaivedRecruits070213/.

[160] *Id.*

[161] REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) [hereinafter COX REPORT], *available at* http://www.nimj.org/

Undoubtedly, there are many others who share this Soldier's viewpoint.[162] Establishing a formal probation system may increase Soldiers' perception of the fairness of the military system.

Third, establishing a formal probation system may also increase the public's perception of the fairness of the military justice system.[163] The converse—public skepticism of the military justice system—began as early as World War II.[164] Though the military justice system has undergone great reform since World War II, organizations such as Citizens Against Military Injustice[165] highlight public sentiment that military justice is still unfair and that "military discipline and justice are inconsistent dimensions . . . ."[166] "Suspicion, distrust, iron-fisted, secretive, out of control, fearful, not to be trusted, arrogant, single minded, tyrannical. . . . These words are being used throughout this country to describe the current conditions and beliefs held by its citizens about the military justice system."[167] Recent articles such as "Is Military Justice Broken?"[168] "Accountability, Transparency, and Public

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documents/Cox_Comm_Report.pdf. The Honorable Walter T. Cox III led a commission to conduct a survey regarding the fairness of the military justice system. This report contains the commission's findings and recommendations.

[162] This is based on the author's time spent as a trial defense attorney, a defense appellate attorney, and branch chief at the U.S. Army Defense Appellate Division.

[163] *See* COX REPORT, *supra* note 161, at 2 (stating that "our military justice cannot be viewed solely from the vantage point of the military; it must also be viewed from the perspective of the people and the politicians.").

[164] Cooke, *supra* note 114; *see also supra* note 112.

[165] Citizens against Military Injustice (CAMI), a non-profit organization, was established in May 2000. Its mission is to

> [p]rovide pertinent information, resources, help and support to all military personnel who have been or about to be charged with a crime under the Military System of Justice and further, to assist inmates, loved ones and family members whose lives have been affected by the justice system of the United States Military.

COX REPORT, *supra* note 161.

[166] SCHLUETER, *supra* note 112, at 3.

[167] COX REPORT, *supra* note 161.

[168] Gary Solis, *Is Military Justice Broken?*, L.A.TIMES, Sept.10,2007, *available at* http://www.latimes.com/news/opinion/la-oe-solis10sep10,0,1253257.story?coll=la-opinion-center. While Solis says that the military system is working, his article does not lend credence to that. He asks questions about the tragedy in Haditha but leaves them unanswered, such as, "Why are court-martial convictions hard to come by? Did they let culpable participants walk? Should the process be allowed to work through to verdict?" *Id*.

Confidence in the Administration of Military Justice,"[169] and "Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice"[170] echo further proof that many citizens are still skeptical of the military justice system. In a letter written to the Cox Commission, the wife of a convicted servicemember wrote:

> My husband was sentenced to serve 12 years at the USDB [United States Disciplinary Barracks located at Fort Leavenworth, Kansas] on January 15th 1998. . . . My complaint is this. That had he been a civilian he would have more than likely only gotten *probation* or maybe 3 years imprisonment. . . . Why is it a person who has served without incident for 18 years of their lives [sic], and has accepted full responsibility for his actions, is sentenced so harshly?[171]

A concerned parent of an accused wrote,

> My son was willing to lay down his life for OUR country, OUR freedom, OUR way of life, and OUR justice system. If my child was willing to die for OUR country, then shouldn't he be entitled to the SAME justice system that he would lay down his life for?[172]

When one considers that probation is available in every civilian federal or state court, that the military criminalizes conduct that would be legal in the civilian system, and that probation is unavailable to servicemembers, the perception that military discipline and justice are inconsistent has some credence. Establishing a formal probation system might increase the public's perception of fairness in the military justice system.

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[169] Eugene Fidell, *Accountability, Transparency, & Public Confidence in the Administration of Military Justice*, 9 GREEN BAG 2D 361, 362 (2006) (stating that "formal military justice process seems to have been employed only to prosecute enlisted personnel")

[170] Lindsy Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice*, 16 DUKE J. COMP. & INT'L 169, 189 (2006) (comparing the role of U.S. military commanders in military justice to the role of Canadian military commanders and Israeli commanders in military justice and concluding that "the perception argument, therefore, is a noteworthy justification for limiting the role of the U.S. military commander in the military justice context").

[171] COX REPORT, *supra* note 161 (emphasis added).

[172] *Id.*

Fourth, establishing a formal probation system might ensure that the Army gets value from its investment. According to Department of Army budget estimates for fiscal years 2008 and 2009, the Army alone spent $3,251,321,000 in accession training, basic skill and advanced training (including specialized skill training and professional development education, etc.), and other related training and education (including recruiting and advertising, off-duty and voluntary education, etc.) .[173] The Department of the Army estimates spending $4,011,752,000 in Fiscal Year (FY) 08 and $4,697,252,000 in FY 09.[174]

According to the Army Human Resources Command, the average cost to train a new Soldier from the recruiting station until he reached his first duty station in FY 07 was $67,100.[175] It cost $1093 to process one Soldier through the military entrance processing station (MEPS) alone.[176] The per-Soldier estimated cost of basic training was $16,000. [177] The average cost of advanced individual training was $28, 000 and one station training cost $31,600.[178]

Despite the pros of having a formal probation system in the military, there are certainly cons. First, commanders may see probation as a limit on their command authority. A sentence to probation as contemplated by this article would be binding on the convening authority and would limit

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[173] U.S. DEP'T OF ARMY, FISCAL YEAR 2008/2009 BUDGET ESTIMATES, OPERATION AND MAINTENANCE, ARMY JUSTIFICATION BOOK (Feb. 2007), *available at* http://www.asafm.army.mil/budget/fybm/fy08-09/oma-v1.pdf.

[174] *Id.*

> [T]his budget requests supports our ability to recruit and train the force, to enhance the Army's relevant and ready Land Force capability, and to provide educational opportunities for Soldiers and civilians . . . . To meet Army accession requirements for the Active, National Guard, and Reserve officers, this budget includes an increase of $113.1 million for FY 2008 . . . to provide scholarships and additional incentives such as completion bonuses and stipends . . . . The Army's assertive Army Strong advertising campaign, along with an increase in the number of Active Duty and contract recruiters, will target the eligible population in the overall Army effort to recruit to a 489.4 thousand base force in FY 2008.

Id. at 5.

[175] Dep't of Army, Army Human Resources Command, *Cost of a New Recruit* (Feb. 22, 2008) (information sheet provided by Colonel Ralph Gay, Army Accessions Research).

[176] *Id.*

[177] *Id.*

[178] *Id.*

the convening authority's discretion in maintaining discipline. Many commanders today believe, just as Honorable John Kenney, the Under Secretary of the Navy stated in 1949, that "[t]o subtract from the commanding officer's powers of discipline through courts-martial can only result in a diminution of his effectiveness as a commander."[179] Former battalion commander Colonel Richard Bezold, recalling a particularly troublesome Soldier, adamantly believes that a probation system would undermine command authority.[180] He believes that other Soldiers will perceive probation as getting over.[181] " [Soldiers] know exactly what is going on in the unit and what folks can get away with and that could have a detrimental impact on unit discipline and morale."[182]

Second, even apart from the restriction on their command authority, commanders may see the commitment to a formal probation system as extra burdensome for an Army already extremely taxed. Command attention and commitment at all levels would be required.[183] Duties such as the day-to-day supervision of the probationer would fall under the purview of the command. According to Judge (Colonel) Patrick J. Parrish, Army Trial Judge at Fort Bragg, North Carolina, "Commanders will likely see a probation system as just adding another bureaucratic level."[184]

Judge Parrish is not alone in this criticism. Former brigade commander Colonel David Clark has "a hundred reasons" why the military should not have a formal probation system.[185] Colonel Clark believes that "our legal system is pretty efficient in comparison to the civilian system. From flash to bang—it's pretty quick. The overhead

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[179] INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, *supra* note 113.

[180] E-mail from Colonel Richard Bezold, U.S. Army, to author (Mar. 2, 2008, 10:00 EST) (on file with author). Colonel Richard Bezold is the former commander of 2d Forward Support Battalion, 2d Infantry Division, Camp Casey Korea from 2003–2005. Colonel Bezold also led his battalion to war in the Al Anbar Province in Iraq from August 2004 through August 2005.

[181] *Id.*

[182] *Id.*

[183] See Section V for a discussion of statutes and regulations that would require presidential approval and Department of Defense action.

[184] Telephone Interview with Judge (Colonel) Patrick J. Parrish, U.S. Army, Military Judge, Fort Bragg, N.C. (Jan. 15, 2008) [hereinafter Parrish Telephone Interview].

[185] Telephone Interview with Colonel David Clark, U.S. Army, Commander, Training Support Brigade, Fort Sam Houston, Tex. (Feb. 29, 2008). Colonel Clark, an infantry officer, is also the former commander of 1/506th, 2d Brigade Combat Team, 2d Infantry Division in Korea and Iraq.

[i.e., manpower required to supervise the Soldier] would be debilitating. We don't have the overhead to monitor Soldiers."[186] Brigade commander Colonel Tommy Mize sees limited utility in a formal probation system and believes that "certain aspects of the UCMJ [like non-judicial punishment under Article 15 and a suspended sentence] provide the same sort of flexibility that probation does in the civilian courts."[187] Furthermore, according to Brigadier General Gary S. Patton, the military's graduated disciplinary system usually means that if a case actually goes to court-martial, it is likely that the offense did not merit probation in the first place.[188] Undoubtedly, many commanders would be concerned about the potential blemished image of military service. After all, "military service is an honor and not a right."[189]

A formal probation system might also be criticized as just another attempt to civilianize the military, which is a "specialized society separate from civilian society."[190] In *United States v. Ralston*, Judge Raby of the Army Court of Military Review feared that the "civilianization" of the military justice system would spell its end. He stated:

> [I] wish to muse whether we gatekeepers of military law are not inadvertently finding more and more novel ways in which gradually to ease line officers and commanders out of the military system—moving it ever closer to the civilian justice model. *Quarere*: If this trend continues, could we reach a point, *in futuro*, where the military justice system is no longer unique, and thus no longer necessary?[191]

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[186] *Id.*

[187] E-mail from Colonel Tommy Mize, Chief, Theater, Master Plans and Construction, U.S. Forces Korea, to author (Mar. 10, 2008, 17:53 EST) (on file with author). Colonel Mize, an engineer officer, is the former Commander, 44th Engineer Battalion, 2d Brigade, 2d Infantry Division, Korea and Ramadi, Iraq. In July 2008, he took command of 1st Engineer Brigade at Fort Leonard Wood, Mo.

[188] E-mail from Brigadier General Gary Patton, U.S. Army, Chief of Staff, 25th Infantry Division, to author (Mar. 14, 2008, 10:00EST). Brigadier General Patton is the former Commander, 2d Brigade Combat Team, 2d Infantry Division, Korea and Ramadi, Iraq, 2002–2005.

[189] Interview with Lieutenant Colonel Stephen Stewart, U.S. Marine Corps, Professor, Criminal Law Dep't, TJAGLCS, Charlottesville, Va. (Nov. 20, 2007).

[190] Parker v. Levy, 417 U.S. 733, 743 (1974).

[191] SCHLUETER, *supra* note 112, at 5 (quoting Judge Raby in United States v. Ralston, 24 M.J. 709 (A.C.M.R. 1987)) (emphasis added). Note also that Schlueter recognized that

In *United States v. Jones*,[192] the U.S. Navy Court of Military Review was even more critical of perceived attempts at "civilianization," stating, "Many have certainly taken to so-called 'civilianization' of the United States military justice system like ducks to water. Yet the truth of the matter appears to be that this timorous and undisciplined spirit of conformism may be fraught with some serious problems."[193] The court further stated that "the military cannot adopt the language, thinking, and legalisms of the civilian legal sector without ultimately breaking down the fixed and accepted beliefs, values and distinctions which enable us, effectively and militarily, to relate our conduct to each other."[194]

V. Proposal to Implement

Admittedly, a formal probation system in the military would be difficult to implement and would garner criticism, but it could work. Although this concept might seem novel to some, it certainly is not new. Major General Kenneth J. Hodson, the Judge Advocate General of the Army from 1967 to 1971,[195] believed that military judges should be empowered to adjudge probation, stating that "military judges of general courts-martial . . . [should] be authorized to impose sentences, *including probation*, in all except capital cases . . . ."[196] Major General Hodson also believed that commanders should be largely removed from the military justice system.[197]

"[a]ssuming that Judge Raby is correct and that the military justice system is becoming civilianized and no longer unique, it does not necessarily follow that it would become unnecessary." *Id*.

[192] 7 M.J. 806, 808 (N.M.C.M.R. 1979).

[193] *Id.* at 808.

[194] *Id*.

[195] Kenneth J. Hodson, *Courts-Martial and the Commander*, *in* 3A CASES AND MATERIALS ON THE ANALYSIS OF THE MILITARY JUSTICE LEGAL SYSTEM: COMMAND AND CONTROL 627 (1975). Major General Hodson was also the Chief Judge of the U.S. Army Court of Military Review and the former Chairman and Secretary of the American Bar Association. *Id*.

[196] Kenneth J. Hodson, *Military Justice: Abolish or Change?*, *in* 3A CASES AND MATERIALS ON THE ANALYSIS OF THE MILITARY JUSTICE LEGAL SYSTEM: COMMAND AND CONTROL 775 (1975).

[197] *Id*. Specifically, Major General Hodson recommended that "commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty." *Id*.

A. Mechanics

1. The Probation Officer and the Presentence Report

Similar to the federal scheme, a probation system in the military will need probation officers to make it work.[198] Either an officer of the accused's command or a military correction specialist[199] would be tasked to draft the presentence report,[200] to supervise and enforce the conditions of probation, and to notify the convening authority and the court if the probationer fails to comply.

The suggestion of a probation officer is not completely unheard of or farfetched. While not mandated by the UCMJ, the U.S. Navy Court of Military Review upheld the convening authority's designation of a probation officer. In *United States v. Figueroa*,[201] the convening authority suspended the accused's sentence of a bad-conduct discharge, total forfeitures, and any unexecuted hard labor at the date of his action for a period of ten months unless sooner vacated. In suspending his punishment, the convening authority appointed a probation officer and required the accused to report to the probation officer at least once a week. [202]

On appeal, the accused alleged that "the convening authority exceeded his authority in appointing a probation officer and in requiring appellant to report to such an officer at least once a week."[203] Relying on a slip opinion issued by the Court of Military Appeals, [204] the Navy Court of Military Review upheld the convening authority's appointment of a probation officer for the accused and required the accused to report to his probation officer.[205] The court commended the convening authority, stating that "the Court considers the convening authority's action a commendable effort to assure the appellant a fair and realistic

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[198] *See* Section II. B.1, *supra*.
[199] *See* Major Russell W.G. Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, ARMY LAW., July 1988, at 26, 31 n.72 (reasoning that Army, Navy, and Marine Corps military corrections personnel are equipped to do this because they get five weeks of training in addition to many subcourses relating to penology, correctional report writing, sentence computation).
[200] The suggested contents of the presentence report will be discussed *infra*.
[201] 47 C.M.R. 212 (N.M.C.R. 1973).
[202] *Id*.
[203] *Id*.
[204] *Id*. (relying on United States v. Lallande, 46 C.M.R. 170 (1973)).
[205] *Id*. at 213.

opportunity to redeem himself in the Marine Corps."[206] While commendable, the designation of a probation officer is not likely the norm even under today's suspension procedure. To ensure that it is a norm, and that the accused has a fighting chance at rehabilitation, the designation of a probation officer will be vital to the successful implementation of a formal probation system.

If a probation system in the military is going to work, it must also have "truth in sentencing."[207] The factfinder should have a presentence report to aid in deciding what punishment to impose.[208] Right now, the defense primarily "holds the key" as to what evidence is presented at a sentencing.[209] Courts should have "a better picture of an accused—for good or for bad"[210] when considering whether to adjudge probation. [211] Such information would be incorporated into a presentence report. The presentence report should include the following:

> [D]etailed information about the offense or offenses for which sentence is to be imposed. This would include a prosecution version; defense version; statement of financial, physical, and psychological impact on any victim; codefendant information, including relative culpability; and statement of summaries of witnesses and complainants. The report should feature personal and family data. The accused's early life influences, home and neighborhood environment, and family cohesiveness should be included. The accused's criminal and disciplinary history is a very significant component, and available information relating to juvenile delinquency, truancy, and running away from home should be noted. Accomplishments, special talents and interests, and significance of religion in the accused's life are also pertinent.[212]

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[206] *Id.*
[207] Pohl Telephone Interview, *supra* note 132. Judge Pohl coined this phrase during the interview.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] Grove, *supra* note 199, at 32 (referencing the Presentence Investigation Report 1984 by the Administrative Office of the U.S. Courts, Probation Division).

2. Making the Decision

Probation will be within the sole discretion of the factfinder.[213] The factfinder will continue to rely on the aims of sentencing in determining an appropriate sentence for an accused.[214] To assist the panel in determining what conditions may be appropriate based on the presentence report and on evidence presented at presentencing, panel members would be given a worksheet tailored by the military judge with the input of the trial counsel and the defense counsel to aid them in determining discretionary conditions of probation.[215] Some conditions will be mandatory.[216] Trial counsel and defense counsel should have freedom to present evidence and argument to the military judge of appropriate conditions to be included in the worksheet.

3. Supervision and Enforcement

As described above, a probation officer will be tasked with supervising and enforcing probation conditions and may exercise broad discretion in ensuring that a probationer complies with the conditions of probation. The probation officer should immediately inform the convening authority when he receives credible information that the probationer may have violated the terms of his probation. [217]

4. Probation Revocation

Before a term of probation may be revoked, the convening authority will hold a revocation proceeding.[218] The proceedings would be less

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[213] *Cf.* note 59.

[214] *See supra* note 131 (referencing the aims of sentencing given in the *Benchbook* instruction.).

[215] *See* Pohl Telephone Interview, *supra* note 132.

[216] Mandatory conditions would include that the probationer commit no other crimes, that he report to his probation officer weekly, that he attend structured rehabilitation classes geared to his offenses, that he submit to random drug testing, that he pay restitution, and that he notify his probation officer of any change in financial condition. *Cf.* 18 U.S.C.S. § 3653(a)–(b) (LexisNexis 2008) (providing mandatory and discretionary probationary conditions for federal cases).

[217] *Cf.* 18 U.S.C. § 3603(3) (describing the duties of federal probation officers).

[218] This process should be similar to the vacation of suspension process in Article 72, UCMJ that convening authorities are already familiar with. *See* UCMJ art. 72 (2008); *see also* Telephone Interview with Judge (Colonel) Lisa Schenck, Chief Judge, U.S. Army

formal than a trial, but the probationer would be entitled to counsel. The probationer would also be allowed to present evidence in his favor.[219] The convening authority must be reasonably satisfied that the probationer has violated the terms of his probation.[220] The convening authority may decide to impose additional probation conditions, extend the probationary period, or revoke his probation.[221] The accused should also have the right to waive his revocation proceeding.[222]

B. Statutory Amendments

To establish a probation system, Rule for Courts-Martial 1003(b) would have to be amended to include probation as an authorized punishment. The amendment might read:

> Any court-martial may adjudge probation in lieu or in addition to any other authorized punishment under this subsection. Probation may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, midshipman, warrant officer who is not commissioned or enlisted person has been found guilty.
>
> In determining whether to adjudge probation, it is appropriate to consider (1) whether the accused is charged with multiple counts, (2) whether the accused has had previous convictions pursuant to Article 15 or any other proceeding, (3) whether the offense involved drugs, (4) whether the accused seriously injured anyone and (5) whether he used a weapon.[223] The court shall determine the conditions of probation and shall issue the condition in writing and shall cause a copy of the conditions to be served on the accused.

Court of Criminal Appeals, Arlington, Va. (Jan. 8, 2008) [hereinafter Schenck Telephone Interview]. Judge Schenck recommended that the revocation proceeding be left in the convening authority's hands. *See id.*

[219] *Cf.* FED. R. CRIM. P. 32 (describing the rights of a probationer at a revocation hearing).

[220] *See supra* note 97. This is the same standard used in federal courts.

[221] *Cf.* 18 U.S.C.S. § 3565 (giving the options the court has when probationer violates terms of probation.)

[222] Schenck Telephone Interview, *supra* note 218. Judge Schenck recommended providing the probationer the right to waive his revocation hearing. *See id.*

[223] *Cf.* PETERSILIA, *supra* note 5, at 27 (suggesting factors for courts to consider in deciding whether to impose confinement or punishment).

> Probation shall be for a reasonable time necessary to ensure that the sentencing aims of rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses. Upon the successful completion of his probationary period, the suspended part of any sentence shall be remitted.[224]

Department of Defense directives[225] would have to be amended to preclude Soldiers from being administratively separated based solely on a court-martial conviction when probation is adjudged.[226] Otherwise, probation's goal of rehabilitating the offender may be thwarted by a command that might want to take the easier route and separate the Soldier.[227] Army Regulation 600-8-2, *Suspension of Favorable Personnel Actions (FLAGS)*,[228] would need to be amended to provide that Soldiers will continue to be monitored (i.e., flagged) upon a permanent change of station.[229]

VI. An Alternative to Probation: Suspension of Punishment by Courts-Martial

While the fundamental premise of implementing a probation system (i.e., rehabilitating the Soldier while meeting the needs of the Army) is

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[224] This recommendation is based on a combination of examining (1) the language for current authorized punishments provided in RCM 1003, (2) factors discussed by Petersilia, *supra* note 5, (3) the sentencing aims of the military justice system, and (4) suspension and remission of unexecuted punishment in RCM 1108.

[225] U.S. DEP'T OF DEFENSE, DIR. 1332.30, SEPARATION OF REGULAR AND COMMISSIONED OFFICERS (14 Mar. 1997); U.S. DEP'T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (21 Dec. 1997).

[226] Telephone Interviews with Judge (Colonel) Stephen Henley, Chief Trial Judge, U.S. Army Trial Judiciary, Arlington, Va. (Dec. 26, 2007 & Jan. 7, 2008) [hereinafter Henley Telephone Interviews].

[227] *See id.*

[228] U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) (23 Dec. 2004). This regulation describes the process of marking (i.e., "flagging") a Soldier's personnel records to prevent favorable action from being taken toward the Soldier while he is pending an unfavorable action.

[229] Henley Telephone Interviews, *supra* note 226. Judge Henley recommended that Soldiers be flagged to ensure that the probationer completes his probationary period.

generally believed to be an "interesting idea with some merit," [230] implementing a probation system may be "too big of a leap,"[231] "too drastic," [232] "too difficult to administer," [233] and "unworkable in a deployed environment." [234] Consequently, an alternative argument is offered. Courts-martial should be empowered to suspend all or part of a court-martial punishment.[235]

Empowering a court-martial to suspend punishment accomplishes many of the aims of a formal probation system.[236] It addresses the supply versus demand dilemma—more Soldiers might be retained to help in the Global War on Terror. It enhances the public's perception of fairness as well as the Soldier's perception of fairness—the public and the Soldier will perceive suspension as a second chance. Additionally, to a more limited degree than probation, it considers the accused's rehabilitation needs—the accused is given the *opportunity* for rehabilitation but not necessarily the *tools*[237] needed for rehabilitation as suggested by a formal probation system.

Furthermore, empowering court-martials to suspend punishment would require very little statutory changes[238] and would only require that RCM 1003(b) be amended to include suspension. The vacation proceedings set forth under Article 72, UCMJ[239] would remain the same. [240] Commanders would likely view empowering court-martials to

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[230] *Id.*
[231] *Id.*
[232] Parrish Telephone Interview, *supra* note 184.
[233] Henley Telephone Interviews, *supra* note 226.
[234] *Id.*; *see also* Pohl Telephone Interview, *supra* note 132.
[235] Every military judge interviewed suggested binding suspension as an alternative to probation. This alternative suggestion is a result of their collaborative recommendations.
[236] *See* Henley Telephone Interviews, *supra* note 226.
[237] The term "tools" contemplates that the conditions placed on probationers such as drug counseling, financial counseling etc., will enhance the probationers' chances for rehabilitation.
[238] Henley Telephone Interviews, *supra* note 226.
[239] *See* UCMJ art. 72 (2008). The accused's special court-martial convening authority would hold a hearing concerning the alleged violation. The probationer would have the right to counsel. The general court-martial convening authority will receive a record of the hearing and the special court-martial convening authority's recommendation. Should the court-martial convening authority decide to vacate the probation, then the accused will serve any portion of his unexecuted sentence.
[240] Schenck Telephone Interview, *supra* note 218.

suspend punishments as less bureaucratic since they are already familiar with vacation proceedings under Article 72, UCMJ.[241]

Empowering a court-martial to adjudge a suspended sentence would also give the sentencing authority more options at sentencing. According to Judge (Colonel) Patrick Parrish, trial judge at Fort Bragg, North Carolina, "I can think of a number of cases where I would have liked to have had the authority to suspend a punishment."[242]

The Advisory Commission to the Military Justice Act of 1983 considered the related topic of empowering military judges and the Courts of Military Review (but not panels) to suspend punishment and recognized the advantages to binding suspension. The Commission stated:

> Just as civilian courts use the probation system to rehabilitate an offender, military courts could use a suspension to give an offender a chance for rehabilitation and to enable the offender to demonstrate that he can render useful military service. This power is one of compassion as well as one that enables the military to retain errant personnel who might well be good Soldiers, sailors, or airmen. Since the convening authority can suspend a discharge, suspension is not a new concept. Placing authority to suspend in the hands of judge is consistent with the way that most civilian jurisdictions proceed.[243]

While the Commission ultimately denied the proposal (for reasons already discussed), two of the nine members dissented from the recommendation.[244]

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[241] *See* UCMJ art. 72.

[242] Parrish Telephone Interview, *supra* note 184. Judge Parrish stated that he would have liked to have had the option of suspended punishment when sentencing a senior non-commissioned officer who is close to retirement or any other servicemember who is close to the end of his term of service.

[243] The MILITARY JUSTICE ACT OF 1983, ADVISORY COMMISSION REPORT (1985) [hereinafter ADVISORY COMMISSION REPORT] (on file at TJAGLCS). Note also that the Cox Commission made a similar recommendation. *See* COX REPORT, *supra* note 161.

[244] ADVISORY COMMISSION REPORT, *supra* note 243, para. VI. Mr. Honigman and Mr. Ripple dissented in this recommendation. The report does not say why these gentlemen dissented, but the inference is that they believed that the advantages cited outweighed the disadvantages.

Commanders may still believe that binding suspension infringes on their power to maintain good order and discipline. In addition to the above comments, Advisory Commission further stated:

> The decision to suspend a discharge reflects a belief that an individual can benefit his service despite a conviction of conduct serious enough to warrant a discharge. Decisions to retain or discharge a person have enormous potential impact on command. These are the kinds of decisions, that commanders, who are responsible for the morale and mission readiness of their commander, must make. [245]

While the accused would be given an opportunity to redeem himself, the studies of the civilian probation system generally conclude that "the intensity of the supervision, rather than the quality of treatment, was essential in reducing recidivism."[246] Suspension does not entail supervision.[247] Under a formal probation system, a specific person is tasked with (1) identifying the treatment needs, if any, of the accused; (2) ensuring that the Soldier is complying with conditions; and (3) enforcing the conditions of probation. Furthermore, a presentence report, a function of a probation system, provides the court with a complete picture of the accused to use in fashioning effective conditions for his rehabilitation. Hence, probation is preferred above suspension. Nevertheless, both a formal probation system and a system that allows courts-martial to suspend all or any part of a sentence provide an accused the opportunity for rehabilitation while satisfying the simple principle of supply versus demand.

VII. Conclusion

In spite of the military judge's recommendation that the bad-conduct discharge be suspended, the convening authority approved the convicted Soldier's discharge and separated him from the Army. For the sake of his children's stability, and because he loved simply being around the Army even though he was not a Soldier, he stayed in the area—close to post. With his bad-conduct discharge, he was able to secure a job at the

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[245] *Id*.
[246] KLEIN, *supra* note 20, at 355–56.
[247] *See* 21A AM. JUR. 2D *Criminal Law* § 904 (2007).

local grocery store as a stocker. Often times while stocking the shelves, he thinks, what if he had been given the opportunity to redeem himself. What if . . . ?

As chance would have it, one day the military judge stops by the grocery store. As he grabs an item off the shelf, he hears a courteous and respectful "Hi, Sir." The military judge responds back with a "Hello." The judge remembers this former Soldier and asks how his children are doing. The children are doing well. The military judge cannot help but note that this former accused still looks like, sounds like, and acts like a Soldier. The judge also cannot help but notice that the convening authority denied his recommendation. Like the Soldier, the military judge walks away wondering, what if . . . ?

Appendix

MORAL WAIVERS

Across the Defense Department, the number of "moral waivers" approved for military recruits with prior felony or misdemeanor crimes on their records has risen in recent years. The number of moral waivers by category since 2003:

ARMY	2003	2004	2005	2006
Moral waivers	**4,918**	**4,529**	**5,506**	**8,129**
Felony	411	360	571	901
Serious nontraffic	2,731	2,560	4,054	6,158
Minor nontraffic	100	113	123	169
Serious traffic	742	844	124	35
Minor traffic	5	6	4	1
Drug	929	646	630	865

NAVY	2003	2004	2005	2006
Moral waivers	**4,207**	**3,846**	**3,467**	**3,502**
Felony	56	40	109	190
Serious nontraffic	2,844	2,340	1,872	2,340
Minor nontraffic	548	677	911	481
Serious traffic	116	131	119	66
Minor traffic	139	134	108	98
Drug	504	524	348	327

MARINE CORPS	2003	2004	2005	2006
Moral waivers	**19,195**	**18,669**	**20,426**	**20,750**
Felony	352	234	481	511
Serious nontraffic	3,443	3,504	4,239	4,636
Minor nontraffic	530	424	523	515
Serious traffic	271	241	321	315
Minor traffic	1,315	1,268	1,142	987
Drug	13,284	12,998	13,720	13,786

AIR FORCE	2003	2004	2005	2006
Moral waivers	**2,632**	**2,530**	**1,123**	**2,095**
Felony	5	4	2	3
Serious nontraffic	1,306	831	358	761
Minor nontraffic	646	1,319	283	1,281
Serious traffic	570	197	365	50
Minor traffic	105	179	115	0
Drug	0	0	0	0

DEFENSE DEPARTMENT				
Moral waivers	**30,952**	**29,574**	**30,522**	**34,476**
Felony	824	638	1,163	1,605
Serious nontraffic	10,324	9,235	10,523	13,895
Minor nontraffic	1,824	2,533	1,840	2,446
Serious traffic	1,699	1,413	929	466
Minor traffic	1,564	1,587	1,369	1,086
Drug	14,717	14,168	14,698	14,978

Source: Defense Department

JOHN BRETSCHNEIDER/STAFF

THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION[1]

REVIEWED BY MAJOR BRIAN P. GAVULA[2]

The Terror Presidency's most fundamental challenge is to establish adequate trust with the American people to enable the President to take the steps needed to fight an enemy that the public does not see and in some respects cannot comprehend.[3]

In July 2004, Jack Goldsmith[4] resigned as Assistant Attorney General, Office of Legal Counsel (OLC), less than ten months after assuming that position.[5] During his brief tenure as the "chief advisor . . . about the legality of presidential actions,"[6] Goldsmith wrestled with some of the most important and controversial issues surrounding the war on terror: the applicability of the Geneva Conventions to Iraqi insurgents,[7] the Terrorist Surveillance Program,[8] and, most famously, the interrogation policy.[9] To his utter astonishment, Goldsmith concluded within two months of taking office that several OLC opinions authored by his predecessors were "deeply flawed"[10] and that consequently, "some

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[1] JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007).

[2] U.S. Army. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] GOLDSMITH, *supra* note 1, at 192.

[4] Jack Landman Goldsmith currently serves as Henry L. Shattuck Professor of Law at Harvard Law School. His educational background includes: B.A., 1984, Washington & Lee University; B.A., 1986, Oxford University; J.D., 1989, Yale Law School; and M.A., 1991, Oxford University. Harvard Law School: Faculty Directory, http://www.law.harvard.edu/facultydirectory/facdir.php?id=559 (last visited Sept. 12, 2008). Immediately prior to serving as the head of the Office of Legal Counsel (OLC), he worked as "Special Counsel" under Department of Defense General Counsel William "Jim" Haynes, where he analyzed legal issues related to missile defense, detainees at Guantanamo Bay, military commissions, and the Iraq invasion. GOLDSMITH, *supra* note 1, at 20–21.

[5] GOLDSMITH, *supra* note 1, at 9, 18.

[6] *Id.* at 9.

[7] *See id.* at 32, 39–42.

[8] *See id.* at 181–82. Although the author describes putting the Terrorist Surveillance Program on sound legal footing as the most difficult task he ever faced in government service, he was constrained by the program's classification from discussing it in detail in this book. *Id.* at 182.

[9] *See id.* at 141–72.

[10] *Id.* at 10.

of our most important counterterrorism policies rested on severely damaged legal foundations."[11] In the following months, against the backdrop of a terrorist threat level "that was more frightening than at any time since 9/11,"[12] Goldsmith's efforts to place the Bush administration's antiterrorism policies on a more firm legal footing would inexorably place him "on a collision course with powerful figures in the administration,"[13] ultimately leading to his resignation.

In *The Terror Presidency: Law and Judgment Inside the Bush Administration*, Jack Goldsmith describes the insular practices, unprecedented pressures, and peculiar philosophies of presidential power that shaped the Bush administration's counterterrorism policies following the terrorist attacks of 9/11. While it may disappoint readers expecting either a chronological, blow-by-blow account of the debates in President Bush's inner circle or a legalistic issue-by-issue rebuttal to former OLC lawyer John Yoo's[14] *War by Other Means*,[15] *The Terror Presidency* is nonetheless an informative and worthwhile synthesis of lessons learned from the Bush administration's approach to the war on terror. In both criticizing and defending this approach, Goldsmith first examines the organizational structure and legal conditions that led to "the surprisingly central and sometimes unfortunate role that lawyers played in determining counterterrorism policy."[16] Using several representative policy examples, he then skillfully contrasts the Bush presidency with the "crisis presidencies"[17] of Abraham Lincoln and Franklin Roosevelt to support his overall thesis: that in seeking to maximize the President's

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[11] *Id.*

[12] *Id.* at 74; s*ee also* GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 245–46 (2007) (discussing an unusually detailed and credible threat to financial institutions in New York, New Jersey, and Washington during the spring and summer of 2004).

[13] GOLDSMITH, *supra* note 1, at inside front cover.

[14] While Yoo served as deputy to Goldsmith's predecessor, Jay Bybee, in practice he had primary responsibility for counterterrorism policies from 2001–2003 due to his unique expertise. *See id.* at 23; CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 79–82 (2007). Yoo has become infamous as the author behind the so-called "torture memos." *See, e.g.*, Mark Mazzetti, *'03 U.S. Memo Approved Harsh Interrogations*, N.Y. TIMES, Apr. 2, 2008, at A1; Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

[15] JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006).

[16] GOLDSMITH, *supra* note 1, at 12. John Yoo echoes the central role of OLC lawyers. YOO, *supra* note 15, at 20.

[17] GOLDSMITH, *supra* note 1, at 12.

formal power to do whatever he thought necessary to respond to the terrorist threat, the Bush administration's "go-it-alone"[18] approach—characterized by "minimal deliberation, unilateral action, and legalistic defense"[19]—instead diminished the presidency's informal power and credibility.[20]

In the opening chapter, Goldsmith sets the stage for the prominence of lawyers in post-9/11 policymaking by describing the OLC as an arm of the Department of Justice empowered to issue legal opinions that are "binding throughout the executive branch"[21] and that, if reasonably relied upon, effectively preclude subsequent prosecution.[22] Thus, "[i]n an administration bent on pushing antiterrorism efforts to the limits of the law, OLC's authority to determine those limits made it a frontline policymaker in the war on terrorism."[23] While the OLC has a tradition of giving "detached, apolitical legal advice,"[24] Goldsmith recognizes the reality that OLC lawyers usually are "philosophically attuned"[25] to the current administration, resulting in a role that is "something inevitably, and uncomfortably, in between" that of a neutral court and a zealous private attorney.[26]

Unfortunately for Jack Goldsmith, in October 2003 he took the helm of an OLC which the administration expected to be more akin to the latter. Goldsmith inherited a set of legal opinions largely authored by former OLC deputy John Yoo,[27] whose expansive view of unconstrained presidential war powers pervaded these opinions and fell in line with other like-minded individuals in the Bush administration, such as David Addington, the Vice President's Counsel.[28] More dangerously, Yoo's

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[18] *Id.* at 123.
[19] *Id.* at 205.
[20] *Id.* at 140, 215.
[21] *Id.* at 23.
[22] *Id.* at 23, 96. For example, the CIA referred to the infamous "torture memo" as a "'golden shield.'" *Id.* at 144.
[23] *Id.* at 42.
[24] *Id.* at 33.
[25] *Id.* at 34; *see also* YOO, *supra* note 15, at 19 (describing himself as sharing the Bush administration's philosophy).
[26] GOLDSMITH, *supra* note 1, at 35.
[27] *Id.* at 22–23; *see also* SAVAGE, *supra* note 14, at 79; YOO, *supra* note 15, at 20, 33.
[28] *See* GOLDSMITH, *supra* note 1, at 97–98. Goldsmith devotes a large part of Chapter 3 to the overwhelming influence that the expansive views of executive power held by David Addington and Vice President Dick Cheney had in the development of the Bush administration's antiterrorism policy. *See id.* at 76–90.

concept of executive power often caused his legal reasoning to go far beyond what was necessary,[29] reinforcing the administration's go-it-alone approach. In fact, Goldsmith's very first opinion as OLC head, in which he determined that the Fourth Geneva Convention applied even to Iraqi insurgents, was also the first time that the Bush administration had been told "no" on its antiterrorism policies.[30] Not surprisingly, he encountered everything from puzzled disbelief by then-White House Counsel Alberto Gonzales, to outright hostility by Addington, who barked, "'The President has already decided that terrorists do not receive Geneva Convention protections. . . . You cannot question his decision.'"[31]

After laying out the institutional backdrop for his first OLC opinion, Goldsmith takes the first of several historical detours in order to examine why his conclusion was accepted, albeit grudgingly, by an administration used to getting its way. He traces the evolution from the predominantly political constraints on presidential power that challenged Franklin Roosevelt's actions during World War II,[32] to the legalization and criminalization of warfare that plagued the Bush administration.[33] Not

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[29] *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005) (concluding that Congress cannot place any limits on the President's response to any terrorist threat).

[30] GOLDSMITH, *supra* note 1, at 41.

[31] *Id.* Addington was mistakenly referring to President Bush's February 2002 decision that the Third Geneva Convention did not confer prisoner-of-war status on Al Qaeda or Taliban detainees. *See* Memorandum from President George W. Bush to the Vice President, the Sec'y of State, the Sec'y of Def., the Attorney Gen., Chief of Staff to the President, Director of Cent. Intelligence, Assistant to the President for Nat'l Sec. Affairs, and Chairman of the Joint Chiefs of Staff, Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 29, at 134. Although he was not yet at the Office of Legal Counsel at the time of this decision, Jack Goldsmith agrees that it was the proper interpretation of the law. GOLDSMITH, *supra* note 1, at 110.

[32] GOLDSMITH, *supra* note 1, at 43–53.

[33] *See id.* at 53–70 (discussing the rise of the human rights culture, the development of the concept of universal jurisdiction, and the establishment of the International Criminal Court). High ranking officials in the Bush administration felt personally threatened by what they termed "lawfare"—"'the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective.'" *Id.* at 58 (quoting Charles J. Dunlap, Jr., Air Combat Command Staff Judge Advocate, Address at the Air and Space Conference and Technology Exposition: The Law of Armed Conflict (Sept. 13, 2005), *available at* http://www.afa.org/Media/scripts/Dunlap_conf2005.asp).

only did the Bush administration worry about international law and the threat of foreign courts exercising universal jurisdiction over U.S. officials,[34] but also it had to contend with a multitude of domestic statutes, such as the Foreign Intelligence Surveillance Act, the War Crimes Act, and the Torture Statute.[35] Goldsmith invokes the two dominant forces that arose from this legal framework—the fear of tying the President's hands and the fear of prosecution by subsequent administrations for its wartime decisions[36]—to explain, and to some extent defend, the legalistic stance that many of the administration's policies took, which have caused them to be "criticized as a conspiracy to commit a war crime."[37]

The most infamous example of this notion of providing official cover for potentially illegal acts is the so-called "torture memo" authored by John Yoo on 1 August 2002,[38] the withdrawal of which became the legacy of Jack Goldsmith's time as the head of OLC. In contrast to his efforts to explain other policies, Goldsmith finally takes the gloves off. He blasts Yoo's opinion for defining "torture" too narrowly and for looking to a statute authorizing health benefits, of all places, to explore its contours.[39] He further chastises Yoo for irresponsibly concluding, without any basis in law, that *any* congressional regulation whatsoever of the interrogation of detainees was an unconstitutional infringement on the President's authority as commander in chief.[40] "In sum, on an issue that demanded the greatest of care," Goldsmith chides, "OLC's analysis of the law of torture . . . was legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary."[41] Unable to salvage

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[34] *Id.* at 55–64.
[35] *Id.* at 66.
[36] *Id.* at 12, 67–68.
[37] *Id.* at 68.
[38] Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to White House Counsel Alberto Gonzales, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 29, at 172. Although it was signed by Jay Bybee, his deputy John Yoo was the author. GOLDSMITH, *supra* note 1, at 142. In a second, still-classified August 2002 opinion, Yoo applied his theoretical analysis to approve specific interrogation techniques for use by the CIA. *Id.* at 151.
[39] GOLDSMITH, *supra* note 1, at 144–45. Specifically, Yoo looked to a statute authorizing health benefits for "emergency medical condition[s]" in order to define "severe pain," reasoning that only the infliction of "severe pain" would amount to torture. As Goldsmith points out, this move was rather "clumsy" given that the health benefit statute itself did not define "severe pain." *Id.* at 145.
[40] *Id.* at 148–49.
[41] *Id.* at 151.

its legal reasoning, Goldsmith officially withdrew the August 2002 opinion and tendered his resignation.[42] While John Yoo has used the fact that the separate opinions authorizing specific interrogation techniques remained intact to argue that the withdrawal of the "torture memo" was merely a political panic move in response to the Abu Ghraib scandal,[43] Yoo's stubborn defense of the opinions is widely condemned.[44]

The remainder of *The Terror Presidency* is devoted to advancing Goldsmith's thesis and providing a roadmap for future presidencies when dealing with the terror threat. Acknowledging that the success in preventing new attacks "has had the self-defeating effect of enhancing public skepticism about the reality of the threat,"[45] Goldsmith looks to President Roosevelt's strategy of gaining support for aiding Great Britain despite the neutrality laws and despite the fact that most Americans did not perceive the threat posed by Nazi Germany.[46] Roosevelt's success illustrates the importance of educating the public on the nature of the crisis, consulting widely with the press, Congress, and the political opposition, and narrowly tailoring presidential actions taken on the edge of legality to go no further than necessary.[47] Goldsmith deftly applies these lessons to the contemporary crisis. When the President finally went to Congress in 2006 after the Supreme Court struck down its plan for military commissions in *Hamdan v. Rumsfeld*,[48] Congress gave the President virtually everything he wanted, putting his policy on sound constitutional footing.[49] "Forcing Congress to assume joint responsibility weakens presidential prerogatives to act unilaterally. But it strengthens presidential power overall,"[50] Goldsmith counsels. Even John Yoo, while vehemently defending the legality of the go-it-alone approach, nonetheless admits that the administration may have been better served

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[42] *Id.* at 151–61.
[43] *See* YOO, *supra* note 15, at viii, 171–72, 181–82.
[44] *See, e.g.*, Michiko Kakutani, *What Torture Is and Isn't: A Hard-Liner's Argument*, N.Y. TIMES, Oct. 31, 2006, at E1 (describing Yoo's book as "strewn with preposterous assertions, contorted reasoning, and illogical conclusions").
[45] GOLDSMITH, *supra* note 1, at 188. *But see* Alexander Mooney, Poll: Concerns About Terrorist Attacks at Lowest Level Since 9/11 (Sept. 11, 2008), http://www.cnn.com/2008/POLITICS/09/11/terrorism.poll/index.html (reporting that Americans have given little credit to the President Bush for preventing terrorist attacks).
[46] *See* GOLDSMITH, *supra* note 1, at 192–205.
[47] *Id.* at 197–98, 202–04.
[48] 548 U.S. 557 (2006).
[49] GOLDSMITH, *supra* note 1, at 138–40, 207–08 (discussing the Military Commissions Act of 2006).
[50] *Id.* at 207.

by appealing to Congress and the public.[51]

Although it extracts valuable lessons from the Bush administration, *The Terror Presidency* has its weaknesses. First, the book does not quite live up to the expectations created by its marketing hook. Notwithstanding a front cover that prominently features President George W. Bush and Vice President Dick Cheney and an inside cover that states that the author's job "was to advise President Bush,"[52] Jack Goldsmith was *not* a direct legal advisor to the President. His daily interactions were not with the President and Vice President, but rather with their lawyers: Alberto Gonzales and David Addington, respectively. Even with these surrogates, Goldsmith focuses on the general themes that characterized the policy debates, at the expense of detailing their views on specific issues. The quotes interspersed throughout the book, while often dramatic, are more expressions of emotion—Gonzales's incredulity and Addington's blustery anger—in response to Goldsmith's actions than real insights into their positions. Moreover, Goldsmith barely mentions the roles that the State Department and military lawyers played. Irrespective of its conclusions, Yoo's *War by Other Means* does a much better job of laying out the counterterrorism policies in a logical order and describing the competing viewpoints.

A second weakness of the book is that the author does not, or cannot, fully deliver the inside look a reader may expect. Goldsmith concedes, "Much of what I learned must remain hidden behind thick walls of classified information . . . ."[53] Consequently, he sometimes leaves the reader wondering. For example, Goldsmith links an angry remark by Addington that "'the blood of the hundred thousand people who die in the next attack will be on *your* hands'" only to "an important counterterrorism initiative."[54] Likewise, after reading how Goldsmith left intact the opinions authorizing specific interrogation techniques,[55] the reader is bound to wonder whether waterboarding, which has received

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[51] *See* YOO, *supra* note 15, at viii, 119, 126–27.
[52] GOLDSMITH, *supra* note 1, at inside front cover.
[53] *Id.* at 12.
[54] *Id.* at 71. I have concluded that he was most likely referring to the Terrorist Surveillance Program.
[55] *See id.* at 152–58.

considerable scrutiny in the press,[56] was among those still-approved techniques. More significantly, when Goldsmith excuses his own six-month delay in withdrawing the August 2002 torture opinion by stating that it "wasn't the most difficult or consequential of the flawed legal opinions that needed fixing at the time,"[57] the reader is not only forced to take his word for it, but also left incredulous as to what could possibly be worse. In fact, though Goldsmith "rescinded more OLC opinions than any of [his] predecessors,"[58] he neglects to list any others. The end result is that many of the events that Goldsmith *does* discuss actually occurred *outside* of his nine-month tenure. While his discussions of such matters are very informative, they sometimes lack the insight and credibility of a firsthand observer.[59]

These criticisms, however, belie the overall strength and value of *The Terror Presidency*. Although Jack Goldsmith's time as head of the OLC was relatively brief, he was nonetheless a key figure in the struggle between law and necessity in the early years of the war on terror, giving him a unique perspective that few other authors could have. In fact, several contemporary books on the subject cite Jack Goldsmith as their authority.[60] Moreover, the author's status as a "conservative lawyer" ideologically in tune with the Bush Administration's goals[61] lends added import to his criticisms of its approach. Likewise, Goldsmith's candor in telling what went wrong bolsters his assertion that despite their mistakes, all of the players in the administration, including Yoo and Addington, were acting in good faith.[62] Finally, since *The Terror Presidency* is more a synthesis of lessons learned than a detailed account of how each policy came to be, what the author has gleaned from the work of his predecessors, as well as from his involvement in the still-secret debates he cannot reveal, is just as important as what he can tell us firsthand.

The lessons abound. The war on terror requires "forward-looking

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[56] *See, e.g.*, Walter Pingus, *Waterboarding Historically Controversial*, WASH. POST, Oct. 5, 2006, at A17; Philip Shenon, *Panel Pushes for Nominee to Denounce Harsh Tactic*, N.Y. TIMES, Oct. 24, 2007, at A16.
[57] GOLDSMITH, *supra* note 1, at 156.
[58] *Id.* at 161–62.
[59] For example, in his discussion about how the August 2002 torture opinion could have been written, Goldsmith concedes that he can only "hazard some informed guesses." *Id.* at 165; *see also id.* at 165–72.
[60] *See, e.g.*, JANE MEYER, THE DARK SIDE 261–69, 281–82, 287–94 (2008); BENJAMIN WITTES, LAW AND THE LONG WAR 51–52, 58, 63–64 (2008).
[61] GOLDSMITH, *supra* note 1, at inside front cover.
[62] *See id.* at 128–29, 167.

problem solvers," not "backward-looking rationalizers."[63] Lawyers advising on national security issues must not let the pressures of events and personalities overcome their reasoned judgment. They must explore the limits of legality while realizing that "even blurry chalk lines delineate areas that are completely out of bounds."[64] They must consult widely when acting on the edges of the law and go no further than the exigencies of the situation require. And they must be aware that there are many more factors besides the *law* that make up sound *policy*, such as "context of action, political support, credibility, and reputation."[65]

Thus, though it may fall short of expectations in some respects, the true value of *The Terror Presidency* lies not in the delivery of riveting behind-the-scenes drama or formal legal arguments, but rather in Goldsmith's ability to reflect candidly on his experiences and synthesize the lessons learned from the Bush administration into advice for the next "terror presidency." These lessons will give this book contemporary relevance for the foreseeable future, especially as the Obama administration formulates its own approach to the "war on terror." Moreover, the *Terror Presidency* will remain a valuable resource for anyone, including Judge Advocates, involved in the application of the law, or the development of policy, pertaining to national security.

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[63] *Id.* at 133.
[64] *Id.* at 78. "Often the best a lawyer can do is to lay out degrees of legal risk, and to advise that the further the client pushes into the dark gray areas of legal prohibitions, the more legal risk he assumes." *Id.* at 93.
[65] *Id.* at 133.

THE POST-AMERICAN WORLD[1]

REVIEWED BY MAJOR WALTER H. KWON[2]

I. Introduction

Fareed Zakaria's *The Post-American World* is a disappointing attempt to survey a very real potential American future of declining prosperity, a weakened military, and marginal security. The author thus misses a golden opportunity to raise the consciousness of readers and fails to foster greater probabilities that we can avoid the worst and seize the best that is certain to come our way as a nation.

II. Synopsis

Zakaria spends most of his book giving a history lesson of the non-American world, providing for a fairly entertaining read. However, the underlying theme throughout the book revolves around world economic forces effectuating a decline in American prosperity and power. Unfortunately, it is precisely on this issue that Zakaria misses the mark. Zakaria discusses the 500-year history of the non-Western world, its foundations, and its developmental differences with the West. He then provides a good history of China and its economic, political, and military rise that can be summed up in what "Napoleon famously, and probably apocryphally, said, 'Let China sleep, for when China wakes, she will shake the world.'"[3] Moreover, Zakaria thoroughly details the history of India's social, economic, political, religious, and military development, concluding optimistically that "India can still capitalize on its advantages—a vast, growing economy, an attractive political democracy, a vibrant model of secularism and tolerance, a keen knowledge of both East and West, and a special relationship with America."[4] Furthermore, he compares America's decline in power to the decline of the British Empire. His central tenet is that "[i]n Britain, as it tried to maintain its superpower status, the largest challenge was *economic* rather than *political*. In America, it is the other way around."[5] Finally, Zakaria lays

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[1] FAREED ZAKARIA, THE POST-AMERICAN WORLD (2008).

[2] U.S. Army. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] ZAKARIA, *supra* note 1, at 87–88.

[4] *Id.* at 165.

[5] *Id.* at 169.

out six simple guidelines for America to pursue in the current world order.[6] It is here that Zakaria misses the mark by failing to recognize the largest challenges facing America are, like those of the British Empire, economic challenges. America's most immediate and fundamental underlying problem is its economic malaise.

III. Analysis

A. A Commendable History Lesson, But a Disingenuous Thesis

Zakaria states, "This is a book not about the decline of America but rather about the rise of everyone else."[7] However, his assertion is disingenuous. The natural inference from his book's title, *Post-American World*, is the decline of America. He goes on to say, "[T]he distribution of power is shifting, moving away from American dominance."[8] This is merely a euphemism for declining American power, influence, and economic prosperity. He should be more forthright. If Zakaria simply wanted to write a book about the rise of everyone else, then he should have entitled his book *The Current Rise of Other Powers*. Instead he titled his book *The Post-American World*. In essence, his book is a tale of a declining America and the ascent of China and India as they fill the void. He also leaves out Brazil and Russia, which make up the remainder of the BRIC (Brazil, Russia, India, China) countries and round out the remaining rapidly growing world economies.[9]

While Zakaria does a commendable job discussing the history of the non-Western world and its current ascent onto the world stage, he inadequately tells the story of the economic fundamentals affecting us all. He discusses economics in a superficial, bland, non-compelling, and incomplete manner that does not impress upon the reader the seriousness of our national condition. His book is a "one-size fits all," cleverly marketed to the masses. This is, in itself, not an unforgiveable lapse if that reach into the masses could effectuate a rise in national consciousness. It is only through national consciousness that people will

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[6] *Id.* at 235–50.
[7] *Id.* at 1.
[8] *Id.* at 4–5.
[9] DOMINIC WILSON & ROOPA PURUSHOTHAMAN, GOLDMAN-SACHS GLOBAL ECONOMICS PAPER NO: 99, DREAMING WITH BRICS: THE PATH TO 2050, Oct. 1, 2003, *available at* http://www2.goldmansachs.com/ideas/brics/book/99-dreaming.pdf.

take action to bring about positive change in our economic state of affairs. However, Zakaria fails to achieve this. Americans already know we live in a global world and that our children will live in a global world. Nonetheless, we cannot prepare for this interconnected future unless we clearly identify the severe economic problems we are facing and deal with them effectively. If we go back in learned thinking, the doctrine of probabilities states that the future is nothing more than a series of probabilities.[10] Zakaria thoroughly describes those alarming probabilities, but does not adequately alert the reader as to why those probabilities are unfolding as they are.

B. An Incomplete Portrayal of Reality

Addressing all of the factual areas where Zakaria lacks objectivity or presents an incomplete picture is far beyond the scope of this review. However, key subject areas that are patently weak warrant a terse critique. He states that "between 2000 and 2007, the world economy would grow at its fastest pace in nearly four decades. Income per person across the globe would rise at a faster rate (3.2 percent) than in any other period in history."[11] However, he does not address the catalyst for this growth—the wild creation of credit.[12] In fact, by October 2008, "Alan Greenspan, once viewed as the infallible architect of U.S. prosperity, was called on the carpet . . . . [and] pilloried by a congressional committee for decisions that contributed to the financial crisis devastating world markets."[13] In addition, Zakaria neglects to consider global inflationary pressures and resultant recent food shortages around the world.[14]

Furthermore, he states that historically, we are living in "unusually calm" times.[15] However, he does not adequately address the current

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[10] *Doctrine of Probabilities*, 11 AM. Q. REV. 473, 474 (Mar. & June 1832) (anon.).
[11] ZAKARIA, *supra* note 1, at 7.
[12] *See* Stephen S. Roach, *Greenspan's Follies*, FOREIGN POLICY.COM (Apr. 2008), http://www.foreignpolicy.com/story/cms.php?story_id=4278.
[13] Posting of Doug Mataconis to Below the Beltway, *Alan Greenspan Drinks the Regulatory Kool-Aid*, http://www.belowthebeltway.com/2008/10/24/alan-greenspan-drinks-the-regulatory-kool-aid/ (Oct. 24, 2008, 12:47 EST).
[14] *See* Posting of Richard C. Cook to The Market Oracle, *Fake Inflation Statistics and the New World Order Heralds Class Warfare*, http://www.marketoracle.co.uk/Article5733.html (Aug. 3, 2008, 14:00 EST).
[15] ZAKARIA, *supra* note 1, at 10.

conflicts raging around the world. Nor does he address the seriousness of potential conflicts with Iran, Russia, and China.[16]

In addition, he states that "[a] cottage industry of scaremongering has flourished in the West—especially in the United States—since 9/11."[17] However, he does not address the thwarted terrorist attempts in the United States, the potential for chemical, biological, radiological, or other high-yield explosive attacks in the United States, or the twelve Al Qaeda linked bombings around the world since 9/11.[18]

He presents a thorough description of hyperinflation.[19] However, he claims that we are living in a world of low inflation.[20] This blind oversight is absurd, as rapid inflation currently affects virtually every economy on the globe. [21] This lapse further reflects the incomplete portrait of reality that Zakaria paints throughout his book.

C. Where He Misses the Mark: The Real Issue

Zakaria's most blatant lapse, however, is his failure to adequately link America's decline to its economic situation. Some historians and sociologists have compared the United States at the turn of the twenty-first century with the Roman Empire in its decline.[22] They posit that "Roman economics . . . played a much greater role in the demise of the Empire than was originally believed."[23] Following the fall of the Roman Empire, the Western world entered the Dark Ages.[24]

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[16] *See* Mahdi Darius Nazemroaya, *The Sino-Russian Alliance: Challenging America's Ambitions in Eurasia*, GLOBAL RESEARCH (Sept. 23, 2007), *available at* http://www.globalresearch.ca/index.php?context=va&aid=6688.

[17] ZAKARIA, *supra* note 1, at 14.

[18] Al-Qaeda-Linked Bombings, July 8, 2005, http://www.cbc.ca/news/background/london_bombing/alq_bombing.html.

[19] ZAKARIA, *supra* note 1, at 23–25.

[20] *Id.*

[21] *See* Trevor Williams, Lloyds TSB Corporate Markets Economic Research, *High Global Inflation Has Hit Economic Growth*, Sept. 1, 2008, *available at* http://www.fxstreet.com/fundamental/analysis-reports/economics-weekly/2008-09-02.html.

[22] Thomas Majewski, *How the U.S. Compares to the Roman Empire: Trends in U.S. Policies Parallel Those of Later Rome*, Nov. 17, 2006, http://www.associatedcontent.com/article/85681/how_the_us_compares_to_the_roman_empire.html.

[23] *Id.*

[24] Peter Heather, *The Fall of Rome*, BBC.com, Sept. 11, 2006, http://www.bbc.co.uk.history/ancient/romans/fallofrom_article_01.shtml.

The path of the United States is not identical to that of the Roman Empire, but similarities warrant closer review. We must remember that "those who cannot remember the past are condemned to repeat it."[25] A couple of well known sayings in the financial world reflect the age-old wisdom in the country, and particularly on Wall Street. The first saying is, "As GM [General Motors] Goes, So Goes the Nation."[26] The second saying is, "[W]hen the US sneezes the rest of the world gets the cold."[27] By November 2008, "G.M. [stock] fell . . . . to $2.01 [per share] . . . ."[28] This was "its lowest since the 1930s . . . ."[29] It appears the U.S. economy is teetering on a deep and prolonged recession, the likes of which has not been seen since the Great Depression of 1929.[30] A renowned New York University economist posited as much in August 2008:

> The probability is growing that the global economy—not just the United States—will experience a serious recession. Recent developments suggest that all G7 economies are already in recession or close to tipping into one. Other advanced economies or emerging markets (the rest of the euro zone; New Zealand, Iceland, Estonia, Latvia, and some Southeast European economies) are also nearing a recessionary hard landing. When they reach it, there will be a sharp slowdown in the BRICs (Brazil, Russia, India, and China) and other emerging markets.[31]

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[25] George Santayana, http://en.wikiquote.org/wiki/George_Santayana (last visited Sept. 11, 2008).

[26] Posting of David Glenn Cox to OpEdNews.com, *"As GM Goes, so Goes the Nation,"* July 8, 2008, http://www.opednews.com/articles/-As-GM-Goes--So-Goes-the-N-by-David-Glenn-Cox-080708-937.html (July 8, 2008, 18:20:07 EST).

[27] Posting of Nouriel Roubini to RGE Monitor, *Global Recoupling Rather than Decoupling as the US Heads Towards a Recession*, http://www.rgemonitor.com/blog/roubini/227885/global_recoupling_rather_than_decoupling_as_the_us_heads_towards_a_recession (Nov. 20, 2007).

[28] John Hughes & Jeff Green, *GM Tumbles to Lowest Since '30s, Ford Falls as Aid Plan Falters*, BLOOMBERG.COM, Nov. 20, 2008, http://www.bloomberg.com/apps/news?pid=20601087&sid=anrUMAPY5Uwk&refer=home#.

[29] *Id*.

[30] *See* Posting of Andy Sutton to The National Expositor, *The Great Depression 2008*, Feb. 11, 2008, http://www.national.expositor.com/News/978.html (Feb. 11, 2008, 9:03 EST).

[31] Nouriel Roubini, *The Perfect Storm of a Global Recession*, PROJECT SYNDICATE, Aug. 25, 2008, http://www.project-syndicate.org/commentary/roubini7.

Moreover, famed investor Jim Rogers recently compared the United States' economic crisis with those formerly experienced by other global powers:

> I'm sure when the [British Empire] declined there were many people who rang the bell and said: "Guys, we're making too many mistakes here in the U.K." And nobody listened until it was too late. When Spain was in decline, when Rome was in decline, I'm sure there were people who noticed that things were going wrong. [32]

The evidence of an economic downturn in the United States is stark. Twenty-two banks failed by November 2008, and the Federal Deposit Insurance Corporation currently has classified 171 banks as problem institutions.[33] This past summer, IndyMac Bank suffered a classic run on a bank not seen in years when panicked depositors withdrew 100 million dollars a day.[34] Lines formed reminiscent of the runs on banks during the Great Depression of the 1930s.[35] Tell people their life savings may be gone and this is how they will react.

Moreover, Richard Fisher, President and Chief Executive Officer of the Federal Reserve Bank of Dallas, states,

> [T]he way we resolve these liabilities—and resolve them we must—will affect our own well-being as well as the prospects of future generations and the global economy. Failing to face up to our responsibility will produce the mother of all financial storms. The warning signals have been flashing for years, but we find it easier to ignore them than to take action. Will we take the painful fiscal steps necessary to prevent the storm by reducing and eventually eliminating our fiscal imbalances? That

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[32] Keith Fitz-Gerald, *Exclusive Interview: Jim Rogers Predicts Bigger Financial Shocks Loom, Fueling a Malaise that May Last for Years*, MONEY MORNING, Aug. 19, 2008, http://www.moneymorning.com/2008/08/19/jim-rogers/.

[33] Jonathan Keehner & Elizabeth Hester, *FDIC Lets Firms Without Charters Bid for Bank Assets (Update 3)*, Nov. 26, 2008, http://www.bloomberg.com/apps/news?pid=20601208&sid=auKB.D4i05AM&refer=finance#.

[34] Kathy M. Kristof & Andrea Chang, *IndyMac Bank Seized by Federal Regulators*, L.A. TIMES, July 12, 2008, *available at* http://articles.latimes.com/2008/jul/12/business/fi-indymac12.

[35] *See* Bank Failure: IndyMac Bank. Lessons from the Great Depression Part XIV. Bank Failures., http://www.doctorhousingbubble.com (July 14, 2008).

> depends on you. I mean "you" literally. This situation is of your own creation. When you berate your representatives or senators or presidents for the mess we are in, you are really berating yourself. You elect them. You are the ones who let them get away with burdening your children and grandchildren rather than yourselves with the bill for your entitlement programs.[36]

Given the overwhelming evidence of the United States' economic crisis, Zakaria's failure to address this factor makes his book truly miss the mark. History has repeatedly demonstrated the link between economic downturn and a resulting decline in a nation's global standing. By not thoroughly exploring this salient issue, Zakaria greatly detracts from the credibility of his work.

D. Lessons for America's Military

Zakaria fails to address the simple fact that a nation's power is derived from its national treasure. The British did not build their empire without national treasure, nor did the Romans. America is no different. This fundamental concept permeates all facets of society and directly impacts the military profession of arms. Without national treasure we would be unable to raise and maintain an army, and we could not afford to pay for the personnel and materiel necessary to wage our current wars in Iraq and Afghanistan. Our only recourse would be incurring substantial debt to foreign money lenders to finance our operations and expeditions via U.S. Treasuries.[37] Moreover, the United States recently nationalized Fannie Mae and Freddie Mac agency debt.

> Why? Because the largest bondholders are foreign countries—notably China. And America desperately needs more credit from these large, overseas financiers. Foreigners hold trillions of U.S. dollars and U.S. dollar-denominated debt. If they begin to fear the government

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[36] Richard W. Fisher, President & Chief Executive Officer, Fed. Reserve Bank of Dallas, Remarks Before the Commonwealth Club of California (May 28, 2008), *available at* http://www.dallasfed.org/news/speeches/fisher/2008/fs080528.cfm.

[37] *See generally* U.S. DEP'T OF TREASURY/FED. RESERVE BD., MAJOR FOREIGN HOLDERS OF TREASURY SECURITIES, Nov.18, 2008, http://www.ustreas.gov/tic/mfh.txt.

> is not behind it, they'll dump it fast—which would be the end of the current dollar-based monetary system.[38]

Thus, clearly visible within America's troubled economy lies our Achilles' heel. Foreign countries could hold our currency hostage with threats of, or actual dumping of, U.S. Treasuries and agency debt. Dumping U.S. Treasuries and agency debt would be the equivalent of undermining our military without physical carnage via removal of our financing. These issues are paramount to any discussion of a post-American world. However, Zakaria addresses neither these issues nor, more importantly, what we must do to fix them.

Furthermore, with declining national treasure and a persistent economic downturn, the military faces further challenges. Recently, "[a] commission urged Congress . . . to overhaul military pay and benefits, suggesting that most retiring troops sacrifice part of their pensions unless they agree to wait until age 60 to begin collecting their monthly retirement checks."[39] In short, "[t]he commission's proposal on military retirement would alter one of the military's signature benefit programs."[40] Tell servicemembers their pension plans have been drastically reduced and see how they react. The negative impact on morale and retention could severely debilitate the military. Thus, economic malaise clearly affects the profession of arms.

IV. Conclusion

Zakaria adeptly describes a potential future where America is no longer the world's economic, political, and military superpower. He reaches a wide audience in a mass-consumption manner, but in connecting with the masses, he fails to fully impress upon his readers an awareness of the dire nature of the American predicament. Zakaria leaves you with an entertaining read instead of focusing on the relevant, pertinent, hard facts now giving rise to the real probability of a post-American world that is very unfavorable to Americans. He fails to raise national consciousness, thereby reducing the probability we can prepare for, and possibly alter, what looks to be a future filled with declining prosperity, a weakened military, and marginal security.

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[38] Bill Bonner, *No More Delaying This Decline*, DAILY RECKONING, Sept. 11, 2008, http://www.dailyreckoning.com/Issues/2008/DR091108.html.

[39] Dale Eisman, *Commission Pushes for Revamp of Military Pensions*, VIRGINIAN-PILOT, Feb. 1, 2008, *available* at http://hamptonroads.com/2008/01/commission-pushes-revamp-military-pensions.

[40] *Id.*

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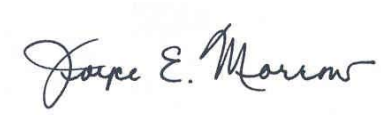

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