



# MILITARY LAW REVIEW

## ARTICLES

“I AM A BIT SICKENED”: EXAMINING ARCHETYPES OF CONGRESSIONAL WAR  
CRIMES OVERSIGHT AFTER MY LAI AND ABU GHRAIB

*Samuel Brenner*

IS GERMANY THE NEW CANADA? ONE AMERICAN DESERTER’S REQUEST FOR  
GERMAN ASYLUM

*Major Christian L. Deichert*

ACHIEVING TRANSPARENCY IN THE MILITARY PANEL SELECTION PROCESS  
WITH THE PRESELECTION METHOD

*Major James T. Hill*

SPECIFIC PERFORMANCE OF ENLISTMENT CONTRACTS

*Major Udi Sagi*

THE THIRD ANNUAL SOLF-WARREN LECTURE IN INTERNATIONAL AND  
OPERATIONAL LAW

*Professor Jack Goldsmith*

THE TWENTY-FIRST MAJOR FRANK B. CREEKMORE, JR. LECTURE

*James J. Graham*

THE SIXTEENTH HUGH J. CLAUSEN LECTURE IN LEADERSHIP

*Teresa A. Sullivan*

## BOOK REVIEWS

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## CONTENTS

### ARTICLES

- “I Am a Bit Sickened”: Examining Archetypes of Congressional War Crimes Oversight after My Lai and Abu Ghraib  
*Samuel Brenner* 1
- Is Germany the New Canada? One American Deserter’s Request for German Asylum  
*Major Christian L. Deichert* 94
- Achieving Transparency in the Military Panel Selection Process with the Preselection Method  
*Major James T. Hill* 117
- Specific Performance of Enlistment Contracts  
*Major Udi Sagi* 150
- The Third Annual Solf-Warren Lecture in International and Operational Law  
*Professor Jack Goldsmith* 192
- The Twenty-First Major Frank B. Creekmore, Jr. Lecture  
*James J. Graham* 204
- The Sixteenth Hugh J. Clausen Lecture in Leadership  
*Teresa A. Sullivan* 219

### BOOK REVIEWS

- The Gamble: General David Petraeus and the American Military Adventure In Iraq, 2006–2008*  
Reviewed by *Major Jerome P. Duggan* 229
- Outliers: The Story of Success*  
Reviewed by *Major Danisha L. Morris* 236

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**“I AM A BIT SICKENED”<sup>1</sup>:  
EXAMINING ARCHETYPES OF CONGRESSIONAL WAR  
CRIMES OVERSIGHT AFTER MY LAI AND ABU GHRAIB**

SAMUEL BRENNER<sup>\*</sup>

*There is no question but that a tragedy of major proportions involving unarmed Vietnamese, not in uniform, occurred at My Lai 4 on March 16, 1968, as a result of military operations of units of the Americal Division.<sup>2</sup>*

*Our report, however, discusses the failure of a relatively small number of soldiers who served at Abu Ghraib prison . . . [and] misconduct (ranging from inhumane to sadistic) by a relatively small group of soldiers and civilians . . . .<sup>3</sup>*

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<sup>\*</sup> J.D., 2009, The University of Michigan Law School; Ph.D. (History), 2009, Brown University. Law Clerk, Honorable David W. McKeague, U.S. Court of Appeals for the Sixth Circuit (2009–2010); Law Clerk, Honorable Kim McLane Wardlaw, U.S. Court of Appeals for the Ninth Circuit (2010–2011). I would like to thank Rebecca S. Eisenberg, Don Herzog, and Marvin Krislov for advice and direction. I would also like to thank David Weis, Claudia Arno, Andrew Arno, Charles Brenner, Elaine Brenner, the fall 2008 Student Scholarship Workshop at The University of Michigan Law School, and Captain Evan Seamone and the staff of the *Military Law Review*.

<sup>1</sup> Robert M. Smith, *White House Says U.S. Policy Bars Any Mass Slaying*, N.Y. TIMES, Nov. 27, 1969, at 1 (printing the statement of Hawaii Senator Daniel K. Inouye, upon seeing pictures of the My Lai massacre).

<sup>2</sup> ARMED SERVS. INVESTIGATING SUBCOMM. OF THE COMM. ON ARMED SERVS., H.R., NINETY-FIRST CONG., 2ND SESS., UNDER AUTHORITY OF H. RES. 105, INVESTIGATION OF THE MY LAI INCIDENT 4 (1970), available at [http://www.loc.gov/rr/frd/Military\\_Law/ML\\_investigation.html](http://www.loc.gov/rr/frd/Military_Law/ML_investigation.html) [hereinafter HÉBERT REPORT].

<sup>3</sup> Statement by General Paul Kern, Commanding General, United States Army Materiel Command, before the Armed Services Committee, United States House of Representatives, on the Investigation of the 205th Military Intelligence Brigade at Abu

The above language—used respectively by a legislator in 1969 and a senior military official in 2004—to describe wartime atrocities was eerily similar. When the members of Congress emerged from the slide shows and spoke with reporters in November of 1969, they were still “shocked and sickened” by the photographs of victims that they had seen at the private, Pentagon-sponsored congressional briefings regarding the March 1968 massacre of South Vietnamese civilians at My Lai by American soldiers under the command of Captain Ernest Medina and Lieutenant William Calley.<sup>4</sup> Illinois Republican Representative Leslie C. Arend left the House briefing early, only an hour after it began, explaining that he had “one of those queasy stomachs” and that “the pictures were pretty gruesome.”<sup>5</sup> “Having been in combat myself,” said Hawaii Democratic Senator Daniel K. Inouye, who lost an arm and won the Medal of Honor while serving in the Army during World War II, “I thought I would be hardened, but I am a bit sickened.”<sup>6</sup> Thirty-five years later, legislators sounded similar notes after congressional briefings on the abuse of Iraqi detainees in the fall of 2003 by American military policemen in the prison at Abu Ghraib. Senate Majority Leader Bill Frist, Republican of Tennessee, and Minority Leader Tom Daschle, Democrat of South Dakota, characterized the images they viewed as “appalling”<sup>7</sup> and “horrific,”<sup>8</sup> respectively. “My stomach gave out,” explained Republican Georgia Senator Saxby Chambliss, adding that some senators gasped at the pictures.<sup>9</sup> “There’s no definition of the Geneva convention or human decency” that would permit these “disgusting, depraved acts,” concluded Democratic Representative Jane Harman, the top-ranking Democrat on the House Intelligence Committee.<sup>10</sup>

This article examines the startling similarities—highlighted by the similarity of the language of 2004 to the language of 1969—between congressional responses to My Lai and alleged war crimes in Vietnam

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Ghraib Prison, Iraq, Second Session, 108th Cong. 2d Sess. (Sept. 9, 2004) [hereinafter Kern Statement].

<sup>4</sup> E.g., William Greider, *Senators Shocked by Pictures*, WASH. POST., Nov. 27, 1969, at A1.

<sup>5</sup> Smith, *supra* note 1, at 1.

<sup>6</sup> *Id.*

<sup>7</sup> Kathy Kiely & William M. Welch, *Abu Ghraib Photos Cause Gasps in Congress*, USA TODAY, May 13, 2004, at A4 (citing Sen. Frist).

<sup>8</sup> Carl Hulse & Sheryl Gay Stolberg, *The Struggle for Iraq: Congress; Lawmakers View Images from Iraq*, N.Y. TIMES, May 13, 2004 (citing Senator Daschle).

<sup>9</sup> Kiely & Welch, *supra* note 7, at A4; *see also* Demetri Sevastopulo, *Senators See New Photographs*, FIN. TIMES (UK), May 13, 2004, at 7.

<sup>10</sup> Kiely & Welch, *supra* note 7, at A4.

and congressional responses to Abu Ghraib and alleged war crimes in Iraq.<sup>11</sup> After both My Lai and Abu Ghraib, for example, some congressional leaders (generally in the House of Representatives) supportive of the president or of military action arguably used their oversight functions to obscure the facts, hobble potential prosecutions of high military officials, and shuffle embarrassing episodes off the national and international stage as quickly as possible.<sup>12</sup> Similarly, in both instances some powerful and influential legislators (generally in the Senate) in the majority party, such as the Democratic Mississippi Senator John C. Stennis and the Republican Virginia Senator John Warner, who initially claimed that they wanted to use congressional oversight powers to focus attention on alleged American atrocities (in Warner's case

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<sup>11</sup> War crimes during both the Vietnam conflict and the Iraq War are "alleged" in the sense that many of them have not been proven in court. In part, this is because American military and political leaders acted to block effective prosecutions, or because some accused military personnel have gotten off on legal technicalities. *See, e.g.*, Josh White, *Officer Acquitted of Mistreatment in Abu Ghraib Case*, WASH. POST, Aug. 29, 2007; *infra* notes 125–48 and accompanying text. It must also be recognized that some number of alleged war crimes, especially during the Vietnam conflict, simply never happened, and were manufactured by conspiracy theorists and opponents of the war. *See infra* note 154. Some war crimes have been proven in courts; on 29 March 1971, for example, a military court-martial found Lieutenant William L. Calley guilty of murdering twenty-two Vietnamese civilians at My Lai and of assaulting a two-year-old boy with the intent to kill. Michael J. Davidson, *Congressional Investigations and Their Effect on Subsequent Military Prosecutions*, 14 BROOK. J.L. & POL'Y 281, 300 (2005). After Abu Ghraib, a number of relatively low-ranking military police of the 372nd Military Police Company, including, most notably, Specialists Charles Graner and Lynndie England, either pled guilty to or were found guilty of offenses such as dereliction of duty and maltreatment of prisoners. *See, e.g.*, Specialist L. B. Edgar, *Court Sentences England to 3 Years*, ARMY NEWS SERV., Sept. 28, 2005; *Graner Gets 10 Years for Abu Ghraib Abuse*, ASSOCIATED PRESS, Jan. 16, 2005.

<sup>12</sup> *See, e.g., infra* notes 98–149 and accompanying text. This, of course, does not mean that American politicians are insensitive to world opinion, or are willing to condone atrocity. In 1996, for instance, Congress took a firm stance against atrocities—or, at least, atrocities committed *against* or *by* American servicemen or nationals—by passing the War Crimes Act, 18 U.S.C. § 2441 (2006), which provided for the fining, imprisonment, and even execution of anyone committing a war crime. While some commentators have objected to the War Crimes Act as not going far enough in holding commanders responsible for the actions of their subordinates, *see, e.g.*, Victor Hansen, *What's Good for the Goose is Good for the Gander: Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 335 *passim* (2007), or in expanding American jurisdiction to the entire world, Congress clearly signaled its disapproval of exactly the sorts of actions for which American servicemen and servicewomen have been responsible in Vietnam and Iraq.

bucking doubters in his own party),<sup>13</sup> ultimately seemed to bow to political pressure or political and nationalist considerations and curtailed investigations and hearings severely.<sup>14</sup> Both during the Vietnam conflict and during the past few years of the Iraq war, those congressmen and congresswomen who wanted, for whatever reasons, to buck the congressional party-line and focus increased attention on incidents of alleged American atrocities and war crimes were required to act in informal ways, by holding unofficial hearings,<sup>15</sup> writing letters to more powerful congressmen,<sup>16</sup> or attempting to speak directly to the American people through the media.<sup>17</sup>

This article argues that despite the starkly different political situations during Vietnam and Iraq—during the late 1960s and early 1970s, for instance, the Republican President Richard Nixon had to contend with a staunchly Democratic congress, while for most of the post-9/11 era President George W. Bush was supported by both a Republican House and a Republican Senate—the history of congressional oversight of the alleged war crimes at My Lai and Abu Ghraib suggests the existence of seven important archetypes of congressional oversight of war crimes. Three of these archetypes—those of the Whistleblowers, the Muckraking Media, and the Activated Public—emerged before Congress had taken any action in response to

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<sup>13</sup> See, e.g., Helen Dewar & Spencer S. Hsu, *Warner Bucks GOP Right on Probe of Prison Abuse*, WASH. POST, May 28, 2004, at A01; Mary Jacoby, *The Patriot*, SALON, June 2, 2004, available at [http://archive.salon.com/news/feature/2004/06/02/john\\_warner/index\\_np.html](http://archive.salon.com/news/feature/2004/06/02/john_warner/index_np.html).

<sup>14</sup> See, e.g., Editorial, *Abu Ghraib Whitewash*, INT'L HERALD TRIB., July 27, 2004 [hereinafter Editorial, *Abu Ghraib Whitewash*] (“[Warner] is showing signs of losing appetite for the fight.”); Editorial, *The Truth About Abu Ghraib*, WASH. POST, July 29, 2005, at A22 [hereinafter Truth Editorial] (“When the Abu Ghraib scandal erupted, GOP leaders such as Sen. John W. Warner (R-VA) loudly vowed to get to the bottom of the matter—but once the bottom started to come into view late last year, Mr. Warner’s demands for accountability ceased.”).

<sup>15</sup> See, e.g., THE DELLUMS COMMITTEE HEARINGS ON WAR CRIMES IN VIETNAM (Citizens Comm’n of Inquiry, eds., 1972) [hereinafter DELLUMS HEARINGS]; Editorial, *4 In House Plan Hearings on War*, N.Y. TIMES, Apr. 7, 1971, at 10.

<sup>16</sup> See, e.g., Letter from Henry A. Waxman (D-CA), Ranking Minority Member, House Comm. on Gov’t Reform, to Tom Davis, Chairman (R-VA), House Comm. on Gov’t Reform (May 4, 2004), available at [http://www.henrywaxman.house.gov/news\\_letters\\_2004.htm](http://www.henrywaxman.house.gov/news_letters_2004.htm).

<sup>17</sup> In recent years, however, those in Congress interested in exercising increased oversight over war crimes have been further hindered by an across-the-board reduction in congressional oversight during the Bush administration. E.g., Susan Milligan, *Congress Reduces its Oversight Role*, BOSTON GLOBE, Nov. 20, 2005; Henry A. Waxman, Op-Ed., *Free Pass From Congress*, WASH. POST, July 6, 2004, at A19.

allegations of war crimes, and help to explain why Congress, which arguably operates under a “fire alarm” model of oversight,<sup>18</sup> has chosen and might choose to engage in war crimes oversight in any particular case. The four remaining archetypes—those of the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives—emerged after Congress was spurred into some sort of action by the Whistleblowers, the Muckraking Media, or the Activated Public, and suggest how war crimes oversight might proceed in Congress. This article concludes that the historical existence and continued viability of these four post-action archetypes might be explained by the political structure of the U.S. Government, and specifically the separation of powers between the Legislative Branch and the Executive Branch and the relationship between the House of Representatives and the Senate and between congressional leaders and those in positions of less power.

Part I of this article addresses Congress’s authority and mandate to engage in oversight, explores the unique nature of war crimes oversight, and summarizes the seven war crimes oversight archetypes. Part II describes the events of the My Lai massacre and examines congressional responses to alleged American war crimes in Vietnam. Part III describes the history of the prisoner abuse at Abu Ghraib, and examines congressional oversight after news of the abuse entered the public eye. Part IV draws upon the history of congressional responses to American war crimes during the Vietnam conflict and the Iraq War, identifies the common archetypes that have emerged during congressional war crimes oversight, and suggests that these archetypes in part owe their existence to the political structure of the U.S. Government. A short conclusion addresses what lessons military attorneys in particular might take from this sort of analysis.

## I. Congressional Oversight Authority and the Archetypes

Any article examining the history of congressional oversight of the Executive Branch’s handling of war crimes allegations and investigations—and concluding that there is historical precedent, and often good political reason, for powerful senators and representatives to *avoid* engaging in meaningful oversight of those investigations—should begin with at least some discussion of what sort of oversight is permitted

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<sup>18</sup> See *infra* notes 377–82 and accompanying text.

or required, either by the Constitution or by statute. Congress's underlying authority to engage in oversight of the Executive Branch is derived from its implied powers in the Constitution.<sup>19</sup> Under its enumerated powers, Congress has the authority to raise and support armies, provide and maintain a navy, and "make Rules for the Government and Regulation of the land and naval Forces."<sup>20</sup> Congress, moreover, has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>21</sup> The Supreme Court has repeatedly recognized Congress's oversight authority where either the Senate or the House has a legitimate legislative function.<sup>22</sup>

To fulfill the responsibilities created by its broad implied constitutional authority, Congress has enacted statutes and various Senate and House rules requiring Congress itself to engage in oversight. The Legislative Reorganization Act of 1946, for example—an act often viewed as laying the basis for the modern, well-defined congressional committee system—mandated that "each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee . . . ."<sup>23</sup> Under current law, this mandate has been revised to read that "each standing committee of the Senate and the House of Representatives shall review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee."<sup>24</sup> While the Senate has no specific rule requiring the Senate Armed Services Committee (or any other committee the work of which would touch on war crimes) to engage in any particular sort of oversight,

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<sup>19</sup> Frederick M. Kaiser, *Congressional Oversight 1* (2006), available at <http://www.fas.org/sgp/crs/misc/97-936.pdf>.

<sup>20</sup> U.S. CONST. art. I, § 8.

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.,* *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. . . . But, broad as is this power of inquiry, it is not unlimited.").

<sup>23</sup> Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 136, 60 Stat. 812.

<sup>24</sup> 2 U.S.C. § 190d (2006).

the House, in contrast, explicitly requires its standing committees to oversee the areas within their jurisdictions.<sup>25</sup> In addition, every standing committee of the House is required to adopt an oversight plan by 15 February of the first session of each Congress.<sup>26</sup> In its plan for the 110th Congress, the House Armed Services Committee, observing that “[t]he military tribunals and the detainees at Guantanamo Bay and elsewhere raise a number of critical issues that fall within the jurisdiction of the committee,” concluded that it would “conduct thorough oversight of, among other things, the possible implication of members of the armed services in alleged incidents of detainee abuse.”<sup>27</sup>

The language of the enacted Legislative Reorganization Acts and of the House Rules is, of course, open to interpretation, and does not explicitly require the Armed Services committees of either the House or the Senate to inquire into how the Executive Branch is administering and executing laws against war crimes, prisoner abuse, or atrocity. In its oversight plans for the 111th Congress, moreover, the House Armed Services Committee dropped the language announcing oversight of “alleged incidents of detainee abuse,” and instead restricted itself to more general language stating that it would “take other necessary actions and conduct related oversight.”<sup>28</sup> While it is authorized by the Constitution, by statute, and by Senate and House rules to engage in broad legislative oversight, and despite the statutory mandate that each standing committee in the House and the Senate “review and study” the application and execution of laws within its jurisdiction, Congress is not explicitly bound to engage in extensive oversight of the Executive Branch’s or military’s handling of allegations of or investigations into war crimes. Provided that the members of Congress believe—or claim to believe—that the military and the Executive Branch are handling such investigations correctly, the topic of war crimes need never arise in the Senate chamber or on the floor of the House. This conclusion is unsurprising, and helps to explain why it is that *archetypes* of war crimes

<sup>25</sup> See Rules of the United States House of Representatives, R. X, cl. 2(b)(2) (“Each committee . . . shall establish an oversight subcommittee, or require its subcommittees to conduct oversight in their respective jurisdictions . . .”).

<sup>26</sup> *Id.* R. X, cl. 2(d).

<sup>27</sup> U.S. House of Representatives, House Armed Services Comm., Oversight Plan for the 110th Congress, available at <http://armedservices.house.gov/oversight110.shtml>.

<sup>28</sup> U.S. House of Representatives, House Armed Services Comm., Oversight Plan for the 110th Congress, available at [http://armedservices.house.gov/oversight\\_plan.shtml](http://armedservices.house.gov/oversight_plan.shtml). In taking focus away from allegations of detainee abuse or war crimes, the Committee mirrored its stance in the oversight plans it adopted for the 105th through 109th Congresses as well.

oversight have emerged: given that Congress has the discretion to engage in such oversight, and clearly chooses at times not to do so, it makes sense that open discussion and hearings into alleged war crimes will only take place when senators and representatives have incentives to engage in this sort of oversight. Under what has been a relatively stable system of congressional organization, we should expect incentives to motivate similar sorts of behavior by similar types of congressional actors—whether established and powerful committee chairs or insurgent representatives eager to make names for themselves.

The question of Congress's authority to engage in oversight in general and war crimes oversight in particular segues neatly into the question of what it is that makes war crimes oversight unique and deserving of special attention from academics, political actors, and military personnel alike. First, like some other forms of oversight, war crimes oversight highlights one aspect of the system of checks and balances between branches of the Government established by the Constitution. When engaging in war crimes oversight, the Legislative Branch is explicitly weighing and judging both the military's actions and the Executive Branch's handling of situations fraught with legal and moral concerns. In part because of the extremely sensitive nature of war crimes investigations, congressional oversight in this context has the potential to affect or alter significantly the balance between the Legislative and Executive Branches—especially if the Legislative Branch highlights or uncovers attempts to conceal allegations or incidents of atrocity.

Second, incidents, allegations, and investigations of war crimes implicate serious national security concerns, on both what might be termed the "tactical" and "strategic" levels. On the tactical (or battlefield) level, published allegations or proofs of war crimes or atrocities committed by American military personnel clearly provide useful propaganda material to enemies of the United States, and may also inspire or encourage those enemies to publicize or commit atrocities of their own against American military personnel or civilians.<sup>29</sup> At the

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<sup>29</sup> Following the publication of information about the abuse of prisoners at Abu Ghraib, for example, al-Qaeda in Iraq released a horrific video showing a man who claimed to be Abu Musab al-Zarqawi, a key al-Qaeda figure, sawing off the head of Nick Berg, a twenty-six-year-old American who had been looking for work in Iraq. On the tape, the murderer stated that "the dignity of the Muslim men and women in Abu Ghraib and others is not redeemed except by blood and souls." See Roland Watson & Tom Baldwin, *American Civilian Seen Beheaded on Terror Website*, *TIMES* (London), May 12, 2004.



same time, of course, the knowledge not only that American personnel had allegedly committed war crimes, but also that military officers and American political actors were attempting to cover up or conceal those allegations, might inflame anti-American passions even more. On the strategic level, similarly, both the public dissemination of war crimes allegations and the willingness of the United States to police its own and hold accountable those responsible have implications for international alliances and partnerships.<sup>30</sup>

Third, congressional oversight of war crimes clearly implicates less pragmatic and more existential concerns over what role the United States wishes to play in world affairs and what moral place the United States wishes to maintain among the powers of the earth; at the very least, it would seem disingenuous for any nation fighting for liberty and freedom for all the world's people to cover up war crimes or to refuse to hold accountable those responsible for atrocities committed against civilians or military personnel.

Put another way, investigations into allegations of war crimes, and congressional oversight of war crimes and war crimes investigations, have the potential to affect dramatically U.S. policy and even performance on the battlefield.<sup>31</sup> War crimes investigations have the potential to see the United States at both its worst (when American military personnel commit atrocities) and its best (when those responsible for such atrocities are held accountable and atrocities are

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Concern over the effect of publicizing news of war crimes or allegations of war crimes is regularly invoked by members of the Executive and Legislative Branches. In deciding to fight the release of additional photographs from Abu Ghraib, for example, President Barak H. Obama announced that, in his view, “[t]he most direct consequence [of releasing such images] would be to further inflame anti-American opinion and put our troops in greater danger.” Editorial, *Obama Defends Reversal on Releasing Detainee Photos*, FOXNEWS.COM, May 13, 2009, <http://www.foxnews.com/politics/2009/05/13/obama-defends-reversal-releasing-detainee-photos/>. See also VICTORIA FONTAN, VOICES FROM POST-SADDAM IRAQ 97–99 (2009) (“In all the insurgency videos that have been collected, there is a clear before-and-after Abu Ghraib effect to be found.”).

<sup>30</sup> See Watson & Baldwin, *supra* note 29 (“The beheading [of Berg] will increase the pressure on Tony Blair to distance Britain not only from the actions of American troops, but also from the more general policies being pursued.”).

<sup>31</sup> See, e.g., Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939 (1998); MICHAEL W. ALEXANDER, COHESIVE TACTICAL UNITS ARE EFFECTIVE COMBAT UNITS 15–16 (1994) (“[Strong leadership and strict discipline were quite lacking in [Task Force Barker from the 23rd Americal Division]. Eventually, at My Lai 4 this lack of cohesion would cause this unit to commit a horrible war crime.”).

strongly and uniformly denounced). The military itself, of course, has a special role to play in investigating war crimes. As in many other contexts, it is the military that is on the front line when allegations of war crimes become known—and it is the military that understandably becomes a focus of congressional investigators when Congress chooses to engage in war crimes oversight. Military investigators and prosecutors themselves thus have a heightened duty in the war crimes context: Where the reputation of the U.S. military, and the United States itself, has been tarnished by war criminals, it is the duty—and the privilege—of those investigators and prosecutors not only to enforce the laws, but also to show the rest of the military, the country, and the world community that the United States will not condone atrocity, even when it is committed in the heat of battle. Should military investigators and prosecutors fail in this duty, they have the potential to cause as much damage to United States' interests (and create as much danger to American soldiers on the battlefield) as did those who committed the original war crimes.

An archetype is an original pattern or model of which all things of the same type are representations or copies; the term “archetype” can thus describe similar-seeming figures, such as the Hero,<sup>32</sup> the Sage, or the Trickster, who reappear throughout history and across cultures in different incarnations. As a historical tool, archetypes are useful and important both because political actors often attempt to invoke them (as George Washington consciously sought to emulate Cincinnatus, the Roman general who returned to his farm rather than retain dictatorial power<sup>33</sup>) and because the structures of political and social systems create opportunities for familiar figures and events to emerge at different points in history.<sup>34</sup> This article argues that historical studies of the war crimes at My Lai and the prisoner abuse scandal at Abu Ghraib demonstrate that seven archetypes of war crimes oversight have emerged consistently in the past when Congress ultimately engages in serious or significant oversight, and that, for reasons relating to the structure of the U.S. Government, those archetypes seem likely to be replicated in future instances in which American troops are alleged to have committed war crimes. While these seven archetypes are discussed at length in Part IV,

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<sup>32</sup> See, e.g., JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (1949).

<sup>33</sup> See, e.g., GARY WILLS, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* (1984).

<sup>34</sup> For more on archetypes, especially in psychology and mythology, see CARL GUSTAV JUNG, *IX COLLECTED WORKS OF C.G. JUNG: THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS* (1959).

in examining the history of My Lai and Abu Ghraib in depth, it is useful to understand and keep in mind the nature and definitions of each of these archetypes:

- The Whistleblowers (Archetype 1): The initial archetype, the Whistleblower—who is often a member of the military—is the participant or observer who, disgusted or disturbed by the war crimes or atrocities, attempts to alert his or her military superiors or members of the Executive and Legislative Branches. The Whistleblowers can face disbelief, opposition from those who wish to conceal allegations of war crimes, and even danger from military personnel and those who believe that the Whistleblowers have betrayed their fellows. The Whistleblower informs legislators, who may then choose whether to engage in oversight, but has little impact on the oversight itself.
- The Muckraking Media (Archetype 2): Regardless of whether a Whistleblower successfully communicates with his or her superiors or with Congress, in order for congressional oversight of war crimes to be sparked, usually some journalist must seize upon the story and publicize the allegations on a broad scale. While in a previous era such journalists might have faced opposition from major media outlets, in the modern era (and especially in light of technological changes), there are few, if any, barriers to widespread publication. As the Whistleblower informs legislators and media, the Muckraking Media disseminates allegations of war crimes to the public (as well as to legislators); while legislators can still choose whether to engage in oversight, publication of allegations by the Muckraking Media obviously raises the political risk should they choose not to do so.
- The Activated Public (Archetype 3): Even with the existence of a Whistleblower and the Muckraking Media widely disseminating a story about allegations of war crimes, Congress will likely not engage in serious oversight of war crimes in the absence of an

Activated Public, which for some reason cares deeply about the allegations or the current military mission. Historically, the public's activation in this context correlates with opposition to or concern about the extent of U.S. military involvement in a particular conflict. Given the risks and rewards inherent to political actors in the U.S. system, effective oversight is far less likely in the absence of an Activated Public.

The first three archetypes are best thought of as general prerequisites to legislative action and effective oversight. Such oversight is far less likely to occur in the absence of any one of the three, but the presence of any of the three probably yields little information about what sort of oversight observers should expect. The nature of the oversight sparked by these three archetypes is better predicted by the remaining four:

- The False Start (or Slow-Running) Senators (Archetype 4): When considering whether to engage in serious or significant war crimes oversight, the False Start Senators, while perhaps initially quite enthusiastic about the notion of Congress engaging in such oversight, pull back from that initial enthusiasm and attempt to take a much less central role or else avoid engaging in oversight altogether. As the investigation into Abu Ghraib demonstrates, however, in some instances these senators may actually wish to continue with war crimes oversight, but in a much slower and—above all—politically quieter process.
- The Obstructionist House Leaders (Archetype 5): Historically, congressional war crimes oversight in the House of Representatives has been hindered by powerful, politically conservative (both Democrat and Republican), pro-administration, pro-military Representatives who seem to be intent on obstructing any *real* inquiry into allegations of atrocities. Effective war crimes oversight—and, particularly galling in the My Lai context, perhaps even effective prosecution by military attorneys—must therefore take place in spite of these leaders.

- The Our-Soldiers-First Legislators (Archetype 6): Congressional war crimes oversight has historically also brought forth Our-Soldiers-First Legislators, who make clear that they will oppose any attempt to hold American military personnel accountable for war crimes regardless of the facts, simply because they will always support American soldiers. There is significant overlap between the Our-Soldiers-First Legislators and both the False Start Senators and the Obstructionist House Leaders, but the Our-Soldiers-First Legislators are generally less openly concerned about national security issues or questions of U.S. policy than they are about promoting the view that American soldiers are uniformly virtuous.
- The Gadfly Representatives (Archetype 7): Given the strong structural elements weighing against effective congressional war crimes oversight, much of what might be termed “oversight” results from the less formal efforts of marginalized, less-powerful members of the House of Representatives who are eager either to remain in the public eye or else to oppose what they might view as absolute conservative, majoritarian control of the House’s powers.

While the fact that consistent archetypes have emerged in past instances of congressional war crimes oversight does not, of course, mean that they will again emerge in the future, the very consistency of these archetypes over time suggests that future war crimes investigations will likely see the emergence of, at the least, *similar* archetypes. If that is true, then it seems possible to use the existence of these archetypes in the future to help determine when and whether particular war crimes allegations or investigations will become as important in the national consciousness as My Lai or Abu Ghraib, or, instead, be largely ignored and ultimately forgotten.

## II. Vietnam Era War Crimes

During the late 1960s, a story broke in the United States about a massacre by soldiers of the Americal Division of unarmed Vietnamese

civilians in the hamlet of My Lai (4).<sup>35</sup> The story emerged after Ronald Lee Ridenhour, a former soldier who had witnessed the massacre, wrote letters to American military and political leaders and eventually to news organizations,<sup>36</sup> and after Seymour Hersh, a young maverick journalist working at the same time, tracked down Lieutenant William Calley, the commander of the soldiers who had allegedly committed the massacre, and published news reports based on Calley's recollections.<sup>37</sup> In response to the allegations, which were quickly followed up by additional news stories and interviews, several distinguished senators initially called for congressional hearings, but quickly backed off. Powerful conservative, hawkish representatives on both sides of the aisle, meanwhile—perhaps anxious to maintain American strength against what they believed was the implacable foe of world communism—used tools of congressional oversight to minimize the effects of war crimes testimony, hinder military prosecution, and even harass those soldiers responsible for exposing American atrocities.

Eventually at least one congressman, Democratic Representative Ronald V. Dellums of California, an avowed radical and socialist, used the allegations as a springboard to buck his party's leadership and serve his own political agenda by holding unofficial hearings attempting to discredit American policy in Vietnam by highlighting additional allegations (at least some of which were manufactured)<sup>38</sup> of American war crimes. Part II.A describes the events of 16 March 1968, when soldiers from the Americal Division attacked My Lai (4), and the emergence of knowledge about the massacre into the public eye. Part II.B examines congressional oversight of the My Lai massacre and Dellums's attempts to engage in "gadfly" oversight of American war crimes more generally. Part II.C briefly describes the aftermath of the My Lai investigation and oversight.

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<sup>35</sup> "My Lai" is properly known as "My Lai (4)"; it was simply one of four hamlets surrounding the Son My village in the Son Tinh district of Quang Ngai province.

<sup>36</sup> Editorial, *Songmy 1: American Troops Are Accused of A Massacre*, N.Y. TIMES, Nov. 23, 1969, at E2 (citing the Ridenhour letter of April 1969); MICHAEL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY 103 (2002).

<sup>37</sup> See REPORTING VIETNAM, PART TWO: AMERICAN JOURNALISM 1969–1975, at 13–27 (Milton J. Bates et al. eds., 1998); SEYMOUR M. HERSH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH 135 (1970); Seymour M. Hersh, *Lieutenant Accused of Murdering 109 Civilians*, ST. LOUIS POST-DISPATCH, Nov. 13, 1969.

<sup>38</sup> See, e.g., *infra* note 154.

A. “A tragedy of major proportions involving unarmed Vietnamese”<sup>39</sup>

“No one will ever know exactly what happened at My Lai on March 16, 1968,” declared former military prosecutor William George Eckhardt in a 2000 article.<sup>40</sup> While Eckhardt, the chief trial counsel in the My Lai courts-martial, might have been overstating the problem, it is true that the sources of facts are numerous and include news accounts, journalistic books, the report of the official military investigation (the “Peers Report”), congressional testimony, trial testimony, and historical works.<sup>41</sup> Both the South Vietnamese, many of whom viewed the destruction of a nest of Viet Cong supporters with pleasure,<sup>42</sup> or who were at least unsurprised at the incidence of atrocity in wartime,<sup>43</sup> and the North Vietnamese and the Viet Cong, who were themselves attempting to turn the attack into a propaganda coup,<sup>44</sup> further muddied the waters by distributing vast amounts of propaganda, which often bore very little resemblance to the truth.<sup>45</sup> While much of the history of the incident is thus confused or unclear, certain parts of the historical record are more than sufficiently clear to allow for historical analysis.

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<sup>39</sup> HÉBERT REPORT, *supra* note 2.

<sup>40</sup> William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 675 (2000).

<sup>41</sup> *Id.* Compare *id.* at 674–78 (the former prosecutor’s theory of events), with GUENTER LEWY, *AMERICA IN VIETNAM* 325–26 (paperback ed. 1980) (1978) (providing a conservative view in a book arguing that most so-called “war crimes” actually did not violate the laws of war). For short summaries of the action, see VIETNAM WAR CRIMES 63–64 (Samuel Brenner ed., 2006); NEIL SHEEHAN, *A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM* 689 (Vintage Books ed. 1989) (1988). For book-length treatments of the subject, see BELKNAP, *supra* note 36; MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* (1992); WILLIAM L. CALLEY & JOHN SACK, *LIEUTENANT CALLEY: HIS OWN STORY* (1974); HERSH, *supra* note 37; WILLIAM R. PEERS, *THE MY LAI INQUIRY* (1979).

<sup>42</sup> See, e.g., *Testimony of Mr. Ta Linh Vien*, Dec. 8, 1970, Folder 45, Box 01, My Lai Collection, The Vietnam Archive, Texas Tech University (providing the account of a former senior South Vietnamese intelligence officer that My Lai was the base of a powerful Viet Cong unit, and that the Americans destroying My Lai (4) were engaging a legitimate military target).

<sup>43</sup> See, e.g., HERSH, *supra* note 37, at 144–50.

<sup>44</sup> See, e.g., *PAVN Political Section Report on Massacre at My Lai*, Mar. 1968, Folder 14, Box 38, Douglas Pike Collection: Unit 03–War Atrocities, The Vietnam Archive, Texas Tech University (containing propaganda distributed by the People’s Army of North Vietnam painting a picture of a bucolic, peaceful, and productive village invaded by brutish, U.S. Soldiers, “with thick bearded faces filled with anger”).

<sup>45</sup> For the reaction of the government of South Vietnam in attempting to cover up the massacre, see HERSH, *supra* note 37, at 145–50.

*1. Massacre at My Lai: 16 March 1968*

On 16 March 1968, U.S. soldiers from Charlie (C) Company of Task Force Barker, a unit of the Americal Division, under the command of Captain Ernest Medina, attacked the South Vietnamese hamlet of My Lai (4), which they suspected of harboring the 48th Viet Cong Battalion.<sup>46</sup> The soldiers of Charlie Company, who, like other American soldiers, referred to the entire area around Son My as “Pinkville,”<sup>47</sup> were upset by having received several casualties from mines and booby traps in the days before the attack.<sup>48</sup> Although the company had not seen much actual combat, as one soldier remarked after the deaths caused by mines and booby-traps, “the company . . . had revenge on its mind.”<sup>49</sup> On the evening before the attack, immediately after the memorial service for a popular sergeant, Captain Medina briefed his platoon leaders, including Lieutenant William L. Calley, and the soldiers of Charlie Company on the operation planned for March 16th. While there are sharply conflicting opinions about what Medina said, all sides (including Medina himself)<sup>50</sup> agree that the captain, *at the least*, ordered his troops to destroy all crops, kill all livestock, burn all houses, and pollute the water wells of the village.<sup>51</sup> As the Peers Commission noted, Medina additionally “created the impression in the minds of many men in the company that they were to kill or destroy everything in the area. He also reminded them that . . . this operation was their chance to get even.”<sup>52</sup>

The next morning, Medina, along with Calley’s 1st Platoon and elements of the 2nd Platoon under Lieutenant Stephen K. Brooks, flew by helicopter into My Lai, where the Americans encountered essentially no resistance.<sup>53</sup> Over the next several hours, Medina’s soldiers rounded up and executed hundreds of residents of the village, almost all of whom were unarmed civilians. At least a few of the victims were tortured and raped.<sup>54</sup> The Peers Commission arrived at what it called “a very

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<sup>46</sup> LEWY, *supra* note 41, at 325–26; Eckhardt, *supra* note 40, at 675.

<sup>47</sup> According to Hersh, the name derived from the fact that the area’s higher population density caused it to appear in red on Army maps, and had nothing to do with the suspected political leanings of its residents. HERSH, *supra* note 37, at 23.

<sup>48</sup> *Id.* at 33–38; Eckhardt, *supra* note 40, at 675.

<sup>49</sup> HERSH, *supra* note 37, at 38–39.

<sup>50</sup> BELKNAP, *supra* note 36, at 58.

<sup>51</sup> Eckhardt, *supra* note 40, at 675, 678–80.

<sup>52</sup> PEERS, *supra* note 41, at 170.

<sup>53</sup> *See, e.g.*, Eckhardt, *supra* note 40, at 675–76.

<sup>54</sup> *See* BELKNAP, *supra* note 36, at 68–69 (“According to Michael Bilton and Kevin Sim, several members of Charlie Company became ‘double veterans,’ GI slang for raping a



conservative figure” of 175 to 200 women, children, and old men, all noncombatants, killed by Charlie Company,<sup>55</sup> though many news reports placed the death toll much higher.<sup>56</sup> Calley himself allegedly personally slaughtered over 100 Vietnamese civilians.<sup>57</sup> Yet, not all the Americans at My Lai committed atrocities: three American soldiers, a helicopter crew commanded by Warrant Officer Hugh Thompson, not only refused to take part in the slaughter, but even held off American troops by pointing weapons while the crew rescued some Vietnamese civilians and flew them to safety.<sup>58</sup> Despite Thompson’s angry protests to his commander about the killings and despite evidence that the Peers Commission suggested “should have alerted responsible individuals at every higher level of command . . . that something was seriously wrong,”<sup>59</sup> the massacre remained relatively unknown for almost a year after the incident.

## 2. *The Whistleblowers, the Media, and the Public*

“I have considered sending this to newspapers, magazines and broadcasting companies,” explained 23-year-old college student and Vietnam veteran Ronald Lee Ridenhour<sup>60</sup> in a 29 March 1969 letter he sent to the dovish Democratic Arizona Congressman Morris Udall, with copies to President Richard Nixon, the Secretaries of Defense, State, and the Army, the Chairman of the Joint Chiefs of Staff, and twenty-two other congressmen, “I somehow feel that this investigation and action by

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woman and then murdering her.”); PEERS, *supra* note 41, at 175 (“With this kind of action going on it seems incredible, but at least two rapes were committed by the 2nd Platoon, and in one case the rapist is reported to have then shoved the muzzle of his M-16 rifle into the vagina of the victim and pulled the trigger . . . this kind of barbarity was very difficult to comprehend.”).

<sup>55</sup> PEERS, *supra* note 41, at 180.

<sup>56</sup> *E.g.*, Henry Kamm, *Vietnamese Say G.I.’s Slew 567 in Town*, N.Y. TIMES, Nov. 17, 1969, at 1.

<sup>57</sup> BELKNAP, *supra* note 36, at 60, 69 (“The soldier responsible for killing the most Vietnamese was Lieutenant Calley.”). According to Belknap, sources confirm that Calley personally fired numerous fresh clips of ammunition into his M-16 in order to kill Vietnamese civilians he had ordered thrown into a ditch, and Calley even ran after a bloody but unhurt two-year-old boy who had managed to crawl out of the ditch, threw him back in, and shot him. *Id.* at 72.

<sup>58</sup> *Id.* at 73–79; Eckhardt, *supra* note 40, at 700–03; David Montgomery, *30 Years Later, Heroes Emerge From Shame of My Lai Massacre*, WASH. POST, Mar. 7, 1998.

<sup>59</sup> PEERS, *supra* note 41, at 180.

<sup>60</sup> For contemporary background on Ridenhour, see Christopher Lydon, ‘*Pinkville*’ *Gadfly*, N.Y. TIMES, Nov. 29, 1969, at 14.

the Congress of the United States is the appropriate procedure.”<sup>61</sup> “As a conscientious citizen,” Ridenhour added, “I have no desire to further besmirch the image of the American serviceman in the eyes of the world.”<sup>62</sup> This letter, which Ridenhour decided to mail at the urging of one of his former high school and college writing instructors,<sup>63</sup> helped to instigate a massive military investigation, international protests, congressional hearings, courts-martial, and, ultimately, a sea change in American attitudes about the Vietnam conflict.

It seemed to Ridenhour that, while his letter drew some attention from military and congressional investigators—one Army investigator came to speak with him, and Congressman Udall expressed some personal interest—the Army was going to try to “whitewash” the case and keep his evidence secret.<sup>64</sup> He hired a literary agent and contacted the *Arizona Republic*, but found that only *Ramparts* Magazine was interested in his story.<sup>65</sup> “[T]hose people have a reputation for being radical and nutty,” Ridenhour explained to *New York Times* reporter

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<sup>61</sup> Editorial, *Songmy 1*, *supra* note 36, at E2 (citing Ridenhour letter); BELKNAP, *supra* note 36, at 103.

<sup>62</sup> Editorial, *Songmy 1*, *supra* note 36, at E2 (citing Ridenhour letter); HERSH, *supra* note 37, at 109 (same).

<sup>63</sup> According to Hersh, Ridenhour was at first interested in using the story of what happened at My Lai as his entry into a career as a journalist, but was convinced by his former teacher Arthur A. Orman to give the story to governmental investigatory agencies. HERSH, *supra* note 37, at 105. Together, Orman and Ridenhour decided to send the letters to leading members of both the House and Senate, in addition to the White House, Pentagon, and Senate. “I had been drafted and worked for the Army’s Adjutant General’s Corps for a while,” explained Orman, “and I knew how responsive the Army was to Congress.” *Id.* at 106.

<sup>64</sup> Lydon, *supra* note 60, at 14. In fact, the letter was receiving serious attention at the highest levels of the military and the Congress. As is perhaps normal in the case of unsolicited letters from non-constituents, of the thirty offices to which Ridenhour sent a copy of his letter, twenty-two later said they had no record of having received the communication. HERSH, *supra* note 37, at 109–10. When Congressman Udall heard about the letter from one of his aides, Roger Lewis, however, Udall immediately wrote to both Secretary of Defense Laird and Representative L. Mendel Rivers, the chair of the House Armed Services Committee. Rivers’s staff had already received a copy of the letter, and Rivers responded by sending a letter on 7 April 1969, urging the Department of the Army to investigate Ridenhour’s claims; Laird, reportedly, had already forwarded his own copy of the letter to the Army several days earlier. BELKNAP, *supra* note 36, at 104. It was only after the Army informed Ridenhour about Lieutenant Calley’s forthcoming court-martial that Ridenhour became convinced that the Army was attempting to make Calley a scapegoat for everything that had happened at My Lai, and so began trying to interest national media outlets in his story. *Id.* at 117. *But see* Peter Osnos, *Mylai Story Almost Went Unnoticed*, WASH. POST, Dec. 1, 1969, at A10.

<sup>65</sup> Lydon, *supra* note 60, at 14.

Christopher Lydon.<sup>66</sup> “They’re not taken seriously by the public at large. And, let’s face it, it’s the public at large—the silent majority—that has to face this sort of thing.”<sup>67</sup> Ridenhour, however, was not the only person working on breaking the story.<sup>68</sup> Prompted by an anonymous tip on 22 October 1969, independent journalist Seymour M. Hersh began investigating a report that the Army was trying to “court-martial some guy in secret at Fort Benning for killing seventy-five Vietnamese civilians.”<sup>69</sup> Hersh traveled to Fort Benning, where he met Calley, and then returned to Washington to write his story exposing the official military investigation.<sup>70</sup> With *Life* and *Look* magazines uninterested, Hersh turned to the obscure Dispatch News Service, which offered the story by cable on November 12th to fifty newspapers around the country. More than thirty, including the *Boston Globe*, *San Francisco Chronicle*, and *Saint Louis Post-Dispatch*, printed the article the following day.<sup>71</sup> A few days later, having been granted permission by the Army to visit an area near My Lai for a single hour, Henry Kamm, the *New York Times*’ roving Southeast Asia correspondent, published a front-page story in which he reported that a small group of South Vietnamese survivors claimed that “a small American infantry unit killed 567 unarmed men, women, and children as it swept through their hamlet on March 16, 1968.”<sup>72</sup>

Over the next two weeks, Hersh followed up his initial story about the Army investigation with reports on personal interviews with former members of Charlie Company,<sup>73</sup> including Paul Meadlo, a 22-year-old Indianan who was deeply psychologically troubled by the events at My Lai.<sup>74</sup> On 20 November 1969, the same day that newspapers carried Hersh’s second Dispatch News Service story about the massacre, the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> BELKNAP, *supra* note 36, at 117–20; HERSH, *supra* note 37, at 132; *see, e.g.*, Robert M. Smith, *Two in Congress Ask Study of Massacre Report*, N.Y. TIMES, Nov. 21, 1969, at 1.

<sup>69</sup> HERSH, *supra* note 37, at 133.

<sup>70</sup> *Id.* at 135; Hersh, *supra* note 37.

<sup>71</sup> *See* REPORTING VIETNAM, PART TWO: AMERICAN JOURNALISM 1969–1975, at 13–27 (Milton J. Bates et al. eds., 1998); HERSH, *supra* note 37, at 135; Hersh, *supra* note 37.

<sup>72</sup> Kamm, *supra* note 56, at 1.

<sup>73</sup> *See, e.g.*, Seymour M. Hersh, *Hamlet Attack Called “Point-Blank Murder,”* ST. LOUIS POST-DISPATCH, Nov. 20, 1969, *reprinted in* 2 REPORTING VIETNAM: AMERICAN JOURNALISM 1969–1975, at 417–21 (Milton J. Bates et al., eds., 2000); Seymour M. Hersh, *Ex-GI Tells of Killing Civilians at Pinkville*, ST. LOUIS POST-DISPATCH, Nov. 25, 1969, *reprinted in* REPORTING VIETNAM, *supra*, at 422.

<sup>74</sup> HERSH, *supra* note 37, at 140.

*Cleveland Plains Dealer*, ignoring warnings from one of the prosecutors in the Calley court martial, published photographs of the killings that had been taken by Ronald L. Haeberle, the Army combat photographer who had been assigned to Charlie Company.<sup>75</sup> Inspired by his feelings of guilt, Meadlo agreed to speak on the *CBS Evening News with Walter Cronkite*; Meadlo's interview with Mike Wallace of the CBS evening news aired on November 24th.<sup>76</sup> When asked "how do you shoot babies?" by a stunned Wallace, Meadlo, the father of two children, replied "I don't know. It's just one of those things."<sup>77</sup> "It just seemed like a natural thing to do at the time," Meadlo explained when Wallace pressed him on what he was thinking while killing civilians.<sup>78</sup> While some newspapers remained cautious for several days or weeks,<sup>79</sup> in light of the evidence Hersh coaxed from participants such as Meadlo, Michael Bernhardt, and Michael Terry, the national mood began to change.<sup>80</sup>

#### B. Congressional Investigations and Hearings into Vietnam War Crimes

Within days of Seymour Hersh breaking the story about the Army's ongoing investigation and prospective court-martial of Lieutenant Calley, legislators began to agitate for Congress to take up an investigation into what had happened and into whether the military had sought to cover up the actions of American soldiers.<sup>81</sup> On November 21, for instance, Republican Ohio Representative William E. Minshall announced that he

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<sup>75</sup>*Id.* at 137–38; Editorial, *The My Lai Massacre*, TIME, Nov. 28, 1969, <http://www.time.com/time/magazine/article/0,9171,840403,00.html>.

<sup>76</sup> Editorial, *'So I . . . Killed 10 or 15'; Killings in Mylai Still Haunt Vietnam Veteran*, WASH. POST, Nov. 25, 1969, at A1.

<sup>77</sup> *Transcript of Interview of Vietnam War Veteran on His Role in Alleged Massacre of Civilians at Songmy*, N.Y. TIMES, Nov. 25, 1969, at A16.

<sup>78</sup> Bill Richards, *My Lai Participant Tries to Forget; Ex-GI Meadlo, a Decade After the Massacre, Says He Feels Ashamed*, WASH. POST, Nov. 13, 1979, at A4.

<sup>79</sup> *E.g.*, Editorial, *Pentagon Says Viet Killings Exaggerated*, WASH. POST, Nov. 17, 1969, at A16; *see also* HERSH, *supra* note 37, at 136–38.

<sup>80</sup> Peter Braestrup & Stephen Klaidman, *Three Vietnam Veterans Tell of Hamlet Slayings*, WASH. POST, Nov. 20, 1969, at A1. Hersh later criticized this story for, in his view, partially diminishing the impact of Haeberle's photographs and Bernhardt and Terry's eyewitness reports by "suggesting that the hardships suffered by Charlie Company might be responsible for its actions." HERSH, *supra* note 37, at 138–39. *See also* Richard Harwood & Laurence Stern, Op-Ed., *Pinkville Symbolizes Brutalization That Inevitably Afflicts Men at War*, WASH. POST, Nov. 26, 1969, at A13 (suggesting that the story of "Pinkville" and the words of Paul Meadlo "will symbolize the brutalization that inevitably afflicts men at war.").

<sup>81</sup> *See, e.g.*, Davidson, *supra* note 11, at 300.

was asking the Democratic Chairman of the House Defense Subcommittee to hold hearings. New York Republican Senator Charles E. Goodell added that he was interested in the Senate Armed Services Committee launching a “full investigation.”<sup>82</sup> Two days later, Senate Majority Leader Mike Mansfield, echoing Goodell, called for a “full and independent inquiry” into charges that U.S. Soldiers had committed atrocities in Vietnam.<sup>83</sup> “The Senate armed services committee ought to look into it, find out what happened, and get to the bottom of it,” Mansfield explained.<sup>84</sup> The Peers Commission noted that “several committees of the Senate and the House of Representatives were vying for the right to conduct an investigation into the incident,”<sup>85</sup> but that the senators and congressmen ultimately settled on the Senate and House Armed Services Committees under the chairmanship of Senator John C. Stennis and Congressman L. Mendel Rivers, respectively, as the proper venues for an investigation.

### *1. False Start Senators and Our-Soldiers-First Legislators*

Even in the immediate aftermath of Congress’s decision to make the Senate and House Armed Services Committees responsible for investigating war crimes at My Lai, numerous senators—including John C. Stennis, the Chairman of the Senate Armed Services Committee—helped nip in the bud the prospect of hearings in the Senate by calling for a non-congressional investigation and by coming out strongly against holding American servicemen responsible for alleged war crimes.

Not all members of Congress were happy with the notion of congressional inquiry; Democratic senators, in particular, seemed interested in somehow avoiding taking on personal or even institutional responsibility for holding the hearings.<sup>86</sup> Speaking in England, Maine Senator Edmund S. Muskie announced, “It’s even conceivable . . . that

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<sup>82</sup> Smith, *supra* note 68, at 1.

<sup>83</sup> Editorial, *Mansfield Asks Congress Study Into Alleged Vietnam Massacre*, N.Y. TIMES, Nov. 23, 1969, at 3.

<sup>84</sup> *Id.*

<sup>85</sup> PEERS, *supra* note 41, at 19.

<sup>86</sup> *Cf.* BELKNAP, *supra* note 36, at 136 (describing token Democratic staffer Daniel Patrick Moynihan’s support for the proposal by former Supreme Court Justice and Ambassador to the U.N. Arthur Goldberg and thirty-three other attorneys and professors for the president to appoint a special commission of “distinguished civilians and military general officers” to launch an investigation of American military policy and rules of engagement in Vietnam).

in order to get into the larger questions, as part of the process of self-analysis, we should have a commission of inquiry like the President's commission on violence."<sup>87</sup> Far more surprisingly, Senator John Stennis, the man put forward two weeks before by Majority Leader Mansfield as the perfect leader of a war crimes investigation, proposed at the beginning of December that Nixon create a special commission to investigate the killings.<sup>88</sup> "I frankly think this is the most effective way to get at this," Stennis announced, adding that "a private study by an impartial group of 'outstanding men' would be preferable to a Congressional hearing."<sup>89</sup> Put another way, Stennis was attempting to foist off the Legislative Branch's oversight authority and responsibility onto a commission appointed by the Executive Branch.

Stennis's desire to involve Nixon and the Executive Branch in the investigation might have had its roots in the fact that, in the month between Hersh's breaking the story on November 13th and Stennis's statement to the press on December 8th, the issue of My Lai had become more complicated and had taken on significant international overtones. On 26 November 1969, the House and Senate Armed Services Committees had summoned Secretary of the Army Stanley R. Resor to testify.<sup>90</sup> It was Resor's testimony the next day, accompanied by slides of Ronald Haerberle's pictures, that sickened the queasy Representative Arend and combat-hardened Senator Inouye.<sup>91</sup> Even before Resor testified, however, it was becoming clear that Pentagon and Executive Branch officials could not agree on something as simple as when they had learned about the alleged war crime. The day before Resor testified, House Republican Leader Gerald R. Ford said that the attack "was known about by top Army officers," though he added that he did not "have it first hand" or "know them by name."<sup>92</sup> The same reporter pointed out, however, that Clark M. Clifford, who was the Secretary of Defense in March of 1968, claimed never to have heard of the event until

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<sup>87</sup> Anthony Lewis, *Study of Songmy Urged by Muskie*, N.Y. TIMES, Nov. 30, 1969, at 26.

<sup>88</sup> Editorial, *Stennis Urges a Panel Study of Vietnam Slayings*, N.Y. TIMES, Dec. 8, 1969, at 3.

<sup>89</sup> *Id.* Perhaps Stennis's hesitation explained why it seemed to the Peers Commission that "the House Armed Services Committee (HASC), with its investigation subcommittee, had the higher prerogative," and why Representative Rivers took the lead in shaping the congressional investigations into My Lai. PEERS, *supra* note 41, at 19.

<sup>90</sup> E.W. Kenworthy, *Resor Called to Testify About Alleged Massacre*, N.Y. TIMES, Nov. 26, 1969, at 1.

<sup>91</sup> *E.g.*, Greider, *supra* note 4, at A1.

<sup>92</sup> Kenworthy, *supra* note 90, at 1.

the story broke in the newspapers in November.<sup>93</sup> One Pentagon spokesman carefully explained that no high Army or Defense Department officials had been aware of the alleged massacre until March or April of 1969.<sup>94</sup>

Attempts in the Senate to pursue hearings into the events at My Lai were further complicated by the reactions of those conservative senators who vigorously opposed holding Medina, Calley, and their subordinates accountable. On November 25th, South Carolina Democratic Senator Ernest F. Hollings, speaking to a nearly empty chamber, demanded to know whether “every soldier who had committed ‘a mistake in judgment’ during the heat of combat was ‘going to be tried as common criminals, as murders? [*sic*]’”<sup>95</sup> Colorado Republican Peter H. Dominick meanwhile attacked CBS for carrying the interview with Meadlo, and warned that the broadcast might jeopardize both Calley’s and Meadlo’s legal rights. “What kind of country have we got,” Dominick asked, “when this kind of garbage is put around?”<sup>96</sup> In an interview on 15 January 1970—reported the next day by Walter Cronkite—Louisiana Democrat Allen Ellender tersely announced that the slain Vietnamese “got just what they deserved.”<sup>97</sup> (Congressional leaders, including Stennis, could clearly see that few colleagues were enthusiastic about the prospect of drawn-out hearings—and were fully aware that conservatives such as Hollings and Elleander would oppose such hearings every step of the way.)

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<sup>93</sup> *Id.* Ronald L. Ziegler, President Nixon’s press secretary, announced that Nixon had learned about the allegations several months before Hersh published his story in November of 1969. Smith, *supra* note 1, at 1.

<sup>94</sup> Smith, *supra* note 1, at 1.

<sup>95</sup> Kenworthy *supra* note 90, at 1.

<sup>96</sup> *Id.*

<sup>97</sup> HERSH, *supra* note 37, at 155. Conservatives and war hawks in the House echoed such attacks on the My Lai investigation and prosecution. Louisiana Democrat John R. Rarick, for instance, a state colleague of the man who ultimately presided over the House hearings, and a former supporter of George Wallace’s presidential campaign, “consistently described My Lai 4 as the ‘massacre hoax,’ and warned, ‘The American people are daily becoming more aware that the news media is being used as a weapon of psychological warfare against them.’” *Id.* at 156. Rarick, along with many other house members, later wrote to the White House after Calley’s conviction to protest the verdict. See BELKNAP, *supra* note 36, at 197.

2. *Obstructionism: The Rivers and Hébert Committee House Hearings*

While Stennis was arguably attempting to avoid presiding over drawn-out war crimes hearings by calling for the creation of a presidential commission, Representative L. Mendel Rivers, the Chair of the House Armed Services Committee, was following an entirely different path in attempting to minimize the damage caused by stories of American atrocities. As the Peers Commission had noted, Rivers's committee appeared to have a higher priority (i.e., Congress viewed the House Committee as more important than the Senate Committee) than even Stennis's in investigating events at My Lai.<sup>98</sup> Rivers, a Democrat, was far more interested in using his committee to provide unquestioned support for the military than he was in engaging in any sort of partisan struggle. As *New York Times* reporter Neil Sheehan noted after Rivers's death in 1970, even the views of the few dissenters on the Committee, none of whom could be classified as pacifists, were anathema to Rivers, who "suppressed them by maintaining a bipartisan majority of older conservative members."<sup>99</sup>

Rivers was an unabashed supporter of both the U.S. military and the United States' involvement in Vietnam: After one meeting, General William Peers, the head of the Peers Commission, noted that he thought that "the obvious bias of Rivers, 'who always supported the men and women in uniform,' made it unlikely that Congress would conduct an objective inquiry into the My Lai incident."<sup>100</sup> Recounting a meeting that he had had with Rivers on 11 December 1969, moreover, Peers, who had "always admired Mr. Rivers," reported that, while talking about the My Lai operation, Rivers "said, in effect, 'You know our boys would never do anything like that.'"<sup>101</sup> Four days later, even while members of his committee were still hearing testimony about the horrific crimes committed by some American soldiers, Rivers, joined by 140 other congressional hawks, pushed through a House resolution praising "each

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<sup>98</sup> PEERS, *supra* note 41, at 19.

<sup>99</sup> Neil Sheehan, *Rivers's Death Unlikely to Alter Views of House Unit on Military*, N.Y. TIMES, Dec. 29, 1970, at 11.

<sup>100</sup> BELKNAP, *supra* note 36, at 138. On November 24, Secretary of the Army Resor announced the creation of the all-military Peers Commission to investigate My Lai. "Not about to be upstaged by an army inquiry," *id.* at 137, Rivers hastily convened a hearing of the full Armed Services Committee.

<sup>101</sup> PEERS, *supra* note 41, at 20–21.



serviceman and veteran of Vietnam for his individual sacrifice, bravery, dedication, initiative, devotion to duty . . . .”<sup>102</sup>

Rivers began holding hearings in earnest on 9 December 1969 before the fourteen members of the Committee’s special investigating subcommittee; after the first day of testimony, Rivers announced that he was not yet ready to say that a massacre had taken place.<sup>103</sup> The following day, however, the subcommittee heard testimony from Hugh Thompson, the former warrant officer who had tried to halt the massacre. Once again, Rivers emerged from the closed hearing to announce that his subcommittee “had not been given information that would lead members to believe that American troops had engaged in a massacre” and that Thompson “did not report” that he had seen unnecessary civilian killings at My Lai.<sup>104</sup> Some fellow committee members and a number of military officers were aghast at Rivers’s claims.<sup>105</sup> “I didn’t know he could say that,” exclaimed one amazed congressman who had heard the testimony.<sup>106</sup> The *Washington Evening Star*, citing an unidentified committee member, reported that Thompson had repeated his allegations about the events at My Lai.<sup>107</sup> Rivers, in turn, denounced the anonymous source as “a damned liar,” and said that his own version of the testimony was accurate.<sup>108</sup> Despite the tension between Rivers and subcommittee members who apparently accepted that Charlie Company *had* committed a massacre, support remained high in the subcommittee for the military—even those elements responsible for war crimes. The next day, for example, the entire subcommittee reportedly jumped up and applauded Captain Medina, Calley’s direct superior and the man who had ordered the attack on My Lai, during his testimony.<sup>109</sup> Amid rumors that Rivers was attempting to “whitewash” the military, Secretary of Defense Melvin Laird convinced Rivers to call off the hearings before the full subcommittee;<sup>110</sup> Rivers then appointed a four-member panel,

<sup>102</sup> HERSH, *supra* note 37, at 157 (emphasis added).

<sup>103</sup> *Id.* at 167.

<sup>104</sup> Editorial, *Pilot’s Testimony Is Cited by Rivers*, N.Y. TIMES, Dec. 11, 1969, at 16.

<sup>105</sup> HERSH, *supra* note 37, at 168–69.

<sup>106</sup> *Id.* at 168.

<sup>107</sup> See, e.g., Editorial, *Rivers Picks Four to Study Songmy*, N.Y. TIMES, Dec. 13, 1969, at 13.

<sup>108</sup> *Id.*

<sup>109</sup> HERSH, *supra* note 37, at 168.

<sup>110</sup> BELKNAP, *supra* note 36, at 136; HERSH, *supra* note 37, at 169; Editorial, *supra* note 107, at 13 (“Asked about the ‘whitewash’ rumors, Mr. Rivers responded, ‘I ought to count 10 before I answer this.’ He added: ‘I am not in that business, but neither am I in

chaired by Louisiana Democrat F. Edward Hébert, one of his closest supporters, to investigate in greater depth.<sup>111</sup>

Possibly concerned about the leaks from the full subcommittee that had hindered Rivers's attempt to hold hearings, Hébert announced that all sessions of the special subcommittee would be closed, that witnesses would be prohibited from discussing their testimony outside of the hearing room, and that not even photographs of the witnesses would be permitted without the witnesses' permission.<sup>112</sup> Despite Resor's and Peers's urgent requests that the Hébert Panel refrain from questioning those witnesses either charged with crimes or scheduled as material witnesses at the courts-martial of those already charged, Hébert, saying that his subcommittee was "right on the edge of revolt," subpoenaed and heard testimony from 150 witnesses over the following months.<sup>113</sup> In June of 1970, the subcommittee issued a fifty-three-page report concluding that "a tragedy of major proportions"<sup>114</sup> had taken place, and that military and civilian officials in Vietnam had attempted to "cover up" what had happened.<sup>115</sup> The subcommittee's report "was not the favorable assessment of its handling of the My Lai matter for which the army had hoped," historian and law professor Michael Belknap observed in 2002.<sup>116</sup> Hébert was ostensibly incensed by what he saw as the Army's lack of cooperation, although—as Peers, albeit hardly an unbiased observer, points out—the panel had no time limit on its investigation, while the military report needed to be completed in time to bring prosecutions in a timely manner.<sup>117</sup> "The committee was hampered

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the business of trying to cater to some people who want to gut the military and destroy it during this time when we should be backing them up.").

<sup>111</sup> Editorial, *supra* note 107, at 13. The other members of the panel were Samuel S. Stratton (D-NY), William L. Dickinson (R-AL), and Charles S. Gubser (R-CA). "All are considered politically moderate to conservative," noted the *Times*. *Id.*

<sup>112</sup> Editorial, *Secrecy Is Imposed on My Lai Hearings*, N.Y. TIMES, Apr. 12, 1970, at 5.

<sup>113</sup> BELKNAP, *supra* note 36, at 139.

<sup>114</sup> HÉBERT REPORT, *supra* note 2, at 5.

<sup>115</sup> Editorial, *House-Panel Says the Army Hampered Investigation Into Songmy Incident*, N.Y. TIMES, July 16, 1970, at 15.

<sup>116</sup> BELKNAP, *supra* note 36, at 139. Explaining why the Rivers Committee did not hold hearings between 26 November 1969, and early December, the report states that "Further hearings were delayed because of the failure of the army to supply all of the information requested by Chairman Rivers, and also because of the Army's reluctance to make witnesses available to the Subcommittee until after they had testified before the Peers Inquiry." HÉBERT REPORT, *supra* note 2, at 2. This explanation conflicts with Belknap's contention that Rivers was "not about to be upstaged by an army inquiry" and so rushed into calling Resor to the Hill. BELKNAP, *supra* note 36, at 137.

<sup>117</sup> PEERS, *supra* note 41, at 22.

by the Department of the Army in every conceivable manner,” Hébert told the *New York Times*.<sup>118</sup> New York Democrat Samuel Stratton added that the committee was “stymied at every step of the way by the Secretary of the Army and top Army brass.”<sup>119</sup>

Exactly who was being stymied, however, remains an open question.<sup>120</sup> Belknap argues that “Hébert’s subcommittee seemed more interested in discrediting those who had exposed the war crimes committed at My Lai than ensuring that those responsible for them were punished.”<sup>121</sup> General Peers observed that, in reading the quotes from Hugh Thompson’s testimony, which took up approximately one-fourth of the entire subcommittee report, he felt that Thompson had been subjected to “more of an inquisition than an investigation.”<sup>122</sup> In its final report, moreover, Hébert’s Subcommittee seemed overly focused on criticizing (by implication) those, including Ridenhour, Thompson, and Haeberle, who had exposed the events at My Lai, rather than on criticizing those who had allowed the “tragedy of major proportions”<sup>123</sup> to unfold: The subcommittee, for instance, devoted several of its relatively few recommendations to such suggestions as one (presumably in response to Haeberle’s retaining possession of My Lai photographs) that the Secretary of the Army should “require official Army photographers to submit all photographs taken while on assignment” and—presumably objecting to the Distinguished Flying Cross awarded to Thompson—should “review the practices and procedures in awarding medals and decorations.”<sup>124</sup>

While Hébert, claiming the preeminence of congressional oversight, publicly objected to what he characterized as the military’s lack of cooperation, Pentagon officials and military prosecutors were desperately warning that, by calling witnesses *and* refusing to release witness transcripts, Hébert was fatally crippling future My Lai prosecutions.<sup>125</sup> Secretary Resor was particularly concerned, writing to Hébert in January

<sup>118</sup> Editorial, *supra* note 115, at 15. See also *House Panel Calls 6 in Songmy Inquiry*, N.Y.TIMES, Apr. 17, 1970, at 13.

<sup>119</sup> *House Panel Calls 6 in Songmy Inquiry*, *supra* note 118.

<sup>120</sup> See, e.g., Davidson, *supra* note 11, at 302 (“The motivation behind Hébert’s refusal to release the transcripts has been the subject of dispute.”).

<sup>121</sup> BELKNAP, *supra* note 36, at 140.

<sup>122</sup> PEERS, *supra* note 41, at 242.

<sup>123</sup> HÉBERT REPORT, *supra* note 2, at 4.

<sup>124</sup> *Id.* at 7–8.

<sup>125</sup> See, e.g., TRENT ANGERS, THE FORGOTTEN HERO OF MY LAI: THE HUGH THOMPSON STORY 155–76 (1999) (cited in Eckhardt, *supra* note 40, at 684 n.50).

of 1970, that “[w]hile it may theoretically be possible for the Committee to interview such witnesses without prejudicing prosecutions, there are a number of potential pitfalls in such a course of action.”<sup>126</sup> Resor was specifically worried about the danger to the My Lai prosecutions posed by an application of the Jenks Act.<sup>127</sup> Under the Jenks Act, after a witness in a criminal trial or court-martial has been called by the United States, the court must, upon motion of the defendant, order the United States to produce any material pre-trial statements that the witness made and that are in the possession of the United States.<sup>128</sup> If the United States elects not to comply with the court’s order, “the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.”<sup>129</sup> Despite the pleas of Resor and numerous congressmen,<sup>130</sup> as well as a more scholarly appeal by Congressman (and later Chief Judge of the Federal Court of Appeals for the District of Columbia) Abner J. Mikva,<sup>131</sup> Hébert was determined not to release the transcript, ostensibly because he was “protecting the prerogatives of the House, the right of Congress to investigate and the rights of the Government and the defendant to proceed with a fair trial.”<sup>132</sup> Even writing over thirty years later, former Chief Trial Counsel Eckhardt is hard-pressed to restrain his anger at what he clearly viewed as an intentional congressional plan to sabotage the My Lai prosecutions:

But by far the most serious interference came from the military’s congressional “friends.” Representatives F.

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<sup>126</sup> Letter from Stanley R. Resor, Sec’y of the Army, to Hon. F. Edward Hébert (Jan. 6, 1970), *cited in* Eckhardt, *supra* note 40, at 684 n.50; *see* BELKNAP, *supra* note 36, at 141.

<sup>127</sup> 18 U.S.C. § 3500 (2006).

<sup>128</sup> *Id.* § 3500(b).

<sup>129</sup> *Id.* § 3500(c).

<sup>130</sup> Letter from Donald M. Fraser [et al.], Members of Congress, to Hon. R. Edward Hébert, Chairman, House Armed Servs. Comm., Subcomm. No. 2, at 1 (Nov. 24, 1970), *cited in* Eckhardt, *supra* note 40, at 684 n.50).

<sup>131</sup> Letter from Abner J. Mikva, Member of Congress, to Hon. L. Mendel Rivers, Chairman, Comm. on Armed Servs. 4 (Dec. 7, 1970), *cited in* Eckhardt, *supra* note 40, at 684 n.50 (“[M]y review of the relevant cases and statutory provisions leave me more convinced than before that the Committee’s decision to withhold from a defendant put to trial by the United States evidence which may be necessary to his defense and simultaneously deny to the prosecution testimony of important witnesses is a decision that can reflect credit on neither the Committee nor the Congress. It must seem a sorry spectacle to the citizens of this nation to see the foremost lawmaking body in the land obstructing administration of the very laws it writes.”).

<sup>132</sup> Richard Halloran, *Sonny Trial Move is Called a ‘Ploy,’* N.Y. TIMES, Oct. 18, 1970, at 10.

Edward Hébert and L. Mendel Rivers of the House Armed Services Committee decided that prosecution of the events at My Lai was not in the national interest. Having reached that conclusion, they calculatingly used their considerable power to sabotage the trials. Their plan was technical, simple, and almost effective. They held hearings (calling all the necessary prosecution witnesses), placed a congressional security classification on this testimony, and refused to release it. Despite vigorous and varied protests, Congress adhered to this refusal, intending that this refusal would prevent the Government from calling any witness who had testified before the Committee. If the Government could not call necessary witnesses, it would be prevented from prosecuting the My Lai Incident.<sup>133</sup>

Not surprisingly, Resor's and Eckhardt's concerns about the implications of the Jenks Act proved to be well-founded.<sup>134</sup> In October of 1970, the military judge in the court-martial of Sergeant David Mitchell announced that because of the Hébert Subcommittee's refusal to release transcripts, he would not allow the prosecution to call any Soldiers who had appeared before Hébert's panel to testify.<sup>135</sup> The military prosecutor, Captain Michael Swann, was able to call only three of the dozens of witnesses he had intended to have testify, while the defense was able to call over twenty former soldiers.<sup>136</sup> The military panel returned a verdict of "not guilty" within several hours—and by some accounts, only waited that long because "longer deliberations would look better."<sup>137</sup> When confronted with the judge's decision, members of Hébert's committee evinced no concern about the fate of the military prosecutions, with Representative Dickinson describing defense requests for a transcript of the House hearings as "a defense 'ploy.'"<sup>138</sup> Dickinson's ostensible confidence in the power of the military justice system might have appeared more plausible had he not immediately

<sup>133</sup> Eckhardt, *supra* note 40, at 684–85.

<sup>134</sup> See, e.g., Davidson, *supra* note 11, at 303 ("Hébert's refusal to release the transcripts affected at least three courts-martial, and in the court-martial of Staff Sergeant David Mitchell, the refusal proved fatal for the prosecution.").

<sup>135</sup> BELKNAP, *supra* note 36, at 224; William Greider, *Ruling Stuns My Lai Case*, ATLANTA J., Oct. 16, 1970, at 8-B, *cited in* Eckhardt, *supra* note 40, at 685 n.53.

<sup>136</sup> BELKNAP, *supra* note 36, at 224.

<sup>137</sup> *Id.* at 224–25.

<sup>138</sup> Halloran, *supra* note 132, at 10.

added to the reporter interviewing him that he would personally be pleased if none of the soldiers involved were brought to trial.<sup>139</sup>

The military judge's decision in Sergeant Mitchell's case hinted at one of the issues that would dog Calley's trial over the next few years.<sup>140</sup> "[M]uch like the Nixon Tape Case," explained Eckhardt, "there was a fundamental clash between governmental branches, with the Congress attempting to veto an executive branch prosecution."<sup>141</sup> After an extensive trial, on 29 March 1971, a military court martial found Lieutenant Calley guilty of murdering twenty-two Vietnamese civilians and assaulting a two-year-old boy with the intent to kill.<sup>142</sup> Soon after his conviction, Calley started his case on a tortuous path of review by appealing to the Army Court of Military Review, citing, in part, the alleged violation of the Jenks Act.<sup>143</sup>

During the trial, the Hébert Panel had ignored two different subpoenas; the trial judge, however, denied Calley's demand that the testimony of any witness who had testified before the panel be stricken from the court-martial record.<sup>144</sup> The Army Court of Military Review, agreeing with the judge in Calley's case and disagreeing with the judge in Mitchell's case, held that the Jenks Act "did not pertain to statements given to Congress,"<sup>145</sup> but that, even if it did apply, any error by the trial court in failing to enforce it was harmless.<sup>146</sup> The following year, however, a federal district court hearing Calley's petition for habeas corpus relief found Calley's convictions "constitutionally invalid," once again citing the Jenks Act requirements.<sup>147</sup> "Congress in effect granted amnesty to Lieutenant Calley. Congress did so, moreover, in a backhanded way that was not known to most Americans and probably even most Congressmen," declared one 1975 op-ed in the *New York Times*.<sup>148</sup> The serious constitutional question posed by the Hébert Subcommittee's refusal to release transcripts of the House hearings was

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<sup>139</sup> *Id.*

<sup>140</sup> For descriptions of the Calley court-martial, see BELKNAP, *supra* note 36, at 168–90; LEWY, *supra* note 41, at 356–64; Davidson, *supra* note 11, at 304–08.

<sup>141</sup> Eckhardt, *supra* note 40, at 684–86.

<sup>142</sup> Davidson, *supra* note 11, at 304.

<sup>143</sup> *Id.* at 305 (citing *United States v. Calley*, 46 C.M.R. 131, 1338, 1184–95 n.14 (A.C.M.R. 1973), *aff'd*, 48 C.M.R. 19, 22 (C.M.A. 1973)).

<sup>144</sup> Editorial, *High Court Gets Calley's Appeal*, N.Y. TIMES, Nov. 29, 1975, at 13.

<sup>145</sup> *Id.* at 306 (citing *Calley*, 46 C.M.R. at 1192).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 307 (citing *Calley v. Calloway*, 382 F. Supp. 650, 700–01 (M.D. Ga. 1974)).

<sup>148</sup> Daniel J. Kornstein, Op-Ed., *Amnesty and Calley*, N.Y. TIMES, Mar. 22, 1975, at 31.

finally resolved after yet another appeal, with the Fifth Circuit, sitting en banc, holding eight to five that—given the many pretrial statements that had been made by all of the witnesses—the *Calley* trial judge’s decision not to strike the testimony of prosecution witnesses was in fact harmless error.<sup>149</sup>

### 3. *Gadflies: The Dellums Committee House Hearings*

The massacre at My Lai, of course, was not the only atrocity committed by American soldiers—and the hearings in the House and Senate Armed Forces Committees thus do not represent the extent of congressional oversight response to allegations of American war crimes. Despite the backlash against men including Ridenhour, Haeberle, Meadlo, and Thompson, the My Lai hearings and courts-martial had the effect of drawing more American atrocity stories out into the open. As Seymour Hersh observed in 1970, “the disclosure of the My Lai massacre cleared the way for published accounts of previously witnessed American atrocities in South Vietnam. Suddenly reporters were finding out that their newspapers were eager to print stories about the shooting of civilians in Vietnam.”<sup>150</sup> Despite the numerous allegations—many coming *from the alleged perpetrators*—that groups such as the Citizens Commission of Inquiry<sup>151</sup> and the Vietnam Veterans Against the War (VVAW) aired over the following few years,<sup>152</sup> however, it is a mistake to believe that all or even most Americans in Vietnam committed war crimes or atrocities.<sup>153</sup> While American servicemen clearly were responsible for committing some war crimes, the number and prevalence of such atrocities committed by Americans has probably been somewhat exaggerated, both by contemporary witnesses and by more recent

<sup>149</sup> *Calley v. Calloway*, 519 F.2d 184, 184 (5th Cir. 1975).

<sup>150</sup> HERSH, *supra* note 37, at 140.

<sup>151</sup> *Contra* LEWY, *supra* note 41, at 313–15 (suggesting that “standards of evidence, decorum, and impartiality” were noticeably lacking at December 1970 hearings sponsored by the National Committee for a Citizens’ Commission of Inquiry on U.S. War Crimes in Vietnam at the DuPont Hotel in Washington, D.C.).

<sup>152</sup> *See, e.g.*, VIETNAM VETERANS AGAINST THE WAR, THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES (1972).

<sup>153</sup> *But cf.* Robert N. Strassfeld, *American Innocence*, 37 CASE W. RES. J. INT’L L. 277, 290–91 (2006) (“While some returning veterans may have exaggerated or fabricated their stories of torture, abusive conduct, and murder of prisoners, there are too many accounts of such behavior to deny that sometimes American Soldiers and marines tortured their Vietnamese prisoners.”).

popular culture portrayals of Vietnam-era soldiers.<sup>154</sup> Still, the specter of Americans committing and getting away with rampant war crimes—and with American generals and political leaders *ordering* such war crimes—was clearly too much for some anti-war activists to bear.<sup>155</sup> Newspaper editors might be willing to publish atrocity stories, but these activists wanted official government recognition.

While powerful conservative Democrats such as Rivers and Hébert had little interest in listening to such anti-war activists,<sup>156</sup> and while (with rare exceptions)<sup>157</sup> major congressional committees refused to hold hearings into allegations of war crimes committed by American troops in Vietnam, these activists *were* able to turn to several congressmen and congresswomen who, while not nearly as powerful as the established hawks on the House Armed Services Committee, were open to any strategy that might bring about an early end to the war. Particularly important to this group was an African-American radical from Berkeley, California, Ronald V. Dellums, who was elected to Congress in 1970, at

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<sup>154</sup> See, e.g., LEWY, *supra* note 41, at 223; MYRA MACPHERSON, *LONG TIME PASSING: VIETNAM AND THE HAUNTED GENERATION* 481–91 (1984). There were and are many serious allegations that some American soldiers committed horrific acts during the Vietnam conflict; it is clear that war crimes were committed by U.S. military personnel. Some of the most lurid allegations were publicized by Mark Lane, a controversial lawyer, anti-war activist, and former member of the New York Legislature. In 1970, Lane published *Conversations with Americans*, a compilation of interviews with thirty-two American soldiers who detailed at length the war crimes and atrocities in which they claimed to have taken part. MARK LANE, *CONVERSATIONS WITH AMERICANS* (1970). *Conversations with Americans* eventually led to the “Winter Soldier” hearings supported by John Kerry (who was not present at the hearings) and others in the anti-war movement, during which American soldiers and veterans testified about atrocities they had seen and committed themselves. Ultimately, many (though not all) of the stories in *Conversations with Americans* were demonstrated to be false. E.g. Neil Sheehan, *Book Review, Conversations with Americans*, N.Y. TIMES, Dec. 27, 1970, at 19. After publishing *Conversations with Americans*, Mark Lane became involved with numerous fringe organizations and individuals.

<sup>155</sup> See, e.g., Tod Ensign, *Organizing Veterans Through War Crimes Documentation*, in VIET NAM GENERATION, Mar. 1994, available at [http://www3.iath.virginia.edu/sixties/HTML\\_docs/Texts/Narrative/Ensign\\_War\\_Crimes.html](http://www3.iath.virginia.edu/sixties/HTML_docs/Texts/Narrative/Ensign_War_Crimes.html).

<sup>156</sup> See, e.g., Sheehan, *supra* note 99, at 11.

<sup>157</sup> See, e.g., Complete Testimony of LT. John Kerry to Senate Foreign Relations Committee on Behalf of Vietnam Veterans Against the War, available at [http://www.wintersoldier.com/graphics/Kerry\\_1971\\_Testimony.pdf](http://www.wintersoldier.com/graphics/Kerry_1971_Testimony.pdf) (reprinting testimony of 22 Apr. 1971). The Senate Committee on Foreign Relations heard Kerry’s testimony during a week of mass anti-war demonstrations in Washington, D.C., at the same time the Dellums Committee was meeting ostensibly without the permission of House leadership. James M. Naughton, *200,000 Rally in Capital to End War*, N.Y. TIMES, Apr. 25, 1971, at 1.



the height of congressional interest in the Calley court-martial and the My Lai investigation.<sup>158</sup> Precisely because he was outside the traditional congressional power structure and was interested in opposing the Nixon administration's policies in Vietnam, Dellums was willing to listen to and actually work with the sorts of anti-war activists who were dismissed with disdain by more established politicians such as Rivers and Hébert.

"If the label of radical disturbs Mr. Dellums, he does not show it," observed a reporter for the *New York Times* in 1970,<sup>159</sup> shortly after Dellums had startled political observers by winning a heavily contested primary against Jeffery Cohelan, an experienced and steadfastly liberal, but (unlike Dellums) pro-war, representative from Berkeley and Oakland, California.<sup>160</sup> "If your definition of radical means a departure from the status quo, then yes, I am a radical," Dellums, a Marine Corps veteran and former Berkeley city councilman, retorted to challengers.<sup>161</sup> Even under less equivocal definitions, Dellums was certainly a radical. When John E. Healy, Dellums's Republican opponent in the general election, attacked Dellums's attendance record as a councilman and depicted Dellums as "a creature of the Black Panthers . . . and of 'the lunatic left wing,'" Dellums refused to denounce his associations with the Black Panthers, an organization which was founded in Oakland, California.<sup>162</sup> Dellums did, however, go so far as to say that he considered violence, "particularly 'bombing' and 'trashing' [property destruction]" to be "really counter-productive."<sup>163</sup>

<sup>158</sup> Editorial, *supra* note 15, at 10.

<sup>159</sup> Earl Caldwell, *Black Insurgent Who Won Berkeley Race Is an Outspoken Radical*, N.Y. TIMES, June 14, 1970, at 46.

<sup>160</sup> Steven V. Roberts, *Birch Member and Black Among Victors on Coast*, N.Y. TIMES, June 4, 1970, at 29. According to Roberts, in his six terms, Representative Cohelan had amassed "a voting record of 93 percent as rated by the liberal Americans for Democratic Action." *Id.* This suggests the Dellums was elected largely on the strength of his anti-war views—and he went to Washington committed to expressing those views as loudly as he could. Caldwell, *supra* note 159, at 46.

<sup>161</sup> Caldwell, *supra* note 159, at 46.

<sup>162</sup> R.W. Apple Jr., *Negro Candidate Succeeds Too Well*, N.Y. TIMES, Sept. 24, 1970, at 32.

<sup>163</sup> *Id.* Dellums went on to have a landmark career in Congress, later serving as the chair of the House Armed Services Committee and the Congressional Black Caucus, and holding office for almost three decades until announcing his retirement in 1997. After spending several years as a lobbyist, Dellums reentered the political arena, taking office as the mayor of Oakland, California, succeeding former (and now current) California Governor Jerry Brown. J. Douglas Allen-Taylor, *Ron Dellums Takes the Helm in Oakland*, BERKELEY DAILY PLANET, Jan. 9, 2007, <http://www.berkeleydailyplanet.com/article.cfm?archiveDate=01-09-07&storyID=26048>. For controversy during the mayoral

Upon arriving in Washington, Dellums, who was interested in opposing the Nixon Administration on many grounds, immediately set about pursuing the anti-war agenda he had proposed when running for Congress.<sup>164</sup> Within months after taking office, Dellums announced plans to conduct public, informal hearings into the “command responsibility” for U.S. “war atrocities” in Vietnam.<sup>165</sup> Dellums, along with three other liberal, anti-war Democrats, announced that he was proceeding with the informal hearings “because of the refusal of the congressional leadership and committee chairmen to [*sic*] a full-scale congressional inquiry into American war crimes in the Indochina war.”<sup>166</sup> In April of 1971, Dellums, along with Manhattan Representative Bella S. Abzug, Michigan Representative John Conyers Jr., and Maryland Representative Parren J. Mitchell, held four mornings of unofficial hearings on Capitol Hill.<sup>167</sup> “We believe it to be the function of Congress to undertake open study of the responsibilities for war atrocities,” Dellums explained.<sup>168</sup> “Of course, we would rather have official inquiry, but Congressional leadership has ignored all our requests. So, we are calling ad hoc hearings.”<sup>169</sup>

The Dellums Committee hearings, which were attended by up to twenty congressmen at various times,<sup>170</sup> drew significant national media

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race over Dellums’s post-congressional career as a lobbyist, see Phillip Matier & Andrew Ross, *In Oakland, Dellums Draws Fire in Mayor’s Race*, S.F. CHRON., Mar. 27, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/03/27/MNR.TMP>.

<sup>164</sup> There is some debate about whether Dellums was acting on his own anti-war initiatives, or whether he was responding to the prodding of organizations such as the Citizens’ Commission of Inquiry. See, e.g., Ensign, *supra* note 155 (“Within days after arriving in Washington, Ron agreed to turn over part of his office for an exhibition of war crime materials. We also convinced him that another large hearing under Congressional auspices was needed.”); DELLUMS HEARINGS, *supra* note 15, at ix (“We were somewhat disconcerted by the generally indifferent, and in some cases hostile, attitude displayed by nearly all the congressmen and staff members with whom we spoke . . . . Only one Congressman, Ronald V. Dellums, a newly elected Black man from Oakland, California, systematically supported our demand that Congress conduct a massive inquiry.”).

<sup>165</sup> Op-Ed, *supra* note 17, at 10.

<sup>166</sup> *Id.*

<sup>167</sup> See, e.g., Ensign, *supra* note 155; Robert N. Stassfeld, “Lose in Vietnam, Bring the Boys Home,” 82 N.C. L. REV. 1891, 1922–23 (2004) (“And to shake a nation from its denial of the brutality of the war we were fighting, they held hearings to expose war crimes that American soldiers had committed in our name.”).

<sup>168</sup> Editorial, *supra* note 15, at 10.

<sup>169</sup> *Id.*

<sup>170</sup> Ensign, *supra* note 155.

attention,<sup>171</sup> but were also plagued by the same sorts of concerns about accuracy that had discredited Mark Lane's *Conversations With Americans*.<sup>172</sup> One former Army Sergeant, Danny S. Notley, testified that he took part in the killing of about thirty Vietnamese men, women, and children in a village called Truong Kahn, near My Lai, in April of 1969.<sup>173</sup> While five Vietnamese women later came forward with a story that, in some particulars, seemed to match Notley's,<sup>174</sup> Notley refused to provide more information to Army investigators than he had given to the Dellums Committee, and so prevented the military from further investigating the case.<sup>175</sup> "Typically, the Army responded by trying to get Notley to 'name names,'" Tod Ensign of the Citizens' Commission of Inquiry later wrote derisively.<sup>176</sup> "No less a luminary than Nixon's Counsel Fred Buzhardt contacted me seeking Notley's cooperation in identifying the guilty (read: low-ranking) parties."<sup>177</sup> Ensign, and presumably Notley, were interested in using the evidence garnered from public hearings such as the Dellums Committee hearings and Winter Soldier hearings to indict the Nixon Administration and the United States' military leadership for setting war crimes policies, rather than using such hearings to gather evidence to use against the low-level grunts who had pulled the triggers. To some observers, however, Notley's silence simply confirmed their suspicion that he had been making the whole story up in the first place, and perhaps as a result gravely wounded and discredited Dellums's atrocity oversight efforts in the eyes of Nixon's still-extant "silent majority."<sup>178</sup>

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<sup>171</sup> See, e.g., Editorial, *supra* note 15, at 10; Richard Halloran, *Ex-G.I. Alleges 30 Slayings Near Mylai*, N.Y. TIMES, Apr. 29, 1971, at 10.

<sup>172</sup> See, e.g., LEWY, *supra* note 41, at 317–18. But see Robert N. Strassfeld, *American Innocence*, 37 CASE W. RES. J. INT'L L. 277, 291 (2006) ("Veterans who testified at the Winter Soldier Investigation, organized by Vietnam Veterans against the War, and at the Congressional hearings on war crimes, organized by Congressman Ron Dellums, gave ample examples of a wide array of torture practices and techniques including, beatings, threatened rapes, water torture, electric shocks to the genitals and other parts of the body, and locking prisoners in a room to spend the night with a python.").

<sup>173</sup> Halloran, *supra* note 171, at 10.

<sup>174</sup> Editorial, *5 Vietnamese Women Support Former G.I.'s Report of Slayings*, N.Y. TIMES, May 10, 1971, at 12.

<sup>175</sup> Editorial, *Inquiry is Thwarted by Ex-G.I.'s Silence*, N.Y. TIMES, May 8, 1971, at 11.

<sup>176</sup> Ensign, *supra* note 155.

<sup>177</sup> *Id.* Ensign and many other anti-war activists were convinced that the United States military was making scapegoats of men like Calley in order to protect America's political and military leadership.

<sup>178</sup> See, e.g., LEWY, *supra* note 41, at 317–18.

### C. The Aftermath of the My Lai Oversight

In the aftermath of the *Calley* guilty verdict, many in the United States responded by defending Calley and his men for doing their jobs or by insisting that, while Calley was guilty, the upper echelons of the military and the Administration were using Calley as a scapegoat so as to avoid close scrutiny of the war.<sup>179</sup> In other words, even many Americans who disapproved of the war and were horrified by the massacre focused criticism on the military and political higher-ups rather than on Calley or his men. Popular support for Calley was overwhelming: On 7 April 1971, for example, the Gallup Poll reported that only nine percent of Americans approved of the court-martial's findings, while seventy-nine percent disapproved.<sup>180</sup> "Terry Nelson and C-Company" released (on the Plantation Label) a particularly hagiographic record entitled *The Battle Hymn of Lieutenant Calley*.<sup>181</sup> The album reportedly sold 202,000

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<sup>179</sup> E.g., Editorial, *The Clamor of Calley: Who Shares the Guilt?*, TIME, Apr. 12, 1971, <http://www.time.com/time/magazine/article/0,9171,904957,00.html> [hereinafter Guilt Editorial] ("The most extraordinary demonstration against the verdict from the antiwar side was staged in Manhattan's Wall Street by the Viet Nam Veterans Against the War. Smack in front of the New York Stock Exchange, a dozen veterans in fatigue jackets passed out leaflets next to a big white van showing a film of American atrocities in Viet Nam. John Kerry, a former gunboat skipper who won a Silver Star in Viet Nam and was wounded three times, read a prepared statement: 'We are all of us in this country guilty for having allowed the war to go on. We only want this country to realize that it cannot try a Calley for something which generals and Presidents and our way of life encouraged him to do. And if you try him, then at the same time you must try all those generals and Presidents and soldiers who have part of the responsibility. You must in fact try this country.'"); Editorial, *Men at Pentagon Decline to Comment on Verdict*, N.Y. TIMES, Mar. 30, 1971, at 12 (quoting Representative Dellums complaining that Calley was "scapegoated"). Anti-war activists, including the director of the American branch of the Bertrand Russell Peace Foundation, had introduced the theme of Calley as a scapegoat long before the conviction. See, e.g., Editorial, *Peace Group to Set UP Panels on Atrocity Charges*, N.Y. TIMES, Nov. 30, 1969, at 30.

<sup>180</sup> BELKNAP, *supra* note 36, at 193.

<sup>181</sup> Guilt Editorial, *supra* note 179. According to the article,

After a voice-over about 'a little boy who wanted to grow up and be a soldier and serve his country in whatever way he could,' the song begins: My name is William Calley, I'm a soldier of this land/I've vowed to do my duty and to gain the upper hand/But they've made me out a villain, they have stamped me with a brand/As we go marching on . . . .

See also BELKNAP, *supra* note 36, at 191; *The Battle Hymn of Lieutenant Calley*, available at <http://www.youtube.com/watch?v=iXNsXIxBkqs> (last visited Oct. 24, 2008).

copies in the first three days after the verdict.<sup>182</sup> In response to the national mood, President Nixon announced that he was going to review Calley's sentence, and that, during the review, Calley would be confined to his quarters at Fort Benning.<sup>183</sup> While Nixon never pardoned him, Calley was ultimately released on parole after his case had wound its way through the courts.<sup>184</sup> In the end, Calley served only a few months in prison.<sup>185</sup>

### III. Iraq War Crimes and Oversight

"The photographs did not lie," wrote *New York Times* reporter Craig R. Whitney.<sup>186</sup> In the spring of 2004, a story broke alleging that American military personnel stationed at Saddam Hussein's infamous Abu Ghraib prison had engaged in acts of prisoner abuse—and that the military personnel had taken and passed around pictures of that abuse. In many ways, the scandal unfolded just as the My Lai scandal had unfolded thirty-five years before. The military began investigating the situation after Joseph M. Darby, an Army Reserve soldier with the 372nd Military Police (MP) Company, anonymously sent an agent of the U.S. Army Criminal Investigation Command some of the pictures he had been given by one of the perpetrators of the abuse.<sup>187</sup> The story emerged in the public eye after the relatives of one of the accused soldiers, concerned that the soldier would be scapegoated to cover for higher-up officers and officials, contacted CBS News' *60 Minutes II* with photographs and information about the alleged war crimes.<sup>188</sup> At around the same time, someone leaked a critical report on the incident to

<sup>182</sup> Guilt Editorial, *supra* note 179.

<sup>183</sup> See, e.g., Linda Charlton, *President Orders Calley Released from Stockade*, N.Y. TIMES, Apr. 2, 1971, at 1.

<sup>184</sup> See BELKNAP, *supra* note 36, at 225–56.

<sup>185</sup> *Id.*

<sup>186</sup> Craig R. Whitney, *Introduction to THE ABU GHRAIB INVESTIGATIONS*, at vii (Steven Strasser ed., 2004).

<sup>187</sup> See, e.g., Dawn Bryan, *Abu Ghraib Whistleblower's Ordeal*, BBC NEWS, Aug. 5, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6930197.stm](http://news.bbc.co.uk/2/hi/middle_east/6930197.stm); Tom Bowman, *Army Tightly Guarded Pictures of Prison Abuse*, BALTIMORE SUN, May 6, 2004, <http://www.baltimoresun.com/news/bal-te.pentagon06may06,0,6156935.story>; Hanna Rosin, *When Joseph Comes Marching Home: In a Western Maryland Town, Ambivalence About the Son Who Blew the Whistle at Abu Ghraib*, WASH. POST, Mar. 17, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A32048-2004May16.html>.

<sup>188</sup> James Dao & Eric Lichtblau, *Soldier's Family Set in Motion Chain of Events on Disclosure*, N.Y. TIMES, May 8, 2004, <http://www.nytimes.com/2004/05/08/national/08IMAG.html>. Mark Benjamin, *Sympathy for Charles Graner*, SALON.COM, Dec. 1, 2008.

Seymour Hersh, the journalist who had broken the My Lai story, and who was now a regular contributor to the *New Yorker*.<sup>189</sup>

In response to the allegations, which were quickly followed by additional news stories and interviews, some legislators immediately called for Congress to engage in significant oversight; given the highly-polarized political scene between Democrats and Republicans, especially in an election year, it is not surprising that a number of those suggesting hearings were Democrats who opposed President George W. Bush's handling of the Iraq War. It was not only Democrats, however, who were seemingly interested in congressional oversight: Republican Senator John Warner of Virginia, the Chairman of the Senate Armed Services Committee, initially indicated that he was interested in holding extensive hearings. After he came under enormous political pressure from his own party, however, Warner eventually limited his investigation into the culpability of the chain of command.

In the House, California Representative Duncan Hunter, the conservative and hawkish Chairman of the House Committee on the Armed Services, was seemingly never interested in pursuing effective oversight, and instead arguably used the tools of congressional oversight to minimize the effects of war crimes testimony and to prevent fellow congressmen from gaining additional information or questioning witnesses. Marginalized by the Republicans, California Democratic Representative Henry Waxman and other influential members of the relatively powerless Democratic minority in the House bucked the official hearing process and fixed upon Abu Ghraib oversight as a means of gaining increased national prominence, opposing the Bush administration, and jockeying for political power. Ultimately, congressional oversight of Abu Ghraib essentially petered out, and only a few enlisted men and women were held accountable for the torture at the prison. Part III.A briefly describes the events that occurred on Cell Block I of the Abu Ghraib prison in the fall of 2003, when soldiers from the 372nd MP Company abused and tortured Iraqi prisoners, and the emergence of knowledge about the prisoner abuse into the public eye. Part III.B examines congressional oversight of the Abu Ghraib abuse,

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<sup>189</sup> See, e.g., CBS, *Abuse of Iraqi POWs by GIs Probed: 60 Minutes II Has Exclusive Report on Alleged Mistreatment*, 60 Minutes II, Apr. 28, 2004; Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?*, NEW YORKER, May 10, 2004, [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact?currentPage=all](http://www.newyorker.com/archive/2004/05/10/040510fa_fact?currentPage=all).

including Waxman's attempts to engage in oversight outside the normal congressional committee system. Part III.C briefly describes the aftermath of the Abu Ghraib investigation and oversight.

A. "The failure of a relatively small number of soldiers who served at Abu Ghraib"<sup>190</sup>

Like the historical record of the My Lai massacre, which is obscured by the existence of numerous conflicting accounts written by observers intent on twisting history to fit particular agendas, the historical record of the abuses at Abu Ghraib is also unclear. Similarly, the lack of a probing and significant congressional investigation has resulted in confusion about the roles played by high-ranking military officers and high-level administration officials in giving the orders to "Gitmo-ize" Abu Ghraib and subject detainees to torture.<sup>191</sup> Given that the events at Abu Ghraib happened so recently, moreover, passions have had little time to cool, and so those events have not yet been exposed to historical scrutiny by scholars detached from the political battles of the "War on Terror." That said, given the numerous news reports on the abuses, the evidence available from the Pentagon's investigations,<sup>192</sup> and the pictures that

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<sup>190</sup> Kern Statement, *supra* note 3.

<sup>191</sup> Cf. Scott Wilson & Sewell Chan, *As Insurgency Grew, So Did Prison Abuse*, WASH. POST, May 10, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A13065-2004May9?2004May9?language=printer>. For a book-length treatment of the Abu Ghraib investigation, coauthored by a lead criminal investigator and the JAG attorney who prosecuted some of those responsible for the prisoner abuse, see CHRISTOPHER GRAVELINE & MICHAEL CLEMENS, *THE SECRETS OF ABU GHRAIB REVEALED* (2010).

<sup>192</sup> This includes, especially, the report of Army Major General Antonio M. Taguba, which is probably the most trustworthy of the investigations. See, e.g., Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade [hereinafter Taguba Report] (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf); Douglas Jehl, *Head of Inquiry on Iraq Abuses Now in Spotlight*, N.Y. TIMES, May 11, 2004, <http://www.nytimes.com/2004/05/11/politics/11TAGU.html> ("The unflinching report on abuses at Abu Ghraib prison in Iraq that General Taguba completed in March, people who know him say, was shaped by that strong moral compass and by his vision of the Army as a noble calling."); Seymour M. Hersh, *The General's Report*, NEWSWEEK, June 25, 2007, [http://www.newyorker.com/reporting/2007/06/25/070625fa\\_fact\\_hersh?currentPage=all](http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh?currentPage=all) ("If there was a redeeming aspect to the [Abu Ghraib] affair, it was in the thoroughness and the passion of the Army's [Taguba's] initial investigation."). Late in 2008, the Senate Armed Services Committee finally approved a long report detailing what occurred at Abu Ghraib; that report was declassified in significant part in April of 2009.

were seared into the memories of many around the world,<sup>193</sup> it is possible to describe at least some of what happened in Cell Block I in the fall of 2003—what General Paul Kern, the Commanding General of U.S. Army Material Command, later concluded was “the failure of a relatively small number of soldiers who served at Abu Ghraib prison.”<sup>194</sup>

*1. Prisoner Abuse at Abu Ghraib: Fall of 2003*

In October of 2003, the 320th Military Police (MP) Battalion, under the command of Lieutenant Colonel Jerry Phillabaum, took up the mission of guarding all prisoners at what the military referred to as “Forward Operating Base (FOB) Abu Ghraib.”<sup>195</sup> Phillabaum, in turn, assigned the 372nd MP Company, a reserve unit based out of Cresaptown, Maryland, under the command of Captain Donald Reese, the mission of guarding the prisoners in Abu Ghraib’s Cell Block I.<sup>196</sup> By that fall, the 372nd, which had been called up in March of 2003, was, along with the entire 800th MP Brigade, tired and frustrated. The soldiers of the 800th had apparently believed that they would be sent home shortly after the end of hostilities in May of 2003.<sup>197</sup> Instead, in late May or early June of 2003, the brigade was given the mission of managing the Iraqi penal system and several detention centers.<sup>198</sup> On 30 June 2003, Brigadier General Janis L. Karpinski assumed command of the 800th MP Brigade, thus becoming the first female U.S. general to command troops in a combat theater.<sup>199</sup> Karpinski had no experience with running a prison; with rare exceptions, her 3400 subordinates were equally inexperienced.<sup>200</sup> The 372nd MP Company, for example, which

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<sup>193</sup> See, e.g., Editorial, *Ugly Americans*, CHI. TRIB., May 5, 2005 (“Those pictures are going to be seared into the minds of jihadists and the young jihadists of the future for 50 years.”) (quoting Democratic West Virginia Senator John D. Rockefeller)).

<sup>194</sup> Kern Statement, *supra* note 3.

<sup>195</sup> Taguba Report, *supra* note 192, at 16, 36.

<sup>196</sup> *Id.* at 16; Editorial, *Former Abu Ghraib Reserve Unit Returns Home*, N.Y. TIMES, Aug. 3, 2004, at A8. The 372d MP Company was one of three companies comprising the 320th MP Battalion, which was one of eight MP battalions comprising the 800th MP Brigade. Taguba Report, *supra* note 192, at 16, 36.

<sup>197</sup> Taguba Report, *supra* note 192, at 36.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 37 (“There is abundant evidence . . . that soldiers through the 800th MP Brigade were not proficient in their basic MOS [Military Occupational Specialty] skills, particularly regarding internment/resettlement operations.”).



had been handling traffic and police duties, was entirely untrained and unprepared for its mission of guarding prisoners.<sup>201</sup>

The 372d MP Company, moreover, found itself stepping into a confused situation at Abu Ghraib. Karpinski was putatively responsible for guarding all detainees in Iraq, but, at the end of August, Major General Geoffrey D. Miller, the commander of the military detention center at Guantanamo Bay, had arrived with interrogators from Guantanamo “experienced in strategic interrogation”<sup>202</sup> on an advisor trip with (according to Karpinski) the goal of “Gitmoizing” detention practices in Iraq.<sup>203</sup> This meant that MPs would essentially be involved in “preparing” and “softening-up” detainees for interrogation.<sup>204</sup> During that trip, Miller also suggested that the guard force should “be actively engaged in setting the conditions for successful exploitation of the internees”<sup>205</sup> and reportedly suggested that the prison guards at Abu Ghraib obtain military working dogs for use in interrogations—which they did shortly thereafter.<sup>206</sup> The situation, and the chain of command, was further confused after 19 November 2003, when the commander of the 205th Military Intelligence (MI) Brigade was given command of FOB Abu Ghraib, while Karpinski, as the commander of the 800th MP Brigade, remained in control of detainee operations within the base.<sup>207</sup> As Major David W. DiNenna, the 320th MP Battalion’s operations,

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<sup>201</sup> Hersh, *supra* note 189.

<sup>202</sup> Taguba Report, *supra* note 192, at 7.

<sup>203</sup> Wilson & Chan, *supra* note 191. See also Janis Karpinski, Testimony to the “International Commission of Inquiry on Crimes Against Humanity Committed by the Bush Administration,” Jan. 21, 2006, available at <http://www.bushcommission.org/?q=node/2>.

<sup>204</sup> See Wilson & Chan, *supra* note 191.

<sup>205</sup> Taguba Report, *supra* note 192, at 8. This recommendation, the Taguba Report concluded, “would appear to be in conflict with the recommendations . . . that military police ‘do not participate in military intelligence supervised interrogation sessions.’” *Id.*

<sup>206</sup> Josh White, *Army General Advised Using Dogs at Abu Ghraib, Officer Testifies*, WASH. POST, July 28, 2005, at A18. R. Jeffrey Smith, *General Is Said to Have Urged Use of Dogs*, WASH. POST, May 26, 2004, at A01.

<sup>207</sup> Taguba Report, *supra* note 192, at 38; see also Eric Schmitt, *The Struggle for Iraq: Testimony; Two U.S. Generals Outline a Lag in Notification on Reports of Abuse in Iraqi Prisons*, N.Y. TIMES, May 20, 2004, <http://www.nytimes.com/2004/05/20/world/struggle-for-iraq-testimony-two-us-generals-outline-lag-notification-reports.html?pagewanted=all> (“General [Ricardo] Sanchez also sought to clarify the intent of an order . . . which put some of the military police at the prison under the command of the 205th Military Intelligence Brigade. . . . General Sanchez said he had only meant to put responsibility for the prison’s security under an active-duty Army officer.”).

training, and intelligence officer, later testified, the command situation at the base in the fall of 2003 was “extremely confusing.”<sup>208</sup>

As a result of the absence of training, Taguba reported, “Brigade personnel relied heavily on individuals within the Brigade who had civilian corrections experience, including many who worked as prison guards or corrections officials in their civilian jobs.”<sup>209</sup> On Cell Block I, this meant that MPs in the 372nd MP Company looked to Specialist Charles A. Graner, a thirty-five-year-old former state prison guard,<sup>210</sup> and Staff Sergeant Ivan L. “Chip” Frederick II, who had similarly worked as a corrections officer in Pennsylvania.<sup>211</sup> Unfortunately, what their fellow soldiers apparently learned from Graner and Frederick was how to abuse prisoners, either in order to “soften” them up for interrogation or perhaps simply for fun. As Major General Taguba later noted, between October and December of 2003, “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees.”<sup>212</sup> The incidents, Taguba concluded, were “intentionally perpetrated by several members of the military police guard force,” and constituted a “systematic and illegal abuse of detainees.”<sup>213</sup> Among those

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<sup>208</sup> Gail Gibson, *Confusion Reigns Inside Iraqi Prison, Army Major Testifies*, BALTIMORE SUN, Feb. 3, 2005, <http://www.baltimoresun.com/news/bal-te.abuse03feb03,0,1566920.story>.

<sup>209</sup> Taguba Report, *supra* note 192, at 37.

<sup>210</sup> Paul von Zielbauer & James Dad, *Guard Left Troubled Life for Duty in Iraq*, N.Y. TIMES, May 14, 2004, at A9.

<sup>211</sup> Edward Wong, *Sergeant Is Sentenced to 8 Years in Abuse Case*, N.Y. TIMES, Oct. 22, 2004, <http://www.nytimes.com/2004/10/22/international/middleeast/22abuse.html>.

<sup>212</sup> Taguba Report, *supra* note 192, at 16.

<sup>213</sup> *Id.* at 16–17. In his report, Taguba found that the abuse by military police personnel included: (1) punching, slapping, and kicking detainees, and jumping on the naked feet of detainees; (2) videotaping and photographing naked male and female detainees; (3) forcibly arranging detainees in various sexually explicit positions for photographing; (4) forcing detainees to remove their clothing and keeping detainees naked for several days at a time; (5) forcing naked male detainees to wear women’s underwear; (6) forcing groups of male detainees to masturbate themselves while being photographed and videotaped; (7) arranging naked male detainees in a pile and then jumping on them; (8) positioning a naked detainee on a Meal Ready-to-Eat (MRE) Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture; (9) writing “I am a Rapest” (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked; (10) placing a dog chain or strap around a naked detainee’s neck and having a female soldier pose for a picture; (11) a male MP guard having sex with a female detainee; (12) using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; and (13) taking photographs of dead Iraqi detainees. Taguba also noted that he had found credible evidence to support claims by some detainees that

participating in the abuse and torture were, in addition to Graner and Frederick, Specialists Sabrina Harman, Megan Ambuhl, and Roman Krol, Sergeants Santos Cardona<sup>214</sup> and Michael Smith, and Private First Class Lynndie England, who was Graner's girlfriend.<sup>215</sup> It was England who appeared in some of the most iconic of the Abu Ghraib photographs, in one of which she was shown holding a detainee on a leash and in another of which she was shown pointing at a detainee's exposed genitals.

Apparently, the fact that detainees were being abused, humiliated, and even physically attacked was common knowledge among the soldiers of the 372nd in the fall of 2003.<sup>216</sup> As the *New York Times* later reported, "[m]istreatment was not only widely known but also apparently tolerated, so much so that a picture of naked detainees forced into a human pyramid was used as a screen saver on a computer in the interrogations room."<sup>217</sup> The abuse was reportedly even known to some of the families and friends of the MPs. When Sabrina Harman, who later pled guilty to abusing detainees, returned to Virginia on leave in November of 2003, she gave a disk containing photographs of detainee abuse to a friend, "saying she wanted to present it to higher-ups when she returned permanently."<sup>218</sup> Lynndie England's lawyer told a writer for *Marie Claire* that, when on leave in December of 2003, England had talked to him about her discomfort with the things that the guards were

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American military prison guards: (1) broke chemical lights and poured the phosphoric liquid on detainees; (2) threatened detainees with a charged 9mm pistol; (3) poured cold water on naked detainees; (4) beat detainees with a broom handle and a chair; (5) threatened male detainees with rape; (6) allowed a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; and (7) sodomized a detainee with a chemical light and perhaps a broom stick. The descriptions of the abuses reported by Taguba are taken almost verbatim from the *Taguba Report*. *Id.* at 16–18.

<sup>214</sup> Adam Zagorin, *An Abu Ghraib Offender's Return to Iraq Is Stopped*, TIME, Nov. 2, 2006, <http://www.time.com/time/world/article/0,8599,1554326,00.html>.

<sup>215</sup> Tara McKelvey, *A Soldier's Tale: Lynndie England*, MARIE CLAIRE, 2006, [http://www.marieclaire.com/world/news/lynndie-england-1?click=main\\_sr](http://www.marieclaire.com/world/news/lynndie-england-1?click=main_sr). England later gave birth to Graner's son. *Id.*

<sup>216</sup> Kate Zernike, *Only a Few Spoke Up on Abuse As Many Soldiers Stayed Silent*, N.Y. TIMES, May 22, 2004 ("[M]any other people, including medics, dog handlers and military intelligence soldiers—and even the warden of the site where the abuses occurred—saw or heard of similar pictures of abuse, witnessed it or heard abuse discussed openly at Abu Ghraib months before the investigation started in January.").

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

doing at Abu Ghraib.<sup>219</sup> More startlingly, Graner apparently shared all his photographs by e-mail with his family, seemingly convinced that there was nothing inappropriate about his behavior. “He sent me every picture,” explained his mother to a sympathetic reporter in December of 2008.<sup>220</sup> “I saw the rope. I saw the naked guy.”<sup>221</sup> As Mark Benjamin, the reporter to whom she was speaking, noted, Graner added commentary to his pictures that “described the routine brutality at Abu Ghraib in quotidian language that would have seemed strange unless you knew, as we do now, that the soldiers there were mostly doing what they were told to do by the various authority figures who were issuing orders.”<sup>222</sup>

Much of the fault for Abu Ghraib can undoubtedly be laid at the feet of Lieutenant Colonel Phillabaum, Brigadier General Karpinski, and a number of other officers, who, according to the *Taguba Report*, were simply not up to the task of training and commanding their respective units. Indeed, the entire 800th MP Brigade appeared to be a dysfunctional unit. In his report, Taguba explicitly found that Phillabaum, the commander of the 320th MP Battalion, was “an extremely ineffective commander and leader.”<sup>223</sup> “Despite his proven deficiencies as both a commander and leader,” Taguba added, Karpinski allowed Phillabaum “to remain in command of her most troubled battalion guarding, by far, the largest number of detainees in the 800th MP Brigade.”<sup>224</sup> In Taguba’s view, the 800th MP Brigade’s adjutant and logistics officers were both “essentially dysfunctional,” the Brigade Command Judge Advocate “was unwilling to accept responsibility for any of his actions,” and the Brigade’s executive officer failed to properly supervise the Brigade staff effectively.<sup>225</sup> Many soldiers in the 800th MP Brigade and the 372nd MP Company ignored uniform standards and failed to regularly salute officers<sup>226</sup>—both indications of a breakdown in

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<sup>219</sup> McKelvey, *supra* note 215.

<sup>220</sup> Benjamin, *supra* note 188.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* Despite Benjamin’s sympathy for Graner, Graner had a seriously checkered past, which included allegations that he had beaten both his wife and an inmate at the Pennsylvania prison where he was once a guard. “This guy is in one of the most notorious prisons in the world?” asked Pennsylvania Democratic Representative John Murtha rhetorically, shortly after the Abu Ghraib story broke. “Outrageous. The damage that they did was irreparable.” von Zielbauer & Dad, *supra* note 210, at A9.

<sup>223</sup> Taguba Report, *supra* note 192, at 39.

<sup>224</sup> *Id.* at 39–40.

<sup>225</sup> *Id.* at 40–41.

<sup>226</sup> *Id.* at 41, 43.

unit discipline.<sup>227</sup> Karpinski, for her part, demonstrated a “complete unwillingness to either understand or accept that many of the problems inherent in the 800th MP Brigade were caused or exacerbated by poor leadership and the refusal of her command to both establish and enforce basic standards and principles among its soldiers.”<sup>228</sup> Lieutenant General Ricardo Sanchez, the commander of coalition forces in Iraq during the Abu Ghraib scandal, clearly pins all blame on the dysfunctions of the 800th MP Brigade. “The problem,” he explained in 2006, was “a catastrophic failure in leadership within the MP brigade, beginning with the brigadier general.”<sup>229</sup> When asked about claims that those above Karpinski in the chain of command bore responsibility for actually ordering some of the abusive techniques employed at Abu Ghraib, Sanchez responded by attacking the American Civil Liberties Union (ACLU) as “a bunch of sensationalist liars, I mean lawyers, that will distort any and all information that they get to draw attention to their positions.”<sup>230</sup>

What remains unclear, even after the Taguba investigation and the media investigations into Abu Ghraib, is to what extent official military or Bush Administration policy and orders contributed to the culture of abuse and torture on Cell Block I. “It is challenging to summarize the overwhelming mountain of evidence that pins the blame for the prisoner abuse squarely on the upper ranks of the Bush administration rather than the lower ranks of the Army,” concluded Benjamin in an article for

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<sup>227</sup> Not all officers of the 800th MP Brigade were negligent in their duties. Major Stacy Garrity, the Brigade Finance Officer, who actually received mention in the Taguba Report after being brought up on charges for consuming alcohol with a non-commissioned officer, Taguba Report, *supra* note 192, at 42, became known as “the Angel of the Desert” for her special care for detainees. See, e.g., Ari Shapiro, “*The Angel of the Desert*,” NPR ALL THINGS CONSIDERED, June 18, 2004, <http://www.npr.org/templates/story/story.php?storyId=1964381>. In his report, Taguba specifically noted that several subordinate units under the 800th MP Brigade, including the 744th MP Battalion under the command of Lieutenant Colonel Dennis McGlone, the 530th MP Battalion, under the command of Lieutenant Colonel Stephen J. Novotny, and the 165th MI Battalion, under Lieutenant Colonel Robert P. Walters, Jr., “persevered in extremely poor conditions, and upheld the Army Values.” Taguba Report, *supra* note 192, at 49–50. Taguba also cited three individual military personnel, including Specialist Darby, who should be “favorably noted.” *Id.* Master-at-Arms First Class William J. Kimbro, a Navy dog handler, “refused to participate in improper interrogations,” and First Lieutenant David O. Sutton reported abuse to his chain of command. *Id.* at 50.

<sup>228</sup> Taguba Report, *supra* note 192, at 40.

<sup>229</sup> Joseph L. Galloway, *U.S. General Defends His Adherence to Geneva Conventions in Iraq*, KNIGHT RIDDER NEWSPAPERS, May 5, 2006.

<sup>230</sup> *Id.*

*Salon*.<sup>231</sup> “On Dec. 2, 2002, [Secretary of Defense Donald] Rumsfeld signed a memo authorizing the use of a panoply of abusive interrogation tactics at Guantánamo Bay, Cuba, including stress positions, exploitation of phobias such as a fear of dogs, forced nudity, hooding, isolation and sensory deprivation.”<sup>232</sup> While perhaps not going as far as Benjamin, Taguba himself believed that the MPs responsible for inflicting the abuse and torture did not come up with the tactics on their own, but he was not permitted to investigate anyone beyond the soldiers and their immediate superiors.<sup>233</sup> “These M.P. troops were not that creative,” Taguba told Hersh. “Somebody was giving them guidance, but I was legally prevented from further investigation into higher authority. I was limited to a box.”<sup>234</sup>

## 2. *The Whistleblowers, the Media and the Public*

On 13 January 2004, Specialist Joseph M. Darby slipped an anonymous note and a CD-ROM containing shocking evidence of the Abu Ghraib abuses under the door of the U.S. Army’s Criminal Investigation Division (CID), thus setting in motion the chain of events that would lead to public exposure of the Abu Ghraib torture and abuses.<sup>235</sup> Graner had given Darby a CD-ROM containing numerous images of prisoner abuse; the images had been circulating among personnel in the 372nd MP Company, but no one had yet officially reported the existence of these particular images to the CID. While Darby was not the first to raise concerns about detainee abuse by American military personnel, the evidence he provided was so explosive that it generated immediate results. “Darby,” Hersh explained in his 2004 book *Chain of Command*, “did what the world’s most influential

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<sup>231</sup> Benjamin, *supra* note 188.

<sup>232</sup> *Id.*

<sup>233</sup> Hersh, *supra* note 192.

<sup>234</sup> *Id.* In 2008, when he was no longer with the military, Taguba authored a preface for a report by *Physicians for Human Rights* in which he was far more direct and explicit. “After years of disclosures by government investigations, media accounts, and reports from human rights organizations,” he wrote, “there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.” Dan Froomkin, *General Accuses WH of War Crimes*, WASH. POST, June 18, 2008, <http://www.washingtonpost.com/wp-dyn/content/blog/2008/06/18/BL2008061801546.html>.

<sup>235</sup> See, e.g., SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* 25 (2004); Bryan, *supra* note 187; Bowman, *supra* note 187; Rosin, *supra* note 187; Zernike, *supra* note 216.

human rights groups could not . . . [w]hen they were presented with Darby's computer disk containing the graphic photographs . . . [t]he Army's senior commanders immediately understood they had a problem."<sup>236</sup> Hours after Darby handed over the images, the Army detained Staff Sergeant Frederick, the senior enlisted man captured in the photographs in Cell Block I, and began searching Frederick's computer equipment for more images.<sup>237</sup> Within days, Lieutenant General Sanchez suspended Karpinski and sixteen others pending investigation.<sup>238</sup> On 31 January Lieutenant General David D. McKiernan, the Commander of Coalition Forces Land Component Command, appointed Taguba to conduct that investigation.<sup>239</sup>

While Darby was undoubtedly the most important whistle-blower, Darby apparently never approached the media, and, instead, communicated only with the CID and Taguba's investigation. News about what had happened at Abu Ghraib broke in the American and international media only after at least two other sets of whistleblowers approached the media with the story.<sup>240</sup> While it is not clear what happened first, shortly after Taguba submitted his report, someone apparently leaked the report to Seymour Hersh, who began writing an article for *Newsweek*. (Hersh later maintained, in another *Newsweek* article, that he did *not* get the report from Taguba himself.<sup>241</sup>) At the same time, Staff Sergeant Frederick's father, who was also named Ivan Frederick—concerned that his son would be made a scapegoat by high-ranking officers after being ordered to soften-up prisoners for interrogation—went to his brother-in-law, William Lawson, for assistance. Lawson reportedly first tried to contact seventeen different members of Congress,<sup>242</sup> but after receiving no replies to his letters he approached David Hackworth, a retired colonel, former writer for *Newsweek*, and muckraking journalist, with the story.<sup>243</sup> With Hackworth's help, Lawson and the senior Frederick then tried to contact a number of media figures, beginning with Bill O'Reilly of the

<sup>236</sup> HERSH, *supra* note 235, at 25.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> See, e.g., Taguba Report, *supra* note 192, at 6.

<sup>240</sup> But see James Ridgeway, *Congress Questions Rummy's Coverup*, VILLAGE VOICE, May 7, 2004, <http://www.villagevoice.com/2004-04-27/news/congress-questions-rummy-s-coverup/> ("Time and again, Rumsfeld returned to the line that this is an old story: 'The idea that this is a story broken by the media is simply not the fact.'").

<sup>241</sup> Hersh, *supra* note 192.

<sup>242</sup> Dao & Lichtblau, *supra* note 188.

<sup>243</sup> *Id.*

conservative Fox News *O'Reilly Factor*, but “nobody wanted to touch the story.”<sup>244</sup> Eventually, however, they made contact with CBS and *60 Minutes II*, which interviewed Staff Sergeant Frederick and somehow obtained some of the Abu Ghraib photographs.<sup>245</sup> Even then, the military managed to delay publication of the story. While CBS was prepared to air the story on 14 April 2008, the network’s executives held the story back two weeks after repeated calls from the Pentagon expressing concern that airing the photographs before the invasion of Fallujah would be extremely harmful to American military forces.<sup>246</sup> General Richard B. Myers, the Chairman of the Joint Chiefs of Staff, reportedly even called *CBS Evening News* anchor Dan Rather personally to tell him that broadcasting the story “would endanger national security.”<sup>247</sup> According to a lawsuit Dan Rather later filed against CBS after essentially being fired, the network only gave approval to air the story on 28 April 2004, when it became clear that Hersh was close to publishing his article in *Newsweek*.<sup>248</sup> Even then, Rather maintained in the lawsuit, “CBS imposed the unusual restriction that the story would be aired only once, that it would not be preceded by on-air promotion, and that it would not be referenced on the *CBS Evening News*.”<sup>249</sup>

Despite the delay in airing the story, the media attention created a firestorm of public concern and attention—a firestorm for which at least some administration officials were apparently simply unprepared. According to Taguba, when he first met Secretary Rumsfeld on 6 May 2004, *the night before Rumsfeld was scheduled to testify to Congress* about Abu Ghraib, Rumsfeld claimed neither to have received a copy of

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<sup>244</sup> Brendan O’Neill, *Leaking Self-Doubt*, SPIKED, May 13, 2004. *Spiked*, a successor to the online magazine *LM (Living Marxism)*, frequently adopts positions against multiculturalism and environmentalism. According to its website, “*spiked* is an independent online phenomenon dedicated to raising the horizons of humanity by waging a culture war of words against misanthropy, priggishness, prejudice, luddism, illiberalism and irrationalism in all their ancient and modern forms.” About *Spiked*, available at <http://www.spiked-online.com/index.php?/about/article/336/> (last visited Feb. 10, 2010). Brendan O’Neill, the magazine’s editor, claimed to have spoken to Hackworth directly.

<sup>245</sup> Dao & Lichtblau, *supra* note 188; see also Editorial, *Hackworth Exposed Abuse Scandal*, WORLDNETDAILY, May 8, 2008, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=38407](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=38407). *WorldNetDaily* describes itself as an “independent conservative news website.” It is possible, but unconfirmed, that CBS received the photographs from Frederick and his family.

<sup>246</sup> DAVID DADGE, *THE WAR IN IRAQ AND WHY THE MEDIA FAILED US* 86 (2006).

<sup>247</sup> Sidney Blumenthal, *Dan Rather Stands By His Story*, SALON.COM, Sept. 27, 2007.

<sup>248</sup> Complaint, *Dan Rather v. CBS Corp.*, No. 603121/07, at 12 (N.Y. Sup. Ct. Sept. 19, 2007).

<sup>249</sup> *Id.*



Taguba's three-month-old report nor have seen any of the photographs from the investigation.<sup>250</sup> Among others at the meeting that night were Deputy Secretary of Defense Paul Wolfowitz, Under-Secretary of Defense for Intelligence Stephen Cambone, Chairman of the Joint Chiefs of Staff General Richard Myers, and Army Chief of Staff General Peter Schoomaker.<sup>251</sup> Apparently, not one of the officials or officers had read Taguba's report or seen any evidence.<sup>252</sup> "At best," Taguba told Hersh, "Rumsfeld was in denial."<sup>253</sup> In denial or not, Rumsfeld was decidedly not pleased with Taguba. When Taguba first entered the room, Rumsfeld declared, in a mocking voice, "Here . . . comes . . . that *famous* General Taguba—of the Taguba report!"<sup>254</sup> During the meeting, Rumsfeld also seemed particularly concerned about how Taguba's report had become public.<sup>255</sup> What all this meant was that when Rumsfeld went to testify to the Senate the following day to explain exactly what had happened at Abu Ghraib, many of the senators were probably more familiar with the facts of what had happened than was the man they were hoping to question.<sup>256</sup>

Unfortunately, unfamiliarity with the facts did not prevent Rumsfeld from releasing information he should have instead kept quiet. Joseph Darby had been assured by Army investigators that the information he had given against his friends and unit-members was anonymous, and so was shocked on 7 May 2004, when, while sitting with hundreds of fellow soldiers watching Rumsfeld testify before Congress, Darby heard Rumsfeld congratulate him by name for his courage in coming forward.<sup>257</sup> Worried for his safety, Darby was rushed out of Iraq, and he and his wife were immediately moved to an undisclosed location, where they were guarded around the clock for six months.<sup>258</sup>

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<sup>250</sup> Hersh, *supra* note 192.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *See, e.g.,* Ridgeway, *supra* note 240 ("But under questioning . . . Rummy began to crumble, unable to describe for the senators such basic things as the chain of command and what instructions the guards had been given.").

<sup>257</sup> *Id.* According to Justine Sharrock, "Seymour Hersh had already published his name, but as Darby says, 'Who reads the damn *New Yorker*?'"<sup>257</sup> Justine Sharrock, *Am I a Torturer?*, MOTHER JONES, Mar. 3, 2008.

<sup>258</sup> Sharrock, *supra* note 257; Bryan, *supra* note 187.

## B. Congressional Investigations and Hearings into Abu Ghraib

Shortly after news of the Abu Ghraib abuse came to light, President Bush appeared on Al Arabiya television and announced that he wanted to tell the people of the Middle East that the abuses “represent the actions of a few people.”<sup>259</sup> “It’s important for people to understand,” Bush added, “that in a democracy that [*sic*] there will be a full investigation.”<sup>260</sup> In the eyes of numerous legislators, this meant that there would be significant congressional oversight, and that both the House and the Senate would have the opportunity to hold probing hearings and investigate thoroughly.<sup>261</sup> “When this situation broke,” explained Senator John Warner, the Republican chairman of the Senate Armed Services Committee, “I felt it was the responsibility of the Congress, a co-equal branch of government, to start hearings.”<sup>262</sup> Warner was echoed by Arizona Republican Senator John McCain, who explained that a trustworthy congressional investigation was necessary in order to maintain public confidence in the war in Iraq.<sup>263</sup> “The way you do that,” explained McCain, “is by having hearings, find out who is responsible, get it done and get it behind us.”<sup>264</sup> Despite Bush’s assurances, Warner’s views on the co-equality of the Legislative Branch, and McCain’s confident conclusion that Congress should hold hearings and put Abu Ghraib in the past, in fact, congressional oversight of the Abu Ghraib abuses was sorely lacking.

A number of senators, including most importantly Warner, but also other Republicans, such as McCain, Susan Collins of Maine, and Lindsey Graham of South Carolina,<sup>265</sup> and Democrats, such as Edward

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<sup>259</sup> Christine Hauser, *Many Iraqis Are Skeptical of Bush TV Appeal*, N.Y. TIMES, May 6, 2004, at A16.

<sup>260</sup> *Id.*; Derrick Z. Jackson, *The Buck Stops with Lynndie: But What About Those At the Top?*, CHI. TRIB., Oct. 3, 2005.

<sup>261</sup> *See, e.g.*, Editorial, *supra* note 193 (“There will be an investigation, there will be a prosecution, and heads will roll.”) (quoting Republican Kansas Senator Pat Roberts, Chairman of the Senate Intelligence Committee).

<sup>262</sup> Carl Hulse & Christopher Marquis, *G.O.P. Split Over Inquiry on Prisoner Abuse*, N.Y. TIMES, May 19, 2004, <http://www.nytimes.com/2004/05/19/world/the-struggle-for-iraq-congress-gop-split-over-inquiry-on-prisoner-abuse.html>.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *See, e.g.*, Editorial, *General: More Prison Abuse Charges Possible*, MSNBC NEWS SERVS., May 19, 2004 [hereinafter Editorial, *Charges Possible*]; *Senators to Question Top Generals on Abuse*, BALT. SUN, May 19, 2004, <http://www.baltimoresun.com/news/bal-te.congress19may19,1,4594408.story> [hereinafter *Senators to Question Top Generals*].

Kennedy of Massachusetts and Carl M. Levin of Michigan, initially supported holding hearings in the Senate. Ultimately, however, Warner apparently buckled to party pressure, effectively suspended hearings for the election season, and ended the hearings after only four sessions.<sup>266</sup> In the House, meanwhile, California Republican Duncan Hunter, the Chairman of the House Armed Services Committee, accused Warner and other Senate members of becoming “mesmerized by cameras,”<sup>267</sup> and essentially blocked hearings, allowing a total of only fourteen hours of sworn testimony about Abu Ghraib over the course of two years.<sup>268</sup> In part, this lack of congressional oversight can be ascribed to a striking across-the-board decrease in congressional oversight during the Bush Administration’s heyday.<sup>269</sup> The lack of extensive hearings in either the Senate or the House meant that much of the congressional noise about Abu Ghraib came instead from less-powerful legislators, including the very-junior Senator Graham and the marginalized Democrats, especially California Representative Henry Waxman, the ranking Minority Member of the House Committee on Government Reform.

### 1. *False Start—Or Perhaps Slow-Running—Senators*

In the immediate aftermath of the public display of the Abu Ghraib photographs on *60 Minutes II* and the publication of those photographs in

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<sup>266</sup> Editorial, *Abu Ghraib Whitewash*, *supra* note 14 (“Warner has admirably resisted pressure from the White House and Republican leaders in Congress to stop his investigation. But he is showing signs of losing appetite for the fight.”). *But see* Editorial, *No Accountability on Abu Ghraib*, N.Y. TIMES, Sept. 10, 2004, <http://www.nytimes.com/2004/09/10/opinion/10fri1.html> [hereinafter *Accountability Editorial*] (“[W]ith due respect to Mr. Warner—who has bravely continued his hearings and seems willing to keep going for months more—the answers are in.”).

<sup>267</sup> Dewar & Hsu, *supra* note 13, at A01; *see also* Hulse & Marquis, *supra* note 262.

<sup>268</sup> Milligan, *supra* note 17. In contrast, during the 1990s the Republican-controlled House “logged 140 hours of sworn testimony into whether former president Bill Clinton had used the White House Christmas card list to identify potential Democratic donors.” *Id.*

<sup>269</sup> *See, e.g., id.* (“An examination of committees’ own reports found that the House Government Reform Committee held just 37 hearings described as ‘oversight’ or investigative in nature during the last Congress, down from 135 such hearings held by its predecessor, the House Government Operations Committee, in 1993–94, the last year the Democrats controlled the chamber.”); Waxman, *supra* note 17, at A19; Charles Babington & Helen Dewar, *Lawmakers Demand Answers on Abuses in Military-Run Jails*, WASH. POST, May 6, 2004, at A12 (“In the Republican-controlled Congress, [House Minority Whip Steny H. Hoyer (D-Md.)] told reporters earlier, ‘there is a disinclination for oversight, particularly as it relates to this administration.’”).

*Newsweek*, a number of senators, led by members of the Senate Armed Services Committee, including Republicans John Warner, John McCain, Susan Collins, and Lindsey Graham and Democrats Carl Levin and Edward Kennedy, made it clear that they were extremely interested in holding extensive Senate hearings into the abuses at Abu Ghraib. While the Armed Services Committee, chaired by Warner, made a good start, angering Secretary of Defense Rumsfeld and sparking intense criticism from some Republican legislators, Warner apparently eventually gave in to party pressure and sharply limited the scope and public nature of the hearings without determining the culpability of high-ranking military officers or administration officials. Interestingly, while the Armed Services Committee *appeared* to abandon its oversight, and certainly sharply limited public hearings into Abu Ghraib, the committee left open its investigation, and in December of 2008—more than four years after beginning its investigation—released a report (approved in November by unanimous voice vote of the seventeen members of the twenty-five-member committee present for the vote) concluding that Rumsfeld and other senior U.S. officials shared much of the blame for the detainee abuse.<sup>270</sup>

From the first moments when news of the Abu Ghraib abuses emerged, a number of senators, including both Democrats and Republicans, began calling for extensive congressional hearings. On 4 May 2004, for example, Democratic Virginia Senator Robert C. Byrd called in the *Congressional Record* for full and open hearings into prisoner abuse by American military forces.<sup>271</sup> “Secret, closed door meetings on a subject of such enormous import smack of damage control and cover-up—and that is the last impression the Senate should be conveying,” Byrd declared. “We must ensure that Congress accedes to no ground rules in its investigations that could further taint this deplorable situation. The time for public hearings on prisons run by the U.S. armed forces is now.”<sup>272</sup> It was John Warner, however, as chairman of the Armed Services Committee, who was clearly the most influential senator in terms of determining whether the Senate would hold oversight hearings—and the Virginia senator, a veteran of both the Navy and the

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<sup>270</sup> David Morgan, *U.S. Senate Report Ties Rumsfeld to Abu Ghraib Abuse*, REUTERS, Dec. 11, 2008. The report, which was largely declassified in April of 2009, can be found at [http://armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf).

<sup>271</sup> Senator Robert C. Byrd (D-W. Va.), CONG. REC., May 4, 2004, at S4824.

<sup>272</sup> *Id.*

Marine Corps and a former Secretary of the Navy, was apparently incredibly angry about what had happened at Abu Ghraib.

“It contradicts all the values we Americans learn,” Warner declared when the Senate opened hearings on May 7th. “Let me be as clear as one senator can be: This is not the way for anyone who wears the uniform of the United States of America to conduct themselves.”<sup>273</sup> The Armed Services Committee, he explained, has a “solemn responsibility” to discover what went wrong and “to make sure it never, never happens again.”<sup>274</sup> Warner did not confine his anger to the men and women of the 372nd MP Company who had actually participated in the torture and abuse. “Behind closed doors, however,” noted a reporter for *Salon*, “[Warner] has surprised observers with occasional flashes of anger at Donald Rumsfeld’s evasions.”<sup>275</sup> According to his Senate colleagues, Warner was determined not to be intimidated into halting hearings. “He is motivated by a strong sense of duty to get to the bottom of a scandal that has deeply scarred American credibility in the world,” added the *Salon* reporter.<sup>276</sup> He shows “a penchant for bucking his party, taking heat and surviving,” concluded the *Washington Post*.<sup>277</sup>

Shortly after the Abu Ghraib news broke, Rumsfeld agreed to testify before Warner’s committee for two hours and then to brief all senators in a closed session thereafter.<sup>278</sup> Warner made his anger clear by requiring Rumsfeld to testify under oath—a requirement usually waived as a courtesy for the Secretary of Defense.<sup>279</sup> About a week and a half after hearing from Rumsfeld, Warner announced that the Senate Armed Services Committee was summoning General John P. Abizaid, Lieutenant General Ricardo S. Sanchez, and Major General Geoffrey D. Miller to testify in an open session.<sup>280</sup> “Daily we see from your press a number of new avenues that have to be explored,” Warner told the media, “and we have also on our own initiative found a number of new

<sup>273</sup> Jacoby, *supra* note 13; Transcript, *Rumsfeld Testifies Before Senate Armed Services Committee*, WASH. POST, May 7, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A8575-2004May7?language=printer>.

<sup>274</sup> Dewar & Hsu, *supra* note 13, at A01.

<sup>275</sup> Jacoby, *supra* note 13.

<sup>276</sup> *Id.*

<sup>277</sup> Dewar & Hsu, *supra* note 13, at A01.

<sup>278</sup> Jacoby, *supra* note 13.

<sup>279</sup> *Id.*

<sup>280</sup> Carl Hulse, *Senate Panel Will Summon 3 Generals for Hearing*, N.Y. TIMES, May 18, 2004, <http://www.nytimes.com/2004/05/18/national/18SPEN.html?pagewanted=1>.

avenues that need to be explored.”<sup>281</sup> As of May 21st, Warner had “a lengthy list of Pentagon officials he would like to call” to testify before the committee.<sup>282</sup> “The Armed Services Committee . . . has served notice that it would not pull back, as the House Armed Services Committee has done,” concluded the *Los Angeles Times* on May 17th.<sup>283</sup> “When this situation broke,” Warner explained, “I felt it was the responsibility of the Congress, a co-equal branch of government, to start hearings.”<sup>284</sup> Despite holding hearings, however, the Armed Services Committee was unable to get many answers from the testifying officials and officers; each senator had only six minutes to ask questions of each witness,<sup>285</sup> and as the witnesses claimed to know little about key documents and events, the senators asking questions were unable to follow-up.<sup>286</sup> Still, Warner was certainly not the only senator—or even the most forceful senator—on the committee pushing the investigation. “Warner’s style of questioning at times has been overshadowed by the more aggressive probing and criticism of other senators on the committee,” noted the *Washington Post*, specifically citing questioning from Republican Senators Collins, Graham, and McCain.<sup>287</sup>

Despite their earnest desire to fully explore what had led to the torture at Abu Ghraib, Warner and his Republican colleagues were not without political leanings and were not unaffected by political concerns. Warner “is also a Republican supporter of President Bush,” noted two reporters in the *New York Times*, “and as he conducts the hearings, he is dancing a fine line between members of his party who want him to back

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<sup>281</sup> *Id.*

<sup>282</sup> George Edmonson, *Rumsfeld: Scandal a Drain*, ATLANTA J.–CONST., May 21, 2004, at A7.

<sup>283</sup> Richard Simon & Elizabeth Shogren, *Senators to Press Scandal*, L.A. TIMES, May 17, 2004.

<sup>284</sup> Hulse & Marquis, *supra* note 262.

<sup>285</sup> See, e.g., John Tierney, *Hot Seat Grows Lukewarm Under Capital’s Fog of War*, N.Y. TIMES, May 20, 2004, at A14 (“The senators were stymied in part by the six-minute limit on each questioner, which often left little time for questions after an introductory proclamation.”).

<sup>286</sup> See, e.g., *id.* (“But General Sanchez said that he had never even seen this list [of approved interrogation techniques], let alone authorized any of the harsher techniques. Mr. Byrd and other senators spent much of the morning in confusion trying to figure out where the list had come from.”).

<sup>287</sup> Dewar & Hsu, *supra* note 13, at A01; see also Richard Simon, *S.C. Republican Digging for Iraq Abuse Answers: Sen. Lindsey Graham Rankles Party Elders with His Pursuit of Truth in the Scandal that Many Others Wish Would Fade Away*, L.A. TIMES, June 29, 2004, at A20.

the White House and Democrats.”<sup>288</sup> Indeed, a number of senators, including Oklahoma Republican James Inhofe and Texas Republican John Cornyn, explicitly criticized Warner for continuing to hold hearings and Democrats for calling for additional investigation.<sup>289</sup> “With top Iraq battlefield commanders scheduled to testify about the prison abuse scandal before the Senate Armed Services Committee on Wednesday, a major rift has developed among Republicans as to whether Congress is taking the inquiry into the issue too far,” reported the *New York Times* on May 19th.<sup>290</sup> These hearings, Cornyn explained, represent “a real distraction from trying to win the war, especially at this most fragile time.”<sup>291</sup> “I think [Warner] feels it’s necessary to have these hearings, and I’m sure his reasons are good reasons,” Inhofe had told *New York Times* reporters a week earlier.<sup>292</sup> “I can’t tell you what they are because I don’t know. I have to wonder what good is served by putting it in public, to the extent that those people who have a political agenda can use this.”<sup>293</sup>

Within two months of the scandal’s emergence, it became apparent that the investigation in the Senate was losing steam, in large part because of Bush Administration foot-dragging and pressure from Republicans in both the Executive and Legislative Branches of government. “When the Abu Ghraib scandal broke,” Seymour Hersh later reported, “Senator John Warner, then the chairman of the Armed Services Committee, was warned ‘to back off’ on the investigation, because ‘it would spill over to more important things.’”<sup>294</sup> Warner’s spokesman acknowledged that Warner had been pressured, but said that Warner had resisted that pressure.<sup>295</sup> Nonetheless, as the *New York Times* noted in the summer of 2004, “[t]he Congressional investigation into the abuse of Iraqi detainees at Abu Ghraib prison has virtually ground to a halt.”<sup>296</sup> Numerous factors, including “the calendar, the preferences of some of Mr. Warner’s Republican colleagues and the pace

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<sup>288</sup> Sheryl Gay Stolberg, *Warner, Courtly Republican, Guides Panel in Rough Seas*, N.Y. TIMES, May 12, 2004, at A14.

<sup>289</sup> See *infra* Part III.B.2.

<sup>290</sup> Hulse & Marquis, *supra* note 262.

<sup>291</sup> Dewar & Hsu, *supra* note 13, at A01.

<sup>292</sup> Stolberg, *supra* note 288.

<sup>293</sup> *Id.*

<sup>294</sup> Hersh, *supra* note 192.

<sup>295</sup> *Id.*

<sup>296</sup> Eric Schmitt, *Congress’s Inquiry Into Abuse of Iraqi Prisoners Bogs Down*, N.Y. TIMES, July 16, 2004, <http://www.nytimes.com/2004/07/16/politics/16abus.html>.

of the military investigations, many of which are behind schedule,” contributed to prevent Warner from holding new hearings.<sup>297</sup>

By July there was also less interest from senators in what had happened at Abu Ghraib; only ten senators from both parties attended a briefing to update lawmakers on the status of pending inquiries.<sup>298</sup> Perhaps most importantly, Warner faced criticism from fellow Republicans, who felt that were Warner to hold more hearings he “would only hand Democrats an explosive campaign issue” during a critical presidential and congressional election cycle.<sup>299</sup> In an editorial, the *Washington Post* noted that Warner’s vow “to continue probing the abuse of detainees in Iraq despite pressure from leading congressional Republicans to stop” had come to nothing: since March Warner had failed to hold a single public hearing, partly “because of the Bush administration’s resistance to supplying key witnesses and documents.”<sup>300</sup> “Warner has admirably resisted pressure from the White House and Republican leaders in Congress to stop his investigation,” concluded the *International Herald Tribune* at the end of July, “[b]ut he is showing signs of losing appetite for the fight.”<sup>301</sup>

In September of 2004, Warner suddenly announced that he was going to hold another day of hearings, but many media outlets had concluded that the Senate’s oversight had essentially petered out. “After months of Senate hearings and eight Pentagon investigations, it is obvious that the administration does not intend to hold any high-ranking official accountable for the nightmare at Abu Ghraib,” concluded the *New York Times* in an editorial.<sup>302</sup> “It was pretty clear yesterday that Senator John Warner’s well-intentioned hearings of the Armed Services Committee are not going to do it either.”<sup>303</sup> Some observers, however, such as the *Washington Post*’s Jackson Diehl, were nonetheless

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> Editorial, *Unanswered Questions*, WASH. POST, July 11, 2004, at B06; see also Editorial, *Abu Ghraib Whitewash*, *supra* note 14 (“The Defense Department has consistently tried to stymie Warner’s investigation. It ‘misplaced’ thousands of pages from Major General Antonio Taguba’s report on Abu Ghraib, the only credible military account so far. It stalled the completion of a pivotal look at army intelligence by two other army generals. And it ignored Senate demands for the Red Cross reports on American military prisons for months.”).

<sup>301</sup> Editorial, *Abu Ghraib Whitewash*, *supra* note 14.

<sup>302</sup> Accountability Editorial, *supra* note 266.

<sup>303</sup> *Id.*



surprised. “What was remarkable about the latest round of congressional hearings,” Diehl noted, “were the signs that a handful of Republicans in both congressional houses are unwilling to play by the script. In spite of the dictates of partisanship, they . . . insisted that lowly prison guards and interrogators should not be the only ones to face consequences.”<sup>304</sup> Still, despite the day of hearings in September—and despite at least one suggestion in 2006 that senators were still interested in investigating<sup>305</sup>—it seemed clear that the Senate hearings had amounted to little; witnesses had testified while saying almost nothing, and there seemed no clear path toward finding out whether anyone above Karpinski in the chain of command had had anything to do with formulating a policy of torture and abuse in Cell Block I. “The topic,” concluded *Salon* writer Mark Benjamin, “has sparked little formal inquiry since an initial round of hearings were [sic] held during the spring of 2004.”<sup>306</sup>

While Warner and his fellow interested members of the Armed Services Committee appear to fit the mold of the False Start Senators<sup>307</sup>—in that they passionately indicated their interest in holding oversight hearings and in fact called several high-ranking officials and officers to testify, but then gradually drew back from pressing the issue—such a judgment might be premature. Instead, it might be more accurate to view them as *slow-running* senators instead, as the investigation into Abu Ghraib continued, though almost entirely outside the public eye. On 11 December 2008, over four-and-a-half years after beginning their investigation, the Armed Services Committee released a report harshly critical of Rumsfeld and other senior military officers.<sup>308</sup> “The abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own,” the report’s Executive Summary states.<sup>309</sup> “The fact is that senior officials in the

<sup>304</sup> Jackson Diehl, *Refusing to Whitewash Abu Ghraib*, WASH. POST, Sept. 13, 2004, at A21.

<sup>305</sup> Mark Benjamin, *Not So Fast, General*, SALON.COM, Mar. 7, 2006 (“The bipartisan Warner-Levin letter [preventing General Miller from resigning, and so keeping him available for the investigation] signals that Congress’ anemic probe of abuse at Abu Ghraib might have a pulse after all.”).

<sup>306</sup> *Id.*

<sup>307</sup> See *infra* Part IV.4.

<sup>308</sup> Morgan, *supra* note 270; see also [http://armed-services.senate.gov/Publications/Detainee\\_Report\\_Final\\_April\\_22\\_2009.pdf](http://armed-services.senate.gov/Publications/Detainee_Report_Final_April_22_2009.pdf).

<sup>309</sup> SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY Executive Summary, at xii (2008) [hereinafter Executive Summary], available at [http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS\\_For%20Release\\_12%20December%202008.pdf](http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS_For%20Release_12%20December%202008.pdf). The Senate Armed

United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”<sup>310</sup> Despite this evidence suggesting that at least some senators were interested in continuing oversight, the oversight investigation was clearly hindered and delayed by political concerns almost from the beginning. Even the timing of the release of the new report appears to have been guided by partisanship: The report was not released until the Democrats had been in control of the Senate for two years—and until after the presidential election of 2008.<sup>311</sup>

## 2. *Our-Soldiers-First Legislators and Republican Critics*

Senators such as Warner, Collins, Graham, McCain, Levin, and Kennedy, all of whom were interested in pursuing probing oversight investigations into what had happened at Abu Ghraib, found themselves facing significant criticism from a number of legislators. These critics suggested both that the detainees at Abu Ghraib deserved what they had gotten and that investigation into the abuses at Abu Ghraib was harmful to American military personnel, the United States’ mission in Iraq, and—not surprisingly, given the political landscape in which the Abu Ghraib oversight played out—the President of the United States. Certainly, the two most important and vocal legislators were Oklahoma Senator James Inhofe, a Republican member of the Armed Services Committee, and California Representative Duncan Hunter, the Republican chairman of the House Armed Services Committee.

Perhaps because it was the Senate Armed Services Committee initially leading the charge to investigate what had happened at Abu Ghraib, Senator Inhofe’s comments about whether the Abu Ghraib detainees deserved the abuse they had received and to what extent the members of the 372nd deserved to be punished seemed particularly out of place to his colleagues. When it came his turn during a committee hearing to question Taguba, for example, Inhofe “began by expressing puzzlement at ‘this outrage everybody seems to have about the treatment

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Services Committee initially released only the executive summary in December of 2008; the great majority of the report remained classified until April of 2009. Morgan, *supra* note 270.

<sup>310</sup> Morgan, *supra* note 270.

<sup>311</sup> James Rowley, *Coercive Interrogation Was Common in Iraq, Senate Report Says*, BLOOMBERG, Apr. 21, 2009.

of these prisoners.”<sup>312</sup> “I’m probably not the only one up at this table that is more outraged by the outrage, than we are by, the treatment.”<sup>313</sup> “[T]hese prisoners—they’re murderers, they’re terrorists, they’re insurgents,” Inhofe announced.<sup>314</sup> “Many of them probably have American blood on their hands. And here we’re so concerned about the treatment of those individuals.”<sup>315</sup> Noting that pictures of American military personnel mistreating prisoners should be accompanied by pictures of the executions of prisoners under the regime of Saddam Hussein, Inhofe declared that he was “also outraged that we have so many humanitarian do-gooders right now crawling all over these prisons looking for human rights violations while our troops, our heroes, are fighting and dying.”<sup>316</sup> The Cable News Network (CNN) observed that Senators Hillary Rodham Clinton and Evan Bayh “appeared surprised” at Inhofe’s remarks, that “some other Republicans disavowed them,” and that McCain actually left the committee room while Inhofe was speaking.<sup>317</sup> “Asked outside the meeting room whether he agreed with Inhofe, McCain replied, ‘No way.’”<sup>318</sup>

Inhofe’s remarks about whether the oversight investigation was going to be harmful for American troops in Iraq were certainly less offensive to his fellow senators, but nonetheless, seemed to make light of what had happened at Abu Ghraib. “Quite frankly, I’m sorry that you guys are here,” Inhofe told Generals Abizaid and Sanchez during their May 19th testimony. “I’d rather be handling this in some way where we can get your statement, get it in the record and have that done with, because you have an awesome responsibility. I know that you’re anxious to get back to the battlefield and that’s where your mind is today and that’s where your heart is.”<sup>319</sup> “I think he [Warner] should stop the hearings at this point; we’ve heard enough,” Inhofe added near the end of May.<sup>320</sup> “We have a war to win, and we need to keep our talents

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<sup>312</sup> Walter Shapiro, Op-Ed, *Senator “Outraged” by Reaction to Prisoner Abuse*, USA TODAY, May 11, 2004, [http://www.usatoday.com/news/opinion/columnist/shapiro/2004-05-11-hype\\_x.htm](http://www.usatoday.com/news/opinion/columnist/shapiro/2004-05-11-hype_x.htm).

<sup>313</sup> *Id.*

<sup>314</sup> Editorial, *GOP Senator Labels Abused Prisoners “Terrorists,”* CNN.COM, May 12, 2004, <http://www.cnn.com/2004/ALLPOLITICS/05/11/inhofe.abuse/index.html>

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Prison Abuse Scandal Divides US President’s Party*, AGENCE FRANCE PRESSE, May 20, 2004 [hereinafter *Prison Abuse Scandal*].

<sup>320</sup> Dewar & Hsu, *supra* note 13, at A01.

concentrated on winning the war as opposed to prisoner treatment.”<sup>321</sup> Inhofe was not the only senator suggesting that the congressional investigation was harming American troops and the American military mission in Iraq. “It begins to look like we are engaged in some collective hand-wringing,” said Texas Republican John Cornyn, a member of the Armed Services Committee, “which can be a distraction from fighting and winning the war.”<sup>322</sup>

Unlike Inhofe, who seemed to think that the detainees at Abu Ghraib had deserved the abuse and torture they suffered,<sup>323</sup> Representative Duncan Hunter focused both on the effect that he believed the Senate’s hearings would have on the American military mission in Iraq and on the political fortunes of Republican congressmen and the Bush Administration. “The Senate has become mesmerized by cameras,” Hunter declared, “they have given now probably more publicity to what six people did in the Abu Ghraib prison at 2.30 in the morning than the invasion of Normandy.”<sup>324</sup> The Senate Committee is “basically driving the story” of prisoner abuse, Hunter concluded.<sup>325</sup> “We are at this point diserving our military operation in theater,” he added.<sup>326</sup> “It is time to refocus on winning the war and not pull our battlefield leadership out of the theater.”<sup>327</sup> Speaking after hearing about the beheading of American captive Nicholas Berg, Hunter explicitly connected the continuation of oversight investigations to harm to individual Americans. “We’ve got to make a decision on precisely how to handle [releasing new photos], especially in light of what’s occurred today,” Hunter announced.<sup>328</sup> “From my own perspective, it validates Secretary Rumsfeld and General Myers’ attempt to keep these initial photos from being published . . . I think it shows they were trying to save American lives when they did that. Unfortunately, those pictures were released.”<sup>329</sup> Just as Inhofe was

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<sup>321</sup> *Id.*

<sup>322</sup> Hulse & Marquis, *supra* note 262.

<sup>323</sup> Shapiro, *supra* note 312 (“Referring to current interrogation tactics, Inhofe said, ‘You’ve just got to be tough, and you’ve got to try to get the information out. If you don’t get the information out, more Americans can be killed. And then you’d really hear squealing about it.’”).

<sup>324</sup> *Senators to Question Top Generals*, *supra* note 265; Dewar & Hsu, *supra* note 13, at A01.

<sup>325</sup> *Senators to Question Top Generals*, *supra* note 265.

<sup>326</sup> *Prison Abuse Scandal*, *supra* note 319; Editorial, *Charges Possible*, *supra* note 265.

<sup>327</sup> Hulse & Marquis, *supra* note 262.

<sup>328</sup> Editorial, *Senators to View Abuse Images Wednesday*, CNN.COM, May 12, 2004, <http://www.cnn.com/2004/ALLPOLITICS/05/11/congress.abuse.photos/index.html>.

<sup>329</sup> *Id.*

not alone in the Senate in protesting that the investigations were harming American military interests, Hunter was not alone in the House. “We should not allow [an investigation] to distract us from the war at hand,” Texas Republican Tom DeLay agreed.<sup>330</sup>

### 3. *Obstructionism: The Republicans in the House of Representatives*

While representatives such as Hunter and DeLay were openly criticizing the Senate investigation into what occurred at Abu Ghraib and were expressing their concern for the effect that the investigation would have on American troops and the American military mission in Iraq, Republican leaders in the House (including Hunter) were doing more than talk by minimizing any oversight in their chamber and obstructing attempts by Democrats to investigate Abu Ghraib more closely. Just as John Warner in the Senate was the most important senator for determining the course of oversight hearings into Abu Ghraib, Duncan Hunter, the chairman of the House Armed Services Committee, was the most important representative. Unlike Warner, of course, Hunter had little interest in holding hearings, and repeatedly suggested that congressional investigation of Abu Ghraib would be harmful for American interests and U.S. forces, and was intended to harm Republican politicians.<sup>331</sup> “Maybe we should cancel every piece of Congressional business for the entire year so that the issue at Abu Ghraib can be milked until the election,” Hunter suggested rhetorically, arguing that Congress had “given undue attention to the abuse of prisoners.”<sup>332</sup> Apart from refusing to hold more than one public hearing,<sup>333</sup> Hunter, who set the schedule for the Armed Services Committee, also turned down requests from both Democrats and Republicans at a committee meeting for access to executive branch documents and reports on Abu Ghraib. Concluding that the Committee should first read the Army’s entire 6000-page report on Abu Ghraib before asking for more material from the Executive Branch, Hunter was openly contemptuous. “The idea that we’re going to send a message back now, that somehow we have been stonewalled when they sent us 6,000 [pages] and only four

<sup>330</sup> Hulse & Marquis, *supra* note 262.

<sup>331</sup> See *supra* Part III.B.2; Hulse & Marquis, *supra* note 262.

<sup>332</sup> Carl Hulse, *Even Some in G.O.P. Call for More Oversight of Bush*, N.Y. TIMES, May 21, 2004.

<sup>333</sup> See, e.g., *id.* (“The issue burst into the open in recent days as the Senate and House took starkly different approaches to the prison abuse inquiry, with the Senate holding a series of high-profile hearings and the House one public session.”).

members of the committee have had the time to read them so far, does not make sense,” he announced. “It also sends a false message, it implies that somehow that we’re not getting facts, in fact we’re getting more facts than we can digest. So I don’t think we should start doing business by resolutions of inquiry.”<sup>334</sup> Hunter’s obstructionism was particularly effective. “In the past two years, a House committee has managed to take only 12 hours of sworn testimony about the abuse of prisoners at Iraq’s Abu Ghraib prison,” noted *Boston Globe* reporter Susan Milligan in 2005.<sup>335</sup>

Hunter was not the only House Republican seeking to stymie or avoid significant congressional oversight of the Abu Ghraib allegations. During the week of 11 May 2004, the ranking Democrats on the International Relations, Armed Services, and Government Reform Committees, at the request of House Minority Leader Nancy Pelosi, all sent letters to their respective Republican chairmen requesting that the committees “exercise their full oversight responsibilities and hold further hearings into the abuses at prisons in Iraq.”<sup>336</sup> Not surprisingly, given Waxman’s penchant for impassioned letter-writing,<sup>337</sup> the letter to Tom Davis, which was signed by all of the Democrats on the House Committee on Government Reform, as well as by Vermont Independent Bernard Sanders, was particularly strong. The decision “not to investigate these abuses” and to “defer instead to the Administration’s internal investigations” is “an abdication of Congress’ constitutional oversight responsibility,” the letter concluded.<sup>338</sup> The chairmen who received the letters, however, simply refused to engage in additional oversight, with Davis’s spokesman dismissing Waxman’s letter as “partisan mudslinging.”<sup>339</sup> “We’re not afraid to ask difficult questions,” added the spokesman, “but Mr. Davis determines the agenda, not Mr. Waxman, and we’re not going to craft our hearing schedule on Mr. Waxman’s partisan blueprint.”<sup>340</sup>

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<sup>334</sup> *US Congressional Democrats Blocked in Effort to Widen Prison Torture Probe*, VOANEWS.COM, June 15, 2004; see also Milligan, *supra* note 17.

<sup>335</sup> *E.g.*, Milligan, *supra* note 17.

<sup>336</sup> Michael S. Gerber, *House Dems Demand More Iraq Hearings*, THE HILL, May 12, 2004.

<sup>337</sup> See *infra* Part III.B.4.

<sup>338</sup> Letter from Rep. Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, et al., to Rep. Tom Davis, Chairman, House Comm. on Gov’t Reform (May 11, 2004).

<sup>339</sup> Gerber, *supra* note 336.

<sup>340</sup> *Id.*

Finally, frustrated by the responses (or lack of responses) they were getting from the House committee chairmen, and presumably also interested in creating additional fodder for the campaign season, Democratic Minority Leader Nancy Pelosi of California, Democratic Whip Steny Hoyer of Maryland, and Democratic Caucus Chairman Robert Menendez of New Jersey sent a letter directly to Speaker J. Dennis Hastert of Illinois.<sup>341</sup> Complaining that there did “not seem to be an investigative agenda” anywhere in the House, the three Democratic leaders noted that they believed “that the House will be derelict in its institutional oversight responsibilities unless this situation changes soon.”<sup>342</sup> Hastert’s response was surely not what the Democrats were looking for: He noted that the Republican majority “had actively kept abreast of developments in Iraq, even though it might not be conducting the ‘show trials’ he said Democrats would prefer.”<sup>343</sup>

While the Republican claim that the Democrats were simply interested in manufacturing an issue for an important election year was not without some validity, perhaps more telling of the attitudes of House Republicans than either Davis’s rejection of Waxman’s request or Hastert’s disdain for “show trials” were the comments of Ohio Republican Bob Ney, the Chairman of the House Administration Committee. The week before the Democrats sent their letters, Ney declared that he “absolutely” disagreed with the Senate members who believed that Congress should investigate Abu Ghraib. “America’s reputation has been dealt a serious blow around the world by the actions of a select few,” Ney announced.<sup>344</sup> “The last thing our nation needs now is for others to enflame this hatred by providing fodder and sound bites for our enemies.”<sup>345</sup> As Susan Milligan reported in 2005, in the aftermath of the Abu Ghraib scandal Republican leaders attempting to hinder Democratic efforts to investigate the Bush Administration took such steps as refusing to give the Democrats a room in which they could interview witnesses and seeking to reverse a law allowing any group of seven House members to demand documents without the approval of the majority party.<sup>346</sup>

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<sup>341</sup> Hulse, *supra* note 332.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> Waxman, *supra* note 17, at A19.

<sup>345</sup> Gerber, *supra* note 336; Editorial, *House GOP Defer to Bush on Iraq Abuses*, THE HILL, May 6, 2004; Waxman, *supra* note 17, at A19.

<sup>346</sup> Milligan, *supra* note 17 (“Since the minority party does not have subpoena power, the law is one of the few tools Democrats have to influence investigations.”).

#### 4. *Gadflies: The Waxman Letters and the Democratic Minority*

Marginalized by the Republicans, stymied by chairmen such as Duncan Hunter, and explicitly criticized by Speaker Hastert, a number of Democrats in the House, including, most importantly, California Representative Henry Waxman, attempted to irritate the Republican majority, gain additional media exposure, and even engage in effective oversight by pushing for additional hearings, holding unofficial hearings,<sup>347</sup> publishing editorials in newspapers, and especially waging letter-writing campaigns. By the time news of Abu Ghraib broke, Waxman, who as a member of the minority in the House and who no longer had the power of the subpoena, was already noted for attempting to engage in oversight by writing open letters to fellow legislators, government agencies, and government contractors.<sup>348</sup> In seeking to stir up additional public concern about the Abu Ghraib investigation, Waxman both wrote letters to Republican congressmen and published an op-ed in the *Washington Post*—though it seems likely he knew that neither tactic would in fact convince Republicans in the House to open hearings into what had happened at Abu Ghraib. On 4 May 2004, Waxman wrote to Tom Davis, the Chairman of the House Committee on Government Reform, to request that the committee look into the actions of private contractors at Abu Ghraib.<sup>349</sup> In the letter, Waxman summarized some of the evidence (some from the *New Yorker*, some from CBS, and some from the *Los Angeles Times*) about what American

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<sup>347</sup> See, e.g., *id.* (“Waxman, who held his own unofficial hearing into Iraq contracting, has been rebuffed in his efforts to conduct bipartisan investigations on a number of topics that involve members of the administration and powerful industries. The rejected list includes: the administration role, if any, in condoning detainee abuse at Abu Ghraib and Guantanamo Bay . . .”).

<sup>348</sup> See, e.g., Letter from Rep. Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, to Donald H. Rumsfeld, U.S. Sec’y of Def. (Apr. 30, 2003) (“I am writing about Halliburton’s ties to countries that sponsor terrorism.”); Letter from Rep. Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, to W.J. Tauzin, Chairman, House Comm. on Energy and Commerce, & James C. Greenwood, Chairman, Subcomm. on Oversight and Investigations, Comm. on Energy and Commerce (Apr. 17, 2003) (“I am writing to urge you to investigate what appears to be two years of document destruction by Philip Morris Incorporated, in violation of a federal court order.”).

<sup>349</sup> Letter from Rep. Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, to Representative Tom Davis, Chairman, House Comm. on Gov’t Reform (May 4, 2004). While the Armed Services Committee had primary responsibility for investigating the Armed Forces, the Government Reform Committee was tasked with investigating, among other things, individuals who contracted with the Government.



forces had done to detainees at Abu Ghraib.<sup>350</sup> “Other committees may examine the military’s involvement in this inexcusable episode,” Waxman concluded, “I hope you agree with me that our Committee has a unique responsibility to investigate the involvement of private contractors in this incident.”<sup>351</sup>

Two months later, in an editorial in the *Washington Post*, Waxman publicly decried the manner in which Congress during the Bush Administration had “abdicated oversight responsibility altogether,” concluding that oversight during the Clinton and Bush years had “been driven by raw partisanship.”<sup>352</sup> “The House is even refusing to investigate the horrific Iraq prison abuses,” Waxman added, clearly hoping to anger and activate the *Washington Post*’s readers. “Compare the following: Republicans in the House took more than 140 hours of testimony to investigate whether the Clinton White House misused its holiday card database but less than five hours of testimony regarding how the Bush administration treated Iraqi detainees.”<sup>353</sup>

Perhaps taking a page from Waxman’s playbook, in the spring and early summer of 2004, Democratic leaders in the House wrote a number of open letters to prominent Republicans urging increased oversight of the Abu Ghraib abuse. During the week of 11 May 2004, for example, ranking Democrats on the International Relations, Armed Services, and Government Reform Committees sent letters to their respective committee chairmen asking for additional oversight.<sup>354</sup> The following week, the three senior Democrats in the House sent a similar, though more general, letter to Dennis Hastert.<sup>355</sup> On 4 June 2004, the ranking minority members of the House committees on Government Reform, the Judiciary, Appropriations, Armed Services, International Relations, Intelligence, Energy and Commerce, and Ways and Means, all followed up with a letter sent directly to President Bush requesting assistance in learning more about what had happened in Iraq.<sup>356</sup> “We are writing to inform you of our determination to investigate the prison abuses at Abu

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<sup>350</sup> *Id.* at 1–2.

<sup>351</sup> *Id.* at 3.

<sup>352</sup> Waxman, *supra* note 17, at A19.

<sup>353</sup> *Id.*

<sup>354</sup> Gerber, *supra* note 336; *see also supra* notes 336–40 and accompanying text.

<sup>355</sup> Hulse, *supra* note 316; *see also supra* notes 341–43 and accompanying text.

<sup>356</sup> Letter from Rep. Henry A. Waxman, Ranking Minority Member, House Comm. on Gov’t Reform, et al., to George W. Bush, President of the United States (June 3, 2004).

Ghraib,” the Democrats wrote<sup>357</sup> “While we would prefer to participate in committee investigations with our respective chairs, we cannot allow the refusal of the Republican leadership and committee chairs to pursue these matters to obstruct Congress’ access to essential information.”<sup>358</sup>

The eight ranking Democratic committee members who signed the letter<sup>359</sup> surely knew that their letter requesting that Bush provide the Democratic minority with documents about Abu Ghraib would amount to nothing—just as their letters to their committee chairmen had amounted to nothing. The Bush Administration, which appeared to be largely indifferent to public pressure to release documents, might have been more receptive to a private Democratic approach; surely, much of the communication among legislators and between legislators and the Executive Branch happens in phone calls and face-to-face meetings, rather than in the pages of formal open letters. Like Waxman, however, by writing these letters Democrats were trying to make noise about Abu Ghraib, probably hoping to stoke public concern over American war crimes, and perhaps seeking to alter the balance of power in the House and between the House and the Executive Branch.

### C. The Aftermath of the Abu Ghraib Oversight

In the aftermath of the Abu Ghraib prisoner abuse scandal, many Americans were not especially willing to view England, Graner, Frederick, and their colleagues on the night shift at Abu Ghraib’s Cell Block I as additional victims in the Calley mold, or to identify with the perpetrators while criticizing the military and political elite. There were limited exceptions: Some drew explicit comparisons between what they admitted were the unpleasant and illegal practices of the Abu Ghraib jailors and the murdering and graphic beheadings practiced by the United States’ enemies in Iraq. Such observers concluded that the actions of the Abu Ghraib jailors had not been all that bad in relative terms.<sup>360</sup> On his 4 May 2004 show, the conservative radio host Rush Limbaugh went

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<sup>357</sup> *Id.* at 1.

<sup>358</sup> *Id.*

<sup>359</sup> Those signing the letter were Representative Waxman, Michigan Representatives John Dingell and John Conyers, Jr., Wisconsin Representative David R. Obey, Missouri Representative Ike Skelton, California Representatives Tom Lantos and Jane Harman, and New York Representative Charles B. Rangel. *Id.* at 5–6.

<sup>360</sup> See, e.g., Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES, May 23, 2004, <http://www.nytimes.com/2004/05/23/magazine/23PRISONS.html>.

further, and suggested that the members of the 372nd MP Company were simply “having a good time” to relax from the pressure of being under fire.<sup>361</sup> “This is no different than what happens at the Skull and Bones initiation,” Limbaugh exclaimed, “and we’re going to ruin people’s lives over it and we’re going to hamper our military effort, and then we are going to really hammer them because they had a good time . . . you ever heard of emotional release? You ever heard of need to blow some steam off?”<sup>362</sup>

Even those Americans not willing to go as far as Limbaugh in the wake of the scandal were nonetheless divided on how vile the guards’ actions had been, with sixty percent of respondents in an ABC/*Washington Post* poll classifying what happened at Abu Ghraib as “abuse,” and only twenty-nine percent classifying what happened as “torture.”<sup>363</sup> “Some people are upset with what [Joseph Darby] did—ratting them out—and also because of what happened to those contractors, the beheading,” explained Robert Ewing, a veteran and Darby’s former high school history teacher, describing a discussion from Ewing’s current class of high school seniors. “They might say what the guards did pales in comparison.”<sup>364</sup>

Even if they accepted that the MPs at Abu Ghraib had acted inappropriately, Americans were divided on who should be punished and what form that punishment should take. Many in the military and in

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<sup>361</sup> LEIGH A. PAYNE, UNSETTLING ACCOUNTS: NEITHER TRUTH NOR RECONCILIATION IN CONFESSIONS OF STATE VIOLENCE 285 (2008) (quoting Rush Limbaugh, “*It’s Not About Us; This is War*” (Radio broadcast May 4, 2004).

<sup>362</sup> *Id.*

<sup>363</sup> Sharrock, *supra* note 257; ABC NEWS/WASHINGTON POST POLL: TORTURE—5/23/04, available at <http://abcnews.go.com/images/pdf/955a3Torture.pdf> (last visited July 1, 2010). The poll also revealed that:

Majorities identify three specific coercive practices as acceptable: sleep deprivation (66 percent call it acceptable), hooding (57 percent) and so-called “noise bombing” (54 percent), in which a suspect is subjected to loud noises for long periods. Far fewer Americans accept other practices. Four in 10 call it acceptable to threaten to shoot a suspect, or expose a suspect to extreme heat or cold. Punching or kicking is deemed acceptable by 29 percent. And 16 percent call sexual humiliation—alleged to have occurred at the Abu Ghraib prison in Baghdad—acceptable in some cases.

*Id.*

<sup>364</sup> Rosin, *supra* note 187.

Congress closed ranks around the military hierarchy and the Bush Administration. As Seymour Hersh noted in 2005, “despite the subsequent public furor over Abu Ghraib, neither the House nor the Senate Armed Services Committee hearings led to a serious effort to determine whether the scandal was a result of a high-level interrogation policy that encouraged abuse.”<sup>365</sup> Nonetheless, at least some observers (including Major General Taguba, who became something of a pariah in the military after completing his report<sup>366</sup>) were convinced that the enlisted MPs of the 372nd MP Company had been punished while their superiors, equally responsible, had inappropriately escaped repercussions entirely.<sup>367</sup> Retired Army Colonel Lawrence Wilkerson, for example, Secretary of State Colin Powell’s former chief of staff, stated, in October of 2008, that he believed that torture “was being tolerated by some along the chain of command” and implied that those convicted for their actions at Abu Ghraib were held to a different standard than were their higher-ups.<sup>368</sup> “The president and the vice president, God forbid, were letting go with an umbrella of policy that said you could do what you want and that the gloves were off,” Wilkerson noted.<sup>369</sup>

In the end, of the twelve soldiers convicted of various charges as a result of the abuse at Abu Ghraib, only three (Graner, who received a sentence of ten years of confinement; Frederick, who received a sentence of eight years confinement; and Lynndie England, who received a sentence of three years of confinement) served sentences of longer than ten months.<sup>370</sup> As of the end of 2008, only Graner remained in prison—

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<sup>365</sup> Hersh, *supra* note 192.

<sup>366</sup> *Id.*

<sup>367</sup> Jackson, *supra* note 260. Secretary Rumsfeld, for example, ostensibly accepted “full responsibility” for “the terrible activities that happened at Abu Ghraib.” The abuse “occurred on my watch,” he explained, “and as secretary of defense I am accountable for them, and I take full responsibility.” Jim Garamone, *Rumsfeld Accepts Responsibility for Abu Ghraib*, AM. FORCES PRESS SERV., May 7, 2004. Despite this claim, however, Rumsfeld faced no penalties and continued to serve as secretary of defense until just after the 2006 off-year elections. Apart from his statement to Congress, it is hard to see how he was “accountable” or how he took “full responsibility” for the prisoner abuse.

<sup>368</sup> Jay Hamburg, *Torture Erodes U.S. Values, Military Leaders Say*, ORLANDO SENTINEL, Oct. 16, 2008, [http://articles.orlandosentinel.com/2008-10-16/news/torturetalk16\\_1torture-wilkerson-soyster](http://articles.orlandosentinel.com/2008-10-16/news/torturetalk16_1torture-wilkerson-soyster).

<sup>369</sup> *Id.*

<sup>370</sup> See, e.g., TA Badger, *Pfc. England Sentenced to 3 Years*, ASSOCIATED PRESS, Sept. 28, 2005; Josh White, *Army Dog Handler Gets Six Months in Prison; Penalty One of Lightest for Detainee Abuse*, WASH. POST, Mar. 23, 2006, at A15. No officers were convicted of any wrongdoing, though several were demoted or were punished in ways that effectively ended their careers. Jackson, *supra* note 260.

where he was repeatedly complaining about being forced to stay in a cell where the lights were kept on twenty-four hours a day.<sup>371</sup> Brigadier General Karpinski was reprimanded and relieved of her command of the 800th MP Brigade in April of 2005 and demoted to colonel a month later, ostensibly for dereliction of duty, making a “material misrepresentation” to investigators, failing to obey a lawful order, and shoplifting a \$22 bottle of perfume at MacDill Air Force Base in Florida in 2002—an allegation she denies.<sup>372</sup> Major General Taguba, only the second Filipino ever to achieve the rank of general in the U.S. Army, received a lateral transfer to the Pentagon to work in the office of the Assistant Secretary of Defense for Reserve Affairs, where, he was later told, he could “be watched.”<sup>373</sup> In January of 2006, he received a call from General Richard Cody, the Army’s Vice-Chief of Staff and a long-time acquaintance, who without exchanging any pleasantries or offering any explanations informed Taguba that Taguba needed to resign by January of 2007.<sup>374</sup> “They always shoot the messenger,” Taguba explained to Seymour Hersh.<sup>375</sup> “From the moment a soldier enlists, we inculcate loyalty, duty, honor, integrity, and selfless service. And yet when we get to the senior-officer level we forget those values.”<sup>376</sup>

#### IV. Identifying Archetypes of Congressional War Crimes Oversight

Thucydides’ famous suggestion, that “an exact knowledge of the past [is] an aid to the understanding of the future, which in the course of human things must resemble if it does not reflect it,”<sup>377</sup> is of great interest to political scientists, who look for recurrent patterns in disparate events. This concept is more problematic for historians, however, who tend to suspect that events do not repeat so neatly in different contexts. The history of congressional oversight of war crimes after My Lai and Abu Ghraib suggests that in this instance the political scientists are correct:

<sup>371</sup> Benjamin, *supra* note 188.

<sup>372</sup> Editorial, *Shoplifting Charge Dogs Iraq Gen*, CBS, June 2, 2004; Editorial, *Ex-Abu Ghraib General Denies Shoplifting*, ASSOCIATED PRESS, May 13, 2005. In October of 2005, Karpinski released a book in which she claimed that she had been scapegoated by her superiors because of her gender. JANIS KARPINSKI, *ONE WOMAN’S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY* (2005).

<sup>373</sup> Hersh, *supra* note 192.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> THUCYDIDES, *THE PELOPONNESIAN WAR* 1.22, 16 (Robert B. Strassler ed., Richard Crawley trans. 1996) (1874).

that history demonstrates that similar archetypes emerged just before and just after times when Congress was faced with the choice of whether to engage in war crimes oversight. Part IV.A discusses the archetypes of the Whistleblowers, the Muckraking Media, and the Activated Public—three archetypes that emerged before Congress took explicit war crimes oversight action, and that explain, together with the concept of the “fire-alarm” model of congressional oversight, how archetypes operated to spur congressional action. Part IV.B examines the archetypes of the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives—four archetypes that emerged after Congress was spurred into action by the media and the public—and suggests that these archetypes sprang from the political structure of the U.S. Government, the separation of powers between the Executive and Legislative Branches, and the relationships both between the Senate and the House of Representatives and between the powerful and largely powerless members of Congress.

#### A. Archetypes Prior to Congressional Involvement

The Whistleblowers, the Muckraking Media, and the Activated Public, the three archetypes that emerged prior to congressional involvement in war crimes oversight after My Lai and Abu Ghraib, are archetypes of congressional oversight because all three were necessary to spur Congress into exercising its oversight function. Put another way, under a traditional “fire-alarm” model of congressional oversight,<sup>378</sup> Congress will generally not turn its attention to war crimes oversight until required to do so by some motivating force such as a whistleblower, a muckraking journalist, or an interested public. These three archetypes evolved over the decades between My Lai and Abu Ghraib as technology developed and as American society adjusted to the realities of the post-Vietnam, post-Watergate, and even post-Monica Lewinsky world. They nonetheless remain effective archetypes in understanding how Congress might be forced to focus publicly on allegations of war crimes committed by American forces.

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<sup>378</sup> Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

### 1. *Fire-Alarm Oversight*

The “fire-alarm” model of congressional oversight helps explain why Congress did not, after either My Lai or Abu Ghraib, engage in war crimes oversight until motivated to do so by the Whistleblowers, the Muckraking Media, and the Activated Public. In an influential 1984 article in the *Journal of American Political Science*, Mathew McCubbins and Thomas Schwartz argued that what had previously appeared to scholars to be neglect of oversight was instead really “a preference for one form of oversight over another, less-effective form.”<sup>379</sup> Under the “fire-alarm model” of congressional oversight McCubbins and Schwarz proposed or identified,

Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself. . . . Instead of sniffing for fires, Congress places fire-alarm boxes on street corners, builds neighborhood fire houses, and sometimes dispatches its own hook-and-ladder in response to an alarm.<sup>380</sup>

The fire-alarm model, argue McCubbins and Schwarz, is more cost-effective than is a police-patrol model, under which “at its own initiative, Congress examines a sample of executive-agency activities, with the aim of detecting and remedying any violations . . . and by its surveillance, discouraging such violations.”<sup>381</sup> Perhaps more importantly, at least in the politically-loaded and controversial context of war crimes oversight, engaging in oversight under the fire-alarm model might bring more credit to a legislator than would engaging in oversight under the police-patrol

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<sup>379</sup> *Id.* at 165.

<sup>380</sup> *Id.* at 166. McCubbins and Schwartz were admittedly talking about oversight of legislative goals, rather than oversight of Executive Branch military actions. The principle, however, remains the same: Congress gets more accomplished in an oversight sense when it relies upon others to pull fire alarms than it does if it engages in active policies. *Id.* at 171–72. *But see id.* (“[W]e do not contend that a predominantly fire-alarm policy is more likely than a predominantly police-patrol policy to serve the public interest, only that it is likely to secure greater compliance with legislative goals; whether such compliance serves the public interest depends on what those goals are.”).

<sup>381</sup> *Id.* at 166.

model. “Justly or unjustly,” McCubbins and Schwarz note, “time spent putting out visible fires gains one more credit than the same time spent sniffing for smoke.”<sup>382</sup> Put another way, congressmen who are operating primarily under the fire-alarm likely will not engage in war crimes oversight until and unless their alarms are pulled by whistleblowers, media gadflies, or an increasingly concerned public.

## 2. *The Whistleblowers (Archetype 1)*

The first archetype that emerged after My Lai and Abu Ghraib was that of the Whistleblowers. While it is possible to conceive of journalists stumbling upon stories about war crimes, or even to conceive of Congress investigating and finding such stories independently, it is obviously easier for those interested in atrocity news to learn about alleged war crimes from whistleblowers than from independent digging. Participants in atrocities generally attempt to cover up those atrocities; observers of war crimes try to cover up their involvement. After both My Lai and Abu Ghraib, it was whistleblowers who initially raised questions about possible war crimes: in 1969, it was Ridenhour,<sup>383</sup> who had been a helicopter door gunner at the time of the massacre and who only joined Lieutenant Calley’s former unit after Charlie Company “had been through ‘Pinkville.’”<sup>384</sup> After Abu Ghraib, it was Specialist Joseph M. Darby, a member of the 372nd Military Police Company who had not taken part in the abuse, who reported the story to Army investigators.<sup>385</sup>

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<sup>382</sup> *Id.* at 168.

<sup>383</sup> Lydon, *supra* note 60, at 14; Osnos, *supra* note 64, at A10.

<sup>384</sup> Ron Ridenhour, “*Jesus Was a Gook*,” in *NOBODY GETS OFF THE BUS: THE VIET NAM GENERATION BIG BOOK* 138–40 (Kali Tal & Dan Duffy eds., 1994).

<sup>385</sup> See, e.g., Bryan, *supra* note 187; Bowman, *supra* note 187; Rosin, *supra* note 187. Ridenhour and Darby were the initial whistleblowers, but the history of the investigations into My Lai and Abu Ghraib suggests that once military investigators and journalists begin digging into the stories, initial whistleblowers might quickly be joined by additional whistleblowers. Shortly after news of My Lai broke, for example, journalists quickly found that both members of Charlie Company and others (including Calley, Paul Meadlow, Michael Bernhardt, Michael Terry, and photographer Ronald L. Haeberle) were willing to give additional details into the massacre. Braestrup & Klaidman, *supra* note 80, at A1; Editorial, *supra* note 75. After Darby helped lead to the Taguba investigation, Ivan Frederick’s family approached *60 Minutes II* and an unknown whistleblower passed the Taguba Report to Seymour Hersh. Dao & Lichtblau, *supra* note 188.



The history of oversight after My Lai and Abu Ghraib also suggests that the archetypical Whistleblowers were partly ostracized from their military communities, threatened by their military and civilian peers, and occasionally even reprimanded by the authorities that should have been praising them for their actions. By the time he wrote to military and political officials regarding the My Lai massacre, Ridenhour was already out of the military, and so was not subject to the same sorts of pressures as were some other My Lai and Abu Ghraib whistleblowers. As he later recounted,<sup>386</sup> however, one night while on patrol he spoke about My Lai to his long-time friend and military teammate Michael Terry, who on 16 March 1969, “after the pork and beans but before the peaches” of his meal, had been responsible for gunning down wounded survivors in the My Lai kill-trench.<sup>387</sup> “Mike, Mike,” Ridenhour asked. “Didn’t you know that was wrong?”<sup>388</sup> Terry answered that he didn’t know, and that it was “just one of those things.”<sup>389</sup> After that conversation, however, Terry walled Ridenhour off—a potential problem in their six-man Long-Range Reconnaissance and Patrol unit.<sup>390</sup>

The response to Hugh Thompson was far more serious than was the response to Ridenhour. Thompson, for example, was subjected to what Peers regarded as “more of an inquisition than an investigation,”<sup>391</sup> and was in some ways criticized by congressmen speaking to the media. Ridenhour, Thompson, and Haerberle were also clearly the targets of several of the Hébert Subcommittee’s recommendations, including, especially, the recommendation that the military should “review the practices and procedures in awarding medals and decorations.”<sup>392</sup> The implication, that the military should reconsider the Distinguished Flying Cross it had awarded to Thompson, was clear.

Because of the manner in which his whistleblowing came to light, Darby faced perhaps the most dangerous situation. He had been assured that the information he had given against his friends and unit members

<sup>386</sup> See, e.g., Ron Ridenhour, Comments at the Conference on My Lai held at Tulane University (Dec. 1994).

<sup>387</sup> Ridenhour, *supra* note 384, at 138–40.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* (“We never talked about My Lai again after that, though we pulled four more LRRP missions together and finished the remaining seven months of our tours in Vietnam in the same company. We continued to be cordial, but we were not close after that.”).

<sup>391</sup> PEERS, *supra* note 41, at 242.

<sup>392</sup> HÉBERT REPORT, *supra* note 2, at 7–8.

was anonymous. “I was afraid for retribution not only from them, but from other soldiers,” he later told the British Broadcasting Corporation (BBC).<sup>393</sup> After Rumsfeld, testifying before Congress on 7 May 2004, publicly identified Darby as the source of the information, Darby immediately “felt 400 pairs of eyes on him.”<sup>394</sup> Darby and those who protected him and his wife for the next six months<sup>395</sup> were not being paranoid: At least some of the residents of Darby’s hometown were highly critical of Darby’s decision to step forward,<sup>396</sup> and many in his hometown “called him a traitor.”<sup>397</sup> “I call him a rat,” announced Mike Simico, who was visiting relatives in Cresaptown.<sup>398</sup> “If I were [Darby], I’d be sneaking in through the back door at midnight,” added Janette Jones, who lived just across the border from Cresaptown in Pennsylvania.<sup>399</sup> Jones explained that she believed that if Darby had not stepped forward then al-Zarqawi would not have killed Nick Berg.<sup>400</sup> “[W]hen you go against your fellow man like that, I don’t know. Some people won’t like it,” concluded Alan St. Clair, who lived down the road from Darby’s high-school home.<sup>401</sup> Colin Engelbach, the commander of Cumberland’s Henry Hart VFW Post 1411, went the furthest, calling Darby a “borderline traitor” on national television and announcing that people should “get him.”<sup>402</sup>

### 3. *The Muckraking Media (Archetype 2)*

The second archetype that emerged after My Lai and Abu Ghraib was that of the Muckraking Media. In one sense this archetype might almost be thought of as the “Seymour Hersh” archetype.<sup>403</sup> In 1969, it was Seymour Hersh who went door-to-door at Fort Benning looking for William Calley,<sup>404</sup> and in 2004 it was the imminent publication of

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<sup>393</sup> Bryan, *supra* note 187.

<sup>394</sup> Sharrock, *supra* note 257.

<sup>395</sup> See Bryan, *supra* note 187.

<sup>396</sup> Rosin, *supra* note 187.

<sup>397</sup> Bryan, *supra* note 187.

<sup>398</sup> Rosin, *supra* note 187.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*; Editorial, ‘Zarqawi’ Beheaded US Man in Iraq, BBC, May 13, 2004, <http://news.bbc.co.uk/2/hi/3712421.stm>.

<sup>401</sup> Rosin, *supra* note 187.

<sup>402</sup> See Sharrock, *supra* note 257.

<sup>403</sup> See, e.g., HERSH, *supra* note 235, at xii (“With his stories on My Lai, Hersh joined a tradition of muckrakers . . .”); Hersh, *supra* note 37.

<sup>404</sup> HERSH, *supra* note 235, at x.

Hersh's article in the *New Yorker* that caused CBS to broadcast the Abu Ghraib photographs at the end of April. Nonetheless, the race between the *New Yorker* and *60 Minutes II* to break the Abu Ghraib story—and, for that matter, the decisions by newspapers to publish pictures of My Lai, despite warnings from the prosecutors in the Calley court-martial<sup>405</sup>—demonstrates that, after both My Lai and Abu Ghraib, there was certainly more than one muckraking journalist interested in chasing down the news about alleged American war crimes.

The Muckraking Media operated best after receiving information from the Whistleblowers. Given the military's desire to avoid any public dishonor, whistleblowers operating without the support of muckraking journalists were far less effective in spurring either public attention or congressional action. After seeing the massacre at My Lai, and in fact putting his helicopter crew and his own body between the bullets of Charlie Company and Charlie Company's victims, Hugh Thompson reported the atrocity to his superiors, to little effect.<sup>406</sup> Ridenhour, in contrast, was concerned even after writing to numerous political and military officials that the Army would whitewash the historical record, and so he sent his story to *Ramparts* magazine despite his misgivings about the magazine's reputation.<sup>407</sup>

The job of the Muckraking Media in identifying instances of war crimes deserving of congressional oversight and encouraging Congress to act has evolved and in many ways has been made far easier since My Lai by two trends: (1) the increasing media and public interest in muckraking stories or exposés of scandals and war crimes and (2) the increasing ease and speed of mass publication. The first trend can be ascribed in part to the public loss of confidence in authority after the Vietnam conflict and Watergate.<sup>408</sup> Crusading investigative journalists Bob Woodward and Carl Bernstein had proven that there were scandals

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<sup>405</sup> HERSH, *supra* note 37, at 137–38; Editorial, *The My Lai Massacre*, *supra* note 75.

<sup>406</sup> BELKNAP, *supra* note 36, at 73–79; Eckhardt, *supra* note 40, at 700–03; Montgomery, *supra* note 58.

<sup>407</sup> Lydon, *supra* note 60, at 14.

<sup>408</sup> See, e.g., JAMES T. PATTERSON, GRAND EXPECTATIONS 769 (1996) (“More generally the war undercut the standing of political elites. . . . Popular doubt and cynicism about ‘the system’ and the Washington Establishment lingered long after the men came home.”); *id.* at 782 (“Watergate, [many Americans] believed, proved—yet again—the deviousness and arrogance of government officials who claimed to serve the public interest.”).

to be found even at the very highest levels of the U.S. Government.<sup>409</sup> The effect on the media of the second trend, which can be ascribed to technological developments, is hard to overestimate, especially in the age of the blogosphere. In 1969, Hersh found that mainstream news magazines such as *Life* and *Look* were uninterested in publishing a story exposing the massacre at My Lai and that, as a result, he was forced to publish with the untried, untested Dispatch News Service.<sup>410</sup> After the initial story of Abu Ghraib broke, in contrast, hundreds of websites, online newspapers, and blogs immediately began chasing down leads and publishing additional pictures. The increased speed of mass publication has significantly accelerated the news cycle, and continues to blur the distinction between journalists and the public-at-large.<sup>411</sup> As a result, in the future Congress might find that its decision about whether to engage in war crimes oversight is even more heavily influenced by muckraking “journalists” (or muckraking *somebodies*) than it was in the past.

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<sup>409</sup> See, e.g., CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974). Of course, not all muckraking stories about government or military cover-ups amount to anything. In January of 2010, attorney and *Harper's* contributor Scott Horton, recounted an involved story regarding what he believes were several murders of prisoners carried out at Guantánamo Bay in 2006. Scott Horton, *The Guantánamo "Suicides": A Camp Delta Sergeant Blows the Whistle*, HARPER'S, Jan. 18, 2010, <http://harpers.org/archive/2010/01/hbc-90006368>. As *Slate's* editor-at-large Jack Shafer wrote in noting that journalists had generally refused to follow up on the story, however, “Horton should be grateful for the relative silence greeting his 8,000-word article. While rich in detail, the piece never comes close to making its case . . . nor does it present persuasive evidence to show that multiple branches of the military, the FBI, the Justice Department, and two White Houses have deliberately concealed the true nature of the deaths.” Jack Shafer, *Suicide or Murder at Guantánamo? The Shortcomings of a Harper's Magazine "Exposé,"* SLATE, Jan. 28, 2010.

<sup>410</sup> HERSH, *supra* note 235, at ix; see also REPORTING VIETNAM, PART TWO: AMERICAN JOURNALISM 1969-1975, at 13-27 (Milton J. Bates et al. eds., 1998); HERSH, *supra* note 37, at 135.

<sup>411</sup> See, e.g., Editorial, *What Is A Journalist?*, CHRISTIAN SCI. MONITOR, Mar. 18, 2005, [www.csmonitor.com/2005/0318/p08s02-comv.html](http://www.csmonitor.com/2005/0318/p08s02-comv.html) (“But in the Internet age, the cost of distributing news has become minimal. Almost anyone can set up a web log (‘blog’) or send a mass e-mailing, and present themselves as someone who surveys the public scene and presents ‘news.’ Some of these lone-wolf reporters are a refreshing challenge to the usual pack journalism of old media. Reputable reporters hear the howl and see if the yapping is worth pursuing.”). At the same time, of course, the proliferation of unedited “news” sources has clearly reduced the trustworthiness of many individual pieces of reported information.

#### 4. *The Activated Public (Archetype 3)*

The third common archetype that emerged—third, at least, in that it necessarily followed the archetypes of the Whistleblower and the Muckraking Media, though it was probably more important than the other two in terms of spurring congressional action—was that of the Activated Public. Whistleblowers and muckrakers are relative easy to identify after the fact, as by definition whistleblowers need to communicate with authorities and by definition journalists need to publish. An activated public is a far harder thing to define, identify, and quantify. The events surrounding the My Lai massacre and the prisoner abuses at Abu Ghraib demonstrate, however, that the public became activated in response to either the reports of whistleblowers or the stories of muckrakers, or some combination of the two. The activated public quickly made its presence known by demanding additional news coverage, communicating with its elected representatives, responding to polling questions,<sup>412</sup> writing letters of support to the accused or their victims,<sup>413</sup> and even threatening the whistleblowers and muckrakers who broke the stories in the first place.<sup>414</sup> While members of Congress do not always respond to public opinion in crafting legislative agendas,<sup>415</sup> members of Congress often seek to respond to public concern and interest so as to maintain electability.<sup>416</sup> Once the public was activated after My Lai and Abu Ghraib, senators and representatives found it hard

<sup>412</sup> One poll, for example, released in July 2004, suggested that Americans roundly rejected torture under circumstances akin to those at Abu Ghraib. U.S. Public Rejects Nearly All Forms of Torture or Coercion Even in Face of Possible Terrorist Attack, *Program on International Policy Attitudes/Knowledge Networks*, July 22, 2004, available at [http://www.worldpublicopinion.org/pipa/articles/bjjusticehuman\\_rightsra/111.php](http://www.worldpublicopinion.org/pipa/articles/bjjusticehuman_rightsra/111.php) (last visited July 16, 2010).

<sup>413</sup> See *supra* notes 180–84 and accompanying text (describing the enormous public support for Lieutenant William Calley in the wake of the court martial guilty verdict).

<sup>414</sup> See, e.g., *supra* notes 393–402 and accompanying text (describing threats made against Joseph Darby for blowing the whistle on Abu Ghraib); HERSH, *supra* note 235, at x (describing how a Pentagon reporter for the *Washington Post* assigned to follow up on Hersh's initial My Lai story called Hersh a "son of a bitch" and asked "where do you get off writing a lie like that?"). See also *id* at xvii (quoting Richard Pearle, the former chairman of the President's Defense Policy Board, stating that "Sy Hersh is the closest thing American journalism has to a terrorist, frankly.").

<sup>415</sup> See, e.g., STEPHEN E. FRANTZICH, *WRITE YOUR CONGRESSMAN: CONSTITUENT COMMUNICATIONS AND REPRESENTATION* 77 (1986) ("No observer truly believes that issue mail controls legislative output, nor does anyone believe that congressional decision making goes on isolated from the input of constituent letters.").

<sup>416</sup> See, e.g., DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 64 (1974) ("Outside the roll call process, the congressman is usually able to tailor his positions to suit his audiences. A solid consensus in the constituency calls for ringing declarations.").

to avoid engaging in war crimes oversight without being criticized by the media and attacked by at least part of the public.<sup>417</sup> To return to the fire-alarm model of congressional oversight: the public concern over My Lai and Abu Ghraib demonstrated that an activated public was the equivalent of thousands or tens of thousands of fire alarms all being pulled, all at exactly the same moment.

The archetype of the Activated Public not only helps explain Congress's decisions regarding war crimes oversight after My Lai and Abu Ghraib, but also might help explain why congressional oversight of My Lai and Abu Ghraib (however poorly accomplished) was not mirrored by congressional oversight of alleged atrocities during the Second World War or the Korean conflict. American forces committed a number of war crimes during those conflicts. In 1943, for example, Americans massacred seventy-four surrendered Italian soldiers and two surrendered German soldiers after the capture of Biscari airfield in Sicily;<sup>418</sup> during the Second World War in the Pacific, some American soldiers killed surrendering Japanese soldiers and collected body parts from Japanese dead;<sup>419</sup> and early in the Korean War, American soldiers

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<sup>417</sup> See, e.g., Truth Editorial, *supra* note 14, at A22; BELKNAP, *supra* note 36, at 136; HERSH, *supra* note 37, at 169; Editorial, *supra* note 107, at 13 (“Asked about the ‘whitewash’ rumors, Mr. Rivers responded, ‘I ought to count 10 before I answer this.’”).

<sup>418</sup> RICK ATKINSON, *THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943–1944*, at 117–20 (2007). After General Omar Bradley, along with two journalists who had witnessed the killings, complained to General George Patton, whose men had massacred the prisoners, Patton reluctantly agreed to investigate. “I told Bradley that it was probably an exaggeration,” Patton wrote in his journal, “but in any case to tell the officer to certify that the dead men were snipers or had attempted to escape or something, as it would make a stink in the press and also would make the civilians mad. Anyhow, they are dead, so nothing can be done about it.” *Id.* at 119. In the end, after attempting to suggest to General George Marshall that the killings had been “thoroughly justified,” Patton agreed to try the two men most responsible. *Id.* According to Atkinson, the two correspondents who saw the massacre accepted Patton’s assurances that such massacres would never happen again, and “never printed a word.” *Id.* Sergeant Horace T. West admitted that he had participated in shooting thirty-six POWs, was found guilty, and was stripped of rank and sentenced to life in prison. Captain John T. Compton, who was charged in a second incident of executing forty POWs, claimed to be following orders, and was acquitted. See also James J. Weingartner, *Americans, Germans, and War Crimes: Converging Narratives from “the Good War,”* 94 J. AM. HIST. 1164 (2008).

<sup>419</sup> See, e.g. JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 35 (1986) (“By the final years of the war against Japan, a truly vicious cycle had developed in which the Japanese reluctance to surrender had meshed horrifically with Allied disinterest in taking prisoners.”); Ben Fenton, *American Troops ‘Murdered Japanese POWs,’* LONDON TELEGRAPH, Aug. 6, 2005, <http://www.telegraph.co.uk/news/>

allegedly indiscriminately killed Korean civilians at No Gun Ri.<sup>420</sup> The atrocities at My Lai and Abu Ghraib occurred during wars or conflicts that were enormously contentious and unpopular to large segments of the U.S. population. Both World Wars were viewed as far more necessary and, even, “good” wars,<sup>421</sup> and the American public clearly did not view the Korean police action as “bad” in the way that it later viewed Vietnam as bad.<sup>422</sup> Perhaps the answer lies in the fact that the American public was *not* “activated” about war crimes or atrocities—or at least about *American* war crimes or atrocities—during earlier conflicts. When the

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worldnews/asia/japan/1495651/American-troops-murdered-Japanese-PoWs.html; RICHARD ALDRICH, *THE FARAWAY WAR* (2005); NIALL FERGUSON, *THE WAR OF THE WORLD: HISTORY’S AGE OF HATRED* 546 (2007) (“Boiling the flesh off enemy skulls to make souvenirs was a not uncommon practice. Ears, bones and teeth were also collected.”); Simon Harrison, *Skull Trophies of the Pacific War: Transgressive Objects of Remembrance*, 12 *J. ROYAL ANTHROPOLOGICAL INST.* 817 (2006).

<sup>420</sup> See, e.g., Charles J. Hanley & Martha Mendoza, *AP Updates Its ‘No Gun Ri’ Pulitzer Winner: New Document Reveals Order to Shoot Refugees*, ASSOCIATED PRESS, May 29, 2006; Jeremy Williams, *‘Kill ‘em All’: The American Military in Korea*, BBC, Jan. 2, 2002, [http://www.bbc.co.uk/history/worldwars/coldwar/korea\\_usa\\_01.shtml](http://www.bbc.co.uk/history/worldwars/coldwar/korea_usa_01.shtml). The Associated Press won the Pulitzer Prize for breaking the No Gun Ri story in 1999, after which the issue sparked a long-running historical debate, particularly between Hanley and Robert Bateman, an Army-officer-turned-historian. See, e.g., ROBERT BATEMAN, *NO GUN RI: A MILITARY HISTORY OF THE KOREAN WAR INCIDENT* (2002); Robert Bateman, *Did the Associated Press Misrepresent the Events that Happened at No Gun Ri?*, HISTORY NEWS NETWORK, Feb. 23, 2004; Michael Taylor, *A War of Words on a Prize-Winning Story/No Gun Ri Authors Cross Pens on First Amendment Battlefield*, S.F. CHRON., Apr. 7, 2002, [http://articles.sfgate.com/2002-04-07/opinion/17542177\\_1\\_gun-ri-korean-war-incident-robert-bateman](http://articles.sfgate.com/2002-04-07/opinion/17542177_1_gun-ri-korean-war-incident-robert-bateman). Interestingly, one of the supposed whistleblowers the Associated Press relied on (twelve were interviewed for and quoted in the initial article) in breaking the story, Edward Lee Daily, who claimed to have been a highly-decorated soldier who took part in the massacre, turned out to be lying about his presence in the unit accused of involvement with the incidents at No Gun Ri. In March of 2002, Daily pled guilty to defrauding the Government for claiming to have been a former prisoner of war and to have been wounded in combat. See John Gerome, *No Gun Ri Veteran Admits to Defraud*, ASSOCIATED PRESS, Mar. 4, 2002. Despite the existence of the archetypes of the Whistleblowers, the Muckraking Media, and the Activated Public (as measured by furious debate among at least veterans of the Korean War), the incident at No Gun Ri has still not spurred congressional oversight—though this may change. See, e.g., Charles J. Hanley & Jae-Soon Chang, *Commission Seeks U.S. Compensation for War Crimes*, ASSOCIATED PRESS, Aug. 4, 2008.

<sup>421</sup> See, e.g., STUDES TERKEL, *“THE GOOD WAR”: AN ORAL HISTORY OF WORLD WAR II* (1985).

<sup>422</sup> See, e.g., DAVID HALBERSTAM, *THE COLDEST WAR 2* (2007) (“Korea would not prove a great national war of unifying singular purpose, as World War II had been, nor would it, like Vietnam a generation later, divide and thus haunt the nation. It was simply a puzzling, gray, very distant conflict, a war that went on and on and on, seemingly without hope or resolution, about which most Americans, save the men who fought there and their immediate families, preferred to know as little as possible.”).

public was united behind war aims, or, perhaps, was truly worried that the fate of the United States was at risk in a particular conflict, it was presumably far less likely to be concerned or activated by allegations of American war crimes, or at least to be activated in such a way as to demand *scrutiny* of such war crimes.

## B. Archetypes Following Congressional Involvement

The four archetypes that emerged following the beginnings of congressional involvement in war crimes oversight after My Lai and Abu Ghraib—the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives—help explain how senators and representatives have responded, and might respond, to allegations that American military personnel have committed atrocities or war crimes. These archetypes clearly shift and evolve over time: The archetype of the Gadfly Representatives, for example, evolved from addressing struggles between marginalized members of the majority party and their party leaders during the Vietnam era to addressing struggles between a marginalized *minority* and the leaders of the *majority* in the House of Representatives after Abu Ghraib. Nonetheless, the origins of each of these archetypes appear to lie in the political structure of the U.S. Government, the separation of powers between the Executive and Legislative Branches, and the relationships both between the Senate and the House of Representatives and between the powerful and the largely powerless members of Congress. This suggests that when faced with future opportunities for congressional oversight of war crimes, legislators will again fill the general archetypal roles seen after My Lai and Abu Ghraib.

### 1. *The False Start Senators (Archetype 4)*

A fourth archetype that emerged after My Lai and Abu Ghraib was that of the False Start Senators. Some senators from both parties were clearly concerned by reports about My Lai and Abu Ghraib and interested in discovering exactly what had happened, while some other senators were likely interested in using hearings into war crimes as political tools. The events following exposure of and public interest in My Lai and Abu Ghraib, however, suggest that even those key senators who wanted the truth about American war crimes to come out were, after



initial enthusiasm, very reluctant to actually pursue congressional inquiry—or at least public, *prompt* congressional inquiry.

Immediately after news of My Lai and Abu Ghraib broke, a number of senators made it clear that they saw a need for timely, probing hearings.<sup>423</sup> In 1969, both Republican Senator Charles Goodell and Democratic Majority Leader Mike Mansfield called for investigations.<sup>424</sup> In 2004, Democratic Senator Robert C. Byrd similarly called for full and open hearings into prisoner abuse—a sentiment that was echoed by a number of key senators on the Armed Services Committee, including John Warner, Lindsey Graham, John McCain, Edward Kennedy, Carl Levin, and Susan Collins.<sup>425</sup> Despite the early enthusiasm expressed by senators for oversight hearings, however, some of those same senators quickly pulled back from their stated goals of holding “full,” presumably public, hearings.<sup>426</sup> This hesitancy did not, of course, necessarily reflect a desire by the Senate to condone war crimes. That said, given Congress’s role as the overseer of the Executive Branch, Senator John Stennis’s observation that “a private study by an impartial group of ‘outstanding men’ would be preferable to a Congressional hearing,”<sup>427</sup> while not unreasonable, indicated that at least some Democrats in the Senate were not interested in probing publicly into the Johnson and Nixon Administrations’ handling of the war. After Abu Ghraib, senators pulled back more slowly than Muskie and Stennis had in 1969, but by the end of September of 2004, appeared to have abandoned their oversight investigation.<sup>428</sup> Like the Senate of the My Lai period, the Senate of the Abu Ghraib period seemed content to let the incident slide gently into the past.

Appearances, of course, can be deceiving, and recent events, most notably the December 2008 release of the report by the Senate Armed Services Committee about Administration failures after Abu Ghraib, have suggested that the Senate never truly abandoned the investigation

<sup>423</sup> See *supra* Parts II.B.1, III.B.1.

<sup>424</sup> Smith, *supra* note 68, at 1; Editorial, *supra* note 83, at 3.

<sup>425</sup> Senator Robert C. Byrd (D-W.Va.), CONG. REC., May 4, 2004, at S4824; Richard Simon & Elizabeth Shogren, *Senators to Press Scandal*, L.A. TIMES, May 17, 2004, <http://articles.latimes.com/2004/may/17/nation/na-congress17>.

<sup>426</sup> See *supra* Parts II.B.1, III.B.1.

<sup>427</sup> *Id.* Perhaps Stennis’s hesitation explained why it seemed to the Peers Commission that “the House Armed Services Committee (HASC), with its investigation subcommittee, had the higher prerogative,” and why Representative Rivers took the lead in shaping the congressional investigations into My Lai. PEERS, *supra* note 41 at 19.

<sup>428</sup> *Supra* Part III.B.1.

into the Abu Ghraib abuses.<sup>429</sup> In light of the publication of this report, it might be reasonable to describe senators such as Warner, Graham, Collins, McCain, Levin, and Kennedy more as “slow running” senators than as “false starting” senators. It nonetheless seems clear that senators facing the prospect of engaging in oversight of contentious, politically-sensitive allegations of war crimes tend to back off or back down from initial enthusiasm for engaging in probing oversight. While it is impressive and notable that the Senate Armed Services Committee ultimately produced a report that focuses on the responsibility shared by high-ranking military officers and officials in the Department of Defense for the abusive interrogation techniques employed at Abu Ghraib, it is equally notable that it took over *four and a half years* for even twenty pages of that report to see the light of day, and that the Senate conducted almost all of its investigation out of the public eye.

The purpose, function, and design of the Senate help to explain the development of the archetype of the False Start (or Slow-Running) Senators. As the responses in the Senate after My Lai and Abu Ghraib suggest, senators are often interested in avoiding entanglement in extremely contentious public issues. In part, this might be due to the nature of the Senate, which from the framing of the Constitution was designed to be more of a reflective and sober body than the House of Representatives—which was one reason why the Framers mandated that senators serve a six-year term and not be eligible for election until the age of thirty.<sup>430</sup> “By contrast with the impersonal, hierarchical, and disciplined House, the Senate has long tolerated and even promoted individualism, reciprocity, and mutual accommodation,” observed political scientists Colton Campbell and Nicol Rae in 2000. “So while the popularly elected House was liable to succumb to partisan public passions, the Senate would always provide a brake, a second look, a

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<sup>429</sup> See *id.*; Morgan, *supra* note 270; Executive Summary, *supra* note 309.

<sup>430</sup> See, e.g., Adam Clymer, *Senate's Role as "Saucer" Defines Clinton Strategy*, N.Y. TIMES, Dec. 21, 1998, <http://www.nytimes.com/1998/12/21/us/impeachment-the-process-senate-s-role-as-saucer-defines-clinton-strategy.html> (describing the Senate's “considerable sense of self-importance and dignity”); Richard F. Fenno, Jr., *The Senate through the Looking Glass: The Debate over Television*, 14 LEGIS. STUD. Q. 313, 335 (1989) (“In the language of the familiar colloquy about bicameralism, the Senate certainly acted as the “cooling saucer””); RICHARD F. FENNO, JR., THE UNITED STATES SENATE: A BICAMERAL PERSPECTIVE 5 (1982) (describing an anecdote about George Washington comparing the Senate to a saucer, as “hot” legislation could be poured into the Senate to cool just as hot tea could be poured into a saucer to cool).

longer-run view, and a well-deliberated decision.”<sup>431</sup> This is not a universal rule: in the 1950s, Wisconsin Senator Joseph McCarthy was able to ride concern and even hysteria about communist infiltration in government to achieve national prominence. Such demagoguery, however, was very much out of character for members of the Senate, who have in the modern period been less interested in using hearings to advance their individual careers. Even in the 1970s, for example, Senator Sam Ervin, a Democrat from North Carolina who achieved fame as “Senator Sam” while chairing the Watergate Hearings, did not attempt to use the hearings as a stepping-stone to higher office.<sup>432</sup> While the Senate floor saw moments of antagonism and strife during the 1990s,<sup>433</sup> even at times of enormous partisan strife, such as the impeachment hearings for President Clinton, the Senate has retained some sense of decorum, civility, and courtesy.<sup>434</sup>

## 2. *The Obstructionist House Leaders (Archetype 5)*

A fifth archetype that emerged after My Lai and Abu Ghraib was that of the Obstructionist House Leaders. Unlike in the Senate, in the House both obstructionist hearings after My Lai and the *obstruction* of hearings after Abu Ghraib proceeded in a carefully regimented fashion. What is most striking about the House’s war crimes oversight is that after both My Lai and Abu Ghraib, hearings were dominated by conservative, pro-Administration, and pro-military representatives seemingly intent on

<sup>431</sup> COLTON C. CAMPBELL & NICOL C. RAE, *THE CONTENTIOUS SENATE: PARTISANSHIP, IDEOLOGY, AND THE MYTH OF COOL JUDGMENT*, at xi (2000). *But see id.* (questioning whether this reputation is a myth).

<sup>432</sup> Cf. James R. Dickenson, *Sen. Sam Ervin, Key Figure in Watergate Probe, Dies*, WASH. POST, Apr. 24, 1985, at A01 (“Ironically, it was because he was a strict constitutionalist whose interpretation of a document he revered defied ideology or party lines—the sort of person Nixon professed to admire—that Ervin was the choice of then-Senate Majority Leader Mike Mansfield (D-Mont.) to head the special committee.”).

<sup>433</sup> See, e.g., Adam Clymer, *Claim of P.O.W. Cover-Up Rends Senate Decorum*, N.Y. TIMES, Sept. 8, 1993, <http://www.nytimes.com/1993/09/08/us/claim-of-pow-cover-up-rends-senate-decorum.html>; Helen Dewar, *Suspicious Simmer in the Senate; Partisan Bickering Expected as Democrats Push Liberal Agenda*, WASH. POST, July 22, 1990, at A16; see also ERIC M. USLANER, *THE DECLINE OF COMITY IN CONGRESS* (1993).

<sup>434</sup> See, e.g., David Von Drehle, *Protecting Propriety in the Club*, WASH. POST, Jan. 9, 1999, at A10; Spencer S. Hsu, *Senate’s Partisan Lines Don’t Foreclose Partnerships*, WASH. POST, Jan. 31, 1999, at A20; Joel Achenbach, *The Proud Compromisers*, WASH. POST, Jan. 9, 1999, at A11; see also Eric M. Uslaner, “Is the Senate More Civil Than the House?,” Conference on Civility and Deliberation in the Senate, sponsored by the Robert J. Dole Institute and the Pew Foundation (July 16, 1999).

doing all that was possible to *obstruct* any real inquiry into the events of 1968 and 2003 respectively.

After news of My Lai and Abu Ghraib broke in the national and international media, powerful leaders in the House of Representatives moved to reduce the duration, scope, and possibly import of any investigations into American atrocities.<sup>435</sup> In 1969, for example, Congressman L. Mendel Rivers clearly sought to forestall effective hearings—such that even when he was convinced to call off his white-washing hearings before the full Subcommittee, he appointed Representative Hébert to lead up the conservative, hawkish subcommittee that ultimately focused just as much on ways in which the military could prevent *news* of events such as My Lai from breaking as on how to actually prevent American atrocities in combat.<sup>436</sup> Perhaps, more importantly, by questioning all potential prosecution witnesses in closed session, the Hébert panel nearly—in the face of clear warnings from military prosecutors—derailed all prosecutions arising from the events at My Lai (4).<sup>437</sup> In 2004, Representative Duncan Hunter, Chairman of the House Armed Services Committee, acted far more circumspectly than had Rivers and Hébert thirty-five years earlier, but he still managed to stymie anything more than the gloss of oversight. Convinced that additional oversight would be damaging for both American and presumably Republican interests,<sup>438</sup> Hunter limited the committee to one day of televised hearings, and successfully prevented committee members from requesting additional documents from the Bush Administration.<sup>439</sup> Following Hunter's lead, other Republican committee chairmen in the House also refused to hold additional hearings, with Speaker J. Dennis Hastert, the ultimate authority in the hierarchical House, ultimately suggesting that the Democrats were actually seeking a series of "show trials" against American military personnel.<sup>440</sup>

Just as the emergence of the archetype of the False Start Senators can be explained by the nature of the U.S. Senate, the emergence of the

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<sup>435</sup> *Supra* Parts II.B.2, III.B.3.

<sup>436</sup> *Supra* Part II.B.2; HÉBERT REPORT, *supra* note 2, at 7–8.

<sup>437</sup> *See, e.g.*, Eckhardt, *supra* note 40, at 684–85.

<sup>438</sup> *See, e.g.*, *Prison Abuse Scandal*, *supra* note 319; Editorial, *Charges Possible*, *supra* note 265.

<sup>439</sup> Editorial, *US Congressional Democrats Blocked in Effort to Widen Prison Torture Probe*, VOANEWS.COM, June 15, 2004; *see also* Milligan, *supra* note 17.

<sup>440</sup> *Id.*

archetype of the Obstructionist House Leaders can be explained by the nature of the U.S. House of Representatives. The House, with its two-year term of office and its unwieldy size, is governed both by the whims of the public and the discipline of the political parties. Writing in their 1993 *Legislative Leviathans*, for example, Gary W. Cox and Mathew D. McCubbins argued that political parties “are a kind of legislative cartel that seizes the structural power of the House” in order to pass party-defined collective policies and minimize member defection.<sup>441</sup> If Cox and McCubbins are correct, then (as Campbell and Rae observed in 2000) the procedural atmosphere (as opposed to personal atmosphere, which can be notably rancorous and undisciplined) in the House can be “impersonal, hierarchical, and disciplined.”<sup>442</sup> Both after My Lai and after Abu Ghraib those representatives wanting to expand the oversight investigations were stymied by powerful conservative committee chairmen<sup>443</sup> “loyal” to the U.S. military and interested more in whitewashing or minimizing than in exposing the truth behind allegations of American war crimes. For example, as *New York Times* reporter Neil Sheehan noted after Rivers’s death in 1970, Rivers carefully suppressed dissenters on his committee “by maintaining a bipartisan majority of older conservative members.”<sup>444</sup> The disciplined and hierarchical nature of the House—which would never, for example, allow the undisciplined<sup>445</sup> minority-rights tool of the filibuster—enables these sorts of chairmen to gain power and set committee and House agendas in almost dictatorial fashion.

### 3. *The Our-Soldiers-First Legislators (Archetype 6)*

A sixth archetype that emerged after My Lai and Abu Ghraib was that of the Our-Soldiers-First Legislators. There is significant overlap between the Our-Soldiers-First Legislators and both the False Start

<sup>441</sup> GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 15 *passim* (1993).

<sup>442</sup> CAMPBELL & RAE, *supra* note 431, at xi. *But see id.* (questioning whether this reputation is a myth). This is opposed to a personal atmosphere, which can be notably rancorous and undisciplined.

<sup>443</sup> *See infra* note 461.

<sup>444</sup> Sheehan, *supra* note 99, at 11.

<sup>445</sup> *See, e.g.*, FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 4 (1965) (describing how, in 1935, Democratic Senator Huey P. Long of Louisiana verbally entered recipes for Roquefort cheese salad dressing into the *Congressional Record* in order to pressure his colleagues in an attempt to reduce the size of the proposed National Recovery Administration).

Senators and the Obstructionist House Leaders: Both Representatives Rivers and Hébert, for example, along with the entire subcommittee that applauded Captain Medina's testimony after My Lai, clearly filled more than one archetypal role. Nonetheless, some legislators made it clearer than did others that they would quite simply oppose any attempt to hold American troops responsible for war crimes or to criticize Soldiers for actions on the battlefield—and that they had disdain for those legislators who felt otherwise.<sup>446</sup> As with the emergence of both other archetypes, the development of the archetype of the Our-Soldiers-First Legislators is explained by the structure of American democracy, which has encouraged the election of military veterans, and especially by the manner in which political parties redistrict in order to create “safe” congressional districts.

In the aftermath of the events at My Lai and Abu Ghraib, as public concern over the actions of American troops grew and congressional investigations appeared to gather steam, some extremely pro-military legislators, in both the Senate and the House, took the position that either no American military personnel could ever have committed the alleged acts, or else that the victims deserved whatever had been done to them. After My Lai, Senator Ernest Hollings and Representatives John R. Rarick and L. Mendel Rivers (along with 140 other conservative congressmen) made clear through statements and resolutions that they believed that, at worst, American Soldiers had been guilty of “a mistake of judgment”<sup>447</sup>—or that, as Representative Allen Ellender said, those slain at My Lai “got just what they deserved.”<sup>448</sup>

After the news of My Lai broke Senator Hollings and Representatives Ellender, Rarick, and Rivers focused on praising and defending military personnel as individuals. After the initial round of hearings about Abu Ghraib, however, several Our-Soldiers-First legislators generally focused instead on the collective welfare of U.S. military personnel and the success of the military mission in Iraq. Legislators including Senator James Inhofe and Representative Duncan Hunter *did* mention the well-being of individual American personnel.

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<sup>446</sup> At a meeting of the House Armed Services Committee in the early 1970s, for example, then-chairman Louisiana Representative F. Edward Hébert, sarcastically told Colorado Congresswoman Patricia Schroeder to “support our boys like you would support our enemy.” ROBERT DAVID JOHNSON, *CONGRESS AND THE COLD WAR* 194 (2006).

<sup>447</sup> Kenworthy, *supra* note 90, at 1.

<sup>448</sup> HERSH, *supra* note 37, at 155.

Still, Inhofe and Hunter, along with Senator John Cornyn and Representative Tom DeLay, focused primarily on their stated belief that serious oversight hearings would damage the American war effort in Iraq.<sup>449</sup>

The emergence of the archetype of the Our-Soldiers-First Legislators after My Lai and Abu Ghraib can be explained both by the nature of U.S. political culture, which, until recently, had historically favored the election of veterans,<sup>450</sup> and also by the methods that political parties use to draw “safe” congressional districts. “[U]p until the 1990s, there were more veterans in Congress than would be expected, given the number and age distribution of veterans in the general population,” observed political scientists William Bianco and Jamie Markham in 2001.<sup>451</sup> “This veterans’ surplus ended in the mid-1990s in both the house and the Senate. Now, veterans are under-represented in both chambers.”<sup>452</sup> Seeking to understand what effects this change might have had, political scientists Christopher Guelphi and Peter D. Feaver observed that as the percentage of veterans serving in the Executive Branch and the legislature increases, “the probability that the United States will initiate militarized disputes declines. Once a dispute has been initiated, however, the higher the proportion of veterans, the greater the level of force the United States will use in the dispute.”<sup>453</sup>

If veterans in Congress are generally more comfortable than are non-veterans with greater amounts of force, then it is also possible that veterans in Congress may tend to have less empathy for detainees and enemy combatants and sympathizers than do non-veterans. Despite evidence that the overrepresentation of veterans in Congress flipped in the mid-1990s, the historic over-representation of veterans also means that, even during the Bush Administration, many of the more senior members of Congress, both in the House and in the Senate, were probably more likely than not to be military veterans. This fact cuts both

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<sup>449</sup> *Supra* Part IV.B.2.

<sup>450</sup> See, e.g., William Bianco & Jamie Markham, *Vanishing Veterans: The Decline in Military Service in the U.S. Congress*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 275–88 (Peter D. Feaver & Richard H. Kohn eds., 2001).

<sup>451</sup> *Id.* at 276.

<sup>452</sup> *Id.*

<sup>453</sup> Christopher Guelphi & Peter D. Feaver, *Speak Softly and Carry a Big Stick? Veterans in the Political Elite and the American Use of Force*, 94 *AM. POL. SCI. REV.* 779, 779 (2002).

ways: After Abu Ghraib, it was John Warner, a veteran of both the U.S. Navy and the U.S. Marine Corps, and of both World War II and the Korean War, who led the calls for real oversight.<sup>454</sup> The fact that a legislator has served in the Armed Forces clearly does not require that legislator to embody the Our-Soldiers-First archetype—but it may make it more likely that he or she will do so.<sup>455</sup>

The emergence of the archetype of the Our-Soldiers-First Legislators, at least in the House of Representatives, can also be explained by the developing redistricting practices of political parties, which have in recent decades resulted in fewer and fewer ideologically contested districts. As was highlighted by the conflict in the early 2000s over the successful attempts by Texas Republicans to redraw congressional districts so as to ensure continued Republican domination of the Texas congressional delegation,<sup>456</sup> party leaders routinely redistrict in order to increase the power of one party or another in districts, and so effectively take many districts out of electoral play.<sup>457</sup> This suggests that incumbents have an enormous electoral advantage over challengers, and that nominees of the majority party in a “safe” district are likely to be more conservative or more liberal than would be the case if the district were not slanted one way or another. In other words, if a candidate does not need to appeal to swing voters to be elected, but does need to appeal strongly to a conservative or liberal base, then that candidate is more likely than not to have powerful conservative or liberal tendencies. What this means is that at least some districts are likely to elect extremely conservative representatives more interested in protecting their constituents, many of whom have been in the military or have family in the military, than in ferreting out information about alleged American atrocities. Not surprisingly, almost all of the Our-Soldiers-First Legislators who spoke out during oversight into My Lai and Abu Ghraib respectively, came from either Louisiana, Texas, Oklahoma, or South

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<sup>454</sup> Dewar & Hsu, *supra* note 13, at A01. Warner was also joined by two other Republicans, John McCain and Lindsey Graham, with extensive military experience.

<sup>455</sup> Senators Hollings and Inhofe and Representatives Ellender, Rarick, and Hunter all served in the military; Senator Cornyn came from a military family.

<sup>456</sup> See, e.g., Ralph Blumenthal, *After Bitter Fight, Texas Senate Redraws Congressional Districts*, N.Y. TIMES, Oct. 13, 2003, <http://www.nytimes.com/2003/10/13/national/13/TEXA.html>.

<sup>457</sup> See, e.g., Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the US House of Representatives, 1952–82*, 31 AM. J. POL. SCI. 126 (1987)



Carolina<sup>458</sup>—states with strong conservative traditions and populations with significant military experience.

#### 4. *The Gadfly Representatives (Archetype 7)*

A seventh archetype that emerged after My Lai and Abu Ghraib was that of the Gadfly Representatives. After both My Lai and Abu Ghraib, marginalized members of the House of Representatives turned to less formal means of applying pressure to the forces governing the House, such as holding unofficial public hearings, writing open letters, and publishing editorials. This emergence and development of this archetype is similarly explained by the hierarchical and disciplined nature of the House of Representatives, which marginalizes those representatives not in positions of power and leaves marginalized representatives almost no “official” channels through which to conduct oversight, jockey for power, or even simply make themselves heard. The development of this archetype demonstrates that there is no necessary link between the party affiliation of gadflies and the identity of the majority party in the House: after My Lai, for example, the gadflies were all marginalized members of the majority party, while after Abu Ghraib the gadflies were generally powerful members of marginalized minority party.

During the congressional oversight into both My Lai and Abu Ghraib a number of less-powerful, “radical” or “renegade,” or simply marginalized representatives in the House defied and worked outside of the normal congressional channels and instead seized upon investigations into and allegations of American war crimes to attack the Nixon and Bush Administrations respectively, gain national exposure, and presumably jockey for political power. After My Lai, the most notable among these representatives included California Democrat Ron Dellums, New York Representative Bella S. Abzug, Michigan Democrat John Conyers Jr., and Maryland Democrat Parren J. Mitchell, who helped plan the Dellums Committee Hearings into War Crimes in Vietnam.<sup>459</sup> While

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<sup>458</sup> Senator Hollings represented South Carolina; Representatives Rivers, Ellender, and Rarick represented Louisiana; Senator Inhofe represents Oklahoma; and Senator Cornyn represents Texas. Representative Hunter represents a conservative district of California.

<sup>459</sup> Editorial, *4 in House Plan Hearings*, *supra* note 15, at 10; *4 Congressmen to Hold Inquiry on War Crimes*, WASH. POST, Apr. 7, 1971, at A8. Other representatives present for at least some of the Dellums Committee hearings included South Dakota Democrat (and later Senator) James Abourezk, New York Democrat Jonathan B. Bingham, New

Dellums, Abzug, Conyers, and Mitchell were all Democrats, all four extremely liberal, anti-war, and even radical legislators<sup>460</sup> found that in the late 1960s and early 1970s they were relatively powerless in a House that, while governed by a Democratic majority, was nonetheless dominated by conservative Southern committee chairmen and senior members.<sup>461</sup> As former Louisiana Representative Billy Tauzin later

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York Democrat Shirley Chisholm, Don Edwards, Robert W Kastenmeier, Illinois Democrat Abner J. Mikva, and Ohio Democrat John F Seiberling.

<sup>460</sup> Dellums, Abzug, Conyers, and Mitchell were clearly not mainstream or sedate politicians. Dellums, for example, apparently embraced the “radical” label – though he noted that he considered violence, “particularly ‘bombing’ and ‘trashing’ [property destruction]” to be “really counter-productive.” See, e.g., Caldwell, *supra* note 159, at 46; Apple, *supra* note 162, at 32. Abzug, who was popularly known as “Battling Bella,” similarly gloried in the label of “radical.” “I am not a centrist,” she told the *New York Times* in 1986. “She brought with her a belligerent, exuberant politics that made her a national character.” Laura Mansnerus, *Bella Abzug, 77, Congresswoman And a Founding Feminist, Is Dead*, N.Y. TIMES, Apr. 1, 1998, <http://www.nytimes.com/1998/04/01/nyregion/bella-abzug-77-congresswoman-and-a-founding-feminist-is-dead.html>; see also SUZANNE LEVINE & MARY THOM, BELLA ABZUG: HOW ONE TOUGH BROAD FROM THE BRONX FOUGHT JIM CROW AND JOE MCCARTHY, PISSED OFF JIMMY CARTER, BATTLED FOR THE RIGHTS OF WOMEN AND WORKERS, RALLIED AGAINST WAR AND FOR THE PLANET, AND SHOOK UP POLITICS ALONG THE WAY (2007). Mitchell, like Dellums one of the leaders of the Congressional Black Caucus, was described by contemporaries as “one of God’s angry men.” See, e.g., Jacqueline Trescott, *One of God’s Angry Men*, WASH. POST, Sept. 23, 1977, at C1; Douglas Martin, *Parren Mitchell, 85, Congressman and Rights Leader, Dies*, N.Y. TIMES, May 30, 2007, <http://www.nytimes.com/2007/05/03/us/30mitchell.html>. Conyers, another founder of the Congressional Black Caucus, garnered the honor being listed 13th on Richard Nixon’s “enemies list.” JOHN C. CONYERS, JR. ET AL., THE CONSTITUTION IN CRISIS: THE HIGH CRIMES OF THE BUSH ADMINISTRATION AND A BLUEPRINT FOR IMPEACHMENT, at xiv (2007).

<sup>461</sup> See, e.g., Ben Evans, *Southern Clout in Congress Hits Low*, ASSOCIATED PRESS, Mar. 31, 2007 (“[T]he South was so dominated by conservative Democrats . . . [who] could hold office virtually as long as they wanted, earning seniority and privileges. . . . Committee chairmen held far more power and independence than they do under today’s centralized system, and Southerners often made clear their disdain for contrary views from other parts of the country.”). The power of the chairman was almost unchallenged: when in 1973 Dellums, with the backing of the Congressional Black Caucus, which he helped found, finally won a seat (and became the first African-American ever to serve) on the House Armed Service Committee, Chairman F. Edward Hébert showed his enormous displeasure in a particularly humiliating way. When Dellums, whom Hébert called a “black male bomb-thrower from Berkeley,” and Colorado Representative Pat Schroeder, who had been elected in 1972 and whom Hébert called “the white woman bomb-thrower from Denver,” arrived at the organizing meeting of the committee (on which Schroeder was the first woman ever to serve), they found that Hébert had mandated that they be provided with only one chair, so that they had to share. Massachusetts Democratic Representative Barney Frank later referred to this as “the only half-assed thing Ron and Pat ever did in their political lives.” RON DELLUMS, LYING DOWN WITH THE LIONS: A PUBLIC LIFE FROM THE STREETS OF OAKLAND TO THE HALLS OF

observed, “[t]here was a time when Southerners just got re-elected and re-elected over and over again. You stick around long enough, you get powerful.”<sup>462</sup> Writing in 2001, Dellums noted that he faced a “daunting challenge” as “a ‘left-wing radical’ elected to a Democrat-controlled Congress—a Congress significantly influenced by its ‘Southern Barons.’”<sup>463</sup> In part to gain attention, and presumably in part because they held their anti-war views sincerely,<sup>464</sup> Dellums, Abzug, Conyers, and Mitchell scheduled their war crimes hearings, which attracted significant attention and served both to further the anti-war movement and to advance the careers of those legislators involved with holding them.<sup>465</sup>

Unlike Dellums, Abzug, Conyers, and Mitchell, who were marginalized within their own party (which controlled Congress), California Democrats Henry Waxman and Minority Leader Nancy Pelosi, along with the remainder of the Democratic leadership who functioned as gadflies during the Abu Ghraib hearings, were actually influential Democrats who had been marginalized because they were in the minority party. During the early years of the Bush Administration, Republicans exercised enormous control over the House of Representatives.<sup>466</sup> The marginalized Democrats, unable to hold hearings, to gather documents, or to subpoena witnesses, instead turned to writing letters and editorials to draw public attention to the Abu Ghraib oversight. While they could not have hoped that their letters would have any real effect on their colleagues, they presumably believed that the letters would help the Democrats return to power as the 2004 elections approached.

The archetype of the Gadfly Representative emerged from the hierarchical and disciplined nature of the House of Representatives, and

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POWER 149–50 (2001); PATRICIA SCHROEDER, 24 YEARS OF HOUSE WORK . . . AND THE PLACE IS STILL A MESS: MY LIFE IN POLITICS 40 (1998); ROBERT DAVID JOHNSON, CONGRESS AND THE COLD WAR 194 (2006).

<sup>462</sup> Ben Evans, *Southern Clout in Congress Hits Low*, ASSOCIATED PRESS, Mar. 31, 2007.

<sup>463</sup> DELLUMS, *supra* note 461, at 4.

<sup>464</sup> “Within days after arriving in Washington,” for example, Dellums apparently “agreed to turn over part of his office for an exhibition of war crime materials.” Ensign, *supra* note 155.

<sup>465</sup> See, e.g., DELLUMS, *supra* note 461; SCHROEDER, *supra* note 461; JOHNSON, *supra* note 461.

<sup>466</sup> See, e.g., Carl Hulse, *In New G.O.P. Era, DeLay Drives Agenda for Congress*, N.Y. TIMES, Jan. 5, 2003, <http://www.nytimes.com/2003/01/05/us/in-new-gop-era-delay-drives-agenda-for-congress.html>.

represents the flip side of the archetype of the Obstructionist House Leaders. That hierarchical and disciplined nature<sup>467</sup> rewards seniority, party loyalty, and identification with strong majorities. Given the need for elected officials to be *re*-elected, marginalized legislators, whether powerless members of the majority party or powerful members of a powerless minority party, need to find ways to pursue their legislative agendas, achieve legislative and public relations “victories,” and gain access to increased visibility in the media. For Dellums and his colleagues after My Lai, and for Waxman and the Democratic House leaders after Abu Ghraib, the best strategy—quite apart from whatever true feelings they had about the nature of American war crimes or atrocities, or the need to hold higher-ups accountable— was to be as vocal as possible on the largest stage available.

## V. Conclusion

As this article is being published in the *Military Law Review*, it seems reasonable to conclude with some observations for military attorneys. Understanding the archetypes of congressional war crimes oversight might not initially appear useful for military investigators and prosecutors, either because this examination is largely historical and theoretical or because, by the time Congress engages in oversight, the military’s role might be done. Such, of course, was not the case following My Lai, when the efforts of military prosecutors were being intentionally hindered by Rivers’s subcommittee—and such was not the case when the military continued to face the Abu Ghraib fallout long after most congressional oversight was finished. Military investigators and attorneys can, in fact, benefit in clear, tangible ways by understanding how congressional war crimes oversight might proceed, and by understanding how to negotiate the system of congressional oversight to ensure both that responsible parties are held accountable for committing atrocities and that it remains clear to the nation and the world that the U.S. military—and the United States itself—condemn war crimes and promote both justice and the rule of law. By functioning in this fashion, military attorneys can help prevent the inflammation of anti-American passions, enhance the safety and security of American troops on the battlefield, and support the counterinsurgency mission of winning the hearts and minds of civilian populations wherever the American military is operating. The examination of the archetypes of war crimes

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<sup>467</sup> See *supra* notes 441–42 and accompanying text.

oversight, then, stands as one example in which a historical, theoretical analysis strongly and necessarily informs practical concerns and action on the ground.

The history of political oversight of war crimes and allegations of war crimes during the Vietnam era and the Iraq War reveals that such oversight was exactly that—*political*.<sup>468</sup> Perhaps it would be naïve to expect anything different. The archetypes that marked congressional oversight into My Lai and Abu Ghraib emerged from the well-understood world of U.S. political relationships. The three archetypes that emerged before Congress engaged in war crimes oversight—the archetypes of the Whistleblowers, the Muckraking Media, and the Activated Public—sprang from a traditional model of congressional oversight. The four archetypes that emerged after Congress turned its attention to war crimes oversight—the archetypes of the False Start Senators, the Obstructionist House Leaders, the Our-Soldiers-First Legislators, and the Gadfly Representatives—arose out of the traditional struggles between the Executive Branch and the Legislative Branch, the Senate and the House of Representatives, and the powerful and powerless members of Congress. These archetypes will likely continue to transform in the face of the advancement of technology, the changing nature of the media, and the evolution of the understanding of the separation of powers under the United States Constitution. In the event of future allegations that American forces have committed war crimes, however, these archetypes will probably nonetheless emerge in recognizable form once again. Members of Congress might therefore use insight into these archetypes to develop more focused responses to allegations of American war crimes, so that, in the future, senators and representatives have more to offer when contemplating or overseeing war crimes investigations than that they were “a bit sickened” by the photographs.<sup>469</sup>

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<sup>468</sup> See, e.g., Linda L. Fowler & Seth Hill, Presentation at the Annual Meeting of the American Political Science Association, *Guarding the Guardians: Senate Oversight Activity in Foreign Affairs, 1947–2004* (Aug. 31, 2006) (“An extensive review of the literature is not necessary to stress two simple points, however. First, the ideological polarization . . . could extend readily to external relations with the executive branch. Second, when party reputation is the name of the game, we would expect sophisticated leaders to use every means available to claim success . . .”).

<sup>469</sup> Smith, *supra* note 1, at 1 (quoting Sen. Daniel K. Inouye, Haw.).

**IS GERMANY THE NEW CANADA? ONE AMERICAN  
DESERTER'S REQUEST FOR GERMAN ASYLUM**

MAJOR CHRISTIAN L. DEICHERT\*

*What if every truck driver suddenly decided that he  
didn't like the whine of those shells overhead, turned  
yellow, and jumped headlong into a ditch? The  
cowardly bastard could say, "Hell, they won't miss me,  
just one man in thousands." But, what if every man  
thought that way? Where in the hell would we be now?  
What would our country, our loved ones, our homes,  
even the world, be like?<sup>1</sup>*

I. Introduction

In November 2008, most of the Soldiers of the 412th Aviation Support Battalion, based in Katterbach, Germany, were getting ready for their first Thanksgiving home after a fifteen-month deployment to Iraq. One member of the unit, Specialist André Shepherd, spent his Thanksgiving formally applying to the German government for political asylum.<sup>2</sup> As Shepherd is the first American deserter to request political

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<sup>1</sup> CHARLES M. PROVINCE, *THE UNKNOWN PATTON* 32 (1982).

<sup>2</sup> See André Shepherd, *I Am Petitioning for Political Asylum in Germany*, CONNECTION E.V., Nov. 27, 2008, <http://www.connection-ev.de/z.php?ID=371>. Although the term "asylum" has different meaning in different contexts, this article will follow Hemme Battjes's example and adopt the definition used by the *Institut du Droit International* at its Bath Conference of 1950: "[T]he term 'asylum' means the protection offered by a

asylum under a new European Union (EU) law,<sup>3</sup> the German government could set a dangerous precedent if it approves his application.

Shepherd, an Apache helicopter mechanic, deserted from his unit after he learned he would deploy again and lived in hiding until his unit eventually returned from its second tour in Iraq.<sup>4</sup> In his asylum application, Shepherd stated that he deserted to avoid committing war crimes in Iraq and to avoid service in what he alleged to be an unlawful conflict.<sup>5</sup> He cited to a 2005 German administrative court decision reinstating a *Bundeswehr* (German Army) major who was demoted for refusing to carry out duties that he felt could contribute to the conflict in Iraq.<sup>6</sup> In evaluating Shepherd's asylum application, Germany must apply a 2004 EU Council Directive that expanded the definition of qualified refugees to include some military deserters.<sup>7</sup>

André Shepherd is not the first Soldier to object vocally to deployment to Iraq. As of February 2010, the protest group Iraq Veterans Against the War claimed to have over 1700 members.<sup>8</sup> Nor is Shepherd the first Soldier to apply for asylum after having deserted. At the time Shepherd filed his initial asylum application, the Immigration and Refugee Board of Canada had rejected the asylum applications of at least ten American deserters, starting with Jeremy Hinzman in 2005.<sup>9</sup>

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State on its territory or elsewhere to an individual who came to seek it." HEMME BATTJES, *EUROPEAN ASYLUM LAW AND INTERNATIONAL LAW* 5–6 (2006) (translating Institut du Droit International, *L'ASILE EN DROIT INTERNATIONAL PUBLIC* (1950)).

<sup>3</sup> Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 302) 2-12 (EC) [hereinafter Qualification Directive], discussed in Part III *infra*.

<sup>4</sup> See Mike Esterl, *U.S. Deserter "Having Time of My Life" as He Seeks Asylum in Germany*, WALL ST. J., Jan. 29, 2009, at A1, available at <http://online.wsj.com/article/SB123318899887026687.html>.

<sup>5</sup> See Shepherd, *supra* note 2.

<sup>6</sup> Bundesverwaltungsgericht [BVerwG] [Federal administrative court] June 21, 2005, 120 DEUTSCHES VERWALTUNGSBLATT 1455 (2005), discussed in Part IV *infra*. For an English summary and discussion of Major Pfaff's case, see Nikolaus Schultz, *Was the War on Iraq Illegal? The German Federal Administrative Court's Judgment of 21st June 2005*, 7 GERMAN L.J. 25, 26 (2006), Ilja Baudisch, *Germany v. N*, 100 AM. J. INT'L L. 911 (2006).

<sup>7</sup> See Qualification Directive, *supra* note 3.

<sup>8</sup> See IRAQ VETERANS AGAINST THE WAR (Sept. 16, 2010), <http://ivaw.org>.

<sup>9</sup> See, e.g., *Hinzman v. Canada* (Minister of Citizenship & Immigration), [2007] 1 F.C.R. 561 (Can.). Although one American deserter successfully appealed the denial of her asylum application in November 2009, the Federal Court based its opinion on the deserter's allegations of persecution based on her sexual orientation and not based on her

However, Shepherd is testing new legal waters, and in doing so, he has become a “poster boy” for German peace activists.<sup>10</sup>

Shepherd is the first American deserter to apply for asylum in Germany under the new EU rules.<sup>11</sup> If Germany grants him asylum, it could have serious implications for the American military presence there and other EU nations. Though the American military presence in Europe has decreased since the end of the Cold War, over 50,000 servicemembers remain in Germany.<sup>12</sup> In 2008, only seventy-one Soldiers deserted from posts in Europe.<sup>13</sup> If Germany recognizes Shepherd’s claims and grants him asylum, this number is bound to increase.

This article evaluates the legal claims Shepherd sets forth in his asylum application against the backdrop of the current status of German and European law. Part II examines the factual background of Shepherd’s case and lays out his claims. Part III addresses the development of the 2004 European Union legislation that forms the basis of Shepherd’s asylum claim. Part IV examines Shepherd’s argument that he deserted to avoid committing war crimes and crimes against peace. Part V analyzes Shepherd’s arguments on how he qualifies for protection under the Qualification Directive. Ultimately, this article concludes that, although Shepherd presents intriguing arguments, his claim for asylum is not supported by international law.

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political opposition to the war. See *Smith v. Canada* (Minister of Citizenship and Immigration), [2009] F.C. 1194 (Can.).

<sup>10</sup> Esterl, *supra* note 4.

<sup>11</sup> See Cordula Meyer & Simone Kaiser, *Deserting the Iraq War: US Soldier Seeks Political Asylum in Germany*, SPIEGEL ONLINE, Dec. 3, 2008, <http://www.spiegel.de/international/world/0,1518,594250,00.html>.

<sup>12</sup> In 1989, nearly 250,000 active duty servicemembers worked in Germany, over 200,000 of whom were soldiers. See U.S. DEP’T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (30 Sept. 1989), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/Hst0989.pdf>. By 2009, approximately 52,000 active duty servicemembers remained in Germany, over 37,000 of whom were soldiers. See U.S. DEP’T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (30 Sept. 2009), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0909.pdf>.

<sup>13</sup> See Esterl, *supra* note 4.



## II. Background

André Shepherd enlisted in the Army in January 2004 and deployed to Iraq in September 2004, just after completing initial training as a helicopter mechanic.<sup>14</sup> Shepherd worked in the 601st Aviation Support Battalion at Forward Operating Base Speicher near Tikrit, Iraq, maintaining AH-64 Apache attack helicopters.<sup>15</sup> According to Shepherd, he began questioning the Iraq war during the deployment and did more research on the war after his unit returned to Katterbach, Germany.<sup>16</sup>

The problem was that the more I looked into the subject, the more uncomfortable I got. I spent a considerable amount of time cross-referencing and verifying the information that I was receiving, but I always arrived to the same conclusion: our military was being used as a tool for worldwide imperialism under the guise to spread “freedom” (i.e. control) to underprivileged nations, one bullet at a time. My entire world was turned upside down. All this time I believed in the integrity, honor, loyalty and justice of our Armed Forces. We were supposed to be the “good guys.” As an active member of the Army, I cannot be free from the guilt of having supported this war I was led to believe was justified.<sup>17</sup>

In early 2007, Shepherd learned that his unit, now designated the 412th Aviation Support Battalion, would deploy again to Iraq.<sup>18</sup> In early April, he learned that he would deploy with them.<sup>19</sup>

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<sup>14</sup> See Shepherd, *supra* note 2.

<sup>15</sup> See *id.* At the time, the 601st fell under 4th Brigade (Aviation), 1st Infantry Division (Mechanized).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* The unit moved from the 1st Infantry Division to the 12th Combat Aviation Brigade as part of a larger transformation of the U.S. Army in Europe. See Nancy Montgomery, *Army Announces Details of 2007 Transformation and Rebasing Plan*, STARS & STRIPES, June 9, 2006, <http://www.stripes.com/article.asp?section=104&article=37761>. The 412th deployed to Joint Base Balad, Iraq, from July 2007 to September 2008. See Sergeant First Class Chris Seaton, *Germany's 412th ASB Finishes Combat Tour in Iraq*, DEF. VIDEO & IMAGERY DISTRIBUTION SYS., Sept. 7, 2008, <http://www.dvidshub.net/news/23332/germanys-412th-asb-finishes-combat-tour-iraq>.

<sup>19</sup> See Shepherd, *supra* note 2.

On the night of 11 April 2007, after ten days of deliberation, Shepherd quietly packed his things and deserted his unit.<sup>20</sup> He spent the next two years in hiding, first spending time with German punk rockers, then making connections with German peace organizations such as the Military Counseling Network, part of the German Mennonite Peace Committee.<sup>21</sup> He wanted to settle in Germany but needed proof of his Army discharge before he could apply for permanent residency.<sup>22</sup> Shepherd waited until his unit returned from its fifteen-month deployment before resurfacing so that he would not “have the risk of being sent back to Iraq.”<sup>23</sup> Finally, on 26 November 2008, Shepherd turned himself over to German authorities and submitted a formal application for asylum.<sup>24</sup> A few months later, on 4 February 2009, Shepherd and his German attorney, Dr. Reinhard Marx, presented their case to the German Federal Office of Migration and Immigration (*Bundesamt für Migration und Flüchtlinge*, or BAMF).<sup>25</sup>

### III. Asylum Law in Germany

In his application, Shepherd argues that he qualifies for asylum under German and European Union law.<sup>26</sup> The German Basic Law provides that “[p]ersons persecuted on political grounds shall have the right of asylum.”<sup>27</sup> Germany also implemented the Qualification Directive, enacted in 2004 by the European Union to establish minimum refugee

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<sup>20</sup> See André Shepherd, *Statement of André Shepherd at Press-Conference in Frankfurt/M. (Germany)*, WAR RESISTERS’ INT’L, Nov. 27, 2008, <http://www.wri-irg.org/node/6108>.

<sup>21</sup> See Esterl, *supra* note 4.

<sup>22</sup> See James Ewinger, *AWOL Cleveland Soldier Seeks Asylum in Germany*, CLEV. PLAIN DEALER, Dec. 1, 2008, [http://www.cleveland.com/news/index.ssf/2008/12/awol\\_cleveland\\_soldier\\_seeks\\_a.html](http://www.cleveland.com/news/index.ssf/2008/12/awol_cleveland_soldier_seeks_a.html).

<sup>23</sup> Shepherd, *supra* note 20.

<sup>24</sup> See Meyer & Kaiser, *supra* note 11.

<sup>25</sup> See *German Court Hears US Army Deserter’s Case for Asylum*, DEUTSCHE WELLE, Feb. 5, 2009, <http://www.dw-world.de/dw/article/0,,4005756,00.html>.

<sup>26</sup> See Reinhard Marx, *Antrag zur Anerkennung als Asylberechtigter für André Lawrence Shepherd* [Application on Recognition as an Asylum Seeker for André Lawrence Shepherd], CONNECTION E.V., available at <http://www.connection-ev.de/z.php?ID=362>.

<sup>27</sup> “Politisch Verfolgte genießen Asylrecht.” Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, B.G.Bl. 1, art. 16a (Ger.). For English translations of the German Basic Law, this article relies on the official English translation published by the Bundestag (German parliament) in 2008, which is available at [http://www.bundestag.de/interakt/informationmaterial\\_alt/fremdsprachiges\\_material/downloads/ggEn\\_download.pdf](http://www.bundestag.de/interakt/informationmaterial_alt/fremdsprachiges_material/downloads/ggEn_download.pdf).

status determination standards.<sup>28</sup> The Qualification Directive applied the general tenets of the 1951 Geneva Convention Relating to the Status of Refugees<sup>29</sup> to EU members and provided additional guidance on how to apply these tenets.

The Refugee Convention very generally defined a refugee as either any person who previously had been defined as a refugee or who, “owing to wellfounded [sic] fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>30</sup> The Refugee Convention created a two-pronged test: the person must have a fear of persecution and that fear must be reasonable (well-founded).<sup>31</sup> Additionally, one or more of the specified reasons for the persecution must apply, such as belonging to a particular social group or having a particular political opinion.<sup>32</sup>

The EU Qualification Directive essentially adopts the Convention’s basic definition of a refugee and expands on its terms. As in the Refugee Convention, there must be a reasonable fear of persecution, and the persecution must be for a qualifying reason. Article 10 restates the Refugee Convention reasons for persecution and defines them in greater detail.<sup>33</sup> Article 9 of the Qualification Directive provides guidance on what amounts to “acts of persecution.” Article 9(1) states that such acts “must . . . be sufficiently serious by their nature or repetition as to

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<sup>28</sup> See Qualification Directive, *supra* note 3. Germany implemented the Qualification Directive through the Asylverfahrensgesetz [AsylVfG] [Asylum Procedures Act], Aug. 19, 2007, BGBl. I at 1970 (F.R.G.) and the Aufenthaltsgesetz [AufenthG] [Residency Act], Jul. 30, 2004, BGBl. I at 1950 (F.R.G.), as amended by the Asylum Procedures Act.

<sup>29</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. See Qualification Directive, *supra* note 3, at 12–14.

<sup>30</sup> See Refugee Convention, *supra* note 29, art. 1A. The Refugee Convention also gave signatory states the option to apply this definition to any person or just those that were affected by events in Europe. See *id.* art. 1B. Although the original text of the Refugee Convention applied this definition only to persons affected by events prior to 1 January 1951, the 1967 protocol to the Convention incorporated its definition of “refugee” without temporal or geographical limits. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

<sup>31</sup> See U.N. HIGH COMM’R ON REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶¶ 37–42 (1992) [hereinafter UNHCR HANDBOOK].

<sup>32</sup> *Id.* ¶ 66.

<sup>33</sup> See Qualification Directive, *supra* note 3, art. 10.

constitute a severe violation of basic human rights.”<sup>34</sup> Article 9(2) lists specific examples of acts of persecution, including “prosecution or punishment, which is disproportionate or discriminatory” and “prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2).”<sup>35</sup> The three exclusion clauses are as follows:

A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes; [or] (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.<sup>36</sup>

The above language is taken almost verbatim from article 1F of the Refugee Convention.<sup>37</sup>

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<sup>34</sup> *Id.* art. 9(2).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* art. 12(2). Paragraph 22 of the preamble to the Qualification Directive, which discusses “acts contrary to the purposes and principles of the United Nations,” essentially refers to acts of terrorism and the planning and financing of terrorism. See 2004 O.J. (L 304) 13. Referring to the nearly identical language in the Refugee Convention, the UNHCR noted that “crimes capable of affecting international peace, security, and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights.” U.N. HIGH COMM’R ON REFUGEES, BACKGROUND NOTE ON THE APPLICATION OF THE EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES ¶ 47, 4 Sept. 2003, available at <http://www.unhcr.org/refworld/docid/3f5857d24.html>.

<sup>37</sup> See Refugee Convention, *supra* note 29, art. 1F.

## IV. Shepherd's Fear of Persecution

In his asylum application, Shepherd argues that he meets the criteria in the Qualification Directive because he has a reasonable fear of persecution. He states that he

refuses, for reasons of conscience, to continue his military service, because he does not wish to take part in a war by the United States against Iraq that is in violation of international law and the prohibition of violence stated under Article 2, Number 4 [sic] of the Charter of the United Nations<sup>38</sup> and, furthermore, does not wish to be involved in war crimes in connection with the deployment of his unit in Iraq.<sup>39</sup>

Because he deserted in order to avoid committing acts that are listed as exclusion criteria at article 12(2), he argues that he qualifies as a refugee under article 9 of the Qualification Directive. Shepherd claims that the implied threat of prosecution for his desertion constitutes an act of persecution within the meaning of article 9(2)(e) of the Qualification Directive.<sup>40</sup>

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<sup>38</sup> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2(4).

<sup>39</sup> Meyer & Kaiser, *supra* note 11.

<sup>40</sup> See Marx, *supra* note 26, para. III (citing Michael Bothe, *Der Irak-Krieg und das völkerrechtliche Gewaltverbot* [The Iraq War and the International Prohibition of Violence], 41 ARCHIV DES VÖLKERRECHTS [ARCHVR] 255 (2003); Holger Hestermeyer, *Die völkerrechtliche Beurteilung des Irakkriegs im Lichte transatlantischer Rechtskulturunterschiede* [The International Assessment of the Iraq War in Light of Transatlantic Differences in Legal Culture], 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 315 (2004); Alois Riklin, *Wertfreiheit, Bellum iustum und der Irak-Krieg* [Ethical Neutrality, Jus ad Bello, and the Iraq War], 45 ARCHVR 35 (2007); Markus Kotzur, *Gewissensfreiheit contra Gehorsamspflicht oder: der Irak-Krieg auf verwaltungsgerichtlichem Prüfstand* [Freedom of Conscience versus Duty of Obedience: The Iraq War on Trial in Administrative Court], 61 JURISTEN ZEITUNG [JZ] 25 (2006); Thomas Bruha, *Irak-Krieg und Vereinte Nationen* [The Iraq War and the United Nations], 41 ARCHVR 295 (2003); and Christian Tomuschat, *Völkerrecht ist kein Zweiklassenrecht: Der Irak-Krieg und seine Folgen* [International Law is Not a Second-Class Law: The Iraq War and Its Consequences], 51 VEREINTE NATIONEN 41 (2003)).

### A. Deployment as a Crime Against Peace

Shepherd's first argument attacks the legal justification for the invasion of Iraq. He states that the invasion of Iraq was an illegal war of aggression, thus his deployment in furtherance of the war would constitute a "crime against peace"<sup>41</sup> within the meaning of the Qualification Directive.<sup>42</sup> In support of his argument, he cites to several scholarly articles<sup>43</sup> but relies mainly on the case of Major Florian Pfaff.<sup>44</sup>

In April 2003, shortly after the invasion of Iraq, Pfaff, a *Bundeswehr* officer, refused to obey an order to participate in a software development project.<sup>45</sup> The goal of the project was to develop the *Standard-Anwendungs-Software-Produkt-Familien* (Standard Application Software Product Family), a suite of applications to help streamline German military operations.<sup>46</sup> When his superiors assigned him to work on the project as part of his regular duties, Pfaff refused, citing his right to conscience under article 4(1) of the German Basic Law.<sup>47</sup> He believed the software could be used to support Operation Iraqi Freedom, which he

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<sup>41</sup> Crimes against peace involve "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, art. 6a, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>42</sup> See Marx, *supra* note 26, para. III.1.a.

<sup>43</sup> See *id.* para. III.1.a.aa.

<sup>44</sup> Bundesverwaltungsgericht [BVerwGE] [Federal Administrative Court] June 21, 2005, 120 DEUTSCHES VERWALTUNGSBLATT 1455 (2005). Although the court's decision does not actually name the plaintiff, Major Pfaff has since identified himself as the plaintiff in the action. See FLORIAN PFAFF, TOTSCHLAG IM AMT: WIE DER FRIEDE WERRATEN WURDE [Murder in Office: How the Peace Was Betrayed] (2008).

<sup>45</sup> See Schultz, *supra* note 6, at 26.

<sup>46</sup> See Bundesministerium der Verteidigung [Federal Ministry of Defense], *SASPF—Management of the Troops*, Aug. 25, 2004, [http://www.bmvg.de/portal/a/bmvg/kcxml/04\\_Sj9SPyKssy0xPLMnMz0vM0Y\\_QjzKLd4k3cbcESYGZbub6kTAQjzX4\\_83FT9oNQ8fW\\_9AP2C3IhyR0dFRQC3ZZpd/delta/base64xml/L2dJQSEvUUt3QS80SVVFLzZfRF8zM1FF?yw\\_contentURL=%2FC1256F1200608B1B%2FN264WRA6167MMISEN%2Fcontent.jsp](http://www.bmvg.de/portal/a/bmvg/kcxml/04_Sj9SPyKssy0xPLMnMz0vM0Y_QjzKLd4k3cbcESYGZbub6kTAQjzX4_83FT9oNQ8fW_9AP2C3IhyR0dFRQC3ZZpd/delta/base64xml/L2dJQSEvUUt3QS80SVVFLzZfRF8zM1FF?yw_contentURL=%2FC1256F1200608B1B%2FN264WRA6167MMISEN%2Fcontent.jsp).

<sup>47</sup> "Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich." ["Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable."] Grundgesetz für die Bundesrepublik Deutschland [German Basic Law], art. 4(1).

believed to be illegal.<sup>48</sup> A German court-martial convicted Pfaff of insubordination and demoted him to captain; he appealed his conviction to the federal administrative court.<sup>49</sup> On appeal, the court found Pfaff's freedom of conscience under the German Basic Law trumped his duty to obey orders under German military law.<sup>50</sup> The court also "argued at great length that the prohibition of the use of force in international relations as provided for in Art. 2.4 of the [U.N.] Charter and corresponding *jus cogens* was *prima facie* violated."<sup>51</sup>

This article will not address the legality of the 2003 invasion of Iraq, which has been debated at length by legal scholars on both sides of the issue.<sup>52</sup> Rather, this article focuses on the factual and legal differences between Pfaff's case and Shepherd's situation. Pfaff disobeyed his orders in early April 2003, over a month before the U.N. Security Council recognized the United States and United Kingdom as occupying powers and called on them to restore security in Iraq.<sup>53</sup> Shepherd, on the other hand, was scheduled to deploy in July 2007, under the authority of a U.N. mandate and at the invitation of the Iraqi government.<sup>54</sup>

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<sup>48</sup> See Baudisch, *supra* note 6, at 911. Major Pfaff objected to the amount of support Germany was providing to the invasion of Iraq. German troops had been sent to Kuwait, German Airborne Warning and Control System (AWACS) planes and crews were flying reconnaissance missions over Turkey, Germany had granted overflight rights to NATO forces flying to and from Iraq, and German troops were assigned to guard American military bases in Germany. *Id.*

<sup>49</sup> See Schultz, *supra* note 6, at 25. The *Bundeswehr*, wanting Major Pfaff discharged from service, also appealed the lower court's ruling. *Id.*

<sup>50</sup> See Baudisch, *supra* note 6, at 911. "Der Soldat muss seinen Vorgesetzten gehorchen." ["The Soldier must obey his superiors."] Soldatengesetz [Soldier's Act] [SG], § 11(1), last amended July 31, 2008 (BGBl. I S. 1629).

<sup>51</sup> Schultz, *supra* note 6, at 37.

<sup>52</sup> For arguments that the Iraq invasion was illegal, see, e.g., Sean Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004) (concluding the invasion was "without a persuasive legal justification"); Thomas Franck, *Iraq and the Law of Armed Conflict*, 80 INT'L LAW STUD. 15 (2006) (arguing that the invasion was "probably not . . . undertaken in compliance with the law governing recourse to force"). Compare these with arguments that the Iraq invasion was legal, see, e.g., Nicholas Rostow, *International Law and the 2003 Campaign Against Iraq*, 80 INT'L LAW STUD. 21 (2006) (arguing that the invasion of Iraq was a legitimate exercise of anticipatory self-defense); Michael Schmitt, *The Legality of Operation Iraqi Freedom Under International Law*, 3 J. MIL. ETHICS 82 (2004) (arguing that although U.N. Security Council Resolution (UNSCR) 1441 contained no legal mandate to use force, Iraq's material breach of the cease-fire in UNSCR 687 reactivated the authorization for use of force in UNSCR 678). For a more comprehensive bibliography, see Rostow, *supra*, at 32 n.8.

<sup>53</sup> See S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

<sup>54</sup> "The Security Council . . . [n]otes that the presence of the multinational force in Iraq is at the request of the Government of Iraq and reaffirms the authorization for the

Furthermore, it is well settled that crimes against peace “can only be committed by those in a high position of authority representing a State or State-like entity.”<sup>55</sup> As a specialist, Shepherd hardly qualifies.<sup>56</sup> For these reasons, Shepherd’s arguments regarding crimes against peace are unpersuasive.

### B. Apache Mechanics as War Criminals

Shepherd also takes the position that his involvement in the repair and maintenance of AH-64 Apache helicopters equates to a war crime. He argues that the use of Apaches in urban warfare violates the principles of distinction and proportionality<sup>57</sup> and that the use itself is a

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multinational force as set forth in resolution 1546 (2004) and decides to extend the mandate of the multinational force as set forth in that resolution until 31 December 2007.” S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006) (citing S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004)).

<sup>55</sup> U.N. HIGH COMM’R ON REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: APPLICATION OF THE EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES ¶ 11, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003).

<sup>56</sup> Although Shepherd acknowledges that individual Soldiers cannot normally commit crimes against peace, he does not concede the argument; rather, he maintains that even indirect participation in the Iraq war would be facilitating or encouraging a crime against peace. See Marx, *supra* note 26, para. III.1.b.

<sup>57</sup> It is generally agreed that there are four basic principles in the law of armed conflict. The first is military necessity.

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. The second is distinction. “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” *Id.* art. 48. The third is proportionality. It is prohibited to cause “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” *Id.* art. 51(5)(b). The last is unnecessary suffering. “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” *Id.* art. 35(2). Although the United States has not ratified



war crime.<sup>58</sup> Shepherd appears to take a lesson from Specialist Jeremy Hinzman's failed bid for Canadian asylum. Citing conditions at Guantánamo Bay and Abu Ghraib, Hinzman, an infantryman, argued that he could be called on to commit human rights violations in Iraq.<sup>59</sup> The court was not persuaded, noting that "[Hinzman's] argument is premised on it having been established that the violations of international humanitarian law that have taken place in Iraq rise to the level of being systematic or condoned by the State, and that, therefore, an involvement in the war would amount to complicity in a crime."<sup>60</sup> Unwilling to agree to this premise, the court held that Hinzman had not made any showing that "he would have personally been engaged in, been associated with, or been complicit in acts condemned by the international community as contrary to basic rules of human conduct."<sup>61</sup>

Here, Shepherd attempts to establish a greater connection between the duties he would have performed in Iraq and potential war crimes. In his application, Shepherd presents allegations of war crimes in Fallujah in 2004,<sup>62</sup> as well as reports of civilian casualties resulting from helicopter raids.<sup>63</sup> He also points out that although the AH-64 was designed primarily for use against armored vehicles, "it has come to be used against individuals and buildings, sometimes with no knowledge by helicopter crews of who may be occupying buildings."<sup>64</sup> As a mechanic,

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Additional Protocol I, the United States considers these and other provisions of AP I "as already part of customary international law." Memorandum from The Judge Advocates Gen. to Assistant Gen. Counsel (Int'l), Office of the Sec'y of Def., subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986).

<sup>58</sup> See Marx, *supra* note 26, para. III.1.b.dd.

<sup>59</sup> See Hinzman v. Canada (Minister of Citizenship & Immigration), [2007] 1 F.C.R. 608 (Can.).

<sup>60</sup> *Id.* at 609.

<sup>61</sup> *Id.* at 587.

<sup>62</sup> See Marx, *supra* note 26, para. III.1.b.bb (citing Spencer Spratley, *U.S. Military Committed War Crimes in Fallujah: Open Letter to the International Criminal Court of Justice*, GLOBAL RES., Mar. 14, 2008, <http://www.globalresearch.ca/index.php?context=va&aid=8340>).

<sup>63</sup> See *id.* para. III.1.b.ee (citing AMNESTY INT'L, CARNAGE AND DESPAIR: IRAQ FIVE YEARS ON (2008), available at <http://www.amnesty.org/en/library/asset/MDE14/001/2008/en/3f78611b-f1e9-11dc-adcd-cdafd0ab0dfe/mde140012008eng.pdf>).

<sup>64</sup> See *id.* (quoting Bill Rau & Karen Parker, *U.S. War Crimes in Iraq 2007–2008: An Up-Date*, CONSUMERS FOR PEACE, Apr. 1, 2008, available at <http://www.consumersforpeace.org/pdf/WAR-CRIMES-3.pdf>).

Shepherd states, he would be supporting the commission of war crimes by repairing and maintaining attack helicopters.<sup>65</sup>

The use of Apache helicopters in urban warfare certainly carries with it a danger that civilians will be harmed. “The risk of [collateral damage and civilian injury] from air operations is magnified in the urban settings where military and civilian assets are collocated and often difficult to distinguish.”<sup>66</sup> However, although civilian casualties in war are tragic and should be avoided whenever possible, at times they are unavoidable. Additional Protocol I provides: “In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”<sup>67</sup> Not only do enemy combatants in Iraq make no effort to so distinguish themselves, it is standard practice among insurgents to “unlawfully feign civilian status to carry out attacks.”<sup>68</sup> These tactics “have in general placed all civilians in Iraq at greater risk of harm.”<sup>69</sup> The law of armed conflict recognizes this possibility and does not take a strict liability view of injury to civilians. Rather, it places lesser burdens on commanders, such as taking “all reasonable precautions to avoid losses of civilian lives and damage to civilian objects”<sup>70</sup> and taking “all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life.”<sup>71</sup>

Although the law of armed conflict does not hold commanders strictly liable for civilian casualties, Shepherd demands this standard regardless. He labels civilian deaths from Apache helicopters as attacks on innocent civilians and, therefore, war crimes.<sup>72</sup> Accordingly, Shepherd holds that his role in repairing and maintaining Apache helicopters would make him guilty of war crimes.<sup>73</sup> “[W]ar crimes are such hostile or other acts of soldiers or other individuals as may be

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<sup>65</sup> See *id.* para. III.1.b.dd.

<sup>66</sup> MATTHEW WAXMAN, RAND MONOGRAPH REPORT: INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS 24 (2008).

<sup>67</sup> AP I, *supra* note 57, art. 44(3).

<sup>68</sup> HUMAN RIGHTS WATCH, A FACE AND A NAME: CIVILIAN VICTIMS OF INSURGENT GROUPS IN IRAQ ch. XIII, Oct. 2, 2005, available at <http://hrw.org/reports/2005/iraq1005/>.

<sup>69</sup> *Id.*

<sup>70</sup> AP I, *supra* note 57, art. 57(4).

<sup>71</sup> *Id.* art. 57(2)(a)(ii).

<sup>72</sup> See Marx, *supra* note 26, para. III.2.b.cc.

<sup>73</sup> *Id.* para. III.2.b.gg.

punished by the enemy on capture of the offenders.”<sup>74</sup> Certainly, individuals who personally commit war crimes can be held responsible, as can a commander who knew or should have known that his or her subordinates were involved in war crimes.<sup>75</sup> However, Shepherd offers no support or basis for how support personnel may be held liable for the actions of the combat troops or commanders they support. This assertion is without merit.

Even assuming *arguendo* that Shepherd's contentions regarding war crimes and crimes against peace are valid, his arguments are ultimately self-defeating. Article 12(2)(a) of the Qualification Directive specifically excludes a person from refugee status if there are serious reasons to believe that “he or she has committed a war crime or a crime against peace.”<sup>76</sup> If deploying to Iraq is a crime against peace, Shepherd is excluded from refugee status because he deployed to Iraq in 2004. Similarly, if repairing and maintaining AH-64 Apache attack helicopters for use in Iraq qualifies as a war crime, Shepherd is excluded from refugee status for having already done so.

## V. Shepherd's Reasons for Persecution

To qualify as a refugee, it is not enough for Shepherd to demonstrate a reasonable fear of persecution. The persecution feared must be “for reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>77</sup> Shepherd alleges two reasons that the United States will persecute him: first, because of his political opinions about the war in Iraq; and second, because of his membership in a particular social group of deserters and conscientious objectors.

### A. Political Opinions

Shepherd claims that he fears persecution for his political opinion, that is, his opposition to the war in Iraq.<sup>78</sup> As Shepherd recognizes, it is

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<sup>74</sup> L. OPPENHEIM, 2 INTERNATIONAL LAW 251 (H. Lauterpacht ed., 7th ed. 1952).

<sup>75</sup> “[T]he law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.” *In re Yamashita*, 327 U.S. 1, 15 (1946).

<sup>76</sup> Qualification Directive, *supra* note 3, art. 12(2).

<sup>77</sup> Refugee Convention, *supra* note 29, art. 1A.

<sup>78</sup> See Marx, *supra* note 26, para. III.2.b.

not necessary for a refugee to have acted on his or her political opinions.<sup>79</sup> Despite this assertion, it is abundantly clear that Shepherd has done so, perhaps in an attempt to bolster his claims that the Army would persecute him. After filing his application, Shepherd gave a number of interviews denouncing the Iraq war<sup>80</sup> and published an open letter to President Barack Obama after the 2009 inauguration.<sup>81</sup> In February 2009, he accepted the “Peace Through Conviction” prize from the Munich American Peace Committee.<sup>82</sup>

However, there is a distinction between persecution for a particular political opinion and punishment for a politically motivated act. The *UNHCR Refugee Handbook* states,

Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political opinion or for politically-motivated acts. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee.<sup>83</sup>

By leaving his unit prior to his scheduled deployment, Shepherd, arguably, committed a punishable act: desertion with the intent to avoid

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<sup>79</sup> *Id.* (citing JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 149 (1991)).

<sup>80</sup> See, e.g., Phillip Hen, *US-Deserteur: Von einem, der sich weigerte, jedem Befehl Folge zu leisten* [U.S. Deserter: From One Who Refused to Follow Orders], *FUDDER*, Apr. 29, 2009, <http://fudder.de/artikel/2009/04/29/us-deserteur-von-einem-der-sich-weigerte-jedem-befehl-folge-zu-leisten/>; Elsa Rassbach, *Soldier Seeking Asylum: “I Want to Be Able to Atone,”* *COMMON DREAMS*, May 28, 2009, <http://www.commondreams.org/headline/2009/05/28-4>.

<sup>81</sup> See André Shepherd, *Open Letter from André Shepherd to Pres. Obama*, *TÜBINGEN PROGRESSIVE AMERICANS*, <http://www.tpa-active.com/index.php/issues/4-war-peace/32-open-letter-from-andre-shepherd-to-pres-obama>.

<sup>82</sup> See Agence France-Presse, *US Deserter Receives German Peace Prize*, *MILITARY.COM*, Feb. 9, 2009, <http://www.military.com/news/article/February-2009/us-deserter-receives-german-peace-prize.html>. Shepherd did not attend the award ceremony in Munich because he was not allowed to leave the Karlsruhe area while his asylum application was pending. See *id.* However, he did prepare an acceptance speech. See André Shepherd, *Prize “Peace Through Conviction” for U.S. AWOL Soldier*, *CONNECTION E.V.*, Feb. 7, 2009, <http://www.connection-ev.de/z.php?ID=534>.

<sup>83</sup> *UNHCR HANDBOOK*, *supra* note 31, ¶ 84.

hazardous duty.<sup>84</sup> However, Shepherd has made no showing that, should he be prosecuted for desertion, he would face a disproportionate sentence based on his political opinions. To the contrary, Shepherd admits in his application that he likely faces from six months to several years of confinement.<sup>85</sup> As the German Constitutional Court has held, to prove political persecution, the allegedly persecutory acts must go “beyond what was normal in the country of origin.”<sup>86</sup>

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<sup>84</sup> The maximum penalty for desertion with the intent to avoid hazardous duty is reduction to the lowest enlisted grade, forfeiture of all pay and allowances, confinement for up to five years, and a dishonorable discharge. *See* UCMJ art. 85 (2008). Desertion is only punishable by death in a time of war, defined as “a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’ exists.” *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(18)* (2008). To date, no such declaration or finding has been made regarding Operation Iraqi Freedom or Operation Enduring Freedom. Only one Soldier has been executed for desertion since the end of the American Civil War. Private Eddie Slovik first deserted for four months when he encountered shelling when landing at Omaha Beach in France in August 1944. He rejoined his unit in October 1944, then deserted again in November 1944 after he was wounded in the Hurtgen Forest in Germany. Of the approximately fifty death sentences pending at the time, General Dwight Eisenhower approved only Slovik’s to serve as an example. Slovik was executed by a firing squad on 31 January 1945. *See generally* WILLIAM BRADFORD HUIE, *THE EXECUTION OF PRIVATE SLOVIK* (1954). To date, seven U.S. Presidents have not acted on petitions to pardon Slovik posthumously. *See* Jennifer Reeger, *Deserter’s Execution Remains Vivid for Whitehall Man*, *PITTSBURGH TRIBUNE-REVIEW*, Jan. 30, 2011, [http://www.pittsburghlive.com/x/pittsburghtrib/news/westmoreland/s\\_720477.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/westmoreland/s_720477.html).

<sup>85</sup> *See* Marx, *supra* note 26, para. II. Given the length of Shepherd’s absence, his admission appears accurate; *see, e.g.*, *United States v. McPherson*, 68 M.J. 526 (Army Ct. Crim. App. 2009) (involving case of soldier who missed movement and deserted for six weeks and was sentenced to three months confinement and a bad-conduct discharge); *United States v. Mejia-Castillo*, No. 20040654, 2009 WL 6842543 (Army Ct. Crim. App. Mar. 26, 2009) (involving case of soldier who deserted for seven months and was sentenced to twelve months confinement and a bad-conduct discharge); *United States v. Worthington*, No. 20040396, 2006 WL 6625258 (Army Ct. Crim. App. Sept. 18, 2006) (involving case of soldier who missed movement and deserted for two months and was sentenced to eight months confinement and a bad-conduct discharge).

<sup>86</sup> Gert Westerveen, *Cases and Comments: IJRL/0098*, 4 *INT’L J. REFUGEE L.* 94, 95 (1992) (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 12, 1990, 2 BVerfGE 525/90 (F.R.G.)). The *Hinzman* court dismissed a similar argument, noting that if the Army court-martialed Hinzman for desertion, it “would be punishment for nothing more than a breach of a neutral law that does not violate human rights, and does not adversely differentiate on a Convention ground, either on its face, or in its application.” *Hinzman v. Canada* (Minister of Citizenship & Immigration), [2007] 1 F.C.R. 588 (Can.).

## B. Deserters and Conscientious Objectors as a Particular Social Group

Although Shepherd describes himself as a “conscientious objector,”<sup>87</sup> he never attempted to apply for conscientious objector status.<sup>88</sup> Army Regulation 600-43<sup>89</sup> defines conscientious objection as a “firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief.”<sup>90</sup> Prior to deserting in 2007, Shepherd asked a noncommissioned officer in his unit about conscientious objection.

The answer I received was most troubling. I was told that it would take months for them to decide my claim. First, I would have to speak with a Chaplin [sic] and a counselor to verify my credibility, second to see a psychiatrist to give me a mental check-up, and then my claim would get sent to my commander to decide if I was qualified. I would have to disagree with all wars, not just the ones we know to be unnecessary and immoral as well as live a lifestyle according to my objections. I had to verify what he said, so I looked up the Army Regulations on the Internet so I could read them for myself. After studying the regulations carefully, I knew that this option would not work, as I still believe it is necessary to use force but only as the absolute last resort or for defense purposes.<sup>91</sup>

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<sup>87</sup> See Marx, *supra* note 26, para. III.2.a.

<sup>88</sup> See Shepherd, *supra* note 2.

<sup>89</sup> U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006) [hereinafter AR 600-43].

<sup>90</sup> *Id.* at 27 (glossary). The regulation defines two classes of conscientious objectors: 1-A-0, persons who sincerely object to participating as a combatant but do not object to military service in a noncombatant status, and 1-0, persons who sincerely object “to participation of any kind in war in any form.” *Id.* Soldiers who qualify for 1-A-0 classification are retained in military service and reassigned to noncombatant duties, but Soldiers designated as 1-0 must be discharged “for the convenience of the Government.” *Id.* ¶ 3-1a.

<sup>91</sup> See Shepherd, *supra* note 2.

At best, Shepherd could be described as a “selective” conscientious objector, a status which American law does not recognize.<sup>92</sup> In *Gillette v. United States*,<sup>93</sup> the Supreme Court reviewed two cases, one involving a conviction for the willful failure of a draftee to report for induction, and the other a *habeas corpus* action brought by a soldier seeking discharge.<sup>94</sup> Both appellants had specific objections to participating in the war in Vietnam, but not to military service in general.<sup>95</sup> Although the Court did not doubt their sincerity, it “refused . . . to interpret the [Selective Service] statute to accommodate their claims.”<sup>96</sup> Because he would not be able to satisfy the requirements for conscientious objection under U.S. law, Shepherd argues that he had no alternative but to desert to avoid redeployment to Iraq.<sup>97</sup>

This argument alone is insufficient under international law. The *UNHCR Handbook* specifically addresses the issue of selective conscientious objection:

Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a

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<sup>92</sup> For that matter, neither does German law. Article 4(3) of the German Basic Law provides: “Niemand darf gegen sein Gewissen zum Kriegsdienst mit der Waffe gezwungen werden.” [“No person shall be compelled against his conscience to render military service involving the use of arms.”] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [German Basic Law], art. 4(3). Although military service is compulsory in Germany, article 12a provides: “Wer aus Gewissensgründen den Kriegsdienst mit der Waffe verweigert, kann zu einem Ersatzdienst verpflichtet werden.” (“Any person who, on grounds of conscience, refuses to perform military service involving the use of arms may be required to perform alternative service.”). *Id.* art. 12a(2). These basic rights are applied through another statute, the Gesetz über die Verweigerung des Kriegsdienstes mit der Waffe aus Gewissensgründen (Kriegsdienstverweigerungsgesetz) [KDVG] [Law on the refusal to perform military service with weapons due to conscience (Conscientious Objector Statute)], last amended on July 31, 2008 (BGBl. I S. at 1629) (F.R.G.).

<sup>93</sup> 401 U.S. 437 (1971).

<sup>94</sup> *See id.*

<sup>95</sup> *See id.* at 439–40. *Gillette*, appealing his draft-dodging conviction, described the war in Vietnam as “unjust.” *Id.* at 439. *Negre*, appealing the denial of his habeas action, objected “to the war in Vietnam, not to all wars.” *Id.* at 440.

<sup>96</sup> Michael F. Noone, Jr., *Conscience and Security: An Introduction, in SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMMODATING CONSCIENCE AND SECURITY* 1, 3 (Michael F. Noone, Jr. ed., 1989). The Court’s ruling is summarized in AR 600-43: “[R]equests by personnel for qualification as a conscientious objector after entering military service will not be favorably considered when these requests are . . . [b]ased on objection to a certain war.” AR 600-43, *supra* note 89, ¶ 1-5a.

<sup>97</sup> *See Shepherd, supra* note 2.

person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.<sup>98</sup>

Shepherd appears to pursue this latter argument earlier in his asylum application, attacking the legality of the Iraq war.<sup>99</sup> However, apart from references to scholarly articles and the Pfaff decision,<sup>100</sup> he does not provide any evidence of collective international condemnation.<sup>101</sup>

Although the Refugee Convention does not further elucidate how a particular social group is defined, two approaches have formed in asylum law.<sup>102</sup> One, the “protected characteristics” approach, asks “whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.”<sup>103</sup> This would include, for example, gender or ethnic background.<sup>104</sup> The other, the “social perception” approach, asks

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<sup>98</sup> UNHCR HANDBOOK, *supra* note 31, ¶ 171.

<sup>99</sup> See Part IV *supra*.

<sup>100</sup> Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 21, 2005, 120 Deutsches Verwaltungsblatt 1455 (2005).

<sup>101</sup> Despite the controversy over the decision to invade Iraq, neither the U.N. Security Council nor the General Assembly took any action to condemn the United States and the United Kingdom, although then-U.N. Secretary-General Koffi Annan *sua sponte* described the invasion in an interview as “not in conformity with the UN charter.” *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, <http://news.bbc.co.uk/2/hi/3661134.stm>. Contrast such inaction with the U.N. General Assembly’s condemnation of Serbian ethnic cleansing in Bosnia and Herzegovina. See, e.g., G.A. Res. 47/121, U.N. Doc. A/RES/47/121 (Dec. 18, 1992); S.C. Res. 819, U.N. Doc. S/RES/819 (Apr. 16, 1993).

<sup>102</sup> U.N. HIGH COMM’R ON REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 5 (2002) [hereinafter U.N. HIGH COMM’R ON REFUGEES].

<sup>103</sup> *Id.* ¶ 6.

<sup>104</sup> See BATTJES, *supra* note 2, at 256.



“whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.”<sup>105</sup>

Article 10 of the EU Qualification Directive essentially combines these two approaches, providing that a particular social group can be formed when

members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and . . . that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.<sup>106</sup>

Rather than proscribe one approach or the other, article 10 requires that both tests be satisfied.<sup>107</sup> The Directive provides homosexuals as an example of a particular social group.<sup>108</sup> German courts have ruled that

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<sup>105</sup> U.N. HIGH COMM’R ON REFUGEES, *supra* note 102, ¶ 7. The Wiesbaden Administrative Court applied a two-part social perception test in a 1993 decision granting asylum to an Iranian homosexual, asking first whether the public views a particular collection of individuals as a group, and second, whether in the eyes of an objective observer the public treats this group as undesirable. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 534–35 (1993) (citing Verwaltungsgericht [VG] Wiesbaden [Wiesbaden Administrative Court], Apr. 26, 1983, No. IV/1 E 06244/81 (F.R.G.)).

<sup>106</sup> Qualification Directive, *supra* note 3, art. 10(d).

<sup>107</sup> See James Hathaway, *What’s In a Label?* 5 EUR. J. MIGRATION & L. 1, 17 (2003). The Hannover Administrative Court used a variant of this approach when a refugee from Ghana claimed that corrupt public officials qualified as a social group under the Refugee Convention. In addition to looking for similar characteristics among the group’s members, the court also required a showing of some degree of inner structure to the group. See Fullerton, *supra* note 105, at 533–34. However, the Qualification Directive does not require any particular degree of cohesion within a social group. See BATTJES, *supra* note 2, at 256.

<sup>108</sup> Qualification Directive, *supra* note 3, art. 10(d). In addition to sexual orientation, the 2001 draft of the Qualification Directive included “age or gender, as well as groups comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership.” COMM’N OF THE EUROPEAN CMTYS., PROPOSAL FOR A COUNCIL DIRECTIVE ON MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS AND STATELESS PERSONS AS REFUGEES OR AS PERSONS WHO OTHERWISE NEED INTERNATIONAL PROTECTION art. 12 (2001).

homosexuals,<sup>109</sup> Sri Lankan Tamils,<sup>110</sup> and Yezidi Turks qualify as particular social groups.<sup>111</sup>

In his application for asylum, Shepherd maintains that he is a member of a particular social group of deserters and conscientious objectors,<sup>112</sup> and that the U.S. military will prosecute him for his affiliation to this particular social group.<sup>113</sup> This argument presents a logical fallacy. Should Shepherd be prosecuted by the Army, it would be because he deserted his unit, regardless of the reason and regardless of whom Shepherd associated with following his desertion.

In claiming that his beliefs against the war qualify as an immutable characteristic, he cites to a 1989 resolution by the U.N. Commission on Human Rights.<sup>114</sup> This resolution, adopted without a vote, recognized “the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience, and religion.”<sup>115</sup> However, Shepherd fails to point out that the resolution does not address selective conscientious objection, but rather the right to object to military service in its entirety.

The resolution also called upon states to recognize the right of conscientious objection by providing alternate service.<sup>116</sup> The U.N.

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<sup>109</sup> See Fullerton, *supra* note 105, at 534–35 (citing Verwaltungsgericht [VG] Wiesbaden [Wiesbaden Administrative Court], Apr. 26, 1983, No. IV/IE 06244/81 (F.R.G.)).

<sup>110</sup> See Gert Westerveen, *Cases and Comments: IJRL/0080*, 3 INT’L J. REFUGEE L. 337–38 (1991) (citing Verwaltungsgericht Berlin [VG] [Berlin Administrative Court], 1984, 22 A 811/82 (F.R.G.)). Tamils are a minority ethnic group in Sri Lanka that was largely disenfranchised by the Sinhalese majority after Sri Lankan independence in 1948; Tamil separatists fought a bloody civil war for a separate Tamil state from 1983 to 2009. See *Background Note: Sri Lanka*, U.S. DEP’T OF STATE (June 7, 2010), <http://www.state.gov/r/pa/ei/bgn/5249.htm>.

<sup>111</sup> See Westerveen, *supra* note 110, at 337–38. Yezidis are a Kurdish minority with traditions from Islam and Zoroastrianism; Muslims persecute Yezidis as heretics, contending that the Yezidi main deity, Tawsy Melek, is actually Satan. See *The Truth About the Yezidis*, YEZIDI TRUTH.ORG, [http://www.yeziditruth.org/the\\_yezidis](http://www.yeziditruth.org/the_yezidis) (last visited Jan. 18, 2010).

<sup>112</sup> See Marx, *supra* note 26, para. III.2.a.dd.

<sup>113</sup> See *id.* para. III.2.a.ff.

<sup>114</sup> See *id.* para. III.2.a.cc. Shepherd’s application incorrectly refers to the resolution as a U.N. General Assembly document.

<sup>115</sup> Draft Report of the United Nations Commission on Human Rights, U.N. Doc. E/CN.4/1989/L.10/Add.15 (1989) [hereinafter U.N. Doc E/CN.4/1989/L.10Add.15].

<sup>116</sup> See Kevin J. Kuzas, Note, *Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?* 31 VA. J. INT’L L. 446, 453 (1991) (citing U.N. Doc. E/CN.4/1989/L.10/Add.15 (1989)).

Commission on Human Rights reemphasized this in 1993, specifically reminding states with compulsory service of its recommendation for implementing alternate service “compatible with the reasons for conscientious objection.”<sup>117</sup> Similarly, in 1997, the Commission passed another resolution encouraging states to “consider granting asylum to those conscientious objectors compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service when there is no provision, or no adequate provision, for conscientious objection to military service.”<sup>118</sup>

It is clear from the language of these resolutions that the U.N. Commission on Human Rights was referring to nations that did not provide an alternative to compulsory military service. It was not calling for nations that already allow conscientious objection to expand existing conscientious objector rules. Shepherd’s application ignores the fact that the United States has not relied on the draft since December 1972.<sup>119</sup> Shepherd admits in his application that his enlistment was voluntary, and although he mentions the stop-loss policy,<sup>120</sup> he makes no attempt to tie this policy in to his arguments on conscientious objection. He therefore leaves a hole in his argument by asserting a right to conscientious objection<sup>121</sup> but failing to explain how that right applies to his situation.

Ultimately, Shepherd fails to satisfy the Qualification Directive’s test for belonging to a “particular social group” because his opinions about the war in Iraq do not rise to the level of immutable, unchangeable characteristics such as age, gender, family ancestry, or sexual orientation. Such opinions are already addressed by the provisions regarding political opinion in the Refugee Convention and the Qualification Directive. Shepherd’s argument for particular social group appears merely as an attempt to bolster his claim for refugee status.

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<sup>117</sup> HITOMI TAKEMURA, INTERNATIONAL HUMAN RIGHT TO CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AND INDIVIDUAL DUTIES TO DISOBEY MANIFESTLY ILLEGAL ORDERS 56 (2009) (citing U.N. Commission on Human Rights Resolution 1993/84, Mar. 10, 1993).

<sup>118</sup> U.N. Commission on Human Rights Resolution 1998/77, Apr. 22, 1998.

<sup>119</sup> See Thomas Evans, *The All-Volunteer Army After Twenty Years: Recruiting in the Modern Era*, 27 ARMY HISTORY 40 (1993).

<sup>120</sup> See Marx, *supra* note 26, paras. I, II.

<sup>121</sup> As Shepherd himself recognizes, however, there is no international convention or declaration that recognizes a right to conscientious objection. See *id.* para. III.2.a.cc; see also Cecilia M. Bailliet, *Assessing Jus ad Bellum and Jus in Bello within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum*, 20 GEO. IMMIGR. L.J. 337, 341 (2006).

## VI. Conclusion

Although the Qualification Directive and the Pfaff decision appear to create a new mechanism for Soldiers seeking to avoid deployment, they are not a “get out of jail free” card, at least for André Shepherd. Shepherd may have had a stronger case had he objected during his first deployment, or had he taken a more direct part in hostilities. While Shepherd’s arguments likely will prove unpersuasive, it is very probable that others will attempt to succeed where Shepherd appears to have failed. In Canada, other servicemembers continued to petition for Canadian asylum even after the Canadian government denied Jeremy Hinzman’s asylum application.<sup>122</sup> All things considered, while Shepherd’s bid for asylum may be the first such case in Germany, it likely will not be the last.

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<sup>122</sup> See, e.g., *Smith v. Canada (Minister of Citizenship and Immigration)*, 2009 F.C. 1194 (Can.); *Lowell v. Canada (Minister of Citizenship and Immigration)*, 2009 F.C. 649 (Can.); *Landry v. Canada (Minister of Citizenship and Immigration)*, 2009 F.C. 594 (Can.); *Glass v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C. 881 (Can.); *Key et al. v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C. 838 (Can.); *Colby v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C. 805 (Can.).

**ACHIEVING TRANSPARENCY IN THE MILITARY PANEL  
SELECTION PROCESS WITH THE PRESELECTION METHOD**

MAJOR JAMES T. HILL\*

I. Introduction

In 2004, Sergeant (SGT) Ryan Weemer and SGT Jose Luis Nazario allegedly participated in the murder of four Iraqi detainees in Fallujah, Iraq.<sup>1</sup> The allegations did not surface until approximately two years later, resulting in criminal charges against both of the Soldiers.<sup>2</sup> The key difference between the two cases was the status of SGT Nazario, who was a civilian at the time the charges surfaced, placing his offense solely within the jurisdiction of a United States district court.<sup>3</sup> While fortuitous, the chain of events in both criminal justice systems resulted in protections for Mr. Nazario that were unavailable to SGT Weemer during his court-martial. In particular, Mr. Nazario's jury was selected by random.<sup>4</sup> By virtue of this selection process, Mr. Nazario had the means to analyze the random procedures used to select his jury and compare them with the standards proscribed by Federal statute to ensure

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<sup>1</sup> Rick Rodgers, *Marine's Trial Begins in '04 Slaying in Iraq*, SAN DIEGO UNION-TRIB., Apr. 1, 2009, at B1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1821–1869 (2006), mandates federal courts implement random jury selection processes. *Id.* § 1861. The law requires the jury pool be established by an unspecified random process, *id.* § 1863(b)(2), but specifically mandates the jury venire be selected by jury wheel or random lot process. *Id.* § 1863(b)(4).

his jury was lawfully constituted.<sup>5</sup> By contrast, in SGT Weemer's military case, a convening authority (CA)<sup>6</sup> with the discretion to refer the charges to trial, hand-selected his panel members after their nomination by subordinate members of the same command.<sup>7</sup> Because of the peculiarities of the current military panel selection process, in contrast to Mr. Nazario, SGT Weemer had no way of verifying his panel was selected in compliance with the applicable statutory requirements.<sup>8</sup>

While the military justice system is a different animal than the civilian one, the drafters of the 1950 Uniform Code of Military Justice (UCMJ) were intent on creating a system more aligned with civilian notions of justice than its predecessor.<sup>9</sup> Thus, while the UCMJ retained command control over the administration of the system,<sup>10</sup> this authority came with a heightened requirement to root out sources of undue influence to bring the system in line with civilian practice. For example, the 1950 code prohibited the practice of CAs admonishing court members for executing their duties.<sup>11</sup> In subsequent reforms, Congress created a military judiciary and strengthened the independence of military judges to more closely mirror their civilian counterparts.<sup>12</sup> Yet, Congress has not

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<sup>5</sup> See discussion *infra* Part II.A.

<sup>6</sup> With limited exception, all service branches utilize a panel selection method whereby convening authorities' (CA) subordinate staff or commanders nominate candidates for the CA's consideration in selecting a panel. See generally JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURT-MARTIAL apps. E-I (1999) [hereinafter JSC REPORT] (summarizing the predominant panel selection procedures used in each of the military services and the Coast Guard) (on file with Office of The Judge Advocate General, U.S. Army).

<sup>7</sup> Article 25(d)(2), Uniform Code of Military Justice (UCMJ), merely requires that the CA detail members for panel duty whom are best qualified "by reason of age, education, training, experience, length of service, and judicial temperament. UCMJ art. 25 (2008) (codified at 10 U.S.C. § 825 (2006)). However, all military service branches use a panel selection method whereby the CA hand-selects panel members to be detailed to a court-martial panel. See generally JSC REPORT, *supra* note 6, apps. E-I.

<sup>8</sup> See discussion *infra* Part II.A-B.

<sup>9</sup> See Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49, 54 (2009).

<sup>10</sup> See *infra* note 57 and accompanying text.

<sup>11</sup> Uniform Code of Military Justice of 1950, art. 37, Pub. L. No. 81-506 (codified as amended at 10 U.S.C. §§ 801-946) ("No authority . . . shall censure, reprimand, or admonish such court of any member . . . with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. ").

<sup>12</sup> See generally Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. The 1968 act created the military judge position to replace the law officer, and required that

enacted reform to address what has become the most glaring disparity between the two systems—the lack of transparency in military panel selection when compared to civilian juror selection.

This disparity engenders a sense of unfairness, especially given the greater number of cases in which individuals accused of committing crimes on active duty are prosecuted in federal court under the Military Extraterritorial Jurisdiction Act.<sup>13</sup> The more evident the disparity becomes, the greater the attendant risk that Congress will perceive a need to close the gap and simply adopt a process akin to the federal one, which remains, “virtually inconceivable in a military setting.”<sup>14</sup> If implemented in a wholesale manner, the federal jury selection process would be incompatible with military demographics—making panels disproportionately junior<sup>15</sup> and requiring judgment by members junior in rank to an accused under a “purist” random scheme.<sup>16</sup>

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military judges be assigned to organizations directly responsible to the Judge Advocate General or his designee. *See id.* § 2(9) (amending Article 26, UCMJ). *See also* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. The 1983 act sought to increase the independence of the military judge by prohibiting CAs and members of their staff from preparing “any report concerning the effectiveness, fitness, or efficiency of the military judge . . . which relates to his performance as a military judge.” *See* Military Justice Act of 1983 § 3(c)(1) (amending Article 26, UCMJ).

<sup>13</sup> *See* First Lieutenant James E. Hartney, *A Call for Change: The Military Extraterritorial Jurisdiction Act*, 13 GONZ. J. INT’L L. 2 (2009–2010), <http://www.gonzagajil.org/content/view/198/1/> (discussing two cases in which former service members have been tried under the Military Extraterritorial Jurisdiction Act); *see also* Press Release, Dep’t of Justice, Retired Military Official Pleads Guilty to Bribery and Conspiracy Related to Defense Contracts in Afghanistan (July 1, 2009), *available at* [http://www.justice.gov/atr/public/press\\_releases/2009/247621.htm](http://www.justice.gov/atr/public/press_releases/2009/247621.htm) (discussing four cases in which service members have been charged in federal court with crimes committed while on active duty).

<sup>14</sup> Major Christopher Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 255 (2003).

<sup>15</sup> JSC REPORT, *supra* note 6, at 22 (“A system using random nomination is likely to select service members predominately from the enlisted grades of E-3 to E-6 and the officer grades of O-3 and O-4.”).

<sup>16</sup> *See* Behan, *supra* note 14, at 256 (“To be a purist [random selection scheme] . . . one would have to be willing to discard . . . the tradition that one’s actions will never be judged by someone junior in rank or experience . . . .”); *see also* UCMJ art. 25(d)(1) (2008) (“When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.”).

Although sweeping reform of military justice practices may seem improbable due to longstanding acceptance of the status quo, reforms to the military justice systems of Canada and the United Kingdom illustrate this possibility. Until fairly recently, both nations utilized panel selection procedures similar to those still implemented in the United States but were forced to implement random systems.<sup>17</sup> The proverbial straw that broke the camel's back in both countries was their civil courts' determinations that commanders' roles in the processes violated soldiers' rights to independent and impartial tribunals.<sup>18</sup> While change in the United States would likely not come from the courts,<sup>19</sup> the same underlying concerns could eventually motivate similar congressional reforms.

Prior to the exercise of civilian oversight, the military services can, and should, implement internal reforms to the panel selection process that achieve transparency on par with federal jury selection. Part II.A explains that transparency benefits the military by eliminating appearances CAs routinely stack courts-martial panels.<sup>20</sup> Part II.B further underscores how transparency eliminates the potential for unlawful command influence (UCI) existing in the subordinate nominating process. Part II.C demonstrates the risk that Congress will legislate reforms to UCMJ Article 25(d)(2), which governs panel

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<sup>17</sup> See JSC REPORT, *supra* note 6, app. M, at 4.

<sup>18</sup> See *R. v. Genereux* [1992] S.C.R. 259 (holding the commander's role in the court-martial process a violation of the Canadian Charter of Rights and Freedoms guarantee to an independent and impartial tribunal); *Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221 (1997) (holding the commander's role in the court-martial process a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantee to an independent and impartial tribunal).

<sup>19</sup> It is well settled that the Sixth Amendment right to trial by jury, the primary legal principal that would otherwise be at issue in collaterally attacking panel selection, is not applicable to trial by courts-martial. See, e.g., *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial . . ."); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988) ("The right of trial by jury has no application to the appointment of members of courts-martial.").

<sup>20</sup> In the military justice context, the verb "to stack" is sometimes used to describe unlawful command influence (UCI) in the panel selection process. *United States v. Hilow*, 32 M.J. 439, 440 (C.M.A. 1991) ("We hold that the deliberate stacking of the pool of potential members . . . violated Article 37, UCMJ, 10 USC. § 837."). Court-stacking can occur when panel members are selected using criteria that are inconsistent with Article 25. *United States v. Loving*, 41 M.J. 213, 321 (C.A.A.F. 1994) ("Court stacking . . . on the basis of race or gender violates . . . Article 25 . . .") (internal quotation marks omitted).



selection, in the absence of a military solution.<sup>21</sup> Part III.A then explores alternative ways of achieving transparency, beginning with random selection methods used in two experiments. Part III.B concludes this article by proposing specific internal reforms that will achieve transparency without the drawbacks of random selection.

## II. The Need for Transparent Panel Selection Procedures

### A. Eliminating the Appearance of UCI in the Convening Authority Member-Selection Process

Implementing transparent panel selection procedures would benefit the military justice system in the long-term by eliminating perceptions—however unwarranted—that CAs routinely stack panels.<sup>22</sup> Such procedures would consequently reduce a tide of litigation currently generated by the perception of UCI in the selection of panel members.<sup>23</sup> To this end, a brief explanation of the transparency involved in selecting Mr. Nazario’s jury helps to illustrate the problems that remain unsolved in the military justice arena.

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<sup>21</sup> See 10 U.S.C. § 825 (2006) (codifying UCMJ Article 25).

<sup>22</sup> See, e.g., Colonel James A. Young, III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 107 (2000) (“As long as the person responsible for sending a case to trial is the same person who selects the court members, the perception of unfairness will not abate.”); Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 4 (1998) (“The [panel selection] process naturally breeds unlawful command influence and its mien . . . [court-stacking] is consistently achieved, suspected, or both.”); JSC REPORT, *supra* note 6, at 18 (“To the extent that there is a possibility of abuse in the current system, there will always be a perception that that convening authorities and their subordinates may abandon their responsibilities and improperly attempt to influence the outcome of a court-martial.”).

<sup>23</sup> See, e.g., *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998) (holding that no panel stacking occurred where commanders were 7.8% of the installation’s officer population but constituted 80% of the panel membership); *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994) (finding insufficient evidence of systematic exclusion based on statistical evidence comparing the race and gender composition of the panel to the military installation); *United States v. Gooch*, No. 37303, 2009 WL 4110962, at \*3 (A.F. Ct. Crim. App. Nov. 24, 2009) (unpublished) (“[T]he fact that there were no members of the appellant’s race on the panel does not establish a systematic exclusion of members of his race, or any race, from the court-martial panel.”); *United States v. Hodge*, 26 M.J. 596, 600 (A.C.M.R. 1988) (“The absence of a black member from the panel detailed to hear appellant’s case bespeaks random chance as much as it does discriminatory intent.”).

First, Mr. Nazario's attorneys could access on-line the random jury selection plan used to pool his jury<sup>24</sup> and compare that plan to the federal statute<sup>25</sup> to ensure those procedures were lawful. Second, federal statute provided Mr. Nazario's attorneys a process through which they could obtain "any relevant records," such as voting rolls or driver license records, used to pool the jury to ensure compliance with the published plan.<sup>26</sup> In summary, Mr. Nazario's attorneys could rest assured that, regardless of the racial, gender, or class composition of his jury, his jury was not stacked if the objectively verifiable statutory procedures were followed.

Service members like SGT Weemer find themselves in an entirely different situation. The standard method of panel selection<sup>27</sup> provides them no way of verifying their CAs are complying with the provisions of Article 25(d)(2).<sup>28</sup> More pointedly, while that statute requires CAs to select members who are best qualified "by reason of age, education, training, experience, length of service, and judicial temperament,"<sup>29</sup> a CA could unlawfully exclude or include prospective panel members based on race, gender, or other illegal criteria, and easily conceal such unlawful intentions.<sup>30</sup>

The inability to verify CAs are complying with Article 25(d)(2) naturally leads to perceptions that CAs are unlawfully influencing the composition of panels.<sup>31</sup> In turn this perception encourages litigation

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<sup>24</sup> See Plan of the United States District Court, Central District of California for the Random Selection of Grand and Petit Jurors (U.S. Dist. Court for the Central Dist. of California), available at <http://www.cacd.uscourts.gov/> (last visited Jan. 12, 2011) (follow "General Orders" hyperlink; then follow "07-10" hyperlink).

<sup>25</sup> See *supra* note 4 (discussing the Jury Selection and Service Act of 1968).

<sup>26</sup> See 28 U.S.C. §1867(d) (2006).

<sup>27</sup> For purposes of this article, the terms "standard selection method" and "standard method" refer to the predominant panel selection method used throughout the military services. That method consists of two steps. First, subordinates to the CA nominate prospective members. See *supra* note 6 and accompanying text. Second, the CA selects the panel members from among these nominees based on her subjective determination that they meet the statutory criteria in Article 25(d)(2). See *supra* note 7 and accompanying text.

<sup>28</sup> See UCMJ art. 25(d)(2) (2008).

<sup>29</sup> *Id.*

<sup>30</sup> There are no mechanisms built into the standard panel selection method to allow an accused to verify the CA complied with Article 25(d)(2). See generally JSC REPORT *supra* note 6, apps. E-I (summarizing the predominant panel selection procedures used in each of the military services and the Coast Guard).

<sup>31</sup> See *supra* note 22.

which in many cases may miss the mark and target panels selected in accordance with Article 25(d)(2).<sup>32</sup> The best way to reduce perceptions of UCI and the corresponding litigation the perception encourages is to “publish the truth about the situation”<sup>33</sup> by putting the accused on the same footing as his counterpart in federal court—and to provide him with the ability to analyze direct evidence his CA complied with Article 25(d)(2).

#### B. Eliminating UCI in the Subordinate Member-Nomination Process

Along with aspects of the CA’s panel selection process, transparency can only be achieved by addressing the subordinate nominating procedure involved in the selection process. Beyond the inability to challenge the CA’s unwritten decision process, SGT Weemer could not have known, let alone have challenged, the validity of the process used by subordinate commanders to nominate the members of his panel pool.<sup>34</sup>

The facts in *United States v. Smith*<sup>35</sup> and *United States v. Hilow*<sup>36</sup> illustrate how subordinate nominating renders the panel selection process vulnerable to UCI. In *Smith*, the trial counsel ordered a paralegal specialist to compile a list of “hard core” female nominees.<sup>37</sup> The paralegal specialist complied and the CA eventually selected two of the women for panel duty.<sup>38</sup> Similarly, in *Hilow*, the CA selected nineteen individuals nominated by the adjutant general for panel duty because they were “commanders and supporters of a command policy of discipline.”<sup>39</sup> In both *Smith* and *Hilow*, the CAs were unaware of their subordinates’ illegality and acted in good faith.<sup>40</sup> Nonetheless, in both

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<sup>32</sup> See *supra* note 23.

<sup>33</sup> *United States v. Cruz*, 20 M.J. 873, 890 (A.C.M.R. 1985) (“It is axiomatic that the best way to dispel the appearance of evil is to publish the truth about the situation.”).

<sup>34</sup> Subordinates involved in the nominating process must also comply with Article 25(d)(2). *United States v. Dowty*, 57 M.J. 707, 712 (N-M. Ct. Crim. App. 2002) (“A subordinate’s improper selection of a member pool may taint the convening authority’s selection, even if the convening authority has no knowledge of the impropriety.”) (citation omitted).

<sup>35</sup> 27 M.J. 242 (C.M.A. 1988).

<sup>36</sup> 32 M.J. 439 (C.M.A. 1991).

<sup>37</sup> *Smith*, 27 M.J. at 245.

<sup>38</sup> *Id.* at 248.

<sup>39</sup> *Hilow*, 32 M.J. at 441.

<sup>40</sup> *Id.* at 442; *Smith*, 27 M.J. at 248.

cases, UCI seeped into the selection process, and the Court of Military Appeals (COMA) resultantly granted relief in each case.<sup>41</sup>

The military's subordinate nominating procedures are similar to those once used in many federal courts—Congress prohibited their continued use with the passage of the Federal Jury Selection and Service Act of 1968.<sup>42</sup> Prior to this legislation, it was common for federal courts to nominate jurors using the “key-man” system, a process whereby a juror commissioner would request prominent members of the community to nominate individuals for jury duty.<sup>43</sup> During hearings on the legislation, the chair of the committee charged with examining this legislation, Judge Irving Kaufmann, explained, “[l]ong experience with subjective requirements . . . provide a fertile ground for discrimination and arbitrariness, even when the jury officials act in good faith.”<sup>44</sup> Accordingly, Congress ultimately closed this avenue of abuse by implementing a random selection scheme,<sup>45</sup> perhaps indicating how a reform-minded Congress would resolve the lack of transparency in military panel selection.

### C. Shielding the Panel Selection Process from Immediate and Sweeping Legislative Reform

Though the panel selection process needs change, that change should be sought without a legislative overhaul of Article 25(d)(2). Foremost, Article 25(d)(2) is not the reason the military panel selection process lacks transparency. Transparency is lacking because of the manner in which Article 25(d)(2) is implemented. Additionally, Article 25(d)(2) possesses a mission essential attribute which must be retained—it is

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<sup>41</sup> *Hilow*, 32 M.J. at 444 (setting aside the sentence); *Smith*, 27 M.J. at 251 (setting aside the findings and sentence).

<sup>42</sup> See *supra* note 4 (discussing the Jury Selection and Service Act of 1968).

<sup>43</sup> See Major General (Ret.) Kenneth J. Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51, 62 (1972–1973) (“Until the enactment of the Federal Jury Selection [and Service] Act, it was common for federal jurors to be selected by the key-man system, whereby the jury commissioner would contact the local banker, the local minister, the local businessman, and perhaps the local superintendent of schools and ask them to nominate people for jury duty.”).

<sup>44</sup> *Federal Jury Selection: Hearings on S. 1319 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong. 49, 255 (1967) (statement of Judge Irving K. Kaufmann, Chair, Committee on the Operation of the Jury System).

<sup>45</sup> See *supra* note 4 (discussing the Jury Selection and Service Act of 1968).

flexible, dictating no particular method of selection, ensuring courts-martial can be conducted anywhere and under virtually any conditions.<sup>46</sup> Finally, Article 25(d)(2)'s mandate for the "best qualified" members<sup>47</sup> additionally ensures that panels possess the requisite level of competence to carry out their unique military justice function when they are selected in accordance with the statute.<sup>48</sup>

By framing the issue as one of implementation rather than substance of the law, the military may retain the ability to make necessary modifications while there is still time. However, lack of action could inevitably lead to undesired and sweeping change. An analogous example exists in the recent legislative revisions to the sexual assault statute, UCMJ Article 120.<sup>49</sup> There, Congress revised Article 120 despite the position of judge advocates from all the military branches who opined that the revision was unnecessary.<sup>50</sup> Political pressure became untenable after several high profile cases, a congressional task force, and an independent commission focused public criticism on how the military was addressing sexual assaults.<sup>51</sup>

It is conceivable that similar attacks on the military panel selection process could also motivate congressional action. As recently as May 2001, the Cox Commission released a report which contained this scathing rebuke of the panel selection process:

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<sup>46</sup> JSC REPORT, *supra* note 6, at 46 ("To maintain an effective uniform military justice system, military justice procedures, such as the court-martial member selection process, must be sufficiently flexible to be applied in all units, locations, and operational conditions and across all five Armed Forces.").

<sup>47</sup> UCMJ art. 25 (2008).

<sup>48</sup> Panel member competency has critical import as military panels carry out a judicial function for which civilian juries generally do not—sentence adjudication. JSC REPORT, *supra* note 6, at 8 n.22. Sentence adjudication requires panel members to assess the crime's impact on mission, unit discipline, and the efficiency of command, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(4) (2008) [hereinafter MCM], necessitating a base level of military experience beyond even what counsel are likely to possess. Young, *supra* note 22, at 118 ("Junior judge advocates are often prosecutors, defense counsel, or subordinate to the staff judge advocate whose office is prosecuting the case.").

<sup>49</sup> The new Article 120 went into effect 1 October 2007. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136; *see also* UCMJ art. 120 (2008).

<sup>50</sup> Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW., Aug. 2007, at 1, 20.

<sup>51</sup> *See id.* at 17–18.

There is no aspect of the military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence than the antiquated process of panel selection. The current practice is an invitation to mischief. It permits—indeed requires—a convening authority to choose the persons responsible for determining guilt or innocence of a service member who has been investigated and prosecuted at the order of that same authority.<sup>52</sup>

A similar sentiment was reflected in a *U.S. News & World Report* cover story, published in December 2002.<sup>53</sup> There, the author asserted court-martial panels were “stacked to convict”<sup>54</sup> and questioned “[w]hy is it . . . that these men and women are governed by a system of justice that provides a standard of fairness inferior to that guaranteed to even the most hardened criminals who appear each day in America’s civilian courts?”<sup>55</sup> Even from within the military legal community there have been calls to reform the panel selection process going back to at least to 1972.<sup>56</sup>

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<sup>52</sup> HONORABLE WALTER T. COX III ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 7 (2001).

<sup>53</sup> See Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., Hodson, *supra* note 43, at 64 (recommending removing the commander from panel selection and implementing a random panel selection process); Major Rex R. Brookshire, II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972) (advocating a random selection process within the confines of Article 25(d)(2)); Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 160–61 (1992) (advocating the amendment of Article 25(d)(2) and the implementation of a random panel selection process); Glazier, *supra* note 22, at 67–73 (advocating abolishing Article 25(d)(2) and implementing a random panel selection system); Young, *supra* note 22, at 108–09 (proposing the abolition of Article 25(d)(2), the removal of military panels from sentence adjudication, and the implementation of a random panel selection process). *But see* Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 25 (1998) (defending current panel selection practice and arguing random selection would be too administratively burdensome); Behan, *supra* note 14, at 255–57 (arguing advocates of random panel selection elevate form over substance and defending the status quo).

Congress too, on occasion, has turned its attention to the panel selection process. In 1949, during the legislative hearings to the UCMJ, when the “most troublesome question” of command control over the panel selection process was a focus of debate, drafters ultimately determined that any alternative to command selection would not be “practicable.”<sup>57</sup> Then, in 1971, there were various bills introduced in Congress calling for random selection, none of which were ever enacted.<sup>58</sup> Next, in 1999, Congress directed the Joint Service Committee on Military Justice (JSC) to study alternatives to standard panel selection practices, including random selecting, that were consistent with Article 25(d)(2).<sup>59</sup> The JSC examined the different methods of panel selection employed throughout the service branches, analyzed past random court-martial selection experiments, and analyzed the reformed Canadian and United Kingdom systems.<sup>60</sup> The Committee concluded that Article 25(d)(2) is incompatible with random selection,<sup>61</sup> and found that the standard selection method best applies Article 25(d)(2)’s best qualified mandate.<sup>62</sup> Thereafter, Congress took no action, and the status quo remained.

It would be unwise to take recent Congressional silence as a sign that Article 25(d)(2) is safe from reform. Rather, history reveals that the military’s failure to make the selection process transparent periodically provokes Congress to consider its own reforms of Article 25(d)(2). Plausibly, the military could break that cycle by making the process transparent, thereby preserving the flexibility to use the standard selection methods as the mission requires. At a minimum, the JSC Report illustrates how the military can potentially influence the path of reform by experimenting with alternatives consistent with the mandates of Article 25(d)(2).

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<sup>57</sup> *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 10 (1949) (statement of Rep. Carl Vinson), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/congr-floor-debate.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/congr-floor-debate.pdf).

<sup>58</sup> See S. 4169, 91st Cong. § 825 (1970); S. 1127, 92d Cong. (1971); H.R. 6901, 92d Cong. § 825 (1971); see also Behan, *supra* note 14, at 16 (discussing the details of the random proposals in each bill).

<sup>59</sup> Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 1920.

<sup>60</sup> JSC REPORT, *supra* note 6, at 3.

<sup>61</sup> *Id.* at 22 (“Random nomination of court-martial members will not ensure the selection of court-martial members ‘best qualified’ under Article 25(d)(2).”).

<sup>62</sup> *Id.* at 3 (“[C]urrent practice best applies the criteria of Article 25(d), UCMJ . . .”).

### III. Alternative Selection Methods Consistent with Article 25(d)(2)

#### A. Lessons from Past Experiments in Random Selection

Panel selection experiments are hardly unprecedented in the Army's history. Experiments occurred at Fort Riley in 1974 and, later, at V Corps in 2005. Both experiments sought to rectify Article 25(d)(2) with random procedures and both were motivated out of concern that Congress might impose uninvited reforms.<sup>63</sup> Despite the inherent limitations of both experiments, their analysis is noteworthy for the lessons they provide today.

The Fort Riley experiment sought transparency by eliminating the nominating procedure and the CA's hand-selection of nominated members for panel duty.<sup>64</sup> Consequently, the experiment disregarded Article 25(d)(2)'s best qualified mandate.<sup>65</sup> Under the experimental procedures, randomly-drawn candidates had to possess only four qualifications preselected by the CA—be older than twenty-one; have one year of active duty service; have three months assignment history at the installation; and have a minimum pay grade of E3.<sup>66</sup> Administrators identified personnel who matched these qualifications by querying a personnel database called the Standard Installation Division Personnel System (SIDPERS).<sup>67</sup> Identified personnel were subsequently disqualified if they answered “yes” to several questionnaire questions

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<sup>63</sup> While there are no documents that suggest the precise reason for the Fort Riley experiment, the project officer for the experiment indicated, in an after-action review, one reason was to determine the feasibility of Congress reforming the process. *See* Letter from Major Rex Brookshire, Project Officer and Colonel Charles P. Dribben, Staff Judge Advocate, Fort Riley, Kan. (Mar. 10, 1975) [hereinafter Fort Riley After Action Review], reprinted in JSC REPORT, *supra* note 6, app. K (“[T]he [threshold] question [of the experiment] concerns the extent to which Congress should impose upon the Armed Forces the requirements which prevail in most civilian communities concerning jury trials.”). Similarly, the project officer for the V Corps experiment indicated in a published article that experiment was motivated by the desire to provide a workable alternative in the event Congress decided to reform the panel selection process. Lieutenant Colonel Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, ARMY LAW., Oct. 2006, at 22, 26 (“It was feared that turning a blind eye to the issues related to panel selection and seating might result in drastic changes forced upon the military without the luxury of fine-tuning the random selection process incrementally over time.”).

<sup>64</sup> *See generally* JSC REPORT, *supra* note 6, app. J, at 1–4.

<sup>65</sup> *See* UCMJ art. 25 (2008).

<sup>66</sup> JSC REPORT, *supra* note 6, app. J, at 2–3.

<sup>67</sup> *Id.*



regarding criminal history, non-citizenship status, projected duty and leave schedules, and other issues.<sup>68</sup> Those who survived this less-than-rigorous screening process ultimately formed the random candidate pool.<sup>69</sup> Members were thereafter detailed to the panel if the number they had been pre-assigned corresponded to a number drawn randomly.<sup>70</sup>

The V Corps method, on the other hand, had a more rigorous candidate screening process but did nothing to resolve the underlying problems with the standard selection method.<sup>71</sup> Specifically, it retained the standard method's subordinate nominating and CA hand-selecting procedures to establish a large pool of random candidates.<sup>72</sup> Those individuals consisting of this candidate pool were then assigned a number, and were detailed to the panel if their assigned number was chosen pursuant to a random number sequence obtained from the website [www.random.org](http://www.random.org). In essence, a random mechanism was merely grafted over existing procedures, giving the process an air of transparency while not actually achieving it.<sup>73</sup>

Both experiments possessed the same inherent flaw—they reduced panel competency, a point illustrated by anecdotal observations from both Fort Riley<sup>74</sup> and V Corps.<sup>75</sup> Ironically, one possible reason the

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<sup>68</sup> See *id.* at 3–4.

<sup>69</sup> *Id.* app. J, at 4.

<sup>70</sup> *Id.*

<sup>71</sup> From a procedural stand point, the V Corps' random selection method contained four steps. The first was identical to the standard method, entailing subordinate commanders nominating individuals for panel duty. Huestis, *supra* note 63, at 27. The second step was also identical to the standard method, entailing the CA hand selecting one-hundred of the nominated individuals pursuant to Article 25(d)(2)'s best qualified mandate. *Id.* Third, the CA assigned each individual in this selectee pool a number. *Id.* Finally, individuals were detailed to panel duty depending on whether their assigned number was chosen pursuant to a random number sequence obtained from [www.random.org](http://www.random.org). *Id.*

<sup>72</sup> See *supra* note 71.

<sup>73</sup> *Id.*

<sup>74</sup> See Letter from Captain Peter W. Garretson, Chief Trial Counsel, to Major Rex Brookshire, Deputy Staff Judge Advocate, Fort Riley, Kan. 6 (Feb. 20, 1975), reprinted in JSC REPORT, *supra* note 6, app. K. (“The primary objection of this office [to random selection] . . . is the inexperience and lack of maturity of the lower enlisted men. These soldiers do not have a sufficient amount of knowledge of the military community or of the way of the world to sit in judgment of their fellow soldiers.”); see also Letter from Colonel Robert L. Wood, Military Judge, to Major Rex Brookshire, Deputy Staff Judge Advocate, Fort Riley, Kan. 6 (Dec. 13, 1974), reprinted in JSC REPORT, *supra* note 6, app. K (“So far as I know, no one has ever contended that jurors should be immature, uneducated, inexperienced, have no familiarity with the military service, and have no

experiments reduced competence resides in the promise of randomness. Specifically, in contrast to the standard selection method where the CA details the “best qualified” to a panel, random methods give both the best and least qualified in any candidate pools an equal opportunity for random selection.<sup>76</sup>

Though the Fort Riley and V Corps methods did not comply with the spirit of Article 25(d)(2), they appear to have complied with its letter. In *United States v. Yager*, the COMA, while not directly addressing the issue, indicated in a footnote that the Fort Riley method complied with Article 25(d)(2).<sup>77</sup> They reasoned that the CA personally approved the members selected via random method pursuant to Article 25(d)(2).<sup>78</sup> Similarly, in *United States v. Beatty*, the trial judge upheld the V Corps method after determining that the CA had personally selected the panel members.<sup>79</sup>

While the V Corps and Fort Riley experiments did not uncover a viable alternative to the standard selection method they did establish a crucial lesson necessary for the development of one today: Article 25(d)(2) is not beholden to any particular method of selection. Therefore, it is time to take advantage of this precedent and build upon the lessons learned from these experiments; it is time for the military to develop and institute a panel selection method that achieves transparency without sacrificing panel competence.

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judicial temperament . . . . I therefore recommend that . . . a new program be devised which . . . will not lower the qualifications of jurors.”)

<sup>75</sup> Two attorneys who tried cases before V Corps’ random panels complained they were “too junior.” Huestis, *supra* note 63, at 31. Another attorney who observed the experiment posited “[a]ny time you have a first lieutenant as the board president, the government should be concerned . . .” *Id.*

<sup>76</sup> See JSC REPORT, *supra* note 6, at 32 (explaining random court-martial selection methods undermine competence because the best and least qualified within a given group have an equal chance of being selected).

<sup>77</sup> *United States v. Yager*, 7 M.J. 171, 171 n.1 (C.M.A. 1979) (“[S]election of court-martial members was subject to the approval of the convening authority. This exception was necessary to ensure compliance with Article 25(d)(2) . . . .”); see also *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) (“[I]t would appear that . . . [random] selection is permissible, if the convening authority . . . personally appoints the court members who have been randomly selected.”).

<sup>78</sup> 7 M.J. at 171 n.1.

<sup>79</sup> Huestis, *supra* note 63, at 29–30 (discussing the trial judge’s decision to uphold selection method).

## B. Preselection of Article 25(d)(2) Qualifications as the Solution for Transparency

### 1. *The Preselection Concept*

Within the boundaries of Article 25(d)(2), there is a method that would bring transparency to the selection process without sacrificing panel member quality. Similar to the Fort Riley experiment, the CA would preselect the panel's qualifications; dissimilar to the Fort Riley experiment however, the new method would not involve randomness. Further, instead of using the SIDPERS database to query for individuals matching the selected qualifications, the proposed method would utilize its successor database, the Electronic Military Personnel Office (eMILPO).<sup>80</sup> Then, with the aid of a numerical point system established by the CA, members meeting the preselected qualifications would be automatically detailed to the panel.

The eMILPO system has four attributes that are ideal for military panel selection. First, it can be accessed anywhere in the world as it is Web-based.<sup>81</sup> Second, the system contains a myriad of personnel information on every Soldier, which a CA could access to conduct an Article 25(d)(2) analysis.<sup>82</sup> Third, eMILPO is continually updated at the unit level to account for personnel losses and gains in combat and peacetime.<sup>83</sup> Fourth, eMILPO allows the user to conduct an "ad hoc query" of its source data by using multiple search criteria.<sup>84</sup> Thus, for

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<sup>80</sup> Press Release, Army Europe Pub. Affairs, eMILPO to Replace SIDPERS: New System Will Save Soldiers' Time (May 23, 2002), *available at* [http://www.hqusaureur.army.mil/html/inks/Press\\_Releases/2002/May2002/23May2002-02.htm](http://www.hqusaureur.army.mil/html/inks/Press_Releases/2002/May2002/23May2002-02.htm).

<sup>81</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 1-0, HUMAN RESOURCES SUPPORT para. C20 (21 Feb. 2007) [hereinafter FM 1-0].

<sup>82</sup> See FIELD SYSTEMS DIV., U.S. ARMY HUMAN RESOURCES COMMAND, THE ELECTRONIC MILITARY PERSONNEL OFFICE FUNCTIONAL GUIDANCE 180-83 (ver. 4.1 2006) [hereinafter FUNCTIONAL GUIDANCE], *available at* [http://www.hqda.army.mil/MPSC/Docs/emilpo\\_functional\\_guidance.doc](http://www.hqda.army.mil/MPSC/Docs/emilpo_functional_guidance.doc) (listing reports eMILPO is capable of generating, including officer record briefs (ORBs), enlisted record briefs (ERBs) and an ad hoc query report); see also FIELD SYSTEMS DIV., U.S. ARMY HUMAN RESOURCES COMMAND, AD HOC QUERY SPREADSHEET (n.d.) [hereinafter QUERY SPREADSHEET], *available at* [http://www.hqda.army.mil/MPSC/Docs/emilpo\\_functional\\_guidance.doc](http://www.hqda.army.mil/MPSC/Docs/emilpo_functional_guidance.doc) (scroll down to page 182, then follow "Ad Hoc Query" hyperlinked Excel Spreadsheet) (listing an excel spreadsheet containing 894 searchable data elements that allow the electronic Military Personnel Officer (eMILPO) user to query education, age, awards, deployments, skills, race, religion, marital status, and other personal data of Soldiers).

<sup>83</sup> FM 1-0, *supra* note 81, at 4-4 to 4-6.

<sup>84</sup> See *supra* note 82.

panel selection, CAs could preselect their Article 25(d)(2) qualifications and appoint a subordinate to run an ad hoc query,<sup>85</sup> thereby narrowing prospective panel members to only those who meet desired qualifications.

The eMILPO system is not without drawbacks. The ad hoc query function, for example, is not as simple as an Internet search engine.<sup>86</sup> Rather, the system's data elements that coincide with Article 25(d)(2) criteria would require some learning and familiarity on the part of advising staff judge advocates (SJAs).<sup>87</sup> Another limitation is that ad hoc query function does not contain a data element that allows users to search for a subject's assignment history,<sup>88</sup> which is undoubtedly an important factor in evaluating the "experience" criterion of Article 25(d)(2).<sup>89</sup> None of these issues is insurmountable or outweighs the benefits of identifying technical compromises.

The eMILPO's inability to search assignment history could be remedied with the institution of a numerical point system. Here, as a mechanism to automatically detail prospective members to the panel, the CA could predesignate desirable categories of past assignments for qualified panel members. Then, among the pool of prospective members, those identified by the ad hoc query would receive one point per assignment in each of these pre-designated categories. Accordingly, members would be automatically detailed to the panel in order of their point scores.<sup>90</sup>

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<sup>85</sup> Many of eMILPO's data elements require the user know specific codes that correspond to particular criteria or qualifications being screened for. *See generally* QUERY SPREADSHEET, *supra* note 82. Consequently, someone with training and experience using the system would likely need to be involved in conducting the query.

<sup>86</sup> In fact, the eMILPO Function Guidance advises, "successful queries require an understanding of the basic query principles, familiarity within the data elements available, forethought in the query design, patience, and practice." FUNCTIONAL GUIDANCE, *supra* note 82, at 182.

<sup>87</sup> As an example, if while preselecting her Article 25(d)(2) criteria the CA decided enlisted members should have at least "two years of college," the Staff Judge Advocate (SJA) would need to advise that the system is only searchable by semester hours. *See generally* QUERY SPREADSHEET, *supra* note 82. Similarly, if the CA wanted the members to have "ten years of military service," the SJA would need to know eMILPO is searchable by either the "initial military entry date" or the "military entrance active duty date." *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See* UCMJ art. 25 (2008).

<sup>90</sup> When using this point system, it is useful to think of the eMILPIO preselection method in three steps. The first involves querying eMILPO's existing data elements with the

## 2. *The Mechanics of Preselection*

The mechanics of the proposed preselection method are actually similar to standard practice.<sup>91</sup> The first step entails the SJA advising the CA of her statutory responsibilities pursuant to Article 25(d)(2). During the advice, the SJA explains the mechanics of preselection, differences from the current practice, and reasons why preselection is desirable as a reform measure. A memorandum containing the written portion of the advice appears at Appendix A.<sup>92</sup> Appendix B contains the document that the CA would sign to implement the SJA's recommendations.

During this meeting, the CA would also memorialize her Article 25(d)(2) qualification selections—separately for officers and enlisted personnel—on Article 25(d)(2) worksheets like the one appearing at Appendix C.<sup>93</sup> This worksheet provides blank spaces where the CA can write her primary and alternate criteria to establish the minimum “age, education, training, experience, length of service” a qualifying member should have. Paragraph 3a and 3b of Appendix C to explain the manner and order in which alternate qualifications would automatically replace primary ones. Finally, the CA would use the worksheets to identify any individuals she determines, because of operational necessity, should not

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qualifications the CA has preselected. Several queries may be necessary, using progressively less strict qualifications the CA also preselected, until the number of candidates identified by the query is at least equal to the number of alternates and primary members needed. The second step involves a subordinate manually querying each individual's ORB or ERB and tallying points based on experience designated by the CA. Third, these individuals are automatically detailed as primary or alternate members according to their respective points. For example, for a twelve member officer panel, the twelve members identified by the ad hoc query with the highest points would be detailed to the panel. The remaining officers would be alternates. The member with the highest points would be detailed first in the event alternates are needed. The CA would also need to designate how to resolve the order of detailing in the event two prospective members have an equal number of points. A possible solution is to prioritize the older individual, or the one who has a longer length of service.

<sup>91</sup> See generally Major Craig S. Schwender, *One Potato, Two Potato . . . : A Method to Select Court Members*, ARMY LAW., Apr. 1989, at 12 (explaining a step-by-step method of appointing panel members using the standard selection method).

<sup>92</sup> Compare *infra* Appendix A, with *id.* apps. 20–21 (offering a sample memorandum that advises the CA on panel selection using the standard method).

<sup>93</sup> Compare *infra* Appendix C, with Schwender, *supra* note 91, app. 22 (providing a sample worksheet in which a CA uses the standard selection method and writes the names of the primary and alternate panel members).

serve panel duty based on recommendations from her subordinate commanders.<sup>94</sup>

The final step in preselection involves a second appointment with the CA, in which the SJA advises the CA in a manner consistent with the memorandum appearing at Appendix D. Here, the SJA presents a separate officer and enlisted candidate list, each numerically prioritized by point score. The CA reviews the qualifications of these individuals to affirm they are “best qualified” in her opinion “by reason of age, education, training, experience, length of service, and judicial temperament.”<sup>95</sup> As a final act, she signs an action memorandum, similar to Appendix B, implementing the automatic primary and alternate detailing procedures. This would set the stage to convene courts-martial under the preselection method.

### 3. *The Legal Viability of the Preselection Method*

#### a. *Safeguards Against Systematic Exclusion*

Though a military accused would now know exactly what qualifications resulted in his panel being selected, this transparency would also create a legal vulnerability. Specifically, as Article 25(d)(2) does not define its criteria,<sup>96</sup> fertile ground would exist to attack the CA’s selected qualifications by arguing they are inconsistent with the statute. More to the point, defense counsel could argue those qualifications resulted in otherwise qualified individuals being systematically excluded from panel duty.<sup>97</sup> But two cases provide insight on how CAs implementing the pre-selection method can effectively guard against

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<sup>94</sup> While the preselection method eliminates the subordinate nominating process, it is still necessary to coordinate with subordinate commanders to determine personnel they believe should not serve panel duty for reasons of operational necessity. The CA would review the list of these individuals assembled by the SJA office in deciding who, if anyone, should not serve panel duty. This mechanism is designed to ensure that commanders retain complete control over the disposition of their personnel to meet mission requirements. See Behan, *supra* note 14, at 257 (criticizing random selection for withdrawing “from commanders the ability to direct the disposition of their personnel”).

<sup>95</sup> UCMJ art. 25(d)(2) (2008).

<sup>96</sup> See generally *id.*

<sup>97</sup> See, e.g., *United States v. McLaughlin*, 27 M.J. 685 (A.C.M.R. 1988) (holding the exclusion of “junior” officers from panel duty was consistent with Article 25(d)(2) and therefore did not amount to systematic exclusion of otherwise qualified personnel).

such arguments—*United States v. Crawford*<sup>98</sup> and *United States v. Yager*.<sup>99</sup>

In *Crawford*, the COMA upheld an SJA’s admitted limitation of enlisted membership on the appellant’s panel to “senior enlisted.”<sup>100</sup> Before so holding, the court established the applicable rule: Standards are acceptable when qualifications are “reasonably and rationally calculated to obtain jurors meeting the statutory requirements [of Article 25(d)(2)].”<sup>101</sup> The court found no improper exclusion even though qualified personnel were “undeniably” excluded;<sup>102</sup> it reasoned that the “seniority” qualification fell within the confines of Article 25.<sup>103</sup>

In *Yager*, the COMA was again confronted with the issue of whether an improper criterion was used to select a panel—a panel randomly selected during the Fort Riley experiment.<sup>104</sup> Specifically, the criterion at issue was one of the pre-selected screening criteria—that panel members have a minimum pay grade of E3.<sup>105</sup> The specific issue was whether this qualification amounted to an unlawful systematic exclusion of even lower-ranking personnel.<sup>106</sup> The COMA determined it was not, stating the exclusion was the “embodiment” of Article 25(d)(2), in that there was a “demonstrable relationship” between it and the statutory criteria.<sup>107</sup>

Taken together, *Crawford*’s “reasonably and rationally calculated” test and *Yager*’s “demonstrable relationship” test provide insight how

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<sup>98</sup> 35 C.M.R. 3 (C.M.A. 1964). For cases either citing or following this precedent, see *Gosa v. Mayden*, 413 U.S. 665, 688 (1973) (Douglas, J., concurring) (citation); *United States v. Bertie*, 50 M.J. 489, 1999 (C.A.A.F. 1999) (same); *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999) (same); *United States v. Morrison*, 66 M.J. 508, 508 (N-M. Ct. Crim. App. 2008) (same); *United States v. Dowty*, 60 M.J. 163, 170 (C.A.A.F. 2004) (following).

<sup>99</sup> 7 M.J. 171 (C.M.A. 1979). For cases construing or citing this case, see *United States v. Autrey*, 20 M.J. 912, 916 (A.C.M.R. 1985) (construing); *United States v. McClain*, 22 M.J. 124, 130 (C.M.A. 1986) (citing with approval); *McLaughlin*, 27 M.J. at 688 (same); *United States v. Lewis*, 46 M.J. 338, 342 (C.A.A.F. 1997) (same); *United States v. Benson*, 48 M.J. 734, 739 (A.F. Ct. Crim. App. 1998) (same); *Roland*, 50 M.J. at 68, *Dowty*, 60 M.J. at 170 (Cox, J., concurring) (citing).

<sup>100</sup> *Crawford*, 35 C.M.R. at 35–36.

<sup>101</sup> *Id.* at 39.

<sup>102</sup> *Id.* at 39–40.

<sup>103</sup> *Id.* at 40.

<sup>104</sup> *United States v. Yager*, 7 M.J. 171, 171–72 (C.M.A. 1979).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 172–73.

panels selected using the preselection method can withstand systematic exclusion arguments—CAs should select qualifications that have a logical nexus to the plain meaning of the Article 25(d)(2) criteria.

*b. Exempting Potential Panel Members for Operational Necessity*

Documenting what individuals are exempted from panel duty for reasons of operational necessity could create another legal vulnerability; but only by exposing a decision now masked by the standard selection method. For example, if in implementing the status quo, a CA believes operational necessity dictates that her chief of staff should focus on mission planning instead of panel duty, the CA could simply not select that officer, leaving the defense forever unaware. The preselection method would merely require that the CA now disclose that decision. Unfortunately, there is no case law precisely on point discussing the scope of the CA's power to exempt individuals from panel duty for operational necessity. The lack of case law is likely a consequence of the heretofore hidden nature of that decision and underscores the risk in now disclosing it.

On the other hand, some authorities do support the CA's authority to exempt individuals from panel duty in such circumstances. In *United States v. Weisen*,<sup>108</sup> the Court of Appeals for the Armed Forces (CAAF) stated that "national security exigencies or operational necessities" could have justified what was otherwise error in the trial judge's retention of a panel member tainted by implied bias.<sup>109</sup> It logically follows that operational necessity could have also justified the CA's exemption of that same individual from service as a panel member in the first place. This interpretation is also consistent with the legislative history of Article 25(d)(2), whose authors were careful not to dictate a panel selection process that could interfere with military missions.<sup>110</sup> Further, an expansive view of CA's authority is supported by *United States v. Bartlett*, where the CAAF found that not even the Secretary of the Army

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<sup>108</sup> 57 M.J. 48 (C.A.A.F. 2002).

<sup>109</sup> *Id.*

<sup>110</sup> See *supra* note 57 and accompanying text.



had the power to infringe upon a CA's Article 25(d)(2) discretionary powers.<sup>111</sup>

*c. Other Concerns Over Preselection*

Two additional aspects of preselection may appear, to be problematic from a legal perspective. First, preselection does not at first glance appear to account for the subjective Article 25(d)(2) criterion of "judicial temperament." Second, the method does not simultaneously weigh all the Article 25(d)(2) qualifications. For example, assignment history is considered only after the other qualifications, perceivably resulting in the exclusion of individuals that otherwise would be selected using the standard selection method. A closer analysis ultimately reveals that neither issue constitutes a statutory violation.

Preselection, in all actuality, accounts for members' "judicial temperament" in two distinct ways. First, the system requires the CA to select the "age, education, training, experience, and length of service" that she believes a panel member with appropriate "judicial temperament" should have.<sup>112</sup> Additionally, under the method, the CA excludes categories of individuals whom she believes do not have "judicial temperament"—those with criminal histories or who are under investigation.<sup>113</sup> As Article 25(d)(2) does not specify how its criteria must be applied, nothing prohibits the CA from addressing "judicial temperament" in these ways.<sup>114</sup> There is also no requirement that CAs simultaneously weigh all the Article 25(d)(2) criteria.<sup>115</sup> Any perceived exclusion of qualified personnel is, therefore, illusory because it requires

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<sup>111</sup> 66 M.J. 426 (C.A.A.F. 2008) (holding that the Secretary of the Army lacked the authority to implement a regulation prohibiting a CA from selecting officers for panel duty whom were assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, and those detailed to Inspector General duties).

<sup>112</sup> See *infra* Appendix A, para. 2

<sup>113</sup> For example, Appendix A, para. 3d, contains boiler plate language that categorically excuses individuals who are flagged pursuant to Army Regulation (AR) 600-37. The CA could of course expand this categorical excusal to include other areas such as those who recently received non-judicial punishment. See also Schwender, *supra* note 91, at 13 (explaining factors, such as criminal history, that a CA could use to disqualify prospective panel members from duty).

<sup>114</sup> See UCMJ art. 25 (2008).

<sup>115</sup> *Id.*

a comparison with the standard method of selection, a method the statute does not proscribe.<sup>116</sup>

Even if these two issues were somehow problematic, the pre-selection method's final panel review and detailing process would likely vitiate any legal vulnerability. In *Yager*, for example, facts were before the court that the CA pre-selected minimum panel member qualifications—with no indication “judicial temperament” was even considered—yet the court never mentioned this procedure could have resulted in noncompliance with Article 25(d)(2).<sup>117</sup> Rather, the court glossed over Fort Riley's complete disregard for the Article 25(d)(2) criteria of “education” and “training,” and the statute's best qualified mandate.<sup>118</sup> In the end, the court stated that the random process complied with Article 25(d)(2) because the CA personally detailed the members.<sup>119</sup>

#### 4. Addressing Practical Considerations in Preselection

Legal considerations aside, practical concerns must also be factored into the decision to implement the preselection method. Several potential criticisms exist. First, while the preselection method achieves a level of transparency beyond the status quo, CAs could still misuse the process to influence the outcome of a particular case. Second, while the preselection method eliminates some administrative burdens, it creates new ones. Third, though the preselection method may restrict the CA's ability to illegally discriminate, it could also undermine her ability to ensure that women and minorities are represented on a panel.<sup>120</sup> Each of these issues is discussed in turn.

First, while a CA conceivably could select the qualifications with the intent to achieve a particular result, the preselection method could easily eliminate this potential for UCI. For example, CAs could replicate what

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<sup>116</sup> *Id.*

<sup>117</sup> See generally *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979).

<sup>118</sup> See UCMJ art. 25; see also *supra* Part III.A (analyzing the exact preselected qualifications used to screen the Fort Riley random panels).

<sup>119</sup> *Yager*, 7 M.J. at 171 n.1.

<sup>120</sup> See *United States v. Crawford*, 35 C.M.R. 3, 41 (C.M.A. 1964) (“[T]here was no error in the deliberate selection of a Negro to serve on the accuser's court-martial.”); *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) (“[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels.”).

the federal juror statute does by institutionalizing the juror qualifications so that they cannot be manipulated to fit the peculiarities of any case.<sup>121</sup> There is nothing prohibiting CAs from replicating this aspect of the federal statute by institutionalizing their Article 25(d)(2) qualifications in a local regulation.<sup>122</sup> The CAs' successors, in the interest of transparency, could simply affirm the pre-existing published qualifications. As a result, all future human decision-making would be removed from the selecting decision, leaving just a computer to select the members.<sup>123</sup> In this respect, the preselection method could achieve transparency on par with federal random juror selection.

Second, any additional administrative burdens created by preselection are offset by the ones it eliminates. For example, the preselection method requires subordinate commanders to identify personnel who should not serve for reasons of operational necessity; but the elimination of the nominating procedure compensates for this burden.<sup>124</sup> Further, while preselection requires two CA appointments to select a panel,<sup>125</sup> these appointments would be cumulatively less labor-intensive than the single appointment now required by the standard method.<sup>126</sup> Moreover, if the CA institutionalizes her Article 25(d)(2)

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<sup>121</sup> See 28 U.S.C. § 1865(b) (2006) (establishing minimum federal juror qualifications with regard to age, residency, criminal history, English proficiency, and physical and mental health).

<sup>122</sup> "Institutionalizing" the Article 25(d)(2) criteria in this manner was proposed during the Fort Riley experiment. Fort Riley After Action Review, *supra* note 63, at 9.

<sup>123</sup> The idea that transparency in panel selection could be achieved by allowing a computer to identify the members based on inputted Article 25(d)(2) criteria is not new. See, e.g., David M. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 20 (1991) ("[A] computer could be programmed to turn out a cross-section of officers and enlisted members based upon the language of article 25 . . . . I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial . . . .").

<sup>124</sup> See discussion *supra* Part III.B.2.

<sup>125</sup> *Id.*

<sup>126</sup> While the standard selection method requires one appointment with the CA to select the panel, that appointment is labor intensive, generally requiring the SJA to prepare and the CA to review hard copy data files in making selection decisions. See Schwender, *supra* note 91, at 13, 15–16. By contrast, during the first CA appointment using the preselection method, the CA would pre-select her qualifications based on her own personal experience, see discussion *supra* Part III.B.2, a selection she need not make again during her tenure as CA. See *supra* Part III.B.4 (discussing institutionalizing Article 25(d)(2) qualifications). The second appointment would be even less labor intensive, merely requiring the CA's review and detail those selected matching the pre-selected criteria. See discussion *supra* Part III.B.2.

qualifications, the process is further streamlined, eliminating the need for a CA to preselect those qualifications at later appointments.<sup>127</sup>

Third, preselection can be just as inclusive of racial minorities and women as the status quo.<sup>128</sup> The eMILPO system has specific race and gender data elements that allow the CA to pre-designate a certain number of officers and enlisted on every panel to be women and minorities.<sup>129</sup>

### III. Conclusion

At its core, transparency in military panel selection requires a technical and practical solution rather than statutory revision. If the military continues to ignore the practical component, however, it risks congressional abolition of Article 25(d)(2)'s statutory framework and possibly an untenable alternative. That risk should not be tolerated given the availability of personnel databases like eMILPO that offer the possibility to implement a flexible and transparent panel selection process that does not sacrifice panel competence. Commanders should, therefore, harness this technology, thereby reducing litigation costs, increasing fairness, and ensuring the long-term viability of CA member selection.

Two steps should be taken immediately to protect the panel selection process from unnecessary legislative reform. First, SJAs should seek to implement pilot programs in their jurisdictions using the preselection method outlined in this article; afterwards they should publish the lessons learned for dissemination to all jurisdictions and for use in future JSC studies.<sup>130</sup> Second, judge advocate leadership from all the services should advocate for the creation of user-friendly panel selection applications within their service-specific personnel databases. By taking these two steps, judge advocates can do their part to ensure the long-term health of the military justice system.

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<sup>127</sup> See *supra* notes 121–23 and accompanying text.

<sup>128</sup> The memorandum at Appendix D could be amended to require that in the event the preselection process results in the absence of any women or minorities, a certain number of woman and minorities would be automatically detailed to the panel. More specifically, Appendix D could be amended to require that a designated number of members that would otherwise be on the panel to be automatically excused and then replaced by the first female or minority alternate with the highest points.

<sup>129</sup> See *supra* note 82.

<sup>130</sup> See, e.g., Huestis, *supra* note 63 (discussing the results of the V Corps experiment).

**Appendix A**

ABCD-SJA

Date

MEMORANDUM FOR Commander, 99th Infantry Division

SUBJECT: Selection of Courts-Martial Panel Members

1. OBJECTIVE. To select members for the primary and alternate General and Bad Conduct Discharge Special Courts-Martial Panels for courts convened by this headquarters during the next 120 days, or until relieved.

2. DISCUSSION.

a. Article 25(d)(2), UCMJ, provides, “when convening a court-martial, the convening authority shall detail as members thereof such members of the Armed Forces as, in his opinion, are best qualified for the duty be reason of age, education, training, experience, length of service, and judicial temperament.”

b. Historically, General Court-Martial Convening Authorities (GCMCA) have selected members of their command for panel duty who had been nominated for their consideration by subordinate leaders. Since the inception of the UCMJ, attorneys have attacked this panel selection for its lack of transparency. To improve the perception of the system and remedy this concern, a transparent selection process could be implemented whereby the GCMCA preselects her Article 25 criteria. Discussed below is a three-step process by which panel members could be selected and detailed to a court-martial panel in this manner.

c. The first step in the process is establishing the panel pool by listing the qualifications you have selected in the eMILPO personnel database. Select qualifications that have a logical nexus to the plain meaning of the following criteria: age, education, training, experience, and length of service. Base these criteria on qualities you desire in a panel member with the appropriate judicial temperament and whom you believe is best qualified to serve.

d. At the second step, applying these same principles, designate points based on the type of assignment history that you feel resembles the best-qualified panel member with appropriate judicial temperament. After you complete step one and two, one point will be assigned for assignments you have indicated upon comparison with all queried Officer and Enlisted Record Briefs.

e. At the third step, primary and alternate members will be designated based on their respective points. Those in the pool with the more points will be prioritized over those with less.

### 3. RECOMMENDATIONS.

a. Select the minimum age, education, training, experience, and length of service panel members should have on the enclosed officer and enlisted worksheets. Further, select first, second, and third alternate qualifications for each of these primary qualifications on the worksheets. Selecting these alternate qualifications will negate the need for a follow-up appointment in the event the first ad hoc query using your first selections does not produce the requisite number of panel members needed in Para 3c below. The order in which each primary qualification will be substituted by its alternative will be determined by you, by placing a number in the box directly over each primary qualification on the attached enlisted and officer worksheets.

b. Direct the alternate qualifications be utilized as follows. If the first query does not produce the requisite number of panel members listed in Para 3c below, a second query will be conducted. In conducting this second query, direct that the first primary qualification be replaced with its first alternate—the qualification in which you wrote the number “1” over its corresponding box. If there are still insufficient panel members after this second query, a third query will be conducted, replacing another primary qualification—the qualification with the number “2” written in its corresponding box—with its first alternate. The process will continue as many times as necessary using the 2nd and 3rd alternates if necessary to each primary qualification until the minimum number of personnel listed in Para 3c are identified.

c. Mandate that the officer pool list contain at least 30 personnel and the enlisted pool list contain at least 20 personnel after the individuals listed in Para 3d are removed.

d. Declare the following individuals unavailable to serve on court-martial panels and direct that they not be counted against the number of personnel required as listed in Para 3c: (1) individuals who are flagged or should be flagged pursuant to Army Regulation (AR) 600-37; (2) individuals who have relocated, deployed, or retired; (3) individuals who have been separated from the service. Also, identify on the attached worksheets any individuals whom you determine, for reasons of operational necessity, should not serve panel duty.

e. Establish what priority the primary and alternate members identified by eMILPO should serve based on Article 25, UCMJ, by implementing the point system discussed in Para 2. List separately the assignments history that you believe a best qualified officer and enlisted panel member would have on the attached worksheets. Assign one point per assignment and direct that

individuals with more points be prioritized in rank order over those with fewer points. Designate how priority would be resolved in the event two individuals have the same number of points. Also be cognizant of defining the assignment history either too broadly or too narrowly. For example, apportioning points based on panel members having occupied “leadership positions” or “positions of trust” would leave doubt as to your intentions. Conversely, apportioning points based on members having been “82nd Airborne infantry commanders during the Gulf War” would likely apply to too few individuals. An example of a sufficiently narrow but not overly broad criterion would be to assign points based on a member having been “a commander at any level.” To encompass those with other leadership experience, you could assign points based on those who have been “primary or special staff head at brigade level or higher.” Similarly, for enlisted personnel, you could assign points to those who have been “squad leaders,” “platoon sergeants,” “first sergeants,” or “command sergeants major.”

f. After accomplishing the recommendations in Para 3a–e, select a new panel of officers and enlisted personnel to hear General Courts-Martial and Special Courts-Martial cases in your GCMCA jurisdiction.

4. The POC for this memorandum is the undersigned.

2 Encls

1. Enlisted Article 25 Worksheet
2. Officer Article 25 Worksheet

JOE SMEDLAP  
COL, JA  
Staff Judge Advocate

**Appendix B**

ABCD-CG

Date

MEMORANDUM FOR Staff Judge Advocate, 99th Infantry Division

SUBJECT: Selection of Courts-Martial Panel Members

1. Your recommendations are approved.
2. The POC for this memo is the SJA.

Encls  
as

DOIT YESTERDAY  
Major General, USA  
Commanding



Appendix C

Article 25(d)(2) Worksheet

1. **STEP 1**—Establish baseline Article 25 criteria.

a. **Age**

- (1) Primary \_\_\_\_\_
- (2) 1<sup>st</sup> alt \_\_\_\_\_
- (3) 2<sup>d</sup> alt \_\_\_\_\_
- (4) 3<sup>d</sup> alt \_\_\_\_\_

b. **Education**

- |                               |                               |                               |
|-------------------------------|-------------------------------|-------------------------------|
| (1) Primary _____             | (1) Primary _____             | (1) Primary _____             |
| (2) 1 <sup>st</sup> alt _____ | (2) 1 <sup>st</sup> alt _____ | (2) 1 <sup>st</sup> alt _____ |
| (3) 2 <sup>d</sup> alt _____  | (3) 2 <sup>d</sup> alt _____  | (3) 2 <sup>d</sup> alt _____  |
| (4) 3 <sup>d</sup> alt _____  | (4) 3 <sup>d</sup> alt _____  | (4) 3 <sup>d</sup> alt _____  |

c. **Training**

- |                               |                               |                               |
|-------------------------------|-------------------------------|-------------------------------|
| (1) Primary _____             | (1) Primary _____             | (1) Primary _____             |
| (2) 1 <sup>st</sup> alt _____ | (2) 1 <sup>st</sup> alt _____ | (2) 1 <sup>st</sup> alt _____ |
| (3) 2 <sup>d</sup> alt _____  | (3) 2 <sup>d</sup> alt _____  | (3) 2 <sup>d</sup> alt _____  |
| (4) 3 <sup>d</sup> alt _____  | (4) 3 <sup>d</sup> alt _____  | (4) 3 <sup>d</sup> alt _____  |

d. **Length of service**

- (1) Primary \_\_\_\_\_
- (2) 1<sup>st</sup> alt \_\_\_\_\_
- (3) 2<sup>d</sup> alt \_\_\_\_\_
- (4) 3<sup>d</sup> alt \_\_\_\_\_

e. **Experience (non-assignment history) (e.g., deployments, awards, badges)**

- |                               |                               |                               |
|-------------------------------|-------------------------------|-------------------------------|
| <input type="text"/>          | <input type="text"/>          | <input type="text"/>          |
| (1) Primary _____             | (1) Primary _____             | (1) Primary _____             |
| (2) 1 <sup>st</sup> alt _____ | (2) 1 <sup>st</sup> alt _____ | (2) 1 <sup>st</sup> alt _____ |
| (3) 2 <sup>d</sup> alt _____  | (3) 2 <sup>d</sup> alt _____  | (3) 2 <sup>d</sup> alt _____  |
| (4) 3 <sup>d</sup> alt _____  | (4) 3 <sup>d</sup> alt _____  | (4) 3 <sup>d</sup> alt _____  |

2. **STEP 2**—In the boxes provided above, designate the rank order you want the alternate qualifications to be utilized.

3. **STEP 3**—List present and past duty positions which will be eligible for one point per assignment. Also designate how priority would be resolved in the event two individuals have the same number of points (e.g. age, length of service).

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4. **STEP 4**—Identify any specific individuals whom you determine because of operational necessity should not serve panel duty.

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**Appendix D**

ABCD-SJA

Date

MEMORANDUM FOR Commander, 99th Infantry Division

SUBJECT: Selection of Court-Martial Panel Members

## 1. REFERENCES:

- a. The Manual for Courts-Martial, United States (2008 edition) (MCM).
- b. The Uniform Code of Military Justice (UCMJ).
- c. Army Regulation 27-10, Military Justice.

2. PURPOSE: To select General Court-Martial (GCM) and Special Court-Martial (SPCM) Panel Members.

## 3. BACKGROUND.

a. Attached at enclosure 1 is the list of the top enlisted personnel who meet the Article 25 criteria you preselected, numbered sequentially according to the point system you established, beginning with the individuals with the greatest number of points. The second enclosure consists of the officers who meet the Article 25 criteria you preselected, prioritized in the same manner as the enlisted list.

b. Per your directive, individuals meeting the following criteria were removed from the lists: (1) individuals who are flagged or should be flagged pursuant to AR 600-8-2; (2) individuals who have relocated, deployed, or retired; (3) individuals who have been separated from the service.

## 4. RECOMMENDATIONS.

a. Review the officer list at enclosure 1 and the enlisted list at enclosure 2 to ensure the individuals listed therein are best qualified pursuant to Article 25 (d)(2), UCMJ. That is, that the individuals, in your opinion, are best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament.

b. Designate the top twelve (12) officers, numbered from 1–12 on the officer list, to be detailed to both the General Court-Martial and Special Court-Martial panels. Furthermore, select the bottom five (5) of these officers, numbered 8–12 on the officer pool list, to be excused from the panels when enlisted members are requested.

c. Designate the top five (5) enlisted personnel, numbered 1–5 on the enlisted pool list, be detailed to both General Courts-Martial and Special Courts-Martial.

d. Designate the next (12) officers, numbered 13–24 on the officer pool list, be detailed as alternate members to both GCMs and SPCMs, to be detailed in priority of their point scores as directed in Para 4g.

e. Designate twelve (12) enlisted personnel, numbered 12–24 on the enlisted pool list, to be detailed as alternate members to both GCMs and SPCMs and to be detailed in rank order according to their point score as directed in Para 4h.

f. Direct that officer alternates will be used to replace primary officer members and enlisted alternates will be used to replace primary enlisted members.

g. Direct three alternate officer members be detailed automatically according to their point score under the following circumstances:

- (1) If before trial, the number of members of a general court-martial falls below seven;
- (2) If before trial, the number of members of a special court-martial falls below five;
- (3) If at trial an officer panel falls below quorum.

h. Direct three alternate enlisted members be detailed automatically according to their point score if a panel with enlisted members falls below a quorum because of too few enlisted members.

i. Direct the court-martial panel members serve from the date selected until 31 May 2011 or until relieved.

j. That those cases currently referred to trial on or after the date of this memorandum, in which the court has not been assembled, be tried by the court members newly selected.

5. The point of contact for this memorandum is the undersigned.

3 Encls

1. Officer list
2. Enlisted list
3. ORBs/ERBs

JOE SMEDLAP  
COL, JA  
Staff Judge Advocate

## SPECIFIC PERFORMANCE OF ENLISTMENT CONTRACTS

MAJOR UDI SAGI\*

## I. Introduction

In a famous Monty Python sketch a Regimental Sergeant Major yells at a group of soldiers: “Now! Today we’re going to do marching up and down the square. That is unless any of you got anything better to do? Well, anyone got anything they’d rather be doing than marching up and down the square?”<sup>1</sup> When a soldier puts his hand up, the Sergeant Major asks him contemptuously, “Yes? Atkinson? What would you rather be doing, Atkinson?”<sup>2</sup> Atkinson replies, “Well to be quite honest, Sarge, I’d rather be at home with the wife and kids.”<sup>3</sup> Surprisingly, after making sure he heard correctly, the Sergeant Major replies: “Right, off you go.”<sup>4</sup>

The sketch is surprising and funny because, as most know, a soldier cannot leave his position or military service whenever he sees fit.<sup>5</sup> This common knowledge forms a fundamental perception of what it means to be in the military: Soldiers cannot just quit, no matter how unsavory or hazardous the task. This article examines the military service obligation from the perspective of the enlistment contract and the legal rules that apply to its enforcement, in particular, whether the enlistment contract is enforceable against servicemembers who seek to breach it and leave military service.

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<sup>1</sup> THE MEANING OF LIFE (Celandine Films 1983).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *infra* Part II.

Since the abolishment of the draft in the United States during the 1970s, the enlistment contract has been the main vehicle for individuals to join the Armed Forces.<sup>6</sup> Throughout the decades, courts have addressed the legal aspects of the enlistment contract.<sup>7</sup> Today, courts widely agree to view the enlistment contract as an ordinary contract and, consequently, resolve enlistment cases using normal contract law principles.<sup>8</sup> However, as demonstrated in this article, this view poses a legal question that has not yet been addressed by the courts or scholars.

For the last 150 years, courts of equity have followed the well-established common law rule against specific performance in case of a breach of a contract for personal services.<sup>9</sup> A personal services contract is defined as a contract in which one of the sides agrees to render to the other side services that are “continuous [and] involve skill, personal labor, and cultivated judgment.”<sup>10</sup>

Enlistment contracts are examples of contracts for personal services.<sup>11</sup> Thus, by entering into an enlistment contract, the individual takes upon himself the obligations of a personal services contract, which cannot be specifically enforced under normal contract principles. If accurate, the Armed Forces are not legally allowed to enforce enlistment contracts against servicemembers who decide to breach their contracts before the end of their periods. Military regulations, such as Army

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<sup>6</sup> Neil J. Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121 (1974).

<sup>7</sup> See, e.g., *Antonuk v. United States*, 445 F.2d 592 (6th Cir. 1971); *Brown v. Dunleavy*, 722 F. Supp. 1343, 1349 (E.D. Va. 1989). As can be deduced from the cases cited in this article, courts usually address three different kinds of enlistment contract issues: servicemembers seeking discharge from military service based on their enlistment contracts; servicemembers seeking to avoid certain duties or positions based on their enlistment contracts; and servicemembers facing court-martial claiming not to be subject to the Uniform Code of Military Justice (UCMJ) because they were not legally enlisted at the time of the alleged offense. This article addresses each of these arguments.

<sup>8</sup> *Santiago v. Rumsfeld*, 407 F.3d 1018 (9th Cir. 2005); *Gengler v. United States*, 453 F. Supp. 2d 1217 (E.D. Cal. 2006); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274 (D.D.C. 2005). This rule does not apply to servicemembers' entitlement to pay and allowances, which is “determined by reference to the statutes and regulations . . . rather than to ordinary contract principles.” *United States v. Larionoff*, 431 U.S. 864, 869 (1977). See *infra* Part III for a detailed analysis of the contractual nature of the enlistment contract.

<sup>9</sup> RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through Aug. 2009). See also *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687 (Ch.).

<sup>10</sup> *Rutland Marble Co. v. Ripley*, 77 U.S. 339, 358 (1870).

<sup>11</sup> See *Baldwin v. Cram*, 522 F.2d 910 n.4 (2d Cir. 1975).

Regulation (AR) 635-200,<sup>12</sup> which dictate that enlisted persons can only be discharged in specific circumstances, not whenever they choose to leave, would be unenforceable under this contractual approach. Taken to the extreme, it would likewise be illegal to force a servicemember who wishes to turn his back in the midst of a battle to stay and fight with his fellow servicemembers.<sup>13</sup>

Surprisingly, in their application of legal precedents, courts have largely failed to consider how the traditional prohibition against specific performance of personal services contracts affects enlistment contracts enforcement. If the doctrine is still valid and applies to military service, it could have devastating consequences for Congress's ability to "raise and support armies."<sup>14</sup> While addressing enlistment contracts, some courts<sup>15</sup> and scholars<sup>16</sup> have assumed that enlistment contracts are enforceable despite being personal services contracts; however, their assumptions have lacked actual legal analysis.<sup>17</sup> This article provides a detailed, and much needed, explanation for why there is no place for the

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<sup>12</sup> U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (17 Dec. 2009) (RAR, 27 Apr. 2010) [hereinafter AR 635-200].

<sup>13</sup> A behavior that constitutes a capital offense. UCMJ art. 99 (2008).

<sup>14</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>15</sup> Out of hundreds of cases concerning the enlistment contract, a court directly referred to this question only once, stating that "enlistment contract, the kind of contract which as regards forms of service other than the military is not specifically enforceable by an affirmative decree . . ." *Baldwin*, 522 F.2d at 910 n.4.

<sup>16</sup> Dilloff, *supra* note 6, at 147–48, states that

An enlistment contract is a personal services or employment contract. It is almost universally held that a contract for personal services will not be specifically enforced, either by affirmative decree or by an injunction. The general rule is apparently not applicable to enlistment contracts, since the courts have, in effect, ordered specific performance in the many different situations which have already been discussed. . . . No cases have expressly discussed the question of making a volunteer specifically perform, but the basic rationale which has precluded any consideration of this contractual issue has been the all-encompassing supervening power of the Government in dealing with its military forces. Until this mantle of protection can be completely removed from enlistment agreement negotiations, it is unlikely that the issue will arise.

*Id.* (footnotes omitted); see also Captain David A. Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1 n.138 (1977) ("Although courts hesitate to specifically enforce personal services contracts, the military enlistment contract seems to be the exception.") (citing Dilloff, *supra* note 6).

<sup>17</sup> See *supra* notes 15–16.



rule that prohibits specific enforcement of personal services contracts. This analysis should lend some reliability and validity to both federal courts' and military courts' approaches to cases concerning the enlistment contract.

The issue of enlistment contract enforcement is complex and involves matters of criminal and contract law, substance and procedure, and theory and practice. Part II of this article refines the legal issue surrounding specific performance of enlistment contracts and provides the framework for the analysis. Part III then explores the legal characteristics of the enlistment contract in detail. Next, Part IV surveys the origins, scope, and rationales for the common law rule against specific performance of personal services contracts and argues, in light of those rationales, that the prohibition against specific performance of personal services is inapplicable to enlistment contracts.

## II. Refining the Question

In the context of enlistment contract enforcement, some may suggest that the prohibition against specific performance is irrelevant because it has no practical effect in military service. For example, it could be argued that criminal justice mechanisms in the Uniform Code of Military Justice (UCMJ) appropriately address breaches of enlistment contracts. Articles 85 and 86 establish the offenses of Desertion and Absence Without Leave, both of which make it a criminal offense to be absent "without authority" from one's "unit, organization, or place of duty."<sup>18</sup> Thus, a servicemember who fails to abide by his enlistment contract by willfully absenting himself from duty commits a criminal offense. With the reins of criminal process in its hands, the military need not resort to contractually based enforcement to obtain compliance.

Another possible argument concerns the difficulty of applying the doctrine of specific performance in practice. Specific performance of a contract is an equitable remedy that can be granted in two different situations. First, an order for specific performance can be granted when a party to a contract has breached a contractual obligation owed to the other party to the contract.<sup>19</sup> In this case, the specific performance order

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<sup>18</sup> UCMJ arts. 85–86 (2008).

<sup>19</sup> Alan Schwartz, *The Case for Specific Performance*, 89 *YALE L.J.* 271, 274 (1980) ("Specific Performance is the most accurate method of achieving the compensation goal

is granted as a remedy for a breach that already took place, and it is meant to mend it.<sup>20</sup> Second, a specific performance order can also take the form of an injunction.<sup>21</sup> In this form, the specific performance order is an anticipatory relief, preventing a future breach.<sup>22</sup> In both cases, specific performance is a court-ordered decree. Although a breach of enlistment contract by a servicemember is not an imaginary option, recalling that the military can use the UCMJ, it is hard to contemplate a situation in which the military will seek a court order to enforce the enlistment contract upon that servicemember, both before the breach and after.<sup>23</sup>

While these arguments may seem compelling at first glance, they do not automatically invalidate doctrines that are regularly applied in the courts.

Even without court intervention, enlistment contracts are routinely enforced.<sup>24</sup> Under current practice, servicemembers cannot leave the service or obtain a discharge unilaterally.<sup>25</sup> A breach of the enlistment contract by a unilateral act may constitute a criminal offense.<sup>26</sup> As the Court of Appeals for the Second Circuit in the case of *Baldwin v. Cram*<sup>27</sup> noted, “The statute is a way for the Army in effect specifically to enforce

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of contract remedies because it gives the promisee the precise performance that he purchased.”).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687 (Ch.).

<sup>22</sup> See Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16 MARQ. SPORTS L.J. 261, 262 (2006).

<sup>23</sup> This scenario is hard to imagine for two main reasons. First, the option to court-martial the servicemember or to impose other disciplinary action against him is readily available while a court decree takes time. Second, one legal approach to the enlistment contract holds that it applies only to one’s status, and a breach of contract that changes the status of the sides does not relieve those sides of their contractual obligations. See *United States v. Grimley*, 137 U.S. 147 (1890). See also Part III.

<sup>24</sup> Partially through the use of UCMJ arts. 85–86 (2008).

<sup>25</sup> See, e.g., AR 635-200, *supra* note 12 (establishing that, notwithstanding some exceptions, an enlisted person can initiate his separations only if the Army consents to his request). For example, according to paragraph 6-6, a soldier may request separation due to dependency or hardship, but the Army does not have to approve the request, since separation because of dependency or hardship is “for the convenience of the Army.” *Id.* para. 6–1. Another example, under paragraph 4–4, would include a soldier serving on indefinite enlistment who requests a voluntary separation; his request can also be denied.

<sup>26</sup> UCMJ arts. 85, 86 (2008).

<sup>27</sup> 522 F.2d 910 (2d. Cir. 1975).

its personal services or enlistment contract.”<sup>28</sup> Furthermore, unlike other kinds of contracts, where a breach of the contract can lead to the termination of the contractual relationship, a mere breach of the enlistment contract does not normally lead to a discharge of the enlisted soldier.<sup>29</sup> Instead, a soldier who has breached his enlistment contract will probably be prosecuted or otherwise disciplined, but his status as an enlisted soldier will not immediately end, unless the military takes affirmative steps to end it. The fact that the military routinely enforces enlistment contracts justifies further inquiry into the nature of enlistment contracts and their enforceability.

Moreover, courts and practitioners may find the legal principles discussed in this article relevant in criminal or disciplinary procedures where the service obligation of the servicemember is the issue.<sup>30</sup> Specifically, some of the legal principles that underlie the rule that bars enforcement of personal services contracts are universal in nature and may apply to other proceedings.<sup>31</sup> A defense argument of defective enlistment—i.e., arguing flaws in the enlistment contract should invalidate the enlistment and, thus, annul the court-martial’s jurisdiction over the matter—is a good example.<sup>32</sup>

<sup>28</sup> *Id.* at 910 n.4. By “[t]he statute,” the Court of Appeals for the Second Circuit was referring to 10 U.S.C. § 269 (repealed 1994) and 10 U.S.C. § 673a (current version at 10 U.S.C. § 12303 (2006)), which allowed orders to active duty of reserve soldiers who failed to report for training. Even though the statute the court referred to was not a punitive statute but an administrative one, the same analysis could be made with regard to the criminal offenses mentioned above.

<sup>29</sup> *United States v. Grimley*, 137 U.S. 147, 151 (1890).

<sup>30</sup> *See, e.g.*, *Taylor v. Resor*, 42 C.M.R. 7 (C.M.A. 1970).

<sup>31</sup> For example, these concerns equally apply to the argument that enforcing a personal services contract contradicts the Thirteenth Amendment. *See infra* Part IV.C.3.

<sup>32</sup> A person is subject to court-martial jurisdiction only when he has one of the military statuses described in UCMJ art. 2(a). Therefore, an argument that an enlistment process was defective, to the point that it failed to change a person’s status from a civilian to a servicemember, may be a good defense argument in court-martial proceedings. *See, e.g.*, *Grimley*, 137 U.S. 147; *United States v. Quintal*, 10 M.J. 532 (A.C.M.R. 1980); *United States v. Valadez*, 5 M.J. 470 (C.M.A. 1978). Note, however, that this kind of defense argument has to overcome the hurdle set in UCMJ art. 2(c):

- (c) Notwithstanding any other provision of law, a person serving with an armed force who—
  - (1) submitted voluntarily to military authority;
  - (2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submissions to military authority;
  - (3) received military pay or allowances; and

Military criminal or disciplinary proceedings are not the only means to enforce enlistment contracts. Sometimes, although not in the straightforward manner suggested above, federal courts also play a role in the enforcement of enlistment contracts. For instance, when a servicemember files a petition with a federal court requesting a writ of habeas corpus<sup>33</sup> challenging the military's decision to retain him,<sup>34</sup> the court may refuse to grant the writ. The question addressed in this article—that is, whether an enlistment contract can be specifically enforced—may prove helpful for courts contemplating a servicemember's petition for habeas corpus. Even though the whole analysis may not be applicable to all habeas corpus cases, some of the arguments may still be pertinent.<sup>35</sup>

Even if petitioners have not yet raised the rule barring specific performance of personal services contracts in their challenges to their enlistment contracts, the analysis in this article may contribute to the general understanding of the enlistment contract. Because enlistment contracts are a major building block of the military, further study of them and the legal doctrines that apply to them may strengthen the legal

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(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

*See also* United States v. Gennosa, 11 M.J. 764 (N.M.C.M.R. 1981).

<sup>33</sup> A petition for habeas corpus is possibly the only cause of action available for a servicemember to challenge his service obligation according to his enlistment contract in a federal court. *Gengler v. United States*, 453 F. Supp. 2d 1217, 1240–41 (E.D. Cal. 2006) (ruling that the Contracts Disputes Act, the equitable estoppel doctrine, the Administrative Action Act, and the Tucker Act cannot be used by a servicemember as causes of action against the military). Of the five causes of action that the complaint in *Gengler* contained, the court approved only the habeas corpus cause of action. *Id.*

<sup>34</sup> *E.g.*, *Santiago v. Rumsfeld*, 407 F.3d 1018, 1020 (9th Cir. 2005) (examining a habeas corpus petition of a soldier whose enlistment term was extended by the stop loss policy); *Woodrick v. Hungerford*, 800 F.2d 1413 (5th Cir. 1982) (denying airman's request for rescission of his enlistment contract on grounds of fraudulent inducement and mistake); *Gengler*, 453 F. Supp. 2d 1217 (discussing the plaintiffs' request to set their term of duty for seven years, as prescribed in their service agreements with the Navy). This would also apply to other types of orders. *See, e.g.*, *Antonuk v. United States*, 445 F.2d 592 (6th Cir. 1971) (discussing a habeas corpus request against Army's intent to order plaintiff, a reserve soldier, to active duty, after the plaintiff "accumulated more than five unexcused absences from scheduled drills").

<sup>35</sup> For example, the argument that enforcing an enlistment contract violates the servicemember's Thirteenth Amendment rights, as discussed in Part IV.C.3, may also prove useful when a court contemplates whether to issue a writ of habeas corpus.

foundation of the military's personnel practice. In this article, the journey may be more important than the destination.

While the nature of enlistment contracts necessarily requires a contractual analysis, these contracts have a specific character. Enlistment contracts are not commercial; their primary objective is to transform civilians into soldiers, sailors, airmen, Marines, and Coast Guardsmen. The following sections will not overlook this important distinction.

### III. The Contractual Aspects of Enlistment Contracts

The question of specific performance of enlistment contracts is only relevant if enlistment contracts are considered contractual vehicles. This Part explores the courts' use of common law contract interpretation principles to evaluate enlistment contracts. It will also explore a limited exception to the general rule, which applies only to pay and allowances, but hardly touches on specific performance.

#### A. The Supreme Court's Early Approach

A forty-year-old individual enlisted in the military. At the time of his enlistment, the law required enlistees to be no more than thirty-five years of age. Therefore, the individual falsely represented himself when he claimed to be twenty-eight years old in order to enlist.

On the day of his enlistment, the new recruit went home, not without permission, but he did not return until authorities apprehended him three months later. He was court-martialed for desertion, and he subsequently filed a petition for habeas corpus in the federal court, asserting, among other arguments, that his enlistment was void because at the time of his enlistment he was older than the age prescribed by statute for enlistment. That individual's name was John Grimley, and the facts outlined above are the facts of *United States v. Grimley*,<sup>36</sup> the case most commonly cited by courts when considering the nature of enlistment contracts.

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<sup>36</sup> *Grimley*, 137 U.S. 147 (based on research in the Lexis database, as of 10 January 2010, *Grimley* was cited in no fewer than 286 court decisions).

In *Grimley*, the Supreme Court begins its analysis by defining the legal principles underlying its ruling in the case.<sup>37</sup> The Court states, without debate, that the “case involves a matter of contractual relation between the parties,”<sup>38</sup> erasing any doubt that contract law applies to the issue at hand. The Court then proceeds to examine Grimley’s argument, and concludes that only the Government can rely on Grimley’s failure to meet the maximum age requirement, as “[o]nly the party for whose benefit it was inserted”<sup>39</sup> can take advantage of a contractual qualification that wasn’t met. The Court further holds that this “is the ordinary law of contracts.”<sup>40</sup>

Having reached a conclusion, based on contractual principles, that there was no merit to Grimley’s argument, the Court could have stopped. However, the Court strengthened its opinion by explaining that the enlistment contract is not an ordinary contract.

But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract, but it is one of those contracts which changes the *status*, and where that is changed, no breach of the contract destroys the new *status* or relieves from the obligations which its existence imposes.<sup>41</sup>

Thus, Grimley cannot avoid the charges preferred against him by using the wrong information he gave the military upon his enlistment.

The Court’s status observation was novel, and led many to believe that the main principle of law that can be extracted from the decision is the status-creating nature of the enlistment contract.<sup>42</sup> However, this is

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<sup>37</sup> *Id.* at 150.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 151.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *E.g.*, *Collins v. Rumsfeld*, 542 F.2d 1109 (9th Cir. 1976); *Grukke v. United States*, 228 Ct. Cl. 720 (1981) (“The relationship between the soldier and state has changed over the past 90 years since *In re Grimley* . . . ruled that under conditions then existing, enlistment only effects a change of status, thereby making contract principles unnecessary.”); *United States v. Russo*, 1 M.J. 134, 136–37 (C.M.A. 1975) (“Although the Supreme Court in *Grimley* emphasized that a valid enlistment contract gives rise to a change in status which forecloses subsequent claims of breach of contract, that is not to say that the Government knowingly may violate its own regulations . . .”).

not the case. A careful reading of *Grimley* reveals that when the Court referred to the status-creating nature of the enlistment contract, it did not intend to substantially deviate from the principle that it established at the beginning of the decision: that the enlistment contract is an ordinary contract to which contract law applies.

The Court in *Grimley* began its decision by explaining that the enlistment contract is a contract to which contract law rules and doctrines apply.<sup>43</sup> The contractual nature of the enlistment contract was the main basis for the Court's decision. Only after reaching a conclusion using contractual doctrines, did the Court then refer to the status-creating nature of the enlistment contract as additional support.<sup>44</sup> The words that the Court chose to use when introducing the status notion also point in this same direction, "But in this transaction something more is involved than the making of a contract."<sup>45</sup> Indeed, the Court viewed the status-changing power of the enlistment contract as supplementing the contractual attributes of the enlistment contract, not as impairing or replacing them.<sup>46</sup>

The relation between the status-changing aspects of the enlistment contract and its contractual characteristics according to *Grimley* was best described by the U.S. District Court for the District of Colorado in the case of *Pfile v. Corcoran*.<sup>47</sup>

The fact that the enlistee has changed his status means that he cannot through breach of the contract throw off this status. But change of status does not invalidate the contractual obligation of either party or prevent the contract from being upheld, under proper circumstances, by a court of law.<sup>48</sup>

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<sup>43</sup> *Grimley*, 137 U.S. at 150.

<sup>44</sup> *Id.* at 151.

<sup>45</sup> *Id.*

<sup>46</sup> *But see* William P. Casella, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. CHI. L. REV. 783 n.14 (1972) (suggesting that at the time of the *Grimley* decision, contract and status were two mutually exclusive concepts).

<sup>47</sup> *Pfile v. Corcoran*, 287 F. Supp. 554 (D. Colo. 1968).

<sup>48</sup> *Id.* at 556–57.

## B. Latter Indecisiveness

*Grimley*'s distinctions still left room for differences in courts' interpretation of enlistment contracts. Although the Court probably did not intend to, its decision in *Grimley* caused some confusion in later decisions of lower courts. Over the century since *Grimley*, courts were unable to agree on a unitary approach for enlistment contracts. Most of the courts chose to examine enlistment through the lenses of contract law. Other courts preferred to view the enlistment contract as a status-changing document, adjudicating enlistment contract cases according to various federal statutes. Some other courts, albeit using a contractual narrative, mistakenly applied legal principles outside of contract law to resolve the cases at bar.<sup>49</sup>

The majority of courts that had to deal with enlistment issues chose to apply contract law principles in order to resolve the legal questions presented.<sup>50</sup> According to this practical prevailing view, "[a]n enlistment contract, as an agreement between the enlistee and the military service involved, is subject to traditional principles of contract law."<sup>51</sup> Courts applied this rule to arguments regarding breach of the enlistment contract,<sup>52</sup> rescission of the enlistment contract,<sup>53</sup> and construction of the

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<sup>49</sup> Dilloff, *supra* note 6, at 122. For a detailed description and analysis of court decisions that refer to the legal nature of the enlistment contract, see also Casella, *supra* note 46; Schlueter, *supra* note 16.

<sup>50</sup> Dilloff, *supra* note 6, at 122.

<sup>51</sup> *Dubeau v. Commanding Officer, Naval Reserve Ctr.*, 440 F. Supp. 747, 748 (D.C. Mass. 1977); see also *United States v. Valadez*, 5 M.J. 470, 473-74 (C.M.A. 1978) ("Despite scholarly suggestions for a more realistic view of the phenomenon known as enlistment, it has been generally held, as a matter of federal case law, that certain contract law principles are applicable to enlistment contracts.").

<sup>52</sup> *E.g.*, *Cinciarelli v. Carter*, 662 F.2d 73 (D.C. Cir. 1981) (discussing a breach of an active duty agreement between the Marine Corps and a senior reserve officer); *Brown v. Dunleavy*, 722 F. Supp. 1343, 1349 (E.D. Va. 1989) ("Claims by members of the military that enlistment contracts have been breached or are invalid are decided under traditional theories of contract of law.") (citing *Woodrick v. Hungerford*, 800 F.2d 1413 (5th Cir. 1986); *Cinciarelli*, 662 F.2d 73; and *Pence v. Brown*, 627 F.2d 872 (8th Cir. 1980)); *Crane v. Coleman*, 389 F. Supp. 22 (E.D. Pa. 1975) (ruling that not every breach of the enlistment contract entitles the servicemember to rescission of his contract).

<sup>53</sup> *E.g.*, *Pence*, 627 F.2d 872 (applying to enlistment contracts the common law rule that a fraud or misrepresentation during the formation of a contract, even if innocently and non-negligently made, may bring to a rescission of it); *Withum v. O'Connor*, 506 F. Supp. 1374, 1378 (D.P.R. 1981) (granting petitioner's request for habeas corpus, on grounds of false representation by the recruiter); *Gulke v. United States*, 228 Ct. Cl. 720 (1981); *Whitaker v. Callaway*, 371 F. Supp. 585 (E.D. Pa. 1974) (addressing mutual mistake in an enlistment contract); *United States v. Wagner*, 5 M.J. 461 (C.M.A. 1978). The court



enlistment contract.<sup>54</sup> Some courts gave special attention to the effect of new legislation or regulations on pre-existing enlistment contracts.<sup>55</sup>

Because the relationship between servicemembers and the Government is not an ordinary commercial relationship, and because uniform approaches are important to servicemembers within different services, the courts applied federal common law–based contract law in lieu of ordinary, state law.<sup>56</sup> As one judge explained, “[g]eneral principles of contract law are applied, rather than the law of any one state, because of the unique relation between the military and those in the armed services, and the need for a consistent interpretation of enlistment contracts.”<sup>57</sup>

At the other end of the spectrum, some courts refused to consider the enlistment in terms of contract law.<sup>58</sup> Those courts emphasized that the relationship between the servicemember and the military are a “matter of

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in *Withum v. O'Connor* summarized the law on false representations in enlistments as follows:

Military enlistment contracts are subject to traditional principles of contract law. . . . A recruit is entitled to rescind an enlistment contract if the military is unable to perform its obligation; if the terms of the contract are so ambiguous as to be misleading; or if the recruit was induced to enter into the contract by fraud or false representations. Even if the misrepresentations were innocently or nonnegligently made, if they were material and induced the prospective recruit to enlist, the contract may be rescinded. It is not necessary, however, that the false representations deprive the recruit of every benefit of the contract.

506 F. Supp. at 1378 (internal citations omitted).

<sup>54</sup> *E.g.*, *Tremblay v. Marsh*, 750 F.2d 3 (1st Cir. 1984) (interpreting the petitioner’s enlistment contract); *Lundgrin v. Claytor*, 619 F.2d 61 (10th Cir. 1980) (basing the decision to deny medical student’s request for injunction against his orders to active duty on interpretation of his enlistment contract); *Rodriguez v. Vuono*, 757 F. Supp. 141 (D.P.R. 1991) (examining the plaintiff’s argument regarding his military service obligations using common law contractual principles).

<sup>55</sup> *E.g.*, *Antonuk v. United States*, 445 F.2d 592 (6th Cir. 1971); *Winters v. United States*, 412 F.2d 140 (9th Cir. 1969); *Pfile v. Corcoran*, 287 F. Supp. 554 (D. Colo. 1968).

<sup>56</sup> *See United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947); *Rodriguez*, 757 F. Supp. at 147 (“Claims that military induction contracts are invalid or have been breached are decided under traditional theories of contract law, rather than the law of any state.”).

<sup>57</sup> *Brown v. Dunleavy*, 722 F. Supp. 1343, 1349 (E.D.Va. 1989).

<sup>58</sup> *See, e.g.*, *Taylor v. Resor*, 42 C.M.R. 7, 8 (C.M.A. 1970) (“Enlistment in an armed force does not establish a contract relationship between the individual and the Government, but a status.”); *United States v. Russo*, 1 M.J. 134 (C.M.A. 1975).

status”<sup>59</sup> that can be created and terminated only as prescribed by law.<sup>60</sup> Thus, “no useful purpose is served by reviewing the common-law rules of contract.”<sup>61</sup> Although this approach was adopted mainly by military courts trying to prevent servicemembers from evading the court’s criminal jurisdiction by claiming that their enlistment contracts were void, its traces can also be found in the Supreme Court’s decision of *Bell v. United States*.<sup>62</sup>

*Grimley*’s ambiguous language caused more than just a split in the way courts approached enlistment contract issues. Some courts, trying to closely follow the *Grimley* methodology, confused principles of contract law with other principles of law. For example, in *Woodrick v. Hungerford*,<sup>63</sup> after being medically qualified to enroll in pilot training, a student—Woodrick—decided to join the Air Force’s Reserve Officers’ Training Corps (ROTC) program in order to be commissioned as a pilot.<sup>64</sup> Two years later, still a student, Woodrick underwent another set of medical examinations that revealed that he was not qualified to fly.<sup>65</sup> In fact, those examinations showed that Woodrick should never have been qualified to fly in the first place, demonstrating error in his first set of qualifying examinations.<sup>66</sup> After learning of the second examination results, Woodrick stopped attending the ROTC classes and was removed from the program for non-attendance.<sup>67</sup>

Based on his enlistment contract, Woodrick was called to active duty for two years as an enlisted airman.<sup>68</sup> Woodrick did not report to duty, was apprehended, and was placed under investigation for desertion.<sup>69</sup> Soon after that, he petitioned the federal court, requesting a writ of habeas corpus, arguing that the initial medical examinations were material misrepresentations.<sup>70</sup> The Fifth Circuit started with the observation that “claims that enlistment contracts have been breached or

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<sup>59</sup> *United States v. Noyd*, 40 C.M.R. 195, 202 (C.M.A. 1969).

<sup>60</sup> *Id.*

<sup>61</sup> *United States v. Blanton*, 23 C.M.R. 128, 129 (C.M.A. 1957).

<sup>62</sup> 366 U.S. 393 (1961). *See also infra* Part III.D (discussing the *Bell* case).

<sup>63</sup> 800 F.2d 1413 (5th Cir. 1986).

<sup>64</sup> *Id.* at 1413–14.

<sup>65</sup> *Id.* at 1414.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1414–15.

are invalid are decided under traditional canons of contract law.”<sup>71</sup> However, instead of conducting a contractual analysis of Woodrick’s misrepresentation claims, the court rejected his claims because he failed to show that he exhausted all of the administrative remedies available to him within the Air Force.

[W]here a serviceman seeks to effect a rescission of his enlistment contract by means of the habeas writ in federal court, he must show that he has exhausted all available intraservice remedies, [unless] the petitioner is able to demonstrate that pursuit of intraservice remedies would be futile, or would cause him to suffer irreparable harm.<sup>72</sup>

Despite its initial statement that the case should be decided in accordance with contract law principles, the *Woodrick* court clearly decided not to apply these principles. If the court had done so, it would likely have reached another conclusion. Given that Woodrick’s claim of misrepresentation was factually correct, contract law principles may likely have voided his enlistment, which would have meant that his status never changed and he never became an airman.<sup>73</sup> In such a case, all administrative remedies existing within the Air Force would have been irrelevant and unavailable to him. Thus, by refusing to examine his contractual arguments because Woodrick did not exhaust remedies within the Air Force, the court actually decided not to apply contract law principles to Woodrick’s case. Instead, the Court followed with a statutory examination of the case.<sup>74</sup>

### C. Current Approach

Recently, the confusion created by the courts’ perceived indecisiveness gave way to a clearer picture. A series of recent court decisions clearly establishes that the enlistment contract is mainly an ordinary contract, to which, notwithstanding one longstanding exception,<sup>75</sup> contract law principles *do* apply.

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<sup>71</sup> *Id.* at 1416.

<sup>72</sup> *Id.* at 1417. The Eleventh Circuit followed this decision in *Winck v. England*, 327 F.3d 1296 (11th Cir. 2003).

<sup>73</sup> *See supra* note 53.

<sup>74</sup> *Woodrick*, 800 F.2d at 1417–18.

<sup>75</sup> *See infra* Part III.D.

The subject of two of those cases, *Qualls v. Rumsfeld*<sup>76</sup> and *Santiago v. Rumsfeld*,<sup>77</sup> is the Stop-Loss policy.<sup>78</sup> In *Qualls*, the plaintiff joined the Army National Guard for one year.<sup>79</sup> A short while after that, his unit was called for active duty, and his term of service was extended in accordance with the Stop-Loss policy.<sup>80</sup> Qualls challenged the Army's action in court, arguing that the application of the policy to him was a

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<sup>76</sup> 357 F. Supp. 2d 274 (D.D.C. 2005).

<sup>77</sup> 407 F.3d 1018 (9th Cir. 2005).

<sup>78</sup> According to the Stop-Loss policy, the term of service of many Reserve component soldiers (as well as active duty Soldiers) whose enlistments were about to expire was unilaterally extended when their units were called to active duty to deploy. The extensions were for the period of the units' deployment. The Stop-Loss policy was based upon 10 U.S.C. § 12305(a), which provides,

Notwithstanding any other provision of law, during any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 12301, 12302, or 12304 of this title, the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.

The President delegated his authority under this statute to the Secretary of Defense, who further delegated it to the Secretaries of the military departments. Exec. Order No. 12,728, 55 C.F.R. 35029 (1990). Generally, after the 11 September 2001 terror attacks, the Army decided, pursuant to this authority, to extend the period of service of Reserve component soldiers whose units were called to active duty under 10 U.S.C. § 12302 or 10 U.S.C. § 12304.

Besides the *Qualls* and *Santiago* cases, the policy was also challenged in *Doe v. Rumsfeld*, 435 F.3d 980 (9th Cir. 2006). See also Daniel C. Brown, *Stop Loss: Illegal Conscripted in America?*, 54 AM. U. L. REV. 1595 (2005); Evan M. Wooten, *Banging on the Backdoor Draft: The Constitutional Validity of Stop Loss in the Military*, 47 WM. & MARY L. REV. 1061 (2006); Cheryce M. Cryer, *Stop Loss and the Back-Door Draft: An Illumination of Government Contract Violations and Potential Allegations of Modern-Day Slavery*, 49 HOW. L.J. 843 (2006); Hannah Dyer, *Keeping Faith: The United States Military Enlistment Contract and the Implementation of Stop-Loss Measures*, 34 PEPP. L. REV. 791 (2007).

The Stop-Loss policy was considerably narrowed two years ago. Message, 210042Z Mar 09, Dep't of Army, subject: Active Army (AA) Unit Stop Loss/Stop Movement (SL/SM) Policy for Units Scheduled to Deploy OCONUS for OIF and OEF Operations—Update/Revision.

<sup>79</sup> *Qualls*, 357 F. Supp. 2d at 278.

<sup>80</sup> *Id.* At the time, Qualls's term of service was extended from 6 July 2004 to 24 December 2031. *Id.* As explained in *Santiago*, the Army truly did not intend to utilize the Stop-Loss policy to retain Reserve component soldiers unilaterally in service for twenty-five years. The date was set for the Army's administrative convenience. *Santiago*, 407 F.3d at 1021 n.2.

breach of his enlistment contract;<sup>81</sup> that signing an enlistment contract for a term of one year was a misrepresentation by the Army;<sup>82</sup> and that by failing to notify him of the possibility of an involuntary extension of his service term, the Army violated his constitutional right of due process.<sup>83</sup> Denying Qualls's request for a preliminary injunction, the court stated that Qualls's contractual arguments, require application of "common law principles of contract law."<sup>84</sup> The court rejected the Army's argument that the issue should be resolved using other principles.<sup>85</sup> Indeed, having performed a thorough contractual analysis, the court concluded that "nowhere in the enlistment contract does the Army forfeit its right to involuntarily extend enlistees pursuant to United States laws."<sup>86</sup>

*Santiago's* facts were similar to *Qualls's*. *Santiago's* term of service in the National Guard was just about to expire when his unit was called to active duty and he was informed that his enlistment had been extended in accordance with the Stop-Loss policy.<sup>87</sup> *Santiago* also petitioned the federal court. His arguments were generally comparable to *Qualls's*, and so was the court's decision. Once again, the court agreed that "[e]nlistment contracts, with exceptions not relevant here, are enforceable under the traditional principles of contract law,"<sup>88</sup> and the court examined the case using traditional common law contractual doctrines.<sup>89</sup>

This view of the enlistment contract is not unique to the Stop-Loss cases. During the last decade, courts continued to address arguments involving the enlistment contract, such as breach of contract,<sup>90</sup> the effect of legislation and regulatory changes on contractual obligations included

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<sup>81</sup> *Qualls*, 357 F. Supp. 2d at 279–80.

<sup>82</sup> *Id.* at 284.

<sup>83</sup> *Id.* at 285.

<sup>84</sup> *Id.* at 279–80.

<sup>85</sup> *Id.* at n.1.

<sup>86</sup> *Id.* at 284. The court refused to grant Qualls the preliminary injunction he sought. Later, in another decision, the court accepted the defendant's motion to dismiss the suit, on grounds that it was rendered moot when Qualls agreed to extend his National Guard enlistment by six additional years. *Qualls v. Rumsfeld*, 412 F. Supp. 2d 40 (D.D.C. 2006).

<sup>87</sup> *Santiago v. Rumsfeld*, 407 F.3d 1018, 1020 (9th Cir. 2005). *Santiago* learned about the extension of his enlistment while he attended what was supposed to be his last weekend training. *Id.*

<sup>88</sup> *Id.* at 1022.

<sup>89</sup> *Id.* at 1022–23.

<sup>90</sup> *Parrish v. Brownlee*, 335 F. Supp. 2d 661, 673–74 (E.D.N.C. 2004).

in the enlistment contract,<sup>91</sup> and the effects of contradiction between legislation and enlistment contracts.<sup>92</sup> All courts have ruled according to contract law, where applicable.

It thus appears that there is no further room for confusion or indecisiveness; the enlistment contract is, after all, a contract that is governed by contract law, and its power to change the status of the servicemember does not impair its contractual nature. However, the currently controlling view of the enlistment contract has one exception, recognized by the Supreme Court in *Bell v. United States*.<sup>93</sup>

#### D. The *Bell v. United States* Exception

The petitioners in *Bell* were enlisted soldiers who were held captive during the Korean conflict.<sup>94</sup> While captive, the petitioners “behaved with utter disloyalty to their comrades and to their country.”<sup>95</sup> The petitioners refused to be repatriated when the hostilities were concluded, but eventually, after spending some time in China, returned to the United States.<sup>96</sup> Upon returning, the petitioners requested accrued pay and allowances for the time they spent in captivity, basing their claim on 37 U.S.C. § 242, which read that “[e]very [servicemember] . . . who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance.”<sup>97</sup> Despite the statute’s apparent language, the Government refused to pay the petitioners, and the petitioners filed a suit in the Court of Federal Claims. During the proceedings, the Government argued that its refusal to provide the petitioners pay and allowance was based on the contractual principle that “one who willfully commits a material breach of a contract can recover nothing under it,”<sup>98</sup> together with the fact that their behavior in captivity amounted to a

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<sup>91</sup> *Irby v. U.S. Dep’t of Army*, 245 F. Supp. 2d 792, 800 (E.D.Va. 2003) (suggesting that regulations in effect are read into the enlistment contract, and apply even if they are later changed).

<sup>92</sup> *Gengler v. United States*, 453 F. Supp. 2d 1217 (E.D. Cal. 2006) (involving case of Navy fixed-wing pilots who signed seven-year enlistment contracts when, according to 10 U.S.C. § 653(a), they should serve at least eight years of active duty).

<sup>93</sup> 366 U.S. 393 (1961).

<sup>94</sup> *Id.* at 394.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 401.

material breach of the enlistment contract.<sup>99</sup> The Supreme Court rejected the Government's argument, stating that "common-law rules governing private contracts have no place in the area of military pay. A Soldier's entitlement to pay is dependent upon statutory right."<sup>100</sup>

The Supreme Court repeated this ruling in *United States v. Larionoff*,<sup>101</sup> where a group of Navy enlisted men requested a reenlistment bonus that they were supposedly entitled to. This time, both parties to the case, as well as the Court, agreed that "the rights of the affected service members must be determined by reference to the statutes and regulations . . . rather than to ordinary contract principles."<sup>102</sup> This precedent was then implemented by the lower courts and has not been challenged since.<sup>103</sup>

The *Bell* exception is an exception to the generally accepted contractual nature of the enlistment contract. However, this caveat has no effect on the enforceability of the enlistment contract, mainly because the question of specific performance of the enlistment contract does not entail any issues of pay or allowance.<sup>104</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> 431 U.S. 864 (1977).

<sup>102</sup> *Id.*

<sup>103</sup> See, e.g., *Jablon v. United States*, 657 F.2d 1064 (9th Cir. 1981); *Bryant v. Dep't of the Army*, 553 F. Supp. 2d 1098 (D. Minn. 2008).

<sup>104</sup> In *Jablon*, 657 F.2d. at 1066–67, the Ninth Circuit suggested a new explanation for the *Bell* exception. According to *Jablon*, the enlistment contract's substance is contractual, even with regards to pay and allowance; however, in suits for pay and allowance, a remedy can only be granted to the extent Congress has statutorily waived sovereign immunity. Thus, even though the basis for a suit for pay and allowance is contractual, a remedy can only be granted as prescribed by statute: "There is a significant difference between the court's power to order the armed services to discharge a soldier because the military has breached the conditions under which he or she enlisted and the power to order the government to pay damages for breach of a contract which the court would have no authority to enforce." *Id.* at 1067. Under this analysis, the *Bell* exception is a practical exception rather than a doctrinal one.

#### IV. Specific Performance of Contracts for Personal Services and the Enlistment Contract

##### A. The Enlistment Contract is a Personal Services Contract

As established above, legal disputes between the parties to the enlistment contract—one of the armed services and the servicemember—regarding its validity, applicability, or breach, should be adjudicated in accordance with the principles of contracts law. However, saying that an enlistment contract is a regular contract is not enough. The enlistment contract's nature makes it a personal services contract, a particular type of contract that requires application of special rules.

A personal services contract is a contract to perform “continuous [duties that] involve skill, personal labor, and cultivated judgment.”<sup>105</sup> Indeed, if a party to a contract takes it upon herself to perform “personal acts which require special knowledge and experience and the exercise of skill, discretion, and cultivated judgment,”<sup>106</sup> these services are of a personal nature. To determine which duties in a contract are of a personal nature, it is helpful to examine whether they are delegable.<sup>107</sup> Only a non-delegable service can be considered a contract for personal services.<sup>108</sup> Contracts for artistic performance,<sup>109</sup> participation in professional sports,<sup>110</sup> and—to some extent—employment<sup>111</sup> are all well known examples of personal services contracts.

The uniform enlistment contract for all armed services is found in Department of Defense Form 4/1 (DD Form 4/1).<sup>112</sup> In this form, the servicemember (or prospective servicemember) takes it upon himself to “serve a total of eight (8) years . . . . Any part of that service not served on active duty must be served in the Reserve Component . . . .”<sup>113</sup> Although DD Form 4/1 does not explicitly establish it, it is clear that the contracted services performed by the servicemember for the military are

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<sup>105</sup> Rutland Marble Co. v. Ripley, 77 U.S. 339, 358 (1870).

<sup>106</sup> Shubert v. Woodward, 167 F. 47, 55–56 (8th Cir. 1909).

<sup>107</sup> RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through August 2009).

<sup>108</sup> *Id.*

<sup>109</sup> Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.).

<sup>110</sup> Cent. New York Basketball, Inc. v. Barnett, 181 N.E.2d 506 (Ohio Com. Pl. 1961).

<sup>111</sup> *Ex parte* Jim Dandy Co., 239 So. 2d 545 (Ala. 1970).

<sup>112</sup> U.S. Dep't of Def., DD Form 4/1, Enlistment/Reenlistment Document Armed Forces of the United States (Oct. 2007) [hereinafter DD Form 4/1].

<sup>113</sup> *Id.* sec. 10(a).



of a personal nature. First, the servicemember is selected for enlistment for his specific personal capabilities or knowledge. The military “may [only] accept original enlistments . . . of qualified, effective, and able-bodied persons.”<sup>114</sup> Second, the services that the servicemember is obligated to perform for the Armed Forces are not delegable; the enlistment contract does not allow the servicemember to end his obligation period subject to him finding a replacement,<sup>115</sup> nor do the regulations that control separations and discharge of enlisted servicemembers.<sup>116</sup> A servicemember who is given an order is required to fulfill it personally, using his abilities and training.<sup>117</sup> Certainly, the military is a profession that requires adequate training.<sup>118</sup> Therefore, the enlistment contract, through which servicemembers enlist, is a personal service contract.<sup>119</sup>

#### B. Specific Performance of Personal Services Contracts

Specific performance, a remedy for breach of contract,<sup>120</sup> endeavors to make the breaching party comply with his contractual duties.<sup>121</sup> Normally granted as a remedy *after* a breach of contract has occurred, it is imposed to compel the breaching party to perform a neglected contractual obligation.<sup>122</sup> The remedy of specific performance can also

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<sup>114</sup> 10 U.S.C § 50 (2006).

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g.*, AR 635-200, *supra* note 12.

<sup>117</sup> *See* UCMJ art. 90 (2008).

<sup>118</sup> U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 1-8 (3 Aug. 2007).

<sup>119</sup> *Baldwin v. Cram*, 522 F.2d 910 n.4 (2d. Cir. 1975).

<sup>120</sup> *In re Estate of B.E. Griffin v. Summer*, 604 S.W.2d 221, 225 (Tex. Civ. App. 1980) (“The purpose of specific performance is to compel a party who is violating a duty to perform under a valid contract to comply with his obligations.”).

<sup>121</sup> *Mcklean v. Keith*, 72 S.E.2d 44, 53 (N.C. 1952) (“The remedy of specific performance is an equitable remedy of ancient origin. Its sole function is to compel a party to do precisely what he ought to have done without being coerced by the court.”).

<sup>122</sup> *McCoy Farms, Inc. v. J & M McKee*, 563 S.W.2d 409, 415 (Ark. 1978).

Specific performance is an equitable remedy which compels the performance of a contract on the precise terms agreed upon or such a substantial performance as will do justice between the parties under the circumstances. It is a means of compelling a contracting party to do precisely what he should have done without being coerced by a court.

*Id.*; *see Mcklean*, 72 S.E.2d at 53.

be introduced as a pre-breach order to prevent a party to a contract from future breach of the contract.<sup>123</sup> However, despite intent to fully perform the original contractual agreement,<sup>124</sup> specific performance is not the default remedy for a breach of contract.<sup>125</sup> Being an equitable relief, this remedy lies solely within the discretion of the court.<sup>126</sup> Generally, courts grant the remedy of specific performance when an order for monetary damages does not completely fulfill the remedial goals.<sup>127</sup>

A long held limitation to the equitable remedy of specific performance is the bar against ordering specific performance of contracts for personal services.<sup>128</sup> According to this rule, a court of equity will not grant a decree for specific performance of a contract for personal services.<sup>129</sup> In the seminal case of *Lumley v. Wagner*,<sup>130</sup> the plaintiff,

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<sup>123</sup> See Rapp, *supra* note 22, at 262.

<sup>124</sup> Compare Schwartz, *supra* note 19, at 274 (“Specific performance is the most accurate method of achieving the compensation goal of contract remedies because it gives the promisee the precise performance that he purchased.”), with Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1977–1978) (applying economic analysis principle to ascertain that specific performance is not always in the *ex ante* intent of both parties to the contract). Kronman suggests that parties to a contract will *ex ante* prefer a remedy of specific performance, in case of a breach, only “[w]hen the contract is for unique goods or services.” Kronman, *supra*, at 369.

<sup>125</sup> See *Kimball v. Swanson*, 177 N.W.2d 375, 380 (Wis. 1970) (“Specific performance is an equitable remedy, addressed to the sound discretion of the court.”); *Seascope, Ltd. v. Maximum Mktg. Exposure, Inc.*, 568 So.2d 952, 954 (Fla. Dist. Ct. App. 1990) (“[E]mployment or personal services . . . contracts are not enforceable by injunction or specific performance. . . . The appropriate remedy in such cases is an action for damages for breach of contract.”).

<sup>126</sup> *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 103 (9th Cir. 1970) (cited by Gengler v. United States, 453 F. Supp. 2d 1217, 1231 (E.D. Cal. 2006)); *Raybovich Boat Works, Inc. v. Atkins*, 585 So.2d 270, 272 (Fla. 1991) (“[T]he remedy of specific performance is not a matter of right. To the contrary, the court contemplating an order of specific performance is obligated to consider whether this remedy, based on the facts of the case, would achieve an unfair or unjust result.”); *McCoy Farms, Inc.*, 563 S.W.2d at 415; *Mcklean*, 72 S.E.2d at 53; *Green, Inc. v. Smith*, 317 N.E.2d 227, 233 (Ohio Ct. App. 1974); RESTATEMENT (FIRST) OF CONTRACTS § 359 (1932) (current through August 2009).

<sup>127</sup> See *In re Estate of Griffin v. Summer*, 604 S.W.2d 221, 225 (Tex. App. 1980); *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719 (Cal. Ct. App. 1991); RESTATEMENT (FIRST) OF CONTRACTS § 361 (1932) (current through August 2009) (discussing factors affecting the determination to grant specific performance when damages are inadequate, including that estimating the damages may be difficult; the transaction’s worth cannot be measured in monetary terms; and damage collection may be difficult).

<sup>128</sup> See generally RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through August 2009); MODERN LAW OF CONTRACTS § 13:17 (2009).

<sup>129</sup> *Arthur v. Oaks*, 63 F. 310, 317 (7th Cir. 1894). The case explains,

“the lessee of Her Majesty’s Theatre”<sup>131</sup> in England, entered an agreement with the defendant, Mademoiselle Johanna Wagner, who was a young opera singer, to sing in the theater he operated, and to refrain from “exercising her professional abilities in England without the consent of the plaintiff.”<sup>132</sup> However, the defendant later agreed to sing for another opera house, for a larger sum.<sup>133</sup> At that time, it was already established that a court of equity would not order specific performance of the positive part of a personal services contract.<sup>134</sup> Thus, the plaintiff requested the court to specifically enforce only the negative part of the contract, that is, to prohibit the defendant from singing for the competing theater.<sup>135</sup> The defendant based her argument on the common law doctrine that a court of equity would specifically enforce a contractual obligation only if the contract in its entirety is enforceable; and since the positive part of her contract with the plaintiff was unenforceable, the negative part of the contract was also unenforceable.<sup>136</sup>

In its decision, the court immediately agreed that the positive part of the contract—the part in which the defendant agreed to sing for the plaintiff—could not be specifically enforced.<sup>137</sup> The only question that remained was whether the negative part was enforceable. After considering many authorities “that . . . have not been uniform,”<sup>138</sup> the court concluded first, that the common law doctrine upon which the defendant relied applies only to contractual obligations that are separate

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But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal services of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware.

*Id.*

<sup>130</sup> *Lumley*, (1852) 42 Eng. Rep. 687 (Ch.). Many consider the *Lumley* case to be the seminal case in the context of specific performance of personal services contracts. *See, e.g., Kaser v. Fin. Prot. Mktg., Inc.*, 831 A.2d 49 (Md. 2003); *Swager v. Couri*, 395 N.E.2d 921 (Ill. 1979). *But see Rapp, supra* note 22, at 263 n.8 (demonstrating that the *Lumley* case was actually not the first time a court ruled that personal services contracts are not specifically enforceable).

<sup>131</sup> *Lumley*, (1852) 42 Eng. Rep. 687.

<sup>132</sup> *Id.* at 688.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 691.

<sup>135</sup> *Id.* at 698.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 693.

<sup>138</sup> *Id.* at 691.

and independent of each other and second, that the negative obligation not to perform for another theater was actually inseparable from her positive obligation to sing for the plaintiff.<sup>139</sup> Thus, the common law doctrine that the defendant cited did not prevent the court from enforcing her negative obligation not to sing for another theater.<sup>140</sup> The court then decided to grant the plaintiff the requested injunction.<sup>141</sup>

The decision in the *Lumley* case set the standard, presently still applicable, for personal services contracts: A court of equity will not decree specific performance of a positive part of a personal services contract.<sup>142</sup> However, a court will specifically enforce, in appropriate cases, negative stipulations in those contracts.<sup>143</sup> Note, however, that this distinction between positive and negative obligations is less relevant to the issue of specific enforcement of enlistment contracts because the debatable part of the enlistment contract is its positive part—the part that requires the servicemember to serve for a set period of time. For the purpose of analyzing the enforceability of enlistment contracts, the *Lumley* case is important because it reaffirmed the rule that a court of equity will not specifically enforce the positive part of a contract for personal services.

Bearing in mind that the enlistment contract is a contract for personal services, the logical conclusion should be that the rule that bars specific performance of personal service contracts applies to enlistment contracts. In other words, knowing that the servicemember's obligations in her enlistment contract are of a personal nature, it seems reasonable to think that the *Lumley* decision should apply to the enlistment contract; however, this is not the case. A closer look at the rationales that underlie the courts' reluctance to decree specific performance of personal services contracts reveals that these rationales do not apply to enlistment contracts.

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<sup>139</sup> *Id.* at 693.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> RESTATEMENT (FIRST) OF CONTRACTS § 380 (1932) (current through August 2009).

<sup>143</sup> See Allen R. Grogan, *Statutory Minimum Compensation and the Granting of Injunctive Relief to Enforce Personal Service Contracts in the Entertainment Industries: The Need for Legislative Reform*, 52 S. CAL. L. REV. 489, 490 (1979) (“Although personal service contracts are not specifically enforceable, in certain circumstances they may be enforced by prohibitory injunction, a decree that prohibits an employee from performing services for any competitor of the original employer under the contract.”) (footnotes omitted); Rapp, *supra* note 22, at 262.

### C. The Personal Services Rule Rationales and their Applicability to Enlistment Contracts

A court's unwillingness to specifically enforce personal services contracts is ancient, dating to before the case of *Lumley*, and well established.<sup>144</sup> However, even though courts almost always came to the same conclusion—that this kind of contract is not specifically enforceable—they did not always base their decisions on the same rationales. Generally speaking, courts' decisions reveal four different kinds of rationales for the rule: (a) difficulties in the court's oversight of contract's performance; (b) the undesirable effect of lack of trust in the contractual relationship; (c) personal liberty; and (d) the availability of an alternative remedy.<sup>145</sup> These four rationales are complementary. While some courts may rely on only one of the rationales,<sup>146</sup> others rely on more than one rationale when requested to specifically enforce personal service contracts.<sup>147</sup>

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<sup>144</sup> See *supra* note 130; David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771, 778 (1992).

<sup>145</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through August 2009); WILLISTON ON CONTRACTS § 67:102 (4th ed. 2009); Rapp, *supra* note 22, at 271–81.

<sup>146</sup> See, e.g., *Seascope, Ltd. v. Maximum Mktg. Exposure, Inc.*, 568 So.2d 952, 954 (Fla. Dist. Ct. App. 1990) (stating that a court of equity will not enforce a contract for personal services because “[t]he appropriate remedy in such cases is an action for damages for breach of contract.”).

<sup>147</sup> See, e.g., *Arthur v. Oaks*, 63 F. 310 (7th Cir. 1894). However, some scholars, especially those who belong to the Economic Analysis of the Law school of thought, offer a fifth rationale to justify why contracts for personal services should not be enforced. According to this rationale, specifically enforcing contracts for personal services is economically inefficient, compared to the damages remedy. When a court decrees an order for specific performance, the parties to the contract will engage in negotiation. This negotiation should lead to the most efficient outcome for the parties—the breaching party that does not want to perform his contractual obligations, but is enforced to by the court order, will pay the other party the sum of money (or equal to money) that will convince him not to demand the execution of the breaching party's obligation. In a perfect market, the negotiation costs in this case and in a case in which the breaching party was ordered to pay damages to the other party will be the same. However, when the breached contract is a contract for personal services, the breaching party will probably not be in a position to allow him to negotiate freely for his “release” from the contract; therefore, the negotiation's outcome will not be economically efficient. For example, an employee that wants to breach his employment contract cannot hold negotiations for long, since he has to earn his living by working. This will impair his negotiating power and may result in an economically inefficient outcome. See Rapp, *supra* note 22, at 262 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 130–32 (4th ed. 1992)). For a further economic analysis of the specific performance remedy,

1. *Difficulties in Courts' Oversight of the Performance*

The first rationale that underlies courts' resentment of enforcing contracts for personal services is the inherent difficulty of enforcing personal services contracts.<sup>148</sup> As the Supreme Court of California stated, "it is inconvenient, or, as others express it, impossible, for a court of justice to conduct and supervise the operations incident to and requisite for the execution of a decree for the specific performance of a contract which involves the rendering of personal services."<sup>149</sup> When

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see also Kronman, *supra* note 124 (claiming that specific performance is the economically efficient remedy only when the subject of the contract is unique, and cannot be readily substituted with money); Schwartz, *supra* note 19, at 274 (rejecting Kronman's reasoning, and stating that the specific performance remedy does not necessarily invite a less efficient result).

For the purpose of analyzing whether courts can specifically enforce enlistment contracts there is no need to discuss this rationale. First, this rationale is only offered by scholars, but not by the courts. Even Judge Posner of the Court of Appeals for the Seventh Circuit, who proposed this rationale in *Economic Analysis of the Law*, did not discuss this rationale the only time he wrote, as a judge, on the issue of specific performance of personal services contracts. See *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 115 (7th Cir. 1990) (stating solely that courts will "refuse[] to order specific performance of employment contracts, because it is difficult and time-consuming for a court to supervise the parties' conduct in an ongoing and possibly long-term relationship of employment," and citing *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687 (Ch.)). It is highly likely that when the subject of specific enforcement of enlistment contracts is discussed in a court, this rationale will not play a role in the discussion. Second, when enlistment contracts are at issue, the theoretical option of bargaining out does not exist. A soldier will not bargain his way out of military service simply because the habitat of the enlistment contract is not a commercial habitat, and the terminology that fits economic analysis of the law does not necessarily fit the context of enlistment contracts.

<sup>148</sup> The Supreme Court of Michigan used this rationale in *Heth v. Smith* to explain why contracts for personal services are not specifically enforceable:

Contracts for affirmative personal service consisting of a succession of acts, the performance of which cannot be consummated in one transaction, but must continue for a time, definite or to become definite, and which involve special knowledge, skill, judgment, integrity, or other like personal qualities, the performance of which rests in the individual will and ability, and involving continuous duties which a court of equity could not well regulate, are not, as a rule, enforceable by decree for specific performance.

141 N.W. 583, 586 (Mich. 1913).

<sup>149</sup> *Poultry Producers of S. California v. Barlow*, 189 Cal. 278, 289 (1922). In California, the personal services rule was enacted into statute. CAL. CIV. CODE § 3423(e). The Supreme Court of California is referring to the rationales of the California Statute. However, since the California statute is based on the common law rule, the rationales for

referring to the difficulty involved in specifically enforcing personal services contracts, courts focus on two kinds of interrelated difficulties.<sup>150</sup> First, enforcement of personal services contracts for prolonged periods of time may require more than one court decision, and courts may need to accompany and supervise the performance of the contracts for the duration of those periods.<sup>151</sup> Indeed, “[i]f performance be decreed, the case must remain in court forever.”<sup>152</sup> Second, since personal services contracts require some sort of skill or professional merit, courts find it difficult to pass “judgment upon the quality of performance.”<sup>153</sup>

However, when the personal services contract is an enlistment contract, those difficulties should not be a major concern. As a matter of fact, unlike employment or other commercial services contracts, the enlistment contract is self-enforcing. The military services have many methods of assessing the quality of the service of servicemembers, such as periodical evaluations and command supervision.<sup>154</sup> Those methods are intended to guarantee objective professional assessments of servicemembers’ military performance and skill.<sup>155</sup> Therefore, if an enlistment contract is enforced, it is unlikely that a court or other non-military review authority will have to assess the servicemember’s performance of the contract. Furthermore, even if an external authority is required to review a servicemembers’ performance, the military’s assessment tools should guaranty an objective, usable, and relevant evaluation, which can serve as the basis for the review.

Moreover, the Armed Forces have an enforcement tool that other employers and purchasers of other personal services simply do not have. The military environment is one of discipline and obedience.<sup>156</sup>

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the statute and the common law rule are the same, and the Supreme Court of California’s analysis can also be applied to the common law rule.

<sup>150</sup> *McKnight v. Gen. Motors Corp.* 908 F.2d 104, 115 (7th Cir. 1990) (“Courts of equity traditionally have refused to order specific performance of employment contracts, because it is *difficult* and *time-consuming* for a court to supervise the parties’ conduct in an ongoing and possibly long-term relationship of employment.”) (emphasis added).

<sup>151</sup> *Rutland Marble Co. v. Ripley*, 77 U.S. 339, 358 (1870).

<sup>152</sup> *Id.*

<sup>153</sup> *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123, 137 (Cal. Ct. App. 1984).

<sup>154</sup> U.S. DEP’T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (10 Aug. 2007) [hereinafter AR 623-3]; U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008) [hereinafter AR 600-20].

<sup>155</sup> AR 623-3, *supra* note 154, para. 1-9.

<sup>156</sup> *See generally* *Parker v. Levy*, 417 U.S. 733, 758 (1974).

Breaches of the enlistment contract and substandard performance are subject to disciplinary measures, starting with informal counseling and ending with criminal prosecution under the UCMJ.<sup>157</sup> In this way, even if the evaluation performed by the military shows that a servicemember does not fulfill his requirements (or contractual obligations), a court or an external authority will not be called to enforce them. The military possesses the required means to enforce the performance by itself.

## 2. *Contractual Inefficiency*

The second rationale that courts use to justify their reluctance to enforce personal services contracts addresses the inefficiency that could be caused by enforcing those contracts. As mentioned above, parties to personal service contracts usually expect that skill, judgment, special knowledge, and discretion will be employed during the execution of the contract.<sup>158</sup> Those contracts usually require a “relationship of cooperation and trust” between the contracting parties.<sup>159</sup> Consequently, enforcing a contract when that trust has been broken and probably cannot be fully restored is inefficient.<sup>160</sup> The “confidence and loyalty” that formed the basis of the contract between the parties cannot be restored by a court order, and without trust, it would be undesirable to enforce the contract.<sup>161</sup> As one court mentioned in the context of employment contracts, enforcing a breached contract is inadvisable because it can lead to “the continuance of hostile, intolerable employment relationships.”<sup>162</sup>

It is interesting to note that, unlike the first rationale, which is based on narrow institutional considerations, the second rationale looks at enforcement of personal services contracts from a wider perspective. When addressing the second rationale, courts usually refer to contractual

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<sup>157</sup> See AR 600-20, *supra* note 154.

<sup>158</sup> See *supra* text accompanying notes 105–108.

<sup>159</sup> *Zannis v. Lake Shore Radiologists, Ltd.*, 392 N.E.2d 126, 129 (Ill. App. 1979).

<sup>160</sup> *Poultry Producers of S. California v. Barlow*, 189 Cal. 278, 288 (1922) (“Another reason assigned for the rule, according to some of the authorities, is that, in view of the peculiar personal relation that results from a contract of service, it would be inexpedient, from the standpoint of public policy, to attempt to enforce such a contract specifically.”).

<sup>161</sup> *Felch v. Findlay Coll.*, 200 N.E.2d 353, 355 (Ohio App. 1963); RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through Aug. 2009); MODERN LAW OF CONTRACTS § 13:17.

<sup>162</sup> *Lark v. Post-Newsweek Stations, Connecticut, Inc.*, No. CV-94-070-53-26, 1994 WL 684718, at \*7 (Conn. 1994).



efficiency as a matter of public policy, rather than as a matter of importance solely to the parties to the contract; “where one of the contracting parties is to act as the confidential agent of the other, it is necessary, not only for the parties, but for the sake of society at large, that there should be entire harmony and a spirit of co-operation between the contracting parties.”<sup>163</sup>

There are several reasons why this rationale does not apply to enlistment contracts. The military is a hierarchal organization. The relationship between the military and its servicemembers is built on coercion, discipline, and obedience, rather than on mutual trust, harmony, and cooperation.<sup>164</sup> This is true both of militaries based on mandatory service or a draft, and all-volunteer military forces. Although ensuring that servicemembers are content with their service may be advisable, the unique structure of the military enables it to efficiently extract and benefit from the skill, judgment, and discretion of servicemembers even when they are no longer content with their service.<sup>165</sup> Therefore, because of the military’s unique relationship with servicemembers, enforcing enlistment contracts, even though they are personal services contracts, does not necessarily lead to inefficient execution of the contracts.

The risk of inefficient enforcement of enlistment contracts is further dulled by the camaraderie that characterizes military life. The military is structured around units made up of servicemembers. Often, a unit’s ability to achieve its goals depends on the cooperation and contribution of all members of the unit. As members of the unit strive to achieve the objectives set for them, they will often apply group pressure on any member not as motivated as they are.<sup>166</sup> A servicemember who no longer identifies with the military organization or no longer wants to be

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<sup>163</sup> *Barlow*, 189 Cal. At 288–89; *see also Zannis*, 392 N.E.2d at 129 (“[A]s a matter of public policy courts will avoid the friction that would be caused by compelling an employee to work, or an employer to hire or retain someone against their wishes.”).

<sup>164</sup> *See Parker v. Levy*, 417 U.S. 733, 744 (1974).

<sup>165</sup> *See id.* (“To maintain the discipline essential to perform its mission effectively, the military has developed what ‘may not unfitly be called the customary military law’ or ‘general usage of the military service.’”) (citing *Martin v. Mott*, 12 Wheat. 19, 35 (1827)); *see also supra* text accompanying notes 156–61.

<sup>166</sup> *See* CHRISTOPHER C. STRAUB, *THE UNIT FIRST* 3 (1988) (“To fight well presupposes that at least most of the soldiers in a unit have chosen to fight at all, that they individually have the will to fight. Then the individual wills must combine into a fighting team, a team that has practiced and whose members have confidence in each other and in team performance.”).

part of it may be forced by his peers to maintain a certain level of performance to allow the unit to accomplish its mission effectively. In other words, servicemembers in the military must answer not only to their commanders, but also to their fellow servicemembers.<sup>167</sup> Informal peer pressure can supplement the coercive nature of the military hierarchy and reduce the potential for any inefficiency that might result from compelling someone to render personal services.

Furthermore, because the contractual efficiency rationale is rooted in public policy, it does not prevent specific performance of enlistment contracts. It is at the height of public interest that the military achieves its goals efficiently.<sup>168</sup> The specific public interest served by maintaining military services through the enforcement of enlistment contracts is stronger than the general public interest achieved by not enforcing contracts that may prove inefficient.<sup>169</sup> Specific performance of enlistment contracts, therefore, does not contravene public policy in the same way that specific performance of ordinary personal service contracts does.

### 3. *Personal Liberty*

The third rationale's concern is the effect of enforcement on the enforced party's personal liberty. In the words of the Seventh Circuit, "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another."<sup>170</sup> This rationale can be based on two different legal bases: the Thirteenth Amendment's prohibition of involuntary servitude<sup>171</sup> and international treaties.<sup>172</sup> While courts and scholars have discussed the Thirteenth Amendment's impact on the remedy of specific performance in the context of personal services contracts and of the military service, they have not yet discussed the international legal basis of this rationale.<sup>173</sup>

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<sup>167</sup> *But see* Rapp, *supra* note 22, at 273.

<sup>168</sup> *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY paras. 1-40, 1-41 (14 June 2005).

<sup>169</sup> *See generally* Gengler v. United States, 453 F. Supp. 2d 1217, 1238 (E.D. Cal. 2006) (effect of public policy considerations on enlistment contract's interpretation).

<sup>170</sup> *Arthur v. Oaks*, 63 F. 310, 317 (7th Cir. 1894).

<sup>171</sup> U.S. CONST. amend. XIII.

<sup>172</sup> *See infra* Part IV.C.3.b.

<sup>173</sup> *See, e.g., Arthur*, 63 F. at 317; Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020 (2009). In fact, the consideration of personal liberty is also based on general principles of human rights and equity, and not

*a. The Thirteenth Amendment*

The Thirteenth Amendment reads, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>174</sup> Although the Amendment is closely linked to African slavery, its prohibition is not restricted only to that form of servitude; it applies to any form of slavery or involuntary servitude.<sup>175</sup> The terms “slavery” and “involuntary servitude,” however, are not defined by the Constitution. While the term “slavery” is quite clear, the term “involuntary servitude” requires some clarification.<sup>176</sup>

The Supreme Court defined involuntary servitude as a condition in which the employee—or the victim—has no “available choice but to work” due to legal or physical coercion or the threat of such use.<sup>177</sup> This definition excludes employment situations in which the employee has some ability to decide whether to retain his status as an employee, even if

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only on the Thirteenth Amendment and international law. The rule barring specific performance of personal services contracts evolved in England, where, naturally, the Thirteenth Amendment does not apply, and before international law even forbade slavery. *See, e.g., De Francesco v Barnum*, (1890) L.R 45 Ch.D. 430 (U.K.) (“I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery”). In the United States, however, as long as the Thirteenth Amendment is in place and the courts do not rule explicitly otherwise, the Thirteenth Amendment will continue to serve as the main authority for discussions of this rationale.

<sup>174</sup> U.S. CONST. amend. XIII. Involuntary servitude is also forbidden by 10 U.S.C. § 1854(a) (2006):

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

*Id.*

<sup>175</sup> *Butler v. Perry*, 240 U.S. 328, 332–33 (1916).

<sup>176</sup> *United States v. Kozminski*, 487 U.S. 931, 942 (1988) (“While the general spirit of the phrase ‘involuntary servitude’ is easily comprehended, the exact range of conditions it prohibits is harder to define.”).

<sup>177</sup> *Id.* at 943–44.

the decision entails harsh consequences.<sup>178</sup> Some argue that this relatively narrow definition of involuntary servitude denies some individuals the protection of the Thirteenth Amendment.<sup>179</sup>

When interpreting and applying the Thirteenth Amendment, courts usually draw a distinction between involuntary services provided to private employers and mandatory services rendered to the states or the Federal Government.<sup>180</sup> The Amendment itself excludes from its prohibition servitude imposed as punishment for a crime.<sup>181</sup> Furthermore, according to the Supreme Court's interpretation, the Thirteenth Amendment was not meant to prohibit the Government or the states from compelling the performance of civilian duties, such as military or civic service, by threat of sanction.<sup>182</sup> Courts consider those duties "exceptions" to the general rule.<sup>183</sup> Undeniably, "[t]he great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."<sup>184</sup>

Despite the Supreme Court's clear definition of involuntary servitude, courts tend to presume that specific enforcement of personal services contracts impinges on personal liberty in a manner that violates the Thirteenth Amendment, without performing the analysis required by the Supreme Court's definition. For example, in a suit filed by a recording company seeking to prevent another recording company from using the services of an artist who first entered a contract with the plaintiff, the court commented that "an unwilling employee cannot be compelled to continue to provide services to his employer either by ordering specific performance of his contract, or by injunction. To do so runs afoul of the Thirteenth Amendment's prohibition against

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<sup>178</sup> *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 459 (2d Cir. 1996) ("The Thirteenth Amendment does not bar labor that an individual may, at least in some sense, choose not to perform, even where the consequences of that choice are 'exceedingly bad.'").

<sup>179</sup> See Joey Asher, *How the United States is Violating Its International Agreements to Combat Slavery*, 8 EMORY INT'L L. REV. 215 (1994).

<sup>180</sup> *Kozminski*, 487 U.S. at 943-44.

<sup>181</sup> U.S. CONST. amend. XIII; see *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

<sup>182</sup> *Kozminski*, 487 U.S. at 943-44 ("[T]he Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties.").

<sup>183</sup> *Butler v. Perry*, 240 U.S. 328, 333 (1916).

<sup>184</sup> *Id.*

involuntary servitude.”<sup>185</sup> The court did not apply the Supreme Court’s definition.

Some scholars have objected to courts’ presumption that specific performance of all personal services contracts is an inherent violation of the Thirteenth Amendment. For example, Christopher Rapp distinguishes between labor contracts, for which enforcement should be forbidden by the Thirteenth Amendment on its face, and other personal services contracts, which may, to some extent, be enforced.<sup>186</sup>

Nathan Oman, on the other hand, objects to any general rule in this context, arguing that the Thirteenth Amendment prohibits specific performance of only those personal services contracts whose enforcement would constitute degrading slave-like domination, not those involving a well compensated relationship involving no domination.<sup>187</sup> In other words, according to Oman and contrary to the approach taken by most courts, the applicability of the Thirteenth Amendment to personal services contracts merits a separate and specific analysis and cannot be generalized.<sup>188</sup>

Notwithstanding courts’ general view of the Thirteenth Amendment in the context of personal services contracts, the courts have made it quite clear that the Thirteenth Amendment has no effect on military service.<sup>189</sup> As discussed earlier, courts construe the Amendment as not applying to services rendered to the Government or to states as part of

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<sup>185</sup> *Beverly Glen Music, Inc. v. Warner Commc’ns, Inc.*, 224 Cal. Rptr. 260, 261 (Cal. Ct. App. 1986); *see also Poultry Producers of S. Cal. v. Barlow*, 189 Cal. 278, 288 (1922) (“[I]t would be an invasion of one’s statutory liberty to compel him to work for, or to remain in the personal service of, another. It would place him in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States . . . .”); *Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co.*, 271 F. 743, 744 (Ga. D. Ct 1921) (“The right . . . of one to refuse to serve, even though under a binding contract to do so, is a part of the constitutional personal liberty of the land. The failure or refusal to perform a contract of service may create a liability in damages, but no court will enforce the service”); *Arthur v. Oaks*, 63 F. 310, 317 (7th Cir. 1894).

<sup>186</sup> Rapp, *supra* note 22, at 277.

<sup>187</sup> Oman, *supra* note 173, at 2025.

<sup>188</sup> Kronman described this approach best, saying “[t]he nature, completeness, and duration of self-imposed limitations on personal freedom determine their legal and moral acceptability.” Kronman, *supra* note 124, at 372.

<sup>189</sup> *E.g., Hesse v. Resor*, 266 F.Supp. 31, 35 (E.D. Mo. 1966) (“The 13th amendment right to freedom from involuntary servitude does not apply to military service.”).

one's civic duty or service.<sup>190</sup> This includes military service, despite the heavy burden it may impose on servicemembers' personal liberty. This ruling, issued when military service was still mandatory,<sup>191</sup> is all the more relevant today, when military service is voluntary. Indeed, courts are inclined to reassert this standard when addressing involuntary extensions to enlistment contracts originally entered into voluntarily.<sup>192</sup>

In one case, the plaintiff petitioned the court to enjoin the Air Force from enforcing his enlistment contract claiming an order to report for active duty violated the Thirteenth Amendment prohibition against involuntary servitude.<sup>193</sup> The plaintiff had served with the Air Force for eleven years before the Air Force issued the "extended active duty order" . . . pursuant to the enlistment contract."<sup>194</sup> The court concluded,

The plaintiff's thirteenth amendment claim that enforcement of an order requiring him to report for active duty would constitute involuntary servitude, is not well taken. While it is true that enlistment in the armed forces pursuant to a contract differs from involuntary induction into the armed forces, we think that no distinction exists for purposes of applying the thirteenth amendment to the facts of this case.<sup>195</sup>

Therefore, to the extent that the Thirteenth Amendment supports the personal liberty rationale against enforcing specific performance of personal service contracts, it does not apply to the enforcement of

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<sup>190</sup> See *supra* notes 180–184.

<sup>191</sup> *United States v. Crocker*, 274 F. Supp 776 (D.C. Minn. 1969) (holding that the draft law does not violate the Thirteenth Amendment, even during times of peace); *Howze v. United States*, 272 F.2d 146, 148 (9th Cir. 1959) ("The power of Congress to raise armies, and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment, or the absence of a military emergency."); *Bertelsen v. Cooney*, 213 F.2d 275 (5th Cir. 1954) (declaring that the "Doctors Draft Law," Public Law 779, § 4(i)(2), 81st Congress, Second Session, 64 Stat. 826, was within the power of the Congress and does not constitute a Thirteenth Amendment violation).

<sup>192</sup> See *Clark v. United States*, 461 F.2d 781, 784 (Ct. Cl. 1972) (holding that activation of commissioned officers whose ready reserve agreements have expired does not violate the Thirteenth Amendment); *United States v. Shy*, 10 M.J. 582, 583 (A.C.M.R. 1980) (holding that retention of the accused in service after expiration of his enlistment term in order to conduct court-martial proceedings against him was not prohibited by the Thirteenth Amendment, which "is inapplicable to service in the military.").

<sup>193</sup> *Lonchyna v. Brown*, 491 F. Supp. 1352, 1352 (D.C. Ill. 1980).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1354.

enlistment contracts. However, support for the personal liberty rationale can also be drawn from a completely separate source: international agreements.

*b. International Agreements*

The United States is party to a series of treaties and international agreements banning slavery and involuntary servitude. As Joey Asher has argued,<sup>196</sup> the definitions of “slavery” and “involuntary servitude” included in those agreements have been interpreted more expansively than the same terms in the Thirteenth Amendment have been interpreted by U.S. courts.<sup>197</sup> Asher points out that according to those international agreements, “all means of coercion other than law and physical force are equally impermissible means of coercion into slavery.”<sup>198</sup> Because international agreements prohibit a wider array of enforced employment than the Thirteenth Amendment, they could serve as an alternative and independent legal source for the personal liberty rationale against the enforcement of personal services contracts.

The first notable international agreement<sup>199</sup> is the Universal Declaration of Human Rights (Universal Declaration), which maintains that “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”<sup>200</sup> In contrast to the Thirteenth Amendment, the language of the Universal Declaration is not limited to certain forms of coercion, nor is it restricted to civilian servitude.<sup>201</sup> On the contrary, the Universal Declaration explicitly prohibits slavery and personal servitude “in all their forms.”<sup>202</sup> Therefore, on its face, the legal prohibitions of the Universal Declaration appear to support the rule barring specific performance of personal services contracts, and they may even be construed to prohibit enforcement of military service. However, since the Universal

<sup>196</sup> Asher, *supra* note 179.

<sup>197</sup> *Id.* at 234–48.

<sup>198</sup> *Id.* at 242.

<sup>199</sup> This section addresses only the most relevant international agreements, and they are not necessarily cited in chronological order. *See id.* (analyzing all of the international agreements that discuss slavery and personal servitude).

<sup>200</sup> Universal Declaration of Human Rights art. 4, G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration].

<sup>201</sup> Asher, *supra* note 179, at 244.

<sup>202</sup> Universal Declaration, *supra* note 200, art 4.

Declaration is not a treaty but merely a widely accepted General Assembly Resolution, it is not binding,<sup>203</sup> and it is not considered part of the “law of the land” of the United States.<sup>204</sup> Consequently, the value of the Universal Declaration as an independent legal authority against the enforcement of personal services contracts, including enlistment contracts, is limited.<sup>205</sup>

In contrast to the Universal Declaration, the Convention to Suppress the Slave Trade and Slavery of 1926<sup>206</sup> (Slavery Convention) is a binding agreement that could serve as an independent source prohibiting enforcement of personal services contracts. Parties to the Slavery Convention, the United States included, took upon themselves to prevent the slave trade and to “bring about, progressively and as soon as possible, the complete abolition of slavery.”<sup>207</sup> In contrast to the Thirteenth Amendment, the Slavery Convention defines the term slavery,<sup>208</sup> and its definition is somewhat broader than the interpretation of the term “slavery” in the Thirteenth Amendment.<sup>209</sup>

Despite its focus on slavery, the Slavery Convention does not independently prohibit compulsory service or labor. Instead, to prevent “forced labour from developing into conditions analogous to slavery,” the Slavery Convention establishes a progressive process to end compulsory labor, and “compulsory or forced labour may only be exacted for public purposes” until then.<sup>210</sup> Consequently, the Slavery Convention’s prohibition against “compulsory labour” might, in some circumstances, apply to court ordered specific performance of personal services contracts. Nevertheless, the Slavery Convention would not prohibit specific performance of enlistment contracts because they are

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<sup>203</sup> Hurst Hannum, *The Status of The Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 317–18 (Fall 1995–Winter 1996).

<sup>204</sup> U.S. CONST. art. VI.

<sup>205</sup> It has been suggested that the prohibition against slavery embedded in the Universal Declaration represents customary international law and, therefore, is binding on all states. See Hannum, *supra* note 203, at 334. However, even if slavery is forbidden in general, the broad definitions of slavery and involuntary servitude are probably not accepted as customary international law.

<sup>206</sup> Convention to Suppress the Slave Trade and Slavery, Sep. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter Slavery Convention].

<sup>207</sup> *Id.* art. 2.

<sup>208</sup> *Id.* art. 1.

<sup>209</sup> Asher, *supra* note 179, at 238–39.

<sup>210</sup> Slavery Convention, *supra* note 206, art 5(1).



explicitly excluded from the forced labor proscriptions of the convention.<sup>211</sup>

The International Covenant on Civil and Political Rights<sup>212</sup> (ICCPR) represents another possible international source. The ICCPR entered into force in 1976, and it prohibits, among other things, “slavery and the slave-trade in all their forms,”<sup>213</sup> as well as “servitude.”<sup>214</sup> The ICCPR also mandates that “[n]o one shall be required to perform forced or compulsory labour.”<sup>215</sup> Once again, the language of the ICCPR, as well as its historical background, strongly suggest a broad interpretation of the terms “slavery” and “servitude.”<sup>216</sup> In this context, it is important to note that the United States’ suggestion, which was made during the negotiations period, to add the word “involuntary” before the word “servitude” was rejected, strengthening the conclusion that the ICCPR, by prohibiting servitude conditions entered into voluntarily, is intended to be far more expansive than the Thirteenth Amendment’s prohibition.<sup>217</sup> Because the United States has ratified the ICCPR and has incorporated it into U.S. law,<sup>218</sup> its far-reaching prohibition on servitude and forced labor may well serve as a legal basis for the rule barring specific performance of personal services contracts.

On the other hand, the ICCPR still could not be used to prevent the enforcement of enlistment contracts. Article 8(3)(ii) of the ICCPR explicitly excludes military service from the definition of forced labor. The article states that “the term ‘forced or compulsory labour’ shall not include: . . . [a]ny service of a military character.”<sup>219</sup> Therefore, the ICCPR does not prevent the enforcement of a military service obligation, whether mandatory or voluntary, including by an order for specific

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<sup>211</sup> Another possible argument is that the Slavery Convention, *supra* note 206, is not self-executing. *See* Asher, *supra* note 179, at 245.

<sup>212</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>213</sup> *Id.* art. 8.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Asher, *supra* note 179, at 246.

<sup>217</sup> *Id.* at 248. The International Labour Organization’s Convention (No. 29) Concerning Forced Labour, June 28, 1930, 39 U.N.T.S. 55 [hereinafter Forced Labor Convention] also prohibits “all work of service which is exacted from any person under the menace of any penalty.” *Id.* art. 2. However, contrary to the ICCPR, the Forced Labor Convention does not prohibit forced labor that was entered into voluntarily. *See id.*

<sup>218</sup> S. EXEC. REP. NO. 102-23 (1992), *reprinted in* 31 I.L.M. 645.

<sup>219</sup> ICCPR, *supra* note 212, ¶ 8(3).

performance. Ultimately, while some international agreements may restrict the enforcement of personal service contracts by specific performance, they do allow enforcement of military service, both mandatory and voluntary. International agreements, for that reason, will not prevent specific performance of an enlistment contract.

Even though enforcing enlistment contracts may impinge on servicemembers' personal liberty, neither the Thirteenth Amendment nor international agreements to which the United States is a party formally prevent specific performance of enlistment contracts. Thus, the personal liberty rationale cannot justify following the rule barring specific performance of personal services contracts with regards to the enlistment contract.

#### 4. *The Availability of an Alternative Remedy*

The fourth rationale for the rule barring specific performance of personal services contracts is strongly connected to the equitable nature of the specific performance remedy. Sometimes, courts refuse to order specific performance when another remedy is available.<sup>220</sup> As an equitable remedy, specific performance is appropriate only when another remedy is not available or does not fully accomplish the remedial goal;<sup>221</sup> when another remedy is available—primarily damages—the court will not resort to an equitable remedy.<sup>222</sup> Thus, whenever a breach of a personal services contract is repairable by damages or by any other non-

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<sup>220</sup> See, e.g., *Rutland Marble Co. v. Ripley*, 77 U.S. 339, 359 (1870) (“But what is a still more satisfactory reason for withholding a decree for specific performance is, that the party who asks for it has an entirely adequate remedy provided by the reservation in his deed, and by the contract itself.”); *Seascope, Ltd. v. Maximum Mktg. Exposure, Inc.*, 568 So.2d 952, 954 (Fla. Dist. Ct. App. 1990).

<sup>221</sup> See *supra* note 127 and accompanying text.

<sup>222</sup> *McMenamin v. Philadelphia Transp. Co.*, 51 A.2d 702, 704 (Pa. 1947) (“Those rights which have been protected by a court of equity no longer exist, and will not be recreated by a decree of a court of equity requiring specific performance of a contract for personal services. The remedy, if any, is an action at law for damages.”); *Ryan v. Reddington*, 87 A. 285, 286 (Pa. 1913) (“The remedy of the plaintiffs at law was entirely adequate as both the term and compensation for the employment were fixed by the contract. It is, therefore, apparent that a court of equity had no jurisdiction . . . .”); see also *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979) (granting damages for breach of employment contract in lieu of specific performance of the contract).

equitable remedy, the courts will not order specific performance.<sup>223</sup> In the words of the Seventh Circuit,

The right of an employe [sic] engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages . . . .<sup>224</sup>

This rationale has little effect when no alternative remedy can fully compensate or otherwise reverse the consequences of the breach. Such is the case when enlistment contracts are breached by servicemembers. The military provides servicemembers training that is unique to the military, and when a servicemember leaves military service before the end of his obligation, the military not only has to recruit another servicemember to replace him, it also has to train the new servicemember. The total strength of the military and its ability to accomplish its goals are compromised.<sup>225</sup> Meanwhile, ordering a servicemember who has breached his enlistment contract to pay damages to the military cannot fully compensate for the damage he caused. Damages may reimburse the military for the costs of training another recruit, but they cannot make up for the temporary decrease in the readiness of the force. The only way to fully avoid these manpower shortages of trained personnel is to enforce enlistment contracts for the durations established in the agreements.

#### D. Public Interest Considerations

Examining the rationales offered by the courts for barring specific performance of personal services contracts reveals that none of the

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<sup>223</sup> This rationale is not unique to personal services contracts. Derived from the equitable nature of the specific performance remedy, this rationale applies to all contracts.

<sup>224</sup> *Arthur v. Oaks*, 63 F. 310, 318 (7th Cir. 1894).

<sup>225</sup> SHEILA NATARAJ KIRBY & HARRY J. THIE, *ENLISTED PERSONNEL MANAGEMENT: A HISTORICAL PERSPECTIVE* 105 (1996) (“When [servicemembers] leave early not only has the military lost a valuable asset, but it also has to acquire and train a replacement.”); *see also* U.S. DEP’T OF DEF., DIR. 1100.4, *GUIDANCE FOR MANPOWER MANAGEMENT* (12 Feb. 2005); U.S. DEP’T OF DEF., INSTR. 1304.30, *ENLISTED PERSONNEL MANAGEMENT PLAN (EPMP) PROCEDURES* (14 Mar. 2006).

rationales apply to enlistment contracts. Even though enlistment contracts are personal services contracts, they lack the traits that make personal services contracts unenforceable. The *Baldwin*<sup>226</sup> Court's hunch was correct: enlistment contracts should be exempted from the rule prohibiting enforcement of contracts for personal services. However, even if one or more of the rationales does apply to enlistment contracts, they should not prevent their enforcement because, according to some courts, the application of the contractual doctrine barring specific performance of personal services contracts is potentially subject to general overarching considerations of the public interest. A good example of that is found in *Shubert v. Woodward*, where the Eighth Circuit said,

Again, the enforcement of the specific performance of the contract in hand will necessarily entail upon the courts through many years the supervision and direction of a continuous series of acts, many of which will present the question whether or not they accord with the contract . . . . It is conceded that a court of equity has ample power to determine all these questions and to conduct this business by its receiver, or master, and that it will sometimes enforce the performance of contracts where the performance involves more intricate details, or longer periods of time, where the other equities of the complainant in the case, or the public interest, are controlling. But in the absence of such public interest, or such controlling equities, or of clear evidence that irreparable injury will probably result to the complainant if it withholds the relief sought, a court of equity does not constrain, and it ought not to compel, the enforcement of the specific performance of a contract

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<sup>226</sup> *Baldwin v. Cram*, 522 F.2d 910 n.4 (2d Cir. 1975).

<sup>227</sup> Compare *Shubert v. Woodward*, 167 F. 47, 56 (8th Cir. 1909), with *Arthur*, 63 F. at 317 (refusing to order striking railroad employees back to work and relying on the rule barring specific performance of personal services contracts, even though the strike might have caused severe damage to the public). In *Arthur*, the Seventh Circuit further reasoned, "[b]ut these evils, great as they are, . . . are to be met and remedied by legislation restraining alike employees [sic] and employers so far as necessary adequately to guard the rights of the public." *Id.*

Sometimes, courts' decisions to order specific performance of an employment contract, which is another example of a personal services contract, implicitly or explicitly disregard the rule barring specific performance of personal services contracts because of the public interest served by enforcing them. Such is the case, for example, regarding collectively bargained employment contracts.<sup>228</sup> When an employee, employed through a collective bargain contract is fired in violation of the Constitution,<sup>229</sup> or where damages do not constitute a sufficient remedy,<sup>230</sup> courts may reinstate the employee to her prior position, notwithstanding the fact that the reinstatement is *de facto* specific performance of a personal services contract.<sup>231</sup>

As discussed above, there is a vested public interest in maintaining a strong, ready, apt, and trained military force. Just as courts decided that the public interest in protecting collective employment relationships justifies deviating from the rule barring specific performance of personal services contracts, courts may also conclude that the public interest in maintaining a trained and ready military justifies abandonment of the rule in certain cases. In other words, the courts may ultimately decide that military mission readiness is "controlling" even if some or all of the rationales described above were applicable to enlistment contracts.<sup>232</sup> This logic may, perhaps, explain why the court in *Baldwin v. Cram* assumed, almost as if it was a natural fact, that unlike other forms of service, enlistment contracts are enforceable.<sup>233</sup>

## VI. Conclusion

After letting Atkinson go home to his wife and kids, Monty Python's Regimental Sergeant Major asks his squad, "Now, everybody else happy with my little plan of marching up and down the square a bit?"<sup>234</sup> This

<sup>228</sup> MODERN LAW OF CONTRACTS § 13:17.

<sup>229</sup> *Reuber v. Unites States*, 750 F.2d 1039, 1066–67 (D.C. Cir. 1984).

<sup>230</sup> *Thurston v. Box Elder Cnty.*, 892 P.2d 1034, 1040 (Utah 1995) (explaining that the rationales for the rule barring specific performance of personal services contracts "are susceptible to closer scrutiny in light of contemporary employment relationships and the need to protect at-will employees from wrongful termination of their employment").

<sup>231</sup> *Id.*

<sup>232</sup> *Shubert*, 167 F. at 56. In this context, it is useful to remember that courts are already known to be deferential when they deal with the military. See *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Sebra v. Neville*, 801 F. 2d 1135 (9th Cir. 1986).

<sup>233</sup> *Baldwin v. Cram*, 522 F.2d 910 n.4 (2d Cir. 1975).

<sup>234</sup> THE MEANING OF LIFE (Celandine Films 1983).

time Coles, another soldier, raises his hand and says, “Sarge, I’ve got a book I’d quite like to read.”<sup>235</sup> The Sergeant Major replies, “Right! You go read your book then! Now, everybody else quite content to join in with my little scheme of marching up and down the square?”<sup>236</sup> By the end of the sketch, the Sergeant Major ends up marching up and down the square all by himself.<sup>237</sup>

A scenario in which any servicemember can decide to leave the service at will would be a military personnel planner’s nightmare. Such unfettered freedom would harm the military’s ability to accomplish its goals, which requires strict resource planning.<sup>238</sup> Applying the rule barring enforcement of personal services contracts to enlistment contracts would render them unenforceable. Surprisingly, this issue has never been thoroughly discussed in the courts or by scholars even though the question is not merely theoretical. As explained in this article, a determination that the enlistment contract is not contractually enforceable should have affected the decisions of both federal courts and military courts-martial.

As a common law-based contract law doctrine, the rule barring specific performance of personal services contracts will only apply to enlistment contracts if enlistment contracts are governed by ordinary contract law doctrines. As shown in Part III, past indecisiveness aside, courts currently employ contract law doctrines to enlistment contracts, except when it comes to pay and allowance issues. This makes the focal issue of this article more pertinent than ever: If contract law applies to enlistment contracts, why does the contract law rule regarding specific performance of personal services contracts not apply?

In order to answer this question, this article focused on the reasons and rationales that underlie, according to over one-hundred-and-fifty years of court decisions, the rule prohibiting specific performance of personal services contracts. Of the four different rationales—difficulties in courts’ oversight of the contract’s performance, contractual inefficiency, personal liberty, and availability of other remedies—none apply to enlistment contracts. The enlistment contract’s special characteristics and purpose make it “immune” to the effect of those

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> KIRBY & THIE, *supra* note 225, at 105.

rationales on its enforceability. Moreover, as demonstrated, public policy considerations also play a role in the legal perception that the enlistment contract is specifically enforceable despite the rule barring specific performance of personal services contracts. In sum, the assumption that the enlistment contracts are enforceable despite their personal quality is confirmed.

**THE THIRD ANNUAL SOLF-WARREN LECTURE IN  
INTERNATIONAL AND OPERATIONAL LAW\***

**REFLECTIONS ON GOVERNMENT LAWYERING**

PROFESSOR JACK GOLDSMITH<sup>†</sup>

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<sup>†</sup> This essay is an edited transcript of a lecture delivered on 24 February 2010 by Professor Jack Goldsmith to members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 58th Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School, U.S. Army (TJAGSA) on 8 October 1982 in honor of Colonel (COL) Waldemar A. Solf. On 16 August 2007, the Chair was renamed the Waldemar A. Solf and Marc L. Warren Chair in International and Operational Law.

Colonel Waldemar Solf (1913–1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later.

Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; Staff Judge Advocate (SJA) of both the Eighth U.S. Army/U.S. Forces Korea/United Nations Command and the U.S. Strategic Command; Chief Judicial Officer, U.S. Army Judiciary; and Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross (ICRC) Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as Chairman of the U.S. delegation to the ICRC Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea.

He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War



General Miller, General Ayers, Colonel Burrell, distinguished guests, members of the 58th Graduate and 53d Operational Law of War Courses, staff and faculty of the Legal Center and School, it is a genuine honor to be invited today to speak to you in this distinguished lecture series named after Colonels Solf and Warren. For me it has been a special treat to meet Colonel Warren, whom I've long admired but never met. Thank you very much for inviting me.

I do not exaggerate when I say that there's no group of lawyers I admire more than military lawyers. I spent a very happy year, perhaps the best year of my professional career, in the Department of Defense's General Counsel's Office working side by side every day and many nights with lawyers from all of the services. I entered the Pentagon, I must confess, a mild and largely uninformed skeptic of what I viewed as the expanding roles and responsibility of military lawyers. But I am happy to report that I emerged a year later a convert to the importance of law and lawyers to the integrity of military action. I learned a lot from military lawyers that year; I've continued to learn from them over the years; and I hope to learn from you some more today during the question-and-answer period.

Today I am going to talk to you about my time in the Justice Department as the head of the Office of Legal Counsel (OLC), which is basically the legal advisor to the President. The President, as you know, is the Chief Executive Officer of the nation. He has delegated the power to interpret laws for the Executive Branch to the Attorney General, who in turn has delegated that power to OLC. The vast majority of legal advice I gave to the President and the Attorney General concerned legal issues related to the war on terrorism and national security law. I've written a book about these experiences called *The Terror Presidency*.<sup>1</sup> The occasion for me to return to these issues today is the release of a report last week by the Justice Department concerning an inquiry into

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Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

<sup>1</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

potential ethical lapses by some of my predecessors.<sup>2</sup> I don't know how much you know about this so I'll just briefly summarize what has happened.

Since I left Washington to go to Harvard in 2004, I've taken approximately three dozen trips back to Washington to be questioned by a variety of investigatory bodies in Washington, all growing out of all things that happened during my year in the Justice Department. I was not a target of any of these investigations, but they wanted to talk to me nonetheless. One of these investigations was by the Office of Professional Responsibility (OPR), which is the ethics branch of the Justice Department. OPR conducted a five-year investigation of my predecessors, Jay Bybee and John Yoo, concerning their drafting of two interrogation memos that I withdrew.<sup>3</sup> OPR ultimately concluded that John Yoo and Jay Bybee had committed professional misconduct because they had failed to provide thorough, candid, and objective legal advice.<sup>4</sup>

The OPR finding was overturned by a senior career lawyer in the Deputy Attorney General's Office named David Margolis.<sup>5</sup> He overruled the OPR on the ground that they did not articulate a known, unambiguous obligation or standard against which they were judging the actions of the lawyers in question. Along the way in his remarkable seventy-page opinion, Margolis flagged a number of legal and other mistakes that OPR had made in bringing judgment on OLC's interrogation analysis. I have not studied the hundreds and hundreds of pages in the OPR matter to form a strong conclusion or to give you a full analysis of the arguments in play. But I do think that it provides an

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<sup>2</sup> See Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to The Att'y Gen., subject: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (Jan. 5, 2010) [hereinafter Margolis Memo], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>.

<sup>3</sup> Memorandum from Jay S. Bybee, Ass't Att'y Gen., to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002); Memorandum from John C. Yoo, Deputy Ass't Att'y Gen., to William J. Haynes II, Gen. Counsel of the Dep't of Def., subject: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003).

<sup>4</sup> U.S. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY REPORT (2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

<sup>5</sup> See Margolis Memo, *supra* note 2.

opportunity to reflect on some of the paradoxes, difficulties, and challenges of lawyering inside the Executive Branch, especially in a time of crisis. Although I will be speaking about my experiences advising the President, I think they're analogous to your experiences advising your non-lawyer superiors.

Let me begin by trying to articulate what an Executive Branch lawyer is supposed to do when he or she advises a client. What is the lawyer's obligation, especially when novel and difficult interpretative issues arise? I naively thought this was a simple matter when I entered the OLC job. I thought—and I testified to this effect at my confirmation hearings—that I was simply going to provide good faith, impartial legal advice. I was influenced by one of my predecessors, William Barr, who said, "Being a good legal advisor [to the President] requires that I reach sound legal conclusions, even if sometimes they are not the conclusions that some may deem to be politically preferable."<sup>6</sup> This was my attitude going in, and I think it's a good attitude to have going in. But as soon as I got there, I realized this attitude was too simple. There are many countervailing considerations and pressures, almost all of which, I thought, were legitimate, and all of which made the job much more difficult.

First, I was not an accidental pick for this job. The reason the President chose me for OLC was that his subordinates had read my writings and interviewed me and knew what my views were on various issues. They liked those views, so I was not a neutral choice. I was not chosen because they thought I was going to be completely neutral—neutral in the sense of not having views on a variety of issues that would come before me. As a group of Clinton Administration OLC officials once said, "The Office of Legal Counsel is located in the Executive Branch and serves both the institution of the Presidency and a particular incumbent, a democratically elected President in whom the Constitution vests Executive power."<sup>7</sup> Since the President is elected and exercises Executive power, he can choose to select his lawyers—people with whom he basically agrees on interpretative and legal issues.

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<sup>6</sup> *Id.* at 33.

<sup>7</sup> WALTER DELLINGER ET AL, PRINCIPLES TO GUIDE THE OFFICE OF THE LEGAL COUNSEL (2004), available at [http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf).

The second countervailing consideration, related to the first, is that, as Elliot Richardson once said, “Advice to a President needs to have the political dimension clearly in view, without regard to any pejoratives attached to the word political.”<sup>8</sup> This doesn’t mean that you’re supposed to be political, and it doesn’t mean you can be an advocate in the same sense that you would if you were a private attorney advising a client. Rather, it means that the lawyer is a member of an Executive Branch and is not neutral to the President’s or to the commander’s agenda when advising him or her on a legal matter. Unlike a court that often just says “no” or “yes,” I never said “no” to any of my superiors without trying to find a way to help them find a way to achieve their desired ends within the law. The third countervailing consideration was that, as Robert Jackson once said, the President “gets the benefit of a reasonable doubt as to the law.”<sup>9</sup> Finally, many issues facing an executive branch lawyer have no or little judicial precedent. In those situations, the lawyer must apply not-entirely-neutral Executive Branch precedents, written by Executive Branch lawyers, in Executive Branch situations.

The challenge for the lawyer who faces these four considerations is to not to let them get out of control. Often when an Executive Branch lawyer advises a client on a national security matter, the advice takes place in secret without a dissenting opinion or appellate review. This is a situation fraught with the possibility of mistakes. But there are checks as well. For me, one was the powerful culture at OLC of detachment, professional integrity, and loyalty to the institution and to the law, not just the President or the particular client. At OLC I realized, as Margolis put it in his report, that an “enormous responsibility . . . comes with the authority to issue institutional decisions that carried the authoritative weight of the Department of Justice.”<sup>10</sup> I knew that everything I did would affect the institution’s reputation, and I felt sobered to be acting on behalf of the Justice Department and the Government. I was influenced in this respect by Walter Dellinger, another one of my predecessors, who said to me over breakfast before I was confirmed, “You won’t be doing your job well, and you won’t be serving your client’s interests, if you rubber-stamp everything the client wants to do.”<sup>11</sup>

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<sup>8</sup> *Id.* at 34.

<sup>9</sup> GOLDSMITH, *supra* note 1, at 35.

<sup>10</sup> See Margolis Memo, *supra* note 2, at 67.

<sup>11</sup> GOLDSMITH, *supra* note 1, at 38.

Applying all of these considerations is more an art than a science. Here is how I described the art in *The Terror Presidency*:

I found myself at OLC managing what Jimmy Carter's Attorney General Griffin Bell, described as the tension between the "duty to define the legal limits of executive action in a neutral manner *and* the President's desire to receive legal advice that helps him to do what he wants." This ever present tension was unusually taut after 9/11, when what the President wanted to do was to save thousands of American lives. There is no magic formula for how to combine legitimate political factors with the demands of the rule of law. The head of OLC must be a careful lawyer, must exercise good judgment, must make clear his independence, must maintain the confidence of his superiors, and must help the President to find legal ways to achieve his ends, especially in connection with national security. OLC's success over the years has depended on its ability to balance these competing considerations—to preserve its fidelity to law while at the same time finding a way, if possible, to approve presidential actions.<sup>12</sup>

This brings me, finally, to the OPR matter. I explained in detail in *The Terror Presidency* how what I viewed as legal errors in the interrogation opinions, in combination with various contextual factors, led me to withdraw the interrogation opinions. The OPR report did not analyze whether the lawyers who wrote the opinions I withdrew got the right or wrong legal answer. Rather, it considered whether they committed professional misconduct. As I said in *The Terror Presidency*, and as I reiterated in a memorandum I submitted to David Margolis on OPR, I'm quite confident that these men did not act in bad faith. One cannot understand the substantive and craft errors in the opinions without keeping in mind that they were written in the summer of 2002 at a time when threat reports were extremely concrete and, as someone there then told me later, when everyone was sure on September 11th, 2002, there would be bodies in the streets of Washington. They acted under incredible pressure, under incredible fear.

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<sup>12</sup> *Id.* at 38–39.

This fear does not excuse or justify the legal errors. But it does put them in context. And it allows for some comparisons. For Yoo and Bybee were not the first Executive Branch lawyers in time of crisis to make mistakes and write opinions that were later repudiated. Let me give you some other examples.

Consider Robert Jackson—Supreme Court Justice, author of the famous *Youngstown* concurrence, Attorney General, Solicitor General, and one of the greatest lawyers of his generation. In the late summer of 1941, Attorney General Jackson advised President Roosevelt that he could exchange retired American naval destroyers for naval bases with the British. In the spring of that year, the consensus among lawyers was that this exchange would be clearly unlawful, not only under international law, but also under a variety of neutrality statutes. It was clearly prohibited, and that was Jackson's opinion in the spring of 1941. Over the summer of 1941, during the Battle of Britain as Nazi bombs fell on Britain, as the situation got more and more dire, and as Churchill's request became more and more desperate, Roosevelt changed his mind. He decided he was going to send the destroyers, and Jackson approved the action. Jackson had changed his mind, and he wrote an opinion explaining his reasoning. It is not a persuasive legal opinion, in my opinion. But you don't have to take my word for it, for many others agree. Edward S. Corwin, the famous Princeton constitutional law scholar at the time, said the opinion "was an exercise of unrestrained autocracy and the most dangerous opinion ever penned by the Justice Department."<sup>13</sup> Senator Daniel Patrick Moynihan, in his book on the laws of war, said that "Jackson clearly subverted the law and subjected Roosevelt to impeachment."<sup>14</sup>

Edward Bates was Abraham Lincoln's Attorney General when Lincoln decided to ignore Chief Justice Roger B. Taney's order to release a prisoner because the President lacked authority to suspend the writ of habeas corpus.<sup>15</sup> Bates, who had a reputation as a fine lawyer, wrote what Arthur Schlesinger Jr. later called an "exculpatory legal opinion" that said Lincoln had the power to suspend the writ of habeas corpus even though most people then thought only Congress had that

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<sup>13</sup> Edward S. Corwin, Letter to the Editor, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES, Oct. 13, 1940, at 72.

<sup>14</sup> DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 72 (1990).

<sup>15</sup> *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

power—a view that is accepted law today.<sup>16</sup> Bates's legal opinion is completely unconvincing.

Another example is Abram Chayes. Chayes was one of the most distinguished academic lawyers of the 20th century and was the Legal Advisor to the State Department during the Cuban Missile Crisis. He advised President Kennedy during the crisis that the quarantine of Cuba did not violate the U.N. Charter.<sup>17</sup> Most international lawyers think that Chayes was wrong.

What do these examples show? They show that the interpretative process is invariably shaped by the context in which it takes place. The opinions by Jackson, Bates, and Chayes were written by outstanding Executive Branch lawyers to help the President achieve a vital national security goal in time of crisis. These lawyers exploited ambiguities and loopholes in the law. They read the relevant precedents in ways that favored presidential power. They stretched the meaning of statutes and treaties. And they did not always give full play to contrary arguments or precedents. It's quite clear that they believed, in the context in which they acted, that they were doing the right thing under the law and that they did not act in bad faith. But their good faith interpretations of the law, under the pressure of events, were later viewed to be tendentious or erroneous.<sup>18</sup>

Why, one might ask, is Robert Jackson a hero while Bybee and Yoo are not? Why are Chayes and Bates not criticized more for their tendentious legal interpretations? There are many answers. One is obviously the subject matter of the opinions under discussion. Wherever one draws the line when interpreting limitations on coercive interrogation, the line is going to be controversial unless you draw it

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<sup>16</sup> Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1868) (opinion of Edward Bates dated July 5, 1861).

<sup>17</sup> ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (1974).

<sup>18</sup> It's not just Executive Branch lawyers who shape the law to the crisis at hand. It's courts as well. Courts consist of lawyers who are supposed to be more detached than Executive Branch lawyers vis-à-vis the Executive. And yet, in times of crisis in our nation's history, courts have done things that later looked like stretching the law under the pressure of events. In the Civil War, the Supreme Court approved a number of military commissions that didn't have a modicum of due process. In World War I, they upheld prosecutions for seditious libel that have been viewed as violative of the First Amendment ever since. In World War II, they upheld the internment of Japanese-Americans that is today seen as an embarrassing black mark.

someplace where it shouldn't be, some place where it's just not a faithful reflection of the law. Moreover, those opinions came to light at about the same time as the terrible Abu Ghraib photos. The opinions and the abuse were invariably linked together whether there was, in fact, a connection or not.

Also, the context matters. Jackson, Bates, and Chayes acted in crises that turned out well. Those wars are over. And it is quite clear in retrospect that they were significant crises—the Battle of Britain, the Civil War, the Cuban Missile Crisis. Everything that happened in those crises is viewed through the afterglow of victory. For better or worse, the wars that are going on today are not viewed to have the same level of crisis. If the public had access to the same threat information that Yoo and Bybee were reacting to, I think their opinions would have been looked at differently, and I think if the war were over and we had achieved a clear victory, they would be looked at differently.

Also, I think it's fair to say that the opinions I withdrew contained not just legal mistakes but craft lapses as well. Jackson's opinion was much better crafted, in part because he had a lot longer to draft it and, in part, because the issues were easier and less contestable. The interrogation opinions were written in secrecy and disclosed much later. I don't think they were written in secrecy for any insidious purpose, but they were not released. Jackson's opinion appeared in the *New York Times* the same day as the destroyers-for-bases deal was announced. Finally, I think we live in a legalistic age today that Jackson, Chayes, and Bates did not live in. Legal standards in those days were viewed much more through a political lens, and today they're not. Compliance with the law is insisted on then in ways it was not in past times.

In my opinion, these examples from the past have implications for the OPR ethics investigation. It seems to me—and Margolis agreed—that at the very least, OPR should have exercised caution, or at least empathy, in judging people who exercise legal judgment in crisis. I think it's wrong to infer bad faith simply from the fact of error, even clear legal error, for that would have landed Robert Jackson in the ethics dock as well. Any rule that would land Jackson in ethics trouble for a legal opinion cannot be the right rule.

Also, OPR viewed the opinions not from the perspective of threat and danger in which they were written but, rather, from the clear perspective of hindsight. OPR's investigation took five and a half years.



It picked through every OLC draft, every e-mail related to every draft, and every collateral conversation. I want you to think about some of your written legal opinions and just imagine if every single e-mail that you wrote in time of crisis in connection with the drafting of those opinions, and every draft, and every collateral conversation, was picked over. I know that for my opinions, it wouldn't be a pretty experience. OLC did not have OPR's luxury of five and a half years to reach a decision. It had to act immediately. This is one of the difficulties of being an Executive Branch lawyer: You often don't have the luxury of time.

So what lessons can we learn from these episodes, and from what Yoo and Bybee have gone through compared to what Jackson went through? I think one important lesson is that when you're acting in situations of threat and danger and offering legal advice, it is important to remember that you will not be judged from that perspective. Rather, as my colleague Jim Comey, the Deputy Attorney General, once wrote, you will be judged "in a quiet, dignified, well-lit room" where your judgments will be "viewed with the perfect, and brutally unfair, vision of hindsight," where it is impossible to "capture even a piece of the urgency and exigency felt during crisis."<sup>19</sup> It also means that you're going to be judged not just on the basis of what you did at the time, but also to some degree on the basis of how things turned out.

I don't think you should shade your judgment based on a prediction of how things will turn out. I think you have to do the right thing in context, based on the factors I discussed earlier. But I also think it's appropriate—vital, in fact—to consider the future and to act in a way that you're going to be able to explain and justify later. Comey described this as a uniquely lawyerly ability: the ability "to transport ourselves to another time and place and the ability to present facts to an imaginary future fact-finder in an environment very different from the one in which we face crisis and decision."<sup>20</sup>

At a minimum, the decision-making *process* must maintain its integrity. A decision-making process with integrity—one that involves proper consultation with the right people and a careful opinion with good craft values—will inform how the decision is looked at later, even if the substance of the decision turns out not to have been, from the perspective

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<sup>19</sup> James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 439, 443 (2007).

<sup>20</sup> *Id.*

of hindsight, the right one. Ultimately, *how* the lawyer reached the decision will be scrutinized. If he or she reached the decision in a proper way, that will affect how critics view the merits. These are considerations that Bybee and Yoo, under the pressure of time and crisis, did not focus on enough.

Comey concluded his essay by saying:

It is the job of a good lawyer to say “yes.” It is as much the job of a good lawyer to say “no.” “No” is much, much harder. “No” must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. “No” is often the undoing of a career. And often “no” must be spoken in competition with the voices of other lawyers who do not have the courage to echo it.

For all those reasons, it takes far more than a sharp legal mind to say “no” when it matters most. It takes moral character. It takes an ability to see the future. It takes an appreciation of the damage that will flow from an unjustified “yes.” It takes an understanding that, in the long run, intelligence under law is the only sustainable intelligence in the country.<sup>21</sup>

I agree with this analysis. But I think it’s incomplete. It’s also very difficult, sometimes, to say “yes,” especially in a controversial or contested context involving application of a controversial or contested law. I worry very much that in the increasingly politicized world in which lawyers’ actions are judged, it has become harder and harder to say “yes.” I don’t know if this affects the military, but I know it affects the civilian side. Lawyers throughout the nation’s civilian national security apparatus are extremely cautious about approving actions that are legal but are also politically controversial. This cautiousness seems personally rational in light of the enormous reputational harm suffered by many national security lawyers in the last seven or eight years. The 9/11 Commission Report criticized the pre-9/11 lawyer-induced risk aversion in the intelligence world caused by lawyers who give overly cautious advice and worry about saying “yes” when it might be controversial later. I worry that we’re returning to that culture of risk aversion.

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<sup>21</sup> *Id.* at 444.

In closing, then, I want to emphasize that while it takes courage to say “no” when “no” is the right answer and will be controversial, it also takes the courage to say “yes” when “yes” is controversial but is the right answer. I don’t envy you in making these tradeoffs every day, but I wish you good luck in doing so.

Thank you very much.

**THE TWENTY-FIRST MAJOR FRANK B. CREEKMORE, JR.  
LECTURE\***

JAMES GRAHAM<sup>†‡</sup>

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\* This is an edited transcript of a lecture delivered on 19 November 2009 by Mr. James J. Graham, Trial Attorney, U.S. Department of Justice, to attendees of the Government Contract and Fiscal Law Seminar, members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 58th Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The Major Frank B. Creekmore Lecture was established on 11 January 1989. The lecture is designed to assist The Judge Advocate General's School in meeting the educational challenges presented in the field of government contract law.

Frank Creekmore graduated from Sue Bennett College, London, Kentucky, and from Berea College, Berea, Kentucky. He attended the University of Tennessee School of Law, graduating in 1933, where he was inducted into the Order of the Coif for scholarly achievement. After graduation, Mr. Creekmore entered the private practice of law in Knoxville, Tennessee. In 1942, he entered the Army Air Corps and was assigned to McChord Field in Tacoma, Washington. From there, he participated in the Aleutian Islands campaign and served as the Commanding Officer of the 369th Air Base Defense Group.

Captain Creekmore attended The Judge Advocate General's School at the University of Michigan in the winter of 1944. Upon graduation, he was assigned to Robins Army Air Depot in Wellston, Georgia, as contract termination officer for the southeastern United States. During this assignment, he was instrumental in the prosecution and conviction of the Lockheed Corporation and its president for a \$10 million fraud related to World War II P-38 Fighter contracts. At the War's end, Captain Creekmore was promoted to the rank of major in recognition of his efforts.

After the war, Major Creekmore returned to Knoxville and the private practice of law. He entered the Air Force Reserve in 1947, returning to active duty in 1952 to successfully defend his original termination decisions. Major Creekmore remained active as a reservist and retired with the rank of lieutenant colonel in 1969. He died in April 1970.

† Mr. Graham is a Trial Attorney in the Fraud Section, Criminal Division, U.S. Department of Justice. He is a graduate of Boston College, and the University of Texas Law School. Previous to his current position, Mr. Graham spent eighteen years as a partner at the Washington, D.C., office of Jones Day. In October 2008, the U.S. Attorney General awarded Mr. Graham the Distinguished Service Award. In June 2009, the Department of Justice issued a press release regarding Mr. Graham's involvement in the conviction of a military contractor who had stolen large quantities of fuel in Afghanistan. A subsequent Department of Justice press release, in August 2009, details Mr. Graham's recent prosecution of two individuals who pleaded guilty to bribing a U.S. Army contracting officer in Afghanistan. Mr. Graham has also authored numerous articles. *See, e.g.,* James Graham, *Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud*, 14 PUB. CONT. L.J.216 (1984); James Graham, *Mischarging: A Contract Dispute of a Criminal Fraud*, 15 PUB. CONT. L.J. 208 (1985); James Graham, *Corporate Criminal Liability for the Public Contractor—Are Guidelines Needed?*, 21 NAT'L CONT. MGMT. L.J. (1988); James Graham, *The Qui Tam*

### I. The New Federal Acquisition Regulation Mandatory Disclosure Rule—A Sea Change

Frank Creekmore retired in 1969 and I started in government service in 1971, so our careers almost overlap, and it is an honor to be here. I want to thank the JAG School and the Creekmore family for this opportunity. This audience is a very impressive group for me. I normally speak to prosecutors and investigators and white collar crime lawyers. For the most part, I know more about the procurement process than they do. From yesterday, I understand who you are, and I am in awe of your knowledge of the procurement and acquisition process.

I also long have admired the work that the JAG School has done. I have used the *Year in Review* as sort of a guide to stay up on the process, and I am glad for the opportunity to talk about the FAR rule mandating that contractors disclose fraud and corruption in their contracts. I am not going to go through the rule in detail because I'm counting on this group as one of the few in America that actually read the Federal Acquisition Regulation (FAR) and pay attention to it. I want you to understand where we at the Department of Justice (DoJ) and the Office of Inspector General were coming from when we proposed the rule. As the title to this talk indicates, we intended this rule to be a sea change in the way the Government and its contractors interact, and that remains an ambitious objective.

So you know my perspective. I began my legal career in 1971 in the Criminal Division. After graduating from the University of Texas Law School, I joined DoJ in the Honors Program and stayed there eighteen years. When it became clear I had been there long enough, I joined Jones Day, which is a big law firm, where I had the privilege to represent government contractors—the types of people and businesses that I had been investigating and prosecuting in my eighteen years as the Government. I stayed eighteen years at Jones Day and then came back to my first home, the Department of Justice, to finish my legal career. I returned full of ideas, and one of the ideas became the Mandatory Disclosure Rule.

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*Amendments: Privatizing the Civil Prosecution Function*, 49 FED. CONT. REP. 659 (1988). Mr. Graham is on the Board of Editors for *Business Crimes Bulletin*.

‡ The views expressed here are my own and not those of the Department of Justice.

For some reason, I became passionate about government contract law early in my career in the Department of Justice. We are all formed by our early experiences as lawyers. The first person that I ever prosecuted was an engineer hired by the U.S. Agency for International Development to review and approve claims that the contractor made in connection with the construction of the Saigon water system. John Hay was convicted for taking bribes from the French contractor Les Établissement Eiffel that were found in a Swiss bank account.

My second case was an Army contractor who was supplying all the beef to the military. Their competitor recruited a Senate committee to investigate how he was able to consistently win the contracts. We found out, essentially, that they substituted round steak for sirloin, enabling them to underbid the competition, and were bribing the Army inspectors to hide that practice. The memorable thing for me was appearing as a twenty-eight-year-old before a Senate subcommittee at a hearing telling them why they should not interfere with my investigation. It was those sorts of experiences that whetted my appetite for this field.

## II. The Origin of the Mandatory Disclosure Rule

I hope that my experiences will invite others to pursue changes in the way the Government does business.

The FAR's Mandatory Disclosure Rule (the rule) became effective in December of 2008.<sup>1</sup> We hope at the Department of Justice that it radically changes the way contractors and their government relate. The preamble to the rule candidly refers to it as a "sea change" in the fundamental approach to compliance. Make no mistake, we intended this.

If any of us told our civilian friends at a cocktail party that when the Government enters into business with contractors, agreeing to pay them millions—or billions—of dollars, without the accompanying obligation to admit their mistakes, our civilian friends might surely question why that is. We may have some type of explanation rooted in the way our procurement system developed. We all have found our sides and some

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<sup>1</sup> Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064 (Nov. 12, 2008).

of us—many of us have made a living in the litigation that surrounds the relationship between the Government and contractors.

Really, the idea behind the rule was, “Why don’t we require contractors to tell us about things that they frankly don’t want to tell us about?” This idea fueled this issue more than twenty-five years ago. The original Department of Defense (DoD) Inspector General (IG) law, was enacted in the early ’80s.<sup>2</sup> Some of you are old enough to remember the \$14,000 coffeemaker, the \$400 hammer and the \$2000 toilet seat. Those issues are what generated a lot of the fraud interest back then. At that time, the DoD IG said to people within the Pentagon, “Why don’t we make them report this stuff?” But it was the Packard Commission that persuaded Secretary Weinberger to pursue this voluntary disclosure as opposed to the mandatory approach.<sup>3</sup>

The DoD Voluntary Disclosure Program was stood up in 1986,<sup>4</sup> and, in the beginning, the program worked well. During the first few years, the number of self-disclosures by contractors averaged almost sixty per year, and all the major DoD contractors participated. Some big matters were disclosed and addressed in that process, and I think the facts are that no contractor who chose to participate in that program lied in a disclosure, except for one known case.

Over time, the program fell into disuse for a variety of reasons, some attributable to the Government and some to the contractors. It is undisputed that DoJ took too long to process the disclosures, and it is also undisputed that it too often punished the disclosing contractors, as opposed to rewarding them, by demanding inflated False Claims Act damages.<sup>5</sup> The Government found itself saying reflexively, “Well that’s what the False Claims Act says,” as opposed to examining the full context of the disclosure.

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<sup>2</sup> Inspector General Act of 1978, 5 U.S.C. app. § 1 (2006).

<sup>3</sup> Executive Order No. 12,526, 50 Fed. Reg. 29,203 (July 18, 1985)

<sup>4</sup> See, e.g., Enclosure to Taft Memorandum, *reprinted in* U.S. Dep’t of Def., Inspector Gen., The Department of Defense Voluntary Disclosure Program: A Description of the Process (Apr. 1990) (describing the “Department of Defense Program for Voluntary Disclosures of Possible Fraud by Defense Contractors”).

<sup>5</sup> 31 U.S.C. §§ 3729ff (2006).

The real reason for the decline was that the intensity of the enforcement effort decreased over time. In the intervening twenty-plus years, contractors had less reason to disclose. By 2005, there were only a handful of voluntary disclosures per year, leading to the question of what these contractor compliance programs were up to. I would suggest that part of the answer to the reduction of disclosures over time lies in the fact that their chance of being caught decreased and the penalty of being caught amounted to the same False Claims Act penalties contractors faced if they made a voluntary disclosure. You do the calculation if you are a contractor.

Now, I am going to cover how the attitude about corporate disclosure changed. Many of you remember the next scandal after DoD's toilet seat and coffeepot was the Savings and Loan collapse. In the late 1980s, Congress imposed mandatory disclosures on banks to disclose fraud that they discovered in the course of their business.<sup>6</sup> The Treasury Department and Federal Deposit Insurance Corporation have managed the Suspicious Activity Reports Program and responded to the hundreds of suspicious activity reports that are filed every year by U.S. banks.

In 1991, the U.S. Sentencing Commission published its commentary explaining what they meant by an "effective compliance program."<sup>7</sup> They offered standards on how courts should assess corporate behavior. Interestingly, those standards in 1991 were drawn almost word-for-word out of standards developed at DoD and Justice in the original Voluntary Disclosure Program. The Sentencing Guidelines expressed the view that corporations were expected to self-disclose and cooperate with investigators if they were going to receive any sentencing relief.

In 2002, we experienced the collapse of Enron and WorldCom, which fueled Sarbanes-Oxley and required corporate disclosures of securities fraud. Lastly, as the Government cranked up its healthcare enforcement effort, healthcare providers discovered they had been subject for the last twenty years to a criminal statute that required them to disclose, and, in fact, many of them did. Their impetus was not that they wanted to disclose but that they knew the risk of criminal prosecution, which, while probably still remote, was there. They were simply unwilling to run that risk.

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<sup>6</sup> 12 U.S.C. §§ 1818, 1819 (2006).

<sup>7</sup> U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (1991).



You should now add that to the other landscape change, which is that the Justice Department stopped prosecuting companies after Arthur Andersen. There, DoJ became sensitive to the fact that they ended a company and put thousands of people out of work. They started to look for a more effective way to enforce the law. The Department, in the last Administration, had already made the policy change that if a company discloses and cooperates, the risk of prosecution by the company is, frankly, almost nil.

### III. The Rulemaking Process

This was the landscape that put us into 2006, when we started to think about the rule. Darleen Druyun was the longtime and powerful career Air Force Deputy Undersecretary convicted on corruption charges in 2004 relating to her dealings with Boeing. There was nervous laughter in the room when somebody talked about Darleen Druyun doing something good yesterday at the end of the day. While Darleen Druyun had nothing to do with the rule, the rule's genesis was a product of her difficulties with the law. Paul McNulty, before he became Deputy Attorney General, was the U.S. Attorney responsible for her case. He came to the Department of Justice in 2006 with an interest in upgrading the Government's lagging procurement fraud effort.

McNulty, with the help of the Assistant Attorney General in the Criminal Division, formed the National Procurement Task Force, with Steve Linick as the Staff Director. Essentially, it was a collection of the IGs and the Federal Bureau of Investigation with the goal to put increased emphasis on combating fraud and corruption in the procurement process. The Task Force ultimately focused on improving on what the Government was already doing. They got the investigators to include reference to the Task Force in the press releases, promoted the cases a little better, and generated some increased energy levels on the cases. In the process, they were searching for an initiative that would go beyond that, and this is where the idea for the rule arose.

Part of the luck was our first step to find some help outside of DoJ. We asked a friend off-line whether the Office of Federal Procurement Policy (OFPP) would support such a radical FAR change if Justice proposed it. Remember, it was still just an idea by a couple of lawyers at Justice.

Rob Burton—by that time, the Deputy Administrator of OFPP, who went way back with us—fielded our question. He was a young lawyer in the Defense Logistics Agency in the 1980s. While he could not promise a final rule, he was in the position to get a proposed rule into the *Federal Register*, which for the Justice Department was a victory in itself. That was also enough for senior DoJ people, like the Assistant Attorney General and the Deputy Attorney General, not all that familiar with the process and rightly concerned that we were pushing them off the edge of a cliff and beyond their comfort zone. Rob's endorsement was enough to make them comfortable to support such an idea.

Who was going to draft such thing? None of us in the DoJ had ever drafted a FAR regulation or even been involved in the process. Again, we were lucky enough to draw on expertise from two DLA lawyers, who had worked around the FAR Council and the Defense FAR, to draft up this regulatory proposal with just enough specificity using FAR language that the FAR Council and the FAR Law Team would be comfortable without feeling like DoJ was invading their province. That process took two days.

In May of 2007, for the first time in its history, the Department of Justice asked the Executive Branch to open a FAR case. This request occurred with the support of Assistant Attorney General Alice Fisher after exchanging numerous drafts with Rob and others in OFPP. In a sense, just getting that far was an achievement for the National Procurement Fraud Task Force. Many thought the initiative would “die in committee,” and it did take a while to progress forward—about eighteen months. Candidly speaking here, few senior acquisition people in the General Services Administration (GSA) and DoD, in private, favored the rule.

Before I tell you about the lucky accident that sort of made it all happen, I want to tell you about the FAR Council contribution. The FAR Council is a group of high-level acquisition executives from GSA, the National Aeronautics and Space Administration (NASA), DoD, and some civilian agencies.<sup>8</sup> Almost all the work is done by the Law Team. They draft the proposed FAR language and then read and discuss every public comment. The Law Team is made up of acquisition folks—attorneys for the most part—from the major procurement agencies.

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<sup>8</sup> See, e.g., Office of Mgmt. & Budget, *FAR Council Members*, WHITE HOUSE, [http://www.whitehouse.gov/omb/Procurement\\_far\\_farc\\_members](http://www.whitehouse.gov/omb/Procurement_far_farc_members).

I am not sure in the beginning how happy the Law Team was to receive the Justice proposal accompanied by a request from OFPP to expedite. They worked in secret, too. What I mean by that is, despite the fact that DoJ proposed the rule, since DoJ was not a member of the FAR Council, we were not included in the first phase leading up to the initial *Federal Register* announcement. The first time we saw how it came out was when it appeared in the *Federal Register* on 14 November 2007.<sup>9</sup> No one called and asked during the initial rulemaking process why Justice was seeking the rule or asked for any ideas about what language would be helpful until the public saw that notice. But it only took six months to accomplish that.

The proposed rule actually followed pretty closely our initial proposal. The Council took our suggestion that there should be some effort to minimize the impact on small contractors, but they went a little further and also excluded the application to commercial contractors and overseas contractors. When I first saw that overseas exemption, I thought it was essentially an effort to be practical, that it did not make any sense to impose such requirements on a company like Public Warehousing Company in Kuwait, for example. This is a Kuwaiti company that supplies essentially all the food stuff to our troops in the Middle East. The requirement to make a disclosure about misconduct by any of its senior people would not be particularly effective in meeting the rule's objectives.

It was that decision to exclude contracts overseas that triggered a happy accident. When an Associated Press reporter wrote in February of 2008 and said that Vice President Cheney and his staff put that exception in the rule to protect Halliburton, that article gave the rule some real momentum. All of a sudden the senior acquisition folks spent a lot of time denying that the Vice President or his staff even knew about the rule, which was true. They also added how much the Administration was in support of the rule, which could be said to be an exaggeration at that point.

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<sup>9</sup> Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64,019, 64,020 (Nov. 14, 2007).

#### IV. The Happy Accident of the Close the Loophole Act

After seven more articles by this same reporter, senior folks from Justice, OFPP, and GSA—and I think somebody from DoD—found themselves before a House subcommittee in April 2008 defending the Vice President and responding to questions about whether they supported the proposed rule. In private, few of these agencies were enthusiastic about the rule, but it was too hard for them to say so.

Congress did something even better after the hearing. They introduced the Close-the-Loophole Act, a good title. Just like that, the provisions showed up in the Defense Authorization Act.<sup>10</sup> In a matter of days, the overseas and commercial exemptions disappeared and Congress wrote a law mandating the Office of Management and Budget (OMB) to have a final rule within 180 days. I think, in truth, if that happy accident had not occurred, the FAR Council would still be working on the rule today.

I want to talk a few minutes about the people on the FAR Law Team involved in the drafting process. The Law Team is a great group of public servants. It is a part-time job for acquisition lawyers, in this case lawyers from GSA, NASA, DoD, who meet periodically—sometimes weekly when they are working on a rule—to draft, review, and revise proposed FAR language on new proposals.

I was invited, shortly after the proposed rule was published, to help the Law Team evaluate the public comments. What I saw among the Team was concern about imposing new requirements on contractors and concern about reducing the contractor base. I also saw concern about giving additional work to overworked contracting officers and some skepticism about the Department of Justice and the Inspector General.

There were times it was hard to go to the meetings. Often, my only ally at those meetings was Chris McCommas from the Army. In the end, it eventually became the Law Team's rule to shape. I came to understand and respect their process, how they go about it, and how passionately they express their concern with the system and their desire that the rules make sense and are workable. We wrestled over every line of the proposed rule and discussed in detail all sixty-eight public comments, including those that were off-the-wall.

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<sup>10</sup> Pub. L. No. 110-252, tit. V, ch. 1, 122 Stat. 2323 (2008).

Interesting to me, none of the major DoD contractors filed any comments. However, there was an active campaign from the associations, and this included lengthy briefs from the Council of Defense and Space Industries Association, the Defense Industry Initiative, the Professional Services Council, and two American Bar Association (ABA) committees. But we also did something here that was a little outside the lines. First, we asked the IGs to all write in support of the rule. They were not used to doing that, but they were the beneficiaries of the rule, and they wrote letters. We also reached out to the public interest groups who more often find themselves criticizing DoJ and asked them to write public comments in support of the rule. The Project on Government Oversight and Taxpayers Against Fraud wrote some pretty substantive letters. The IGs at NASA and GSA wrote very strong letters in support, as did the DoD IG.

When the Law Team looked at the public comments, they had not only the letters from the contractors largely opposing the rule, but also letters of support. The Team initially was puzzled to find agencies in the Government writing to them in support of a rule. The opponents of the rule argued for the status quo. They thought the Voluntary Disclosure Program was great, somehow finding a way to ignore the fact that there were practically no disclosures. They asserted that mandatory disclosure was unconstitutional or worse. We are still waiting for a citation on that point. An opportunity was missed by their failure to suggest changes to the disclosure formulation itself.

In the end, after almost a year-and-a-half, I left the FAR Team with great respect for the process. The dedication of the members of the Team in getting it right was remarkable. A lot of that can be attributed to Amy Williams, the Chairperson of the Team. She knew how to permit her family of acquisition lawyers to squabble, to disagree, to nitpick, yet she seemed always to find a way to find a middle-ground while remaining faithful to the intent, to the goal of the regulation.

The work product of that effort is a preamble of thirty pages in the *Federal Register*—three columns, small type—all written by the Law Team.<sup>11</sup> Its purpose was to explain the objectives of the rule. I would not say that it is exciting reading, but it is good reading to understand what the rule accomplishes and how it should be implemented. You should come away with it thinking that it was calculated to be fair. I

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<sup>11</sup> 73 Fed. Reg. 67,064–67,093 (Nov. 12, 2008).

came away from the process proud of being part of that Law Team, which contributed to some of my now twenty-one years of public service. The ABA is now writing a book about the rule. While it will reflect some griping, I think you will conclude that the choices made by the Law Team more than hold up.

#### V. Implementation Experience over the First Year

What happens now? The IGs have received over a hundred disclosures since December of 2009. The disclosures are made by the largest and smallest commercial contractors. Some look like the old voluntary disclosure submissions with a lot of lawyer reports and attachments; others come from companies—it might be shocking to say—that simply report the information in unpolished form, as if they trust the Government. Some of the biggest contractors have chosen to send a large number of individual employee time card cases involving problem employees who use their day to surf the net or worse, and I will describe some of the disclosures to you in a minute. These small time card cases—some of them adding up to ten, twenty, thirty thousand dollars—will never be prosecuted and will never be False Claims Act cases.

From the Justice Department's point of view, we have sort of made the calculus never to criticize anyone for making a disclosure, however insignificant. While individual employee time cards are not really what we were focusing on in pursuing those disclosures, they do show these large contractors know about the rule as well as the focus of their compliance programs.

Does it look like DoJ's objectives have been met after twelve months? Our first objective was to enlist contractors, to the extent they have been willing, to help in ensuring that the public the process was free of fraud and corruption; real team work, real action—not slogans. The second objective in requiring that disclosures go to the contracting officers, as well as the IGs, was to get the IGs working more closely with the contracting officers and the contractor compliance programs. Many of the IGs in the drafting would have preferred that we excluded the contracting officers. We thought it was an important part of the process that when the contractor screws up, he tells the IG *and* he tells the contracting officer at the same time, hoping that those two functions will

work together more effectively . We really wanted to change the way problems of fraud and corruption were handled in a significant way.

We also included, and intended to include, our own loophole in the rule. We recognized that even with a regulation, disclosure was still going to be voluntary, i.e. the contractor had to be willing to do it, and it is something that is often difficult to do. The loophole that remains in the rule is that contractors do not have to disclose overpayments to the IG; they have to disclose them to the contracting officer as the FAR already required. The rule just added, “And if you don’t, you will be debarred.”<sup>12</sup> We added the word “significant” to “overpayment,”<sup>13</sup> which permits a contractor to say, “I’m not going to call this fraud. I really don’t see it as fraud. It’s an honest mistake, and I am just going to repay it as an overpayment.” Hoorah for them and boo for us if we in the Government does not find a way to track that; we do not find a way to track whether that is a trick or, in fact, it really just is an overpayment— i.e. an innocent mistake.

In the end, the success of this initiative will not be measured by the number of disclosures since it is still up to the contractors to choose to make the disclosures. Success will not be measured by the number of contractors prosecuted, because our purpose is fewer—not more—prosecutions. Success should be measured, first, by how the Government—particularly the IGs and DoJ—treat the contractors who make disclosures. Are we prepared to reward them? Are we prepared to process their disclosures speedily and fairly? Second, how do we treat the contractors who choose not to disclose—to ignore the rule and not to make disclosure? These are the decisive questions.

## VI. Some Representative Disclosures

You might find it interesting if I shared with you some disclosures that we have received. How many of you here have ever heard of an inverted domestic corporation? A company came in and reported, “We discovered that we’re an inverted domestic corporation and we shouldn’t have been getting contracts under that provision.” We inquired about what sort of mechanism we have set up within the Government to address that law. It turned out, at least as best I could find, not much,

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<sup>12</sup> GEN. SERVS. ADMIN ET AL., FEDERAL ACQUISITION REG. 9-406-2(b)(1)(vi) (July 2010).

<sup>13</sup> *Id.* 9-406-2(b)(1)(vi)(C).

and so we said, “Well, we’re not that interested in punishing that company that came in. In fact, we want to reward them for reminding us that this is an area of law that we should be looking at.” That was one of the by-products of the disclosure that I was not anticipating.

Another one was a contractor employee who charged a Government contract for 442 hours of viewing sexually explicit material. I mean that is a *lot* of time. In another case, a company goes out and hires a new head of contracts. To generate more business, he falsely qualifies them as a small business and encourages the staff to substitute lower quality electric parts. Another case, that is part of an ongoing criminal investigation, involved an employee found to have stolen \$400,000 in Government-owned equipment. Another disclosure involved an employee who was found to have pawned Government property that he was stealing.

In another case, that was exactly what we were seeking, the disclosure revealed inadequate testing of the parts and failure of certain parts to meet contract specifications—something we would not otherwise identify with the limited inspections the Government is able to do in many cases. Normally, we only find out about such defects if the contractor chooses to alert us or if the part fails. Another case involved false testing reports on concrete used in foundations. Another one featured employees who received gifts and passed sensitive information to a subcontractor. While that situation really involves the employee cheating his employer, it is still a federal violation and something that may cost the Government money. We want it disclosed.

Another disclosure involved a contractor that was already under investigation. They found other indications of stuff regarding bribery by a subcontractor of some of its employees and purchases diverted to other uses. The company disclosed that, even though it was under investigation for different things. Another one was a Berry Act disclosure.<sup>14</sup> What made it significant was the prime contractor—the subcontractor was the Berry Act violator—may well have made efforts to conceal the violation. Finally, an employee received commissions for awarding subcontracts; a manager of the company had a financial relationship with a competitor and had solicited kickbacks from a subcontractor. These are matters that we should be acting on and ones we should be concerned about.

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<sup>14</sup> 10 U.S.C. § 2533a (2006).



The other day at a conference on the rule, I heard an argument from a lawyer who claimed, “Oh, all this would have been disclosed anyway.” He was talking about one of the big top three defense contractors. I said, “Well, do you think they would have disclosed the case you and I worked on together?” (I won’t tell you the details of that case, but it involved a chief financial officer and a president of the company.) Something we have to be realistic about in terms of this rule is that it is not easy inside a company to make disclosure; it is sort of foreign to their way of doing work—it often requires them to take action against their employees, and the higher up, the harder it is.

After the rule was final a few in the Government said, “Well, we’d better get ready. It’s December 13th and we’re going to get an avalanche of disclosures.” I said, “Guys, it’s not going to work that way. It’s going to take time for people to understand.”

## VII. Conclusion

I want to give you one concrete example revealing why this rule was a good idea. It happened only three weeks ago. I was in an interview with an FBI informant, who is still with the contractor at a very high level, asking him about the contract fraud. I go through his background and the contract provisions that he says were being violated. He says, “You know, when I realized we were doing this, I went to the president and I told him about this new rule.” I said, “What rule?” This is not a contract professional. This is an executive—a vice president in a company delivering services to the Government. He said, “This rule that requires you to make disclosure,” and I said, “Well that’s interesting, and what did the president say?” “Well he said he was going to go get the lawyer to look at it.” “Okay, what did he do?” “He got the company lawyer to look at it.” I said, “Now you can’t tell me what the lawyer said because that’s covered by the privilege, but what happened next?” “Well he then decided he needed to get a consultant.”

It is that sort of thing that we wanted to empower—right-thinking people in companies because it is not just one person that commits this kind of behavior. It is usually a group of them. All we need is one to speak up and empower that company; and for him to alert his employer that there is an obligation to disclose and that there is a risk if one does not. This was an important objective of this rule.

At the end of the day, it is going to be a team effort, not just the Justice Department and IGs. It is going to be a team effort with regard to the support of the acquisition community because the disclosures are going to be made to contracting officers. We want the disclosures made to contracting officers so they know about it and so they are in a position to do something about it in real time, as opposed to waiting three or four years.

What I hope I have accomplished today is to suggest to you that there is a deeper mission that really will require your support and your help to apply the rule effectively, reasonably, and fairly.

Thank you very much.

**THE SIXTEENTH HUGH J. CLAUSEN  
LECTURE IN LEADERSHIP<sup>1</sup>**

TERESA A. SULLIVAN\*

Thank you, General Miller, for your introduction. I'm grateful for this opportunity to speak to you during your conference. For those of you who have come from out of town, I hope you have enjoyed your week in Charlottesville.

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\*Teresa A. Sullivan is the eighth President of the University of Virginia. She was elected to the post on 11 January 2010 and assumed office on 1 August 2010. Prior to that, President Sullivan served as the Provost and Executive Vice President for Academic Affairs at the University of Michigan. She was also Professor of Sociology in the College of Literature, Science, and the Arts. From 2002 to 2006, President Sullivan served as Executive Vice Chancellor for Academic Affairs for the University of Texas System. In that role, she was the Chief Academic Officer for the nine academic campuses within the University of Texas System. President Sullivan first joined the University of Texas at Austin in 1975 as an instructor and later became an assistant professor in the Department of Sociology. From 1977 to 1981, she was a faculty member at the University of Chicago. She returned to Texas in 1981 as a faculty member in Sociology and was named to the Law School faculty in 1986. President Sullivan also held several administrative positions at the University of Texas, including Vice President and Graduate Dean (1995–2002), Vice Provost (1994–1995), Chair of the Department of Sociology (1990–1992), and Director of Women's Studies (1985–1987).

President Sullivan's research focuses on labor force demography, with particular emphasis on economic marginality and consumer debt. The author or co-author of six books and more than fifty scholarly articles, her most recent work explores the question of who files for bankruptcy and why. President Sullivan has served as chair of the U.S. Census Advisory Committee and is a past secretary of the American Sociological Association and a fellow of the American Association for the Advancement of Science. A graduate of James Madison College at Michigan State University, Ms. Sullivan received her doctoral degree in sociology from the University of Chicago.

<sup>1</sup> This is an edited transcript of a lecture delivered on 7 October 2010 by President Teresa A. Sullivan to attendees of the Judge Advocate General's Corps's World-Wide Continuing Legal Education conference, members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 59th Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General (TJAG), U.S. Army, from 1981 to 1985 and spent over thirty years in the U.S. Army before retiring in 1985. His distinguished military career included assignments as the Executive Officer of The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood, Texas; Commander, U.S. Army Legal Services Agency and Chief Judge, U.S. Army Court of Military Review; The Assistant Judge Advocate General; and, finally, TJAG. On his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

I'd like to begin today by saying an emphatic thank-you to all of you for your service to our nation. You serve as attorneys, judges, judge advocates, and in other roles in the JAG Corps. You serve in various regions across the nation and all over the world. At least two officers in the audience today came to Charlottesville straight from assignments in Afghanistan and Iraq. I understand that most of you here today have served overseas in support of the wars in Afghanistan and Iraq in the last eight years, or you will be leaving to serve there soon.

The common denominator for all of you is your decision to choose a career based on service. This decision exemplifies the deepest form of patriotism and personal commitment to defending democracy and freedom. All of us who enjoy the benefits of national security and the everyday freedoms that come with it are grateful to you.

I was asked to speak to you this morning on the topic of leadership. It seems a little ironic. I think most of you could probably teach me a thing or two about leadership. "Leadership" is a word that can mean different things in different contexts. It can mean different things to people who work in different jobs.

I work in higher education; you work in the U.S. military. I have leadership responsibilities as a university president; you have leadership responsibilities as high-ranking Army officers. But we have different internal structures and different constituents. We have different missions and day-to-day goals. So, does the word "leadership" mean the same thing to us?

I think it does, because the principles of effective leadership transcend the boundaries of various occupations or disciplines. They transcend the military/non-military divide. The principles of effective leadership remain true across national borders and diverse industries.

I've developed some ideas about leadership during thirty-five years of work in higher education. I began my career as a sociology instructor at the University of Texas in 1975. Later, I moved into administrative work, though I continued to teach and do research, taking on greater and greater levels of responsibility, and eventually becoming the Executive Vice Chancellor for Academic Affairs for the University of Texas System. Just before coming to UVA, I was Provost and Executive Vice President for Academic Affairs at the University of Michigan where,

besides being Chief Academic Officer, I was also the Chief Budget Officer.

During those three-plus decades in higher education, I've learned a lot about human nature—the human nature of faculty members, in particular—and I've also learned some lessons about motivating and leading people. Along the way, I've come to understand and appreciate some of the fundamental concepts of strong leadership. Those are the concepts I'll talk about for the next several minutes.

The first concept: Know your mission. The word “mission” has special resonance in military circles, but it holds meaning for all of us in leadership roles. In order to lead effectively, we need to know what we're leading toward, or, in some cases, what we're leading away from.

Developing a clear sense of mission, and communicating it clearly to your colleagues, is the first step toward strong leadership. The next step is to live your mission, day in and day out. Let the mission guide your thinking. Let it inform every decision you make.

A strong mission statement can help guide your mission. As you know, just about every company, non-profit organization, church, and bowling league in America has a mission statement. The U.S. Army has a mission statement, of course. The mission statement posted on the Army website reads this way: “The Army's mission is to fight and win our Nation's wars by providing prompt, sustained land dominance across the full range of military operations and spectrum of conflict in support of combatant commanders.”<sup>2</sup>

Fight and win. Now that's a mission that everyone can understand.

The University of Virginia has a “statement of purpose,” which is just another name for a mission statement. It reads like this:

The central purpose of the University of Virginia is to enrich the mind by stimulating and sustaining a spirit of free inquiry directed to understanding the nature of the universe and the role of mankind in it. Activities designed to quicken, discipline, and enlarge the

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<sup>2</sup> *Organization*, U.S. ARMY, <http://www.army.mil/info/organization> (last visited Nov. 18, 2010).

intellectual and creative capacities, as well as the aesthetic and ethical awareness, of the members of the University and to record, preserve, and disseminate the results of intellectual discovery and creative endeavor serve this purpose.<sup>3</sup>

That's not quite as concise as the Army's mission statement—you know, academics never like to use ten words when they can use 100—but the statement of purpose does give the members of our University community a declaration of mission in words we can all understand.

The University's Health System has a nice, simple mission statement. Its mission is "to provide excellence and innovation in the care of patients, the training of health professionals, and the creation and sharing of health knowledge."<sup>4</sup> That statement gives everyone who works in our Health System a sense of individual purpose and also a shared ambition. A good mission statement is like a compass: it keeps everyone on your team pointed in the right direction.

A second step for effective leadership: Know your priorities. I'm sure all of you are familiar with the military concept of "commander's intent." The commander's intent is a concise written expression of the purpose of a military operation and the desired end state of the operation.

By nature, the commander's intent is more specific than a mission statement. It's less about a broad vision and more about a very specific, finite objective. Its purpose is to help soldiers in the field prioritize their decision-making so the results align with what the commander hopes to achieve.

The commander delivers the message of intent at the outset of the operation, and it doesn't change or fluctuate throughout the course of the engagement. Now, as all of you know much better than I do, it can be hard to lay out a strategy and stick with it throughout a military engagement. So many things can change: the enemy can surge forward or back off; reinforcements can arrive; the weather can shift; other variables can change.

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<sup>3</sup> UNIV. OF VA., STATEMENT OF PURPOSE AND GOALS (1985), *available at* <http://www.virginia.edu/statementofpurpose/purpose.html>.

To allow for these fluctuations, the commander's intent is usually a fairly simple statement, with just enough vagueness to allow for interpretation—something like this: “Rapidly defeat remaining enemy forces and establish a covering force within 24 hours.”

A simple statement of the commander's intent allows individual officers in the field to make their own decisions about the best way to meet the commander's expectations. If identifying priorities is an important part of leadership, the commander's intent is a good example of how to identify and communicate priorities.

College and university presidents would probably be wise to issue something like the commander's intent each semester to rally the troops in the faculty. We may never go into combat, but a clear statement of our priorities and exactly what we hope to accomplish could benefit everyone in the university.

Since this is my first semester, I have made it a point to talk about my three top priorities with every audience in my speeches around Grounds this semester. It's not quite as concise as a commander's intent, but it does convey to members of the audience how I'm spending my time and why I think that's important.

A third concept: Know the difference between “urgent” and “important.” This is related to knowing your priorities, of course. Your priorities will always remain important. Urgent matters come and go as various crises come and go.

Every day we are forced to balance matters of urgency with matters of importance. We need to stay focused on important matters even as we are forced to contend with urgent matters that demand immediate attention. And we have to find a way to not let the important things suffer for the sake of resolving the urgent things.

Knowing the difference of what's urgent as compared to what's important can help you determine and balance your short- and long-term goals. Take care of urgent matters in the short term, but keep your eye fixed on the important things for the long-term.

As leaders, we have a tendency to want to keep urgent matters to ourselves until they're fully resolved. We have to learn to delegate urgent items to our capable colleagues so we can keep our eyes on

what's important. As President, I try to share urgent items with vice presidents and deans, when possible, so I can stay focused on long-term, important items. If you're surrounded by good people, let them help you with the urgent matters that come up.

From time to time, one or more of your long-term, important priorities may shift to urgent because of a sudden crisis that arises. Budgetary constraints or other financial crises can often force our priorities from the "important" category temporarily into the "urgent" category. But we should never abandon what's important for the sake of what's urgent. Keeping tabs on what's important is akin to knowing your mission. We call this "sticking to our guns."

Another leadership concept: Be aware of your blind spots. In other words, you need to know what you don't know, accept that you can't possibly know everything about your organization, and encourage your colleagues to help you fill in the gaps.

As a brand-new university president—I'm new to being President, new to UVA, new to the Commonwealth of Virginia—I know there's still a lot that I don't know about Virginia, this University, and its people, culture, and traditions. I've asked my colleagues in the administration for help. I've asked my vice presidents, deans, and staff to help me watch out for landmines and to steer me in a different direction if I'm about to step on one. In exchange for this favor, I have promised them this: I'll never shoot the messenger who brings bad news.

It can be hard to share bad news, especially if you're sharing it with someone who's higher in the chain of command than you are, but the peril of not sharing bad news can be catastrophic. Let me tell you a story that illustrates this point. It's a story I told to my staff at one of my first meetings with them. As you know, I spent many years at the University of Texas at Austin where there's an excellent group in social psychology who, for many years, have studied the black box tapes that are retrieved when an aircraft crashes. One of the things they're looking for is the extent to which the interactions among the crew may have contributed to the eventual crash.

They told me about one particularly grim incident that occurred on an Asian airline, with a Japanese pilot and a Japanese crew. Everybody in the crew, except the pilot, knew that they were going to miss the runway and end up in Tokyo Bay, but because of the norms of the



culture, it was not appropriate to directly confront the captain with this news. So, instead they tried to find more indirect ways to suggest to him that it was a good time to review the instruments, and they began with a series of suggestions. “Honorable Captain, please consult the altimeter,” and so on. These conversations got increasingly urgent, but the captain never got the message. The crew and all the passengers died in the crash. So what I said to my staff was just come in my office and say “Captain”—and I’ll know what you mean. By the way, this same team of researchers found that if there had been just one American on the crew, this reluctance to speak up would not have happened because our culture says that we expect to shout out when we see something bad on the way.

However, it is true that in a bureaucracy, sometimes that engrained cultural habit we have of speaking up gets muted because we’re afraid of what will happen to us if we speak up. So, you need to keep your subordinates well aware that bringing you bad news is a good thing to do and not something that you’ll be punitive about.

We need to create cultures so that colleagues at every level are willing to share bad news, as hard as it may be to do that. It is a maxim of organizational studies that good news travels quickly, and bad news has a hard time traveling up. The deference to superiors in the military chain of command may create a culture of reticence. That can be dangerous. We all know that bad news can turn into worse news if it doesn’t get reported promptly.

Managing change is another facet of effective leadership. As Army officers, you know plenty about change. You are regularly reassigned and moved around; you may rarely stay settled in one place for more than two years or so. The Army itself is in a period of transition and organizational change.

I’ve experienced a lot of change since January, when I was elected UVA’s eighth President. My husband Doug and I have moved from Ann Arbor to Charlottesville, settled into the President’s house at Carr’s Hill, and taken up our respective duties—mine in the President’s office and Doug’s in the Law School, where his teaching and research focuses on religious liberty law and remedies.

It’s natural to want to hit the ground running when you start a new job, but I think there’s a reason God gave us two ears and one mouth. It

was an indication we should listen twice as much as we talk. It's important to open your ears before you open your mouth. Do a lot of listening, and educate yourself aggressively.

I started as President on 1 August. Since then, I've participated in a lot of meetings—with students; with faculty members; with foundation boards; with deans and vice presidents; with our athletics department; with our colleagues at the University of Virginia's College at Wise which is located in southwest Virginia; with alumni here in Virginia and on the West Coast; with the Governor, the Secretary of Education, and all state agency heads; and with Virginia's legislators in their home offices all over the Commonwealth and also in Washington, D.C. The end result is that I still don't know everything about UVA and Virginia, but I know a lot more than I did two months ago. I also know more about what I don't know—those blind spots I mentioned earlier—and I understand where I need help filling in gaps in my own knowledge.

Our Board of Visitors, as part of my annual evaluation plan, has asked me to build a set of developmental objectives for those areas that are blind spots or areas I don't know so much about, so that I can lay out a consistent plan for attacking those blind spots and learning more about them. In the mean time, what I need to do is be aware that those are areas where I don't know enough and may make a mistake if I move too quickly or without enough consultation.

For those of us who aren't in the military, part of managing change is figuring out how to motivate colleagues when you have no real penal authority or discipline power over them. Faculty members who have tenure are sometimes resistant to change. When they have tenure, why should they change? Well, if you don't have a stick, you have to use the carrot. You have to help your people understand how they will benefit from the changes you want to lead.

One of my early priorities as President is to reconfigure our internal budgeting. The University's internal budget functions are opaque to just about everyone. I want to create a new budget model for all of our schools that will bring more transparency and more predictability. But the current budget model has been in place for a long time, so I expect some natural resistance to changing it. The trick for me is to show why a new budget model will be better for everyone, even if, as all change does, it brings some consequences that people don't like.

Part of the challenge of effective leadership is establishing an institution-wide culture of leadership at every level. Most of you report to a commanding officer, and you have junior officers who report to you. I report to a Board of Visitors, and I have vice presidents and others who report to me. But those of us who sit in the command post or the executive office are often far removed from the institution's day-to-day activities.

The people on the front lines are much closer to the action, and they sometimes see things that their leaders may be missing. It's important to create a culture of leadership that permeates the entire organization so the front-line people are encouraged to speak up and empowered to act when that is appropriate. A good commanding officer will challenge junior officers to share their opinions. A good president does the same thing with vice presidents, deans, and staff. This encourages a kind of "trickle-up" leadership that includes everyone at every level. It builds a stronger organization from the ground up.

I'm also a firm believer in managing by walking around. I spend a lot of time showing up sometimes unexpectedly in places around Grounds just to see how things are working or maybe to see how they would be experienced from the student's point of view. That's also an important opportunity for me to catch our employees at their best and to congratulate them on doing a good job. I consider it not a very good day in the President's office if I've not been able to say to at least five people, "You're doing a good job at that." That's something that's important to say.

There's a line about leadership from a John F. Kennedy speech that was never delivered in public, because the line is from the speech that he was scheduled to deliver in Dallas on the day he was assassinated. Kennedy's motorcade was en route to the Dallas Trade Mart, where he was scheduled to speak to a gathering of the Dallas Citizens Council. The Graduate Research Center of the Southwest located at the University of Texas-Dallas co-sponsored the event. In his prepared remarks, Kennedy was planning to salute the Council and the Center for representing the best qualities of leadership and learning in the city. "Leadership and learning are indispensable to each other,"<sup>5</sup> were the words he planned to say.

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<sup>5</sup> President John F. Kennedy, Remarks Prepared for Delivery at the Trade Mart in Dallas (Nov. 22, 1963) (undelivered speech), *available at* JOHN F. KENNEDY PRES. LIBR. &

In spite of that sad association with President Kennedy's death, those of us in leadership positions can take a lesson from that line in the last speech he ever prepared. To lead effectively, we have to be willing to learn constantly, all our lives.

Thomas Jefferson, UVA's founder, described what he called "the important truths that knowledge is power, that knowledge is safety and that knowledge is happiness."<sup>6</sup> Those words are still important, and still true, today.

Learning is the foundation of leadership. Life-long learning creates life-long leaders. This idea fits appropriately with the continuing legal education conference that has brought all of you together this week, so I'll close with that thought.

I appreciate being invited to speak to you today, and I hope the remainder of your conference is productive and enjoyable.

Thank you.

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MUSEUM, <http://www.jfklibrary.org> (highlight "Research" and select "Ready Reference"; then select "Selected Speeches of John F. Kennedy"; then follow "Remarks Prepared for Delivery at the Trade Mart in Dallas, November 22, 1963" hyperlink) (last visited Nov. 18, 2010).

<sup>6</sup> SAMUEL EAGLE FORMAN, *THE LIFE AND WRITINGS OF THOMAS JEFFERSON* 200 (1900).

**THE GAMBLE: GENERAL DAVID PETRAEUS AND THE  
AMERICAN MILITARY ADVENTURE IN IRAQ, 2006–2008<sup>1</sup>**

REVIEWED BY MAJOR JEROME P. DUGGAN\*

*You got to know when to hold 'em, know when to fold  
'em, know when to walk away, and know when to run.<sup>2</sup>*

*We were dealt a real shitty hand, but we've played it to  
the best of our ability.<sup>3</sup>*

I. Introduction

Thomas Ricks's *The Gamble* is the sequel to his acclaimed *Fiasco: The American Military Adventure in Iraq*.<sup>4</sup> *The Gamble* picks up where *Fiasco* left off, in 2005, and chronicles the dynamic period before, during, and after the great personnel turnover and "surge" that rendered the Iraqi Theater of Operations a securer, but still challenging, environment. This book is a recommended read for military officers, including judge advocates, for its insight into the fundamental cultural changes at the highest echelons of the U.S. military, as well as its illumination of effective leadership's profound effect on the modern battlefield. However, at the end of the book, readers must decide for themselves whether the United States succeeded in its gamble and whether Ricks succeeded in his *Gamble*, as both have their successes and failures.

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<sup>1</sup> THOMAS E. RICKS, *THE GAMBLE: GENERAL DAVID PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2009).

<sup>2</sup> KENNY ROGERS, *The Gambler*, on *THE GAMBLER* (United Artists 1978).

<sup>3</sup> RICKS, *supra* note 1, at 149 (quoting Colonel (COL) Peter Mansoor, General Petraeus's close advisor during his tenure as Commander, Multi-National Forces–Iraq).

<sup>4</sup> THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2006). The book was a finalist for the Pulitzer Prize in the category of General Nonfiction in 2007. *General Nonfiction*, THE PULITZER PRIZES, <http://www.pulitzer.org/bycat/General-Nonfiction> (last visited Aug. 31, 2009). For differing viewpoints on the planning and early execution of Operation Iraqi Freedom, see generally BOB WOODWARD, *PLAN OF ATTACK* (2004) and RORY STEWART, *THE PRINCE OF THE MARSHES: AND OTHER OCCUPATIONAL HAZARDS OF A YEAR IN IRAQ* (2006).

## II. Going “All-In” with the Surge

Ricks begins the book with the alleged 19 November 2005 massacre of Iraqi civilians in Haditha, identifying it as the putative nadir of Operation Iraqi Freedom (OIF).<sup>5</sup> Although Haditha seemed to have limited strategic impact for U.S. forces, it spurred a changing of the guard at the highest levels of the U.S. military that would set conditions for implementation of a completely new strategy in Iraq: the surge. Within eighteen months, Donald Rumsfeld, Zalmay Khalilzad, General (GEN) Peter Pace, GEN John Abizaid, GEN George Casey, and Lieutenant General (LTG) Peter Chiarelli would be replaced with Robert Gates, Ryan Crocker, Admiral (ADM) Michael Mullen, ADM William “Fox” Fallon, GEN David Petraeus, and LTG Raymond Odierno.<sup>6</sup>

Throughout 2006, GEN (Ret.) Jack Keane and LTG Raymond Odierno waged a personal war to reverse the accelerating downward spiral of OIF through a wholesale overhaul of U.S. strategy. Lieutenant General Odierno realized as the incoming Multi-National Corps–Iraq (MNC–I) commander that he was being handed the game plan for a losing effort. With the assistance of a brain trust of civilian and military advisers in the United States and Iraq, GEN (Ret.) Keane and LTG Odierno developed the change in strategy now known as the surge.<sup>7</sup>

Ricks demonstrates that the surge was not simply the addition of five brigade combat teams in Iraq. Instead, it represented a complete change, focusing resources on protecting the populace (including marginalized Sunnis) and premised on new doctrine and successful counterinsurgency (COIN) campaigns waged by the 3d Armored Cavalry Regiment in Tal Afar and the 1st Armored Division in Ramadi.<sup>8</sup> This new strategy was borne of bright, powerful people at Washington, D.C. think tanks, at the Combined Arms Center in Fort Leavenworth, Kansas, and the Corps

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<sup>5</sup> “What happened that day in Haditha was the disturbing but logical culmination of the shortsighted and misguided approach the U.S. military took in invading and occupying Iraq from 2003 through 2006.” RICKS, *supra* note 1, at 5. Despite the moral outrage Ricks reports, to date no Marines have been found guilty at court-martial for the alleged offenses. *Case Dropped Against Officer Accused of Killings*, N.Y. TIMES LATE ED., June 18, 2008, at A9.

<sup>6</sup> RICKS, *supra* note 1, at 115, 128.

<sup>7</sup> *Id.* at 91–24.

<sup>8</sup> These units’ experience under COLs H.R. McMasters and Sean MacFarland, respectively, contributed two major points to Lieutenant General (LTG) Odierno’s strategy: secure the populace and use the Sunni population marginalized by the Maliki government to assist in security. RICKS, *supra* note 1, at 59–60.

Headquarters in Baghdad. Interestingly, Ricks highlights for the reader that two major elements of the chain of command—Multi-National Forces–Iraq (MNF–I) and Central Command (CENTCOM)—were obstinately opposed to the surge.<sup>9</sup>

With the correct team in place from Robert Gates down and the surge resourced, President Bush authorized its execution. Ricks relates the surge’s successes and pitfalls between 2007 and 2008 through the eyes of the generals running the war, as well as the junior leaders and enlisted Soldiers who executed it at the tactical level.<sup>10</sup> In late 2008, with the surge’s goal of increased security attained, LTG Odierno and GEN Petraeus were promoted to new positions in the CENTCOM Area of Responsibility. Despite the increased stability at that time, Ricks reveals that U.S. military leaders and planners were still weary of a Baghdad government unwilling or unable to take necessary political steps to ensure long-term stability.<sup>11</sup> As in *Fiasco*, Ricks concludes the book with a myriad of U.S. leaders’ forecasts of OIF’s future, including a widely held estimate that U.S. forces would be in combat on Iraqi soil through 2015.<sup>12</sup> Ricks gives no prescient conclusions about how the war will end, but even military leaders strongly disagree over how and when the U.S. involvement should cease.<sup>13</sup>

### III. Analysis: Does Ricks Understand Military No Limit Hold ’Em?

#### A. Ricks Knows the Betting Basics

The title of the book might suggest a relatively sterile account of one general’s military strategy. However, the extensive “Cast of Characters”<sup>14</sup> immediately dispels that notion by highlighting the monumental effort to shift course on the counterinsurgency strategy. The surge was not merely one individual’s initiative but the culmination of work by a diverse collection of leaders at various organizations who came together to create a sea change in U.S. strategy. The manner in

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<sup>9</sup> *Id.* at 104.

<sup>10</sup> *Id.* at 149–93.

<sup>11</sup> *Id.* at 296.

<sup>12</sup> *Id.* at 325.

<sup>13</sup> Michael R. Gordon, *Declare Victory and Depart Iraq, U.S. Adviser Says*, N.Y. TIMES, July 31, 2009, at A1.

<sup>14</sup> RICKS, *supra* note 1, at xv.

which Ricks consolidates this information in a “character-driven” book makes for an engaging and enlightening read.

Ricks’s strengths as a writer are also the hallmarks of a good human intelligence source: placement and access.<sup>15</sup> As a correspondent for the *Washington Post*, Ricks attended relevant briefings in Baghdad and interviewed key characters in the book, including GEN Petraeus and LTG Odierno.<sup>16</sup> Many interviews revealed stunning opinions held by other high-ranking military officers of both generals.<sup>17</sup>

The focus on characters involved with the surge—rather than on the substance of the policy—is not just a literary device; it is critical to understanding the surge’s success. As Ricks explains, the surge was a byproduct of a radical change in the culture of military leadership. He states, “For more than a decade, the Army had been led by post-Cold War officers . . . . Now a new generation of generals was emerging, the leaders of the post-9/11 Army.”<sup>18</sup>

Ricks’s observation that the surge’s success owed as much to leadership as it did to new doctrine is a key lesson for military readers. Any Soldier can read *Field Manual 3-24*<sup>19</sup> and an operations order; however, only a commander with the right leadership traits<sup>20</sup> and

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<sup>15</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS para. 1-19 (6 Sept. 2006) [hereinafter FM 2-22.3].

<sup>16</sup> “The foundation for this book, and the source of most of the quotations that appear in it, is a series of interviews I did in Baghdad and Washington, D.C. over the course of 2007 and 2008 with Gen. Petraeus, Gen. Odierno, and scores of their key staffers and commanders.” RICKS, *supra* note 1, at 373. Ricks incorporated into the book briefing materials obtained during his tenure in Iraq. *Id.* apps. A–D.

<sup>17</sup> See *id.* at 22–23, 130. Ricks relates thoughts from Brigadier General “Smokin’ Joe” Anderson:

“Odierno is more loyal to his people,” he concluded. “Sometimes if you move on from Petraeus, he will forget you. . . . It’s a little bit more about Dave than it is about Ray.” He also thought Odierno better suited for combat. “Odierno is a better war fighter than Petraeus. Petraeus is more the statesman.”

*Id.* at 130.

<sup>18</sup> *Id.* at 277.

<sup>19</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24]. This manual is the new Army doctrine on fighting a COIN campaign, and its tenets are the foundation of the surge.

<sup>20</sup> Ricks notes two of these: flexibility and force of will. RICKS, *supra* note 1, at 132–33. Field Manual 3-24 dedicates an entire chapter to leadership in COIN, emphasizing ethics and sound professional judgment. See FM 3-24, *supra* note 19, para. 7-1.



experience can successfully apply the doctrine and order to a dynamic battlefield.

A prevailing trait of the successful leaders described in the book was the collective ability to remain flexible and adapt to a dynamic battlefield.<sup>21</sup> Ricks focuses on this trait with impressive acumen. As Ricks explains, leaders willing to plan and execute the new doctrine eventually replaced leaders generally content to wage conventional war on an asymmetrical battlefield.<sup>22</sup> These new leaders were open to creative or unconventional solutions and did not merely surround themselves with like-minded sycophants. For example, GEN Petraeus and LTG Odierno recruited advisers who were, in many respects, outcasts or dissidents.<sup>23</sup> Commanders' openness to contrary views and their willingness to apply lessons learned across the battlefield ultimately aided their success.<sup>24</sup>

Ricks's distinctive analysis of various commanders' leadership qualities is perhaps this book's greatest feature. *The Gamble's* real-world account of successful commanders leading in the field and the lessons they learned in battle provides critical insights that military officers at all levels and in all disciplines could benefit from studying. As Roger Nye writes, "[B]y focusing on command, the military student is encouraged to consider every aspect of military operations and strategy."<sup>25</sup>

Judge advocates in particular can garner much from Ricks's analysis. The complex COIN fight has dictated that commanders depend

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<sup>21</sup> "[F]lexibility as applied to military leadership might be defined as being open to change as an opportunity and having a tolerance for ambiguity; adjusting rapidly to new or evolving situations; applying different methods to meet changing priorities." RICKS, *supra* note 1, at 132 (quoting COL H.R. McMaster) (internal quotation marks omitted).

<sup>22</sup> Ricks provides an interesting case study on LTG Odierno, who adapted himself from a conventional thinker with an artillery background in 2004, to an exemplary counterinsurgent in 2007. *Id.* at 107–14.

<sup>23</sup> *Id.* at 140–48. One of LTG Odierno's most trusted advisors was Emma Sky, "a small, fiercely anti-war British expert on the Middle East." *Id.* at 140. He referred to her as his "insurgent." *Id.* at 147. General Petraeus had his own trusted "insurgents" in David Kilcullen and Sadi Othman. *Id.* at 140–45.

<sup>24</sup> *Id.* at 133–48.

<sup>25</sup> ROGER H. NYE, *THE CHALLENGE OF COMMAND 16* (First Perigree ed., 2002). Nye goes on to write, "It is in the mind of the commander that all specialization, personalities, doctrines, and missions must be integrated into some pattern of united effort. The study of command entails the study of all military life." *Id.*

increasingly on their judge advocates. In fact, *Field Manual 3-24* devotes an entire appendix to legal issues.<sup>26</sup> Command reliance on judge advocate support in the current environment is historically unmatched, and judge advocates must be attuned to the needs of military leadership and the constantly evolving battlefield.<sup>27</sup> Critically, while judge advocates must assist commanders in legally meeting their intent, legal advisors must often also act as the staff “dissident” or honest broker. *The Gamble* teaches that contrary viewpoints from staff members, while not always welcome on their face, are necessary for mission accomplishment.<sup>28</sup>

#### B. But Ricks Overplays His Hand

Unfortunately, Ricks fails to give a balanced or complete account of the commanders whom the administration replaced through 2006 and 2007. This failure erodes the credibility of Ricks’s accounts of their incompetence and deprives readers of valuable lessons learned. Had Ricks interviewed a single high-ranking military leader from the 2005–2006 time span, his account might have had more journalistic integrity and been more accurate. However, a study of Ricks’s sources reveals that he failed to interview Gen Pace, GEN Abizaid, GEN Casey, or ADM Fallon for his book.<sup>29</sup> Considering their collective leadership experience and their apparent resistance to the surge, their points of view are an essential component of a balanced account of the strategy.

Interestingly, Ricks’s failure to interview these former commanders is symptomatic of a larger issue with *The Gamble*: an absolute failure to fairly evaluate the surge against the prior strategy. Ricks writes that GEN Casey’s campaign plan essentially focused on the protection of U.S. servicemembers at the expense of the civilian population. In doing so, Ricks mentions only one officer, a former battalion commander, who

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<sup>26</sup> See FM 3-24, *supra* note 19, app. D.

<sup>27</sup> See generally U.S. DEP’T ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY paras. 1-3, 1-4 (15 Apr. 2009) (“The judge advocate’s role in support of military operations . . . has changed dramatically. . . . Judge advocates serve at all levels in today’s operational environment and advise commanders on a wide variety of operational legal issues.”).

<sup>28</sup> See generally RICKS, *supra* note 1, at 146 (discussing a disagreement between Emma Sky and LTG Odierno’s staff on the release of gun camera footage).

<sup>29</sup> *Id.* at 373–82.

asserts the opposite.<sup>30</sup> Additionally, Ricks's own reporting during 2006 contradicts *The Gamble's* implication that U.S. forces at the time huddled in massive bases focused solely on self-preservation.<sup>31</sup> This willful ignorance of counterinsurgency successes of years past severely undercuts his apparent endorsement of the surge and those who executed it.

#### IV. Conclusion: Ricks Breaks Even

“Tell me how this ends.”<sup>32</sup> General Petraeus asked this question in 2003 regarding Iraq, and Thomas Ricks asks the same question at the end of *The Gamble*. But just as readers cannot fault GEN Petraeus for not having an answer, neither can they fault Ricks. Both of them achieved some of their goals, while others remained elusive. Ricks's access to the book's “Cast of Characters” is unparalleled and affords readers a window into exclusive military headquarters and civilian planning institutions at the highest levels. However, *The Gamble's* account of the surge and previous strategic failures is clearly biased, and it loses credibility because of it. Nevertheless, it is a recommended read for military officers, including judge advocates, for its insights into current military leaders and its descriptions of effective leadership techniques. One simply must forgive a subtle bias in the writing to enjoy this entertaining read.

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<sup>30</sup> *Id.* at 217–18.

<sup>31</sup> See Thomas E. Ricks, *In the Battle for Baghdad, U.S. Turns War on Insurgents*, WASH. POST, Feb. 26, 2006, at A1. Ricks wrote this article at a patrol base southwest of Baghdad, not at a major forward operating base such as Liberty or Victory, where troops were attempting to secure a “fault line between Sunni Iraq and Shiite Iraq . . . likely [to] be a flash point for a civil war.” *Id.* Referring to the forces fighting in this area, Ricks wrote, “Following counterinsurgency doctrine, [the Brigade Commander] doesn't want to take areas and then leave them. So he moves his forces slowly, first establishing a checkpoint, then conducting patrols to study the area and its people, and then, after a pause, pushing his front line half a mile forward and putting up another checkpoint.” *Id.*

<sup>32</sup> RICKS, *supra* note 1, at 134.

**OUTLIERS: THE STORY OF SUCCESS<sup>1</sup>**REVIEWED BY MAJOR DANISHA L. MORRIS<sup>\*</sup>

*To build a better world we need to replace the patchwork of lucky breaks and arbitrary advantages that today determine success . . . with a society that provides opportunities for all.*<sup>2</sup>

**I. Introduction**

An outlier is defined as “something that is situated away from or classed differently from a main or related body.”<sup>3</sup> In this book, the term outlier is used to describe men and women who have managed extraordinary successes,<sup>4</sup> men like Bill Joy, who has been called “one of the most influential people in the modern history of computing.”<sup>5</sup> Contrary to popular belief, outliers don’t reach astronomical success simply because they are somehow better, smarter, more determined, or work harder than most. The true secret to extraordinary success, as successfully illustrated in *Outliers*, is, rather, that these individuals are “invariably the beneficiaries of hidden advantages and extraordinary opportunities and cultural legacies that allow them to learn and work hard and make sense of the world in ways others cannot.”<sup>6</sup>

Using case studies, interviews, and his own family history, Malcolm Gladwell examines these “hidden advantages”—cultural legacies, parentage, and when and where a person is born—and illustrates how they contributed to the success achieved by individuals chronicled in the book. In so doing, Gladwell succeeds where so many other authors who write on success have failed: He cleverly avoids coming across as another salesman, peddling the usual lists of “effective habits” and the promise of “self-help”<sup>7</sup> while simultaneously rejecting the concept of

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<sup>1</sup> MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (2008).

<sup>2</sup> *Id.* at 268.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 17.

<sup>5</sup> *Id.* at 36–37.

<sup>6</sup> *Id.* at 19.

<sup>7</sup> See, e.g., STEPHEN R. COVEY, *THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE*, PHEN (1989).

“self-made men”<sup>8</sup> that has captured the American imagination.<sup>9</sup> Instead, Gladwell uses each of the subjects in *Outliers* to challenge the traditional definition of success, asserting:

People don't rise from nothing. We do owe something to our parentage and patronage. . . . The culture we belong to and the legacies passed down by our forebears shape the patterns of our achievement in ways we cannot begin to imagine. It's not enough to ask what successful people are like, in other words. It is only by asking where they are *from* that we can unravel the logic behind who succeeds and who doesn't.<sup>10</sup>

In closing, Gladwell leaves the reader with an interesting thought: Success is “grounded in a web of advantages and inheritances, some deserved, some not, some earned, some just plain lucky . . . . The outlier, in the end, is not an outlier at all.”<sup>11</sup>

## II. The Author

Malcolm Gladwell, himself, is somewhat of an outlier, although he does not agree.<sup>12</sup> He was born in England, the son of a Jamaican, psychotherapist mother and an English, mathematics professor father.<sup>13</sup> Now the author of three New York Times best-sellers<sup>14</sup> and regarded as

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<sup>8</sup> See Frederick Douglass, Address at the Indian Industrial School in Carlisle, Pennsylvania: Self-Made Men (Oct. 17, 1859) (stating that the most successful of men are self-made and concluding that inheritances of convenience are, most often, hindrances to achievement).

<sup>9</sup> See, e.g., JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA (1931) (describing the American dream as “that dream of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement”); see also Jonas Clark, *In Search of the American Dream*, THE ATLANTIC (May 1, 2007), <http://www.theatlantic.com/magazine/archive/2007/05/in-search-of-the-american-dream/5921/#>.

<sup>10</sup> GLADWELL, *supra* note 1, at 19.

<sup>11</sup> *Id.* at 285.

<sup>12</sup> Jason Zengerle, *Geek Pop Star*, N.Y. MAG., Nov. 9, 2008, available at <http://nymag.com/arts/books/features/52014/>.

<sup>13</sup> *Id.*

<sup>14</sup> See generally *Biography*, GLADWELL.COM, <http://www.gladwell.com/bio.html> (last visited Sept. 4, 2009).

one of the most influential writers in business thought,<sup>15</sup> his personal journey to success is as much a testament to the theory underlying *Outliers* as the case studies he uses.

Gladwell did not set out to become a great writer. He studied history at the University of Toronto and ultimately wanted to work in advertising.<sup>16</sup> After graduating, however, Gladwell found himself the victim (or beneficiary) of “demographic luck”<sup>17</sup>—he could not find a job in advertising, so he accepted a job as a writer for the *American Spectator*.<sup>18</sup> The job at the *American Spectator* ultimately led to a position at the *Washington Post*, where Gladwell honed his skills as a business and science reporter and as chief of the New York bureau. Gladwell credits his time at the *Washington Post* with preparing him for his next job, a writer for the *New Yorker*. Gladwell believes the position at the *New Yorker* ultimately gave him his greatest opportunities.<sup>19</sup>

Gladwell’s inability to find a job in advertising, the kind of “lucky break”<sup>20</sup> Gladwell refers to in *Outliers*, paved the way for Gladwell’s success as a writer and public speaker. Because his books challenge organizations to think critically about social change in a way that sheds light on organizational success, they are “on the recommended reading list at many companies and business schools,” and he “has spoken at West Point and the National Institutes of Health, among many other institutions,” including the World Business Forum.<sup>21</sup>

Gladwell is obviously an intelligent and talented writer. However, the world may never have known his talent had he not been born into the right family at the right time.<sup>22</sup> Gladwell’s own success is a result of opportunity; he was introduced to the study of people by his

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<sup>15</sup> See, e.g., Danielle Sacks, *The Accidental Guru*, FAST CO. MAG. (Dec. 19, 2007), available at <http://www.fastcompany.com/magazine/90/gladwell.html?page=0%2C0>.

<sup>16</sup> Zengerle, *supra* note 12.

<sup>17</sup> See GLADWELL, *supra* note 1, at 129–39.

<sup>18</sup> Sacks, *supra* note 12.

<sup>19</sup> Zengerle, *supra* note 12.

<sup>20</sup> GLADWELL, *supra* note 1, at 56, 268.

<sup>21</sup> Rachel Donadio, *The Gladwell Effect*, N.Y. TIMES, Feb. 5, 2006, available at <http://www.nytimes.com/2006/02/05/books/review/05donadio.html?pagewanted=all>.

<sup>22</sup> See, e.g., Robert Colvile, *Outliers: The Story of Success*, DAILY TELEGRAPH (London), Dec. 13, 2008, at 23.

psychotherapist-mother, a writer in her own right,<sup>23</sup> and he could not get a job in advertising in 1968. Now, he is arguably, “the most successful journalist on the planet.”<sup>24</sup>

### III. Analysis

*Outliers* is an insightful compilation of stories about individuals who, by all accounts, are the leaders of their respective fields.<sup>25</sup> Although Gladwell personally conducted some of the interviews in the book, much of the information that forms the basis for his theory derives from other sources.<sup>26</sup> The book itself is divided in two parts: “Opportunity” and “Legacy.”<sup>27</sup> Each part lends credence to the theory that no one achieves success in a vacuum without the intervention of opportunity.

Part one of *Outliers*, appropriately subtitled “Opportunity,” opens with an examination of the birthdates of the elite Canadian Junior A hockey league.<sup>28</sup> While not apparent on the surface, Gladwell cleverly illustrates how skewed age distinctions create a situation where a hockey player born just after January 1st is forty percent more likely to develop into one of the best hockey players in the Canadian hockey league.<sup>29</sup> The potential success of this player is not necessarily based on natural talent, but, rather, may be due to “an enormous advantage in physical maturity” over the players he will play alongside in the next season.<sup>30</sup> Because he is bigger, he will be perceived as better and will be given additional coaching, playing, and practice time which, in turn, will make him better.<sup>31</sup> The “hidden advantage” a hockey player born after cut-off receives is the opportunity to become a better player through practice.

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<sup>23</sup> GLADWELL, *supra* note 1, at 283 (referencing a book his mother wrote in the 1960s entitled *Brown Face, Big Master* in which his mother described her experiences with racial discrimination).

<sup>24</sup> Colvile, *supra* note 22.

<sup>25</sup> GLADWELL, *supra* note 1, at 17.

<sup>26</sup> *Id.* at notes.

<sup>27</sup> *Id.* at contents.

<sup>28</sup> *Id.* at 15–29.

<sup>29</sup> *Id.* at 23–24 (nothing that January 1st is the cut-off date for age-class hockey in Canada).

<sup>30</sup> *Id.* at 24–25.

<sup>31</sup> *Id.*

Like physical ability, genius can also benefit from opportunities to “practice.” For example, Gladwell points out that Bill Joy, a distinguished computer scientist and co-founder of Sun Microsystems, happened to be born at the right time. In 1971, at the age of sixteen, he enrolled as an undergraduate at the University of Michigan. Until then, Joy had never worked with computers, and he intended to major in engineering.

That same year, the University of Michigan Computer Center, one of the best in the nation, opened, providing Joy with an opportunity for thousands of hours of programming “practice” as computer programming was changing from computer cards to time-sharing.<sup>32</sup> Had Joy entered the University of Michigan before 1971, his access to computers would have been, at best, very limited. Despite his genius, he likely would not have had the opportunity to “practice” programming, and his influence on modern-day computing, if any, would have been very limited. Joy, therefore, owes a big part of his success to the unique opportunity he was afforded.

*Outliers* does not suggest that a person can be successful without a baseline of intelligence and without hard work. On the contrary, Gladwell acknowledges the genius of outliers like Joy<sup>33</sup> and embraces the idea that true expertise in any given subject or profession takes about ten thousand hours of practice.<sup>34</sup> However, part one of the book succeeds in convincing the reader that, once a basic threshold of genius is reached, “extraordinary achievement is less about talent than it is about opportunity.”<sup>35</sup>

Part two of *Outliers*, “Legacy,” is the book’s greatest strength. It provides insight into the way cultural legacies, even centuries old, influence behavior and, ultimately, achievement. The stories Gladwell uses to illustrate his theories are entertaining, and his method is effective. At the outset colorful, historic family feuds are used to show that “[c]ultural legacies . . . persist, generation after generation, virtually intact . . . , and they play such a role in directing attitudes and behavior that we cannot make sense of our world without them.”<sup>36</sup> Gladwell also

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<sup>32</sup> *Id.* at 43–47.

<sup>33</sup> *Id.* at 37.

<sup>34</sup> *Id.* at 40.

<sup>35</sup> *Id.* at 76.

<sup>36</sup> *Id.* at 175.



provides real-world examples of how taking affirmative steps to confront the issues created by cultural differences, such as lack of proficiency in “aviation English” in the cockpit of an airplane, can save companies, like Korean Air, from the brink of self-destruction.<sup>37</sup> The broader premise of part two is that understanding cultural legacies can influence how we train and educate, regardless of cultural origin, providing opportunities for all.<sup>38</sup>

Often it is socially and morally repugnant to draw distinctions on the basis culture, because cultural distinctions usually invoke considerations of race and invariably imply a stigma of inferiority. To make matters worse, government programs that were enacted to alleviate some of the divide by providing opportunities to those who, otherwise, would have none, are viewed as “handouts” to racial minorities who are less than qualified and undeserving.<sup>39</sup> In *Outliers*, however, Gladwell does an excellent job of stimulating consideration for cultural legacies on a basis that does not imply inferiority. In fact, in two examples cited in *Outliers*, cultural consideration accentuates positive attributes that create opportunities that increase the chances of outlier success.<sup>40</sup>

#### IV. Conclusion

*Outliers* is a thought-provoking look at the way opportunity affects success. This concept is not novel; it is intuitive that a child born in a low-income neighborhood to drug-addicted parents is less likely to graduate high school than one born in an affluent family with access to private schooling. This is not necessarily because the former child is not as smart as the latter. Instead, it has more to do with the lack opportunities for positive reinforcement. However, most people tend to discount other, more subtle influences on the outcome of success, influences as simple as when someone was born and where he or she went to school.

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<sup>37</sup> *Id.* at 219.

<sup>38</sup> *Id.* at 224–85.

<sup>39</sup> See Progressive.org, Handouts, Entitlement, and Social Welfare (Dec. 17, 2007), <http://www.progressiveu.org/143635-handouts-entitlement-and-social-welfare>.

<sup>40</sup> See GLADWELL, *supra* note 1, at 116–60, 224–49 (stating that the children of Jewish dressmakers and Chinese rice farmers understand the value of meaningful work, a cultural advantage that many American children lack, and understanding meaningful work contributes to outlier-type success).

With the nation in an economic recession, opportunities for education, work, and entrepreneurship have dwindled. Moreover, as businesses have closed and foreclosures have increased, the nation's cultural divide, based primarily on socioeconomic disparity, has continued to deepen. We should strive for a way to provide opportunity to all who are willing to make the effort because, as the examples in *Outliers* demonstrate, "success follows a predictable course. It is not the brightest who succeed. . . . Outliers are those who have been given opportunities—and who have had the strength and presence of mind to seize them."<sup>41</sup>

In an ideal society, there would be no arbitrary advantages on the road to success. As much as possible, many microcosms of American society, such as the U.S. military where minorities represent one-third of the population,<sup>42</sup> have attempted to balance these advantages. Of course, equalizing advantages is a lot simpler to do in a structured environment, like the U.S. military, where there is one standard for everyone; despite cultural backgrounds everyone is given the opportunity to succeed.

On the other hand, how realistic is it to apply this concept to society as a whole? How do you bottle opportunity and make it available to all? Certainly, you can provide additional training aimed at leveling the playing field, but there is no way to ensure that if a job in advertising isn't available, the *American Spectator* will come calling. There are just some opportunities that cannot be equal. After all, aren't families started and business deals made on chance encounters, everyday? Can we really normalize opportunity?

At the very least, *Outliers* levels the playing field in one critical way: It leaves the reader with the certainty that anyone with a baseline intelligence, if given the opportunity, can become an outlier.

Maybe, that's the point.

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<sup>41</sup> *Id.* at 267.

<sup>42</sup> John Kruzen, *Military: Model of Diversity*, ARMED FORCES PRESS SERV., July 22, 2008, available at <http://www.army.com/news/item/4027>.