



# MILITARY LAW REVIEW

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# MILITARY LAW REVIEW

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## LEAVE NO SOLDIER BEHIND: ENSURING ACCESS TO HEALTH CARE FOR PTSD-AFFLICTED VETERANS

MAJOR TIFFANY M. CHAPMAN\*

*[T]he detrimental effects of combat are deep and enduring and follow a complex course, especially in combat stress reaction casualties. PTSD, being the only disorder that distinctly stems from exposure to an external traumatic event, often entails medicolegal and political implications for soldiers who are sent by their nations to war.<sup>1</sup>*

### I. Introduction

Roadside bombs, snipers, ambushes: these events permeated Sergeant (SGT) Smith's daily life during his twelve-month deployment to Iraq in support of Operation Iraqi Freedom (OIF).<sup>2</sup> He faced heavy

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<sup>1</sup> Zahava Solomon & Mario Mikulincer, *Trajectories of PTSD: A 20-Year Longitudinal Study*, 163 AM. J. PSYCHIATRY 659, 665 (2006).

<sup>2</sup> Matthew J. Friedman, *Posttraumatic Stress Disorder Among Military Returnees from Afghanistan and Iraq*, 163 AM. J. PSYCHIATRY 586 (2006). Dr. Friedman poses the typical scenario for today's Reservist Soldier, upon which this account is loosely based. Although the Soldier in the account is fictional, his experiences resemble those of many deployed Soldiers.

and extensive combat exposure on patrols and witnessed horrible scenes of carnage. Haunted by intrusive visions of the deaths of civilians and his fellow Soldiers, SGT Smith returned from Iraq tormented, changed, and unable to leave the combat zone behind. Today, his preoccupation with personal safety and constant anticipation of a hostile act prevent him from reintegrating into normal life. He vividly relives combat experiences in his nightmares, particularly those in which his fellow Soldiers were wounded, and alternately feels emotionally dead and overwhelmed by strong surges of emotions. Since his return, SGT Smith drinks heavily, experiences suicidal thoughts, misses formations, and engages in physical altercations with other Soldiers. SGT Smith, like so many other Soldiers returning from Iraq and Afghanistan, is suffering from Posttraumatic Stress Disorder (PTSD). He is now at risk of being administratively separated and losing his veterans' benefits.<sup>3</sup>

A discharge Under Other Than Honorable Conditions (OTH)<sup>4</sup> is extremely problematic for a Soldier afflicted with PTSD. Current

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<sup>3</sup> A strong correlation exists between PTSD and substance abuse, mental health problems, and persistent misconduct. NAT'L CTR. FOR PTSD, U.S. DEP'T OF VETERANS AFF., IRAQ WAR CLINICIAN GUIDE 24 (2d ed. 2004), available at [http://www.ncptsd.va.gov/ncmain/ncdocs/manuals/nc\\_manual\\_iwcguide.html](http://www.ncptsd.va.gov/ncmain/ncdocs/manuals/nc_manual_iwcguide.html) [hereinafter OIF CLINICAL GUIDE]; Erin M. Gover, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 566-67 (2008). These behaviors and conditions usually conflict with the interests of the military. Increased rates of attrition from military service, particularly involuntary administrative separations, evidence this conflict between PTSD's symptoms and the interests of the military. Charles W. Hoge et al., *Mental Health Problems, Use of Mental Health Services, and Attrition from Military Service After Returning from Deployment to Iraq or Afghanistan*, 295 J. AM. MED. ASS'N 1023, 1025, 1029 (2006). Attrition is defined as leaving military service for any reason. *Id.* at 1030. Among the 220,620 OIF veterans screened, 82.7% remained in military service during the twelve months following the deployment. *Id.* Of the remaining 17.3% that left military service within twelve months after deployment, approximately one-fourth of the Soldiers reported a positive response for a mental health issue on the Post-Deployment Health Assessment (PDHA). *Id.* Of the Soldiers returning from OIF or Operation Enduring Freedom (OEF) in Afghanistan, some 300,000 Soldiers expect to be discharged from the military even though they may be afflicted with PTSD. Gover, *supra*, at 561. These numbers continue to rise. Matthew J. Friedman, *Acknowledging the Psychiatric Cost of War*, 351 NEW ENG. J. MED. 75 (2004).

<sup>4</sup> Administrative separations comprise a portion of these discharges and consist of voluntary separations, generally initiated by the requesting Soldier, and involuntary separations, which are initiated by the Soldier's command. U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS para. 3-7 (6 June 2005) [hereinafter AR 635-200]. Administrative separations are one of a commander's tools for involuntarily separating Soldiers in order to maintain the readiness and discipline of a unit. The underlying policy of administrative separations is to ensure the readiness and competency

legislation bars Soldiers who are administratively separated with an OTH discharge for “willful and persistent” misconduct from receiving Veterans’ Affairs (VA) compensation; in some instances, these Soldiers are also barred from health care benefits.<sup>5</sup> In 1977, Congress passed Public Law 95-126,<sup>6</sup> which permitted some—but not all—who were discharged with an OTH for misconduct to receive health care benefits if the VA determined that the Soldier did not otherwise meet one of the statutory bars set forth in 38 U.S.C. § 5303(a).<sup>7</sup> Consequently, even Soldiers with service-connected disabilities<sup>8</sup> incurred in combat

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of the force. *Id.* para. 1-1. Since maintenance of high standards of conduct, discipline, and performance promote this policy, commanders retain great discretion of the administrative separation process, to include the determination of which individuals should be separated, the basis for separation, and the characterization of the discharge. *Id.* Although AR 635-200 provides factors for consideration when deciding between retention and separation, commanders are not required to justify their decision beyond the procedural requirements of the regulation. *Id.* para. 1-15. Since a commander may view a PTSD-afflicted Soldier’s behavior as a detriment to the unit, a Soldier manifesting symptoms of PTSD is at risk of being involuntarily separated on several primary bases: substance abuse, personality disorders, and misconduct. Hoge et al., *supra* note 3, at 1030. These separations may be characterized as OTH conditions, particularly separations for misconduct, without regard to the underlying anxiety disorder. AR 635-200, *supra*, para. 1-15. An OTH discharge is the most adverse characterization of an administrative separation and is normally issued for misconduct “that constitutes a significant departure from the conduct expected of soldiers in the Army,” such as acts involving use of force or violence to cause serious injury and deliberate acts or omissions “that seriously endanger the health and safety of other persons.” *Id.* para. 3-7.

<sup>5</sup> 38 U.S.C. § 5303(a) (2006); 38 C.F.R. § 3.12(d) (2010). Soldiers who receive an OTH discharge for willful and persistent misconduct are barred from receiving compensation under 38 C.F.R. § 3.12(d), but may retain eligibility for health care unless they are subject to the statutory bars set forth in 38 U.S.C. § 5303(a).

<sup>6</sup> Pub. L. No. 95-126, 91 Stat. 1106 (1977) (codified as amended at 38 U.S.C. § 5303). Congress passed Public Law 95-126 to deny eligibility of veterans’ benefits to “certain persons who would otherwise become so entitled solely by virtue of the administrative upgrading under temporarily revised standards of other than honorable discharges from service during Vietnam . . .” *Id.*

<sup>7</sup> 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(d). The statutory bars consist of discharge or dismissal due to being a conscientious objector who refuses to wear a uniform, perform military duties, or obey lawful orders; receiving a sentence at a general court-martial; resigning as an officer for the good of the service; deserting; being discharged for alienage; and absenting one’s self without leave (AWOL). U.S. DEP’T OF VETERANS AFF., M21-1MR ADJUDICATION PROCEDURES, at 1-B-7 (Mar. 7, 2006), *available at* [http://www.warms.vba.va.gov/M21\\_1MR.html](http://www.warms.vba.va.gov/M21_1MR.html) [hereinafter M21-1MR PROCEDURES].

<sup>8</sup> *See* U.S. Dep’t of Veterans Affairs, Pub. & Intergovernmental Affairs, Federal Benefits for Veterans, Dependents, and Survivors, *available at* <http://www1.va.gov/opa/Is1/2.asp> (last visited Aug. 5, 2009). Disabilities incurred or aggravated during active service are usually considered service-connected. *Id.* The type and degree of disability are main factors in determining the amount of disability compensation a veteran will receive for service-connected disabilities. *Id.*

operations, such as PTSD, were ineligible for VA treatment if they met one of these statutory bars. The determination that the Soldier was “insane” at the time of the underlying offense is a limited exception to these statutory bars.<sup>9</sup>

For PTSD-afflicted Soldiers, proving insanity is an almost impossible hurdle. The VA General Counsel and the U.S. Court of Appeals for Veterans Claims (CAVC) have narrowly interpreted the definition of insanity. Although the regulatory definition appears expansive enough to include PTSD, the current VA interpretation of insanity precludes PTSD-afflicted Soldiers from meeting the criteria.<sup>10</sup> Additionally, since the Veterans’ Judicial Review Act (VJRA) of 1988 prohibits judicial review of VA decisions or statutes beyond the courts within the statutory framework, Soldiers are unable to appeal their claims to other federal courts.<sup>11</sup> Subsequently, Soldiers who are suffering from

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<sup>9</sup> 38 U.S.C. § 5303(b); 38 C.F.R. § 3.354. The regulatory definition of insanity in 38 C.F.R. § 3.354 states that an insane person is one who “exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior;” “interferes with the peace of society;” or “has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack adaptability to make further adjustment to the social customs of the community in which he resides.” 38 C.F.R. § 3.354(a). Other exceptions include the “minor-offense” exception, which excludes discharges based on a minor offense from the definition of willful and persistent misconduct if service is otherwise honest, faithful, and meritorious, and instances where the Soldier has “innocently acquired 100 percent disability.” 38 C.F.R. §§ 3.12(d)(4), 4.17a.

<sup>10</sup> The VA General Counsel and VA adjudication boards equate the regulatory definition of insanity to the criminal affirmative defense of insanity, which is a higher standard. *See* Smith v. Principi, 2004 U.S. App. Vet. Claims LEXIS 403, at \*3 (June 23, 2004), for a discussion of the difference between the criminal law standard of insanity and the definition set forth in 38 U.S.C. § 3.354(a). The military requires that an accused prove that he was “unable to appreciate the nature and quality or the wrongfulness of his acts.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(k)(1) (2008) (defining the affirmative defense of lack of mental responsibility). Yet, the standard of insanity for an administrative finding should be lower than in criminal cases because it is used to determine whether the Soldier should receive health care and other benefits for his military service, not to absolve the individual’s underlying misconduct or change the character of his discharge. By statute, the character of the discharge determines eligibility for VA benefits. 38 U.S.C. § 101(2) (2006).

<sup>11</sup> Slater v. U. S. Dep’t of Vet. Aff., 2008 U.S. Dist. LEXIS 32440, at \*12–14 (M.D. Fla. Mar. 20, 2008). Under the VJRA, veterans may appeal a regional VA office’s decision to the Board of Veterans Appeals, and subsequently to the Court of Veterans Appeals. *Id.* Where the veteran questions the validity or interpretation of the statute or regulation or questions a controlling question of law, the veteran may appeal a decision to the U.S. Court of Appeals for the Federal Circuit and may subsequently petition the U.S. Supreme Court for review. *Id.* at \*14–15.

legitimate, service-connected medical conditions,<sup>12</sup> like PTSD, are precluded from receiving compensation and, potentially, from accessing medical treatment after separation.

In order to ensure Soldiers can access VA healthcare for service-connected PTSD, the Army must first amend Army Regulation (AR) 635-200 and AR 40-501 to incorporate a mandatory PTSD evaluation process prior to separation. Under AR 635-200, Chapters 9, 5-13, or 14,<sup>13</sup> if the Soldier expresses PTSD symptoms in an evaluation with a clinician prior to separation, a qualified mental health specialist must evaluate and diagnose the symptoms. This change would ensure that clinicians diagnose service-connected PTSD and sufficiently document the condition for future VA determinations.<sup>14</sup>

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<sup>12</sup> When applying for VA benefits for a medical condition, veterans must produce medical evidence that the condition either occurred during service or that service aggravated an existing condition, as well as a nexus between the in-service injury or disease and the current claimed medical condition. Nema Milaninia, *The Crisis at Home Following the Crisis Abroad: Health Care Deficiencies for U.S. Veterans of the Iraq and Afghanistan Wars*, 11 DEPAUL J. HEALTH CARE L. 327, 337 (2008).

<sup>13</sup> AR 635-200, *supra* note 4. Each of these chapters indicates a separate basis upon which a Soldier may be separated administratively. *Id.* Chapter 9 provides authority for discharging Soldiers for failure of an alcohol or drug abuse rehabilitation program. *Id.* para. 9-2. Chapter 5-13 provides the process for separating a Soldier for a personality disorder that prevents the Soldier from performing his duties. *Id.* para. 5-13. Chapter 14 prescribes procedures for separating Soldiers for misconduct, including “minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.” *Id.* paras. 14-1, 14-12.

<sup>14</sup> In 2007, the Army launched a one-year joint disability evaluation pilot program that seeks to combine the Army and VA evaluation standards and ratings into a single examination in order to address concerns of the timeliness, efficiency, and consistency of disability evaluations. U.S. GEN. ACCOUNTING OFF., GAO-08-1137, MILITARY DISABILITY SYSTEM: INCREASED SUPPORTS FOR SERVICEMEMBERS AND BETTER PILOT PLANNING COULD IMPROVE THE DISABILITY EVALUATION PROCESS 2 (Sept. 2008) [hereinafter GAO REPORT]. The VA recently announced that, as of July 2010, it will no longer require veterans seeking to establish that their PTSD is service-connected to provide detailed documentation of the traumatic event that they experienced during combat. Ed O’Keefe, *Rules on Filing PTSD Claims to Be Eased*, WASH. POST, July 9, 2010, <http://ebird.osd.mil/ebfiles/e20100709762640.html>. Although the U.S. Government Accounting Office (GAO) recommended that the Army and VA sustain “collaborative executive focus on the pilot,” this initiative, as well as the changes to VA policy regarding establishing service-connected PTSD, are unlikely to have any impact on PTSD-afflicted Soldiers who are discharged with a statutory bar because eligibility for medical benefits hinges on the nature of the discharge, which the pilot program and the more relaxed documentation rules do not address. *Id.*; GAO REPORT, *supra*, at 5.

However, a procedural change to Army Regulations alone is insufficient to ensure retention of a Soldier's eligibility for VA benefits due to the discretion that commanders exercise over the administrative separation process. If a Soldier falls under one of the statutory bars of 38 U.S.C. § 5303(a), legislation bars receipt of all benefits, without regard to his service-connected disability.<sup>15</sup> Therefore, as a matter of equity, Congress needs to amend 38 U.S.C. § 5303 to permit Soldiers that meet one of these statutory bars to receive health care for service-connected disabilities. In the alternative, if Congress maintains the statutory bars under 38 U.S.C. § 5303(a), Congress needs to incorporate PTSD as a valid interpretation of "insanity" for OTH discharges that fall under these statutory bars, thereby making veterans eligible for health care benefits.<sup>16</sup>

## II. Background

### A. History of PTSD: the Shift from "Shell Shock" to Anxiety Disorder

Historically, the military has either been ambivalent or even disdainful of Soldiers suffering from psychiatric symptoms resulting from combat.<sup>17</sup> The military considered these Soldiers as "lacking in moral fiber" rather than injured in combat.<sup>18</sup> During World War I, military physicians observed a neurological condition—termed "shell shock" because physicians believed the condition was directly related to the exploding shells of bombs—consisting of both physiological and psychological symptoms.<sup>19</sup> These Soldiers' inability to fight due to their condition presented a difficult dilemma for military officials: treat the Soldiers as medical patients suffering from a neurological condition, or court-martial the Soldiers as "malingerers or cowards."<sup>20</sup> The introduction of psychotherapy to the front lines during World War II slightly weakened this theory because psychiatrists discovered that the

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<sup>15</sup> 38 U.S.C. § 5303(a) (2006); 38 C.F.R. § 3.12(d) (2010).

<sup>16</sup> 38 U.S.C. § 5303.

<sup>17</sup> Hans Pols & Stephanie Oak, *War and Military Mental Health: The U.S. Psychiatric Response in the 20th Century*, 97 AM. J. PUB. HEALTH 2132, 2133 (2007). See also Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 191 MIL. L. REV. 67 (2007).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Symptoms of shell shock included anxiety attacks, insomnia, confusion, amnesia, hallucinations, and nightmares. *Id.*

<sup>20</sup> *Id.* The fact that only some Soldiers were affected perplexed commanders and bolstered the theory that the affected Soldiers were simply shirking their duty or mentally weak. *Id.*

affected Soldiers were otherwise normal individuals who had simply reached their psychological “breaking point” and “could no longer cope with the unremitting and horrendous stresses of war.”<sup>21</sup>

After the extremely high rates of psychiatric “casualties” in the Korean War, military officials attempted to implement early intervention and treatment procedures for combat stress during the Vietnam War.<sup>22</sup> However, these measures did not prevent the soaring numbers of veterans suffering from PTSD after Vietnam, which went largely unnoticed until fifteen years after the conflict when psychiatrists first realized that prolonged exposure to combat experiences had adverse long-term consequences.<sup>23</sup> This discovery helped stimulate a “major shift in psychiatric interest,” leading to PTSD’s recognition as a diagnostic category in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III) in 1980.<sup>24</sup> Unfortunately, the scale and variation of these numbers led to skepticism of the condition.<sup>25</sup> Additionally, most of our current knowledge regarding PTSD is based on twenty-year-old studies conducted on post-conflict Vietnam veterans; as a result, the studies primarily assessed the condition in its chronic phase instead of in early stages of development.<sup>26</sup>

The introduction of PTSD into the DSM-III in 1980, as well as the linkage between PTSD and combat trauma discovered during the Gulf

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<sup>21</sup> *Id.* at 2135.

<sup>22</sup> *Id.* at 2136. Military officials introduced “combat stress control teams” staffed by mental health care professionals to forward deployed units, time limits on tours of duty, and frequent periods of rest and relaxation. *Id.* Rates of mental health issues related to combat were estimated at 250 per 1000 per year. *Id.*

<sup>23</sup> *Id.* at 2137–38.

<sup>24</sup> *Id.* Additional epidemiological studies of Vietnam veterans in the mid-1980s revealed a prevalence of PTSD in 15% of male veterans, with an even higher lifetime prevalence of 30%. Friedman, *supra* note 3, at 75.

<sup>25</sup> Pols & Oak, *supra* note 17, at 2140. As of 1988, seventy percent of Vietnam veterans were diagnosed with PTSD at some time in their lives, even though the conflict ended some twenty years earlier. Gover, *supra* note 3, at 561.

<sup>26</sup> Solomon & Mikulincer, *supra* note 1, at 659. Prior to combat operations in OIF and OEF, researchers placed more focus on Gulf War Syndrome than PTSD, although retrospective studies in the late 1990s indicated that ten percent of Soldiers who experienced combat events during the Gulf War suffered from PTSD. Friedman, *supra* note 3, at 75. Researchers realized that the rate of prevalence, approximately four percent, was considerably lower in Soldiers who had not seen any combat during the Gulf War, drawing a direct correlation between combat experience and incidence of PTSD. *Id.*

War, helped change mental health specialists' views regarding diagnosis and treatment.<sup>27</sup> Recognition of PTSD as a legitimate diagnosis remains controversial, though, in part due to the difficulty of diagnosis and measurement in its initial phases. Although researchers identified factors that may increase an individual's susceptibility, researchers are unable to determine who will develop the symptoms once exposed to trauma. The unpredictability of PTSD's symptoms also remains a major factor. Regardless of the state of controversy, PTSD has become one of the most frequently diagnosed psychiatric conditions since its inception into the DSM-III.<sup>28</sup>

#### B. Diagnosing PTSD Today Through Research and Expert Assessments

Today, experts consider PTSD an anxiety disorder directly attributed to experiencing "an event involving death, injury, or threat, coupled with the intense fear that the event generated, along with a feeling of helplessness . . . ."<sup>29</sup> The threshold determination of experiencing a traumatic event must be met in combination with four categories of symptoms: "reliving the event, avoidance, numbing, and feeling keyed up."<sup>30</sup> Mental health specialists consider these symptoms in the context

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<sup>27</sup> Pols & Oak, *supra* note 17, at 2140.

<sup>28</sup> Nina A. Sayer et al., *Compensation and PTSD: Consequences for Symptoms and Treatment*, PTSD RES. Q., Fall 2007, at 1.

<sup>29</sup> Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9 (2001). Mental health specialists believe PTSD may actually represent a "major rupture" of an individual's psychological well-being that completely alters the way that individual lives his life. Solomon & Mikulincer, *supra* note 1, at 664. Because an everyday occurrence, such as a car backfiring, may trigger a flashback or startled response, a PTSD-afflicted individual's mind inappropriately triggers a stress response throughout the day that triggers production of adrenaline. Garcia-Rill & Beecher-Monas, *supra*, at 18. Consequently, seemingly normal events that remind the Soldier of the traumatic experience may trigger this "fight or flight" response, in some cases, multiple times a day. *Id.* Over the course of time, the excess amount of hormones secreted in response to an abnormal amount of stressors damages the brain, decreasing the individual's chance for remission and recovery. *Id.* The resulting effect upon the individual may be so severe as to warrant VA disability benefits, since the ability of a veteran to function under the conditions of daily life, including employment, is the basis of a VA disability evaluation. 38 C.F.R. §4.10 (2010).

<sup>30</sup> U.S. Dep't of Veterans Affairs, Nat'l Ctr. for PTSD, What Is PTSD?, available at <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp> (last visited Mar. 24, 2010) [hereinafter Fact Sheet, What is PTSD?]. Before diagnosis can be made, the Soldier must have experienced these symptoms for at least a month; this duration allows an evaluator to determine "clinically significant distress or impairment in social, occupational, or other

of several phases: an immediate phase, “characterized by strong emotions, disbelief, numbness, fear, confusion” and hyperarousal; a delayed phase “characterized by persistence of autonomic arousal, intrusive recollections . . . and combinations of anger, mourning, apathy, and social withdrawal;” and a chronic phase, characterized by a continuation of some intrusive symptoms, hyperarousal, and resentment or sadness.<sup>31</sup>

After obtaining a Soldier’s trauma history, a mental health specialist screens a Soldier for PTSD using one of a variety of screening instruments.<sup>32</sup> In some instances, a trained specialist conducts a more

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important areas of functioning.” U.S. DEP’T OF VETERANS AFF., C&P SERVICE CLINICIAN’S GUIDE 201 (2002), available at <http://www.warms.vba.va.gov/admin21/guide/cliniciansguide.doc> [hereinafter C&P GUIDE]; Nat’l Ctr. for PTSD, U.S. Dep’t of Veterans Affairs, FAQs About PTSD Assessment: For Professionals, available at <http://www.ptsd.va.gov/professional/pages/faq-ptsd-professionals.asp> (last visited Mar. 24, 2010) [hereinafter Fact Sheet, FAQs About PTSD Assessment]. DSM-IV further supplements the DSM-III criteria by requiring an assessment of the individual’s disability or distress. Solomon & Mikulincer, *supra* note 1, at 660; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (text rev., 4th ed. 2000), available at <http://www.ptsd.va.gov/professional/pages/dsm-iv-tr-ptsd.asp> [hereinafter DSM-IV-TR]. The American Psychiatric Association (APA) recently reviewed DSM-IV and proposed new diagnostic criteria for PTSD to be published in DSM-V, the release of which is expected in May 2013. Am. Psychiatry Ass’n, DSM-5 Overview: The Future Manual, available at <http://www.dsm5.org/Pages/Default.aspx> (last visited June 15, 2010). The proposed revisions supplement DSM-IV by adding the following two criteria: the existence of negative alterations in cognitions and mood associated with the traumatic event, and a determination that the disturbance is not due to the direct physiological effects of a substance (e.g., medication or alcohol) or a general medical condition (e.g., traumatic brain injury, coma). *Id.* Even though the proposed revisions to DSM-V will focus more on aggressive, reckless, and self-destructive behavior and clarify other aspects of the disorder, such as delayed onset, there is still no movement to revise the regulatory definition of insanity under 38 C.F.R. § 3.354, creating an even greater divide between the eligibility standards used by the VA and the features of PTSD. *Id.*

<sup>31</sup> Fact Sheet, What Is PTSD?, *supra* note 30, at 1. During this chronic phase, mental health specialists are able to more accurately diagnose PTSD because of the persistence of symptoms. OIF CLINICIAN GUIDE, *supra* note 3, at 11–12.

<sup>32</sup> Friedman, *supra* note 2, at 588. The National Center for PTSD uses a baseline screening instrument consisting of four yes/no questions comprising the four major symptom categories. *Id.* If an individual endorses at least three of the four items, a mental health specialist conducts a more elaborate assessment. *Id.* at 588–89. Mental health specialists measure PTSD in several ways, ranging from the cursory four-item screening checklist to a more elaborate seventeen-item checklist, also developed by the National Center for PTSD, in which each item receives a single rating. Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 15 (2004). On the seventeen-item checklist, results are

detailed, structured interview to rate the individual's presented symptoms, usually as a follow-up to one of the initial screening mechanisms.<sup>33</sup> Regardless of the type of screening mechanism used, multiple instruments exist to further quantify or validate an individual's symptoms.<sup>34</sup> These scales are particularly helpful in distinguishing the severity of the condition and determining whether an individual over-exaggerates his condition.

### 1. *Pseudo PTSD*

Critics of PTSD diagnoses point to the ease of fabricating the symptoms due to the subjective nature of the evaluation.<sup>35</sup> In most households, PTSD is a familiar term, and many Soldiers recognize that service-connected PTSD may be potential mitigation in criminal misconduct cases.<sup>36</sup> Likewise, since many veterans understand that service-connected PTSD is a compensable disability, a concern exists that veterans will exaggerate or fabricate symptoms for financial gain.<sup>37</sup> The growing number of PTSD claims bolsters these skeptics' arguments.

Additionally, research indicates that, among PTSD-afflicted individuals, those seeking compensation express higher levels of symptoms than individuals not seeking compensation.<sup>38</sup> Although individuals seeking compensation may actually experience more psychiatric impairment than others afflicted with PTSD,<sup>39</sup> other studies

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“scored as positive if subjects reported as least one intrusion symptom, three avoidance symptoms, and two hyperarousal symptoms.” *Id.* For a diagnosis of PTSD, the total score must be “at least 50 on a scale of 17 to 85 (with a higher number indicating a greater number of symptoms or greater severity).” *Id.*

<sup>33</sup> Fact Sheet, FAQs about PTSD Assessment, *supra* note 30, at 1. Although the seventeen-item assessment is a valid tool for determining whether an individual is experiencing symptoms in order to refer that individual for treatment, the more time-consuming, structured interview “yields more valid results” needed for a full and accurate diagnosis and treatment plan. *Id.*

<sup>34</sup> C&P GUIDE, *supra* note 30, at 203. The Mississippi Scale for Combat-Related PTSD (M-PTSD), for example, allows evaluators to quantify symptoms in order to discern PTSD from associated disorders. *Id.* The Minnesota Multiphasic Personality Inventory (MMPI) and Minnesota Multiphasic Personality Inventory 2 (MMPI 2) also enable the evaluator to assess the validity of an individual's symptoms. *Id.*

<sup>35</sup> Gover, *supra* note 3, at 563.

<sup>36</sup> Sayer et al., *supra* note 28, at 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

indicate that PTSD-afflicted veterans exaggerate symptoms to “establish a basis for their claims or to maximize payments.”<sup>40</sup> Critics of the VA disability rating system argue that the ineffectiveness of the disability rating criteria for PTSD and other mental disorders causes individuals to inflate their symptoms in order to receive adequate compensation, indicating a need for change in other VA policies related to PTSD.<sup>41</sup>

Regardless, while individuals may fabricate symptoms in a preliminary self-reported screening, clinicians readily identify false claims upon a more extensive, one-on-one evaluation.<sup>42</sup> Since the threshold criterion of PTSD requires the evaluator to determine whether the individual actually suffered exposure to a traumatic event, individuals who are not able to refer to a particular event or series of events will not receive a referral for further screening.<sup>43</sup> The individual must then attest that he suffers from a triad of symptoms.<sup>44</sup> Validity scales, such as the

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<sup>40</sup> *Id.* When compared to non-compensation-seeking veterans, the veterans seeking compensation produced MMPI-2 validity scale scores indicative of “extreme exaggeration.” *Id.* See also Scott Simonson, *Back from War—A Battle for Benefits: Reforming VA’s Disability Ratings System for Veterans with Post-Traumatic Stress Disorder*, 50 ARIZ. L. REV. 1177 (2008) (recommending changes to the VA disability ratings system to more accurately assess fair benefits for PTSD-afflicted veterans).

<sup>41</sup> VETERANS’ DISABILITY BENEFITS COMM’N, HONORING THE CALL TO DUTY: VETERANS’ DISABILITY BENEFITS IN THE 21ST CENTURY executive summary, at 8 (2007), available at [http://www.vetscommission.org/pdf/ExecutiveSummary\\_eV\\_9-27.pdf](http://www.vetscommission.org/pdf/ExecutiveSummary_eV_9-27.pdf) [hereinafter VETERANS’ DISABILITY BENEFITS REPORT]. Congress created this Commission in 2004 out of concern for a variety of veterans’ issues, including treatment and compensation for PTSD. *Id.* at 1. The Commission recommended substantive changes to how mental disorders, including PTSD, are evaluated and rated. *Id.* at 8. One of these recommended changes is the utilization of separate criteria for rating PTSD claims because current rating criteria do not provide adequate compensation based on earnings analysis of PTSD-afflicted veterans. *Id.*

<sup>42</sup> Karl Kirkland, *Post-Traumatic Stress Disorder vs. Pseudo Post-Traumatic Stress Disorder: A Critical Distinction for Attorneys*, 56 ALA. LAW. 90, 91 (1995).

<sup>43</sup> C&P GUIDE, *supra* note 30, at 204. In the military, an individual’s claim must be verified by evidence in his record, such as an award citation, a commander’s narrative, or other documentation of the event. U.S. DEP’T OF VETERANS AFF., M21-1 ADJUDICATION PROCEDURES, at 1-D-3-6 (Aug. 23, 1993), available at [http://www.warms.vba.va.gov/M21\\_1.html](http://www.warms.vba.va.gov/M21_1.html) [hereinafter M21-1 PROCEDURES]. An evaluator must also review the veteran’s military record to confirm the “nature and extent of actual combat experience.” Kirkland, *supra* note 42, at 92.

<sup>44</sup> Kirkland, *supra* note 42, at 91. For disability compensation, a Soldier must exhibit at least one measure of reliving the traumatic experience, three measures of avoidance of stress stimuli, and two measures of hyperarousal. C&P GUIDE, *supra* note 30, at 201. Examples of reliving measures include recurrent nightmares or flashbacks about the traumatic event. *Id.* Examples of persistent avoidance measures include feeling of detachment from others, feeling numb or emotionless, and a loss of interest in normal

Minnesota Multiphasic Personality Inventory (MMPI) and Minnesota Multiphasic Personality Inventory 2 (MMPI 2), also help a mental health specialist determine whether an individual is exaggerating symptoms.<sup>45</sup> Use of these validity scales in combination with an in-person assessment and a “careful review of records” distinguish valid claims from false ones, negating most concerns of pseudo-PTSD.<sup>46</sup>

## 2. Associated Features

Although the quantification scales screen out false claims of PTSD, a number of factors may frustrate diagnosis of PTSD. First, individuals suffering from PTSD may not immediately experience symptoms; onset of symptoms may occur six months to a year after the triggering stressor.<sup>47</sup> Some researchers attribute higher rates of delayed onset among Soldiers to “emotional numbing and denial facilitated by troop management and military training.”<sup>48</sup> Rates of delayed onset may be as high as twenty percent depending on the severity of the traumatic event.<sup>49</sup> Because avoidance is a classic characteristic of PTSD, afflicted individuals may also withdraw and hesitate to seek treatment even though they are experiencing symptoms.<sup>50</sup> Additionally, the nature and extent of symptoms may vary over the passage of time.<sup>51</sup> A “fluctuating course” of “relapses and remissions” characterizes PTSD, which also thwarts diagnosis and treatment and reduces the chance of full recovery.<sup>52</sup>

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activities. *Id.* Examples of symptoms of hyperarousal include increased irritability, inability to concentrate, and insomnia. *Id.*

<sup>45</sup> Sayer et al., *supra* note 28, at 2. According to a 2003 study, “20% of compensation-seeking veterans produced extreme scores on MMPI-2 validity scales.” *Id.* The researchers conducting the study determined that, under the VA disability compensation procedures, individuals have an incentive to exaggerate their symptoms, which in turn leads to the referenced extreme scores. *Id.* at 4.

<sup>46</sup> Kirkland, *supra* note 42, at 92.

<sup>47</sup> DSM-IV-TR, *supra* note 30. In some studies, delayed onset is defined as the appearance of symptoms a year after the initial stressor. Solomon & Mikulincer, *supra* note 1, at 662.

<sup>48</sup> Bernice Andrews et al., *Delayed-Onset Posttraumatic Stress Disorder: A Systematic Review of the Evidence*, 164 AM. J. PSYCHIATRY 1319, 1325 (2007).

<sup>49</sup> Solomon & Mikulincer, *supra* note 1, at 665. The “posttraumatic environment” and a delay in follow-up may also contribute to varying rates of delayed onset. *Id.*

<sup>50</sup> Friedman, *supra* note 2, at 588.

<sup>51</sup> *Id.* at 661.

<sup>52</sup> *Id.* at 662. In one study, combat veterans typically re-experienced the traumatic event in nightmares or flashbacks, had interrupted sleep patterns, and felt hypervigilant during

Second, in addition to its fluctuating nature, PTSD is also strongly associated, or comorbid, with other psychiatric and physical disorders and conditions.<sup>53</sup> This further complicates accurate diagnosis because some of these conditions share or mask the symptoms of PTSD.<sup>54</sup> A Soldier's PTSD symptoms may appear in the form of substance abuse, depression, or increased acts of violence, which are not normally diagnosed with, or considered related to, PTSD.<sup>55</sup> Additionally, no single case of PTSD shares the same characteristics of another, and no indicators exist to determine whether an individual will develop an associated disorder or condition in addition to it.<sup>56</sup>

Although PTSD is unpredictable, studies indicate that substance abuse is significantly related to PTSD because alcohol or drug use is a method of coping with intrusive thoughts, nightmares, insomnia, and hyper-alertness.<sup>57</sup> One study completed in February 2006 indicates that among 26,613 active-duty personnel polled, 6% engaged in "heavy weekly drinking" after returning from Iraq or Afghanistan.<sup>58</sup> Additionally, approximately 26.6% began binge drinking, and 4.8% reported the onset of "alcohol-related problems."<sup>59</sup> The odds of developing an alcohol-related problem increased with the number of

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the first two years after the traumatic event, especially in response to stressors reminiscent of combat. *Id.* at 661. In the third year of assessment, however, the veterans' initial symptoms were augmented by a greater feeling of detachment, avoidance of social activities, and loss of memory. *Id.* at 661–62. Over the course of three years, the predominance of certain symptoms varied, potentially leading the afflicted individual or health care provider to think the individual has recovered. *Id.*

<sup>53</sup> Friedman, *supra* note 2, at 589; *see also* Paula P. Schnurr et al., *Cognitive Behavioral Therapy for Posttraumatic Stress Disorder in Women*, 297 J. AM. MED. ASS'N 820 (2007). Women in the military are at a six percent higher risk for "[l]ifetime prevalence" than men. *Id.*

<sup>54</sup> Friedman, *supra* note 2, at 589.

<sup>55</sup> OIF CLINICIAN GUIDE, *supra* note 3, at 11–12.

<sup>56</sup> *Id.* at 12.

<sup>57</sup> Editorial, *Reserve, National Guard at Higher Risk of Alcohol-Related Problems after Returning from Combat*, SCI. DAILY (Aug. 26, 2008), <http://www.sciencedaily.com/releases/2008/08/080812160607.htm>. *But see* Steven H. Woodward et al., *Hippocampal Volume, PTSD, and Alcoholism in Combat Veterans*, 163 AM. J. PSYCHIATRY 674 (2006). Although the authors found that PTSD "was not strongly associated with an elevated frequency of alcohol abuse/dependence," they also state that "further examination . . . of brain structure and function in PTSD appears warranted." *Id.* at 674, 677.

<sup>58</sup> Editorial, *supra* note 57, at 1.

<sup>59</sup> *Id.*

combat experiences and were higher in those individuals suffering from PTSD.<sup>60</sup>

Commanders with Soldiers suffering from PTSD may only observe the effects of substance abuse on the Soldier's discipline and performance, considering the substance abuse to be the primary issue rather than a manifestation of an underlying anxiety disorder.<sup>61</sup> This distinction is crucial because legislation prohibits the VA from paying disability compensation for alcohol or drug abuse, unless the substance abuse disability is "secondary to or is caused or aggravated by a primary service-connected disorder."<sup>62</sup> Therefore, without a primary diagnosis of service-connected PTSD, a Soldier discharged for substance abuse will be barred from future treatment and benefits.<sup>63</sup>

Posttraumatic Stress Disorder may also be confused with other mental health disorders, such as depression, personality disorders, and even schizophrenia.<sup>64</sup> While depression is closely associated with PTSD, personality disorders and mental diseases usually are not directly induced by a traumatic stressor and rarely exist without "early signs in adolescence."<sup>65</sup> In some severe cases of PTSD, though, the symptoms may be mistaken for borderline personality disorders "because of . . . [the] severity of behavioral disruptions."<sup>66</sup> Soldiers discharged for personality disorders are also barred from VA benefits because,

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<sup>60</sup> *Id.* To understand the correlation between substance abuse and PTSD, one must understand what alcohol or drugs do to the brain. The brain's reticular activating system (RAS) triggers the hormonal "fight or flight response" experienced in times of stress. Garcia-Rill & Beecher-Monas, *supra* note 29, at 12–14. Individuals with PTSD often "self-medicate with alcohol" or drugs to calm an overactive RAS. *Id.* at 21.

<sup>61</sup> Garcia-Rill & Beecher-Monas, *supra* note 29, at 22.

<sup>62</sup> *Allen v. Principi*, 237 F.3d 1368, 1381–82 (Fed. Cir. 2001) (holding that 38 U.S.C. § 1110 does not preclude disability compensation for substance abuse if a servicemember can establish, with clear medical evidence, that the substance abuse disability is secondary to or is caused by the primary service-connected disorder, such as PTSD, and not due to the servicemember's "willful wrongdoing").

<sup>63</sup> 38 U.S.C. § 1110 (2006); C&P GUIDE, *supra* note 30, at 210.

<sup>64</sup> C&P GUIDE, *supra* note 30, at 204. An individual's reliving of the traumatic event in the form of a hallucination or vivid flashback may lead an evaluator to believe the individual is schizophrenic. *Id.*

<sup>65</sup> *Id.* Generally, diagnosis of a personality disorder requires evidence of existence of certain pathological traits during childhood or adolescence, which include general alienation, reluctance to talk to professionals, violent outbursts and assaults, intolerance or distrust of authority, and dysfunctional living patterns. *Id.* Since these symptoms resemble PTSD's symptoms, determining when these symptoms began is crucial for proper diagnosis.

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

generally, the VA considers personality disorders as “pre-existing” entry into military service.<sup>67</sup> As a result, misdiagnosis results in grave consequences for PTSD-afflicted Soldiers.

In 2007, growing concerns that agencies were intentionally misdiagnosing PTSD as personality disorders to avoid paying disability and medical benefits prompted members of Congress, including then-Senator Barack Obama, to send a letter of concern to the Secretary of Defense, Dr. Robert Gates.<sup>68</sup> The Congressmen urged Dr. Gates to conduct “a thorough and independent review of the personality disorder discharge process” and to investigate allegations that this process was being abused.<sup>69</sup> In response, the Under Secretary of Defense for Personnel and Readiness, Dr. David S. C. Chu, admitted that “some behavioral manifestations associated with combat service overlap with the signs and symptoms of other disorders associated with combat service such as major depressions and [PTSD].”<sup>70</sup>

Another associated feature of PTSD is misconduct, usually in the form of violent acts; in these cases, afflicted Soldiers are unable to transition from “survivor mode,” where aggressiveness and hyper-vigilance is a necessity, to the relative calm of garrison life.<sup>71</sup> If a

<sup>67</sup> 38 U.S.C. §§ 1110, 1131 (2006); 38 C.F.R. § 3.303 (2010).

<sup>68</sup> Letter from Sen. Barack H. Obama [et al.], Members of U.S. Congress, to Dr. Robert Gates, U.S. Sec’y of Def. (June 21, 2007) (on file with author).

<sup>69</sup> *Id.*

<sup>70</sup> Letter from David S.C. Chu, Under Sec’y of Def. for Pers. & Readiness, to Sen. Barack H. Obama (Aug. 8, 2007) (on file with author). In an effort to alleviate concerns about the accuracy of the separation process, Dr. Chu pointed to the effectiveness of the mandatory health screenings conducted in conjunction with the Post-Deployment Health Assessment (PDHA) and Post-Deployment Health Reassessment (PDHRA). *Id.* Dr. Chu further emphasized that DoD mental health specialists “are expected to accurately distinguish between symptoms related to exposure to traumatic stress and those that are longstanding and related to a personality disorder,” even though some of the behaviors related to personality disorders “tend to emerge only during periods of stress.” *Id.* Yet, as studies of the PDHA and PDHRA depict, these screenings do not identify the entire population of Soldiers suffering from PTSD, and some Soldiers with mental health concerns fail to receive or request treatment. Hoge et al., *supra* note 3, at 1030.

<sup>71</sup> Gover, *supra* note 3, at 566–67. In a 1983 study of Vietnam veterans, individuals exhibited an inability to shift from survival mode in three distinct ways: with a “dissociative reaction,” through a “sensation-seeking syndrome,” and/or through a “depression/suicide syndrome.” *Id.* at 567. Of the three, dissociation was most common and led to a higher incidence of violent behavior because it caused the afflicted Soldier to respond to seemingly mundane events with the level of violence that would normally only be appropriate in combat. *Id.* Sensation-seeking syndrome, defined by a propensity to “engage in dangerous or thrilling behavior in order to maintain control over the

Soldier exhibits any of these behaviors, even if uncharacteristic, the outside observer may fail to understand the underlying medical cause. Yet, a major distinction between the misconduct attributed to PTSD and other acts of misconduct is the lack of premeditation and the uncharacteristic nature of the acts, indicating the type of impulsive behavior normally associated with PTSD.<sup>72</sup> This distinction may help commanders determine when a Soldier should be referred for mental health diagnosis and treatment.

Given the strong correlation between PTSD and substance abuse, mental health problems, and persistent misconduct,<sup>73</sup> as well as the trend to misdiagnose or misunderstand the underlying condition, commanders and healthcare professionals should carefully screen Soldiers prior to separation. This need is especially acute among Soldiers returning from combat operations.<sup>74</sup>

### C. PTSD and Operation Iraqi Freedom and Operation Enduring Freedom

Soldiers in combat operations are at a higher risk than the rest of the population for developing PTSD.<sup>75</sup> As of 2004, the prevalence rate of PTSD in Soldiers returning from Iraq was between fifteen and seventeen percent in Soldiers returning from Afghanistan.<sup>76</sup> These prevalence rates

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traumatic imagery [PTSD-afflicted individuals] are experiencing,” may also help explain an uncharacteristic increase in non-violent misconduct. *Id.*

<sup>72</sup> Andrew Moskowitz, *Dissociation and Violence: A Review of the Literature*, 5 TRAUMA, VIOLENCE, & ABUSE 22 (2004). The author asserts that flashbacks to the traumatic event may trigger violent behavior, which is “associated with a lack of premeditation, significant emotional arousal, and alcohol use.” *Id.*

<sup>73</sup> OIF CLINICIAN GUIDE, *supra* note 3, at 24.

<sup>74</sup> Hoge et al., *supra* note 32, at 13.

<sup>75</sup> Gover, *supra* note 3, at 563.

<sup>76</sup> Hoge et al., *supra* note 32, at 13. In 2004, researchers conducted an unprecedented early assessment regarding prevalence of combat-related mental health disorders among military members three to four months after their redeployment. *Id.* The study groups consisted of two Army infantry brigades from 82d Airborne Division after a year-long deployment to Iraq or a six-month deployment to Afghanistan, an Army infantry brigade from 3d Infantry Division after an eight-month deployment to Iraq, and two Marine battalions from the 1st Expeditionary Force after a six-month deployment to Iraq. *Id.* Using the seventeen-item National Center for PTSD checklist, the evaluators discovered that rates of “major depression, generalized anxiety, or PTSD [were] significantly higher,” at 15% to 17%, in Soldiers returning from OIF than OEF; incidence of PTSD comprised the largest difference in rates between OIF and OEF veterans, potentially due

increased in a linear fashion with the number of firefights or similar combat events the Soldier experienced; the rates were significantly higher among Soldiers suffering injury in combat.<sup>77</sup> Researchers expect these numbers to increase exponentially for a multitude of reasons, ranging from prolonged exposure to armed conflict, to defective screening mechanisms, to fear of stigmatization for seeking mental health care.<sup>78</sup> These numbers also do not take into consideration the likelihood of delayed onset of PTSD, so prevalence rates may surpass these anticipated numbers.

In addition to documenting a link between PTSD and participation in combat operations, researchers also confirmed the strong association with substance abuse, depression, and misconduct.<sup>79</sup> Also, due to the likelihood of delayed onset, researchers asserted that the optimal period for conducting a mental health survey was not immediately after a deployment—when the military initially screened individuals—but approximately three to four months after the deployment.<sup>80</sup> Previously, these discoveries posed several distinct problems for PTSD-afflicted Soldiers. First, as a result of ineffective screening mechanisms, many Soldiers may abuse alcohol, become depressed, or engage in misconduct before receiving a PTSD diagnosis. In some instances, these Soldiers may be administratively separated for these associated behaviors without ever receiving a diagnosis of PTSD, diminishing the possibility of showing a service-connected disability. Further, a lack of diagnosis, either due to misdiagnosis or delayed onset, reduces the Soldier's ability to argue insanity for PTSD-related offenses. In either instance, a PTSD-afflicted Soldier may lose access to benefits and health care after separation from service.

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to the nature of the conflict in Iraq. *Id.* at 13. The prevalence of PTSD rose from 4.5% in individuals with no combat experiences to 9.3% in individuals reporting involvement in one or two firefights. *Id.* at 16. The rates substantially increased with the number of combat experiences; the highest prevalence rate, 19.3%, belonged to individuals involved in more than five firefights. *Id.*

<sup>77</sup> *Id.* at 16.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The study indicated that these high PTSD prevalence rates were “significantly associated” with alcohol abuse and depression, which were previously considered unconnected conditions. *Id.*

<sup>80</sup> *Id.* at 20.

1. *DoD Efforts to Screen for Combat-Related Mental Health Issues*

In April 2003, the U.S. Department of Defense (DoD) mandated that all servicemembers complete a Post-Deployment Health Assessment (PDHA) immediately before departing a theater of operations or upon return to home station from a deployment in order to screen for mental health issues, among other health issues.<sup>81</sup> Initially, installations administered the PDHA approximately two weeks after Soldiers returned from deployment.<sup>82</sup> The PDHA screens specifically for PTSD by asking servicemembers to respond to four questions that cover the primary characteristics of PTSD, as well as questions regarding an interest to receive care for any reported concerns.<sup>83</sup> The PDHA does not include a screening for substance abuse, mainly because alcohol and drugs are prohibited in theater. Nor is the PDHA able to distinguish among overlapping symptoms of disorders that may be closely related to PTSD.<sup>84</sup> Therefore, many Soldiers suffering from PTSD or PTSD-related conditions may escape attention in this screening process as a result of inadequate survey results and delayed onset of symptoms.

Between 1 May 2003 and 30 April 2004, researchers conducted an extensive study of the PDHA results.<sup>85</sup> This study established the connection between combat deployment, use of mental health care services in the first year following the deployment, and attrition from military service.<sup>86</sup> The study showed that, out of 424,451 active duty servicemembers returning from OIF, 18.4% “screened positive for [one] of the mental health concerns” in the PDHA.<sup>87</sup> Of this positive screening percentage, approximately 4.8% to 9.8% met the PDHA’s criteria for

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<sup>81</sup> Hoge et al., *supra* note 3, at 1024. The PDHA is completed using Department of Defense Form 2796. *Id.* It consists of three pages of “self-administered questions pertaining to deployment location, general health, physical symptoms, mental health concerns, and exposure concerns.” *Id.* The mental health portion includes questions related to “posttraumatic stress disorder symptoms, depression, suicidal ideation, aggression, and interest in receiving mental health services.” *Id.*

<sup>82</sup> *Id.* The PDHA consists of a written survey, followed by a meeting with a health care professional to discuss concerns documented on the PDHA. *Id.* Following the servicemember’s interview, the PDHA is maintained in two locations: the servicemember’s permanent medical records and in the Defense Medical Surveillance System (DMSS) database. *Id.*

<sup>83</sup> *Id.* at 1025.

<sup>84</sup> *Id.* at 1030.

<sup>85</sup> *Id.* at 1025.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1027.

PTSD, further supporting the position that PTSD may have a delayed onset, rather than an immediate effect in a large number of cases.<sup>88</sup> In the year after the deployment, one-third of the servicemembers returning from OIF in the study group accessed mental health care services; however, 23% received no mental health diagnosis after accessing healthcare, indicating impediments to mental health care access still exist.<sup>89</sup>

In addition to affirming concerns that PTSD may not appear immediately upon return from a deployment, the study also showed that OIF veterans who screened positive for a mental health concern<sup>90</sup> were “significantly more likely to leave military service,” with an attrition rate of 21.4% within a year of returning, compared to 16.4% of OIF veterans with no mental health concerns.<sup>91</sup> Attrition rates included separation under both voluntary and involuntary circumstances.<sup>92</sup> Although neither study definitively assigned a primary reason for these higher attrition rates, both studies indicated that a large percentage of servicemembers who met the criteria for a mental health concern did not seek treatment, either voluntarily or due to lack of referral.<sup>93</sup>

In March 2005, the DoD mandated completion of an additional health assessment, the Post-Deployment Health Reassessment (PDHRA),

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<sup>88</sup> *Id.* at 1030.

<sup>89</sup> *Id.*

<sup>90</sup> A mental health concern is defined as a “positive response” to any of the following criteria:

little interest or pleasure (a lot); feeling down (a lot); interest in receiving help for stress, emotional distress, family problem (yes); thoughts of hurting self (some or a lot); a positive screening of PTSD; thoughts of serious conflicts with others (yes); thoughts of hurting someone or sense of a loss of control with others (yes); and have sought or intend to seek care for mental health (yes).

*Id.* at 1027.

<sup>91</sup> *Id.* at 1030. Similar studies of U.S. servicemembers and British military members also reported a strong correlation between mental health issues and attrition from service: approximately twenty-seven percent of those participants receiving outpatient mental health care separated within six months. Mark Creamer et al., *Psychiatric Disorder and Separation from Military Service: A 10-Year Retrospective Study*, 163 AM. J. PSYCHIATRY 733 (2006). The participants of the study served in the military during the Gulf War between August 1990 and September 1991; approximately fifty percent of the participants deployed in support of the conflict. *Id.*

<sup>92</sup> *Id.* at 1031.

<sup>93</sup> *Id.*; Hoge et al., *supra* note 3, at 1031.

within three to six months after deployment.<sup>94</sup> Once again, researchers tested the results of the PDHA and PDHRA among a similar demographic of servicemembers returning from Iraq.<sup>95</sup> The study revealed that the second assessment captured a larger group of individuals with mental health and substance abuse concerns not previously identified during the PDHA.<sup>96</sup> Another important finding was that twice as many servicemembers reported a qualifying number of PTSD symptoms on the PDHRA than on the PDHA,<sup>97</sup> confirming the previous study's assertions that the optimal screening period was three-to-four months after redeployment. Unlike the PDHA, the PDHRA also includes two questions regarding substance abuse,<sup>98</sup> providing servicemembers their first opportunity to report a substance abuse concern. The researchers discovered that, although approximately eleven percent of servicemembers reported misuse of alcohol since redeployment, less than one percent received referrals for substance abuse treatment.<sup>99</sup> One rationale for these incongruent results is that referral for substance abuse treatment triggers more extensive command involvement and, in some cases, may result in negative action if the treated individual relapses while undergoing treatment.<sup>100</sup>

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<sup>94</sup> Memorandum from the Assistant Sec'y of Def. for Health Affairs, to the Assistant Sec'y of the Army et al., subject: Post-Deployment Health Reassessment (Mar. 10, 2005), available at <http://www.ha.osd.mil/policies/2005/05-011.pdf>. As with the PDHA, the servicemember completes a survey, and a health care provider reviews the PDHRA with the servicemember, subsequently entering the assessment into the servicemember's permanent medical records and DMSS. *Id.* at 3.

<sup>95</sup> Charles S. Milliken et al., *Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning from the Iraq War*, 298 J. AM. MED. ASS'N 2141 (2007). The PDHRA forms of 111,484 Army Soldiers and 12,686 Marines, completed between 1 June 2005 and 31 December 2006, formed the basis of the study's results. *Id.* at 2142.

<sup>96</sup> *Id.* at 2141. Concerns about interpersonal conflict marked the most dramatic increase, from 3.5% to 14%, closely followed by a 6% increase in concerns about depression. *Id.* at 2143.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2142. Overall, the two assessments have several minor differences. *Id.* In addition to the substance abuse screen in the PDHRA, the PDHA contains several questions relating to the servicemember's combat experiences and pre-deployment health that are not administered in the PDHRA. *Id.*

<sup>99</sup> *Id.* at 2143.

<sup>100</sup> U.S. DEP'T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM (ASAP) (24 Mar. 2006) [hereinafter AR 600-85]. Like other administrative tools and programs, ASAP is command-driven. *Id.* para. 1-31. Because the program's goal is to facilitate unit readiness, the commander makes the ultimate decision whether an individual will be separated or retained for failure of a rehabilitation program. *Id.* Commanders are

Although an increased number of mental health concerns are identified in the PDHRA, treatment of these issues remains a concern. Many Soldiers receive no diagnosis and therefore do not receive successful treatment due to several reasons.<sup>101</sup> First, compliance with PDHRA completion goals is less than 100%; approximately 21,257 Soldiers did not complete the PDHRA within three to six months after the deployment.<sup>102</sup> In other instances, Soldiers fear that accessing mental health care will lead to stigmatization and a negative impact on their careers, particularly since confidentiality is not absolute.<sup>103</sup> The symptomatic avoidance that afflicts individuals suffering from PTSD greatly exacerbates this fear.<sup>104</sup> Therefore, many afflicted individuals are likely to shy away from treatment due to the military's institutional culture. This in turn raises their chances of developing chronic PTSD and other associated disorders, increases the likelihood of not being diagnosed correctly, and endangers their eligibility for VA health care and benefits.

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encouraged to separate Soldiers who fail to respond successfully to rehabilitation, "except under the most extraordinary circumstances." *Id.*

<sup>101</sup> Hoge et al., *supra* note 3, at 1028.

<sup>102</sup> Message, 251027Z Dec 08, Pentagon Telecomms. Ctr., subject: ALARACT 314/2008-Post-Deployment Health Reassessment (PDHRA) Screening Guidance for Commanders of Active Component (AC) Soldiers.

<sup>103</sup> Milliken et al., *supra* note 95, at 2146. In the Army, referral to alcohol treatment "triggers automatic involvement of a [S]oldier's commander" and makes the Soldier vulnerable to punishment or separation from the military if the Soldier fails to meet the program's requirements. *Id.*; *see also* AR 600-85, *supra* note 100. The Army's "Limited Use Policy" is designed to encourage Soldiers to self-refer for substance abuse problems by prohibiting the use of certain evidence related to substance abuse against a Soldier in punitive actions under the UCMJ or to determine the characterization of discharge. *Id.* para. 6-3. However, the Soldier's command may still initiate separation proceedings for substance abuse upon receipt of information regarding the Soldier's substance abuse. *Id.* para. 6-4(e). A counselor in the rehabilitation program is not prohibited from revealing to the commander that the Soldier committed "certain illegal acts which may compromise or have an adverse impact on mission, national security, or the health and welfare of others." *Id.* para. 6-4(b). Further, information regarding the Soldier's current possession or use of illegal drugs or commission of an offense while under the influence of alcohol or illegal drugs is not covered under this policy. *Id.*; Friedman, *supra* note 2, at 589.

<sup>104</sup> In an early study of servicemembers returning from Iraq, only twenty-three to forty percent of those who screened positive for a mental health concern pursued treatment, in large part because of fear of stigmatization, loss of confidence from peers, and appearing weak. Hoge et al., *supra* note 32, at 13, 16, & 21; *see also* Friedman, *supra* note 2, at 589; Jacqueline M. Hames, *Army Reducing Stigma of Psychological Care, Offering Telepsychiatry* (May 7, 2008), available at <http://www.army.mil/-news/2008/05/07/9013-army-reducing-stigma-of-psychological-care-offering-telepsychiatry/> (discussing new Army initiatives to provide mental health care to deployed Soldiers in remote locations while reducing the stigma associated with such treatment).

## 2. Relationship Between Traumatic Brain Injury and PTSD

Researchers have long debated what factors may increase the probability of developing PTSD, but no method exists that would profile potential PTSD patients accurately.<sup>105</sup> The risk of developing PTSD is particularly acute among Soldiers who suffered a traumatic brain injury (TBI) in combat.<sup>106</sup> The DoD estimates that TBI comprises 22% of combat casualties in OIF and OEF, and up to 80% of Soldiers in theater may have experienced “other blast injuries.”<sup>107</sup> Unlike PTSD, clinicians measure the severity of TBI in terms of the nature of the injury, such as loss of consciousness or loss of memory, rather than the severity of symptoms.<sup>108</sup> Although TBI and PTSD are assessed differently, the two conditions are closely affiliated, in large part because TBI may affect the areas of the brain implicated by PTSD.<sup>109</sup> Further, TBI may actually cloak the effects of PTSD because individuals with severe TBI may suffer from “post-traumatic amnesia,” which may temporarily block the intrusive nightmares or flashbacks that are symptomatic of PTSD.<sup>110</sup>

In response to the massive numbers of TBI cases occurring in OIF and OEF, DoD launched a mandatory training program in the summer of 2007.<sup>111</sup> This program, administered in one- to two-hour sessions, teaches Soldiers how to recognize “the symptoms associated with TBI

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<sup>105</sup> Gover, *supra* note 3, at 566. Factors linked to susceptibility for developing PTSD include “family history, . . . childhood experiences[,] and preexisting mental conditions.” *Id.*; see also Nat’l Ctr. for PTSD, U.S. Dep’t of Veterans Affairs, How Common Is PTSD?, available at <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp> (last visited Mar. 25, 2010) [hereinafter Fact Sheet, How Common is PTSD?] (indicating that an individual’s ethnicity, level of education, sex, age, and use of alcohol may also increase the likelihood of developing PTSD).

<sup>106</sup> E. Lanier Summerall, Nat’l Ctr. for PTSD, U.S. Dep’t of Veterans Affairs, Traumatic Brain Injury and PTSD, available at <http://www.ptsd.va.gov/professional/pages/traumatic-brain-injury-ptsd.asp> (last visited Mar. 25, 2010) [hereinafter Fact Sheet, TBI and PTSD].

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* The DoD uses the American College of Rehabilitation Medicine criteria for rating a TBI as mild, moderate, or severe. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* Conversely, since individuals with TBI may appear to have the same behavioral symptoms of PTSD, studies indicate a high rate of “false positives” for PTSD that may not be ascertained from a cursory screening alone. *Id.*

<sup>111</sup> Charlie Reed, *PTSD and TBI Awareness Programs Launched*, STARS & STRIPES (Mideast), Nov. 5, 2007, <http://www.stripes.com/article.asp?section=104&article=57571&archive=true>.

and PTSD.”<sup>112</sup> Although both injuries have become the “hallmark injuries” of OIF and OEF,<sup>113</sup> Soldiers suffering from TBI do not share the same reticence in seeking treatment as PTSD-afflicted Soldiers. This discrepancy is due, in part, to the fact that TBI is viewed as a physical injury and not a mental health issue. In the minds of some Soldiers, mental health issues, such as PTSD, are shameful, weak conditions.<sup>114</sup>

The DoD needs to place the same amount of emphasis on identifying and treating PTSD as it does TBI. Specifically, DoD needs to educate Soldiers and commanders that PTSD is a legitimate medical condition, and diagnosis does not warrant shame or stigma. Without diagnosis and treatment, PTSD’s symptoms and other comorbid disorders may overwhelm the Soldier. Consequently, unable to assimilate and act “normally,” the Soldier’s condition manifests through misconduct, violence, substance abuse, and other seemingly unrelated behaviors. The more troublesome a Soldier’s behavior becomes, the more likely a commander will view the Soldier as a liability to his unit. The Soldier’s commander may decide to separate the Soldier from the military administratively. Depending on the circumstances, the character and basis of the discharge may effectively end the Soldier’s eligibility for further benefits as a veteran. The Soldier who risked his life in combat, in some instances, returns home only to become a casualty of the system.

### III. Separation from Service

Commanders separate Soldiers from military service through several channels: voluntary separation at the end of a duty tour, an unfavorable discharge following criminal proceedings, and involuntary separation under administrative procedures are the primary methods. The Army’s regulation governing active duty enlisted administrative separations, AR 635-200, establishes the procedural framework for administratively separating Soldiers for a variety of circumstances, including misconduct, personality disorders, and substance abuse.<sup>115</sup> A Soldier’s administrative discharge may be characterized by one of three categories: honorable,

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<sup>112</sup> *Id.* This training may be accessed at [www.army.mil](http://www.army.mil). Army Knowledge Online homepage, available at <http://www.army.mil> (last visited June 11, 2010) (follow “PTSD/TBI Chain Teaching Program” hyperlink; then follow “Strategic Messages” hyperlink).

<sup>113</sup> *Id.*

<sup>114</sup> Friedman, *supra* note 2, at 589.

<sup>115</sup> AR 635-200, *supra* note 4.

general under honorable conditions, and under other than honorable conditions.<sup>116</sup> Among other effects, the type of discharge dictates eligibility for post-separation benefits provided by the VA.<sup>117</sup>

#### A. Eligibility for Veterans Benefits

Congress established the VA in 1930 to “consolidate and coordinate government activities affecting war veterans.”<sup>118</sup> Congress designed veterans’ benefits to serve as “a means of equalizing significant sacrifices that result directly from wartime military service.”<sup>119</sup> Today, the VA provides a wide range of support and benefits to veterans, regardless of wartime service, and their families, primarily through the Veterans Benefits Administration (VBA).<sup>120</sup> Additionally, the Veterans Health Administration (VHA) operates a nation-wide system of medical support encompassing a wide range of services.<sup>121</sup> The VA administers benefits in accordance with rules prescribed by the Secretary of VA in the Code of Federal Regulations (C.F.R.).<sup>122</sup>

The VA adjudicates claims for benefits by first determining a veteran’s eligibility.<sup>123</sup> Only those individuals who served in the active military and received a discharge “under conditions other than dishonorable” meet the threshold determination of eligibility.<sup>124</sup> The

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<sup>116</sup> *Id.* para. 3-7. Army Regulation 635-200 advises that an OTH discharge is “normally appropriate” where misconduct serves as the basis. *Id.* para. 4-13.

<sup>117</sup> *Id.* para. 3-6; *see also* 38 U.S.C. § 101(2) (2006) (defining “veteran,” in terms of eligibility for VA benefits, as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable”). An OTH discharge deprives a veteran of most of the benefits afforded to a veteran with an honorable discharge and causes substantial prejudice in civilian life, particularly when seeking employment. Statutes prevent veterans with an OTH discharge from reenlisting in the Reserves or National Guard, seeking educational assistance, or accessing benefits under the G.I. Bill. 10 U.S.C. §1150 (2006), 38 U.S.C. §1411, 3011 (2006).

<sup>118</sup> M21-1 PROCEDURES, *supra* note 43, at 1-D-2.

<sup>119</sup> PRESIDENT’S COMM’N ON VETERANS’ PENSIONS, VETERANS’ BENEFITS IN THE UNITED STATES 10 (1956), *available at* [http://www.vetscommission.org/Bradley\\_Report.pdf](http://www.vetscommission.org/Bradley_Report.pdf) [hereinafter BRADLEY COMMISSION REPORT].

<sup>120</sup> *Id.* at 1-I-2.

<sup>121</sup> *Id.* The VHA provides inpatient and outpatient care, as well as residential and in-home care programs. *Id.*

<sup>122</sup> *Id.* at 3-I-1.

<sup>123</sup> *Id.* at 6-1.

<sup>124</sup> *Id.*; *see* 38 C.F.R. § 3.12 (2010) (defining character of discharge needed for purposes of eligibility for veterans benefits); *see also* U.S. Dep’t of Veterans Affairs, Fact Sheet

VA's use of the character of an individual's discharge as the threshold determination for eligibility traces back to The Economy Act of 1933, which stated that only individuals with a period of active service terminated by an honorable discharge were eligible for VA benefits.<sup>125</sup> Congress liberalized this requirement in the Servicemen's Readjustment Act of 1944, in part due to the number of World War II veterans who received administrative separations that were not characterized as "honorable."<sup>126</sup> Instead, the Readjustment Act gave the VA the discretion to determine what discharges were considered "dishonorable," which is the criteria reflected in the current 38 C.F.R. § 3.12 and 38 U.S.C. § 5303(a).<sup>127</sup>

The VA's discretion to determine the standard for eligibility remains relatively unchanged. Individuals with an OTH discharge who meet the disqualifying criteria of 38 C.F.R. § 3.12<sup>128</sup> are ineligible for VA compensation but may retain eligibility for health care for service-connected disabilities unless subject to one of the statutory bars in 38 U.S.C. § 5303(a).<sup>129</sup> If the 38 U.S.C. § 5303(a) bars to eligibility apply, however, the Soldier loses all benefits. The effects are tangible: in 2005, the VA determined that 100,781 veterans were dishonorably discharged

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16-8, Other Than Honorable Discharges, Fact Sheet 16-8 (Mar. 2010), <http://www.va.gov/healtheligibility/Library/pubs/OtherThanHonorable/OtherThanHonorable.pdf> [hereinafter Fact Sheet, OTH Discharges]. An individual with an honorable or general discharge is qualified for VA benefits, whereas an individual with an OTH discharge may be disqualified depending on the basis for the discharge. *Id.*

<sup>125</sup> Donald E. Zeglin, *Character of Discharge: Legal Analysis*, in VETERANS' DISABILITY BENEFITS REPORT, *supra* note 41, at A-4.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at A-5.

<sup>128</sup> 38 C.F.R. § 3.12. Under this regulation, discharge for one of the following offenses is considered to have been issued under dishonorable conditions: acceptance of an undesirable discharge in lieu of general court-martial; mutiny or spying; an offense involving moral turpitude (generally, a felony conviction); willful and persistent misconduct; and homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. *Id.* § 3.12(d).

<sup>129</sup> 38 U.S.C. § 5303(a) (2006). For purposes of health care, the servicing VA office determines whether the claimed injury has a service connection. M21-1 PROCEDURES, *supra* note 44, at 1-D-2. For claims of PTSD, establishing a service connection requires "credible evidence that the claimed in-service stressor occurred[,] medical evidence diagnosing the condition [in conformance with the DSM-IV and findings in the examination report] and[,] a link, established by medical evidence, between current symptoms and an in-service stressor." *Id.* Although a claimant's testimony may be sufficient to establish a service connection, the adjudication manual emphasizes that "primary evidence," or written records and other documents, is preferable. *Id.* at 1-D-6.

for VA purposes.<sup>130</sup> These numbers are likely to grow with the number of Soldiers afflicted with PTSD.<sup>131</sup>

B. Statutory Bars under 38 U.S.C. § 5303(a)

Prior to 1977, all individuals with discharges characterized as dishonorable were barred from all VA benefits.<sup>132</sup> However, Congress liberalized eligibility requirements for VA benefits in 1977 with Public Law 95-126, providing that individuals who meet the disqualifying criteria of 38 C.F.R. § 3.12, but not the statutory bars of 38 U.S.C. § 5303(a), retained eligibility for health care benefits for service-connected disabilities.<sup>133</sup> The bars to benefits under both 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12 do not apply if the VA makes a determination of insanity for the period of time during which the offense causing the discharge occurred.<sup>134</sup>

Public Law 95-126's stated purpose was to deny VA benefits to certain veterans who received upgraded discharges for certain offenses during the Vietnam era.<sup>135</sup> When President Jimmy Carter signed Public Law 95-126, he expressed concerns that the provisions raised "serious equal protection problems," particularly with regard to individuals whose records indicated that they were absent without leave (AWOL) for more than 180 consecutive days.<sup>136</sup> For instance, if an individual received an OTH discharge for an AWOL that is less than 180 days, that individual retained health care benefits, at a minimum.<sup>137</sup> If, however, the AWOL leading to the OTH discharge exceeded 180 days, legislation bars receipt of all benefits, unless the Soldier can prove "compelling circumstances"

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<sup>130</sup> VETERANS' DISABILITY BENEFITS REPORT, *supra* note 41, at 6. The VA compiled these results out of 46,476,819 veterans' records. *Id.*

<sup>131</sup> Simonson, *supra* note 40, at 1179. Numbers of veterans receiving VA benefits for PTSD grew 125% between 1999 and 2006. *Id.* at 1178. An additional 400,000 veterans of OIF and OEF are expected to eventually apply for veterans benefits. *Id.* at 1179.

<sup>132</sup> Jimmy Carter, Veterans Benefits Statement on Signing S. 1307 Into Law (Oct. 8, 1977), <http://www.presidency.ucsb.edu/ws/print.php?pid=6771> [hereinafter Carter Statement].

<sup>133</sup> Pub. L. No. 95-126, 91 Stat. 1106 (1977) (codified as amended at 38 U.S.C. § 5303); Zeglin, *supra* note 125, at A-7.

<sup>134</sup> 38 U.S.C. § 5303(b); 38 C.F.R. § 3.12(b) (2010).

<sup>135</sup> Pub. L. No. 95-126, 91 Stat. 1106 (1977) (codified as amended at 38 U.S.C. § 5303).

<sup>136</sup> Carter Statement, *supra* note 132.

<sup>137</sup> 38 C.F.R. § 3.12(c)(6).

for the AWOL or insanity at the time of the offense.<sup>138</sup> Given the close correlation between PTSD and misconduct, particularly avoidance-type behavior, such as AWOL, a PTSD-afflicted Soldier may be barred from all benefits, including health care, unless he can show that his condition amounted to insanity.

Congress needs to amend 38 U.S.C. § 5303(a) for several reasons. The legislative history regarding VA eligibility demonstrates a desire to provide benefits to a larger class of veterans, particularly with regard to treatment of service-connected disabilities.<sup>139</sup> In 1956, the Bradley Commission Report on Veterans' Benefits in the United States recommended to the President that "an undesirable discharge," now an OTH discharge, should not render an individual ineligible for health care if the individual suffered a service-connected disability under circumstances unrelated to the discharge.<sup>140</sup> Current legislation has the opposite result by ignoring the fact that PTSD may be a service-connected disability because of its debilitating effects, that it is often incurred in combat operations, and that PTSD manifests through misconduct, violence, and substance abuse. Further, in some instances, the severity of PTSD may qualify as insanity under the regulatory definition. However, asserting a defense of insanity to overcome a statutory or regulatory bar to benefits is a seemingly insurmountable hurdle under the current interpretation.

### *1. Insanity as an Exception to Statutory and Regulatory Bars*

For purposes of VA eligibility, 38 C.F.R. § 3.354 defines an insane person as

one who, while not mentally defective or constitutionally psychopathic . . . exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack adaptability to make

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<sup>138</sup> *Id.* § 3.12(b), (c)(6).

<sup>139</sup> *See infra* Part IV.C.

<sup>140</sup> BRADLEY COMMISSION REPORT, *supra* note 119, at 396.

further adjustment to the social customs of the community in which he resides.<sup>141</sup>

Although the definition seems broad enough to include some cases of PTSD, some individuals believe that PTSD does not—and should not—meet the definition of insanity for purposes of eligibility for VA benefits.<sup>142</sup> Critics believe that PTSD does not compel individuals to engage in misconduct, and to decide otherwise would erode standards of conduct, destroy unit discipline, and dishonor veterans who chose not to engage in misconduct.<sup>143</sup> These arguments, however, are fallacies: since the unpredictable nature of PTSD affects how the brain perceives and processes stimuli, it causes individuals to behave in unpremeditated, uncharacteristic ways.<sup>144</sup> In contrast, Soldiers suffering from TBI likely will not be punished for erratic behavior because TBI is viewed as a “legitimate” physical injury. Critics’ arguments against PTSD only confirm the existence of the stigma attached to mental disorders and the continued reticence to view PTSD as an actual injury.

In actuality, PTSD is the ideal condition for meeting the insanity definition, depending on the severity of the symptoms. Because PTSD-afflicted Soldiers may uncontrollably overreact to “danger cues,” re-experience their trauma in a dissociative state, or engage in impulsive sensation-seeking or avoiding behaviors, Soldiers suffering from PTSD may satisfy the definition of insanity.<sup>145</sup> A Soldier may satisfy the first prong of the definition by demonstrating that his PTSD symptoms significantly altered his behavior for an extended period of time.<sup>146</sup> Because Soldiers suffering from PTSD consistently show increased aggression, violence, irritability and outbursts of anger, combined with a decreased ability to self-monitor their behavior,<sup>147</sup> many Soldiers have viable arguments that their behavior either “interferes with the peace of society” or is antisocial and lacks the capability for further adjustment.

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<sup>141</sup> 38 C.F.R. § 3.354(a).

<sup>142</sup> Jim Spencer, *Vets Group Stands Tall for Sick GIs*, DENV. POST, May 11, 2007, [http://www.denverpost.com/headlines/ci\\_5867431](http://www.denverpost.com/headlines/ci_5867431).

<sup>143</sup> Gregg Zoyora, *Discharged: Troubled Troops in No-Win Plight; Marines Kicked Out for Conduct Linked to Stress Disorder Are Often Denied Treatment by the VA*, USA TODAY, Nov. 2, 2006, at A1.

<sup>144</sup> Garcia-Rill & Beecher-Monas, *supra* note 29, at 18.

<sup>145</sup> Constantina Aprilakis, Note, *The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD*, 3 GEO. J.L. & PUB. POL’Y 541, 555–56 (2005).

<sup>146</sup> 38 C.F.R. 3.354(a).

<sup>147</sup> OIF CLINICIAN GUIDE, *supra* note 3, at 70.

Comorbid substance abuse and depression may also cause further uncharacteristic deviation from behavioral norms.

Despite these considerations, both the Board of Veterans Appeals (BVA) and the CAVC narrowly construe the definition to more closely resemble a definition of mental incapacity used in criminal proceedings. Examining the plain text of the definition reveals that this higher standard is inappropriate in claims for veterans' benefits since these proceedings are merely administrative and have no effect on the individual's service records. However, under the current interpretation, a PTSD-afflicted Soldier stands little to no chance of being considered insane for purposes of VA eligibility.<sup>148</sup>

The CAVC first interpreted the definition of insanity in *Cropper v. Brown*.<sup>149</sup> The Soldier in *Cropper* received an OTH discharge for misconduct and submitted a claim for VA benefits under both the minor-offense exception and the insanity exception.<sup>150</sup> Since the Soldier had been diagnosed with pyromania, substance abuse, and antisocial personality behaviors while on active duty, the court considered whether any of these conditions were sufficient to meet the definition of insanity.<sup>151</sup> The court determined that the insanity defense could not be used where a Soldier received an OTH discharge for "acts of misconduct over which he ultimately had control but failed, in fact, to control."<sup>152</sup> Although the Soldier submitted a psychiatric report stating he had a "long history of impulsive, antisocial behavior[.]" and that he did "not appear to have any sense of responsibility for many of [his criminal] actions[.]" the court concluded that the Soldier's pyromania, substance

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<sup>148</sup> Many of the claimants are Vietnam veterans who were diagnosed with PTSD after their separation from service. In one case, a veteran claimed compensation for service-connected PTSD approximately thirty years after his dishonorable discharge. No. 05-14 103, 2008 BVA LEXIS 695, at \*1 (BVA 2008). The veteran was separated for misconduct and claimed he was insane at the time of the underlying offenses because he was suffering from PTSD. *Id.* at \*1-2. The Board of Veterans Appeals (BVA) rejected the veteran's claim, stating that his PTSD failed to meet the definition of insanity. *Id.* at \*16-17. Although a physician diagnosed the veteran with "war neurosis," an antiquated term for PTSD, during active service, the BVA applied the more stringent definition of insanity and found no "competent medical evidence of record" supporting a claim for insanity because he was capable of standing trial for the underlying offenses. *Id.* at \*16. Further, the BVA stated that the lack of evidence of "chronic psychiatric" deficiency after service further undermined the veterans' claim. *Id.*

<sup>149</sup> *Cropper v. Brown*, 6 Vet. App. 450, 452-54 (1994).

<sup>150</sup> *Id.* The court summarily rejected the Soldier's minor-offense argument. *Id.*

<sup>151</sup> *Id.* at 452-53.

<sup>152</sup> *Id.* at 453.

abuse, and antisocial behaviors failed to meet the required level of insanity “such that it legally excuses the acts of misconduct.”<sup>153</sup> The regulatory definition, however, requires no such determination.<sup>154</sup>

After *Cropper*, subsequent cases slightly modified the definition of insanity. In *Stringham v. Brown*, the CAVC considered a Soldier’s claim for disability compensation for PTSD when the Soldier was discharged under dishonorable conditions for willful and persistent misconduct.<sup>155</sup> Since the characterization of the Soldier’s discharge statutorily barred eligibility for VA benefits, the court considered whether the claim fell under any of the statutory exceptions.<sup>156</sup> The court also considered the insanity exception since the Soldier’s file indicated a documented diagnosis of service-connected PTSD.<sup>157</sup> The court stated that misconduct leading to discharge and the insanity must share a “simultaneous temporal relationship.”<sup>158</sup> The court found that this temporal relationship did not exist in *Stringham* because, although the Soldier’s file indicated a diagnosis of service-connected PTSD, there was “simply no medical evidence of record to show a relationship between any mental disease, including PTSD, and the appellant’s misconduct.”<sup>159</sup> The court was silent, though, regarding whether the severity of the Soldier’s PTSD was sufficient to meet the definition of insanity.

The CAVC continued to apply a stringent definition of insanity to other PTSD-afflicted Soldiers’ claims for VA benefits in *Struck v.*

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<sup>153</sup> *Id.* at 454–55.

<sup>154</sup> 38 C.F.R. § 3.354(a) (2010).

<sup>155</sup> *Stringham v. Brown*, 8 Vet. App. 445, 447 (1995). On four instances, the appellant received nonjudicial punishment for absence without leave (AWOL), and on one occasion, the appellant received nonjudicial punishment for failure to obey a lawful order. *Id.* at 445. In 1990, the VA determined that the appellant’s PTSD was service-connected for purposes of eligibility for VA health care benefits. *Id.*

<sup>156</sup> *Id.* First, the court determined that the minor-offense exception did not apply because its applicability was limited to single offenses; in this case, the Soldier’s discharge was based on several instances of unauthorized absences (AWOL) and failure to obey a lawful order. *Id.* Even if the minor-offense exception could apply to multiple offenses, the court reasoned, these offenses were not minor because, quoting *Cropper v. Brown*, they “were the type of offenses that would interfere with [the] appellant’s military duties, indeed preclude their performance, and this could not constitute a minor offense.” *Cropper v. Brown*, 6 Vet. App. 450, 452–53 (1994), *overruled in part by* *Struck v. Brown*, 9 Vet. App. 145 (1996). *Struck v. Brown* overruled the *Cropper* requirement of a causal connection between the insanity and the misconduct. *Struck*, 9 Vet. App. at 145.

<sup>157</sup> *Stringham*, 8 Vet. App. at 447–48.

<sup>158</sup> *Id.* at 448.

<sup>159</sup> *Id.* at 449.

*Brown*, even though the court struck down the temporal requirement established in *Cropper*.<sup>160</sup> In *Struck*, a Soldier was separated with an OTH discharge for AWOL.<sup>161</sup> Before his discharge, the Soldier reported to a mental health specialist that he felt suicidal and “that his mind was ‘falling apart.’”<sup>162</sup> Physicians diagnosed the Soldier with narcissistic personality disorder, which, according to his psychiatrist, was “part of a character and behavior disorder due to deficiencies in emotional and personality development of such degree as to *seriously impair his function* in the military service.”<sup>163</sup> Citing *Cropper*, the court determined that the Soldier’s mental condition must rise to the level of severity “such that it legally excuses the acts of misconduct” and that the insanity must exist “at the time of the commission of an offense leading to a person’s . . . discharge.”<sup>164</sup> Since the Soldier’s file contained contradictory evidence that he went AWOL because his unit wasn’t “cutting him any slack” for an injured leg, the court concluded that it was reasonable to find the Soldier was not insane at the time he went AWOL.<sup>165</sup>

Both the BVA and CAVC continue to apply a definition of insanity that more closely resembles an affirmative defense in a criminal case,<sup>166</sup> imposing a higher burden on the veteran to show that his condition was so severe that he was unable to appreciate the wrongfulness of his acts. In one recent claim, a claimant’s file indicated a diagnosis of PTSD upon returning from Vietnam.<sup>167</sup> The claimant stated that he was “haunted by his experiences in Vietnam,” felt “detached from reality,” and drank heavily in an effort to escape intrusive thoughts and memories from

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<sup>160</sup> *Struck*, 9 Vet. App. at 147.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* The Soldier had a history of psychiatric hospitalization for anxiety, schizophrenia, and “marked social inadaptability.” *Id.*

<sup>163</sup> *Id.* at 147–48 (emphasis added). Although the Soldier’s mental condition pre-existed his entry into military service, a psychiatrist stated that military service was “[o]ne of the main exacerbations of [the Soldier’s] mental illness,” and after separation, the Soldier was repeatedly hospitalized for “chronic and disabling schizophrenia.” *Id.* at 149.

<sup>164</sup> *Id.* at 153–54.

<sup>165</sup> *Id.* at 154–55.

<sup>166</sup> *See, e.g.,* United States v. Long Crow, 37 F.3d 1319 (8th Cir. 1994) (discussing the requirements of establishing insanity as an affirmative defense to a federal charge under 18 U.S.C. § 17 and whether evidence of defendant’s PTSD was sufficient to meet these requirements). Generally, the defendant must prove by clear and convincing evidence “that (1) he was suffering from a severe mental disease or defect at the time [of] the charged offenses and (2) that his disease or defect rendered him unable to appreciate the nature and quality or the wrongfulness of his acts.” *Id.* at 1323.

<sup>167</sup> No. 06-15 418, 2008 BVA LEXIS 21421, at \*13 (BVA 2008).

Vietnam.<sup>168</sup> Unable to assimilate into garrison life after his return, much like the hypothetical SGT Smith, the claimant went AWOL several times, often isolating himself in a motel for a period of “detoxing, dissociating, and reliving combat.”<sup>169</sup> Although the veteran was AWOL for a period in excess of 180 days during these binges, the BVA rejected the veteran’s claim because there was no evidence that the veteran “experienced prolonged deviation from his normal behavior; or interfered with the peace of society; or became antisocial.”<sup>170</sup> Further, the BVA cited that there were no findings that he had been “adjudicated incompetent” or that he suffered from any psychiatric conditions before entry to service,<sup>171</sup> although the existence of such condition would most likely render the veteran ineligible for benefits as well. Finally, the BVA emphasized that a substance-abuse disorder, regardless of severity, did not fall within the scope of insane behavior, even though the claimant’s record indicated that disorder appeared at the same time as his PTSD symptoms.<sup>172</sup>

Even in a case where the veteran had a well-documented diagnosis of service-connected PTSD in which a physician considered the condition so severe as to warrant consideration for medical discharge, the BVA found that the severity was insufficient to render the claimant “insane” for purposes of VA eligibility.<sup>173</sup> Although the BVA acknowledged that the claimant had mental difficulties as a result of the PTSD, it found that a diagnosis of PTSD is not “the equivalent of insanity.”<sup>174</sup> Admittedly, assertion of PTSD should not result in an automatic finding of insanity without assessing the facts; however, VA boards and courts have

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

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

<sup>170</sup> *Id.* at \*16, \*19.

<sup>171</sup> *Id.* at \*14.

<sup>172</sup> *Id.* at \*16–17.

<sup>173</sup> No. 06-38 748, 2008 BVA LEXIS 10866, at \*16 (BVA 2008). The claimant received an OTH discharge for “willful and persistent misconduct,” consisting of two periods of AWOL and use of illegal drugs. *Id.* at \*1–2. A physician opined that the claimant began experiencing PTSD symptoms shortly after returning from Vietnam, which was the same period during which the claimant committed his acts of misconduct. *Id.* at \*16–17.

<sup>174</sup> *Id.*; see also No. 05-37 442, 2008 BVA LEXIS 19258, at \*22 (BVA 2008) (holding that, although compelling evidence existed to support a diagnosis of PTSD and anxiety disorder, combined with uncharacteristic incidences of AWOL and injury to claimant’s self after return from Vietnam, “such facts do not establish ‘insanity’ for VA purposes”).

demonstrated a determined resistance to use a definition of insanity that is more appropriate for administrative proceedings.<sup>175</sup>

One finding, however, may indicate a potential shift in analysis regarding whether PTSD may rise to the level of insanity required by statute and regulation. In *Henry v. Nicholson*, a 2007 CAVC case, a physician diagnosed a Vietnam veteran with “anxiety, depression, and apparent passive-aggressive traits” during service, as well as PTSD after separation for misconduct.<sup>176</sup> Although the BVA noted that the veteran’s in-service psychiatric evaluations indicated that he would “stare out into space, sit for long periods of time, would not respond to orders to shower, clean self, etc.,” the BVA summarily determined that the statute and regulations barred the veteran from VA benefits due to the character of his discharge for misconduct and that his PTSD did not qualify as insanity.<sup>177</sup> Reviewing the BVA decision under a “clearly erroneous standard,” the court ruled that the BVA failed to apply the “expansive definition” of insanity found in 38 C.F.R. § 3.354 when it determined the veteran was not insane at the time of the offenses.<sup>178</sup> Whether this claim represents an actual change in analysis or merely an aberration remains to be seen.

## 2. VA General Counsel Opinion Regarding Insanity Parameters

In addition to a judicial narrowing of the definition of insanity, the VA General Counsel also analogized the seemingly expansive definition

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<sup>175</sup> In 2006, on appeal from the BVA to the CAVC, one veteran separated with an OTH discharge for misconduct argued that an exception should be made specifically for misconduct caused by PTSD. *Marret v. Nicholson*, 2006 U.S. App. Vet. Claims LEXIS 841, at \*1 (2006). The Secretary of VA argued that PTSD was insufficient to rise to the level of insanity that would qualify as an exception to reinstate eligibility for VA benefits; the court agreed, and the BVA’s decision to deny eligibility was affirmed. *Id.* at \*1–3; *see also* *Henry v. Nicholson*, 2007 U.S. App. Vet. Claims LEXIS 52 (2007) (holding that PTSD was insufficient to overcome the statutory bar related to OTH discharges for misconduct); *Mudge v. Nicholson*, 2006 U.S. App. Vet. Claims LEXIS 1495 (2006) (holding that PTSD was not a compelling circumstance to excuse AWOL and was insufficient to show that the claimant was insane or unable to determine right from wrong).

<sup>176</sup> *Henry*, 2007 U.S. App. Vet. Claims LEXIS, at \*2–3. The CAVC remanded this case to the BVA, and appellant is currently awaiting a rehearing.

<sup>177</sup> *Id.* at \*3–5.

<sup>178</sup> *Id.* at \*6.

to the more rigorous standard for mental capacity.<sup>179</sup> Although the CAVC held that a determination of insanity requires an examination of the facts and circumstances surrounding the particular case,<sup>180</sup> the VA General Counsel's opinion reflects a very different stance. In essence, the opinion establishes a blanket prohibition on applicability of insanity to certain conditions, many of which are manifestations or associated disorders of PTSD.

First, the VA General Counsel's opinion reiterates the court's ruling in *Winn v. Brown*<sup>181</sup> that personality disorders will not qualify as "a disease," as required by the regulatory definition, because it is not a disease for VA compensation purposes.<sup>182</sup> Further, the opinion states that, although substance abuse may be considered a compensable disease for purposes of disability, a substance abuse disorder does not constitute insanity because the conduct associated with the disorder "does not exemplify the gross nature of conduct which is generally considered to fall within the scope . . . of insanity."<sup>183</sup> Finally, the VA General Counsel determined that all three clauses of the definition must be interpreted "in light of the commonly accepted meaning of the term [insanity]" to mean "such unsoundness of mind or lack of understanding as prevents one from having the mental capacity required by law to enter into a particular relationship, status, or transaction or as excuses one from criminal or civil responsibility."<sup>184</sup> The VA General Counsel bolstered this assertion by stating that Congress's underlying intent regarding the definition of insanity may be presumed from commonly-accepted meanings, which are generally criminal or civil law standards of insanity.<sup>185</sup>

The VA General Counsel's opinion fails, however, to address the inconsistency between the purpose behind other insanity standards and the administrative standard: the definition of insanity for purposes of criminal or civil responsibility is intentionally rigorous because the individual asserting insanity seeks to be absolved of liability for his wrongdoing. For purposes of VA eligibility determinations, though, the

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<sup>179</sup> Definition of Insanity in 38 C.F.R. § 3.354(a), 20 Op. Vet. Admin. Gen. Counsel 5 (1997) [hereinafter VA Gen. Counsel Opinion].

<sup>180</sup> *Stringham v. Brown*, 8 Vet. App. 445, 448 (1995).

<sup>181</sup> *Winn v. Brown*, 8 Vet. App. 510 (1996).

<sup>182</sup> VA Gen. Counsel Opinion, *supra* note 179, at 11.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

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

VA uses a finding of insanity to determine whether the Soldier should receive healthcare and other benefits for his military service. The individual's underlying misconduct is not absolved, and the character of his discharge is not changed upon a finding of insanity.

The opinion also ignores the legislative and regulatory history of the definition of insanity. Since the U.S. Veterans' Bureau first defined the term in 1926 as "a persistent morbid condition of the mind characterized by a derangement of one or more of the mental faculties to the extent that the individual is unable to understand the nature, full import and consequences of his acts, and is thereby rendered incapable of managing himself or his affairs,"<sup>186</sup> legislators have revised the definition several times.<sup>187</sup> With each revision, the definition has grown more expansive and shifted farther away from the more stringent definition applied in criminal proceedings. Yet, in light of this growing expansiveness, numerous VA decisions quelled the application of a broader interpretation.

Although the Secretary of the Department of Veterans Affairs possesses the authority to prescribe all necessary rules and regulations with respect to adjudication of veterans' claims, as well as "the nature and extent of proof and evidence" required to establish eligibility for benefits,<sup>188</sup> he is unlikely to do so for veterans with OTH discharges for several reasons. First, bureaucratic institutions must overcome a great amount of inertia to make substantive changes to existing rules and regulations. These changes may also require significant coordination within the institution as well as public comment—a time-consuming

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<sup>186</sup> *Id.* General Order No. 348 was published on 20 April 1926.

<sup>187</sup> Within the same year, this definition was replaced with a determination that "a person will be deemed insane when he is mentally incapable of attending to his affairs." *Id.* General Order No. 348-A was published on 21 July 1926. *Id.* The following year, the definition was redefined to require a "prolonged deviation from normal behavior"—similar to the current definition—that rendered the individual "incapable of managing his own affairs or transacting ordinary business." *Id.* General Order No. 348-C was published on 26 October 1927. *Id.* The definition offered an additional basis of showing insanity if the person were "dangerous to himself, to others, or to property." *Id.*; *see also* Zang v. Brown, 8 Vet. App. 246, 254 (1995) (noting that Congress excised the provision regarding incompetency in 38 U.S.C. § 3.354 and moved the provision to 38 U.S.C. § 3.353(a)).

<sup>188</sup> 38 U.S.C. § 501(a) (2006).

process.<sup>189</sup> Further, the VA has no incentive to make a change that would flood the system with more eligible veterans given its current under-resourced, overwhelmed state, particularly in light of the projected growth of veterans needing healthcare.<sup>190</sup>

### 3. *Limitations Under the VJRA Framework*

In addition to an overwhelming number of VA cases imposing strict, if not insurmountable, insanity criteria, the VA adjudication framework is an additional barrier to fair and accurate adjudication of veterans' claims. The adjudication process begins when a veteran files a claim for benefits at a VA regional office.<sup>191</sup> The claimant may appeal a decision from the regional office to the BVA, which either remands the claim "for further development" or issues "the final decision of the Secretary."<sup>192</sup> The claimant may subsequently appeal BVA decisions to the CAVC, an Article I court with exclusive jurisdiction over BVA appeals.<sup>193</sup> Under the VJRA, a claimant has limited opportunity to appeal to the U.S. Court of Appeals for the Federal Circuit for issues relating to interpretation of "constitutional and statutory provisions."<sup>194</sup> The VJRA prohibits judicial review of VA decisions or statutes in any other court except the U.S. Supreme Court.<sup>195</sup> Therefore, a limited opportunity exists for an objective reassessment of a Soldier's claim.

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<sup>189</sup> The Administrative Procedure Act, 5 U.S.C. §§ 552–54 (2006), requires independent and executive agencies to inform the public about procedures and rules and to allow public participation in the rulemaking process.

<sup>190</sup> Bruce Patsner et al., *The Three Trillion Dollar War: The True Cost of the Iraq Conflict*, 11 DEPAUL J. HEALTH CARE L. 359 (2008) (book review). The authors of the book project that, by 2012, 1.8 million veterans will be eligible for VA health care. *Id.* at 363. In 2000, the VA backlog of initial claims for VA benefits was 228,000; in 2007, the total number of claims exceeded 600,000. *Id.* at 365. Additionally, the VA must account for an increase of at least \$5.2 billion in benefits payments over ten years due to more relaxed documentation rules for establishing service-connected PTSD, creating a greater number of veterans eligible for benefits. O'Keefe, *supra* note 14, at 2.

<sup>191</sup> *Slater v. U.S. Dep't of Vet. Aff.*, 2008 U.S. Dist. LEXIS 32440, at \*12 (M.D. Fla. Mar. 20, 2008); see also Landy F. Sparr et al., *Veterans' Psychiatric Benefits: Enter Courts and Attorneys*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 205, 207–08 (1994) (describing the adjudication process at each level, starting with the initial review of the claim for eligibility at a regional office to the decision by the U.S. Court of Appeals for the Federal Circuit).

<sup>192</sup> *Slater*, 2008 U.S. Dist. LEXIS 32440 at \*12.

<sup>193</sup> *Id.* at \*12–13.

<sup>194</sup> *Id.* at \*13–14.

<sup>195</sup> *Id.*

Veterans' lack of recourse outside of the VJRA statutory framework is problematic in several respects. First, the regional offices and BVA follow the guidance of the VA Secretary and General Counsel, who have both narrowly restricted application of the insanity exception.<sup>196</sup> Second, upon appeal, CAVC reviews BVA decisions under a "clearly erroneous" standard of review, which requires the court to uphold all factual determinations "if there is a plausible basis in the record."<sup>197</sup> This standard of review is extremely deferential to the BVA unless it literally fails to consider the facts of the case at all.

Constitutional challenges of the underlying statutes face a further obstacle: the U.S. Supreme Court has never answered the question whether applicants for government benefits have property rights in benefits that have not been awarded.<sup>198</sup> The Supreme Court has acknowledged, though, that when applicable statutes and regulations are silent as to notice and opportunity to be heard, such due process is implicit "[when] viewed against our underlying concepts of procedural regularity and basic fair play[.]"<sup>199</sup> Even with this implied right to due process, veterans have little chance of overcoming an adverse decision under the current statutory framework. To some extent, veterans are provided due process when filing claims for benefits because a veteran has an opportunity to be heard by both the regional office reviewing the claim and the BVA on appeal.<sup>200</sup> However, the opportunity for due process in claims adjudication appears to have little value if the CAVC and the VA General Counsel adhere to a flawed insanity standard.

#### IV. Recommended Changes to Legislation

Congress and the military must amend current legislation to afford equitable relief to Soldiers with service-connected PTSD who are currently barred from health care access. They can achieve this objective with a combination of the following specific measures.

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<sup>196</sup> VA Gen. Counsel Opinion, *supra* note 179, at 3.

<sup>197</sup> *Stringham v. Brown*, 8 Vet. App. 445, 447–48 (1995).

<sup>198</sup> *Thurber v. Brown*, 5 Vet. App. 119, 122 (1993). The Supreme Court has only recognized "continued receipt" of veterans' benefits as a constitutionally-protected property interest under the Fifth Amendment. *Id.* at 122–23.

<sup>199</sup> *Gonzales v. United States*, 348 U.S. 407, 411–12 (1955).

<sup>200</sup> *Sparr et al.*, *supra* note 191, at 207–08.

## A. Equitable Relief

Generally, courts provide equitable relief “only sparingly,” and this remedy is often extended to parties that detrimentally relied on the conduct of another party when a remedy does not exist elsewhere in the law.<sup>201</sup> With regard to VA benefits, entitlement is “established by service to country at great personal risk.”<sup>202</sup> Today, Soldiers voluntarily enter service and risk their lives in combat operations in Iraq and Afghanistan. Through no fault of their own, Soldiers may incur disabilities in the course of that service and rely on the assurance that the VA system will identify and treat their service-connected injuries. When the VA denies Soldiers’ claims, Soldiers have no remedy beyond the VJRA framework. Further, Soldiers may be misdiagnosed, fail to acquire documentation of a service-connected condition, or fall short of realizing the impact of the discharge characterization until access to health care is barred.

Recognizing the vulnerability of veterans, the court in *Friedman v. United States* expressed similar concerns over the statute of limitations in military disability compensation cases and offered equitable relief.<sup>203</sup> The court, seeking to protect veterans who either did not know they were injured or failed to appreciate the severity of their injury at the time of separation from service, wanted to ensure that the rules for presenting disability claims “are fair to the plaintiff in giving him adequate time to bring suit and to protect his rights in court.”<sup>204</sup> The court acknowledged the equitable nature of its decision but determined that the rights of veterans deserved protection.<sup>205</sup>

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<sup>201</sup> *Cintron v. West*, 13 Vet. App. 251, 257 (1999) (discussing equitable tolling of filing notices of appeal for veterans benefits).

<sup>202</sup> *Thurber*, 5 Vet. App. at 123 (citing *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 333 (1985), *superseded by statute*, Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105).

<sup>203</sup> *Friedman v. United States*, 310 F.2d 381 (1962). The court in *Friedman* introduced the First Competent Board Rule, which permits a veteran to raise a claim for disability compensation after separation if the veteran was separated without a physical evaluation board (PEB) determination of fitness for active duty. *Id.* at 396.

<sup>204</sup> *Id.* at 402.

<sup>205</sup> Raymond J. Jennings, *Friedman v. United States, the First Competent Board Rule and the Demise of the Statute of Limitations in Military Physical Disability Cases*, ARMY LAW., June 1994, at 25, 31. The author, however, criticizes the court for incorrectly focusing on whether the veteran had notice of future disability rather than knowledge of an existing disability at time of separation. *Id.*

In the context of veterans who received an OTH discharge for misconduct while suffering from service-connected PTSD, an equitable remedy is needed to ensure “procedural regularity and basic fair play.”<sup>206</sup> These Soldiers suffered an injury while in service, and their acts of misconduct may be directly attributed to this injury.<sup>207</sup> As in *Friedman*, many Soldiers not previously diagnosed with PTSD may leave service without knowing that they are suffering from PTSD, or failing to appreciate the severity and complexity of their condition.<sup>208</sup> Further, PTSD is directly linked to substance abuse, misconduct, and acts of violence.<sup>209</sup> These Soldiers may discover that they are ineligible for benefits when they seek treatment after separation and, further, that they have no recourse. Since the BVA and courts within the VJRA framework have already narrowly construed the definition of insanity in VA disability cases, these courts will likely continue to consistently apply the more stringent definition in accordance with the VA General Counsel’s opinion.

Congress should apply the same equitable rationale used by the court in *Friedman* and revise 38 U.S.C. § 5303(a) to permit access to health care for service-connected disabilities. In the alternative, the VA should amend 38 C.F.R. § 3.354(a) to require application of a more expansive definition of insanity. This amendment must expressly state that PTSD falls within the parameters of the definition. Otherwise, legislation bars receipt of benefits because of the character and underlying basis of a veteran’s discharge, which is potentially based on acts of conduct or behaviors attributable to his medical disability. This legislation would not only afford PTSD-afflicted Soldiers the equitable relief that they deserve but would also benefit society as a whole.<sup>210</sup>

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<sup>206</sup> *Gonzales v. United States*, 348 U.S. 407, 411–12 (1955).

<sup>207</sup> A determination of this causal connection is best made by a diagnosing clinician during the claims adjudication process.

<sup>208</sup> The disorder often follows a “fluctuating course” of “relapses and remissions.” *Friedman*, *supra* note 2, at 662.

<sup>209</sup> OIF CLINICIAN GUIDE, *supra* note 3, at 24.

<sup>210</sup> Statistics show that untreated servicemembers increase economic costs to society. CHRISTINE EIBNER, INVISIBLE WOUNDS OF WAR: QUANTIFYING THE SOCIETAL COSTS OF PSYCHOLOGICAL AND COGNITIVE INJURIES (June 12, 2008), available at <http://www.rand.org/pubs/testimonies/CT309/> (reprinting testimony before the House Joint Economic Comm). The author estimated that, over a two-year period, the post-deployment costs resulting from PTSD for 1.64 million servicemembers was \$1.2 billion. *Id.* at 7. The study analyzed the costs of immediate medical treatment, as well as the societal costs in terms of lost productivity, reduced quality of life, and premature mortality that would accrue to all members of society. *Id.* at 2. The study produced

## B. Ramifications of Amending Current Legislation

Requiring application of a more expansive definition of insanity is not without pitfalls; the numbers of claims will likely increase, along with demands and costs on the VA system. The VA system already experiences overwhelming health care demands, and some individuals believe that the system is incapable of handling these current demands, particularly with regard to mental health issues.<sup>211</sup> For instance, in 2007, a record number of claims—over 800,000—flooded the VA system.<sup>212</sup> Of the 263,000 OIF and OEF veterans currently enrolled in the VA system, approximately 52,000 have been diagnosed with PTSD.<sup>213</sup> Without access to healthcare, though, PTSD-afflicted Soldiers face great difficulties in becoming contributing members of society if unable to assimilate and gain employment.

Further, limiting VA benefits to certain types and characterizations of discharges “has been considered to be vital to the good order, discipline, and morale of the military.”<sup>214</sup> Critics argue that offering benefits to Soldiers who commit misconduct lessens the “incentive to perform well and faithfully in service.”<sup>215</sup> But these assertions ignore the fact that, in cases of misconduct caused by PTSD symptoms, the threat of a less than an honorable discharge would not deter improper behavior. Although these assertions should be taken into account when deciding eligibility for benefits, treating Soldiers for service-connected disabilities—particularly disabilities incurred in combat operations—would not necessarily tarnish the achievements of veterans with honorable discharges. Rather, treatment of PTSD-afflicted Soldiers benefits society. Since violence and aggression are features of PTSD,<sup>216</sup> separating and sending untreated Soldiers into society, where less structure, supervisory control, and oversight exist, endangers the community and creates additional societal costs to taxpayers.<sup>217</sup>

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compelling evidence that PTSD significantly impacts the labor market since it affects servicemembers’ ability to return to employment, their work productivity, and their future employment opportunities. *Id.* at 3.

<sup>211</sup> Milaninia, *supra* note 12, at 328.

<sup>212</sup> *Id.*

<sup>213</sup> Patsner, *supra* note 190, at 368 n.20.

<sup>214</sup> Zeglin, *supra* note 125, at A-2.

<sup>215</sup> *Id.*

<sup>216</sup> Gover, *supra* note 3, at 566–67.

<sup>217</sup> EIBNER, *supra* note 210, at 2.

### C. Current Pending Legislation Regarding PTSD

A number of current legislative proposals, seeking to protect the benefits of OEF and OIF veterans, point to the timeliness and importance of addressing PTSD-related concerns. Both the Senate and the House of Representatives proposed legislation that would place a moratorium on discharges for personality disorders in response to growing congressional concerns that Soldiers suffering from PTSD and other combat-related mental disorders are either inadvertently or intentionally discharged for a personality disorder.<sup>218</sup> In both instances, legislators recognized the need to ensure that PTSD-afflicted Soldiers receive an accurate diagnosis and treatment plan prior to separation.

Also, with an increasing number of Soldiers reporting PTSD-related symptoms, earlier intervention would help the DoD and VA mental health systems to better meet the needs of these individuals before chronic disorders become entrenched. Since PTSD is closely associated with attrition from military service,<sup>219</sup> diagnosing and treating Soldiers before they leave military service may mitigate the increased burdens on the VA system. The Psychological Kevlar Act of 2007 focuses on this need for early intervention by directing the development of a new plan that would “incorporate preventative and early-intervention measures . . . [to] reduce the likelihood that personnel in combat will develop PTSD or other stress-related psychopathologies, including substance use conditions.”<sup>220</sup> The bill gives the Secretary of Defense discretion to develop and implement this plan, which would also include providing periodic updates and training programs designed “to educate and

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<sup>218</sup> Senate Bill 2644 would prohibit a Secretary of a military department from discharging a servicemember for a personality disorder unless the servicemember “has undergone testing by DOD for PTSD, TBI, and any related mental health disorder or injury prior to a final action with respect to the discharge.” S. 2644, 110th Cong. (2008). This bill was referred to the Senate Committee on Armed Services in February 2008, but no further action has occurred. House Resolution 3167, titled the Fair Mental Health Evaluation for Returning Veterans Act, addresses similar concerns by imposing a temporary moratorium on discharges for personality disorders except in certain specified cases, such as in instances where the Soldier provided “false or misleading information . . . that is material to discharge for personality disorder.” Fair Mental Health Evaluation for Returning Veterans Act, H.R. 3167, 110th Cong. (2007). This resolution was referred to the Subcommittee on Military Personnel in August 2007; no further action has occurred.

<sup>219</sup> Milliken et al., *supra* note 95, at 2145.

<sup>220</sup> The Psychological Kevlar Act of 2007, H.R. 3256, 110th Cong. (2007). This resolution was referred to the Subcommittee on Military Personnel on 25 September 2007, but to this date, no further action has occurred.

promote awareness among [military personnel and] front-line medical professionals and primary care providers . . . about the signs and risks of combat stress . . . .<sup>221</sup>

Other proposed legislation addresses VA benefits and services provided to veterans with mental health disorders after separation from the military. For example, the Veterans' Disability Benefits Claims Modernization Act addresses requirements for establishing a service connection for PTSD.<sup>222</sup> The Act seeks to establish a presumption of service-connection for PTSD for veterans who deployed in support of a contingency operation, such as OIF or OEF.<sup>223</sup> Currently, in order for a veteran to establish service-connected PTSD, he must have: a current diagnosis of PTSD, credible supporting evidence of occurrence of an in-service stressor, and medical evidence establishing causation between diagnosis and the in-service stressor.<sup>224</sup>

Other legislation addresses VA health care benefits: Senate Bill 2963 specifically addresses the mental health treatment of veterans who served in OIF or OEF.<sup>225</sup> These veterans would be eligible for readjustment counseling and related mental health services through VA health care centers upon request by the veteran.<sup>226</sup> Similarly, Senate Bill

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

<sup>222</sup> Veterans' Disability Benefits Claims Modernization Act of 2008, H.R. 5892, 110th Cong. (2008). The Senate received this resolution on 30 July 2008, and referred it to the Committee on Veterans' Affairs.

<sup>223</sup> *Id.*

<sup>224</sup> M21-1MR PROCEDURES, *supra* note 7, at 4-H-5. The proposed legislation would not create an automatic presumption of PTSD, but it would create a presumption that the in-service stressor occurred if the veteran served in support of a contingency operation and the stressor is related to enemy action. H.R. 5892. The July 2010 policy regarding the establishment of a service connection for PTSD does not create a presumption of PTSD, either. O'Keefe, *supra* note 14, at 1. Rather, the new policy requires that veterans be screened by a VA clinician to confirm that the claim of PTSD is "consistent with the location and circumstances of military service and PTSD symptoms." *Id.* Although supporters of the new policy anticipate that the more relaxed requirements will benefit female veterans and veterans in non-combat arms positions, the new policy fails to address the issue of eligibility for benefits. *Id.*

<sup>225</sup> S. 2963, 110th Cong. (2008). On 30 May 2008, the bill was referred to the Committee on Veterans' Affairs. No further action has occurred.

<sup>226</sup> *Id.* Once a veteran requests this counseling, the VA is obligated to provide the mental health referrals and must advise the veteran of his rights to request review of his discharge. *Id.* The bill also directs that, if a veteran commits suicide within two years after separation from the service and had a medical history of PTSD or TBI, the veteran's death will be considered in the line of duty for purposes of survivors' eligibility to burial benefits and Survivor Benefit Plan benefits. *Id.*

2965 explores the possibility of including severe and acute PTSD among the conditions covered by traumatic injury protection coverage under Servicemembers' Group Life Insurance.<sup>227</sup> Additionally, The Veterans Mental Health Treatment First Act addresses long-term treatment of PTSD and comorbid conditions.<sup>228</sup> The Act directs the Secretary of the VA to implement a program of mental health care and rehabilitation for veterans diagnosed with PTSD, as well as PTSD-related depression, anxiety, or substance abuse.<sup>229</sup>

These pending initiatives highlight the need for increased awareness and training for both the medical community and the VA regarding PTSD, and they direct expanded care of PTSD-afflicted veterans. Unlike the VA General Counsel opinion and judicial interpretation of insanity, these initiatives represent a positive movement towards protecting veterans with service-connected PTSD. More immediate changes are needed, however, to ensure that PTSD-afflicted Soldiers would retain access to health care after discharge. Many of these legislative initiatives remain stalled in Congress, and most fail to remedy the current bar to health care access that PTSD-afflicted Soldiers face if separated for misconduct. Further, none of the initiatives addresses the comorbid disorders or behaviors of PTSD; separation for these comorbid disorders may also serve as a barrier to health care access.

#### D. Recommended Changes to Army Regulations

A Soldier suffering from PTSD risks involuntarily separation on several bases. One basis for separation is for acts of misconduct under Chapter 14 of AR 635-200, which addresses acts ranging from "minor disciplinary infractions" and "pattern[s] of misconduct" to serious offenses, such as drug abuse or desertion.<sup>230</sup> When a commander separates a PTSD-afflicted Soldier for misconduct stemming from PTSD, the Soldier's underlying medical condition essentially serves as a basis for separation. Soldiers separated under Chapter 14 for misconduct

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<sup>227</sup> S. 2965, 110th Cong. (2008). This bill was introduced to the Senate on 1 May 2008 and referred to the Committee on Veterans' Affairs; no further action has occurred.

<sup>228</sup> Veterans Mental Health Treatment First Act, S. 2573, 110th Cong. (2008). This bill was introduced to the Senate and referred to the Committee on Veterans' Affairs on 29 January 2008. To this date, no action has occurred.

<sup>229</sup> *Id.* In order to receive treatment, participating veterans must agree to certain conditions, such as compliance with a specified treatment and rehabilitation plan. *Id.*

<sup>230</sup> AR 635-200, *supra* note 4, para. 14-12.

face a greater likelihood of receiving an OTH discharge and are particularly vulnerable to loss of benefits. Current legislation bars receipt of VA compensation, and potentially health care, when a Soldier receives an OTH discharge.<sup>231</sup>

Although some individuals separated with an OTH discharge may be eligible for a treatment of a service-connected disability in limited circumstances,<sup>232</sup> any discharge issued for “willful or persistent misconduct” constitutes a statutory bar to most benefits.<sup>233</sup> If the misconduct falls under one of the statutory bars of 38 U.S.C. § 5303(a), then the Soldier is precluded from access to health care. In order to remain eligible for VA benefits, a Soldier separated for misconduct with an OTH discharge must show that his claim falls within one of several exceptions: that the Soldier “innocently acquired 100 percent disability” while on active duty,<sup>234</sup> that the discharge was for a “minor offense,”<sup>235</sup> or that he was considered “insane” at the time of the misconduct.<sup>236</sup> Until Congress amends current legislation to permit Soldiers meeting statutory bars to access health care, the only option for PTSD-afflicted Soldiers is to argue that they met the definition of insanity at the time of their misconduct.

Commanders may also recommend separation of a PTSD-afflicted Soldier under Chapter 5-13 of AR 635-200 for a personality disorder.<sup>237</sup> A personality order is defined as “a deeply ingrained maladaptive pattern of behavior of long duration that interferes with the [S]oldier’s ability to perform duty.”<sup>238</sup> Although a mental health specialist must diagnose the personality disorder prior to separation, PTSD symptoms may be

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<sup>231</sup> 38 U.S.C. § 5303 (2006); 38 C.F.R. § 3.12 (2010). Statutory bars are found in 38 U.S.C. § 5303(a) and are further supplemented by regulatory bars in 38 C.F.R. § 3.12(c) and (d).

<sup>232</sup> 38 C.F.R. § 3.360.

<sup>233</sup> *Id.* § 3.12.

<sup>234</sup> *Id.* § 4.17a.

<sup>235</sup> *Id.* § 3.12(d)(4).

<sup>236</sup> *Id.* § 5303(b); *id.* § 3.354; *see also* Stringham v. Brown, 8 Vet. App. 445 (1995) (discussing the applicability of the minor-offense exception under 38 C.F.R. § 3.12(d)(4) and the insanity exception under 38 C.F.R. § 3.12(b) to claims that are otherwise ineligible for benefits under 38 U.S.C. § 5303). For the minor-offense exception, Soldiers will rarely have a viable claim because courts interpreted this exception to generally apply to single offenses that don’t interfere with performance of military duties. Cropper v. Brown, 6 Vet. App. 450, 452–53 (1994).

<sup>237</sup> AR 635-200, *supra* note 4, para. 5-13.

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

confused with borderline personality and other personality disorders.<sup>239</sup> Soldiers separated for a personality disorder also risk losing eligibility for VA health benefits because VA regulations state that personality disorders are considered “pre-existing conditions” with no service-connection.<sup>240</sup> Soldiers afflicted with PTSD are consequently rendered ineligible for treatment in the VA system.

Further, since substance abuse often accompanies PTSD, Soldiers may be at greater risk for separation for a substance abuse-related issue. Chapter 9 of AR 635-200 provides the procedure for separating a Soldier when he fails an alcohol or substance abuse rehabilitation program.<sup>241</sup> Typically, once a Soldier either self-refers or is command-referred into the Army Substance Abuse Program (ASAP), a commander may involuntarily separate a Soldier “because of inability or refusal to participate in, cooperate in, or successfully complete such a program . . . .”<sup>242</sup> If a Soldier is discharged for a disability relating to the Soldier’s alcohol or drug abuse, current legislation bars compensation for that disability unless “caused or aggravated by a primary service-connected disorder.”<sup>243</sup> Since substance abuse is a method of coping with intrusive thoughts, nightmares, insomnia, and hyper-alertness that are symptomatic of PTSD,<sup>244</sup> commanders may believe the substance abuse is the Soldier’s primary issue. Determining whether substance abuse is the primary issue as opposed to a secondary or related issue to another medical problem is crucial because VA is prohibited from paying disability compensation for alcohol or drug abuse, unless the substance abuse disability is “secondary to or is caused or aggravated by a primary service-connected disorder.”<sup>245</sup> Consequently, if PTSD is not diagnosed as the primary disorder, a Soldier discharged for substance abuse alone will be barred from future treatment and benefits.

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<sup>239</sup> C&P GUIDE, *supra* note 30, at 204.

<sup>240</sup> 38 U.S.C. §§ 1110, 1131 (2006); 38 C.F.R. § 3.303 (2010). The House Veterans’ Affairs Committee recently discovered that over 22,500 Soldiers were discharged from the military for personality disorders in the last six years. Press Release, House Comm. on Veterans’ Aff., “Personality Disorder”: A Deliberate Misdiagnosis to Avoid Veterans’ Health Care Costs! (July 25, 2007), <http://veterans.house.gov/news/PRArticle.aspx?NewsID=111>. The Committee expressed concerns that the military may be attempting to save resources by purposefully discharging Soldiers for personality disorders when the Soldiers have legitimate claims for PTSD. *Id.*

<sup>241</sup> AR 635-200, *supra* note 4, para. 9-1.

<sup>242</sup> *Id.* para. 9-2.

<sup>243</sup> 38 U.S.C. § 1110; C&P GUIDE, *supra* note 30, at 210.

<sup>244</sup> Editorial, *supra* note 57, at 1.

<sup>245</sup> C&P GUIDE, *supra* note 30, at 210.

Since the PDHA and PDHRA fail to identify all PTSD-afflicted Soldiers, one method of achieving early intervention is to reexamine current Army regulations governing administrative separations and medical fitness determinations. Currently, the procedure for separation under Chapters 5-13, 9, and 14 varies in several aspects, particularly with regard to the type of medical and mental evaluation afforded to the Soldier. Although AR 635-200 mandates that the Soldier receive a medical and mental evaluation prior to separation under Chapter 14, only Soldiers separated under Chapter 5 for personality disorders or other enumerated mental conditions receive an evaluation by a licensed psychiatrist or similarly accredited mental health specialist.<sup>246</sup> Because the evaluations for separation under Chapter 9 and 14 are less comprehensive, a Soldier who either fails to recognize the presence of PTSD or is too embarrassed to seek treatment for it will likely not have the opportunity to be properly evaluated for PTSD before separation, risking loss of a lifetime of VA health care for his service-connected condition.<sup>247</sup> At a minimum, if a Soldier expresses concerns about PTSD or related symptoms in the PDHA, PDHRA, or during separation screening for Chapter 5, 9, or 14, the Soldier should be referred to a mental health specialist qualified to diagnose PTSD, determine the severity of the condition, and recommend a treatment plan. This information must also be documented in the Soldier's records. If a Soldier is diagnosed with PTSD, his commander should then be required to reevaluate the characterization of discharge and confirm knowledge of this information before selecting a basis and characterization. However,

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<sup>246</sup> AR 635-200, *supra* note 4, paras. 1-32, 5-13, 5-17. For Chapter 14 separations, AR 635-200 requires the mental status evaluation to be conducted by a master-level psychologist or licensed clinical social worker. *Id.* Soldiers separated for personality disorders or other mental conditions under Chapter 5 must be evaluated by a psychiatrist or doctoral-level psychologist "with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for the DoD components." *Id.*

<sup>247</sup> A more thorough mental health screening, conducted by a mental health specialist with training in combat stress-related disorders, is important for several reasons. First, PTSD is a treatable anxiety disorder; if misdiagnosed as a personality disorder, the Soldier is not eligible for further benefits because his condition will likely not be considered service-connected. Next, PTSD patients are at increased odds for abusing alcohol and drugs, and if they are separated under Chapter 9 for failure of a substance abuse rehabilitation program, they will be barred from veterans' benefits unless their substance abuse is related to another service-connected disability. Additionally, if not treated, PTSD symptoms may develop into misconduct, and the Soldier may be barred from future benefits if separated with an OTH discharge for misconduct. Finally, given the fact that Soldiers are likely to under-report mental health issues due to fear of stigmatization and other barriers in the system, an additional stop-gap measure is needed to identify Soldiers suffering from PTSD.

the commander retains discretion to separate the Soldier and characterize the separation.<sup>248</sup>

In addition to requiring a more rigorous mental health screening in the separation process, AR 40-501 also needs revision. Currently, AR 40-501 prescribes the requirements of a Separation Health Assessment (SHA), conducted before a Soldier is involuntarily separated from active duty.<sup>249</sup> The SHA consists of the Soldier's self-reported health status and an interview with a medical care provider, accompanied by a physical examination.<sup>250</sup> The regulation provides no specifics regarding the mental evaluation, and the SHA may be waived entirely if the Soldier "has undergone a physical examination of assessment within 12 months prior to separation or discharge."<sup>251</sup> Although annual periodic health assessments that encompass screening for traumatic brain injury, substance abuse, and "deployment related health problems" are required for all Army personnel, these assessments are primarily based on a Soldier's self-reported health status and review of the Soldier's medical records.<sup>252</sup> As with the SHA, these periodic assessments, usually performed immediately before or after a deployment, are insufficient to

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<sup>248</sup> *But see* U.S. DEP'T OF DEF., DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (28 Aug. 2008) [hereinafter DODD 1332.14] (implementing new procedural requirements for separating Soldiers under Chapter 5-13). Department of Defense Directive 1332.14 requires corroboration by a mental health specialist and endorsement by the Surgeon General of the Military Department when Soldiers who served or are serving in imminent danger pay areas are diagnosed with personality disorders. *Id.* Department of Defense Directive 1332.14 also requires the mental health specialist to address the comorbidity of PTSD or other mental illness prior to separation. *Id.* Finally, DoDD 1322.14 prohibits separation for personality disorder if the Soldier is diagnosed with service-connected PTSD. *Id.*; *see also* Message, 111948Z Feb 09, Pentagon Telecomms. Ctr., subject: ALARACT 036/2009-Policy Changes for Separation of Enlisted Soldiers Due to Personality Disorder (implementing Army efforts to restructure its diagnosis and separation procedures for Soldiers with PTSD and TBI). These policy changes specify that enlisted Soldiers "who have served or are currently serving in imminent danger pay areas" may only be separated for personality disorder if "a psychiatrist or PhD-level psychologist" diagnoses the personality disorder, the diagnosis is corroborated "by a peer or higher-level mental health professional and endorsed by the Surgeon General of the Army," and a medical review confirms that "PTSD, TBI, and/or other comorbid mental illness" is not a "significant contributing factor to the diagnosis." *Id.* If PTSD, TBI, or other comorbid mental illness is a contributing factor, the Soldier must "be evaluated under the Physical Disability System in accordance with AR 635-200." *Id.*

<sup>249</sup> U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS (14 Dec. 2007).

<sup>250</sup> *Id.* para. 8-12.

<sup>251</sup> *Id.* para. 8-24.

<sup>252</sup> *Id.* para. 8-20.

identify and diagnose individuals with PTSD because the Soldier must be able to recognize and report his symptoms.<sup>253</sup>

These measures may further identify PTSD-afflicted Soldiers for diagnosis and treatment. Campaign awareness programs are also needed to reduce the stigmatization attached to mental health disorders, particularly PTSD. Finally, although the VA system attempts to provide comprehensive mental health services such as counseling and individualized treatment plans to veterans with PTSD,<sup>254</sup> these services are useless to a Soldier who never received a diagnosis of PTSD. Given the increased efforts that DoD and Congress have made to implement systems that detect and treat PTSD-afflicted Soldiers, the Army must change current regulations to require more rigorous and effective mental health screenings during the separation process.

## V. Conclusion

Out of fairness to the Soldier who risked his life in combat, Congress must amend current legislation to ensure that all veterans who suffer from service-connected PTSD are able to obtain treatment regardless of the circumstances under which they were separated from the military. In the alternative, Congress must redefine insanity to include PTSD as a potential exception to statutory and regulatory bars. Although the existing definition appears expansive enough to include PTSD, in application, it requires an inappropriate incapacitation determination. Given the current emphasis on new legislation designed to provide treatment and benefits to PTSD-afflicted Soldiers and veterans, the issue clearly warrants more attention. While the PDHA and PDHRA are steps in the right direction, they do not identify a Soldier's PTSD-related issues accurately.<sup>255</sup> Efforts to detect PTSD in early stages are stymied

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<sup>253</sup> Even if a Soldier reports a medical condition or symptom that is documented in his records, the GAO found that, in some instances, only sixty-six percent of medical records were even available for periodic review. U.S. GEN. ACCOUNTING OFF., GAO-30-997T, DEFENSE HEALTH CARE: ARMY HAS NOT CONSISTENTLY ASSESSED THE HEALTH STATUS OF EARLY-DEPLOYING RESERVISTS 3 (July 9, 2003).

<sup>254</sup> Susan Okie, *Reconstructing Lives—A Tale of Two Soldiers*, 355 NEW ENG. J. MED. 2609 (2006). The author states that approximately eighty percent of recently-discharged OIF veterans are not enrolled in the VA system because the veterans live too far from military or VA facilities to receive frequent treatment. *Id.* at 2615.

<sup>255</sup> Milliken et al., *supra* note 95, at 2146 (showing that, among 804 Soldiers that were referred for mental health concerns, 349, or 43.4%, did not access mental health care services).

by the complexity of the disorder, the individuality of each case, and—in the military—the fear of being stigmatized and appearing weak. Researchers confirm that the effects of PTSD are persistent and wide-ranging,<sup>256</sup> and although disagreements regarding diagnosis and measurement remain,<sup>257</sup> the influx of Soldiers suffering from PTSD is indisputable.<sup>258</sup> Currently, the DoD health care system is unable to diagnose every individual accurately, even when that individual reports PTSD-related symptoms.<sup>259</sup>

Regulatory changes are needed to ensure that a Soldier is not erroneously discharged for the wrong condition and that service-connected PTSD is sufficiently documented for future VA treatment. Both AR 635-200 and AR 40-501 need to incorporate a mandatory PTSD evaluation that will be conducted by a mental health specialist “with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for the DoD components,”<sup>260</sup> prior to separation under Chapters 5, 9 and 14. A Soldier’s and a unit’s ability to recognize symptoms is crucial, as well as the capacity to communicate with a mental health specialist to prevent erroneous discharges.<sup>261</sup>

Even with these preventative measures, Soldiers afflicted with PTSD still face a great risk of losing VA benefits and access to health care. The statutory bars encompassed in 38 U.S.C. § 5303(b) preclude Soldiers with an OTH discharge for certain offenses—even if that misconduct is directly related to PTSD—from receiving any benefits, to include health care. Because the VA General Counsel and courts within the VJRA rubric interpreted insanity narrowly, PTSD-afflicted Soldiers have no judicial recourse. Further, the VA has no incentive to change its current interpretation due to the growing demands placed upon the system. Changing judicial access to allow a veteran to appeal to federal district

<sup>256</sup> Solomon & Mikulincer, *supra* note 1, at 665.

<sup>257</sup> Pols & Oak, *supra* note 17, at 2138.

<sup>258</sup> Gover, *supra* note 3, at 561 (predicting that the number of Soldiers affected by PTSD may equal 1,050,000 as a result of OIF).

<sup>259</sup> Hoge et al., *supra* note 3, at 1030. Utilization of mental health services is higher among OIF veterans, but 23% of the OIF veterans who accessed mental health services in the study did not receive any type of mental health diagnosis. *Id.* Further, although studies showed greater success in identifying Soldiers with PTSD several months after the deployment, 60% of OIF veterans “who screened positive for PTSD, generalized anxiety, or depression did not seek treatment.” *Id.* at 1031.

<sup>260</sup> AR 635-200, *supra* note 4, para. 1-32.

<sup>261</sup> Milliken et al., *supra* note 95, at 2147.

court still leaves the determination of insanity a matter of discretion, potentially leading to inconsistent and unfair results.

Soldiers need congressional action to overcome this institutional inertia. Although giving more Soldiers the ability to remain eligible for VA health care services and benefits will increase costs and the demand for more resources, untreated individuals also increase economic costs to society.<sup>262</sup> Congress must revisit veterans' eligibility for benefits, particularly health care, and redefine insanity to protect those who gave so much to their country. Such an important change benefits not only Soldiers with service-connected PTSD but our national interests as well.

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<sup>262</sup> EIBNER, *supra* note 210, at 7.

**A “CATCH-22” FOR MENTALLY-ILL MILITARY  
DEFENDANTS: PLEA-BARGAINING AWAY MENTAL  
HEALTH BENEFITS**

VANESSA BAEHR-JONES\*

In an accompanying article, Major Tiffany Chapman describes issues related to servicemembers administratively separated for acts of misconduct.<sup>1</sup> The instant article addresses separate issues facing servicemembers who have been administratively discharged in lieu of court-martial, whose numbers in the Army have amounted to 19,808, from the period shortly after the inception of the Global War on Terror through 23 July 2010.<sup>2</sup> Of these discharged veterans, statistics reveal that a good portion of them are likely to suffer from combat-related mental conditions—to a greater extent than other veterans—given the inescapable connection between mental illness and criminal behavior.<sup>3</sup> While veterans who receive Other Than Honorable (OTH) conditions discharges in lieu of court-martial may still be eligible for mental health treatment under limited exceptions to the law, sanity board results from

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<sup>1</sup> See generally Major Tiffany M. Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1 (2010).

<sup>2</sup> See E-mail from Homan Barzmeihri, Mgmt. & Program Analyst, Office of the Clerk of Court, U.S. Army Court of Criminal Appeals, to Amy Atchison, Research Librarian, Univ. California, Los Angeles Law School (23 July 2010, 0754 EST) (summarizing statistics for the number of discharges in lieu of Court-Martial within the U.S. Army for the period 2002–2010). Between 2005 and 2 July 2010, the Navy separated 2326 personnel in lieu of court-martial. E-mail from Mike McLellan, External Media Manager, Navy Personnel Command, Public Affairs Office, to Amy Atchison, Research Librarian, Univ. California, Los Angeles Law School (28 July 2010, 1429 EST).

<sup>3</sup> Psychological studies show a strong connection between symptoms of PTSD and violence in veterans. A 1990 study of over 3000 Vietnam veterans, for instance, showed PTSD sufferers committed, on average, 13.3 acts of violence in a year compared to a rate of 3.5 for non-PTSD study participants. Almost half of the PTSD veterans also had been arrested or jailed at least once. RICHARD A. KULKA ET AL., NATIONAL VIETNAM VETERAN READJUSTMENT STUDY (1990). See also Thomas W. Freeman & Vincent Roca, *Gun Use, Attitudes Toward Violence, and Aggression Among Combat Veterans with Chronic Posttraumatic Stress Disorder*, 189 J. NERVOUS & MENTAL DISEASE 317 (2001) (showing a link between chronic PTSD and higher rates of self-reported aggression); Andrew Muskwitz, *Dissociation and Violence: A Review of the Literature*, 5 TRAUMA, VIOLENCE, & ABUSE 22 (2004) (concluding that dissociative symptoms can predict violence).

their military records, which are narrowly-tailored to purely criminal standards, can become the basis for the Veterans Administration's (VA) denials of veterans benefits. This article explores this unique problem in detail and recommends solutions.

The experiences of "K," a U.S. Soldier and Vietnam War veteran, highlight the dilemma faced by many mentally-ill servicemembers contemplating discharge in lieu of court-martial.<sup>4</sup> In 1967, K deployed to Vietnam, where he served in a combat platoon,<sup>5</sup> and then as a machine-gunner aboard small "Riverine" vessels.<sup>6</sup> In later interviews,<sup>7</sup> he recalled being haunted by experiences of watching as villagers—including women and children—were horribly burned by shrapnel.<sup>8</sup> K began compensating for the psychological effects of these events by using drugs, and alcohol.<sup>9</sup> Military records reveal that K attempted suicide while still in the military.<sup>10</sup> Upon returning from the deployment, he had increasing difficulty functioning,<sup>11</sup> periods of unauthorized absence, and was ultimately separated "for the good of the service" in lieu of trial by court-martial with an OTH discharge.<sup>12</sup> After leaving the military, K's situation worsened, as did the symptoms of his Posttraumatic Stress Disorder (PTSD).<sup>13</sup> The destructive behavior culminated in his 1982 conviction for second-degree murder, a crime K committed while intoxicated.<sup>14</sup>

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<sup>4</sup> See James C. May, *Hard Cases from Easy Cases Grow: In Defense of the Fact- and Law-Intensive Administrative Law Case*, 32 J. MARSHALL L. REV. 97 (1998) (describing the administrative case appealing the denial of K's veterans' benefits).

<sup>5</sup> *Id.* at 98.

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

<sup>7</sup> In the process of appealing his case, the clinicians interviewed K extensively about his time in Vietnam. K also underwent interviews with a psychiatrist to determine the effects of the trauma on his mental health. *Id.* at 104.

<sup>8</sup> *Id.* at 106.

<sup>9</sup> *Id.* at 106–08.

<sup>10</sup> *Id.* at 105.

<sup>11</sup> *Id.* at 107.

<sup>12</sup> *Id.* at 97. This would be the equivalent of a Chapter 10 discharge, under the Army's current separation regulation. See U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS (6 June 2005) [hereinafter AR 635-200].

<sup>13</sup> For a description of the historical development of the current diagnostic criteria for PTSD, see Chapman, *supra* note 1, at 6–16. Consistent with these criteria, during K's episodes, he would become violent and deranged, believing he was back in combat. May, *supra* note 4, at 107.

<sup>14</sup> *Id.*

In 1990, K began the lengthy legal fight to obtain veterans' disability benefits for PTSD.<sup>15</sup> His OTH discharge in lieu of court-martial, however, barred his eligibility.<sup>16</sup> Even though a psychiatric report showed K most likely suffered from PTSD during his service,<sup>17</sup> the Veterans' Affairs Board, on the first appeal, ruled that K would remain ineligible for benefits because of the nature of his discharge, necessitating no review of his mental health status.<sup>18</sup> K died from lung cancer<sup>19</sup> (related to his exposure to Agent Orange in Vietnam<sup>20</sup>) as his appeal continued. K's struggle to obtain treatment reveals the conundrum facing other mentally-ill servicemembers who have obtained discharges in lieu of courts-martial and who have been separated under OTH conditions.

In most cases, defense counsel request a sanity board when they suspect that an accused has some sort of mental defect.<sup>21</sup> When the

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<sup>15</sup> The South Royalton Legal Clinic, a general clinic primarily providing legal aid-type services at the Vermont Law School, assisted with K's administrative case from 1990 to 1997. *Id.* at 88–115.

<sup>16</sup> *Id.* at 97.

<sup>17</sup> *Id.* at 105.

<sup>18</sup> *Id.* at 109–10.

<sup>19</sup> *Id.* at 110.

<sup>20</sup> Two months prior to his death, the VA acknowledged K's lung cancer as a service-connected disability based on a presumptive herbicide (Agent Orange) exposure, and awarded medical care benefits solely for cancer treatment. *Id.* at 110. The clinic continued to appeal the denial of disability benefits for K's PTSD on behalf of K's wife and child, eventually convincing the Board of Veterans Appeals in 1997 to rule in favor of granting accrued benefits to K's dependents. The Board acknowledged K suffered from PTSD at the time he went AWOL and, therefore, his Other Than Honorable Conditions (OTH) discharge did not bar him from receiving benefits. *Id.* at 115. Although K's appeals achieved a bittersweet conclusion for his family, the seven-year appeals process and extensive clinic resources devoted to the appeal are not realistic options for the majority of veterans who appeal their benefits cases pro se. See Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U.L. REV. 361, 396 (2009) (noting that 53% of veterans appear in the U.S. Court of Appeals for Veterans Claims, pro se).

<sup>21</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706(a) (2008) [hereinafter MCM]:

If it appears to . . . defense counsel . . . that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused.

board finds that the accused was not insane at the time of the offense—which is routinely the case<sup>22</sup>—the accused confronts a dilemma. If he requests discharge in lieu of court-martial, supposing that the command would be receptive to it, the action will likely result in an OTH, as well as an uphill battle to regain eligibility for any sort of mental health treatment. This quagmire results from a provision in the Veterans' Benefits Code regulations that defines any OTH discharge obtained in lieu of court-martial as “under dishonorable conditions”—a complete bar to obtaining veterans' benefits.<sup>23</sup>

Following a finding of mental capacity during a sanity board, the accused essentially has the perverse incentive to plea-bargain away his veterans' disability benefits with an OTH discharge. Furthermore, the records indicating the competency of the accused will extinguish the only known exception in the Veterans' Benefits Code that permits treatment for OTH recipients.<sup>24</sup> In these cases, the accused ultimately faces a “Catch 22”: He cannot receive benefits unless insane, but has little chance of being found insane.<sup>25</sup> This bar to benefits will usually stand,

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*See also* United States v. Talley, 2007 CCA LEXIS 535, at \*15 (A.F. Ct. Crim. App. Nov. 30, 2007) (unpublished) (describing defense counsel's duty to seek a sanity board inquiry and noting that RCM 706(a) “clearly establishes the duty of trial defense counsel to report sanity issues to an appropriate authority”). In fact, defense counsel have an incentive to request a sanity board in any case in which the accused shows signs of suffering from a mental health problem to prevent against a later claim of ineffective assistance of counsel. In a number of cases, appellants have raised such claims for failure to request a sanity board. *See, e.g., id.*; United States v. Breese, 47 M.J. 5 (C.A.A.F. 1997); United States v. McClain, 1998 CCA LEXIS 549 (A.F. Ct. Crim. App. Apr. 29, 1998) (unpublished); United States v. Cote, 1991 CMR LEXIS 750 (C.M.R. Apr. 9, 1991) (unpublished).

<sup>22</sup> *See* Major Jeff A. Bovarnick & Captain Jackie Thompson, *Trying to Remain Sane: Trying an Insanity Case*: United States v. Captain Thomas S. Payne, ARMY LAW., June 2002, at 13 & 13 n.4 (“Of the thousands of courts-martial completed from 1998–2001, CPT Thomas Payne was the only military person committed to the custody of the Federal Bureau of Prisons (FBOP) resulting from a verdict of not guilty only by reason of lack of mental responsibility. Thus, the frequency of this verdict is quite low.”).

<sup>23</sup> 38 C.F.R. 3.12(d)(4) (2010) specifies that any undesirable discharge accepted during plea-bargaining to escape court-martial is considered as “under dishonorable conditions.” Under 38 U.S.C. § 101(2), any discharge under dishonorable conditions deprives the service member of veteran's status for the purpose of obtaining benefits under the Code.

<sup>24</sup> 38 U.S.C. § 5303(b) (2006).

<sup>25</sup> Although the process of veterans' claims remains a relatively obscure area of administrative law with little coverage in academic publications, the system itself impacted close to seventy-five million people as of 2007, who were potentially eligible to receive benefits from the U.S. Department of Veterans Affairs. *See* Allen, *supra* note 20, at 365.

even if the veteran can later show the mental illness was, in fact, service-connected.<sup>26</sup> The reality of this conundrum is highlighted in a number of veterans' benefits opinions.<sup>27</sup>

Part I of this article explores the peculiar function of the sanity board in precluding mentally-ill veterans from eligibility for exceptions to obtain treatment. It further highlights characteristics of sanity boards that severely limit or preempt the consideration of later, more detailed evaluations for veterans' benefits. Part II then proposes reforms that will better serve the interests of veterans facing court-martial who suffer from mental conditions.

## I. Factors that Contribute to the Creation of a Catch-22 for Mentally-Ill Servicemembers Facing Court-Martial

### A. Some Dilemmas inherent in Sanity Boards

An accused suffering from PTSD faces a particularly arduous challenge in demonstrating the existence of a qualifying condition for incapacity or insanity at a sanity board inquiry.<sup>28</sup> Even where the accused is shown to suffer from PTSD symptoms, a sanity board is unlikely to find that the condition deprived the accused of mental capacity at the time of the charged offenses.<sup>29</sup> For instance, in *United States v. Brasington*, the sanity board representative testified that, even

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<sup>26</sup> See, e.g., *Stringham v. Brown*, 8 Vet. App. 445, 449 (Vet. App. 1995) (finding service-connected PTSD did not qualify as insanity exception because he did not suffer from it at the time of offenses leading to OTH discharge); see also 38 C.F.R. § 4.1 (defining service-connected broadly as a "disability resulting from all types of diseases and injuries encountered as a result of or incident to military service").

<sup>27</sup> See *infra* notes 45–52.

<sup>28</sup> See, e.g., *May*, *supra* note 4, at 114. See also *United States v. Colvano*, 2009 CCA LEXIS 95 (A.F. Ct. Crim. App. Mar. 17, 2009) (involving an unsuccessful appeal of a guilty plea after a sanity board ruling found the appellant did not suffer from PTSD, even though appellant underwent post-conviction treatment for PTSD); *United States v. Brasington*, 2009 CCA LEXIS 383 (A.F. Ct. Crim. App. Oct. 5, 2009) (unpublished) (describing a case where, during the original trial, a sanity board member testified the accused did not suffer from a stress disorder, even though the accused was undergoing psychological evaluation at the time of the offense, and had been diagnosed with an "acute stress disorder" prior to the offense).

<sup>29</sup> See, e.g., *United States v. Young*, 43 M.J. 196, 198 (C.A.A.F. 1995) (describing how "few of the most common symptoms of PTSD could ever lead to a finding of lack of mental responsibility" in declining to find the accused's PTSD undermined his volition in his violent criminal episodes).

had the accused been suffering from an acute stress disorder, the condition would still not qualify as a “severe mental disease or defect.”<sup>30</sup> Such results are attributable to a combination of five factors.

First, common PTSD symptoms that lead to violent behavior—mood liability and combat addiction—may be particularly difficult to identify, diagnose, and present as convincing evidence of a mental disorder within the military justice system.<sup>31</sup> Both of these symptoms could be confused for positive traits not reflective of a disorder due to the fact that many symptoms of combat addiction are easily viewed as motivation and good-soldiering in military environments.<sup>32</sup> The Air Force Court of Criminal Appeals seemed to apply this kind of reasoning in *United States v. Curtis*, citing the accused’s years of fighting in high-stress combat situations as evidence of his competency and dismissing the later finding of PTSD.<sup>33</sup>

Second, delayed-onset PTSD, a condition in which symptoms emerge long after exposure to the traumatic event,<sup>34</sup> or its co-occurrence with other mental health diagnoses, contributes to misdiagnosis among military members returning from combat.<sup>35</sup> Third, even if the sanity

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<sup>30</sup> *Brasington*, 2009 CCA LEXIS 383, at \*13.

<sup>31</sup> One study identified four psychological factors that can lead to violent behavior in those suffering from PTSD: flashback-associated violence, sleep disturbance-associated violence, mood liability-associated violence, and combat addiction violence. J. Silva et al., *A Classification of Psychological Factors Leading to Violent Behavior in Posttraumatic Stress Disorder*, 46 J. FORENSIC SCI. 309–16 (2001). Mood liability in military veterans can involve chronic irritability and hostility. Andrea Friel et al., *Posttraumatic Stress Disorder and Criminal Responsibility*, 19 J. FORENSIC PSYCHIATRY & PSYCHOL. 64 (2008). A 2001 study described a Vietnam combat veteran suffering from mood liability as chronically hostile and irritable, tending to “overreact even to quite minor provocation.” *Id.* at 74. Combat addiction describes a person who “seeks to re-experience previous combat experiences by engaging in a repeated pattern of aggressive behavior.” *Id.* Here, The patient will attempt to recreate the original trauma through “liv[ing] on the edge.” *Id.*

<sup>32</sup> Quick demonstrations of hostility can also serve to positively distinguish a military member training for combat. See, e.g., Lizette Alvarez, *Suicides of Soldiers Reach High of Nearly 3 Decades*, N.Y. TIMES, Jan. 29, 2009, at A19 (describing the “warrior culture” that discourages military members from seeking psychological treatment).

<sup>33</sup> *United States v. Curtis*, 2009 CCA LEXIS 11, at \*15–17 (A.F. Ct. Crim. App. Jan. 6, 2009) (unpublished).

<sup>34</sup> See, e.g., Chapman, *supra* note 1, at 12 (describing features of delayed-onset PTSD).

<sup>35</sup> Because of the sporadic and continuous symptoms of PTSD, the disorder can be especially difficult to correctly diagnose and treat in returning veterans. A twenty-year study of Israeli veterans showed how PTSD symptoms could vary greatly over time and lead to unpredictable diagnoses. The study found 22.6% of those who were diagnosed

board finds evidence of mental illness, because the symptoms of PTSD do not always negate the accused's volition,<sup>36</sup> the illness rarely serves as a complete affirmative defense based on a lack of mental capacity.<sup>37</sup>

Fourth, the structure of and rules governing sanity boards further limit the possibility of a finding of insanity. The sanity boards usually are comprised of only one individual,<sup>38</sup> and, in the case of multiple members, the board can include a supervisor and a subordinate, creating questions of fairness.<sup>39</sup> In addition, if the convening authority does not agree with the findings of the sanity board regarding mental competency, the Rules for Courts-Martial permit the convening authority to refer the charge to

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with PTSD after year one no longer suffered from the disorder after year two. However, of that "recovered" sample, 36.8% were subsequently re-diagnosed with PTSD in year three of the study, suggesting that a number of veterans suffering from PTSD may be found "recovered" only to later suffer from recurring symptoms. In the context of diagnosing the disorder for the purposes of a court-martial, the sporadic onset of PTSD symptoms likely confound consistent diagnoses, increasing the difficulty of proving the disorder in court. Zahava Solomon & Mario Mikulinver, *Trajectories of PTSD: A 20-Year Longitudinal Study*, 163 AM. J. PSYCHIATRY 659, 659-66 (2006). Consider the example of K, which opened this article. Even though he attempted to commit suicide while in the military and suffered from substance abuse problems, military mental health evaluations did not diagnose his symptoms of PTSD. Consider also *Stringham v. Brown*, where the Veterans Board found that the veteran suffered from service-connected PTSD, but did not find evidence in his military mental health records to show he suffered from PTSD symptoms at the time of the offense. 8 Vet. App. 445 (1995).

<sup>36</sup> While the *Diagnostic and Statistical Manual of Mental Disorders* requires an objective evaluation of a causative traumatic stressor and requires symptoms of clinically significant distress or impairment in social, occupational, or other important area of functioning, only symptoms of unconsciousness and disassociation typically result in complete lack of volition in civilian criminal courts. Chapman, *supra* note 1, at 8-9; Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190 MIL. L. REV. 67, 78-79 (2006) (discussing civilian and military cases in which defendants asserted an insanity defense, claiming PTSD caused disassociation at the time of the offense); *see also* AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 467-68 (text rev., 4th ed. 2000). However, PTSD rarely serves as a full affirmative insanity defense in the civilian criminal justice system. *See* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 52-53 (2007) (noting that only "extreme cases of Posttraumatic Stress Disorder (PTSD)" would qualify as an insanity defense in the majority of courts in the United States).

<sup>37</sup> *See, e.g.*, UCMJ art. 50a(a) (2008) (defining the affirmative insanity defense); *United States v. Young*, 43 M.J. 196, 198 (C.A.A.F. 1995).

<sup>38</sup> Hayes, *supra* note 36, at 83.

<sup>39</sup> *United States v. Murphy*, 67 M.J. 514 (A.C.C.A. 2008) (holding no conflict of interest where appellant claimed error based on supervisory relationship between sanity board members).

trial regardless of a finding that the accused lacks mental competency to stand trial.<sup>40</sup>

Finally, the military justice system also does not recognize a psychiatrist-patient privilege, which can discourage defense counsel from calling a psychiatrist to testify to the accused's mental state.<sup>41</sup> In *United States v. Mansfield*, the defense abandoned the planned lack of mental capacity defense because the accused made admissions to the defense psychiatrist that could indicate guilt on cross-examination.<sup>42</sup> Similarly, in *United States v. Toledo*, the prosecution used the psychiatrist on cross-examination as a witness to impeach the accused's credibility.<sup>43</sup> Thus, the current rules and procedures for sanity board evaluations create significant obstacles for introducing and proving evidence of the existence and extent of PTSD.

#### B. The Effects of Sanity Board Determinations on Disability Benefit Evaluations

Congress established an exception to the general rule barring benefits for veterans discharged with an OTH in lieu of court-martial. The existence of this exception recognizes the fact that such veterans may require treatment and be worthy of such care—notwithstanding their discharge characterization.<sup>44</sup> The Department of Veteran Affairs (VA)

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<sup>40</sup> Hayes, *supra* note 36, at 83–84 (discussing RCM 909(c)).

<sup>41</sup> “There is no physician-patient or psychotherapist-patient privilege in federal law, including military law.” *United States v. Mansfield*, 38 M.J. 415 (C.A.A.F. 1993), *cert. denied*, 511 U.S. 1052 (1994). A psychotherapist-patient privilege has been recognized, although not applied, in both the Second Circuit (*In re Doe*, 964 F.2d 1325 (2d Cir. 1992)) and Sixth Circuit (*In re Zuniga*, 714 F.2d 632 (6th Cir. 1983), *cert. denied*, 464 U.S. 983 (1983)). *But see* *Loving v. United States*, 64 M.J. 132, 164 (C.A.A.F. 2006) (recognizing the special privilege that attaches to a psychologist who is “part of defense team”). If, however, the mental health professional testifies, the Government can subject the expert to cross-examination.

<sup>42</sup> *Mansfield*, 38 M.J. 415.

<sup>43</sup> 25 M.J. 270 (C.M.A. 1987), *on reconsideration*, 26 M.J. 104 (C.M.A. 1988), *cert. denied*, 488 U.S. 889 (1988).

<sup>44</sup> This concept of worthiness is highlighted by Congress's intent to except “insane” veterans from treatment prohibitions, despite their characterization of discharge. Chapman, *supra* note 1, at 25. *Cf.* Donald E. Zeglin, *Character of Discharge: Legal Analysis*, in VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 437–38 (2007), available at [http://www.vetscommission.org/pdf/ExecutiveSummary\\_eV\\_9-27.pdf](http://www.vetscommission.org/pdf/ExecutiveSummary_eV_9-27.pdf) (discussing

standards define the characteristics of “insanity” that qualify for this exception. Although such standards are inconsistently applied by VA adjudicators—and ultimately the veterans boards and courts of appeal—PTSD could meet the insanity definition.<sup>45</sup> The problem is that, as Major Chapman recognizes, many VA adjudicators are applying a narrow “criminal-like” criterion, even though the framework is administrative, and not criminal.<sup>46</sup> Sanity board results are now used to deny the exception outright.<sup>47</sup> Ultimately, because VA standards still differ from the UCMJ’s insanity criteria, the sanity board’s evaluations serve to limit the evidence available to prove the insanity exception during later reviews.

In *Gardner v. Shinseki*, a sanity board found the accused competent to stand trial for absence without leave offenses and failure to obey a superior’s order. He was sentenced to two years of hard labor and received a dishonorable discharge.<sup>48</sup> During his confinement, the servicemember showed signs of psychosis. After one year, he was ultimately transferred to a naval hospital where he was diagnosed with schizophrenia.<sup>49</sup> The military released Gardner from the remainder of his sentence and discharged him administratively under OTH conditions, notwithstanding the punitive discharge.<sup>50</sup> In reviewing Gardner’s subsequent claims for service-connected disability benefits, the Board of Veterans’ Appeals based its determination of the appellant’s mental status on the UCMJ’s definition used in his criminal case, still finding

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Congress’s intent in liberalizing the requirement for veterans’ benefits to allow for OTH discharged veterans to receive benefits in 1944).

<sup>45</sup> The regulation implementing 38 U.S.C. § 5303(b) (2006) provides an exception permitting a veteran with an OTH discharge to obtain disability benefits when the claimant was insane at the time of the offense 38 C.F.R. § 3.12(b) (2010). For an exceptional case, in which the Veterans Court overturned the Board’s denial of benefits based on reports that demonstrated the appellant suffered from schizophrenia at the time he committed the Absence Without Leave offenses, see *Beck v. West*, 13 Vet. App. 533, 541 (U.S. App. Vet. Cl. 2000).

<sup>46</sup> Chapman, *supra* note 1, at 29.

<sup>47</sup> The definition of insanity in 38 C.F.R. § 3.354 also appears to provide a more expansive definition of insanity for evaluating the claimant’s mental state at the time of the offense than does the UCMJ. See *Zang v. Brown*, 8 Vet. App. 246, 252–54 (1995) (observing that the existence of insanity, as defined in section 3.354(a), at time of commission of act, negates intent so as to preclude the act from constituting willful misconduct under section 3.1(n)).

<sup>48</sup> 22 Vet. App. at 417 (1995).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 417–18.

the appellant sane at the time of the offense and therefore denying benefits.<sup>51</sup>

Aside from varied and inconsistent standards for insanity, the veterans' benefits courts must also struggle with problems related to temporality—determining the time at which PTSD first emerged. In *Stringham v. Brown*, the Court of Appeals for Veterans Claims acknowledged that the claimant suffered from PTSD because of his service in Vietnam, but, nonetheless, denied his claim for service-connected benefits because there was no evidence showing he suffered from PTSD symptoms at the time of the offense resulting in his separation.<sup>52</sup> Both *Gardner* and *Stringham* demonstrate how the veteran's sanity board evaluations can easily disadvantage later attempts to secure mental health treatment by exception.<sup>53</sup>

### III. Proposals: Expanding the Military Justice System's Capacity to Document and Consider VA Criteria for Insanity

To ensure that mentally-ill separated servicemembers retain access to health benefits, Major Chapman recommends revisions to the Veterans Code, which permit access to health care for all service-connected PTSD, regardless of the nature of a veteran's discharge.<sup>54</sup> Alternatively, she proposes explicit mention of PTSD within the Code's insanity exception.<sup>55</sup> This Part proposes other alternatives suited to the sanity board and administrative review process, which are not dependent on the Veterans Code. In this respect, reforms within the military criminal justice system will ensure that the accused has the opportunity to receive

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<sup>51</sup> *Id.* at 420. *Mudge v. Nicholson* was also a decision in which the Veterans Court remanded because the lower court applied an incorrect standard. 2006 U.S. App. Vet. Claims LEXIS 1495 (U.S. App. Vet. Cl. Dec. 19, 2006) (remanding due to the Board's failure to apply the proper definition and its faulty reliance on whether the claimant could understand the consequences of his actions).

<sup>52</sup> *Stringham v. Brown*, 8 Vet. App. 445, 449 (1995).

<sup>53</sup> *See, e.g.*, *Beck v. West*, 13 Vet. App. 533, 540 (U.S. App. Vet. Cl. 2000) (upholding the Board's finding that "the only evidence of record indicating that the appellant was insane at the time he had committed the AWOL offenses are his own assertions of having had paranoid feelings"); *Cropper v. Brown*, 6 Vet. App. 450, 452 (1994) (upholding the Board's determination of "the lack of any evidence of insanity in the appellant's service medical files"). *Bowles v. Brown*, 1994 U.S. Vet. App. LEXIS 103 (Vet. App. Feb. 8, 1994).

<sup>54</sup> Chapman, *supra* note 1, at 39.

<sup>55</sup> *Id.*

an impartial mental health evaluation and a fair review of mental health evidence with an eye toward current and future treatment.

Because the Catch-22 identified in this article begins with the sanity board process, this article proposes the following two reforms to improve the fairness and comprehensiveness of sanity boards, and the quality of these evaluations.

A. Enlarge the Scope of Issues Considered by the Sanity Board to Address Veterans Benefits Standards, as well as Criminal Ones

As it now stands, the RCMs currently specify only four questions for sanity boards to consider.<sup>56</sup> Reforming sanity board procedures to address VA eligibility standards beyond the standard four military justice questions will assist an accused with an otherwise qualifying condition by preserving eligibility for excepted services. Even if it is not feasible to amend or modify RCM 706, defense and government counsel could submit additional questions to the sanity board or to the convening authority. Alternatively, convening authorities, who have been educated about this dilemma, could independently elect to include these questions in sanity board inquiries. Not only do the RCMs specifically permit fuller sanity board evaluations,<sup>57</sup> it is becoming more common to address

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<sup>56</sup> MCM, *supra* note 21, R.C.M. 706(c)(2):

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term “severe mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

*Id.*

<sup>57</sup> See, e.g., *Brasington*, 2009 CCA LEXIS 383 (involving competing testimony from a sanity board member and another military mental health expert who had conducted extensive psychiatric testing on the accused).

VA standards. For example, the active components have spearheaded recent efforts to synchronize VA standards with their own disability evaluations in recognition of active military members' needs after separation.<sup>58</sup>

The Veterans Code regulations define the insanity exception broadly, considering whether the veteran "interferes with the peace of society" or "lacks the ability to make further adjustments to the social customs."<sup>59</sup> A psychiatric evaluation that included testing for mental health disorders would provide the accused with the basis for requesting an insanity exception post-separation.<sup>60</sup> It would also create a record during military service of mental health problems, which could assist in reclassifying the discharge.<sup>61</sup>

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<sup>58</sup> See, e.g., Editorial, *U.S. Department of Veterans Affairs; VA Announces Expansion of Disability Evaluation System Pilot*, L. & HEALTH WKLY., Nov. 29, 2008, at 2160 (describing a program intended for "19 military installations, representing all military departments," which consolidates active duty and VA disability evaluations into a single process, instead of forcing the veteran to undergo separate evaluations).

<sup>59</sup> 38 C.F.R. § 3.354(a) (2010):

Definition of insanity. An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

<sup>60</sup> For example, with regard to PTSD, psychologists use several different diagnostic tools to evaluate a patient and identify PTSD, the most common being a structured diagnostic interview known as the Clinician-Administered PTSD Scale. Friel et al., *supra* note 31, at 67–68. However, according to the testimony of a sanity board doctor, psychological or psychiatric testing is not routinely conducted for sanity boards. *Brasington*, 2009 CCA LEXIS 383, at \*12.

<sup>61</sup> See *infra* notes 64–69 and accompanying text describing the process of reclassifying discharges.

## B. Broaden the Sanity Board Evaluation to Include Recommendations for Treatment

If the sanity board considered a broader set of questions in evaluating the accused, to include recommended treatment, the military justice system could potentially consider alternatives to court-martial, such as funded treatment programs.<sup>62</sup> A full evaluation of the accused, comprehensive psychiatric testing, treatment recommendations, and predictions of the efficacy of treatment on the accused's behavior would greatly expand the material the convening authority, judge, and court-martial members could consider during negotiations and in sentencing. Although formal adoption of this change would require revision of the RCMs,<sup>63</sup> such standards could be enforced through particularized requests by the military judge or convening authority. A fuller evaluation during pretrial negotiations and sentencing would not require any legislative change to the rules; rather, it would require a change in perspective within the military justice system, prioritizing long-term healthcare and societal welfare among veteran populations in addition to current exigencies.<sup>64</sup>

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<sup>62</sup> There are strong policy reasons for assisting servicemembers through preventative care, such as mental health treatment and substance abuse treatment. In absence of this kind of care, numerous social problems can result from an untreated mentally ill veteran population, including an increase in crime. Studies and news reports have identified an increase in the crime rate of veterans, noting possible links to lack of treatment. See R. Jeffrey Smith, *Crime Rate of Veterans in Colorado Unit Cited*, WASH. POST, July 28, 2009 (reporting on accounts of members of the Army's Fourth Infantry Division's Fourth Brigade that the Army's failure to provide proper treatment for stress was partially the cause for the increased homicide rate in returning veterans); Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 102 (2010) (discussing studies linking veterans suffering from PTSD to a high rate of criminal behavior, and noting "in 2004, state prisons held 127,500 veterans, accounting for approximately 10% of the entire prison population"). The civilian criminal justice system has created new approaches to help veteran criminal defendants, in order to prevent future crime by providing treatment options. See, e.g., Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 159–62 (2009) (exploring the emergence of numerous veterans treatment courts and statutes in Minnesota and California that have recognized the importance of diversion programs in the criminal justice system to help veterans obtain treatment).

<sup>63</sup> 10 U.S.C. § 836 (2006). Article 36 gives the President power to amend the rules implementing trial procedures in military courts-martial.

<sup>64</sup> For one example of the social science literature examining the links between veterans with psychiatric problems and increased crime, see, e.g., Brent B. Benda et al., *Crime*

C. Utilize the Discharge Review Boards Invigorated Review Standards to Thoroughly Evaluate Veterans' Claims and Include Additional Analysis of VA Standards for Further VA Review, Even Where There is Insufficient Evidence to Warrant an Upgraded Discharge

Discharge Review Boards (DRBs) provide a potential forum to address discharges in lieu of court-martial resulting in a denial of benefits to servicemembers with PTSD.<sup>65</sup> The Boards give discharged servicemembers the opportunity to present evidence of injustice or unfairness in their discharge, in order to reclassify the discharge. In 2009, Congress amended the act governing the DRBs with the specific purpose of providing more thorough review for veterans with PTSD and traumatic brain injury (TBI). The new sections require the DRB to include a physician, clinical psychologist, or psychiatrist in cases where the former servicemember was diagnosed with PTSD or TBI following a deployment in support of a contingency operation.<sup>66</sup> Congress also now requires the Secretary to expedite applications for relief from those servicemembers.<sup>67</sup> These amendments would benefit servicemembers separated in lieu of court-martial, who were found competent or sane by a sanity board, but who may still have suffered from documented symptoms of PTSD or TBI during their service.

Even with these amendments in place, however, the DRB review process presents a former servicemember with a challenging up-hill battle. The boards review a vast number of cases with only brief time to consider each claim.<sup>68</sup> The review standard is also extremely deferential

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*Among Homeless Military Veterans Who Abuse Substances*, 26 PSYCHIATRIC REHABILITATION J. 332 (2003); sources cited *supra* note 3.

<sup>65</sup> Each service has its own DRB, as well as Board for Correction of Military Records (BCMR) which typically reviews claims the DRB has already denied. The DRB is comprised of five military officers empowered to review and, if necessary, reclassify discharges awarded other than by general court-martial. Its actions are subject to the review of the secretary of each service. 10 U.S.C. § 1553(a)–(b). The BCMR is made up of civilian personnel from each of the service departments and can change a servicemember's records where "necessary to correct an error or remove an injustice." *See id.* § 1552(a).

<sup>66</sup> *Id.* § 1553(d)(1).

<sup>67</sup> *Id.* § 1553(d)(2).

<sup>68</sup> According to one practitioner's FOIA request, the Army BCMR members spend an average of 3.75 minutes deciding each application, while the Navy BCMR members spend an average of 1.6 minutes. Aside from the Air Force, the services do not require the board members to review applications and supporting evidence before deciding the claims. *See* RAYMOND J. TONEY, MILITARY RECORD CORRECTION BOARDS AND THEIR JUDICIAL REVIEW, MILITARY LAW SECTIONS PROGRAM 3 (June 11, 2010), *available at*

and requires a showing of injustice or legal error to change the discharge.<sup>69</sup> The boards, in fact, start from the “presumption of regularity in the conduct of governmental affairs,” placing the burden on the veteran to provide “substantial credible evidence.”<sup>70</sup> Thus, for those servicemembers who willingly accepted an OTH discharge in lieu of trial, the review may not provide a realistic chance of reclassifying the discharge.

These new reforms, however, suggest that Congress intended the DRB to spend more time considering each application. The requirement in 10 U.S.C. § 1553(d)(1) to include a physician, psychiatrist, or psychologist during the review implies these reviews involve some evaluation of the medical or mental health records. Assuming that the newly-composed DRBs were permitted to spend additional time evaluating claims in which veterans presented additional information besides the singular sanity board evaluation in their sparse files, DRBs would be ideally and uniquely positioned to clarify the record, address some of the VA eligibility criteria, and provide the veteran with a new opportunity to obtain treatment—even if the veteran failed to meet the criteria for a discharge upgrade.

Consequently, the DRBs provide a second opportunity for servicemembers who may have some record of mental health problems, but who are not found insane during the sanity board.

#### IV. Conclusion

This article identified a Catch-22 in which mentally-ill servicemembers will lose their eligibility for service-related benefits primarily based on the results of extremely limited sanity board evaluations. Aside from recommendations to revise the Veterans’ Benefits Code, this article recommended simple measures that could be accomplished within the military. In line with the sacrifices made by many of these veterans, the implementation of these measures can address their problems long after their departure from the armed services.

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[http://www.texasbar.com/flashdrive/materials/military\\_law/MilitaryLaw\\_Toney\\_MilitaryRecord\\_FinalArticle.pdf](http://www.texasbar.com/flashdrive/materials/military_law/MilitaryLaw_Toney_MilitaryRecord_FinalArticle.pdf) (last visited July 18, 2010).

<sup>69</sup> VETERANS FOR AMERICA, THE AMERICAN VETERANS AND SERVICE MEMBERS SURVIVAL GUIDE 329 (2009), available at <http://www.veteransforamerica.org/wp-content/uploads/2008/11/15-Discharge-Upgrades.pdf> (last visited July 18, 2010).

<sup>70</sup> *Id.*

**PEACEKEEPING AND COUNTERINSURGENCY: HOW  
U.S. MILITARY DOCTRINE CAN IMPROVE PEACEKEEPING  
IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

ASHLEY LEONCZYK\*

I. Introduction

By nearly all accounts, the largest United Nations (U.N.) peacekeeping operation in the world is failing. The mission—known until recently as MONUC<sup>1</sup>—is based in the Democratic Republic of the Congo,<sup>2</sup> where more than 18,000 U.N. troops<sup>3</sup> are engaged in an effort to quell violence in the world’s deadliest conflict since World War II.<sup>4</sup> Congo is Africa’s third-largest country—it extends eastward from the capital city of Kinshasa, near the continent’s western coast, and

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<sup>1</sup> Effective 1 July 2010 MONUC’s name has officially been changed to MONUSCO—the “Organization Stabilization Mission in the Democratic Republic of the Congo.” S. C. Res. 1925, UN Doc. S/RES/1925 (May 28, 2010) [hereinafter S.C. Res. 1925]. Because this name change is largely superficial, and because much of this article analyzes MONUC’s past practices, the name “MONUC” will be used to avoid confusion. This acronym is an abbreviation for “Mission de l’Organisation des Nations Unies en République démocratique du Congo” (U.N. Organization Mission in the Democratic Republic of the Congo).

<sup>2</sup> The Democratic Republic of the Congo was known as the Belgian Congo until its independence in 1960. The country was then known as Zaire between 1971 and 1997, under the rule of Mobutu Sese Seko. The country is now commonly referred to simply as “Congo,” or as “DRC” or “DR Congo,” in order to distinguish it from the Republic of Congo, a neighboring country. In this article, the nation will be referred to as “Congo.” For historical background on Congo’s name change and conflicted past, see GÉRARD PRUNIER, *AFRICA’S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE* (2009).

<sup>3</sup> As of 30 April 2010, MONUC’s uniformed personnel strength in Congo includes 18,884 troops, 712 military observers, and 1,223 police. See MONUC: United States Mission in the Democratic Republic of Congo, MONUC Facts and Figures, available at <http://www.un.org/en/peacekeeping/missions/monuc/facts.shtml> (last visited June 25, 2010).

<sup>4</sup> The International Rescue Committee (IRC) estimates that more than five million people have already died as a result of the conflict. INT’L RESCUE COMM., *MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS*, at ii (2007), [http://www.theirc.org/sites/default/files/migrated/resources/2007/2006-7\\_congo\\_mortalitysurvey.pdf](http://www.theirc.org/sites/default/files/migrated/resources/2007/2006-7_congo_mortalitysurvey.pdf). Also, in 2005, the United Nations stated that the conflict in eastern Congo was the “world’s worst humanitarian crisis.” Editorial, *UN Calls Eastern Congo Worst Humanitarian Crisis*, VOICE OF AM., Mar. 16, 2005, <http://www1.voanews.com/english/news/a-13-2005-03-16-voa38-67382547.html>.

encompasses a massive swath of territory in central Africa. Endemic conflict has been raging in the country for decades, and in 1998, it sparked a crisis known as Africa's World War, drawing eleven other African nations into the struggle either as mediators or parties to the conflict. Violence continues today in Congo's east. Despite a strong U.N. military presence on the ground, a yearly budget of more than \$1 billion,<sup>5</sup> and a robust mandate authorizing peacekeepers to undertake "all necessary operations" to "disrupt the military capability of armed groups that continue to use violence in [the] area,"<sup>6</sup> the conflict's death toll continues to rise, and sustainable peace and stability do not seem to be on the horizon.

In fact, as MONUC has ramped up its stabilization efforts under increasingly aggressive mandates, violence against civilians has actually seen a marked *increase* in the region.<sup>7</sup> In March 2009, MONUC began backing a Congolese army offensive—known as *Kimia II*—that aimed to forcibly disarm one of the region's rebel groups. As a result of this operation and related reprisal violence, more than 1000 civilians were killed, almost a million people have been forced to flee their homes, and more than 7000 women and girls have been raped.<sup>8</sup> The situation became so untenable that, on 12 October 2009, eighty-four humanitarian and human rights groups in Congo issued a joint statement asserting that the offensive campaign had resulted in an "unacceptable cost for the civilian population."<sup>9</sup> They called on U.N. peacekeepers to "fulfill their mandate to protect civilians," or else withdraw support for the operation.<sup>10</sup>

Just how MONUC might actually *achieve* its mandate to protect civilians, however, is exactly the question that mission commanders, the

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<sup>5</sup> The MONUC's budget from 1 July 2009 to 30 June 2010 was \$1,405,912,000. U.N. GAOR, 63d Sess., 5th Comm., Agenda Item 132, at 2, U.N. Doc. A/C.5/63/25.

<sup>6</sup> S.C. Res. 1906, at 5, U.N. Doc. S/RES/1906 (Dec. 23, 2009).

<sup>7</sup> See, e.g., Editorial, *DR Congo: Massive Increase in Attacks on Civilians: Government and UN Peacekeepers Fail to Address Human Rights Catastrophe*, HUM. RTS. WATCH, July 2, 2009, <http://www.hrw.org/en/news/2009/07/02/dr-congo-massive-increase-attacks-civilians> ("Since January 2009, nine Human Rights Watch fact-finding missions to frontline areas found a dramatic increase in attacks on civilians and other human rights abuses . . .").

<sup>8</sup> Editorial, *DR Congo: Civilian Cost of Military Operation Is Unacceptable*, HUM. RTS. WATCH, Oct. 13, 2009, <http://www.hrw.org/en/news/2009/10/12/dr-congo-civilian-cost-military-operation-unacceptable>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Security Council, and the U.N. Secretariat have been struggling to answer for more than a decade. The war in Congo is a seemingly intractable, complex, and multidimensional conflict that has confounded observers and peacemaking strategists for years. It is related to an intricate web of political, territorial, and ethnic disputes, many of which can be traced back for decades, ranging from international political rivalries to highly localized mining and land quarrels.<sup>11</sup> The conventional wisdom behind MONUC's increasingly offensive posture, expressed in Security Council Resolutions 1565, 1592, 1756, 1794, and 1856, was that a higher degree of operational force would help neutralize violent rebel groups and therefore *prevent* attacks on civilians.<sup>12</sup> Conventional wisdom, however, has been inadequate to solve Congo's complex security challenges.<sup>13</sup> Congo's conflict is not a conventional war.

Nevertheless, the facts surrounding the war in Congo are not entirely without precedent. In some ways, they are uncannily similar to those of Iraq, circa 2002: Once governed by a brutal dictatorship, the diverse nation is now plagued by violence based largely on entrenched cultural divisions and the scapegoating of a previously elite minority group. State security forces are in disarray, rival militia groups massacre and abuse civilians, and a continuous cycle of violence and instability prevents the formation of any broad-based governing coalition. Residents align with ethnic gangs out of necessity, since police protection is nonexistent and militia patronage offers the only credible

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<sup>11</sup> See, e.g., Séverine Autesserre, *D. R. Congo: Explaining Peace Building Failures, 2003-2006*, 113 REV. AFR. POL. ECON. 423, 429 (2007).

<sup>12</sup> See S.C. Res. 1565, U.N. Doc S/RES/1565 (Oct. 1, 2004) (requesting "rapid deployment of additional military capabilities for MONUC"); S.C. Res. 1592, U.N. Doc. S/RES/1592 (Mar. 30, 2005) (encouraging MONUC "to make full use of its mandate" and stressing that it "may use cordon and search tactics . . . to disrupt the military capability of illegal armed groups"); S.C. Res. 1756, U.N. Doc. S/RES/1756 (May 15, 2007); (authorizing MONUC to "support" offensive operations undertaken by the Congolese army); S.C. Res. 1794, U.N. Doc. S/RES/1794 (Dec. 21, 2007) (encouraging MONUC to "use all necessary means" to support the Congolese army in disarming "recalcitrant" armed groups); S.C. Res. 1856, U.N. Doc. S/RES/1856 (Dec. 22, 2008) (expressing "extreme concern at the deteriorating humanitarian and human rights situation" in Congo and authorizing MONUC to "coordinate" offensive operations that will be "led by and jointly planned with" the Congolese army).

<sup>13</sup> See Peter Uvin et al., *Regional Solutions to Regional Problems: The Elusive Search for Security in the African Great Lakes*, 29 FLETCHER F. WORLD AFF. 67, 68 (2005) (arguing that "conventional wisdom has been insufficient to address key security challenges" in Congo).

security option. In many regions, the complete collapse of governmental control is imminent or has already occurred.

Although these similarities are disturbing from a humanitarian perspective, they may offer a key to success for the U.N. mission in Congo. This article offers a radical, and yet straightforward, solution to the problems that have plagued peacekeeping efforts there for more than a decade: Just as the U.S. military reversed growing instability in Iraq by incorporating counterinsurgency doctrine into its war strategy, the U.N. should use counterinsurgency doctrine to reform failing missions in Congo and beyond. As debates about MONUC's mandate continue in the Security Council, the United States should use its position to promote a counterinsurgency-based approach to peacekeeping. Additionally, U.S. military and civilian agencies should assist the U.N. in its peace-building efforts in Congo by providing technical assistance and training designed to promote rule of law, good governance, and security sector reform. All of these activities are crucial elements of a counterinsurgency doctrine's approach to stabilization.

This article examines the underlying causes of the persistent failure of robust U.N. peacekeeping and shows how counterinsurgency principles can be used to reverse these failures. Part I presents a case study of the war in Congo, where the largest U.N. peacekeeping mission currently operates. This first section provides a brief history of the conflict in Congo, examines the increasingly active pacification efforts undertaken by MONUC, and analyzes MONUC's persistent failure to quell violence in the region. Part II discusses the rise of counterinsurgency doctrine in U.S. military thinking and analyzes the doctrine's applicability to peacekeeping operations. Drawing from the author's personal studies in eastern Congo,<sup>14</sup> Part III returns to the case study of Congo and provides practical recommendations for applying counterinsurgency principles to reform the peacekeeping operation there.

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<sup>14</sup> In January 2008, the author traveled to North Kivu, where the current conflict is centralized, on a research grant. Her research in eastern Congo included travel with MONUC military peacekeepers to the current flashpoints of the conflict, participation in on-the-ground military analysis by peacekeeping troops of recent battles and force movements, and candid discussions of both current frustrations and the potential applicability of alternate strategies. Research also included attendance at the Goma Peace Conference and interviews with numerous rebel soldiers, high-ranking officials in the Congolese army (FARDC), local civilians, community leaders, U.N. officials, and NGO workers [hereinafter Author's Field Research Experience]. The author holds both a B.A. and an M.A. in African Studies and is proficient in both Swahili and French—the two most prominent languages of eastern Congo.

This part presents specific strategies aimed at improving security and combating impunity in Congo and includes an overview of the Congolese military and civilian justice sectors, as well as a discussion of necessary rule of law reform.

## II. MONUC in Congo: Case Study of a Failing Mission

Although MONUC has been in Congo for a more than a decade and has taken an increasingly active peacemaking role in the country, the mission has failed to bring lasting peace to the war-torn nation, highlighting the need for effective intervention and violence prevention in the region. Indeed, although the Congolese government has requested withdrawal of U.N. troops from certain parts of the vast nation, U.N. peacekeeping chief Alain Le Roy has stated that drawdowns in Congo's conflicted east cannot yet be contemplated.<sup>15</sup> "It will take much more time before the critical tasks . . . are implemented," Le Roy has said.<sup>16</sup> Over the last ten years, the Security Council has provided MONUC with progressively more powerful mandates, authorizing aggressive forceful action on the part of U.N. troops to disarm the region's illegal militias.<sup>17</sup> However, MONUC has attempted the mandated disarmament action in concert with an undisciplined and abusive Congolese national army, and it has not provided adequate population-security measures as part of offensive campaigns.<sup>18</sup> In sum, MONUC is supporting the Congolese army in its attempts to use *conventional* warfare against *unconventional* armed insurgent groups. Unsurprisingly, these attempts are failing.

This section provides a brief history of the conflict in Congo and introduces its key players. Although the war in Congo is complex and multidimensional, a cursory discussion of Congo's numerous armed rebel groups, historical ethnic tension, and collapsed state-security sector will provide a necessary background for discussing the status of U.N. peacemaking efforts in the region. This section also provides historical analysis of MONUC's progressively aggressive mandates, as well as a discussion of U.S. military and civilian involvement in Congolese peace-building efforts, noting how the recent ramp-up of the Army's U.S.

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<sup>15</sup> Edith Honan, *U.N. to Start Troop Withdrawals from Congo in 2010*, REUTERS (Mar. 5, 2010).

<sup>16</sup> *Id.*

<sup>17</sup> See *infra* Part II.B.

<sup>18</sup> See *infra* Part II.D.

Africa Command (AFRICOM) relates to these efforts. Finally, this section discusses the failure of *Kimia II*, a recent Congolese army offensive campaign that was supported by MONUC peacekeepers and has resulted in a marked increase in violence against civilians in the region. This section concludes by showing how this offensive disarmament campaign contradicted basic principles of counterinsurgency doctrine.

#### A. A History of the War in Congo

The current conflict in Congo has roots in the 1994 Rwandan Genocide, where Hutu state military forces known as FAR<sup>19</sup> and a related militia, the Interahamwe, directed the slaughter of at least half-a-million Rwandan civilians.<sup>20</sup> More than three-quarters of the nation's Tutsi population were killed during a one-hundred-day campaign of brutal and systematic extermination.<sup>21</sup> Moderate Hutus who opposed the killings, or resisted the call to participate, were also targeted.<sup>22</sup> As Tutsis living in refugee camps in neighboring Uganda invaded to stop the killings, a wave of Hutu refugees fled across the border into eastern Congo.<sup>23</sup> Many of the perpetrators of the Rwandan genocide found shelter among these refugees,<sup>24</sup> carrying hatred and fear into Congo's

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<sup>19</sup> Forces Armées Rwandaises (Rwandan Armed Forces).

<sup>20</sup> See ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 16 (Hum. Rights Watch 1999).

<sup>21</sup> INTERNATIONAL PANEL OF EMINENT PERSONALITIES, AFRICAN UNION, RWANDA: THE PREVENTABLE GENOCIDE ¶ 14.80 (2000), [http://www.africa-union.org/Official\\_documents/reports/Report\\_rowanda\\_genocide.pdf](http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf) [hereinafter INTERNATIONAL PANEL OF EMINENT PERSONALITIES, AFRICAN UNION]. Jean Kambanda, who was Rwandan Prime Minister during the genocide, admitted during his trial at the International Criminal Tribunal for Rwanda (ICTR), that the genocide had been planned in advance and that its purpose was to "exterminate" the civilian population of Tutsi. Prosecutor v. Kambanda, No. ICTR 97-23-S, Judgment, ¶ 39 (Sept. 4, 1998), reprinted in 37 I.L.M. 1413 (1998). He stated, "Mass killings of hundreds of thousands occurred in Rwanda, including women and children, old and young, who were pursued and killed at places where they sought refuge: prefectures, commune offices, schools, churches, and stadiums." *Id.* at 1420.

<sup>22</sup> INTERNATIONAL PANEL OF EMINENT PERSONALITIES, AFRICAN UNION, *supra* note 21, ¶ 14.17.

<sup>23</sup> INT'L CRISIS GROUP (ICG), NORTH KIVU, INTO THE QUAGMIRE?: AN OVERVIEW OF THE CURRENT CRISIS IN NORTH KIVU, ICG KIVU REP. NO. 1, at 3 (1998) [hereinafter ICG KIVU REP. NO. 1]. Although Congo was known as "Zaire" during the rule of Mobutu Sese Seko, which lasted until 1998, this Article uses the name "Congo" to avoid confusion, regardless of the year in of an event.

<sup>24</sup> *Id.*

own population, where indigenous Hutu and Tutsi already lived among members of other Congolese ethnic groups.

At the time of the genocide, the eastern part of Congo had acute ethnic tensions of its own. “Nowhere in [Congo] has the question of citizenship been as contentious as in the Kivu province,” the International Crisis Group stated in 1998.<sup>25</sup> North Kivu, which borders Rwanda, “has over twenty ethnic groups, each claiming to be more indigenous than the others.”<sup>26</sup> Roughly half the pre-genocide inhabitants of North Kivu were Hutu or Tutsi and spoke Kinyarwanda, the national language of Rwanda.<sup>27</sup> Although many Kinyarwanda speakers in Congo descend from families that have lived in the country since before the nineteenth century, other ethnic groups have often questioned Kinyarwanda speakers’ Congolese citizenship, claiming that they are “Rwandans” or “foreigners.”<sup>28</sup> In 1987, for instance, municipal elections in North Kivu had to be cancelled when riots broke out after local authorities refused to allow Kinyarwanda speakers (both Hutu and Tutsi) to vote.<sup>29</sup>

In short, eastern Congo was already a powder keg of ethnic tension in 1994, when more than one million more Kinyarwanda speakers fled into the area,<sup>30</sup> igniting a decades-old conflict. The FAR and Interahamwe genocidaires from Rwanda began spreading anti-Tutsi sentiment among Congo’s Hutu population and other Congolese ethnic groups already disposed to view Tutsi as “foreign,” further blaming Tutsis for the region’s existing problems.<sup>31</sup> This extremist rhetoric prompted attacks against Congolese Tutsi, many of whom fled to Rwanda or Uganda.<sup>32</sup>

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<sup>25</sup> *Id.* at 16.

<sup>26</sup> *Id.*

<sup>27</sup> Autesserre, *supra* note 11, at 426–27

<sup>28</sup> *Id.*; INT’L CRISIS GROUP, CONGO AT WAR: A BRIEFING OF THE INTERNAL AND EXTERNAL PLAYERS IN THE CENTRAL AFRICAN CONFLICT, REP. NO. 2, at 4 (1998).

<sup>29</sup> ICG KIVU REP. NO.1, *supra* note 23, at 16.

<sup>30</sup> *Id.*

<sup>31</sup> *See id.* at 6, 17.

<sup>32</sup> *Id.* at 17.

Soon after fleeing to Congo, the FAR and Interahamwe combatants responsible for the genocide formed a militia known as the Army for the Liberation of Rwanda (ALiR), which began to carry out cross-border attacks against Rwanda.<sup>33</sup> The ALiR also targeted U.S. tourists because of U.S. support for the post-genocide Rwandan government.<sup>34</sup> Its goal was to return to Rwanda and reinstate Hutu leadership, and possibly complete the genocide.<sup>35</sup> The militia gained new recruits from the Hutu refugee camps within Congo,<sup>36</sup> indoctrinating and training them for a planned invasion of Rwanda. Rwanda responded to this threat with direct military incursions into Congo.<sup>37</sup> Finally, after stating that Congolese President Mobutu Sese Seko was willfully harboring this hostile Hutu militia, Rwanda began supporting an insurgency to topple Mobutu's presidency.<sup>38</sup>

In 1997, Rwanda-backed insurgents carried out a successful coup against Mobutu, and rebel leader Laurent Désiré Kabila became the country's new president.<sup>39</sup> Although Kabila owed much of his success against Mobutu's forces to assistance from Rwanda and Uganda, as President, he sought to distance himself from these domestically controversial, "pro-Tutsi" allies.<sup>40</sup> The domestic undercurrent in Congo was predominantly anti-Tutsi and anti-"foreigner," so Kabila sought to cleanse himself of his pro-Tutsi associations in order to counter accusations that he was a "Tutsi puppet" and consolidate support for his presidency.<sup>41</sup> In 1998, Kabila moved to purge Rwandan soldiers from the Congolese army and to expel Rwandan military units from Congo.<sup>42</sup> He also began seeking alliances with the Hutu perpetrators of the Rwandan genocide and other anti-Tutsi groups,<sup>43</sup> calling on Congolese

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<sup>33</sup> *Id.* at 5.

<sup>34</sup> U.S. Dept. of State, Appendix B: Background Information on Terrorist Groups, available at <http://www.state.gov/s/ct/rls/crt/2000/2450.htm> (last visited July 21, 2010) (describing the Army for the Liberation of Rwanda (ALiR)).

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

<sup>36</sup> ICG KIVU REP. NO.1, *supra* note 23, at 6.

<sup>37</sup> *Id.* at 5.

<sup>38</sup> The insurgent group was known as the Alliance of Democratic Forces for the Liberation of Congo/Zaire (ADFL).

<sup>39</sup> See Filip Reyntjens, *The Second Congo War: More than a Remake*, 98 AFR. AFF. 241, 245 (1999).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

<sup>42</sup> See Tatiana Carayannis, *The Complex Wars of the Congo: Towards a New Analytical Approach*, 38 J. ASIAN & AFR. STUD. 232, 242-43 (2003).

<sup>43</sup> See INT'L CRISIS GROUP, AFRICA'S SEVEN-NATION WAR AFRICA REP. NO. 4, at 26 (May 21, 1999) [hereinafter ICG AFR. REP. NO. 4].

people to “take up arms, even traditional weapons—bows and arrows, spears and other things” to kill Tutsi; “otherwise they will make us their slaves.”<sup>44</sup> Rwanda and Uganda, threatened by Kabila’s swift change in attitude, responded with military force.<sup>45</sup> Kabila, in turn, looked to Zimbabwe, Angola, Namibia, and Chad for support,<sup>46</sup> and Congo quickly became the theater of a multi-nation conflict commonly known as “Africa’s first world war.”<sup>47</sup>

In 1999, the U.N. and the Organization of African Unity brokered a ceasefire that was signed by all seven warring states and multiple armed rebel groups, ostensibly ending the war.<sup>48</sup> That same year, the Security Council dispatched a 90-person military observation team to the region to monitor the ceasefire.<sup>49</sup> However, violence in Congo continued since then without abatement, and MONUC’s role soon shifted from that of peace observation team, tasked with simply monitoring a peace that already existed, to a full-scale military peacekeeping mission, tasked with stabilizing a conflict and creating peace where none existed.<sup>50</sup>

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<sup>44</sup> Ann Simmons, *New Genocide Is Feared in Festering Congo*, L.A. TIMES, Oct. 22, 1998, <http://articles.latimes.com/1998/oct/22/news/mn-35103>.

<sup>45</sup> See Carayannis, *supra* note 42, at 243.

<sup>46</sup> ICG AFR. REP. NO. 4, *supra* note 43, at 1.

<sup>47</sup> See, e.g., Int’l Crisis Group, DR Congo, *available at* <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo.aspx> (last visited July 22, 2010) (calling the conflict “Africa’s first world war”). At its height, this conflict involved twelve African countries, either militarily or as mediators. ICG AFRICA REP. NO. 4., *supra* note 43, at i.

<sup>48</sup> Lusaka Ceasefire Agreement, July 23, 1999, U.N. Doc. S/1999/815, annex [hereinafter Lusaka Ceasefire Agreement].

<sup>49</sup> See S.C. Res. 1258, U.N. Doc S/RES/1258 (Aug. 6, 1999) (calling for 90 “UN military liaison personnel” to assist in “developing modalities for the Implementation of the Agreement”); S.C. Res. 1279, U.N. Doc. S/RES/1279 (Nov. 30, 1999) (stating that this team would henceforth constitute MONUC and calling for a supplementary force of 500 military observers).

<sup>50</sup> Security Council Resolution 1291 increased the authorized number of military personnel in MONUC to 5537 and bestowed a Chapter VII mandate on the mission. This resolution authorized MONUC to “take the necessary action” “as it deems it within its capabilities” to protect U.N. personnel and “civilians under imminent threat of physical violence.” S.C. Res. 1291, U.N. Doc. S/RES/1291 (Feb 24, 2000). The U.N. Secretariat then put forward an “updated concept of operations” in 2001, setting forth a four-phase plan for building up MONUC security capability.

## B. MONUC's Increasingly Active Peacemaking Role

In the ten years since the Security Council first authorized MONUC's deployment to Congo, the mission has received increasingly powerful mandates. Nevertheless, MONUC has failed to bring lasting peace to the region. Instead, the U.N. has struggled to increase mission effectiveness in the absence of a clear overall strategy for long-term peacemaking. This subsection will discuss the incremental development of an active, offensive role for MONUC, revealing how the mission's increasingly powerful mandates have failed to usher-in long-term stability.

The *Lusaka Ceasefire Agreement*, signed 10 July 1999, specifically requested a U.N. peacekeeping force, pursuant to Chapter VII of the U.N. Charter,<sup>51</sup> to "track down all armed groups in the DRC."<sup>52</sup> However, a U.N. study at the time estimated that a massive force of 100,000 troops would be required to adequately take on this task.<sup>53</sup> Additionally, it became clear from continued military activity in the agreement's immediate aftermath that, when peacekeepers arrived, there would be no pre-existing peace to "keep."<sup>54</sup> At the time of the Lusaka accord, an International Crisis Group report called the agreement's request for U.N. peacekeepers an "unrealistic" but "well calculated political move."<sup>55</sup> The report further stated:

The request is based on the fact that the UN recently approved a massive peacekeeping operation for Kosovo. African leaders are putting the UN and Western governments on the spot; failure to approve a UN peacekeeping force under the terms put forward by the Lusaka summit will be interpreted as a display of double standards. The Somali experience, where United States Troops, under a UN mandate, were killed in theatre still haunts Western governments, making it difficult for

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<sup>51</sup> U.N. CHARTER arts. 39–51 (addressing "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" within Chapter VII).

<sup>52</sup> Lusaka Ceasefire Agreement, *supra* note 48.

<sup>53</sup> INT'L CRISIS GROUP, THE AGREEMENT ON A CEASE-FIRE IN THE DEMOCRATIC REPUBLIC OF CONGO, REP. NO. 5, at 27 (Aug. 20, 1999) [hereinafter ICG DR OF CONGO, REP. NO. 5].

<sup>54</sup> *Id.* at 26.

<sup>55</sup> *Id.*

them to approve a full-fledged UN operation in the DRC.<sup>56</sup>

Indeed, as noted above, the original U.N. force authorized in August, 1999, was made up of just 90 “UN military liaison personnel” mandated to assist in “developing modalities for the implementation” of the ceasefire agreement.<sup>57</sup>

This team was plainly inadequate to stabilize the ongoing conflict in the region. In fact, on the same day the ceasefire was signed, Rwandan Vice President Paul Kagame questioned the U.N.’s ability to pacify the region: “I know how to fight insurgents,” he remarked; “[D]oes the UN also know?”<sup>58</sup> Kagame had also expressed his intention to ignore the ceasefire if troops fighting on the other side did the same:

I can’t stop the Zimbabweans doing whatever they want. They can decide to take the whole of their army to Congo even after signing the peace agreement. I can’t stop them. But for Rwanda to defend itself, that is a different matter. We have the capacity to defend our country and continue fighting in Congo for a long time with all these problems that you have mentioned. And I think the Zimbabweans know that well. Let them get the message very clear. They came in with hot air, saying they were going to march to the border. You ask them what happened.<sup>59</sup>

As might have been predicted, in the immediate aftermath of the Lusaka accord, violations of the ceasefire were reported from all sides.<sup>60</sup>

By November 1999, it was clear that additional personnel were needed, prompting the U.N. Security Council to authorize an additional contingent of 500 military observers for Congo, noting that this team would constitute the “United Nations Mission in the Democratic

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<sup>56</sup> *Id.*

<sup>57</sup> See S.C. Res. 1258, *supra* note 48 (calling for ninety “UN military liaison personnel” to assist in “developing modalities for the Implementation of the Agreement”).

<sup>58</sup> ICG DR OF CONGO, REP. NO. 5, *supra* note 53, at 17 (quoting Paul Kagame, at the time Rwanda’s Vice President).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 18.

Republic of the Congo” (MONUC).<sup>61</sup> As fighting continued in February 2000, the Security Council increased the authorized number of military personnel in MONUC to 5537 and bestowed a Chapter VII mandate on the mission, giving peacekeepers legal authorization to use force.<sup>62</sup> This resolution authorized peacekeepers to “take the necessary action” as they deem “within [their] capabilities” to protect U.N. personnel and civilians under “imminent threat of physical violence.”<sup>63</sup>

Finally, in 2001, as the war continued to rage, the U.N. Secretariat put forward an updated concept of operations for MONUC.<sup>64</sup> This document set forth a new, four-part plan for increasing MONUC’s capacity to effectively provide security to the local population.<sup>65</sup> In 2003, the Security Council, acting on a recommendation from the Secretary General, again authorized an increase in MONUC troop numbers, this time nearly doubling its force strength.<sup>66</sup> This resolution—Security Council Resolution 1493—established MONUC’s role as an instrument of stabilization and active reform, rather than a more limited operation tasked only with protecting civilians under “imminent” threat.<sup>67</sup> In it, the Security Council “encourag[ed]” peacekeepers “to provide assistance, during the transition period, for the reform of the security forces, the re-establishment of a State based on the rule of law and the preparation and holding of elections.”<sup>68</sup> The 2003 resolution also authorized MONUC “to assist the Government of National Unity and

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<sup>61</sup> S.C. Res. 1279, *supra* note 49.

<sup>62</sup> For a discussion of Chapter VII and its relation to the legal use of force, see *infra* Part V; S.C. Res. 1291, *supra* note 50.

<sup>63</sup> S.C. Res. 1279, *supra* note 49.

<sup>64</sup> Eighth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, UN Doc. S/2001/572 (June 8, 2001) [hereinafter Eighth Report]. See also S.C. Res. 1355, U.N. Doc. S/RES/1355 (June 15, 2001) (calling the Secretary General’s recommendations an “updated concept of operations”).

<sup>65</sup> Eighth Report, *supra* note 64.

<sup>66</sup> S.C. Res. 1493, U.N. Doc. S/RES/1493 (July 28, 2003).

<sup>67</sup> *Id.* para. 25.

<sup>68</sup> *Id.* Earlier in the same year, a French-led “Interim Emergency Multinational Force” had intervened when MONUC failed to contain violence in Congo’s Ituri region. This force was authorized by Security Council Resolution 1484 in 2003. S.C. Res. 1484, U.N. Doc. S/RES/1484 (May 30, 2003).

Transition in disarming and demobilizing those Congolese combatants who may voluntarily decide to enter the disarmament, demobilization and reintegration (DDR) process” and to take necessary actions “to contribute to the improvement of the security conditions in which humanitarian assistance is provided.”<sup>69</sup>

In the seven intervening years since 2003, the U.N. has continued to ramp-up its operations in the region, providing increasingly higher troop levels,<sup>70</sup> more robust mandates, and a variety of new stabilization strategies. For instance, in 2005, the Security Council authorized MONUC to use force much more actively, including in offensive “cordon and search tactics” against “illegal armed groups.”<sup>71</sup> The Resolution stated:

MONUC is authorized to use all necessary means, within its capabilities and in the areas where its armed units are deployed, to deter any attempt at the use of force to threaten the political process and to ensure the protection of civilians under imminent threat of physical violence, from any armed group, foreign or Congolese, in particular the ex-FAR and Interahamwé, encourages MONUC in this regard to continue to make full use of its mandate under resolution 1565 in the eastern part of the Democratic Republic of the Congo, and stresses that, in accordance with its mandate, MONUC may use cordon and search tactics to prevent attacks on civilians and disrupt the military capability of illegal armed groups that continue to use violence in those areas.<sup>72</sup>

By 2007, violence had still not abated, and MONUC’s mandate was again revised to become even more aggressive: Security Council Resolution 1756 called on MONUC to “assist the Government of the Democratic Republic of Congo in establishing a stable security environment in the country” and authorized peacekeepers to “support operations led by the Congolese army integrated brigades deployed in the

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<sup>69</sup> S.C. Res. 1493, *supra* note 66.

<sup>70</sup> See S.C. Res. 1565, *supra* note 12 (authorizing 5900 more troops); S.C. Res. 1635, U.N. Doc. S/RES/1635 (Oct. 28, 2005) (300 more troops); S.C. Res. 1736, U.N. Doc. S/RES/1736 (Dec. 22, 2006) (916 more troops); S.C. Res. 1843, U.N. Doc. S/RES/1843 (Nov. 20, 2008) (2785 more troops).

<sup>71</sup> S.C. Res. 1592, *supra* note 12.

<sup>72</sup> *Id.*

eastern part of the Democratic Republic of Congo.”<sup>73</sup> Such actions were to be undertaken “with a view to[ward]”:

- Disarming the recalcitrant local armed groups in order to ensure their participation in the disarmament, demobilization and reintegration process and the release of children associated with those armed groups;
- [d]isarming the foreign armed groups in order to ensure their participation in the disarmament, demobilization, repatriation, resettlement and reintegration process and the release of children associated with those armed groups; [and]
- [p]reventing the provision of support to illegal armed groups, including support derived from illicit economic activities.<sup>74</sup>

Security Council Resolution 1794, passed later in the same year, took the mandate even further, “encourag[ing]” MONUC to:

*use all necessary means*, within the limits of its capacity and in the areas where its units are deployed, to support the [Congolese army] integrated brigades with a view to disarming recalcitrant foreign and Congolese armed groups, in particular the FDLR, ex-FAR/Interahamwe and the dissident militia of Laurent Nkunda.<sup>75</sup>

In sum, since 1999 the Security Council has incrementally increased MONUC’s power to take aggressive action aimed at disarming the rebel groups responsible for much of the violence in eastern Congo. However, prior to 2008, MONUC’s mandates imagined the Congolese army taking the lead in planning offensive action against illegal armed groups, with MONUC playing only a secondary, supporting role. In 2008, however, this vision and structure dramatically changed—at least in theory.

Security Council Resolution 1856, passed on 22 December 2008, called on MONUC to take the initiative by “coordinat[ing] operations” to disarm local armed groups and carrying out “jointly planned” operations,

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<sup>73</sup> S.C. Res. 1756, *supra* note 12.

<sup>74</sup> *Id.*

<sup>75</sup> S.C. Res. 1794, *supra* note 12 (emphasis added).

rather than just assisting in operations led by the Congolese army.<sup>76</sup> Nevertheless, despite of these escalated mandates for military action, wide latitude on the lawful use of force, and ambitious stabilization goals, endemic violence persists in Congo. Simply ratcheting-up MONUC's authorized force level, troop strength, or aggressive posture has failed to bring lasting peace to the region, reflecting the pressing need for a new strategy.<sup>77</sup>

### C. The Persistence of Violence Against Civilians in Eastern Congo

Despite increasingly robust attempts by the Security Council to forcibly disarm the rebel groups responsible for civilian violence in Congo, militias are still active and powerful in the eastern part of the country. For instance, the previously-mentioned Hutu extremist group, made up partially of ex-FAR/Interahamwe perpetrators of the Rwandan genocide,<sup>78</sup> has not been disarmed or repatriated to Rwanda. Instead, in 2001, the group simply changed its name to the FDLR (Democratic Forces for the Liberation of Rwanda)<sup>79</sup> and continued its attacks on Congolese Tutsi and other civilians.<sup>80</sup> The FDLR is well-trained and highly-entrenched, and it essentially controls many areas of eastern Congo. In direct opposition to this Hutu extremist group is the predominantly Tutsi CNDP—the National Congress for the Defense of the People.<sup>81</sup> The CNDP was, until recently, an illegal militia. Last year, however, the group converted itself into a political party, and its soldiers

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<sup>76</sup> S.C. Res. 1856, *supra* note 12.

<sup>77</sup> As this article goes to print, the U.N. has begun to make certain reforms to its operations in the Congo. Under Security Council Resolution 1906, passed in response to widespread disapproval of MONUC's recent actions in support of the Congolese army's *Kimia II* offensive, MONUC is now mandated to support only operations that it has jointly planned. S.C. Res. 1906, *supra* note 6. Additionally, MONUC has stated that it will undertake to increase the provision of civilian security as part of future disarmament operations and that it will refrain from supporting any operations in which known human rights abusers are taking part. These changes, if implemented, would be very positive reforms for MONUC, and would represent an important step toward bringing MONUC's operations closer in line with counterinsurgency principles.

<sup>78</sup> For a discussion of the ALiR, see *supra*, text accompanying note 33.

<sup>79</sup> In French, the name is "Forces démocratiques de libération du Rwanda."

<sup>80</sup> See U.S. DEP'T OF STATE, OFF. OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006 (Apr. 30, 2007), <http://www.state.gov/s/ct/rls/crt/2006/82738.htm> ("In 2001, the Democratic Forces for the Liberation of Rwanda (FDLR) supplanted the Army for the Liberation of Rwanda (ALIR) . . .").

<sup>81</sup> In French, Congrès national pour la défense du peuple.

were nominally “integrated” into the Congolese national army.<sup>82</sup> The sustainability of this integration, and its implications for local civilians, remains to be seen: The CNDP has in the past claimed that it is protecting the local Tutsi population from extermination by Hutu extremists and cannot disarm until the threat posed by the FDLR has been satisfactorily addressed. Adding to the intense civilian insecurity in the region is a semi-independent group of FDLR deserters known as the “Rasta”<sup>83</sup> and dozens of citizens’ militia groups known as “Mai Mai”—brutal byproducts of intense insecurity in the region that have been terrorizing Congolese civilians for years.<sup>84</sup>

Furthermore, the Congolese national army is currently creating more civilian violence than it is preventing. The army is fractured, weak, and highly undisciplined. It is the product of multiple rebel disarmament schemes undertaken with the goal of “integrating” members of powerful illegal armed groups into a unified national army.<sup>85</sup> The attempted integrations have taken place largely through a process known as “mixage,” wherein Congolese army brigades were created out of three or more rebel militia “battalions,” with no battalion-level integration and very minimal training.<sup>86</sup> As a result, the vast majority of army “recruits” in eastern Congo over the past decade have been ex-rebel soldiers who joined through disarmament schemes.<sup>87</sup> Compounding these problems, commanders are often unable to pay their troops or buy supplies—according to one scholar, officials in Kinshasa have embezzled funds earmarked for army integration and training.<sup>88</sup> In many locations in North Kivu, barracks are non-existent, and troops must either sleep outside or raid neighboring villages to find shelter.<sup>89</sup> Partially as a result

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<sup>82</sup> See, e.g., HUM. RTS. WATCH, RENEWED CRISIS IN NORTH KIVU 17–18 (2007) [hereinafter HUM. RTS. WATCH].

<sup>83</sup> INT’L CRISIS GROUP, A COMPREHENSIVE STRATEGY TO DISARM THE FDLR (July 9, 2009) [hereinafter INT’L CRISIS GROUP].

<sup>84</sup> See PRUNIER, *supra* note 2, at 173–77; HUM. RTS. WATCH, SEEKING JUSTICE: THE PROSECUTION OF SEXUAL VIOLENCE IN THE CONGO WAR 51 (2005) [hereinafter HUM. RTS. WATCH].

<sup>85</sup> See generally HUM. RTS. WATCH, *supra* note 82.

<sup>86</sup> See *id.* at 19.

<sup>87</sup> In fact, there appears to be no widely available process, other than disarmament, for joining the Congolese army. Interview with General Mayala, Commander of the 8th Military Region, FARDC, in Goma, Congo (Jan. 2008).

<sup>88</sup> Autesserre, *supra* note 11, at 429. As an example, one Congolese army brigade in North Kivu had not been paid in four months at the time of the author’s interview in January 2008.

<sup>89</sup> Interview with U.N. Military Personnel, in North Kivu, Congo (Jan. 2008) hereinafter U.N. Military Personnel Interview]. Barracks that do exist in many parts of North Kivu

of these funding and training problems, abuses by Congolese army soldiers are, by one estimation, the most common form of low-level violence against civilians in Congo's east.<sup>90</sup>

Additionally, justice sector reform is sorely needed in the region. There is currently no effective military justice system capable of removing perpetrators of rape, killings, or other human rights abuses from the Congolese army.<sup>91</sup> In some areas, Congolese army brigades are still "non-integrated"—that is, they are essentially still soldiers from a particular "disarmed" rebel militia, now considered Congolese national army.<sup>92</sup> In a non-integrated brigade, ex-rebel soldiers—acting in the same units in which they used to act, carrying the same guns that they used to carry, and sitting in the same places on the road where they used to sit as "rebels"—are now, by force of language alone, considered "Congolese army."<sup>93</sup> Some battalions of these non-integrated army brigades have resisted the push for increased integration and centralization in army structure, not wanting to move to new areas of the country and give up the lucrative mineral mines or road blocks used to extort money from local civilians.<sup>94</sup>

Unsurprisingly, violence against civilians persists as much from these "Congolese army" soldiers as it does from rebel militias. However, MONUC has not taken an active role in attempting to reform or vet the Congolese army. Instead, the Security Council has called on *Congolese authorities* to "intensify as a matter of urgency *their* efforts to reform the security sector,"<sup>95</sup> rather than providing a blueprint for reform and encouraging or requiring Congo's leadership to enact it. Congolese authorities, meanwhile, have failed to initiate the necessary reforms on their own.

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are incredibly basic: they are makeshift camps that resemble squatter settlements. *See also* Autesserre, *supra* note 11, at 429.

<sup>90</sup> Autesserre, *supra* note 11, at 429.

<sup>91</sup> *See infra* Part IV.B.5.

<sup>92</sup> Author's Field Research Experience, *supra* note 14.

<sup>93</sup> *See* HUM. RTS. WATCH, *supra* note 82, at 17–18.

<sup>94</sup> Interview with MONUC military personnel, in Walikale, Congo (Jan. 2008).

<sup>95</sup> S.C. Res. 1794, *supra* note 12 (emphasis added).

#### D. The Recent Crisis

In December 2008, the political situation in North Kivu changed dramatically. After many years of reported *cooperation* with anti-Tutsi FDLR rebels, and many years of hostile rhetoric and offensive action *against* pro-Tutsi CNDP rebels, Congolese leadership in Kinshasa suddenly switched allegiances. After secret negotiations, Congo struck a deal with Rwanda for joint military action *against* the FDLR.<sup>96</sup> Perhaps more surprisingly, Congolese leadership also declared that the CNDP—a Tutsi rebel group that was formerly considered an enemy of the state—could integrate into the Congolese national army *and assist in the forcible disarmament campaign* against its predominantly Hutu FDLR enemies.<sup>97</sup> The MONUC peacekeepers were later enlisted to provide military and logistical support to the operation.<sup>98</sup>

Unfortunately, the offensive campaign has been highly unsuccessful at disarming the FDLR rebels, and it has carried a high civilian cost. The Congolese army continues to suffer extreme discipline problems, and the swift, superficial, and whole-scale “integration” of the CNDP rebel group into its ranks have compounded this problem. According to the International Crisis Group, the integration was more “an effort to dismantle rebel capacities, rather than a genuine effort to rebuild the army.”<sup>99</sup> During the offensive campaign, the Congolese army units made up largely of ex-CNDP rebels ransacked villages, attacked civilians accused of being FDLR collaborators, raped women and young girls, looted, and torched homes.<sup>100</sup> By one account, the Congolese army purposely killed at least 270 civilians between March and November 2009.<sup>101</sup> Additionally, local hospitals have reported that already high rape numbers doubled or tripled during the military operation, and the majority of cases investigated by one Human Rights Watch observer were attributed to soldiers from the Congolese army.<sup>102</sup> These atrocities put MONUC in a problematic position: Peacekeepers provided the

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<sup>96</sup> See INT’L CRISIS GROUP, *supra* note 83, at 2–3.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 4–5.

<sup>99</sup> INT’L CRISIS GROUP, CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY 11 (2009) [hereinafter ICG AFR. REP. NO. 150].

<sup>100</sup> Editorial, *supra* note 7.

<sup>101</sup> Hum. Rts. Watch, Eastern DR Congo: Surge in Army Atrocities, Nov. 2, 2009, available at <http://www.hrw.org/en/news/2009/11/02/eastern-dr-congo-surge-army-atrocities> [hereinafter Hum. Rts. Watch].

<sup>102</sup> Editorial, *supra* note 7.

Congolese army operation with “tactical expertise, transport and aviation support, . . . food rations, fuel, and medical support . . . , at a cost of over well over US\$6 million,”<sup>103</sup> and MONUC support for such an undisciplined and problematic offensive could implicate the U.N. in violations of the laws of war.<sup>104</sup>

Worst of all, the *Kimia II* campaign was almost entirely offensive in nature. MONUC and the Congolese army did not provide adequate population security in connection with the operation.<sup>105</sup> As a result, they have failed to protect Congolese civilians against brutal FDLR retaliatory attacks.<sup>106</sup> As FDLR rebels, who had retreated westward during the offensive campaign, began to return to areas vacated by the U.N. and Congolese army, they unleashed a wave of vicious reprisal violence against civilians. As an example, on 10 May 2009 Human Rights Watch reported:

FDLR combatants brutally massacred at least 86 civilians, including 25 children, 23 women, and seven elderly men at Busurungi, in the Waloaloanda area of Walikale territory, North Kivu. Twenty-four others were seriously wounded. Some of the victims were tied up and executed; others were shot or their throats were slit by knives or machetes as they tried to flee. A number of people were burned to death when FDLR combatants deliberately locked them in their homes and torched their village.<sup>107</sup>

Similar attacks have been reported in recent months throughout eastern Congo. The International Crisis Group has observed that after the Congolese army withdrew from its offensive positions, “FDLR units regrouped and started to reoccupy their former positions while retaliating violently against civilians.”<sup>108</sup> The report further states:

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<sup>103</sup> Editorial, *supra* note 8.

<sup>104</sup> Hum. Rts. Watch, *supra* note 101 (“Some Congolese army soldiers are committing war crimes by viciously targeting the very people they should be protecting. MONUC’s continued willingness to provide support for such abusive military operations implicates them in violations of the laws of war.”). See also Editorial, *UN Discussing DR Congo Withdrawal*, BBC NEWS, Mar. 3, 2010, <http://news.bbc.co.uk/2/low/africa/8548794.stm> (asserting that the U.N. was “last year accused of human rights abuses” in Congo).

<sup>105</sup> Editorial, *supra* note 7.

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

<sup>107</sup> *Id.*

<sup>108</sup> ICG AFR. REP. NO. 150, *supra* note 99, at 10.

FDLR combatants returned to Masisi, Walikale and Lubero. In the three weeks following the operation they carried out seventeen attacks on civilians, targeting humanitarian convoys in particular. Between 25 February and 6 March, 34 civilians were killed and 22 injured. In addition, rape and looting were reported. An additional 100,000 civilians were uprooted in North Kivu in March and April, and dozens of villages were pillaged and set ablaze in FDLR-dominated areas of South Kivu. By 10 April, the UN Office for the coordination of Humanitarian Affairs (OCHA) confirmed that in the first quarter of 2009, attacks against aid workers had risen by 22 per cent . . . .<sup>109</sup>

Despite numerous civilian casualties, the disarmament campaign has had very limited success. During the first four months of 2009, only 578 FDLR combatants were disarmed, and many of these individuals surrendered without weapons.<sup>110</sup> In one calculation by Human Rights Watch, for every rebel combatant who was “disarmed” in the recent offensive, one civilian was killed, seven women were raped, six houses were burned down, and 900 people were forced to flee.<sup>111</sup> As Congolese army troops moved into FDLR-controlled areas during the campaign, the majority of FDLR combatants apparently simply dispersed into small units and moved toward Congo’s interior—entirely avoiding direct confrontation with Congolese army troops and often committing mass atrocities and killing civilians in the process of retreating. Worse, FDLR combatants who *have* been disarmed are reportedly being rapidly replaced by new recruits, making the operation’s overall effectiveness highly questionable.<sup>112</sup>

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<sup>109</sup> *Id.* See also Press Release, DR Congo Top U.N. Official Condemns Terror and Upheaval, *supra* note 91; IRIN, DRC: Attacks Against Aid on the Rise, Apr. 10, 2009, available at <http://www.irinnews.org/Report.aspx?ReportID=83885>.

<sup>110</sup> ICG AFR. REP. NO. 150, *supra* note 99, at 10.

<sup>111</sup> Editorial, *supra* note 8. According to a recent *Agence France-Presse* (AFP) report, the Congolese army has claimed that an additional 600 FDLR fighters were captured between January and March 2010. See Editorial, *Over 600 Rwandan Rebels Killed or Captured: DR Congo Army*, AFP, Mar. 17, 2010, <http://www.google.com/hostednews/afp/article/ALeqM5hoERZAQW2uPr8NBulTv6qXKjHkxg>. This number has not been independently verified, but even if it were corroborated, the total number of FDLR captured is likely not sustainable and does not begin to justify the intense civilian insecurity and endemic abuse that have marked the recent disarmament campaign.

<sup>112</sup> Editorial, *supra* note 8. *But see supra* note 77 (discussing MONUC’s potential new approach).

### E. The Potential for U.S. Involvement in Peacekeeping Operations in Congo

The persistence of violence against civilians and the incapacity of the Congolese army and military justice system to provide safety and security to Congolese civilians present a situation ripe for U.S. involvement and support. The United States is already MONUC's largest financial supporter, contributing \$200 million dollars per year to the peacekeeping mission,<sup>113</sup> and the United States is in a position to greatly impact MONUC's structure and mandate through its role on the Security Council. The United States has also been involved in independent conflict prevention efforts in Congo, through its support of numerous peace deals in the region, and through the provision of millions of dollars in assistance to civil humanitarian assistance programs in the country.<sup>114</sup> In other words, the United States is already heavily invested in Congo, and with good reason: Secretary of State Hillary Clinton has asserted that pervasiveness of rape and gender-based violence in Congo today is "one of mankind's greatest atrocities."<sup>115</sup> Additionally, endemic conflict in Africa hampers U.S. counterterrorism efforts.<sup>116</sup> For these and other reasons, Congo is, in the words of the U.S. Agency for International Development, "of long-term interest to the United States."<sup>117</sup>

There have been many calls for increased U.S. action in Congo.<sup>118</sup> For example, Michael O'Hanlon, a Senior Fellow at The Brookings Institution, wrote a 2009 *Washington Post* op-ed urging the United States to send troops to Congo:

If the situation is to improve, we need to do the one thing that is required above all others—strengthen security, especially in eastern Congo. And by now we

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<sup>113</sup> David McKeeby, *United States Condemns Renewed Conflict*, AMERICA.GOV (n.d.), <http://www.america.gov/st/peacesec-english/2008/October/20081029125549idybeekcm0.1096613.html>.

<sup>114</sup> *Id.*

<sup>115</sup> Corey Flintoff, *Can U.S. Help End Rape as a Weapon in Congo's War?*, NPR NEWS, <http://www.npr.org/templates/story/story.php?storyId=111782564>.

<sup>116</sup> Porter Goss, testimony before the Senate Select Committee on Intelligence, S. Hrg. 109-61 (Feb. 16, 2005).

<sup>117</sup> U.S. Agency for Int'l Dev., *Democracy and Governance in Democratic Republic of Congo*, available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/regions/afr/droc.html](http://www.usaid.gov/our_work/democracy_and_governance/regions/afr/droc.html) (last visited July 21, 2010).

<sup>118</sup> See Flintoff, *supra* note 115.

should have learned the hard way that there is only one way to do so—by leading through example, with the deployment of at least modest numbers of American troops, to spark a broader strengthening of the current U.N. mission.<sup>119</sup>

Similarly, former U.S. Assistant Secretary of State for Africa Jendayi Frazer, now a professor at Carnegie Mellon, has called on President Obama to “galvanize U.S. efforts to end the militia violence” in the country.<sup>120</sup> According to Frazer, “[t]he rebels are going to have to be confronted militarily and defeated by a well-trained Congolese force. The best thing [the United States] could do is train and professionalize that military.”<sup>121</sup> Frazer has further asserted that efforts to promote development, combat terrorism, and build stability in Congo will advance America’s “core interests.”<sup>122</sup>

In addition, the Obama Administration has been vocal in its commitment to promoting peace and stability in the region. In fact, before being elected President, then-Senator Obama sponsored a congressional act to promote stability in Congo. The act, titled, “The Democratic Republic of the Congo Relief, Security, and Democracy, Promotion Act of 2006,” asserts that U.S. policy toward Congo includes supporting “security sector reform by assisting the Government of the Democratic Republic of the Congo to establish a viable and professional national army and police force that respects human rights and the rule of law . . . .”<sup>123</sup> The act calls on the United States to use its position on the U.N. Security Council to “strengthen the authority and capacity of MONUC” by, among other things, “providing specific authority and obligation to prevent and effectively counter imminent threats,”<sup>124</sup> “clarifying and strengthening MONUC’s rules of engagement to enhance

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<sup>119</sup> Michael O’Hanlon, *U.S. Boots On Congo Ground; A New Kind of Force Could Provide Security*, WASH. POST, Aug. 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/13/AR2009081302900.html>.

<sup>120</sup> Jendayi E. Frazer, *Four Ways to Help Africa: The U.S. African Command Should Move from Germany to Liberia*, WALL ST. J., Aug. 25, 2009, [http://online.wsj.com/article/SB10001424052970203706604574372711948607526.html](http://online.wsj.com/http://online.wsj.com/article/SB10001424052970203706604574372711948607526.html).

<sup>121</sup> Flintoff, *supra* note 115. See also Frazer, *supra* note 120 (stating, “[u]ltimately, the problem in Eastern Congo is that you have FDLR insurgents who will never come forward to a negotiated peace process.”).

<sup>122</sup> Frazer, *supra* note 120.

<sup>123</sup> Pub. L. No. 109-456, 120 Stat. 3384, 3386 (2006).

<sup>124</sup> *Id.* at 3389.

the protection of vulnerable civilian populations,”<sup>125</sup> and, where consistent with U.S. policy, “making available personnel, communications, and military assets that improve the effectiveness of robust peacekeeping, mobility, and command and control capabilities of MONUC.”<sup>126</sup> Furthermore, speaking at a diplomacy briefing conference in Washington on 14 June 2010, Assistant Secretary of State for Africa Johnnie Carson asserted that the conflict in Congo “remains a top priority for [the Obama] Administration.”<sup>127</sup>

The above-mentioned calls for—and pledges of—support for peace in Congo and recognition of the need for the United States to exert pressure for reform of MONUC through its role on the U.N. Security Council, may point to a heightened role for the U.S. Army’s newly-created African Command (AFRICOM). The AFRICOM is already involved in a security assistance program in Congo—the United States recently established a program to train a “model unit” light infantry battalion of Congolese army forces in Kisangani, Congo.<sup>128</sup> This training will take six to eight months to complete, and it will be overseen by AFRICOM’s Special Operations Command component. The goal of the operation is to create an initial battalion of highly-trained Congolese soldiers that will provide a “platform from which additional training of Congolese troops can be done by very well trained Congolese troops.”<sup>129</sup>

Additionally, the AFRICOM is an ideal partner for U.N. rule of law efforts in Congo. The American military is already participating in a handful of judicial reform operations in the country, and further U.S. expertise and assistance in this area would be particularly beneficial to peace-building. Rule of law operations are an essential part of U.S. foreign policy: the 2006 National Security Strategy (NSS) of the United States references “rule of law” sixteen times,<sup>130</sup> and judge advocates have

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> U.S. Dep’t of State, U.S. Priorities for Sub-Saharan Africa, June 14, 2010, *available at* <http://www.state.gov/p/af/rls/rm/2010/143144.htm> (reprinting comments of Secretary Carson).

<sup>128</sup> Nicole Dalrymple, U.S. and DRC in Partnership to Train Model Congolese Battalion, Feb. 18, 2010, *available at* <http://www.africom.mil/getArticle.asp?Aart=4032> (last visited July 21, 2010).

<sup>129</sup> *Id.* (citing Ambassador William Garvelink, U.S. Ambassador to Congo).

<sup>130</sup> *See* OFFICE OF THE PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), *available at* <http://www.whitehouse.gov/nsc/nss.html>.

been involved in overseas rule of law operations for over a century.<sup>131</sup> The Center for Law and Military Operations at the Judge Advocate General's Legal Center and School and the Joint Force Judge Advocate at U.S. Joint Forces Command recently produced a manual intended to help military lawyers conduct rule of law operations as part of counterinsurgency efforts,<sup>132</sup> and its practical advice for those engaged in rule of law initiatives is highly applicable to the Congolese context. The *Handbook* asserts that key post-conflict tasks include "setting up police and judicial training programs," assisting a new legislature in passing new laws, and "undertaking public relations campaigns to heighten awareness of the rule of law."<sup>133</sup> All of these efforts are sorely needed in Congo.

Finally, AFRICOM has already deployed a unit of civilian experts, medical personnel, and military engineers to Congo to investigate modalities for assisting survivors of sexual violence.<sup>134</sup> This team is part of a \$17 million U.S. aid package aimed at "preventing and responding to future acts of sexual violence" in Congo's east,<sup>135</sup> and the United States has been exploring ways to expand these efforts. Congo would benefit greatly from U.S. initiatives in judicial training, assisting with legislative reform, media programs aimed at providing basic legal education to the public, and investigative and prosecutorial support.

Although this article chiefly addresses necessary changes to MONUC's peacekeeping strategy, its recommendations are equally relevant to members of the U.S. combat arms and support branches, including judge advocates, and civilians assisting the stabilization process in Congo who operate outside the U.N. structure. In addition, of course, the United States' powerful role on the Security Council and as a financial supporter of peacekeeping missions make U.S. policymakers uniquely situated to press for the necessary changes to the U.N.'s peacekeeping efforts. Therefore, recommendations directed at MONUC in this article are equally relevant to U.S. actors.

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<sup>131</sup> THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH. & CTR. FOR LAW AND MILITARY OPERATIONS, *RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES*, at xi (2007) [hereinafter *RULE OF LAW HANDBOOK*].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 15.

<sup>134</sup> See John Vandiver, *AFRICOM to Aid Congo Rape Victims*, STARS & STRIPES (European ed.), Aug. 16, 2009.

<sup>135</sup> *Id.* (citing U.S. Secretary of State Hilary Clinton).

#### F. The Conflict in Congo is an Unconventional War

The FDLR's actions in response to the Congolese army's *Kimia II* campaign—swift dispersal action to evade large-scale offensive attacks and strategic use of reprisal violence against civilians—are typical tactics of successful insurgent warfare.<sup>136</sup> By attacking civilians, the FDLR has been able to sow disorder and prompt anger at the government forces whose offensive action in some sense “caused” the attacks. Additionally, indiscriminate offensive operations by government forces are helpful to insurgent recruiting: Civilians angered by undisciplined government attacks may join militia groups in order to retaliate or protect themselves and their families from future abusive government action.<sup>137</sup>

Local civilians, themselves bearing the brunt of the extremely high levels of violence perpetrated by armed militia groups, therefore continue to support the FDLR and provide area militias with new recruits. This result is counterintuitive, but still is a classic example of the way in which insurgencies perpetuate.<sup>138</sup> Because unstable and violent conditions draw attention to a host nation's inability to protect its citizens, civilians living in these conditions often seek to acquire patronage relationships with the very militia groups that are terrorizing

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<sup>136</sup> For a good overview of the classical attributes of an insurgency, see THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL, at xlviii (Univ. Chicago Press 2007) (reprinting U.S. DEP'T OF ARMY, FIELD MANUAL 3-34, COUNTERINSURGENCY (15 Dec. 2006)) [hereinafter COUNTERINSURGENCY FIELD MANUAL]. See also DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE 50 (Praeger Security Int'l 2006) (1964) (“The strategy of conventional warfare prescribes the conquest of the enemy's territory, the destruction of his forces. The trouble here is that the enemy holds no territory and refuses to fight for it.”); *id.* at 84 (“By threatening the population, the insurgent gives the population an excuse, if not a reason, to refuse or refrain from cooperating with the counterinsurgent.”).

<sup>137</sup> See John A. Lynn, *Patterns of Insurgency and Counterinsurgency*, MIL. REV., Aug. 2005, at 22, 27 (asserting that indiscriminate violence by counterinsurgents “generates the three ‘Rs’: resentment, resistance, and revenge” among the local population); COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 41 (noting that overly aggressive force by counterinsurgents can motivate new insurgent recruits); Sarah Sewall, *Introduction*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xxv (“The fact or perception of civilian deaths at the hands of their nominal protectors can change popular attitudes from neutrality to anger and active opposition. Civilian deaths create an extended family of enemies—new insurgent recruits or informants . . .”).

<sup>138</sup> See COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 16.

the region, hoping to gain protection from them or escape their violence.<sup>139</sup>

However, while the FDLR has successfully implemented an insurgent strategy typical of “unconventional warfare,” the Congolese army and MONUC’s response has been both highly conventional and highly unsuccessful. The MONUC and the Congolese army have attempted to utilize indiscriminate offensive force in order to prompt FDLR surrender and disarmament. As mentioned above, however, the use of offensive force in the absence of strong population security measures can actually *increase* insurgent power and is extremely unlikely to bring about long-term, effective stabilization. Instead, insurgents can easily retreat from large-scale attacks and avoid direct confrontations with offensive forces, returning later to reoccupy their former positions and brutalize civilians.

### III. Peacekeeping and Counterinsurgency

This article offers a proposed solution to the problems plaguing U.N. peacekeeping in Congo: the incorporation of counterinsurgency doctrine into peacekeeping strategies. Counterinsurgency (COIN) doctrine is a set of guidelines for military action designed for use in unconventional wars.<sup>140</sup> The doctrine aims to enhance strategic understanding of how insurgencies develop, operate, and flourish, and how they can be successfully defeated.<sup>141</sup> Although the theories that form the basis of COIN doctrine have been explored by a handful of military strategists for decades, the impact of these principles on mainstream U.S. military thinking is relatively recent. The U.S. Army and Marine Corps

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<sup>139</sup> See *id.* at 16, 112–13. In the absence of adequate government security following Operation Iraqi Freedom, various ethnic and political militias arose and were empowered by the population’s desire for protection. *Id.*

<sup>140</sup> These guidelines involve “principles, tactics, techniques, and procedures applicable worldwide.” COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xlviii.

<sup>141</sup> See JOINT CHIEFS OF STAFF, JOINT PUB. I-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 111 (12 Apr. 2001 as amended through Apr. 2010) (defining counterinsurgency as “[c]omprehensive civilian and military efforts taken to *defeat* an insurgency and to address any core grievances”) (emphasis added); GALULA, *supra* note 136, at 54 (asserting that victory in counterinsurgency includes the destruction of insurgent forces and political organization, as well as the willful rejection and isolation of the insurgency by the local population). See also COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xli-xlii (noting the importance of “[k]nowledge of the history and principles of insurgency” to successful counterinsurgency.).

developed modern COIN doctrine in response to America's military failures in the early stages of the war in Iraq, and the doctrine represents a paradigm shift.<sup>142</sup> The COIN doctrine contrasts sharply with conventional concepts of warfare, and it is radically changing the way that the United States fights modern wars.<sup>143</sup> Today, counterinsurgency's lessons, widely credited with having changed the fate of the U.S. war in Iraq, are being exported for use in Afghanistan.<sup>144</sup>

Until very recently, the majority of the U.S. military was virtually unacquainted with the theory and practice of counterinsurgency.<sup>145</sup> Instead, the army operated under traditional doctrines of warfare that had proven effective over hundreds of years, using conventional approaches that had been developed to fight classical battles between regular armies of recognized sovereigns. Under a classical theory of warfare, a number of straightforward factors determine which side will prevail:

- (1) The strongest camp usually wins;
- (2) If two camps are the same size, the more resolute wins;

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<sup>142</sup> See, e.g., John A. Nagl, *Foreword to the University of Chicago Press Edition*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 140, at xiii, xvii ("Perhaps no doctrinal manual in the history of the Army has been so eagerly anticipated and so well received . . ."); Sewall, *Introduction*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xxiv ("This field manual is radical in a contemporary American military context . . .").

<sup>143</sup> See Sewall, *Introduction*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 140, at xxiv ("This field manual is radical in a contemporary American military context . . .").

<sup>144</sup> See, e.g., John Antal, *A Tale of Four Strategies: The War in Afghanistan*, 34 MIL. TECH. 4, 4–5 (2010).

<sup>145</sup> Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xiii–xv ("When the Iraqi insurgency emerged the Army . . . did not even have a common understanding of the problems inherent in any counterinsurgency campaign, as it had not studied such battles, digested their lessons, and debated ways to achieve success in counterinsurgency campaigns. It is not unfair to say that in 2003 most Army officers knew more about the U.S. Civil War than they did about counterinsurgency."). See also Colonel George K. Osborn III, U.S. Army, *Foreword* to ANDREW F. KREPINEVICH, *THE ARMY AND VIETNAM*, at xi (1986):

For the U.S. Army, the doctrine of the past thirty-five years or so emerged from the experience of World War II, or more accurately, from a set of assumptions based on that experience and was codified in field manuals, service-school curricula, training programs, and the like, largely in the first five years following the war. The future war that the army was prepared to fight was, above all, one rather like World War II . . . .

- (3) If resolution is equally strong, victory belongs to the group that seizes and keeps the initiative; and  
 (4) Surprise may play a decisive role.<sup>146</sup>

Under this theory, military strength is viewed as largely decisive.<sup>147</sup> Conventional strategies, therefore, focus largely on the use of superior firepower and heavy infantry units to prompt the annihilation or attrition of enemy forces.<sup>148</sup> They emphasize offensive action, high volumes of firepower,<sup>149</sup> high levels of spending on powerful munitions and technology,<sup>150</sup> and “search and destroy” missions against the adversary.<sup>151</sup> In so-called “conventional warfare,” success is measured in battles won and enemy body count achieved.<sup>152</sup> All else being equal, the effectiveness of an army is considered directly proportional to its power<sup>153</sup>—troop numbers, combat training, sophisticated weaponry and

<sup>146</sup> GALULA, *supra* note 136, at xii.

<sup>147</sup> See also 1 CARL VON CLAUSEWITZ, ON WAR 154 (J. J. Graham trans., Kegan Paul, Trench, Trübner & Co. 1909) (1832) (“Every combat is therefore the bloody and destructive measuring of the strength of forces, physical and moral; whoever at the close has the greatest amount of both left is the conqueror.”).

<sup>148</sup> See, e.g., KREPINEVICH, *supra* note 145, at 16, 164–65 (noting that in Vietnam, “the Army applied the doctrine and force structure it had developed for conventional contingencies in Europe and Korea . . . . In a sense, simple attrition of insurgent forces was a natural strategy for MACV to pursue. It emphasized the Army’s strong suits in firepower . . . .”); *id.* at 16 (noting that U.S. Army officials in Vietnam “placed their emphasis on massive firepower and attrition of North Korean and Chinese forces”). *Id.*; 1 CLAUSEWITZ, *supra* note 147, at 32 (“[F]or if war is an act of violence to compel the enemy to fulfill our will, then in every case all depends on our overthrowing the enemy, that is, disarming him, and on that alone.”).

<sup>149</sup> See KREPINEVICH, *supra* note 145, at 5 (“The characteristics of the Army Concept [the U.S. Army’s traditional approach to war] are two: a focus on mid-intensity, or conventional, war and a reliance on high volumes of firepower to minimize casualties—in effect, the substitution of material costs at every available opportunity to avoid payment in blood.”).

<sup>150</sup> See *id.* at 164 (“Attrition is a product of the American way of war: spend lavishly on munitions, materiel, and technology to save lives.”).

<sup>151</sup> See *id.* at 180.

<sup>152</sup> See, e.g., Osborn, *supra* note 145, at xii (noting that in Vietnam, where conventional strategy was used in an insurgent war, “victory in individual battles replaced the accomplishment of a campaign plan based on strategy to attain the objectives of war”); KREPINEVICH, *supra* note 145, at 197 (noting that in Vietnam, “the number of enemy killed in action (KIA) served as the measure of how well the strategy was working,” and “[m]ass application of firepower, as in Korea and World War II, was felt to be the most efficient method of generating an enemy body count”). See also 1 CLAUSEWITZ, *supra* note 147, at 39 (“We have only one means in war—the battle.”).

<sup>153</sup> See 1 CLAUSEWITZ, *supra* note 147, at 18–20 (“Now, philanthropists may easily imagine there is a skillful method of disarming and overcoming an enemy without great bloodshed, and that this is the proper tendency of the Art of War. However plausible this

discipline are the keys to victory, and in all of those areas, the U.S. military is arguably the strongest in the world.<sup>154</sup>

Nonetheless, over the past forty years, the U.S. military has suffered a series of unprecedented failures, beginning with the war in Vietnam and culminating with a struggle to maintain order in Iraq and Afghanistan.<sup>155</sup> Although conventional doctrine was questioned from within the U.S. military during the Vietnam War—Marine Combined Action Platoons (CAPs), for instance, experimented with a “small wars” approach that focused on population security and utilized many principles of counterinsurgency<sup>156</sup>—efforts that fell outside the traditional “Army Concept” of large-unit, heavy artillery operations were derided by the military mainstream and were largely marginalized.<sup>157</sup> The U.S. Army’s deep faith in conventional theories of warfare, and the ingrained belief that success could be measured in battle victory rather than long-term strategic goals, is illustrated by Colonel Harry Summers’s famous comment to his Vietnamese counterpart in April 1975, “You know you never defeated us on the battlefield.”<sup>158</sup> The Vietnamese colonel paused for a moment before replying, “That may be so. It is also irrelevant.”<sup>159</sup>

After decades of using conventional doctrines in unconventional conflicts, U.S. military commanders and civilian leaders began to

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may appear, still it is an error which must be extirpated . . . . [H]e who uses force unsparingly, without reference to the bloodshed involved, must obtain a superiority if his adversary uses less vigor in its application.”).

<sup>154</sup> See Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xiii (“The American Army of 2003 was organized, designed, trained, and equipped to defeat another conventional army; indeed, it had no peer in that arena.”).

<sup>155</sup> See *id.* at xiv–xv.

<sup>156</sup> KREPINEVICH, *supra* note 145, at 172–77. The Marines also instituted a successful population security program known as Golden Fleece that allowed Vietnamese farmers to harvest and sell their crops free of Viet Cong taxation. *Id.* at 174. However, a very small percentage of American forces in Vietnam utilized these approaches. *Id.*

<sup>157</sup> See *id.* at 174–76, 232 (noting that the “Army’s reaction to the CAP program was ill-disguised disappointment, if not outright disapproval, from the top down” and that “[t]o the extent that Regular Army units participated in counterinsurgency operations, they either looked for quick, cheap solutions that did not exist . . . or misused the forces that had been designed to provide some effectiveness in combating insurgents”).

<sup>158</sup> See HARRY G. SUMMERS, JR., ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR 1 (1982) (further noting that “[o]ne of the most frustrating aspects of the Vietnam war from the Army’s point of view is that as far as logistics and tactics were concerned we succeeded in everything we set out to do”).

<sup>159</sup> *Id.*

recognize that large-scale conventional warfare was not working in the low-intensity, protracted conflicts that make up much of modern war.<sup>160</sup> In 2002, *Operation Enduring Freedom* in Iraq was arguably on the brink of collapse. Facing mounting casualties and political chaos as civilian violence gripped the Iraqi countryside, the U.S. Department of Defense was forced to reexamine its traditional strategies. A radically different approach was needed, and previously ignored or marginalized theories of counterinsurgency were reexamined, revitalized, and incorporated into mainstream U.S. military thinking. In this way, modern counterinsurgency doctrine was born.<sup>161</sup>

Today's counterinsurgency doctrine was formulated through an intense process of inter-disciplinary dialogue among academics, policymakers, and the military.<sup>162</sup> In 2005, General David Petraeus, who holds a doctorate from the Woodrow Wilson School of Public and International Affairs at Princeton University and had directed the Multi-National Security Transition Command Iraq (MNSTC-I), returned to the United States and assumed responsibility for doctrinal development within the U.S. Army.<sup>163</sup> Petraeus's experience in Iraq had convinced him of the importance of counterinsurgency training, and he made counterinsurgency education—including a revised manual on counterinsurgency doctrine—a top priority in his new post.<sup>164</sup> General Petraeus and Lieutenant General James Mattis, Petraeus's Marine Corps counterpart in the development of the new manual, solicited expertise and criticism from a wide range of colleagues, academics, journalists, human rights advocates, and veterans of the wars in Iraq and

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<sup>160</sup> In 2006 General Jack Keane, former Vice Chief of Staff of the Army, told Jim Lehrer that the U.S. Army “doesn’t have any doctrine, nor was it educated and trained, to deal with an insurgency . . . . After the Vietnam War, we purged ourselves of everything that had to do with irregular warfare or insurgency, because it had to do with how we lost that war. In hindsight, that was a bad decision.” *Jim Lehrer News Hour* (PBS television broadcast Apr. 18 2006), *quoted in* Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xiv.

<sup>161</sup> See Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xv.

<sup>162</sup> The current doctrine draws deeply from “classics” of insurgency and counterinsurgency, written by earlier theorists such as David Galula, Robert Thompson, Mao Zedong, and T.E. Lawrence. Many of these “classics” are listed in the Field Manual’s bibliography. See COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 391–92.

<sup>163</sup> *Id.* at xv–xvi.

<sup>164</sup> *Id.*

Afghanistan.<sup>165</sup> These groundbreaking efforts catalyzed the writing and publication of the now-canonical *Counterinsurgency Field Manual*.<sup>166</sup>

The manual was published in 2006 and released to civilian readers as well as Marines and Soldiers in the field as *U.S. Army Field Manual No. 3-24* and *Marine Corps Warfighting Publication No. 3-33.5*. The book's uncommonly wide public release proved a major success: The doctrine was greeted with enthusiasm by commanders in the field, to whom the book's reflections about the nature of insurgency rang true. The manual was received with equal excitement by civilians, who were eager for refreshing analysis on what had become the nation's most intractable policy problem.<sup>167</sup> The book sold millions of copies in the United States, and a doctrinal revolution began sweeping through the U.S. military.<sup>168</sup>

The revolutionary premise of COIN doctrine is that offensive force can actually *hinder* success in insurgent conflicts, especially when force is applied indiscriminately.<sup>169</sup> The theory is that excessive force provides fodder for insurgent rhetoric, decreasing popular support and hindering counterinsurgents' ability to collect intelligence by disrupting information networks based on local goodwill.<sup>170</sup> Perhaps counter-intuitively, indiscriminate force applied by counterinsurgents can also cause insurgent power to increase, as civilians angered by the destructive

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

<sup>166</sup> COUNTERINSURGENCY FIELD MANUAL, *supra* note 136.

<sup>167</sup> *See id.* at xvii–xviii (Nagl states that “[t]he finished book was released on December 15, 2006 to extraordinary media outcry; Conrad Crane was featured in *Newsweek* as a ‘Man to Watch’ for his contribution to the intellectual development of the Army and Marine Corps,” and that “[p]erhaps no doctrinal manual in the history of the Army has been so eagerly anticipated and so well received . . .”).

<sup>168</sup> In addition to its incredible hard copy sales, the book was downloaded over two million times in the first two months after its posting to Army and Marine Corps websites. Sewall, *Introduction*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xxi.

<sup>169</sup> In reference to this concept, Lieutenant General James Mattis, who had commanded the 1st Marine Division during the initial Iraq invasion and later became General Petraeus's Marine Corps counterpart in developing modern counterinsurgency doctrine, made his division's motto “No better friend, no worse enemy—First Do No Harm.” Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL *supra* note 136, at xvi.

<sup>170</sup> *See* Richard C. Paddock, *Shots to the Heart of Iraq*, L.A. TIMES, July 25, 2005, <http://articles.latimes.com/2005/jul/25/world/fg-civilians25> (“Of course [recent civilian deaths attributed to U.S. troops] will increase support for the opposition,” said Farraji, 49, who was named a police general with U.S. approval. “The hatred of the Americans has increased. I myself hate them.”).

actions of counterinsurgents become new recruits for expanding insurgent networks.<sup>171</sup>

In addition, in an insurgent war, whole-scale surrender is not a likely response to the use of force, since the “enemy” often does not wear uniforms or fall under the control of a single sovereign state or central control. Insurgent forces often *flourish* as regional body counts rise, regardless of the affiliation of those killed. This is because instability *decreases* the legitimacy of domestic security forces and counterinsurgent forces, making the local population more likely to align with an insurgency in an attempt to escape violence. Protection of civilians, however, has the opposite effect: When civilians feel secure and protected, they are far less likely to align with an insurgency and far more likely to provide information to counterinsurgent forces.<sup>172</sup> As David Galula, one of the forefathers of modern counterinsurgency doctrine, has observed,

The destruction of the insurgent forces requires that they be localized and immediately encircled. But they are too small to be spotted easily by the counterinsurgent’s direct means of observation. Intelligence is the principle source of information on guerrillas, and intelligence has to come from the population, but the population will not talk unless it feels safe, and it does not feel safe until the insurgent’s power has been broken.<sup>173</sup>

Therefore, the goal of counterinsurgent troops is to

protect and hence gain support of the populace, acquire information on the identity and location of insurgents, and thereby defeat the insurgency. While the primary challenge of conventional warfare is massing firepower at the appropriate place and time to destroy the enemy, the key to success in counterinsurgency is massing

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<sup>171</sup> COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 16.

<sup>172</sup> See GALULA, *supra* note 136, at 83 (“The counterinsurgent cannot achieve much if the population is not, and does not feel, protected against the insurgent.”). See also Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at vii, viii (describing insurgency as “a competition between insurgent and government for the support of the civilian population, which provides the sea in which the insurgent swims”).

<sup>173</sup> GALULA, *supra* note 136, at 50.

intelligence derived from the local population to identify the enemy.<sup>174</sup>

Counterinsurgency thus focuses on protecting civilians and promoting peace and security, and, to this end, it incorporates international human rights standards and principles of accountability and transparency.<sup>175</sup> In fact, as discussed below, counterinsurgency has goals very similar to those of U.N. peacekeeping.

Counterinsurgency's impact on U.S. military strategy has been nothing short of revolutionary. Sarah Sewall, director of the Carr Center for Human Rights Policy at the Kennedy School of Government, wrote, at the time of the manual's civilian release, that the new doctrine

challenges much of what is holy about the American way of war. It demands significant change and sacrifice to fight today's enemies honorably. It is therefore both important and controversial. Those who fail to see the manual as radical probably don't understand it, or at least understand what it's up against.<sup>176</sup>

As a result of this "radical" change in doctrine, American strategy in Iraq sharply changed course. This change resulted in measurable security gains and a decrease in violence directed against civilians.<sup>177</sup> Arguably, it also prevented the whole-scale collapse of Iraq's civilian government.

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<sup>174</sup> Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at vii.

<sup>175</sup> See Sewall, *Introduction*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 140, at xxiv ("The new manual is cognizant of international rights standards, expectations of accountability, and the transparency that accompanies the modern world."). See also COUNTERINSURGENCY FIELD MANUAL, *supra*, at 37–39 ("The primary objective of any COIN operation is to foster development of effective governance by a legitimate government. . . . In Western liberal tradition, a government that derives its just powers from the people and responds to their desires while looking out for their welfare is accepted as legitimate.").

<sup>176</sup> See Sewall, *Introduction*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xxi.

<sup>177</sup> See, e.g., Jonathan Schroden, *Measures for Security in a Counterinsurgency*, 32 J. STRATEGIC STUD. 715 (2009); LIEUTENANT COLONEL JIM CRIDER, INSIDE THE SURGE: ONE COMMANDER'S LESSONS IN COUNTERINSURGENCY 13–14 (2009), [http://www.cnas.org/files/documents/publications/CNAS\\_Working%20Paper\\_Surge\\_CriderRicks\\_June2009\\_ONLINE.pdf](http://www.cnas.org/files/documents/publications/CNAS_Working%20Paper_Surge_CriderRicks_June2009_ONLINE.pdf) ("In just a matter of months, the tables had turned. Before, we had no idea who was watching us or plotting attacks; now insurgents had no idea who was giving them up."); Lieutenant Colonel James Vizzard & Timothy Capron, *Exporting General Petraeus's Counterinsurgency Doctrine*, 70 PUB. ADMIN. REV. 485, 491 (2010).

The sweeping changes ushered in by COIN doctrine brought the U.S. military into the twenty-first century. COIN doctrine is designed to provide the military with the tools it needs to successfully counter the unconventional violence that makes up much of post-Cold War warfare. The U.N.—and, ostensibly, the newly-created AFRICOM—now faces similar violence in the Democratic Republic of Congo. If peacekeeping is to succeed at quelling this complex and multi-faceted post-Cold War violence, the prevailing strategy must be brought into the twenty-first century as well.

#### A. A New Kind of War

The irregular, protracted conflicts that led to the development of modern COIN doctrine contrast sharply with the classical, interstate conflicts that for centuries formed the context of conventional warfare.<sup>178</sup> Much of modern warfare involves “complex communal conflicts where armed militias and organized crime play a key role.”<sup>179</sup> Dr. Steven Metz, Chairman of the Regional Strategy and Planning Department at the Strategic Studies Institute of the U.S. Army War College, has described twenty-first century insurgencies as follows:

[T]hey are nested in complex, multidimensional clashes having social, cultural, and economic components. In an even broader sense, contemporary insurgencies flow from systemic failures in the political, economic, and social realms. . . . Such complex conflicts involve a wide range of participants, all struggling to fill the voids created by failed or weak states and systemic collapse.<sup>180</sup>

As such, insurgencies generally occur in *intrastate* conflicts or in conflicts where “indigenous elements seek to overthrow what they perceive to be a foreign or occupation government.”<sup>181</sup>

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<sup>178</sup> They also contrast with the more recent post-colonial or nationalistic transition wars that shaped the U.S. Army’s initial understanding of counterinsurgency. See Steven Metz, *New Challenges and Old Concepts: Understanding 21st Century Insurgency*, PARAMETERS, Winter 2007–2008, at 20, 21–22.

<sup>179</sup> *Id.* at 22.

<sup>180</sup> *Id.*

<sup>181</sup> COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 3.

Many such insurgencies emerged at the end of the Cold War, when weak governments that were no longer receiving support from their previous superpower allies became embroiled in conflict with hostile internal elements.<sup>182</sup> After host governments lost superpower support, internal “insurgent” or “rebel” groups were initially at a resource disadvantage, even with respect to the weak governments they challenged, and did not pose a strong threat to the centralized state.<sup>183</sup> However, insurgent groups were slowly able to overcome this material disparity by fostering civilian violence and instability, thereby forcing their government targets to expend critical resources protecting the civilian population and maintaining stability. Insurgents were thus able to consume the energies of host governments, slowly weakening their hegemony and legitimacy until endangered civilian populations stopped recognizing the government’s authority and legitimacy.<sup>184</sup>

Because of this dynamic, the promotion of civilian insecurity and endemic violence are common tools of insurgents: Failing to keep civilians safe decreases the legitimacy of the national government in the eyes of the populace. By contrast, a national government must establish its own legitimate claim to leadership before it can effectively stamp out an internal insurgency and prevent new insurgencies from forming.<sup>185</sup> This is because legitimate governments rule primarily with the consent of the populace, and as such, they enjoy a degree of support and obedience necessary to maintain stability and develop capabilities to regulate social relationships, take public action, and maintain collective security.<sup>186</sup> If civilians realize that they cannot depend on government forces for protection, however, they are far less likely to accept the government’s legitimate claim to leadership, and they are far more likely to join or aid the rebel groups that have been terrorizing them, in an attempt to protect themselves and their families.<sup>187</sup>

Because of the importance of national stability and host-government legitimacy to a successful counterinsurgency effort, foreign counterinsurgent forces often face the difficult task of helping a host government to reestablish order and stability where none currently

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<sup>182</sup> *Id.* at 7.

<sup>183</sup> *Id.* at 11–13.

<sup>184</sup> *Id.* at 16.

<sup>185</sup> *See, e.g., id.* at 39 (noting that counterinsurgency efforts “cannot achieve lasting success without the [host nation] government achieving legitimacy”).

<sup>186</sup> *Id.* at 37.

<sup>187</sup> *Id.* at 37–38.

exists.<sup>188</sup> This puts conventional military troops in an unfamiliar position. The establishment of order is contrary to the goals of most traditional military operations, which historically aimed to sow *disorder* through widespread bombings, blockades, or other intentional infliction of violence. Indeed, traditional military strategy is based on the fact that violence, drought, hunger, and other forms of disorder, when directed against organized troops, can disrupt military organization and prompt retreat or surrender. Counterinsurgency, however, requires the *establishment* of order, which is accomplished through *prevention* of violence, hunger, and confusion. This requires a wide range of skills that most conventional militaries do not possess. Order-*establishing* skills, such as troop and police training, civics, sanitation, economics, and political facilitation, are classically the purview of civil technocrats, not military personnel.<sup>189</sup> Counterinsurgent forces, however, must learn these skills. They also face the distinctly *unmilitary* task of building sustained relationships with local civilian leaders, since such relationships will ensure that the troops receive vital information and that local civilians do not defect and become new recruits to the insurgency. Because counterinsurgent troops must possess a skill set that is atypical for classical military personnel, success in counterinsurgency is dependent on radical changes in the way that troops are trained.<sup>190</sup>

Successful counterinsurgency requires that troops be taught communication, civics, civil engineering, and police skills. It also requires that troops be taught to adapt quickly to their areas of operations (AOs) and respond creatively when situations on the ground shift. Such creative thinking is vital to success because insurgents relationships and tactics are constantly changing; insurgents and counterinsurgents are essentially engaged in a battle over who can adapt faster to gain the advantages necessary for long-term success.<sup>191</sup>

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<sup>188</sup> *Id.* at 8.

<sup>189</sup> *See id.* at liv.

<sup>190</sup> *See* General David H. Petraeus & Lieutenant General James F Amos, *Foreword* to COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xlv–xlvi.

<sup>191</sup> For a detailed discussion of adaptive behavior in insurgencies and counterinsurgencies, see LIEUTENANT COLONEL DAVID J. KILCULLEN, COUNTERING GLOBAL INSURGENCY (2004), *available at* <http://www.smallwarsjournal.com/documents/kilcullen.pdf>:

[I]nsurgencies are . . . complex adaptive systems. They are relatively invulnerable to operational shock, so most conventional maneuvers (which use operational shock as a defeat mechanism) are ineffective. They are more vulnerable to surprise, but this demands continuous

Conventional troops, on the other hand, are far less likely to need creative reaction and adaptation skills, since conventional military operations are far more dependent on advance, centralized planning than is counterinsurgency. The skill set needed by troops engaged in effective counterinsurgency operations, therefore, differs radically from that needed by troops engaged in conventional military operations.<sup>192</sup>

In his foreword to the most recent edition of the Counterinsurgency Field Manual, John Nagl (a member of the *Counterinsurgency Field Manual*'s writing team, retired Lieutenant Colonel in the U.S. Army, and veteran of the Iraq war) lists some of the requirements of successful counterinsurgency campaigns as population security, economic development, good governance, and the provision of civil services, all in an attempt to "build stable and secure societies that can secure their own borders and do not provide safe haven for terrorists."<sup>193</sup> Because of counterinsurgency's uniquely unmilitary goals, traditional military skills such as marksmanship, security and defense capability, and mental and physical fitness to engage in a combat zone are not sufficient for counterinsurgents. Successful counterinsurgent troops must also possess skills in nation building, civics, and creative analysis.

## B. The Applicability of the Doctrine to Peacekeeping

Just as modern counterinsurgency warfare has drastically altered the skills needed by military operators, changes in modern peacekeeping have drastically altered the skills needed by current peacekeepers. Classical U.N. peacekeeping involved peaceable "observation" of

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innovation: there will never be a single optimal solution. Indeed, the more effective a measure is, the faster it will be obsolete, because it will force the enemy to adapt more quickly.

A shorter version of this paper was published in the *Journal of Strategic Studies* in 2005. 28 J. STRATEGIC STUD. 597 (2005). See also COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at liii, 196.

<sup>192</sup> See, e.g., *id.* secs. 1–3; Petraeus & Amos, *Foreword* to COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xlv (noting that counterinsurgency "requires Soldiers and Marines to employ a mix of familiar combat tasks and skills more often associated with nonmilitary agencies"); Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at ix ("Conventional armies are not well suited to the demands of counterinsurgency. The firepower on which they pride themselves cannot be leveraged against the insurgent; in fact, an almost entirely different orientation is necessary . . .").

<sup>193</sup> Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xix.

ceasefires in conventional wars *between recognized states*. Post-Cold War peacekeeping, on the contrary, is a quasi-military venture that aims predominantly to quell violence *within a weak state*.<sup>194</sup> The U.N. Department of Peacekeeping Operations (DPKO) described the changed context of modern peacekeeping in its 2008 *United Nations Peacekeeping Operations: Principles and Guidelines* (commonly known as the “Capstone Doctrine”), which contains principles and guidelines for field operations, notes that following the end of the Cold War “the strategic context for United Nations peacekeeping changed dramatically.”<sup>195</sup> The majority of modern wars are internal armed conflicts, and as a result, the U.N. has entered a new era of “multi-dimensional” peacekeeping operations:

Multi-dimensional United Nations peacekeeping operations deployed in the aftermath of an internal conflict face a particularly challenging environment. The State’s capacity to provide security to its population and maintain public order is often weak, and violence may still be ongoing in various parts of the country. Basic infrastructure is likely to have been destroyed and large sections of the population may have been displaced. Society may be divided along ethnic, religious and regional lines and grave human rights abuses may have been committed during the conflict, further complicating efforts to achieve national reconciliation.<sup>196</sup>

In stark contrast to its previous role monitoring consensual ceasefires and preventing resurgence of conventional interstate wars, the U.N. increasingly functions as a “midwife of political transitions.”<sup>197</sup> In fact, peacekeeping has become the most commonly used mechanism for attempting to halt civil war.<sup>198</sup>

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<sup>194</sup> See Donald C.F. Daniel & Bradd C. Hayes, *Securing Observance of UN Mandates Through Employment of Military Force*, in *THE UN, PEACE, AND FORCE* 105, 106–07 (Michael Pugh ed., 1997).

<sup>195</sup> U.N. DEPT. OF PEACEKEEPING OPERATIONS, DEP’T OF FIELD SUPPORT, *UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES* 21 (2008), [http://www.peacekeepingbestpractices.unlb.org/Pbpps/Library/Capstone\\_Doctrine\\_ENG.pdf](http://www.peacekeepingbestpractices.unlb.org/Pbpps/Library/Capstone_Doctrine_ENG.pdf) [hereinafter CAPSTONE DOCTRINE].

<sup>196</sup> *Id.* at 21–22.

<sup>197</sup> William J. Durch, *Introduction* to *THE EVOLUTION OF UN PEACEKEEPING* 1, 10 (William J. Durch ed., 1993).

<sup>198</sup> LISA MORJÉ HOWARD, *UN PEACEKEEPING IN CIVIL WARS* 1 (2008).

In this increasingly common intra-national peacekeeping context, U.N. peacekeepers function in a manner very similar to that of counterinsurgent troops: They must maintain law and order; carry out humanitarian functions; protect human rights; and provide basic civilian security where the host government cannot—tasks almost identical to those of counterinsurgents.<sup>199</sup> Indeed, peacekeepers, like counterinsurgents, attempt to strengthen host nation security forces while creating a secure and stable environment. They also work to promote political reconciliation; support the establishment of functioning, legitimate governmental institutions; and provide a framework for ensuring that international actors work together in a coordinated manner.<sup>200</sup> The operating context of modern peacekeeping is, therefore, one of protecting civilian populations and establishing order where none exists—a context identical to that of counterinsurgency.<sup>201</sup>

Additionally, success in multi-dimensional peacekeeping, like success in COIN, depends on the ability to adapt and learn from the local population.<sup>202</sup> Shashi Tharoor, U.N. Under Secretary General for Communications and Public Information under Kofi Annan, noted that in the 1990s, the U.N. was experimenting with peacekeeping, trying “all sorts of new things, everything from delivering humanitarian aid under fire, hunting down warlords, and of course monitoring no-fly zones.”<sup>203</sup> He described the experience as being “very much like fixing the engine

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<sup>199</sup> See, e.g., *id.* at 342:

While UN multidimensional peacekeeping as a solution to civil wars is transferred from one context to the next, similar processes have been occurring in the two major US-led operations, in Afghanistan and Iraq . . . While the operations in Iraq and Afghanistan are not officially termed “multidimensional peacekeeping,” the activities of the United States and its allies . . . mirror quite closely the tasks of multidimensional peacekeeping . . . ;

William J. Durch, *Epilogue: Peacekeeping in Uncharted Territory*, in *THE EVOLUTION OF UN PEACEKEEPING* 463, 474 (William J. Durch ed., 1993) (“Protecting individual human rights while sustaining or rebuilding war-torn countries may be peacekeeping’s new calling . . .”).

<sup>200</sup> CAPSTONE DOCTRINE, *supra* note 195, at 26.

<sup>201</sup> See Kofi Annan, Remarks by the Secretary-General to the Security Council, May 17, 2004, U.N. Doc SG/SM/9311 (2004).

<sup>202</sup> See HOWARD, *supra* note 198, at 2 (noting that “UN Peacekeeping seems to be more successful when the peacekeepers are actively learning from the environment in which they are deployed.”).

<sup>203</sup> LINDA FASULO, AN INSIDER’S GUIDE TO THE UN 59 (2005).

of a moving car.”<sup>204</sup> His analogy would be equally apt to describe COIN efforts, which have been described as “learning to eat soup with a knife.”<sup>205</sup>

Adaptations, however, must take place within a framework of general principles that can guide peacekeepers in their understanding of how rebel groups function and develop and how they can be successfully neutralized. A highly relevant set of principles has already been developed by the U.S. military, in conjunction with non-governmental organizations (NGOs), human rights experts, and scholars; these principles form the basis of COIN doctrine. The U.N., however, has not adopted COIN doctrine for use in peacekeeping operations. Instead, blue-helmet commanders in the field must currently attempt to adapt to changing local violence without any clear centralized doctrine for how such violence might be permanently quelled.

The striking similarities between post-Cold War warfare and post-Cold War peacekeeping have, however, been recognized by several scholars. William J. Durch, who served as the Project Director for the U.N. Panel on U.N. Peace Operations (the Brahimi Report), has warned that “despite every effort politically to avoid placing its forces in harm’s way, a U.N. force deployed into a situation of recent civil war may find it necessary to undertake, at least locally and on a small scale, operations not unlike those required in counterinsurgency.”<sup>206</sup> Similarly, Lise Morjé Howard notes in her recent book *UN Peacekeeping in Civil Wars* that although the U.S.-led “operations in Iraq and Afghanistan are not officially termed ‘multidimensional peacekeeping,’ the activities of the United States and its allies, in conjunction with, at times, the U.N. and other international organizations, mirror quite closely the tasks of multidimensional peacekeeping . . . .”<sup>207</sup> Even the introduction to the University of Chicago Press version of the *Counterinsurgency Field Manual* notes the striking similarities of COIN and peacekeeping:

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<sup>204</sup> *Id.*

<sup>205</sup> LIEUTENANT COLONEL JOHN NAGL, *LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM* (2005); *see also* T.E. LAWRENCE, *SEVEN PILLARS OF WISDOM* 182 (1926) (“[W]ar upon rebellion was messy and slow, like eating soup with a knife.”).

<sup>206</sup> William J. Durch, *Getting Involved: The Political Military Context, in THE EVOLUTION OF UN PEACEKEEPING* 16, 34 (William J. Durch ed., 1993).

<sup>207</sup> HOWARD, *supra* note 198, at 342.

Modern COIN . . . incorporates stability operations, also known as peace support operations, reconstruction, and nation building. Just recently, these were considered a separate category of military activity closely associated with multinational or United Nations peacekeeping operations in which force is rarely used.<sup>208</sup>

This *Counterinsurgency Field Manual's* introduction also briefly questions whether COIN might be a “‘plug and play’ capability” that could work “equally well in a United Nations peacekeeping operation.”<sup>209</sup> However, notwithstanding this sporadic recognition of the closely aligned tasks and goals of peacekeepers and counterinsurgents, there has been no scholarly analysis of these similarities, no public discussion of how COIN might practically be applied to peacekeeping operations, and no call for the U.N. to incorporate the doctrine into its current and future missions.

It is time that these failings were swiftly remedied. The U.N. should reform its current operations in Congo and elsewhere and incorporate principles of counterinsurgency into mission mandates and strategy. COIN doctrine focuses on the effective provision of population security, long-term political solutions to endemic violence, and increased government legitimacy, all areas where U.N. peacekeeping operations are in strong need of improvement. Furthermore, the doctrine is inherently logical, and has a proven record of effectiveness. The U.N. simply cannot afford to ignore its lessons any longer.

For decades, the U.S. military struggled in irregular wars because it was unwilling to reexamine its conventional understanding of conflict and conflict prevention. The U.N. is in a similar position today. Over the past six years, however, the U.S. Army and Marine Corps have recognized that conventional military tactics do not bring long-term pacification in modern intrastate conflicts. The record of recent U.N. peacekeeping operations demonstrates that conventional peacekeeping

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<sup>208</sup> Sewall, *Introduction*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xxiii. *See also id.* at xli (discussing the similarities between the current effort to incorporate COIN into U.S. military capacity and the failed Clinton-era struggle to develop capacity for “multilateral peace operations” that would have included “critical nation-building capabilities that could have proved crucial in Iraq”).

<sup>209</sup> *Id.* at xxiv. *See also id.* at xli (asserting that the failure of the United States to become involved in multilateral peacekeeping operations in 1990s was partially to blame for its lack of capacity in the type of nation-building required in Iraq).

strategies are equally inept at the task. The U.N. should learn from the mistakes of the U.S. military and embrace COIN doctrine before more civilian lives are lost. The United States, moreover, should support counterinsurgency-based reform of U.N. peacekeeping through its position on the Security Council and should assist the U.N. in its counterinsurgency efforts by promoting rule of law and security sector reform in areas of endemic conflict. It will be as beneficial for the U.S. military, particularly AFRICOM, to consider ways in which the unique cultural and military context in Congo fits into the existing COIN framework.<sup>210</sup>

#### IV. Incorporating Counterinsurgency Doctrine into Congolese Peacekeeping Operations

The following section presents six concrete ways that the U.N. and the United States can use counterinsurgency doctrine to revitalize its peacekeeping operation in Congo, noting areas where independent U.S. expertise would be particularly beneficial to the peace-building process. Implementing these recommended changes to MONUC's actions in Congo will demand departures from traditional peacekeeping strategy, just as the implementation of counterinsurgency doctrine into modern warfare has demanded changes in the way the military conceives of and fights modern wars. These changes, however, will be both desirable and lawful.

##### A. Peacekeeping and the Non-Use of Force Principle

Perhaps most notably, though counter-intuitively, effective use of counterinsurgency doctrine will require peacekeeping missions to drop all pretense of the "non-use of force" principle—the idea that force

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<sup>210</sup> In fact, there is reason to believe that current COIN doctrine might be even *more* well-suited for peacekeeping in Congo than it is for military activities in Iraq and Afghanistan. One critic of the COIN's broad applicability, David Kilcullen, has noted that while the doctrine is based largely on a "classical" theory of counterinsurgency, many modern insurgencies differ significantly from those of prior eras. In many ways, however, the rebel militia groups in Congo function like participants in what Kilcullen describes as a classical, rather than modern, insurgency. For instance, Congolese militias operate largely in a rural, rather than urban, environments, they do not make use of anonymous IED attacks, and they do not operate under a primarily faith-based approach. See David Kilcullen, *Counterinsurgency Redux*, 48 SURVIVAL 111–30 (2006).

should only be used by peacekeepers in self-defense. The MONUC is already equipped with a Chapter VII mandate, which provides the mission with the legal authorization to use force.<sup>211</sup> Additionally, MONUC has apparently been explicitly authorized to use force by a confidential note from the U.N. Office of Legal Affairs.<sup>212</sup> However, notwithstanding this fact, U.N.-directed force is seldom used by the mission's peacekeepers. As the U.N. noted in its 1995 *General Guidelines for Peacekeeping Operations*, although current missions have a broad authorization to use force to defend their mandates, "[i]n practice, commanders in the field have been reluctant to use their authority in this way, for well-founded reasons relating to the need for a peace-keeping operation to maintain the active cooperation of the parties to a conflict."<sup>213</sup>

Indeed, although MONUC is authorized to use "all necessary means" to promote its mandate, when peacekeepers participate in offensive campaigns, they currently do so by providing tactical and operational support to the Congolese army. Recent offensive missions have been under the operational control of the Congolese army, not the U.N. This is highly problematic because the Congolese army is incapable of defeating the FDLR, untrained in counterinsurgency, and extremely abusive towards the local population. Operations undertaken in support of the Congolese army, therefore, contradict MONUC's mandate to protect civilian populations and detract from MONUC's ability to gain support and cooperation from the local population—crucial to successful counterinsurgent warfare and lasting peace. The MONUC must *directly control* all forcible action in which it is involved, at least until the Congolese army gains the necessary capability and legitimacy to direct such action.

Force in peacekeeping should be directed against individuals or groups who attack civilians or prevent peacekeepers from fulfilling their mandates, or against "spoiler" elements who would prevent or destroy a

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<sup>211</sup> See U.N. Charter arts. 39–51 (addressing "Action with Respect to Threats to the Peace, Breaches of Peace, and Act of Aggression within Chapter VII).

<sup>212</sup> See Hum. Rts. Watch, *supra* note 101 ("[MONUC's] mandate permits peacekeepers to use force to disarm the FDLR on its own, without joining forces with the abusive Congolese army. The 1 April legal note from the Office of Legal Affairs specifically sets out this option.").

<sup>213</sup> U.N. Dep't of Peacekeeping Operations, *General Guidelines for Peacekeeping Operations* 20, U.N. Doc. 210/TC/GG95 (Oct. 1995).

fragile multilateral peace deal.<sup>214</sup> This type of force has an inherent neutrality: it is not directed against one particular party, *per se*, but rather against *any element that attempts to promote insecurity*, at a “tactical level.”<sup>215</sup> United Nations enforcement actions, in contrast, use force at the “strategic or international level.”<sup>216</sup> In peacekeeping, unlike in enforcement action, “coercion is not the primary aim [of the operation], but incidental thereto.”<sup>217</sup> The term “quasi-enforcement” is sometimes used to refer to robust peacekeeping operations’ neutral use of force not against a specific target, but with a specific aim.<sup>218</sup>

Either MONUC must demonstrate the willingness and ability to direct the use of offensive force against individuals who threaten civilians in Congo, no longer restricting itself to supporting operations undertaken by the Congolese army, or the Security Council must authorize other competent national troops, operating under non-U.N. command structures, to carry out the necessary enforcement action. Without the credibility to threaten or utilize force, the U.N. has no way of preventing the numerous militia groups that may be present in the country from continuing to terrorize civilians and jeopardize the political peace process. Classical, non-forceful peacekeeping (or “peace observation”), as originally conceived, will only work if *all* parties to a conflict are concerned with their own protection and want to prevent further hostilities.<sup>219</sup> If one side does not actually *want* peace, however, but is, instead, intent on massacring civilians, non-forceful consent-based peacekeeping will not be effective. Neutralization of violent elements of the population is necessary if a host state is to be strengthened to the point that it can itself provide security to the populace and prevent the

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<sup>214</sup> The term “spoiler” refers to individuals or factions who believe that an emerging peace or peace agreement threatens their interests or power, and therefore seek to undermine stability. Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 INT’L SECURITY 5, 5 (1997). See also Peter Uvin et al., *supra* note 13, at 79 (“[T]here seem to be two ways to end the threat of spoilers—either entice them to join the peace or coerce them. In the eastern DRC until now, however, neither MONUC nor the Congolese army has been able to achieve either.”).

<sup>215</sup> CAPSTONE DOCTRINE, *supra* note 195, at 34.

<sup>216</sup> *Id.* at 19, 34.

<sup>217</sup> Nicholas Tsagourias, *Consent, Neutrality/Impartiality, and the Use of Force in Peacekeeping: Their Constitutional Dimension*, 11 J. CONFLICT & SECURITY L. 465, 472 (2006).

<sup>218</sup> James Sloan, *The Use of Offensive Force in U.N. Peacekeeping: A Cycle of Boom and Bust?*, 30 HASTINGS INT’L & COMP. L. REV. 385, 391 (2007).

<sup>219</sup> See STEPHEN M. HILL & SHAHIN P. MALIK, PEACEKEEPING AND THE UNITED NATIONS, at xi–xii (2006).

continued rise of armed militia groups. Thus, without force, peacekeepers are ill-equipped to keep or promote peace in intra-state conflicts.<sup>220</sup>

Some critics have questioned the potential effectiveness of forceful peacekeeping, however, and one has decried a “boom and bust cycle” in the U.N., whereby force is increasingly used by the U.N., the resultant missions end in failure, the international community is chastened and peacekeeping’s role is reduced, and then forceful peacekeeping rises again, beginning a new cycle.<sup>221</sup> Forceful peacekeeping does indeed have a troubled past, and past failures beg two important questions—(1) why have forceful peacekeeping missions failed in the past, and (2) can they be adapted to become more successful? The most convincing answer to the first question is that while the *level* of force used in peacekeeping evolved swiftly in the years following the Cold War, the structural, strategic, and doctrinal elements required to use that force effectively never developed within the U.N.<sup>222</sup> Instead, U.N. peacekeeping operations have a vague and nearly incoherent command and control structure, which makes strategic and doctrinal innovation particularly difficult.<sup>223</sup> Originally, the Military Staff Committee of the Security Council was intended to have strategic control over U.N. military action, but it was prevented from doing so because of a Cold War stalemate.<sup>224</sup> When East-West relations warmed and the Security Council regained the ability to create and direct forceful operations, General Assembly and Secretariat-based bodies had already been created to guide peacekeeping action, and bureaucratic inertia has prevented their reorganization or dissolution.

As a result, current peacekeeping operations are “directed” by a myriad of disjointed organizations. When a new peacekeeping operation is created, the Security Council authorizes its deployment, gives it a

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<sup>220</sup> For this reason, some commentators have suggested that peacekeeping may not be viable in most interstate conflicts—a claim which has merit only in the absence of neutral, non-consent-based peace operations. See, e.g., P.F. DIEHL, *INTERNATIONAL PEACEKEEPING* 171–75 (1994).

<sup>221</sup> See Sloan, *supra* note 218.

<sup>222</sup> See John Gerard Ruggie, *The UN and the Collective Use of Force: Whither or Whither?*, in *THE UN, PEACE AND FORCE* 1, 1–2 (Michael Pugh ed., 1997).

<sup>223</sup> See JOHN HILLEN, *BLUE HELMETS: THE STRATEGY OF UN MILITARY OPERATIONS* 243 (2000)

<sup>224</sup> See U.N. CHARTER art. 43; HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS* 12 (1996); HILL & MALIK, *supra* note 219, at xi–xii.

mandate describing mission objectives, and recommends how the mission should be accomplished.<sup>225</sup> The Secretary General, however, appoints a force commander for the mission, and manages mission operations and logistics through Department of Peacekeeping Operations (DPKO)<sup>226</sup> and its newly-created Department of Field Support (DFS).<sup>227</sup> The Secretary General, DPKO, and force commanders together establish the rules of engagement for a given mission, and member states retain significant control over their donated peacekeeping troops.<sup>228</sup> Even the meaning of “self-defense” in a given set of rules of engagement may relate to the *national laws* of a given peacekeeping unit’s country of origin.<sup>229</sup> In short, current peacekeeping missions exist in an operational nightmare. The DPKO is currently undergoing a major reorganization in order to provide better, clearer guidance to peacekeeping troops on the ground,<sup>230</sup> but the currently opaque state of peacekeeping’s strategic control has severely hindered robust peacekeeping’s doctrinal evolution.<sup>231</sup>

As a result, forceful, intrastate peacekeeping currently exists in a doctrinal void. Doctrine is, however, vitally important to coordinated military action: it is the centralized expression of how military groups “contribute to unified action in campaigns, major operations, battles, and

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<sup>225</sup> LINDA FASULO, *AN INSIDER’S GUIDE TO THE UN* 103 (2d ed. 2009).

<sup>226</sup> For further information on DPKO see U.N., Department of Peacekeeping Operations, available at <http://www.un.org/wcm/content/site/sport/dpko> (last visited July 22, 2010).

<sup>227</sup> *Id.* at 103. See also U.N. General Assembly, General Assembly Establishes Department of Field Support as It Adopts Fifth Committee Recommendations on Major Peacekeeping Overhaul, UN Doc. GA/10602 (Jun. 29, 2007).

<sup>228</sup> Captain Dale Stephens, *The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative*, 12 INT’L PEACEKEEPING 157, 158 (2005). One reason for reliance on national control is that U.N. peacekeeping staff has severe shortages. See Daniel & Hayes, *supra* note 194, at 115 (“The head of the Military Advisor’s Office in DPKO noted at the end of 1993 that his office (with 62 officers at the time) did what his army (Canada’s) would involve 1,000 people to do.”).

<sup>229</sup> See Stephens, *supra* note 228, at 165.

<sup>230</sup> See G.A. Resolution 61/256, UN Doc. A/RES/61/256 (Mar. 22, 2007).

<sup>231</sup> See HILLEN, *supra* note 223, at 243:

The United Nations had directed most of its military missions through an improvised system of command and control. The system that evolved was based on a loose definition of command that recognized the prerogatives of the nation-state in regard to its troops in UN service. In addition, . . . the control procedures of UN forces were improvised as the mission proceeded. . . . These conventions of command and control were disastrous in large, complex, and ambitious military missions operating in contested environments.

engagements.”<sup>232</sup> As such, doctrine serves to provide a “common language and a common understanding of how . . . forces conduct operations.”<sup>233</sup> John Nagl has described the role of military doctrine as “enormously important,” and has cited the lack of an adequate doctrine as one of the most critical failings of the Army’s initial invasion of Iraq.<sup>234</sup> Similarly, John Ruggie, a Harvard professor and former U.N. Assistant Secretary General and chief advisor for strategic planning to Kofi Annan, noted, in 1997, that an important factor in the U.N.’s failed peace operations was its “lack of any doctrinal understanding of ‘grey area’ operations together with a very poorly developed U.N. Command structure.”<sup>235</sup> Unfortunately, Ruggie’s criticism remains valid today, as does his admonishment that “without a more solid doctrinal basis, U.N. peace operations will have no future in the terrain between traditional peacekeeping and warfighting.”<sup>236</sup>

Yet the U.N. has persisted in using forceful peacekeeping in the absence of any centralized doctrine for the way in which that force is to be used.<sup>237</sup> Thus, it is not surprising that its use of force has tended toward failure. In essence, recent robust, forceful peacekeeping missions tried to break free of the Cold War constraints on force while continuing to operate in the strategic and doctrinal vacuum inhabited by less ambitious Cold War peacekeeping.

A solution, however, is not elusive. Counterinsurgency doctrine could furnish modern peacekeeping with the necessary principles for

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<sup>232</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS ¶ 1-45 (2001).

<sup>233</sup> *Id.* ¶ I-46.

<sup>234</sup> Nagl, *Foreword*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xiv (“Although there are many reasons why the Army was unprepared for the insurgency in Iraq, among the most important was the lack of current counterinsurgency doctrine when the war began.”).

<sup>235</sup> Ruggie, *supra* note 222, in THE UN, PEACE AND FORCE 1, 1–2 (Michael Pugh ed., 1997).

<sup>236</sup> *Id.* at 13. See also Michael Pugh, *From Mission Cringe to Mission Creep?: Concluding Remarks*, in THE UN, PEACE AND FORCE 191, 191 2 (Michael Pugh ed., 1997) (agreeing that “the UN lacks an appropriate strategic doctrine for ‘grey area’ operations in intrastate conflicts”).

<sup>237</sup> See Ian Johnstone, *Constraining and Enabling the Use of Force: Discursive Power in the UN Security Council*, 2 J. OF INT’L LAW & INT’L RELATIONS 73, 83 (2005) (“[T]he UN ought to have a peace operations “doctrine[.]” . . . but due to political sensitivities it does not possess, other than what appears in training manuals, a master list of standard rules of engagement, and various semi-official documents like the 2003 UN Handbook on Multilateral Peacekeeping Operations. As a result, there is no set policy on the responsibility of peacekeepers to protect civilians.”).

humanitarian use of force. The doctrine is tailored specifically to multi-dimensional, intrastate conflicts and carries a proven history of effectiveness. Counterinsurgency can fill peacekeeping's current doctrinal void and furnish missions with the tools they need to use force in an effective, sustainable manner to prevent civilian violence and promote lasting peace and security.

#### B. Implementing COIN Doctrine

In addition to the necessary changes in MONUC's attitude regarding the use of force, other changes in MONUC strategy and organization are also desirable. These changes include increased peacekeeping troop numbers, a more coercive attitude towards host nation security sector reform, a complete overhaul of MONUC's intelligence collection capabilities, and a much more hands-on approach to technical assistance and training aimed at helping the Congolese government provide basic civil services to Congo's population—particularly in the area of the justice and rule of law reform. Although many of these changes may seem radical, all will be lawful, and all are necessary to the creation of effective peacekeeping strategy.

In order to bring MONUC operations more in line with principles of counterinsurgency, the U.N. should:

1. Increase peacekeeping troop numbers;
2. focus on securing eastern Congo's civilian population, using the "clear-hold-build" approach;
3. direct resources towards efficient, effective intelligence collection and dissemination;
4. vet and train a legitimate, effective national army;
5. promote Rule of Law through Technical Assistance and Training; and
6. work to foster a political solution.

Each recommendation is discussed below in detail.

##### *1. Increase Peacekeeping Troop Numbers*

The Security Council should increase MONUC's authorized troop strength, and contributing countries should provide more forces to the

mission. Sufficient troop density is essential to counterinsurgency warfare. In his classic treatise on counterinsurgency, David Galula asserts that “intensity of efforts and vastness of means” form one of four crucial “laws” of successful counterinsurgency campaigns.<sup>238</sup> According to Galula, the “numerical strength of the armed forces in relation to the size and population of [a] country” is fundamental to victory in unconventional conflicts.<sup>239</sup> In calculating necessary troop numbers, COIN doctrine, therefore, looks to the number of civilian population at risk, rather than the number of hostile enemy combatants present in a given area. Galula stresses that “[t]he operations needed to relieve the population from the insurgent’s threat and to convince it that the counterinsurgent will ultimately win are necessarily of an intensive nature and of long duration. They require a large concentration of efforts, resources, and personnel.”<sup>240</sup> He therefore suggests a very high counterinsurgent troop density of one soldier for every ten or twenty civilians at risk.<sup>241</sup>

The *Counterinsurgency Field Manual* suggests that the minimum troop density required for counterinsurgency warfare is twenty counterinsurgents for every one thousand residents (one counterinsurgent for every fifty insurgents).<sup>242</sup> Of course, there is no mathematical formula that can produce a magic number for troop density requirements—troop needs will be affected by a number of non-quantifiable factors such as geography, strength, and entrenchment of an insurgency, competence of host nation forces, and civilian population density.<sup>243</sup> However, the 20/1000 ratio suggested by the *Counterinsurgency Field Manual* provides a workable benchmark for U.N. force strength in Congo and has roots in robust historical and quantitative analysis. James Quinlivan, a mathematician at Rand Corporation, suggested as early as 1995 that troop numbers for counterinsurgency campaigns should be based on numbers of local civilian population.<sup>244</sup> This is because counterinsurgency’s “hearts and

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<sup>238</sup> See GALULA, *supra* note 136, at 55.

<sup>239</sup> *Id.* at 20.

<sup>240</sup> *Id.* at 55 (noting additionally that “efforts cannot be diluted all over the country” and therefore should be “applied successively area by area”).

<sup>241</sup> *Id.* at 20–21.

<sup>242</sup> COUNTERINSURGENCY FIELD MANUAL, *supra* note 140, at 23.

<sup>243</sup> See, e.g., JOHN J. MCGRATH, BOOTS ON THE GROUND: TROOP DENSITY IN CONTINGENCY OPERATIONS (2006), [http://www.cgsc.edu/carl/download/csipubs/mcgrath\\_boots.pdf](http://www.cgsc.edu/carl/download/csipubs/mcgrath_boots.pdf).

<sup>244</sup> James Quinlivan, *Force Requirements in Stability Operations*, PARAMETERS, Winter 1995, at 59–69.

minds” approach to stabilization is largely focused on securing civilians and thereby gaining their support.<sup>245</sup> After analyzing past data points for successful stabilization programs, Quinlivan concluded that a ratio of 20/1000 is the minimum troop density likely to bring success in counterinsurgency operations.<sup>246</sup>

Although MONUC is currently authorized to deploy up to 19,815 military personnel, its current presence in Congo includes just 18,884 troops, supplemented by 712 “military observers” and 1223 police.<sup>247</sup> There are currently an estimated 1,669,323 civilians at risk in eastern Congo.<sup>248</sup> By this measure, the optimal number of military peacekeepers for the region is roughly 33,000. While this estimation is somewhat arbitrary, it nonetheless seems clear that a significant troop influx is desirable if peacekeeping efforts are to succeed in the region.

Unfortunately, however, the most recent mandate for the U.N. peacekeeping mission in Congo calls for a troop *drawdown*, with 2000 peacekeepers expected to vacate their posts in relatively stable parts of the country.<sup>249</sup> This decision represents a step backwards. The Security Council should swiftly provide authorization for *increased* troop levels that meet or exceed the threshold discussed above, and should redirect any troops being withdrawn from Congo’s more peaceful regions into the troubled east. In the past, the Security Council has increased troop levels for MONUC through successive, incremental authorizations intended to increase mission effectiveness. However, these incremental increases have not succeeded in stabilizing the region. The Security Council should stop providing band-aids for the failing mission—instead, the mission needs complete overhaul and a one-time troop surge would be highly desirable. The longer the Security Council waits to add additional

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<sup>245</sup> *Id.*

<sup>246</sup> James Quinlivan, *Burden of Victory: The Painful Arithmetic of Stability Operations*, RAND REV., Summer 2003, at 28. See also Stephen Budiansky, *A Proven Formula for How Many Troops We Need*, WASH. POST, May 9, 2004, at B04; Colonel Daniel Smith (Ret.), *Iraq: Descending into the Quagmire*, FOREIGN POL’Y IN FOCUS, June 1, 2003, [http://www.fpiif.org/articles/iraq\\_descending\\_into\\_the\\_quagmire](http://www.fpiif.org/articles/iraq_descending_into_the_quagmire).

<sup>247</sup> See MONUC: United States Mission in the Democratic Republic of Congo, MONUC Facts and Figures, available at <http://www.un.org/en/peacekeeping/missions/monuc/facts.shtml> (last visited June 25, 2010).

<sup>248</sup> See UNHCR: The UN Refugee Agency, Democratic Republic of the Congo, Statistical Snapshot, available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e45c366> (last visited June 3, 2010).

<sup>249</sup> See S. C. Res. 1925, *supra* note 1.

troops to secure Congo's civilian population, the more entrenched and powerful rebel groups will become and the more intractable the conflict becomes. The Security Council should, therefore, act now, providing a concentrated influx of troops to stabilize the situation and put an end to endemic violence in the region. Only then can MONUC begin to achieve its mission goals of disarming Congo's rebel militias and creating lasting peace in the country.

2. *Focus on Securing Eastern Congo's Civilian Population, Using the Clear-Hold-Build Approach*

The MONUC should no longer support any Congolese army-led offensive against the FDLR.<sup>250</sup> Instead, peacekeepers should *direct* efforts toward securing Congo's civilian population using the "clear-hold-build" approach provided by counterinsurgency doctrine, and should assist the Congolese army in building the capacity to fight alongside peacekeepers in a disciplined and effective manner.<sup>251</sup> Clear-hold-build, sometimes referred to as the "ink blot" approach, consists of the following steps: first, use high troop levels and a high degree of military force to remove insurgent elements from an area.<sup>252</sup> Next *maintain* civilian security to build trust and support within the civilian population, who will provide crucial intelligence on insurgent activity and whereabouts. Finally, after *holding* territory long enough to build strong relationships among the local population and contribute to the return of sufficient levels of order and economic activity, *build* on that stability, moving out from the borders of the secure territory like a widening "ink blot."<sup>253</sup>

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<sup>250</sup> Although MONUC has recently claimed to have a degree of operational control Congolese army actions during the current *Amani Leo* ("Peace Now") campaign, the degree of actual knowledge and control possessed by MONUC is questionable: accusations of (unknowing) U.N. support for initiatives involving human rights abusers have continued in recent months. MONUC should redouble its efforts to establish command control over disarmament operations.

<sup>251</sup> See COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 174–84 (discussing clear-hold-build).

<sup>252</sup> *Id.* at 175–77.

<sup>253</sup> See *id.* at 174 ("[Counterinsurgency] efforts should begin by controlling key areas. Security and influence then spread out from secured areas.").

The premise of the ink blot approach is that counterinsurgents can secure one area or city at a time, subsequently “reinforce[ing] success by expanding to other areas.”<sup>254</sup> The approach aims to:

- (1) “Create a secure physical and psychological environment”;
- (2) “Establish firm government control of the populace and area”; and,
- (3) “Gain the populace’s support.”<sup>255</sup>

Counterinsurgents attempt to reach these goals through a process of developing “a long-term, effective [host nation] government framework and presence that secures the people and facilitates meeting their basic needs. Success reinforces the [host nation] government’s legitimacy.”<sup>256</sup> Thus, clear-hold-build operations contemplate *lasting* infrastructure and security build-up, not just short-term offensive action. As a result, these operations are directed at creating *lasting*, sustainable peace.

This long-term process of peace *maintenance* contrasts sharply with conventional offensive military strategy, which would require troops to move on from “cleared” areas and swiftly acquire new enemy territory. A similar conventional approach is currently being followed by the Congolese army, with support from MONUC. This approach is having disastrous results: As the Congolese army and MONUC move on from “cleared” areas, FDLR combatants return to these areas and retaliate against civilians. As previously discussed, the Congolese army’s recent offensive has, in fact, led to a marked increase in violence against civilians in the region.

Furthermore, MONUC peacekeepers are unable to provide credible security to Congolese civilians. Peacekeepers in Congo currently operate from bases outside of civilian areas, and they patrol large areas of the country in tanks and trucks. As such, they are unable to secure civilians, since attacks often occur at night, when peacekeepers are generally absent, or when the troops are patrolling another area. The U.N. should change these strategies by looking to counterinsurgency doctrine and adopting an effective clear-hold-build approach.

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

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

<sup>256</sup> *Id.*

*Clear.* First, MONUC should focus its efforts on small areas of North Kivu that have been subject to FDLR reprisal attacks and clear those areas, providing sustained civilian security. The areas chosen for initial clearing operations should not be main FDLR strongholds, since attacking an area where FDLR presence is entrenched would likely result in acute warfare and civilian casualties.<sup>257</sup> Instead, MONUC should choose areas where civilians are at risk and in need of protection but where the majority of the population is unlikely to be sympathetic to FDLR goals. MONUC should “clear” those areas of FDLR combatants, “remov[ing] all enemy forces and eliminat[ing] organized resistance in [the] assigned area.”<sup>258</sup>

In order to successfully clear a town of violent elements, MONUC must disarm, destroy, capture, or force the withdrawal of all FDLR combatants in the area.<sup>259</sup> This could be accomplished through a “cordon and search” operation, a tactic that the Security Council has already authorized and encouraged MONUC to utilize.<sup>260</sup> Peacekeeping units comprised of special forces, possibly acting under contributing countries’ national command structures rather than that of MONUC,<sup>261</sup> could be used to swiftly and capably neutralize FDLR hardliners while other peacekeeping troops secure surrounding civilians. The MONUC or independent troop-contributing countries should set up forces along major routes outside of towns being “cleared,” thereby preventing the FDLR from moving freely to inhabit other civilian areas.

It is absolutely essential that clearing operations are undertaken with MONUC leadership (or that of troop-contributing countries), not under Congolese army direction. The Congolese army has exhibited both ineptitude and a flagrant disregard for human rights in its recent offensive action, and MONUC should not support any of its offensive operations until it undergoes much-needed reforms. Because MONUC leadership is essential to an effective, human rights-based approach to

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<sup>257</sup> *See id.* at 175 (“To create success that can spread, a clear-hold-build operation should not begin by assaulting the main insurgent stronghold.”).

<sup>258</sup> *Id.* at 175–76.

<sup>259</sup> *Id.* at 176.

<sup>260</sup> *Id.* (“This task [clearing an area] is most effectively initiated by a clear-in-zone or cordon-and-search operation.”); S.C. Res. 1592, *supra* note 12 (“stress[ing]” that “MONUC may use cordon and search tactics to prevent attacks on civilians and disrupt the military capability of illegal armed groups”).

<sup>261</sup> Allowing special forces units to operate outside the U.N. command structure would increase the likelihood that the United States or other countries with highly-developed militaries might contribute troops to the operation.

insurgent disarmament, and because disarmament will require both the use of force and the credible threat to use force, MONUC should drop all pretense of the “non-use of force” principle. Peacekeepers are already authorized to take all necessary actions to disarm insurgents and protect civilians,<sup>262</sup> but they must be permitted to do so without fear that they are violating some unspoken tenet of “non-forcible” peacekeeping.

*Hold.* Even more importantly, MONUC should remain in newly cleared areas for a sustained period of time, allowing for normalization of civilian activities and building up local security-sector capacity. MONUC’s mandate during this phase should be to:

- (1) “Provide continuous security for the local populace”;
- (2) “Eliminate [militia group] presence”;
- (3) “Reinforce political primacy”;
- (4) “Enforce the rule of law”; and,
- (5) “Rebuild local host [Congolese government] institutions.”<sup>263</sup>

The MONUC should create mobile bases close to the dwellings of local civilians<sup>264</sup> and develop strong ties and intelligence contacts with the local population in those areas. Peacekeepers might conduct a census to identify local inhabitants and protect against future FDLR incursions, survey the populace about its resource and civil engineering needs, and train the Congolese army or a local police force to provide lasting security in the area.<sup>265</sup>

The perceived safety of area civilians is key to the success of counterinsurgency operations, because civilians who do not feel safe from reprisal attacks are far less likely to risk supporting counterinsurgents.<sup>266</sup> Contact with local civilians is therefore crucial to a successful counterinsurgency campaign, and “tasks that provide an overt

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<sup>262</sup> See Hum. Rts. Watch, *supra* note 101 (referencing a leaked April 1 “legal note” from the U.N. Office of Legal Affairs).

<sup>263</sup> This list of tasks is taken from *The Counterinsurgency Field Manual*. THE COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 174–75.

<sup>264</sup> See, e.g., Editorial, *supra* note 7 (noting that a U.N. assessment team has urgently recommended setting up a base in Busurungi, the site of a recent massacre, but that no base has been established).

<sup>265</sup> See COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 179.

<sup>266</sup> See *id.* at 179.

and direct benefit for the community” must be “key, initial priorities.”<sup>267</sup> Tasks should be undertaken to help create a sense of normalcy and government legitimacy in civilian areas. These might include collecting and clearing trash, removing insurgent symbols from public areas, building or improving roads, creating sources of potable water, building and improving schools, and providing guides and translators.<sup>268</sup> These tasks, all recommended by the *Counterinsurgency Field Manual*, represent only a small sample of the services that might be provided: the actual tasks undertaken should be tailored to the specific needs of any particular civilian population.<sup>269</sup>

The MONUC should enlist its troops, U.N. civil staff, Congolese civilians, and Congolese national army troops to assist with these tasks. This will increase the legitimacy of these groups in the eyes of local civilians and contribute to a lasting infrastructure that will discourage future militia power in the region. Additionally, it would be beneficial to set aside U.N. or donor funds to pay local civilians to undertake some of the necessary building and service provision work.<sup>270</sup> This would help local civilians reassert ownership over their communities, boost local economies, and create alternative means of financial support for those who might otherwise turn to insurgent groups for money or food.

*Build.* Finally, after establishing their intention to provide population security to local civilians and protect them from insurgent attacks, and after gaining credible intelligence from the population about the whereabouts of FDLR hold-outs, MONUC and the Congolese army should move out from stable areas in concentric circles, building stability like a growing “ink blot.” It is crucial, of course, that a number of soldiers or newly-trained police units stay behind in these towns, continuing to provide population security and standing ready to alert peacekeepers if FDLR forces attempt to return and attack civilians, and this is perhaps an area where other competent national troops, such as

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 179–80.

<sup>269</sup> One Indian peacekeeping officer interviewed by the author in January 2008 provided a fantastic example of the flexibility and service provision required of successful counterinsurgent troops. Upon arriving in North Kivu, he surveyed community leaders in his area of operations (AO), determined that a source of drinking water was the biggest need of the local inhabitants, and set about immediately and very publicly building a well. This sort of adaptability should be promoted in all officers through an official doctrine. Interview with MONUC military officer, North Kivu, Democratic Republic of the Congo (Jan. 2008).

<sup>270</sup> *Id.* at 179.

U.S. Soldiers and Marines not operating within the U.N. command structure, could be of assistance.

3. *Direct Resources Towards Efficient, Effective Intelligence Collection and Dissemination*

The Security Council and MONUC should direct more resources towards efficient and effective intelligence collection and sharing. Intelligence is crucial to counterinsurgency operations:

Without good intelligence, counterinsurgents are like blind boxers wasting energy flailing at unseen opponents and perhaps causing unintended harm. With good intelligence, counterinsurgents are like surgeons cutting out cancerous tissue while keeping other vital organs intact. Effective operations are shaped by timely, specific, and reliable intelligence gathered and analyzed at the lowest possible level and disseminated throughout the force.<sup>271</sup>

Intelligence is equally crucial to the peace-building effort in Congo. The MONUC should gather intelligence on the structure, organization, and military activity of the Congolese army, the FDLR, and other militia groups. Without a firm understanding of Congolese army troop make-up, operations, and abuses, MONUC-directed security-sector reform and capacity-building efforts are far less likely to succeed. Unfortunately, there is currently a dearth of such information.<sup>272</sup>

The U.N. has been historically diffident about intelligence collection and dissemination in its peacekeeping operations. According to Frank van Kappen, former military advisor to the U.N. Secretary General, “[t]he traditional attitude within the UN system is that intelligence gathering is contrary to the open nature of the UN system and is therefore absolutely forbidden.”<sup>273</sup> The U.N. has attempted to avoid even using the term “intelligence,” “preferring the term ‘information’ in order

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<sup>271</sup> See COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 179.

<sup>272</sup> Interview with MONUC Military Spokesman, Goma, Congo (Jan. 2008).

<sup>273</sup> Frank van Kappen, *Strategic Intelligence and the United Nations*, in PEACEKEEPING INTELLIGENCE: EMERGING CONCEPTS FOR THE FUTURE 3, 3 (Wies Platje et al. eds., 2003).

to avoid the usual connotations of subterfuge and secrecy.”<sup>274</sup> United Nations officials, relating “intelligence” to espionage, have long considered the term a “dirty word” and approached anything approximating intelligence collection with extreme caution.<sup>275</sup>

This did not create a significant problem for early missions: Intelligence was not necessary in traditional peacekeeping operations, which operated in already-stabilized environments and monitored cease-fires between consenting states.<sup>276</sup> As peacekeeping came to be used in the context of stabilizing intra-state conflicts, however, the need for credible intelligence became paramount. Many members of the U.N. Department of Peacekeeping Operations (DPKO) military staff have recognized this need, asserting that it would be dangerous and unprofessional to undertake robust peacekeeping without solid intelligence. Other individuals within the U.N. Secretariat, however, view a permissive attitude toward intelligence as something “negative, or even despicable.”<sup>277</sup> Intelligence collection is still, therefore, approached with trepidation by U.N. peacekeepers.<sup>278</sup>

This apprehensive posture on intelligence collection must change. Counterinsurgency—indeed, conflict stabilization in general—relies on accurate intelligence gathered from the local population.<sup>279</sup> The very success or failure of a counterinsurgency mission depends on the effectiveness of efforts to collect intelligence.<sup>280</sup> This is because counterinsurgency is an “intelligence-driven endeavor.”<sup>281</sup> Intelligence is necessary in counterinsurgency operations to facilitate understanding of the civilian population, the host government, and relevant rebel militias.<sup>282</sup> In counterinsurgency warfare, “commanders and planners require insight into cultures, perceptions, values, beliefs, interests and

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<sup>274</sup> Hugh Smith, *Intelligence and UN Peacekeeping*, 36 SURVIVAL 229, 229 (1994).

<sup>275</sup> See INT’L PEACE ACAD., PEACEKEEPER’S HANDBOOK 39 (1984).

<sup>276</sup> van Kappen, *supra* note 273, at 4.

<sup>277</sup> *Id.*

<sup>278</sup> Hum. Rts. Watch, *supra* note 101.

<sup>279</sup> See COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 79.

<sup>280</sup> *Id.* (“Effective, accurate, and timely intelligence is essential to the conduct of any form of warfare. This maxim applies especially to counterinsurgency operations; the ultimate success or failure of the mission depends on the effectiveness of the intelligence effort.”).

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

<sup>282</sup> *Id.*

decision-making processes of individuals and groups.”<sup>283</sup> The doctrine, therefore, puts a strong emphasis on intelligence collection.

United Nations peacekeepers in Congo have similar needs for intelligence, and MONUC would be wise to adopt counterinsurgency doctrine’s focus on intelligence efforts. The MONUC should gather information about local civilian needs, backgrounds, values, and beliefs, so that existing problems can be redressed by the U.N. and, eventually, the Congolese government, creating a sense of order and building government legitimacy in key areas. The MONUC should also gather intelligence on the structure, integration level, activities and deployment patterns of Congolese army units currently deployed in North Kivu. This is a necessary precursor to much needed security-sector reform. Finally, MONUC should attempt to gauge civilian perceptions of both peacekeepers and local army units, with an eye to identifying problems that can be addressed to build counterinsurgent support and national legitimacy.

Intelligence collection will be crucial to MONUC’s success at building peace and stability in Congo. Intelligence efforts should, therefore, not be relegated to MONUC civil units or a centralized bureaucracy. Instead, *every MONUC military battalion should be equipped for intelligence collection and analysis.*<sup>284</sup> Intelligence capabilities must be integrated into operational units, because military action and intelligence are symbiotic.<sup>285</sup> Intelligence collected by MONUC troops on the ground should be distributed to other MONUC troops and military staff through a streamlined, efficient process. In this way, peacekeeping troops will be able to build on the knowledge and efforts of fellow units.

Ultimately, the importance of efficient dissemination of intelligence lies in the central role accurate intelligence will play in helping MONUC prevent attacks on civilians. If peacekeepers know the whereabouts of rebel militias or have information regarding their plans to carry out attacks against civilians, they will often be able to prevent those attacks

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<sup>283</sup> *Id.* at 80.

<sup>284</sup> *See id.* (“All operations have an intelligence component. All Soldiers and Marines collect information whenever they interact with the populace. Operations should therefore always include intelligence collection requirements.”).

<sup>285</sup> *Id.* at 118–19 (noting that “[i]ntelligence drives operations and successful operations generate additional intelligence,” while “[o]perations conducted without accurate intelligence may upset the populace and lead them to offer less information”).

and protect civilians from atrocities. Protecting civilians is MONUC's direct purpose in Congo, and intelligence is crucial to that aim. The MONUC's mission must no longer be hindered by a lack of necessary intelligence. The Security Council should reform MONUC's mandate and structure to allow for the efficient collection and dissemination of crucial intelligence.

#### 4. *Vet and Train a Legitimate, Effective National Army*

Until host-nation security forces have both the legitimacy and the capacity to adequately protect the local population, Congolese civilians will likely continue to actively or passively support the militia groups that control large swaths of territory in the region.<sup>286</sup> It is therefore essential that the Congolese army be adequately trained and reformed so that it can provide credible, legitimate security to civilians in the region. Unfortunately, however, the Congolese army currently has almost no legitimacy in the eyes of Congolese civilians; it is responsible for a large portion of rapes, atrocities, and other violence in the region. In a November 2009 report, Human Rights Watch stated:

Congolese armed forces in eastern Democratic Republic of Congo have brutally killed hundreds of civilians and committed widespread rape in the past three months in a military operation backed by the United Nations . . . . In two fact-finding missions in eastern Congo in October 2009, Human Rights Watch documented the deliberate killing by Congolese soldiers of at least 270 civilians . . . . Most of the victims were women, children, and the elderly. Some were decapitated. Others were chopped to death by machete, beaten to death with clubs, or shot as they tried to flee.<sup>287</sup>

Reforms are sorely needed. The army must be restructured to break up pre-integration insurgent command structures and ensure that ethnic discrimination or rivalries within army units do not lead to tension or abuses. In order to achieve these goals, army command and control must

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<sup>286</sup> *Id.* at 94 (“When a government fails to provide security to its citizens or becomes a threat to them, citizens may seek alternative security guarantees. Ethnic, political, religious, or tribal groups in the [area] may provide such guarantees.”).

<sup>287</sup> Hum. Rts. Watch, *supra* note 101.

be centralized and streamlined. Officials in Kinshasa, army commanders in North Kivu, and MONUC staff should have up-to-date information on the exact make-up and troop numbers of every Congolese army battalion operating in the region, including the name and rank of every soldier. National army commanders must have the authority and capability to move battalions and individual soldiers between brigades and regions of the country, and MONUC must be equipped to provide advice about when such action is necessary. Furthermore, this information will be greatly helpful in establishing an effective military justice system, which will be crucial to ensuring that perpetrators of human rights abuses are stripped of their Congolese army uniforms and weapons and prosecuted or rehabilitated; the U.N. should establish a process for vetting the Congolese army to remove perpetrators of human rights abuse. The U.N. and western donors should condition continuing support for the Congolese government on Kinshasa's cooperation with information sharing and related restructuring and vetting of the army.

Additionally, the U.N. should focus a high percentage of its overall peacekeeping effort on the *training and development* of Congolese army forces in stabilized areas, so that those forces can take over the maintenance of security and allow MONUC to build stability in a concentric fashion, steadily enlarging areas of security in a sustainable manner. Training should be provided in military capability, strategy, tactics, logistics, counterinsurgency, and human rights. Training should *not* be limited to small "rapid response" or special forces teams, but should be focused on building overall security capacity and organization within the ranks of the army.

This is an area where the United States can be of particular assistance—as discussed in Part II.E, AFRICOM is currently engaged in training a "model unit" for the Congolese army. This initiative is likely to be highly beneficial to Congo—although Kisangani, where the new unit is based, is far from Congo's troubled eastern region, this geographical separation from overt conflict may be a positive factor. Soldiers trained in this battalion are less likely to have a stake in the continuing conflict in North Kivu, and they may therefore provide the basis for a much-needed neutral reform in the Congolese army.

However, as human rights abuses continue unabated by Congolese troops in the east, the United States would do well to supplement this intensive training of a "model unit" with additional command and control assistance to the Congolese army, focused on preventing abuses in the

Kivus. It is crucial that Congolese army commanders develop the capacity to effectively vet the newly-integrated army and remove human rights abusers from its ranks. Finally, it would greatly benefit the Congolese army if technical advisors and troops, either from the United States or the U.N., embedded with Congolese army units after they have received adequate preliminary training, providing further “on the job” support and training and preventing further human rights abuses.<sup>288</sup>

Finally, developed-nations should expand their funding for Congolese army troop payments to ensure that soldiers receive adequate, on-schedule pay. Although pay may ultimately come from external, non-Congolese sources, soldiers should be paid through existing or revitalized Congolese army structures. Predictable, timely payment for Congolese soldiers through a Congolese structure will greatly increase loyalty to the army and encourage the recruitment of qualified soldiers. It will also bolster army prestige, and make the prospect of being barred from the army for committing rapes or other human rights abuses far more likely to effectively deter soldiers from these acts.

##### 5. *Promote Rule of Law through Technical Assistance and Training*

The U.N. and the United States should work to promote rule of law in Congo by reforming the Congolese justice system. The criminal justice system in Congo is not only dilapidated and ill-functioning—it is, in many places, non-existent.<sup>289</sup> In fact, there is nothing “systematic” about justice in Congo—the small number of judges that do exist in the country are often unable to secure copies of Congolese laws and prior judgments,<sup>290</sup> and lack critical resources such as courthouses and salaries. Penal codes are contradictory, poorly-crafted, and largely aspirational, and a Constitution passed in 2006 describes a court system that has never been created. What is more, the jurisdiction of civilian and military courts overlaps and is highly uncertain. Since rape and other war crimes committed by the Congolese army and various rebel groups are a major impediment to stability in Congo, the question whether such crimes should be tried in military or civilian courts will be critical to judicial

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<sup>288</sup> See COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 51.

<sup>289</sup> See SARAH DAREHSHORI, HUM. RTS. WATCH, SELLING JUSTICE SHORT: WHY ACCOUNTABILITY MATTERS FOR PEACE 51 (2009).

<sup>290</sup> Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1, 49 (2009).

reform efforts. The U.N. and donor states involved in peacebuilding in Congo should undertake a systematic study of the judicial infrastructure that currently exist in Congo and assist the nation in setting up a functional judicial system, capable of trying both military and civilian perpetrators in courts with clear jurisdictional boundaries.

Judicial reform will be absolutely essential to the establishment of lasting stability in Congo. In 2005, several commentators noted that “the root cause of regional insecurity in the great lakes is pervasive ill-governance.”<sup>291</sup> The U.N. has recognized this relationship between ill-governance and continuing conflict in Congo, noting that long-term efforts will be needed to consolidate democracy and good governance in the country before lasting peace is likely.<sup>292</sup> Indeed, MONUC is mandated to “support democratic institutions and the rule of law in Congo.”<sup>293</sup> However, MONUC and donor nations must greatly increase their efforts to promote rule of law and good governance in Congo through both technical assistance and direct political pressure. Good governance and rule of law operations are central to the success of any counterinsurgency operation. As counterinsurgency forefather David Galula observes, “if anarchy prevails in Country X, the insurgent will find all the facilities he needs in order to meet, to travel, . . . to receive and to distribute funds, to agitate and to subvert, or to launch a widespread campaign of terrorism.”<sup>294</sup> Justice sector reform, including the development of a rule of law culture and a functioning, neutral court system, is crucial to establishing government legitimacy, because when a rule of law culture predominates, and militia groups come to be viewed as “criminals,” they are likely to lose popular support.<sup>295</sup> The definition of “rule of law” published by the U.N. Security Council in 2004 is as follows:

Rule of Law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international

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<sup>291</sup> Uvin et al., *supra* note 13.

<sup>292</sup> S.C. Res. 1856, *supra* note 12, at 3.

<sup>293</sup> *Id.* at 5–6.

<sup>294</sup> GALULA, *supra* note 136, at 19 (asserting that “an incompetent bureaucracy plays into the hands of the insurgent”).

<sup>295</sup> COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 42.

human rights law . . . .<sup>296</sup>

This definition has been agreed upon by a range of national and multinational entities, including the U.S. Department of Defense, Department of State, and U.S. Agency for International Development. Rule of law, as defined above, is essential to any peaceful society. It functions to

protect against anarchy and the Hobbesian war of all against all. [In addition,] the Rule of Law should allow people to plan their affairs with reasonable confidence and they know in advance the legal consequences of various actions. [Finally,] the Rule of Law should guarantee against at least some types of official arbitrariness.<sup>297</sup>

Rule of law initiatives are, therefore, one of the most crucial aspects of governance reform in counterinsurgency operations.

Unfortunately, the justice sector in Congo is currently in need of widespread improvements. Ideally, a judicial reform program would include in-depth analysis of the system currently in place. However, the Congolese court system has simply ceased to function in many parts of the country.<sup>298</sup> For example, in one area of North Kivu, an abandoned concrete building bears a large sign proclaiming that it is a court of military justice.<sup>299</sup> Chickens wander in and out of the building, and children play on the grass near it—but that seems to be the extent of its use.<sup>300</sup> The MONUC military officers stationed nearby remarked that they have never seen the building used for any sort of trial.<sup>301</sup>

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<sup>296</sup> U.N. Security Council, U.N. Doc. S/2004/616 (Oct. 13, 2004).

<sup>297</sup> Richard H. Fallon, *The Rule of Law as a Concept in International Discourse*, 97 COLUM. L. REV. 1, 7–8 (1997) (footnotes omitted).

<sup>298</sup> See SARAH DAREHSHORI, HUM. RTS. WATCH, *SELLING JUSTICE SHORT: WHY ACCOUNTABILITY MATTERS FOR PEACE* 51 (2009).

<sup>299</sup> Author's Field Research Experience, *supra* note 14.

<sup>300</sup> *Id.* But see *Le tribunal militaire de garnison de Goma en audiences foraines à Walikake* (sic) *grace à l'appui du programme REJUSCO* (Mobile Court Session of the Goma Military Garrison Court Held in Walikale, Thanks to the Support of REJUSCO), Apr. 2009, available at <http://www.rejusco.org/pages/Audience%20foraine.htm> (describing the groundbreaking occurrence of a military trial in Walikale in April 2009).

<sup>301</sup> Interview with MONUC Military Officers, Walikale, in North Kivu, Congo (Jan. 2008).

Congo's struggle with a lack of judicial infrastructure and development dates back to the days of colonialism, when Congo functioned as a private holding of King Leopold II of Belgium.<sup>302</sup> Widely recognized as one of the most brutal and exploitative colonial regimes in Africa, the Belgian Colonial Administration largely ignored the task of strengthening local courts in Congo—something that was viewed even by contemporary Europeans as part of the “principal business of a tropical dependency.”<sup>303</sup> At the turn of the twentieth century, one British writer denounced the Colonial Administration in Congo for its failure to build even minimal judicial infrastructure in the country, declaring, “there is not a recognized native court from one end of the territory to the other . . . .”<sup>304</sup> Nevertheless, Belgium's colonial legacy in Congo did leave its mark on the country's legal system, which is based on Belgian law.<sup>305</sup> Congo functions under a civil law system that has roots in the 1804 Napoleonic Civil Code.<sup>306</sup>

Congo's legal development fared scarcely better in the thirty years following independence than it had under the Belgian colonial regime. Autocratic rule under Mobutu Sese Seko persisted in the country from the mid-1960s until 1997,<sup>307</sup> and the Mobutu regime spared little time or resources for the development of a justice system—corruption was rampant and the word “justice” was almost an anachronism. The state was run as Mobutu's personal fiefdom, and all authority ultimately rested with the erratic and megalomaniacal ruler.<sup>308</sup> In 1997, during the war which led to Mobutu's ouster, the justice system completely collapsed.<sup>309</sup> A new Military Penal Code was adopted by the transition government in

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<sup>302</sup> For general background on the Congo's colonial history, see ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1998).

<sup>303</sup> EDMUND D. MOREL, *RED RUBBER: THE STORY OF THE RUBBER SLAVE TRADE FLOURISHING ON THE CONGO IN THE YEAR OF GRACE 1906*, at 107 (3d. ed. 1907).

<sup>304</sup> *Id.*

<sup>305</sup> DUNIA ZONGWE ET AL., *GLOBALLEX, UPDATE: THE LEGAL SYSTEM AND RESEARCH OF THE DEMOCRATIC REPUBLIC OF CONGO (DRC): AN OVERVIEW* (2008), [http://www.nyulawglobal.org/globalex/Democratic\\_Republic\\_Congo1.htm](http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.htm).

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

<sup>307</sup> See generally MICHELA WRONG, *IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU'S CONGO* (2002).

<sup>308</sup> See ROBERT B. EDGERTON, *THE TROUBLED HEART OF AFRICA: A HISTORY OF THE CONGO 207–15* (2002).

<sup>309</sup> GLOBAL RIGHTS, *SOS JUSTICE: WHAT JUSTICE IS THERE FOR VULNERABLE GROUPS IN EASTERN DRC?* 7 (2005) [hereinafter *SOS JUSTICE*].

2002,<sup>310</sup> but some rebel groups who did not accept the authority of this new government continued to operate under—and even hold military trials under—an older code of military justice from 1972.<sup>311</sup> Furthermore, in certain cases, the transition government suspended the operation of courts under the 1972 code without setting up any new courts to replace them.<sup>312</sup> After popular elections in 2006 confirmed Joseph Kabila as President, Kabila signed into law a new Congolese Constitution.<sup>313</sup> The 2006 Constitution contemplates widespread changes in the structure of the judicial system.<sup>314</sup> This new system, however, has not yet been put into place.

Under the existing, yet largely defunct system, the highest civilian court in Congo is the *Cour supreme de justice* (Supreme Court).<sup>315</sup> Under this Court sit the *Cour d'appel* (Court of Appeals) and *Tribunal de grande instance* (Superior Court).<sup>316</sup> Each of these courts is officially connected to an executive department of public prosecutions.<sup>317</sup> In addition to these courts are *tribunaux de paix* (magistrates' courts), which have the power to undertake investigations. Unfortunately, because of the dilapidated and chaotic state of the Congolese judicial system, there is very little publicly available information describing the roles and activities of these courts.<sup>318</sup> The judgments of Congolese courts are not published.<sup>319</sup> Even basic information about trial proceedings is difficult to obtain.<sup>320</sup> In fact, Congolese judges routinely have difficulty gaining access to judgments and even laws,<sup>321</sup> and so the current state of the legal sector—especially in rural areas—remains opaque. The MONUC is currently engaged in an effort to “map” the justice system, and this will hopefully lead to more cohesive information

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<sup>310</sup> CODE PÉNAL MILITAIRE, Loi No. 024/2002 of Nov. 18 2002, Journal Officiel, Numéro Spécial [Official Journal, Special Issue], Mar. 20, 2003 (Dem. Rep. Congo) [hereinafter CODE PÉNAL MILITAIRE].

<sup>311</sup> HUM. RTS. WATCH, *supra* note 84, at 27; CODE DE JUSTICE MILITAIRE, Loi no. 72/060 of Sep. 25, 1972 (Dem. Rep. Congo).

<sup>312</sup> HUM. RTS. WATCH, *supra* note 84, at 43.

<sup>313</sup> CONSTITUTION DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO, Feb. 18, 2006 (Dem. Rep. Congo).

<sup>314</sup> ZONGWE ET. AL., *supra* note 305.

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

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

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

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

<sup>319</sup> See Baylis, *supra* note 290, at 49.

<sup>320</sup> *Id.*

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

on the existing civilian legal infrastructure.<sup>322</sup> Such information is a necessary precursor to serious judicial reform efforts.

In addition to the civilian courts noted above, the following military courts operate (at least officially) in Congo: The *Haute cour militaire* (Military High Court) is the court of first instance for criminal prosecutions involving defendant generals, and is also the highest appellate court. Beneath the *Haute cour militaire* sit the *Cours militaires* (Military Courts), which function both as courts of appeals and as courts of first instance for higher-ranking officers. Lower courts include the *Tribunaux militaires de garnisons* (Military Garrison Courts) and *Tribunaux militaires de police* (Military Police Courts).<sup>323</sup> Under the 2006 Constitution, both the military and civil courts are supposed to be under the appellate jurisdiction of a *Cour de Cassation*; however, this high court, like many of the structures contemplated by the Congolese constitution, does not exist.<sup>324</sup>

Even where the justice system is officially operating, it is widely seen as incompetent and lacking in legal substance. According to a December 2009 Special Report by the U.N. Secretary General, military courts in the area around North Kivu did recently manage to conduct thirty prosecutions for offenses ranging from rape to war crimes; however, the report expressed “serious doubts regarding [the proceedings’] legal basis and their compliance with fair trial standards”—for instance, punishments handed down by the military courts have included the death penalty, even though there is a moratorium on capital punishment in Congo.<sup>325</sup> In one case, a *tribunal militaire de garnison* even held a trial in which several unknown and unnamed defendants were tried in absentia and sentenced to death.<sup>326</sup> In addition, U.N. experts have found the military justice system in Congo to be “weak and

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<sup>322</sup> MONUSCO, Rule of Law, Civilian Justice, available at <http://monuc.unmissions.org/Default.aspx?tabid=1893> (last visited July 22, 2010).

<sup>323</sup> ZONGWE ET. AL., *supra* note 305; HUM. RTS. WATCH, SOLDIERS WHO RAPE, COMMANDERS WHO CONDONE (2009) [hereinafter SOLDIERS WHO RAPE].

<sup>324</sup> ZONGWE ET. AL., *supra* note 305.

<sup>325</sup> The Secretary-General, *Thirtieth Report of the Secretary-General on the U.N. Organization Mission in the Democratic Republic of the Congo* ¶ 64, U.N. Doc. S/2009/623 (Dec. 4, 2009) [hereinafter *Thirtieth Report of the Secretary-General*].

<sup>326</sup> *Auditeur Militaire v. Katamisi*, RMP 249/KK/05, RP 011/05, slip op. at 5-6, Tribunal Militaire de Garnison [Military Garrison Court] Kindu, Oct. 26, 2005 (Dem. Rep. Congo) *discussed in* Baylis, *supra* note 290, at 35.

susceptible to executive interference by military or political decision-makers.<sup>327</sup>

Moreover, Congolese courts-martial have been extremely hesitant to try senior military officers, most likely because these officers hold significant political power in the region.<sup>328</sup> To date, no senior officer in Congo has been tried by a court-martial for a sexual crime.<sup>329</sup> One reason that trials of senior officers are so uncommon is that Congolese law permits courts-martial to try senior officers *only* when the sitting judge outranks them—a situation that rarely occurs.<sup>330</sup> Furthermore, commanders often try to protect their enlisted troops from judicial action, either by helping them avoid the court's jurisdictional reach or by exerting political pressure to prevent prosecutions.<sup>331</sup> According to one Congolese lawyer involved in training Congolese soldiers, “a commander does not want to cooperate with the military justice system, it is like a reflex.”<sup>332</sup> In some cases, local military commanders have even required prosecutors to seek their direct approval before issuing any arrest warrants.<sup>333</sup> Impunity for crimes against humanity is widespread in eastern Congo: despite hundreds of documented attacks on civilians by *Congolese* troops, the military prosecutor in Goma had only seventeen cases in May 2007, most involving desertion.<sup>334</sup>

A current example of this culture of impunity in the Congolese armed forces is Innocent Zimurinda, a Congolese army Colonel who is accused of civilian massacres, summary executions, rape, and the recruitment of child soldiers.<sup>335</sup> Although fifty Congolese Non-Governmental Organizations (NGOs) recently joined with Human Rights Watch to call for Zimurinda's arrest, he has not been prosecuted or even apprehended by Congolese authorities. Instead, he was recently spotted at a hotel down the road from MONUC headquarters in Goma, dressed in

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<sup>327</sup> Editorial, *DRC: US, UN Accuse Forces of 'Crimes Against Humanity,'* IRIN NEWS, Mar. 12, 2010, <http://www.irinnews.org/ReportID=88410>.

<sup>328</sup> SOLDIERS WHO RAPE, *supra* note 323, at 47–48 (“Military commanders are powerful figures in Congo, often perceived as being untouchable.”).

<sup>329</sup> *Id.* at 47.

<sup>330</sup> *Id.* at 48.

<sup>331</sup> *Id.* at 49.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 48.

<sup>334</sup> HUM. RTS. WATCH, *supra* note 82, at 59.

<sup>335</sup> Editorial, *DR Congo: Congolese Groups Demand the Removal of Abusive Army Commander*, HUM. RTS. WATCH, Mar. 1, 2010, <http://www.hrw.org/en/news/2010/03/01/dr-congo-congolese-groups-demand-removal-abusive-army-commander>.

a pressed polo shirt and sipping coffee—hardly an embattled fugitive from the law.<sup>336</sup>

Unfortunately, the civilian justice system in Congo is in some ways even *less* effective than the military justice system—it is non-operational in many parts of the country, and civilian courts are seen by some as less trustworthy than military courts.<sup>337</sup> One recent example of the incapacity of civilian courts in Congo was the 2008 arrest and imprisonment, by Congolese authorities, of a herd of goats. Deputy Justice Minister Claude Nyamugabo discovered the goats during a routine prison inspection and secured their release. According to BBC News

The beasts were due to appear in court, charged with being sold illegally by the roadside. The minister said many police had serious gaps in their knowledge and they would be sent for retraining. Mr Nyamugabo was conducting a routine visit to the prison when, he said, he was astonished to discover not only humans, but a herd of goats crammed into a prison cell in the capital. He has blamed the police for the incident. It is not clear what will happen to the owners of the goats, who have also been imprisoned. BBC Africa analyst Mary Harper says that given the grim state of prisons in Congo, the goats will doubtless be relieved about being spared a trial. There was no word on what their punishment would have been, had they been found guilty.<sup>338</sup>

At the same time, many *human* prison sentences cannot be carried out due to lack of resources. For example, one soldier who was recently sentenced to prison time for rape could not be locked up because the jail in which he was supposed to be incarcerated had been destroyed during the war.<sup>339</sup>

There is a clear need for reform and investment in both civilian courts and courts-martial, but the necessary steps for reform raise a

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<sup>336</sup> Stephanie McCrummen, *Abusive Congolese Colonel Got Aid*, WASH. POST, Mar. 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR201003090279.html>

<sup>337</sup> Baylis, *supra* note 290, at 32.

<sup>338</sup> Editorial, *DR Congo Frees Goats from Prison*, BBC NEWS, Sept. 10, 2008, <http://news.bbc.co.uk/2/hi/africa/7607460.stm>.

<sup>339</sup> *Id.*

perplexing problem of Congolese jurisprudence: There is a considerable lack of clarity regarding the jurisdictional scope of both court systems. According to the *2003 Military Penal Code*, military courts have exclusive jurisdiction over offenses enumerated therein, including genocide, war crimes, and crimes against humanity.<sup>340</sup> The *Code* further states that “military” offenses fall under its purview, and defines these offenses as those “undertaken by members of the military or the equivalent.”<sup>341</sup> Presumably, this would include members of local rebel groups. Understandably, several scholars and observers have concluded that courts-martial in Congo have exclusive jurisdiction over attacks by armed soldiers against civilians, regardless of whether the attacks are perpetrated by Congolese army soldiers or insurgents.

One scholar who performed legal research in Kinshasa in 2006 concluded that “military courts have exclusive jurisdiction over war crimes, crimes against humanity, and genocide and *over both civilians and members of the military who commit these crimes*.”<sup>342</sup> Similarly, Nicola Dahrendorf, the U.N. Special Advisor on sexual violence in Congo, has noted that the “jurisdiction of military courts is wide, in that it can judge the military, police and militia, as well as *civilians who commit crimes with weapons of war . . .*”<sup>343</sup> Indeed, trials of combatants not connected with the Congolese army have, at least sometimes, taken place in military courts.<sup>344</sup> Human Rights Watch observers, however, have stated that the military justice system has exclusive jurisdiction only over “members of the army and the police, as well as combatants of armed groups and civilians who commit crimes *against the army*,”<sup>345</sup> and that in cases of attacks on civilians, members of “local armed groups that are not integrated into the national army fall under the jurisdiction of the civilian courts.”<sup>346</sup> Indeed, civilian courts have, in some instances, asserted such jurisdiction, refusing to turn over cases involving non-Congolese army combatants to military courts.<sup>347</sup>

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<sup>340</sup> CODE PÉNAL MILITAIRE, *supra* note 310, arts. 8, 161, 207.

<sup>341</sup> *Id.* art. 40 (“*Les infractions d’ordre militaire sont celles qui ne sont commises que par des militaires ou assimilés.*”).

<sup>342</sup> Baylis, *supra* note 290, at 32.

<sup>343</sup> Nicola Dahrendorf, *MONUC and the Relevance of Coherent Mandates: The Case of the DRC*, in SECURITY SECTOR REFORM AND UN INTEGRATED MISSIONS 67, 83 (Heiner Hänggi & Vincenza Scherrer eds., 2008).

<sup>344</sup> See Baylis, *supra* note 290, at 31.

<sup>345</sup> SOLDIERS WHO RAPE, *supra* note 323, at 19.

<sup>346</sup> HUM. RTS. WATCH, *supra* note 84, at 22.

<sup>347</sup> *Id.* at 31.

The U.N. and other interested parties should undertake systematic investigation and analysis of the current military and civilian justice systems operating in Congo to determine the benefits and detriments of each system. The MONUC should then assist the Congolese legislature in clarifying the jurisdictional reach of each system, and should direct reform and expansion efforts simultaneously toward each system. Although the question whether to direct the majority of initial aid toward the military or civilian system will depend on the results of much-needed study of the current infrastructure, it is likely that the military system is in more crucial need of immediate reform.

The Congolese army is currently one of the worst perpetrators of human rights abuses in the country, and establishing military justice system capable of ending impunity for Congolese soldiers is a necessary first step to restoring the army's credibility. A functioning military justice system would allow for the establishment of a vetting process capable of removing perpetrators of civilian abuse from the army. These steps are critical and time-sensitive, because a credible army, capable of providing security to Congolese civilians, is a crucial prerequisite to lasting peace in the region. Military courts, however, should probably not be given jurisdiction over rebel combatants. Allowing military courts to try only recognized Congolese army soldiers and granting civilian courts jurisdiction over other combatants, would be beneficial in two ways: First, it would de-legitimize insurgent groups by treating them as common criminals, rather than as "equivalents" of the Congolese army. Second, it would allow a surge of initial reform efforts and resources to be directed *at prosecuting cases of abuse within the Congolese army*. This use of resources would be desirable because once the Congolese army begins to resemble a credible state security apparatus, it will, itself, be able to help protect civilians from further attacks by members of other armed groups. Actions to end impunity by the Congolese army are critical because they offer one of the *only ways of combating and deterring civilian violence* within the Congolese army—indeed, no other credible institution exists to protect civilians from this violence. The justice system, however, is not the sole method of combating violence by insurgent groups: If the Congolese army gains capacity and credibility, civilians can be protected from these groups *ex ante*.

Currently, however, impunity for abuses against civilians is rampant in the Congolese army. Reforms are not likely to come from the Congolese government without outside assistance and intervention; a

U.N. Special Report released last December found that the Congolese *Conseil Supérieur de la Magistrature*, the office responsible for the accountability of judges, is currently operating without a budget.<sup>348</sup> The report also found “systemic deficiencies, including with respect to the maintenance of criminal records.”<sup>349</sup> Outside actors must *exert pressure* on Congolese authorities to improve the military justice system and vet the Army to remove human rights abusers from command positions.

Kevin Kennedy, a U.N. spokesman, recently stated when questioned about Colonel Innocent Zimurinda, discussed above, that MONUC is “not in a position to tell the Congolese what they must do with any particular commander.”<sup>350</sup> This type of thinking must change—the U.N. must *pressure* Congolese authorities to arrest and prosecute those responsible for human rights abuses, and MONUC should assist Congolese authorities in this task. Additionally, MONUC should create a mechanism by which civilians and other victims can report human rights abuses, especially those perpetrated by state actors, without fear of reprisal. This would ensure that the U.N. remained independently informed of abuses coming from the Congolese government, and would allow MONUC to collect rape statistics, apply pressure for the investigation of suspected crimes, and provide victims with much-needed aftercare.

The MONUC has had a rule of law section since 1994, and the mission is mandated to assist with justice-sector reform in Congo. The MONUC’s current rule of law efforts include:

- Deploying a small number of technical staff tasked with creating a “pilot prosecution cell” in North Kivu to assist Congolese investigators and prosecutors in cases against soldiers accused of rape and other offenses;<sup>351</sup>
- Working with the Congolese Attorney General to rehabilitate prison facilities, train guards, and reduce prison overcrowding resulting from pretrial detention;<sup>352</sup>
- and

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<sup>348</sup> *Thirtieth Report of the Secretary-General*, *supra* note 325, ¶ 67.

<sup>349</sup> *Id.*

<sup>350</sup> McCrummen, *supra* note 336.

<sup>351</sup> *Thirtieth Report of the Secretary-General*, *supra* note 325, ¶ 64.

<sup>352</sup> *Id.* ¶ 68.

– Supporting a commission tasked with promulgating essential legislation and a new Congolese Constitution.<sup>353</sup>

In addition, MONUC applies pressure for prosecutions in particularly horrific cases of crimes against humanity<sup>354</sup> and has assisted in criminal trials by briefing the court on legal issues.<sup>355</sup> The European Union has also established the Program for the Restoration of Justice in Eastern Congo (REJUSCO) that renovates judicial infrastructure and supports mobile courts in rural areas,<sup>356</sup> and other Congolese and international organizations, including the American Bar Association, are currently participating in rule of law efforts in Congo.<sup>357</sup>

The U.N., donor states, and other organizations should coordinate their rule of law efforts with each other and with the numerous international NGOs active in Congo. As the *Rule of Law Handbook* states, “joint, inter-agency and multinational coordination is the basic foundation upon which all rule of law efforts must be built,” since “coordination and synchronization [are] to the rule of law what fires and maneuver [are] to the high intensity conflict.”<sup>358</sup> Indeed, cooperation is essential to the success of counterinsurgency-based stabilization, because civil programs are viewed by COIN doctrine as essential to the achievement of long-term counterinsurgent goals: They can address root causes of conflict and counteract the state of social disorder in which insurgencies thrive.<sup>359</sup> Currently, however, even the U.N.’s internal coordination in Congo between MONUC military staff and the myriad of U.N. civilian agencies there is greatly lacking.<sup>360</sup> This should be swiftly

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<sup>353</sup> MONUC: United States Mission in the Democratic Republic of Congo, Mandate, <http://www.un.org/en/peacekeeping/missions/monuc/mandate.shtml> (last visited June 3, 2010).

<sup>354</sup> See HUM. RTS. WATCH, *supra* note 84, at 46.

<sup>355</sup> See Baylis, *supra* note 290, at 48.

<sup>356</sup> REJUSCO, RDC: Programme d’appui à la restauration de la Justice à l’Est de la RDC (DRC: Support Program for Justice Restoration in Eastern DRC”), [http://www.btctb.org/doc/UPL\\_200903250921327612.pdf](http://www.btctb.org/doc/UPL_200903250921327612.pdf); HUM. RTS. WATCH, *supra* note 327, at 45.

<sup>357</sup> SOLDIERS WHO RAPE, *supra* note 327, at 45–46.

<sup>358</sup> RULE OF LAW HANDBOOK, *supra* note 131, at ii.

<sup>359</sup> COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 54.

<sup>360</sup> In several MONUC bases visited by the author in January 2008, force commanders were entirely unaware of relevant actions by MONUC civil officials or other U.N. organizations operating in the country. There was a general feeling that a centralized coordination mechanism was lacking and that non-military U.N. staff in-country was

remedied, and reform must come from the top, starting with U.N. civilian officers responsible for operations in the region. A centralized communication and coordination system must be built into the MONUC structure in order to coordinate intra-U.N. stabilization efforts in the region. Complete unity of effort will be needed to achieve lasting peace in the region.<sup>361</sup>

The MONUC, the United States, and other donor states and NGOs should direct immediate attention to the following critical rule of law efforts in Congo:

1. Promote legislative reform to remove impediments barring the prosecution of high-ranking military officers in many courts-martial;
2. Map the military and civilian justice systems to identify courts, judges, and prosecutors currently operating;
3. Run training programs to increase the pool of competent judges, prosecutors, and investigators;
4. Direct aid money toward the payment of salaries and expenses for the aforementioned officials;
5. Provide “on the job” training and mentoring for judges, prosecutors, and investigators;
6. Establish a judicial recordkeeping system and provide all judges, prosecutors, and investigators with copies of relevant penal codes and jurisdictional rules; and
7. Build judicial infrastructure, including court buildings and offices.

All of these tasks are consistent with COIN doctrine’s rule of law approach, and all are necessary precursors to the establishment of legitimate, credible Congolese security forces capable of promoting stability in the region.

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resistant to the idea of communication and cooperation with MONUC military units. Interviews with MONUC Military Officers, in North Kivu, Congo, Jan., 2008.

<sup>361</sup> See COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 57 (“Achieving unity of effort is the goal of command and support relationships. All organizations contributing to a COIN operation should strive, or be persuaded to strive, for maximum unity of effort.”).

### 6. *Work to Foster a Political Solution*

Finally, the U.N. must make a concerted effort to assist the parties to the conflict in eastern Congo in reaching a sustainable, political peace agreement. Insurgencies are essentially political creatures, and although counterinsurgency doctrine can provide effective tools for decreasing levels of civilian violence and promoting space for political reconciliation, a political peace process is still necessary for long-term stabilization. In fact, one of the guidelines of the doctrine is to *promote* a political solution to problems that are sparking continued conflict.<sup>362</sup>

The Security Council has already called on all “illegal armed groups” within Congo to “lay down arms.”<sup>363</sup> However, the majority of combatants in eastern Congo are extremely unlikely to comply with this resolution before a political solution is reached. The CNDP, for instance, has claimed to be protecting Congolese Tutsis from violence or extermination at the hands of Hutu extremists. If its recent integration into the army fails or does not bring about its desired goals, the CNDP will be unlikely to disarm. Likewise, many Hutu FDLR fighters, even those too young to have participated in the genocide, fear that if they attempt to peaceably return to Rwanda, they will be arrested or persecuted.<sup>364</sup> Rwanda’s failure thus far to publish a list of the individuals who are wanted for war crimes has exacerbated these fears.<sup>365</sup> Only a comprehensive, multi-national peace process will be able to address all of these fears and build the foundation of lasting stability in Congo.

In order to support lasting peace in the region, Rwanda will likely seek increased border security, effective action to disarm anti-Tutsi

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<sup>362</sup> Compare GALULA, *supra* note 136, at 62–63 (“What is at stake [in a counterinsurgency campaign] is the country’s political regime, and to defend it is a political affair. Even if this requires military action, the action is constantly directed toward a political goal. Essential though it is, the military action is secondary to the political one, its primary purpose being to afford the political power enough freedom to work safely with the population.”), with COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at 40 (“The political and military aspects of insurgencies are so bound together as to be inseparable. Most insurgent approaches recognize this fact. Military actions executed without properly assessing their political effects at best result in reduced effectiveness and at worst are counterproductive. Resolving most insurgencies requires a political solution . . .”).

<sup>363</sup> S.C. Res. 1856, *supra* note 12, at 7.

<sup>364</sup> Author’s Field Research Experience, *supra* note 14.

<sup>365</sup> *Id.*

rebels, and protection of its business interests in the Kivus. Congolese officials, on the other hand, will want recognition of their sovereignty, consolidation of hegemony within the country, and freedom from continuing foreign intervention. Finally, all militia members will likely seek integration into national armed forces or assistance with reintegration into civilian society, as well as amnesty for their past combat activities. All of these powerful competing interests make a dedicated political peace process necessary for lasting peace in Congo.

The MONUC has been tasked with promoting “political dialogue.”<sup>366</sup> However, Security Council Resolution 1856 also stated that *past* peace conferences and agreements are the “appropriate framework for stabilizing the situation” in Congo.<sup>367</sup> This attitude of reliance on past negotiations must change. Past agreements have already failed to bring lasting peace to Congo, and past cease-fires have, without exception, been violated. In light of continuing instability in the region, *new* work is needed to promote political dialogue in the region. The U.N. should bolster its efforts to promote peace and disarmament talks and should use its political clout to apply pressure on the parties to the conflict. Additionally, the United States is an ideal broker for peace negotiations in the region, because it holds significant political capital with several key players, including a strong relationship with Rwanda and a generally positive perception among civilians in Congo’s east. A U.S. team, led by then-State Department Conflict Advisor Tim Shortley, deftly brokered a peace accord<sup>368</sup> in Goma in 2008, and continued U.S. expertise directed at building regional consensus for peace in Congo is sorely needed. Without such efforts, no military doctrine will be sufficient to build lasting peace in the region.

## V. Conclusion

Peacekeepers and counterinsurgents operating in the post-Cold War world face similar multi-dimensional conflicts. Both types of operation attempt to provide civilian security in complex, unconventional conflicts, and both have faced similar setbacks. However, counterinsurgency

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<sup>366</sup> *Id.* at 5–6.

<sup>367</sup> *Id.* at 2.

<sup>368</sup> Acte D’Engagement du CNDP at les Groupes Armés du Nord-Kivu pour la Paix, La Sécurité et le Développement Durables de la Province du Nord-Kivu, Jan. 23, 2008 [on file with author].

doctrine recently revolutionized U.S. military strategy in multidimensional conflicts, and there is no reason to believe it would not have a similar effect on U.N. peacekeeping.

Furthermore, the use of counterinsurgency doctrine in peacekeeping is valid under international law. Counterinsurgency doctrine is simply a strategic/operational conception of the way in which force can best be used in an effective, humanitarian manner, likely to promote long-term stability. Therefore, the lawfulness of using counterinsurgency doctrine in peacekeeping is dependent only on the lawfulness of the use of force more generally in peacekeeping. The use of force in Chapter VII-authorized peacekeeping missions, however, is both lawful and increasingly common, and, therefore, there is no obstacle under international law to the incorporation of counterinsurgency into peacekeeping mandates.

The MONUC has already been furnished with a Chapter VII mandate and is authorized to use force to secure civilians and disarm rebel groups. However, it is currently attempting to disarm rebels in a highly ineffective manner and with no centralized doctrine for how force should be applied. Counterinsurgency would furnish the mission with the tools it needs to bring lasting peace to Congo, but the doctrine has not yet entered the discourse on peacekeeping. This deficiency deserves to be swiftly remedied—failure to incorporate COIN doctrine into peacekeeping strategy would be tantamount to ignoring the most important military doctrinal innovation in more than a century, and it would carry significant humanitarian costs.

Of course, in order for this doctrinal change to be effected, peacekeeping's command structures will need to be overhauled, as will its strategy and ground operations. Such changes will not be easy to implement: The drive to introduce this massive change in U.N. policy and structure will no doubt require the expenditure of significant political capital. As Sarah Sewell notes in her introduction to the *Counterinsurgency Field Manual*, the costs of counterinsurgency are significant, but they are not inherently unbearable: "Willingness to bear them is a choice."<sup>369</sup> Effective military peacekeeping will require similar sacrifices, but the United States and the U.N. should choose to make those sacrifices.

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<sup>369</sup> Sewall, *Introduction*, in COUNTERINSURGENCY FIELD MANUAL, *supra* note 136, at xxxix.

The U.N. is currently spending upwards of \$1 billion per year on its peacekeeping mission in Congo,<sup>370</sup> yet more than five million people have died in the region since the inception of the war, and the death toll shows no signs of slowing.<sup>371</sup> Its decades-long presence in the region shows, at least, that international society still holds a basic commitment to humanitarian responsibility—global society is not ready to abandon the region into violence and collapse. Yet the U.N. has continued for years with an ineffective program that offers no hope of permanently ending the conflict.

The Security Council should be willing to expend more effort now to prevent decades more of suffering in the future. Endemic violence in Congo continues, and counterinsurgency doctrine provides a proven, effective framework for stabilizing the conflict. It will not be easy to implement counterinsurgency doctrine into U.N. peacekeeping operations. In ten years' time, however, it will be far more difficult to look back, after many more civilian lives have been lost, and justify the failure to take necessary action.

Finally, the United States can help. The United States has widespread technical and theoretical expertise with implementing counterinsurgency doctrine into stabilization programs. America should use its position on the Security Council to advocate for a counterinsurgency-informed reform of multilateral peacekeeping, and should assist the U.N. on the ground by providing technical assistance and training designed to improve host nation security and rule of law capacity. Peacekeeping reform is gravely needed: Current ineffective mandates have made U.N. teams seem, at best, incapable of preventing civilian atrocities. At worst, the teams can serve as symbols to the local populace of the outside world's disregard for their plight: As disorganized bands of rebels continue to rape and torture terrorized civilians, heavily armed and uniformed international soldiers exist passively nearby. Unsurprisingly, when military peacekeepers fail to use force to deter illegal armed groups, locals often begin to see the U.N. as

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<sup>370</sup> See U.N. GAOR, 63d Sess., 5th Comm., Agenda Item 132, at 2, U.N. Doc. A/C.5/63/25.

<sup>371</sup> See Int'l Rescue Comm., Mortality in the Democratic Republic of Congo: An Ongoing Crisis (2007), <http://www.theirc.org/resource-file/irc-congo-mortality-survey-2007>.

complicit in the violence.<sup>372</sup> Reversing this trend and promoting effective U.N. peacekeeping would serve U.S. national security interests and foreign policy goals. President Barack H. Obama recently remarked, “our nation is stronger and more secure when we deploy the full measure of both our power and the power of our values, including rule of law.”<sup>373</sup> Promoting counterinsurgency doctrine in peacekeeping would accomplish both: the doctrine incorporates forceful military action, security-sector capacity building, and rule of law operations focused on ending impunity and promoting human rights. Most importantly, however, the doctrine is likely to work: it might just make peace operations capable of actually delivering peace.

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<sup>372</sup> Author’s Field Research Experience, *supra* note 14. *See also* Hum. Rts. Watch, *supra* note 101 (“MONUC’s continued participation in operation Kimia II, against its mandate and the UN’s own legal advice, implicates UN peacekeepers in abuses.”).

<sup>373</sup> President Barack H. Obama, Address at Central Intelligence Agency Headquarters (Apr. 20, 2009), *available at* <https://www.cia.gov/news-information/speeches-testimony/president-obama-at-cia-html>.

**CONSISTENCY AND EQUALITY:  
A FRAMEWORK FOR ANALYZING THE “COMBAT  
ACTIVITIES EXCLUSION” OF THE FOREIGN CLAIMS ACT**

MAJOR MICHAEL D. JONES\*

I. Introduction

You are a member of a three-person Foreign Claims Commission (FCC) responsible for investigating and reviewing foreign claims submitted in the Multinational Division Central-South area of operations. As you begin reviewing the large stack of recently-submitted foreign claims, you come across a claim related to an incident that occurred in the vicinity of Masayyib, Iraq.<sup>1</sup> The claimant alleges that his brother and sister-in-law were killed, and two other family members were injured, by U.S. Soldiers while driving near Masayyib. The claims packet includes numerous documents including medical treatment records, statements from the claimant, a claims card with the unit’s contact information, and photographs of the bodies. The claimant demands payment in the sum of \$30,000. A review of available statements and associated reports establishes that a force escalation (FE) incident had occurred at a traffic control point southwest of Musayyib on Route Wichita. According to the report and statements from members of the unit concerned, the traffic control point was properly established under the unit standard operating procedures. Warning signs were in place and the Soldiers were trained

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<sup>1</sup> This scenario is based on Foreign Claim 05-IF9-T-022–20 (Apr. 2006), *available at* [http://www.aclu.org/natsec/foia/pdf/Army0366\\_0370.pdf](http://www.aclu.org/natsec/foia/pdf/Army0366_0370.pdf) [hereinafter Foreign Claim 05-IF9-T-022–20]. The American Civil Liberties Union submitted a Freedom of Information Act request for “all records relating to the killing of civilians by U.S. forces in Iraq and Afghanistan since 1 January 2005.” *See id.* The Department of Defense responses were organized into a searchable database, which includes Foreign Claims, Army Regulation 15-6 investigations, and records of trial. *See id.*

on FE procedures. The Soldiers manning the traffic control point followed established procedures when a civilian vehicle approached and failed to stop. The Soldiers attempted to stop the vehicle using hand-and-arm signals, verbal commands, warning lights, and warning shots. When the vehicle continued to approach, the patrol fired at the vehicle with two M249 Squad Automatic Weapons (SAW). The vehicle was immediately disabled and rolled to a stop at the side of the road approximately 150 meters away from the entry of the traffic control point. The Soldiers also reported that the driver appeared to be slumped over the steering wheel of the vehicle and did not appear to be moving. For some inexplicable reason, the Soldiers proceeded to re-engage the vehicle firing approximately 200 additional rounds into the car. The two front passengers, Mr. A and Mrs. A died of gunshot injuries at the scene. Two of the rear passengers, Mr. B and Mrs. B, were severely wounded. The Soldiers immediately transported Mr. B and Mrs. B from the traffic control point to the nearest hospital. During the convoy to the hospital, the Soldiers accidentally crashed into a white sedan parked on the side of the road, severely damaging the passenger door (the sedan owner also filed a claim).

As the FCC tasked with adjudicating this claim, you immediately recognize that portions of this claim may be payable, while other portions of this claim will likely be excluded as combat under the combat exclusion of the Foreign Claims Act. After looking for guidance, you realize that while Army Regulations provide some examples of combat and non-combat activities, there is no methodology you can use to reliably and accurately apply the combat exclusion. In fact, varying interpretations of the applicable authority could result in significantly different results when this claim is adjudicated. You recognize that a framework for analyzing claims involving combat is necessary to ensure that the combat exclusion is being applied with consistency and equality throughout the theater of operations.

Unfortunately, claims such as this are all too common in Iraq and Afghanistan.<sup>2</sup> Claims resulting from FE incidents at traffic control points

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<sup>2</sup> This observation is based on the author's personal experiences as the Chief of Client Services for the Multi-National Corps–Iraq, Office of the Staff Judge Advocate (OSJA), at Camp Victory, Iraq, in 2006 [hereinafter Author's Personal Experience]. As the Chief of Client Services, the author was responsible for adjudicating foreign claims as part of a three member Foreign Claims Commission.

and during convoy operations are especially frequent.<sup>3</sup> Soldiers are often placed in difficult situations where they must quickly decide whether or not to engage a target that may or may not be hostile. The resulting claims are also difficult to analyze and adjudicate.<sup>4</sup> The facts are often confusing, witness statements are generally scarce, evidence is limited, and the desire to compensate seemingly innocent claimants is overwhelming.<sup>5</sup> A review of claims submitted in Iraq that involve similar facts to the ones described above reveal that FCCs have provided compensation to claimants in some cases.<sup>6</sup> However, numerous other FCCs have denied claims that contain almost the same factual circumstances.<sup>7</sup> This disparity reveals a problem with the way FCCs analyze and adjudicate foreign claims.

The Foreign Claims Act's (FCA) stated purpose is to promote and maintain friendly relations through the prompt settlement of meritorious claims.<sup>8</sup> However, the FCA specifically bars payment of claims that result directly or indirectly from acts of the Armed Forces of the United States in combat.<sup>9</sup> This provision is commonly referred to as the "combat exclusion," and it continues to be a source of confusion and controversy for many deployed judge advocates.<sup>10</sup> In order to have an effective foreign claims program, FCCs must analyze claims in a way that results in consistent and accurate application of the combat exclusion.

This article proposes a framework for analyzing claims that may involve the combat exclusion to achieve an effective foreign claims program. The article first examines the FCA's provisions on the combat exclusion. Next, it addresses how the combat exclusion is applied by FCCs in Iraq and Afghanistan, identifying problems that result from the way that the combat exclusion is currently applied. Next, it examines the legal authority relating to the combat exclusion. Finally, it proposes a model framework to assist with the analysis of foreign claims that

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<sup>3</sup> See Documents received from the Department of the Defense in response to ACLU Freedom of Information Act Request, <http://www.aclu.org/natsec/foia/log.html> (last visited Dec. 21, 2008) [hereinafter ACLU Claims Database].

<sup>4</sup> Author's Personal Experience, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> See ACLU Claims Database, *supra* note 3.

<sup>7</sup> See *id.*

<sup>8</sup> 10 U.S.C. § 2734 (2006).

<sup>9</sup> *Id.*

<sup>10</sup> Author's Personal Experience, *supra* note 2.

involve combat. While this framework complies with legal authorities, it also addresses problems that were identified during studies of FCC decision-making processes. Ultimately, the framework, which is visually summarized in a figure with four decision-making considerations, will provide judge advocates with a method of analysis that minimizes the problems associated with the combat exclusion, thereby increasing the effectiveness of the foreign claims program.

## II. The Commander's Emergency Response Program (CERP) and Solatia

Although there are programs, such as CERP and solatia, which may provide monetary payment for losses suffered by third-country nationals, this article focuses on the requirements of the Foreign Claims Act. The CERP is the result of an effort to provide commanders in Iraq with a stabilization tool for the benefit of the Iraqi people.<sup>11</sup> The CERP money originally came from stockpiles of cash maintained by the Ba'ath Party discovered by U.S. Soldiers.<sup>12</sup> During the early stages of Operation Iraqi Freedom, Soldiers of the 3d Infantry Division found more than a hundred aluminum boxes containing about \$650 million in the residential cottages of Ba'ath Party officials.<sup>13</sup> When the initial stockpiles of seized cash ran out, Congress authorized the use of appropriated funds to continue the CERP in Iraq and Afghanistan.<sup>14</sup> The inherent flexibility of the CERP has allowed commanders, often through their assigned judge advocates, to provide financial compensation to claimants whose claims would otherwise be excluded due to combat activity.<sup>15</sup>

Despite the apparent effectiveness of CERP, it is not a substitute for the FCA, nor should it be relied upon as a way to circumvent the FCA's combat exclusion. First, CERP is not designed to fully compensate for losses. The CERP condolence payments are simply an expression of

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<sup>11</sup> Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1, 3.

<sup>12</sup> *Id.*

<sup>13</sup> David Zucchini, *Troops Find Baghdad Stash: \$650 Million—Little-Noticed Cottages Hold Boxes of Cash*, S.F. CHRON, Apr. 19, 2003, at A-10.

<sup>14</sup> Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2003).

<sup>15</sup> Martins, *supra* note 11, at 18.

sympathy,<sup>16</sup> limited in amount, usually by standard operating procedures.<sup>17</sup> Generally, a CERP condolence payment for a death is capped at \$2,500.<sup>18</sup> Compensation for a wrongful death under the FCA would likely be much higher because of the authority to settle claims for higher amounts and because payments are designed to compensate the claimant in accordance with local law or custom.<sup>19</sup> Second, CERP is a relatively new creation and has only been authorized for use in Iraq and Afghanistan.<sup>20</sup> It is unclear if the CERP will be available in future conflicts. Because of the uncertain future of CERP and the financial limits placed on CERP condolence payments, it is important to maximize the use of the FCA and ensure that it is used to its full potential.

In addition to foreign claims and CERP, solatia payments may also be available as a form of compensation. Solatia payments provide funds to victims and family members who suffer injury, loss or damage.<sup>21</sup> An offering of Solatia conveys personal feelings of sympathy or condolence toward the victim or the victim's family.<sup>22</sup> While such feelings do not necessarily arise from legal responsibility, payments are intended to express remorse.<sup>23</sup> Solatia payments are made from the unit's operation and maintenance funds pursuant to directives established by the appropriate commander for the area concerned.<sup>24</sup> Although solatia programs are usually administered under the supervision of a command claims service, they are essentially a theater command function, whose propriety is based on a local finding that solatia payments are consistent with prevailing customs.<sup>25</sup> Accordingly, use of solatia payments is limited only to those areas where local custom allows for its implementation.<sup>26</sup>

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<sup>16</sup> MULTI-NATIONAL CORPS-IRAQ, MONEY AS A WEAPON SYSTEM, at C-15 (1 June 2007) [hereinafter MAAWS].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS paras. 10-5, 10-9 (8 Feb. 2008) [hereinafter AR 27-20].

<sup>20</sup> See Martins, *supra* note 12, at 9, 10.

<sup>21</sup> U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10-10 (21 Mar. 2008) [hereinafter DA PAM. 27-162].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* Solatia funds are not disbursed from claims allocations. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

## III. Introduction to Foreign Claims

## A. History and Implementation of the Foreign Claims Act

On 1 July 1941, U.S. Marines were deployed to Iceland, after a formal invitation, in response to Nazi aggression in Europe.<sup>27</sup> Shortly after the deployment, the Secretary of the Navy petitioned Congress for a statutory waiver of sovereign immunity and a mechanism for the payment of claims that resulted from damages caused by U.S. forces.<sup>28</sup> Congress passed the FCA on 2 January 1942.<sup>29</sup> The statute was originally limited in duration.<sup>30</sup> It was only supposed to apply during the national emergency declared by President Roosevelt.<sup>31</sup> However, Congress extended the FCA multiple times until it ultimately became permanent in 1956.<sup>32</sup> Since 1956, the statute has undergone numerous modifications, usually resulting in an increase in the monetary limits on compensation.<sup>33</sup>

Under the current structure described by Army Regulation 27-20, *Claims*, foreign claims are adjudicated by a single FCC or a three-person FCC.<sup>34</sup> Foreign Claims Commissions are appointed by the Commander of the U.S. Army Claims Service (USARCS).<sup>35</sup> They are responsible for investigating all claims that are referred to a commission as well as arranging for payment of valid claims, proposing settlements, and denying invalid claims.<sup>36</sup> Currently, a three-member FCC has the authority to settle claims for an amount not to exceed \$50,000.<sup>37</sup> A three-member FCC can deny a claim submitted for any amount.<sup>38</sup> A single-member FCC, consisting of a judge advocate or claims attorney, has the authority to settle claims for an amount not to exceed \$15,000.<sup>39</sup> Any claim that does not exceed \$15,000 can also be disapproved by a

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<sup>27</sup> *Id.* para. 10-1.

<sup>28</sup> *Id.*

<sup>29</sup> 10 U.S.C. § 2734 (2006).

<sup>30</sup> DA PAM. 27-162, *supra* note 21, para. 10-1.

<sup>31</sup> *Id.*

<sup>32</sup> 10 U.S.C. § 2734.

<sup>33</sup> *Id.*

<sup>34</sup> AR 27-20, *supra* note 19, para. 10-6.

<sup>35</sup> *Id.* para. 10-6(b).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* para. 10-9(d).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* para. 10-9(c).

single-member FCC.<sup>40</sup> Foreign Claims Commissions calculate settlement offers based on numerous factors including the nature of the evidence provided, the results of the FCC's investigation, local laws and customs, as well as the estimated monetary values resulting from the loss, damage, or injury.<sup>41</sup>

#### B. The Purpose and Basic Provisions of the Foreign Claims Act

The stated purpose of the FCA is to promote "friendly relations" between host nations and U.S. forces.<sup>42</sup> However, the FCA does not provide for the payment of all claims. Only inhabitants of foreign countries may submit claims under the FCA.<sup>43</sup> Additionally, the FCA specifically defines the types of claims that will be accepted for adjudication.<sup>44</sup> The FCA excludes claims that are combat-related, allowing a claim only if

it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.<sup>45</sup>

This provision is commonly referred to as the "combat exclusion" of the FCA, and it continues to create confusion among many FCCs.<sup>46</sup> For example, when asked about his understanding of the combat exclusion, one judge advocate in Iraq stated, "Early in the deployment I struggled with the non-existent definition of combat activity. As a result, I frequently called [name omitted] of MNC-I for guidance[,] but [sic]

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<sup>40</sup> *Id.*

<sup>41</sup> DA PAM. 27-162, *supra* note 21, ch. 2.

<sup>42</sup> 10 U.S.C. § 2734 (2006).

<sup>43</sup> DA PAM. 27-162, *supra* note 21, para. 10-2.

<sup>44</sup> 10 U.S.C. § 2734.

<sup>45</sup> *Id.*

<sup>46</sup> Author's Personal Experience, *supra* note 2.

many claims were still in the gray area of combat activity.”<sup>47</sup> Due to this “gray area,” the definition of combat activity often varies from one FCC to another.<sup>48</sup>

### C. Regulatory Provisions Regarding the Combat Exclusion

Although Army regulations offer some additional guidance on what constitutes “combat,” there is still significant room for interpretation. Ultimately, none of the regulations explain how claims involving combat should be analyzed or what information should be considered when adjudicating these types of claims.<sup>49</sup> Army Regulation (AR) 27-20, *Claims*,<sup>50</sup> and Department of the Army Pamphlet 27-162, *Claims Procedures*,<sup>51</sup> are the primary Army regulations explaining the procedures for processing claims under the FCA. Chapter 10 of both publications deal specifically with foreign claims. At most, these regulations provide insights on the general nature of claims to be allowed and disallowed. Army Regulation 27-20 defines noncombat activities as “authorized activities essentially military in nature, having little parallel in civilian pursuits, which historically have been considered as furnishing a proper basis for payment of claims,”<sup>52</sup> and may include: practicing the firing of missiles and weapons, training and field exercises, maneuvers that include the operation of aircraft and vehicles, as well as the use and occupancy of real estate without a contract or international agreement.<sup>53</sup> The regulation also prohibits payment for activities “incident to combat, whether in time of war or not.”<sup>54</sup>

Both publications also define combat activity. According to AR 27-20, combat activities are “activities resulting directly or indirectly from action by the enemy, or by the Armed Forces of the United States.”<sup>55</sup>

<sup>47</sup> E-mail from Judge Advocate, 1st Brigade Combat Team, 4th Infantry Division, U.S. Army, Iraq, to Major Mike Jones (17 Sept. 2008, 22:10 EST) (on file with author).

<sup>48</sup> E-mail from Judge Advocate, 1st Armored Division, U.S. Army, Iraq, to Major Mike Jones (17 Sept. 2008, 19:04 EST) (on file with author).

<sup>49</sup> See AR 27-20, *supra* note 19, DA PAM. 27-162, *supra* note 21.

<sup>50</sup> AR 27-20, *supra* note 19.

<sup>51</sup> DA PAM. 27-162, *supra* note 21, para. 10-2.

<sup>52</sup> AR 27-20, *supra* note 19, glossary.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* A third category of operation, that is commonly recognized, is a “not combat operation.” Although not defined by AR 27-20 or DA Pamphlet 27-162, the term “not combat operation” is frequently used within the military to describe those operations that

These definitions, although helpful, fail to precisely define combat activity or provide any type of guidance on how to analyze a claim that appears to be combat or combat related. In practice, these definitions are minimally helpful in distinguishing between combat and noncombat activities.<sup>56</sup> Because definitions of combat activity are ambiguous and because guidance is lacking on how to analyze claims that involve combat activities, an examination of the way FCCs are interpreting and applying the combat exclusion will provide additional insight on available alternatives.<sup>57</sup>

#### IV. The Combat Exclusion and its Application

##### A. Statistics Concerning the Application of the Combat Exclusion

Recently, the American Civil Liberties Union (ACLU) submitted a Freedom of Information Act (FOIA) request for information relating to deaths and injuries of civilians in Iraq and Afghanistan.<sup>58</sup> In response to the request, the Government released approximately 500 claims that matched the criteria established by the request.<sup>59</sup> Of those 500 cases—204, or about forty percent were apparently rejected because the injury, death, or property damage had been “directly or indirectly” related to combat.<sup>60</sup> While, ultimately, some of these claimants may have received some form of condolence payment, such payment was likely limited in amount.<sup>61</sup> Recent examinations of the claims database maintained by the U.S. Army Claims Service (USARCS) yielded similar statistics. According to USARCS, 6036 claims were denied as a result of the

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are purely administrative in nature and do not fall into the category of either combat or noncombat operations.

<sup>56</sup> Colonel R. Peter Masterton, *Managing a Claims Office*, ARMY LAW., Sept. 2005, at 46, 68 (describing the difficulty of making such determinations).

<sup>57</sup> The newly created Iraqi Security Agreement addresses the issue of claims, but does not alter the application of the Foreign Claims Act in Iraq. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq art. 21 (Jan. 1, 2009), available at [http://www.mnf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf). The agreement provides that the U.S. forces shall pay just and reasonable compensation in settlement of third party claims arising out of acts, omissions, or negligence of members of the U.S. forces done in the performance of their official duties and incident to the non-combat activities of the U.S. Forces. *Id.*

<sup>58</sup> See ACLU Claims Database, *supra* note 3.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> MAAWS, *supra* note 16, at C-15.

combat exclusion in Iraq since July of 2003.<sup>62</sup> As 13,319 foreign claims were submitted in Iraq since July of 2003, this means that approximately forty-five percent of all foreign claims filed in Iraq—nearly half of all claims filed in Iraq—were excluded as combat.<sup>63</sup>

#### B. Surveys of Foreign Claims Commissions

Frequent application of the combat exclusion as a basis for denying claims is also supported by information received from FCCs who are currently serving in, or have recently returned from, Iraq and Afghanistan. With the assistance of the Chief of Claims, Multi-National Corps–Iraq (MNC–I), the author contacted several FCCs with recent foreign claims experience. Each of the FCCs was asked to complete a questionnaire containing several questions regarding foreign claims and the combat exclusion. Of the fourteen FCCs that were contacted, nine responded. Because thirteen FCCs were in Iraq at the time of this survey, the nine survey responses represent a broad cross-section of claims experience in Iraq.<sup>64</sup>

The questionnaire asked how frequently the combat exclusion was applied, how the combat exclusion was interpreted, as well as what resources were used to resolve questions about the combat exclusion. The FCCs who responded confirm that the number of claims paid under the FCA was significantly reduced through the application of the combat exclusion.<sup>65</sup> In fact, one respondent estimated that the combat exclusion was a factor in forty to fifty-five percent of the claims that he adjudicated.<sup>66</sup> These estimates are further proof that the combat exclusion has a significant impact on the number of claims that are paid. Any provision that potentially excludes nearly half of all claims filed warrants careful examination to ensure that it is being applied consistently and fairly, and that it is being correctly analyzed to maximize the effectiveness of the FCA. Unfortunately, questionnaire

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<sup>62</sup> E-mail from U.S. Army Claims Serv., Fort Meade, Md., Operations and Records, to Major Mike Jones (6 Mar. 2009, 0:14 EST) (on file with author).

<sup>63</sup> E-mail from U.S. Army Claims Serv., Fort Meade, Md., Operations and Records, to Major Mike Jones (22 Jan. 2009 14:29 EST) (on file with author).

<sup>64</sup> *Id.*

<sup>65</sup> See E-mail Responses to the Foreign Claims Survey (on file with author) [hereinafter Survey Responses].

<sup>66</sup> E-mail from Judge Advocate, U.S. Army, Iraq, to Major Mike Jones (19 Sept. 2008) [hereinafter 19 Sept. 2008 e-mail] (on file with author).

responses indicate that consistent application and analysis is not occurring, which may be one of the reasons why the number of claims excluded as combat is so high.<sup>67</sup>

Surveys of several FCCs in Iraq indicate that there are numerous interpretations and applications of the combat exclusion. When asked to explain the meaning of the combat exclusion in their own words, responses varied widely. One FCC described his application of the combat exclusion as follows:

I consider the combat exclusion to apply to all CF offensive operations and to active self-defense against identified threats. Under this definition, I include raids on houses, etc. as constituting offensive operations by CF. I consider escalation of force (EOF) measures to constitute active self-defense against identified threats.<sup>68</sup>

This interpretation of the combat exclusion is very broad because it focuses on the nature of the mission. By comparison, a Foreign Claims Commission adjudicating claims in Baghdad applies a much narrower definition, focusing on actual events, as opposed to the general nature of the operation:

The FCA Combat Exclusion states that the FCA cannot be used for damages/injuries/death resulting from combat operations. When we first got here, we (NCOIC, CJA, and myself) got into a discussion about what that really meant. For example, when you are talking about operations in Sadr City, Iraq, what isn't a combat operation? But we decided that was too broad. So this is how I apply it: If a patrol is traveling down route X and hits a parked car as they are moving through a congested street, then the FCA applies. If a patrol is engaged by an IED and fires at the trigger man's location (after establishing PID of course) and hits a car parked in the vicinity with SAF, then that is not covered

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<sup>67</sup> See Survey Responses, *supra* note 65.

<sup>68</sup> 19 Sept. 2008 e-mail, *supra* note 66.

under FCA—the damage was caused while responding to some perceived or actual hostile act or intent.<sup>69</sup>

Similarly, another FCC noted:

The combat exclusion automatically precludes the United States from paying claims under the Foreign Claims Act when those claims arose from combat related incidents. Combat related incidents typically include Targeted Missions, Escalation of Force, and React to Contact. This is in contrast to claims that arise from activities that do not involve actual or imminent contact with hostile forces. I look to the unit and details of the incident.<sup>70</sup>

While the above responses indicate some degree of interpretive variation on the application of the combat exclusion, other responses applied more rigid standards. For example, one FCC stated that “[t]he combat exclusion applies any time CF intentionally fire weapons to kill.”<sup>71</sup> On balance, these contrary responses demonstrate that FCCs with similar training, involved in similar operations, have differing interpretations of the same regulation.

The Chief of Client Services for Multi-National Corps–Iraq (MNC–I) is largely responsible for providing oversight, training, and guidance for foreign claims operations in Iraq.<sup>72</sup> The MNC–I Chief of Client Services also serves as the primary Iraq foreign claims point of contact for USARCS.<sup>73</sup> Because of this unique position, the MNC–I Chief of Client Services has a better view of how foreign claims are adjudicated in Iraq than most judge advocates.<sup>74</sup> He notes that discretionary variances do exist in the interpretation and application of the combat

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<sup>69</sup> E-mail from Judge Advocate, U.S. Army, Baghdad, Iraq, to Major Mike Jones (24 Sept. 2008, 21:44 EST) (on file with author).

<sup>70</sup> E-mail from Judge Advocate, U.S. Army, Iraq, to Major Mike Jones (22 Oct. 2008) (on file with author).

<sup>71</sup> E-mail from Judge Advocate, U.S. Army, Iraq, to Major Mike Jones (17 Sept. 2008) (on file with author).

<sup>72</sup> E-mail from Judge Advocate, Chief of Client Servs., Multi-National Corps–Iraq, U.S. Army, Baghdad, Iraq, to Major Mike Jones (3 Oct. 2008) (on file with author).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

exclusion,<sup>75</sup> especially regarding force escalation procedures that result in the injury of innocent bystanders.<sup>76</sup>

While the various survey responses were largely consistent with statutory definitions of combat and noncombat activities, they still reflected divergent views. Because of these differences, multiple FCCs could analyze the same claim and come to drastically different conclusions; this underscores the necessity of a standardized analytical framework.

#### V. The Impact of Inconsistent Application of the Combat Exclusion

Unfortunately, the use of the combat exclusion can undermine support of U.S. military efforts from the local population.<sup>77</sup> In much the same way that payment of claims can create goodwill and a positive perception of U.S. forces, denial of payment can have the opposite effect.<sup>78</sup> While any claimant who is denied compensation will be upset and dissatisfied, the situation can become exponentially worse when a claimant is denied compensation due to improper analysis or lack of sufficient investigation. While the claimant may not immediately realize that his claim was improperly adjudicated, subsequent discussions with other successful claimants may reveal inconsistencies between FCCs.<sup>79</sup> These inconsistencies ultimately result in distrust of the foreign claims system and U.S. forces.<sup>80</sup> Improper application of the FCA can have broader impacts as well. A 2007 article published in the *New York Times* criticizes the U.S. military for using condolence payments *instead of* compensation under the FCA.<sup>81</sup> The article notes that

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Captain Jeffery S. Palmer, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 237–38 (1997).

<sup>78</sup> E-mail from Judge Advocate, former Chief of Client Services, Multi-National Corps–Iraq, U.S. Army, Baghdad, Iraq, to Major Mike Jones (3 Oct. 2008 no time available) (on file with author).

<sup>79</sup> *Id.*

<sup>80</sup> Author's Personal Experience, *supra* note 2.

<sup>81</sup> Jon Tracy, *Sometimes in War, You Can Put a Price on Life*, N.Y. TIMES, May 16, 2007, [http://www.nytimes.com/2007/05/16/opinion/16tracy.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/05/16/opinion/16tracy.html?_r=1&oref=slogin).

Condolence payments are often used to provide some degree of compensation to claimants when an FCC determines that the claim is excluded as combat. E-mail from Judge Advocate, 3d Brigade Combat Team, 4th Infantry Division, U.S. Army, Baghdad, Iraq, to Major Mike Jones (24 Sept. 2008) (on file with author).

The Foreign Claims Act offers full compensation for the loss along the lines for what Americans can receive in civil court; condolence involves nominal payment. But the military has conflated the two, giving condolence even as it has investigated and punished wrongdoing by our troops.<sup>82</sup>

In other words, condolence payments are being used instead of the FCA, even though the FCA would allow for more compensation. Because the *New York Times* article did not address specific claims, it is impossible to say if the criticisms presented are accurate. However, inclusion of a consistent and well-reasoned analysis of whether the combat exclusion applied would avert similar criticism and negative publicity. Another article, also published in the *New York Times*, includes a quote from the Executive Director of the Campaign for Innocent Victims in Conflict.<sup>83</sup> She notes that “the arbitrary nature of how money is dispersed can intensify feelings of ill will on the ground, which, ironically, the compensation payments are designed to mitigate.”<sup>84</sup>

The negative effects of inconsistent analysis and application of the combat exclusion go beyond negative publicity. When the method of analysis and application of the combat exclusion varies significantly between FCCs, claimants may forum shop their claims or submit the same claim to multiple FCCs in the hopes of obtaining a favorable analysis.<sup>85</sup> Additionally, different interpretations of the combat exclusion may create the perception of inequity, which would arguably increase dissatisfaction among claimants and reduce our ability to spread goodwill. According to one former Chief of Client Services for MNC-I,

Without clear, uniform standard[s], foreign claimants will clearly not understand the process and will doubt the objectiveness of the law. If they interpret that we, the American government, are playing favorites, they will interpret not getting paid as not being a favorite. Thus, this could lead to several individuals having distaste for Americans when they never had any before.

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<sup>82</sup> Tracy, *supra* note 81.

<sup>83</sup> David S. Cloud, *Compensation Payments Rising, Especially by Marines*, N.Y. TIMES, June 10, 2008, <http://www.nytimes.com/2006/06/10/world/middleeast/10payments.html?scp=3&sq=%252>.

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

<sup>85</sup> Author's Personal Experience, *supra* note 2.

Moreover, in an area where we are trying to encourage the establishment of the rule of law, it appears to our claimants that our laws are discretionary with no real standard.<sup>86</sup>

This dissatisfaction demonstrates how serious the potential problem is. The lack of consistent analysis and application could result in not just negative publicity and dissatisfied claimants, but widespread dissension among the very people that the foreign claims system is designed to assist. It is important to recognize that the foreign claims system has broader implications than just within Iraq or Afghanistan.<sup>87</sup> Our ability to quickly and fairly compensate claimants can impact the perception of the military as a whole, both at home and abroad.<sup>88</sup> Variations will always exist in how FCCs analyze and apply the combat exclusion simply because of differences in their respective areas of operation, but these variations can be minimized through the institution of specialized training and guidance.

Because there will always be situations where claims must be denied, this article does not advocate elimination of the combat exclusion altogether; the combat exclusion serves a valid purpose. The funds allocated to pay foreign claims are obviously limited and courts have recognized that there are legitimate reasons for denying claims that result from combat. Specifically, in *Koohi v. United States*, the court recognized the importance of combat exclusions, observing how fear of claims liability should not prevent the Government from exercising bold and imaginative measures to overcome enemy forces.<sup>89</sup> The court also explained that war produces innumerable innocent victims of harmful conduct, and that it would make little sense to single out, for special compensation, a few of these persons on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other.<sup>90</sup>

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<sup>86</sup> E-mail from Judge Advocate, former Chief of Client Servs., Multi-National Corps–Iraq, U.S. Army, Baghdad, Iraq, to Major Mike Jones (3 Oct. 2008, 15:56 EST) (on file with author).

<sup>87</sup> See Cloud, *supra* note 83; Tracy, *supra* note 81; Paul von Zielbauer, *Civilian Claims on U.S. Suggest the Toll of War*, N.Y. TIMES, Apr. 12, 2007, [http://www.nytimes.com/2007/04/12/world/middleeast/12abuse.html?\\_r=1&scp+ 2&sq=](http://www.nytimes.com/2007/04/12/world/middleeast/12abuse.html?_r=1&scp+ 2&sq=).

<sup>88</sup> *Id.*

<sup>89</sup> 976 F.2d 1328, 1334–35 (9th Cir. 1992).

<sup>90</sup> *Id.*

To the extent practicable, if FCCs apply a standard framework of analysis when examining claims that deal with combat, the claims system will be more consistent and appear less arbitrary. This, in turn, will further the purpose of the FCA because a consistent and well-reasoned claims process will promote and maintain friendly relations more than a system that appears to be lacking in standards and procedures.<sup>91</sup> The analytical framework, however, must still meet the purpose of the FCA and be capable of uniform application by all FCCs. It must also effectively limit the number of claims paid in a manner that does not degenerate the foreign claims process into an automatic process of compensation.

## VI. Cases Examining the Meaning of Combat

Judicial interpretations of the combat exclusion are important because they shed light on the key attributes of the proposed framework for analyzing foreign claims involving combat. Before examining this set of cases, it is important to note that they all deal with claims brought under the Federal Tort Claims Act (FTCA),<sup>92</sup> which is similar to the FCA in that it also contains a type of combat exclusion.<sup>93</sup> However, there are some differences between the two acts with regard to the language used to establish the exclusion.<sup>94</sup> As previously stated, the FCA does not allow claims that “arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat.”<sup>95</sup> The FTCA does not allow claims “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>96</sup> This distinction is important because it shows that the two acts, while similar, differ with regard to the scope of the combat exclusion. Despite the differences in language, these cases are still useful because they are one of the few sources of authority, outside of the

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<sup>91</sup> Author’s Personal Experience, *supra* note 2.

<sup>92</sup> The FTCA creates an exception to the Federal Government’s protection of sovereign immunity and allows, with certain exceptions, the Government to be sued in tort as a private individual would be in certain circumstances. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004). The FTCA also gives federal district courts jurisdiction over claims against the United States for injury caused by the negligent or wrongful act of a government employee while acting within the scope of employment. *Id.*

<sup>93</sup> 28 U.S.C. § 1346(b) (2006).

<sup>94</sup> *See id.*; 10 U.S.C. § 2734 (2006).

<sup>95</sup> 10 U.S.C. § 2734.

<sup>96</sup> 28 U.S.C. § 1346(b).

regulations, that examine the nuances, meaning, and scope of a combat exclusion.

A. *Johnson v. United States*

Perhaps the leading case in this area is *Johnson v. United States*.<sup>97</sup> *Johnson* involved an action for damages against the United States for pollution of a clam farm by vessels of the U.S. Navy.<sup>98</sup> The alleged pollution occurred from December 1945 through 1946, when the Navy, because of force protection concerns over congestion in many of the country's ports, anchored sixteen ammunition cargo vessels in Washington State's Discovery Bay.<sup>99</sup> The vessels were responsible for supplying ammunition to various combat vessels of the Navy.<sup>100</sup> They had previously been engaged in active logistical support of combat operations in the Pacific Theater.<sup>101</sup> Upon the termination of hostilities in 1945, the Navy ordered vessels to Discovery Bay pending reassignment.<sup>102</sup> The vessels were manned and commanded by naval personnel.<sup>103</sup>

The appellants' complaint alleged that these vessels discharged oils, sewage, and other noxious matter into the waters of Discovery Bay, which polluted both the waters and the adjacent tidelands owned by the appellants, thereby damaging their commercial clam farm.<sup>104</sup> As a result of this pollution, the State of Washington prohibited the taking of clams from appellants' lands for sale to the public.<sup>105</sup> The appellants claimed damages totaling \$46,000 for partial permanent injury to the clam farm and loss of the season's profits.<sup>106</sup>

In response, the Navy relied upon the combat exclusion of the FTCA, which states that the FTCA does not apply to "[a]ny claim arising out of the combatant activities of the military or naval forces, or Coast

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<sup>97</sup> 170 F.2d 767 (9th Cir. 1948).

<sup>98</sup> *Id.* at 768.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 769, 770.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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

Guard, during time of war.”<sup>107</sup> The Navy’s reliance on the combat exclusion of the FTCA forced the court in *Johnson* to examine the meaning of combatant activities. The court determined that

“Combat” connotes physical violence; “combatant,” its derivative, as used here, connotes pertaining to actual hostilities; the phrase “combatant activities,” of somewhat wider scope, and superimposed upon the purpose of the statute, would therefore include not only physical violence, but activities both necessary to and in direct connection with actual hostilities.<sup>108</sup>

This definition is important because the court focuses on the distinction between the term “combat” and how it is different from the term “combatant.” In so doing, the court notes that combat relates to physical violence,<sup>109</sup> a simple concept that is easier to identify than the more amorphous concept of combat. After this distinction, the court goes on to highlight the differences between combat and combatant activities, noting that the physical violence of combat is not the same as the activities necessary and in direct support of that physical violence.<sup>110</sup>

[T]he act of supplying ammunition to fighting vessels in a combat area during war is undoubtedly a “combatant activity,” but this fact does not make necessary a conclusion that all varied activities having an incidental relation to some activity directly connected with previously ended fighting on active war fronts must, under the terms of the Act, be regarded as and held to be a combatant activity. To so hold might lead to results which need not here be considered. The rational test would seem to lie in the degree of connectivity. Aiding others to swing the sword of battle is certainly a “combatant activity,” but the act of returning it to a place of safekeeping after all of the fighting is over cannot logically be cataloged as a “combat activity.”<sup>111</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 770.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

Of primary significance is the definition of combat that the *Johnson* court uses. Here, even though the court focuses primarily on the meaning of combatant activities, as used in the FTCA, this simple explanation and analysis, that “combat connotes physical violence,”<sup>112</sup> is extremely useful to FCCs who are responsible for adjudicating foreign claims in Iraq and Afghanistan.

B. *United States v. Skeels*

Another important FTCA case, *United States v. Skeels*, provides further interpretation of the combat exclusion addressed by *Johnson*.<sup>113</sup> Jasper Skeels and several other people were fishing in the Gulf of Mexico on the morning of 24 July 1945.<sup>114</sup> While they were fishing, U.S. Army planes were conducting training in the same area.<sup>115</sup> Several of the planes were firing their weapons at targets being towed by other planes.<sup>116</sup> At some point, a piece of iron pipe fell from one of the planes, or one of the targets, striking Jasper Skeels in the head and killing him.<sup>117</sup> The administrator of Skeels’s estate filed a claim under the FTCA for the death of Mr. Skeels.<sup>118</sup> Because the United States was still at war with Japan at the time of the incident, the court examined the FTCA’s meaning of the term “combatant activities.”<sup>119</sup> The court in *Skeels* noted that combat activities means the actual engaging in physical force.<sup>120</sup> It explained that

the phrase [combat activities] was used to denote actual conflict, such as where the planes and other instrumentalities were being used, not in practice and training, far removed from the zone of combat, but in bombing enemy occupied territory, forces or vessels, attacking or defending against enemy forces, etc.<sup>121</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> 72 F. Supp. 372 (D. La. 1947).

<sup>114</sup> *Id.* at 373.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 373, 374.

<sup>120</sup> *Id.* at 374.

<sup>121</sup> *Id.*

The *Skeels* Court's interpretation of combat activities is very similar to the *Johnson* court's interpretation,<sup>122</sup> with both courts applying the ordinary meaning of the words to determine that combat involves physical force or violence directed and devoted to the destruction of the enemy or enemy property. These two cases provide FCCs with both a useful definition of combat activities and an example of how to analyze claims involving combat.

### C. *Koohi v. United States*

*Koohi v. United States* also addresses the meaning of combat with regards to the application of the combat exclusion under the FTCA, as well as the reasons for the existence of a combat exclusion.<sup>123</sup> In *Koohi*, the court was presented with another action brought under the FTCA. The action was brought by heirs of deceased airline passengers and crew.<sup>124</sup> The incident that underlies this suit occurred in July of 1988.<sup>125</sup> The USS *Vincennes*, a naval cruiser operating in the Persian Gulf equipped with the Aegis air defense system, dispatched a reconnaissance helicopter to investigate reports of Iranian gunboats in the area.<sup>126</sup> The helicopter was allegedly fired upon by anti-aircraft guns.<sup>127</sup> In response, the *Vincennes* crossed into Iranian territorial waters and fired upon the gunboats.<sup>128</sup> Shortly after the engagement, a civilian Iranian Airbus, Iran Air flight 655, took off from a joint commercial-military airport at Bandar Abbas, Iran.<sup>129</sup> The flight path of Iran Air

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<sup>122</sup> See also *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp 1242, 1255 (E.D.N.Y. 1984) (discussing the application of the combat exclusion of the FTCA to a claim for injury resulting from the chemical defoliant Agent Orange). Although the court primarily focuses on the *Feres* Doctrine, the court also addresses the combat exclusion of the FTCA. *Id.* In its discussion, the court notes that "if a civilian was injured on a battlefield by a grenade that exploded prematurely because the government's specifications for the grenade were improper, that civilian should not be barred by the combatant activities exception from suing." *Id.* The court goes on to note that "if a soldier was aiming a handgrenade at the enemy and, as a result of his negligence, a civilian was injured, the combatant activities exception would apply." *Id.* This simple example provides claims judge advocates with a tangible example of combat that is easily applied. *Id.*

<sup>123</sup> 976 F.2d 1328, 1330 (9th Cir. 1992).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

flight 655 brought it in close vicinity to the *Vincennes*.<sup>130</sup> The crew of the *Vincennes* misidentified the aircraft as an Iranian F-14 and employed its air defense system to shoot it down.<sup>131</sup> All 290 people aboard the plane were killed.<sup>132</sup>

Because the resulting claims were filed under the FTCA,<sup>133</sup> the court in *Koochi* was also forced to address the combat exclusion of the FTCA as part of their opinion.<sup>134</sup> The *Koochi* Court adopted the *Johnson* Court's definition of combat activities, noting that combat activities involve not only physical violence, but also activities that are both necessary and in direct connection with actual hostilities.<sup>135</sup> The court also pointed out that "the firing of a missile in perceived self-defense is a quintessential combat activity."<sup>136</sup> The *Koochi* Court then examined the reasons behind the existence of a combat exclusion. These reasons have already been examined briefly above, but it is important to focus on them again in more detail because they are significant to the FCC adjudication process. First, the court noted that:

[T]ort law is based in part on the theory that the prospect of liability makes the actor more careful. Here, Congress certainly did not want our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces; nor did it want our soldiers, sailors, or airmen to be concerned about the possibility of tort liability when making life or death decisions in the midst of combat.<sup>137</sup>

The court then examined the second reason behind the combat exclusion by focusing on the realities of combat:

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> The plaintiffs sought compensation from the United States and several private companies involved in the construction of the Aegis Air Defense System, which was deployed on the *Vincennes*. *Id.* at 1330. The plaintiffs asserted claims against the United States for the negligent operation of the *Vincennes* and claims against the weapons manufacturers for design defects in the Aegis system. *Id.*

<sup>134</sup> *Id.* at 1333.

<sup>135</sup> *Id.* at 1333 n.5.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1335.

War produces innumerable innocent victims of harmful conduct—on all sides. It would make little sense to single out for special compensation a few of these persons—usually enemy citizens—on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other.<sup>138</sup>

Finally, the court discussed the punitive aspects of tort law and how these aspects justify the existence of a combat exclusion:

Society believes tortfeasors should suffer for their sins. It is unlikely that there are many Americans who would favor punishing our servicemen for injuring members of the enemy military or civilian population as a result of actions taken in order to preserve their own lives and limbs.<sup>139</sup>

These three principles provide added perspective on the combat exclusion. Examining the reasons for the existence of a combat activities exception helps judge advocates to better understand how the combat exclusion of the FCA should be applied.

The *Koohi* court also addressed the issue of engaging an unintended target, which is a problem that occurs frequently in urban combat settings:

The combatant activities exception applies whether U.S. military forces hit a prescribed or an unintended target, whether those selecting the target act wisely or foolishly, whether the missiles we employ turn out to be "smart" or dumb, whether the target we choose performs the function we believe it does or whether our choice of an object for destruction is a result of error or miscalculation. In other words, it simply does not matter for purposes of the "time of war" exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of

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<sup>138</sup> *Id.*

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

the act and not the manner of its performance that counts.<sup>140</sup>

Essentially the court is saying that whether or not the act was negligent is irrelevant, so long as the circumstances surrounding the act can be defined as combat. While thorough investigation is always important, the FCC need not make a determination of negligence, in circumstances where the combat exclusion applies. The existence of combat itself is determinative in most cases. However, there is an important distinction between combat actions involving negligence and combat actions involving criminal conduct or violations of the law of war.<sup>141</sup> The issue of criminal conduct under the Uniform Code of Military Justice (UCMJ) and law of war violations as they relate to foreign claims will be addressed in more detail. For now, it is important to realize that the court's statement, "it is the nature of the act and not the manner of its performance that counts" is valid only if the manner in which the act was performed does not equate to a violation of the UCMJ or the law of war.<sup>142</sup>

#### VII. A Framework of Analysis to Determine if the Combat Exclusion Applies

Having examined how courts have applied and analyzed combat and combat exclusions, the principles established by the courts in *Johnson*, *Koohi*, and *Skeels* can now be incorporated into a framework for foreign claims adjudication. This framework is designed to assist FCCs with examining and analyzing claims that involve combat activities. Notwithstanding the framework, FCCs must still apply the provisions of AR 27-20 and DA Pamphlet 27-162 to ensure that all other requirements are met prior to paying or settling any foreign claim.<sup>143</sup>

The following analysis consists of four separate prongs. In performing this analysis, FCCs should first thoroughly review each claims packet, fully investigate the claim, and examine all relevant

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<sup>140</sup> *Id.* at 1336.

<sup>141</sup> *See infra* Part VII.

<sup>142</sup> *Koohi*, 976 F.2d at 1336.

<sup>143</sup> *See* DA PAM. 27-162, *supra* note 21, ch. 10 (explaining the general procedures for intake, processing, evaluation, and investigation of foreign claims); AR 27-20, *supra* note 19, ch.10.

evidence.<sup>144</sup> Once the investigation is complete, the FCC should then examine each prong and record their determinations for inclusion in the claims packet. Documentation is important because it shows that each claim was thoroughly examined and considered.<sup>145</sup> For the first prong, the FCC must look to see if the claim contains information indicating the occurrence or threat of physical violence. The second prong requires the FCC to examine the context surrounding the occurrence of the physical violence. The third prong focuses on the degree of connectivity (proximate cause) between the acts that gave rise to the claim and the physical violence. For the fourth prong, the FCC must look to see if there is evidence of acts that are contrary to the law. Each prong is described in the text immediately below, while the graphic depiction appears in a flowchart at the Appendix.

#### A. Prong 1: Physical Violence<sup>146</sup>

The first prong evaluates whether the evidence indicates the presence of physical violence, which is the term used in *Johnson* and *Skeels* to explain the meaning of combat.<sup>147</sup> In order to address all possible situations that could result in a foreign claim, physical violence includes threats of physical violence. This prong requires the FCC to examine the claim for evidence of instances of physical violence or what the *Johnson* court referred to as “swinging the sword of battle.”<sup>148</sup> Examples include shooting, use of explosives, ramming or crashing with vehicles, hand-to-hand combat, forcible taking of property, destruction of property, verbally communicating threats, aiming a weapon, etc. The presence of physical violence is a strong indicator that the claim may ultimately be excluded as combat. Conversely, the lack of any evidence of physical violence means the claim does not involve combat and the combat exclusion does not apply.

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<sup>144</sup> See DA PAM. 27-162, *supra* note 21, ch. 10.

<sup>145</sup> See ACLU Claims Database, *supra* note 3 (containing numerous claims with little or no explanation as to why a claim was approved or denied resulting in the appearance that a thorough examination process was not performed).

<sup>146</sup> For the purposes of this article, the term physical violence also includes threats of physical violence such as aiming a weapon at an individual, firing a warning shot, verbally communicating a threat, etc.

<sup>147</sup> *Johnson v. United States*, 170 F.2d 770 (9th Cir. 1948).

<sup>148</sup> *Id.*

For example, if a claimant submitted a claim for the death of his livestock due to contamination of his water supply by pollutants improperly disposed of by U.S. forces, it would be an example of a claim that does not contain any evidence of physical violence or threats of physical violence. Accordingly, the combat exclusion would not apply. Alternatively, the traffic control point scenario presented in the introduction of this article does contain evidence of physical violence.<sup>149</sup> In this scenario, Soldiers manning a traffic control point fired at a vehicle that failed to stop when directed. During the initial engagement, the vehicle was disabled and it appears that the driver was injured or killed. The Soldiers intentionally fired at the vehicle in order to disable the vehicle and eliminate the potential threat. The act of shooting constitutes physical violence. An FCC examining this portion of the claim would conclude that there is evidence indicating the presence of physical violence, and would then move to the next prong for further analysis.

#### B. Prong 2: Context Surrounding the Physical Violence

Context is very important when examining foreign claims. Acts of physical violence may be excluded in one context, but may be compensable in another. Specifically, DA Pamphlet 27-162, *Claims Procedures* states

Claims arising “directly or indirectly” from combat activities of the U.S. armed forces are not payable. Whether damages sustained in areas of armed conflict are attributable to combat activities or noncombat activities depends upon the facts of each case. Damages caused by enemy action, or by the U.S. armed services resisting or attacking an enemy or preparing for immediate combat with an enemy, are certain to be considered as arising from combat activities.<sup>150</sup>

In other words, the FCC must determine the context surrounding the act of physical violence to determine if it is related to resisting or attacking an enemy or preparing for immediate combat with an enemy. If the FCC finds that the act of physical violence that gave rise to the claim is related to resisting or attacking an enemy or preparing for immediate combat

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<sup>149</sup> See *supra* Part I.

<sup>150</sup> DA PAM. 27-162, *supra* note 21, para. 10-3.

with an enemy, then the regulation definitively states that the claim is excluded as combat, assuming that the act was lawful.<sup>151</sup>

Referring again to the introductory scenario, one can see how this prong is applied. As discussed above, the act of shooting is an example of physical violence. The evidence in the claims packet indicates that the Soldiers were intentionally firing at a vehicle that failed to stop for a traffic control point. The Soldiers perceived the vehicle as an enemy threat based on its failure to stop. Accordingly, the physical violence of shooting was directly related to resisting a perceived enemy attack, so the analysis continues with the next prong of the framework. It is important to note that while neither DA Pamphlet 27-162 nor AR 27-20 precisely defines what an enemy is, practical application of the regulation to current conflicts involving enemies that are difficult to identify requires the inclusion of perceived enemies in the definition.<sup>152</sup>

Conversely, applying prong two to another portion of the introductory scenario results in a different conclusion. Recall that after the engagement, the Soldiers transported some of the injured passengers to a local hospital. During the movement to the hospital, the Soldiers crashed into an automobile, damaging the door. According to the first prong, crashing is an example of physical violence. However, in this case, the result is different because the context has changed. The act of physical violence occurred during a convoy to a hospital. It did not involve resisting or attacking an enemy or preparing for immediate combat with an enemy. Because of the change in context, one can conclude that, although an act of physical violence occurred, it is not of the nature that would result in application of the combat exclusion and the combat exclusion analysis is complete. The fact that a convoy, operation, or mission occurs in a combat zone, such as Iraq or Afghanistan, does not automatically mean that it is combat as defined by the FCA. Such a broad interpretation of combat runs counter to the purposes of the FCA because it would result in the exclusion of all claims that occur in a combat zone.<sup>153</sup> Had the drafters of the FCA intended such a result, then they could have easily changed the combat exclusion to a combat zone exclusion or time of war exclusion.<sup>154</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> See generally AR 27-20, *supra* note 19, ch.10; DA PAM. 27-162, *supra* note 21, ch. 10.

<sup>153</sup> See 10 U.S.C. § 2734 (2006).

<sup>154</sup> *Id.*

### C. Prong 3: Proximate Cause

This prong examines the connection between the acts that gave rise to the claim and the physical violence that occurred. Once an FCC is able to identify the presence or threat of physical violence and concludes that the physical violence directly related to resisting or attacking an enemy or preparing for immediate combat with an enemy, then she must examine the relationship between the acts that gave rise to the claim and the physical violence that occurred. This step of the analysis is contemplated by the language of DA Pamphlet 27-162, which states that “[c]laims arising ‘directly or indirectly’ from combat activities of the U.S. armed forces are not payable.”<sup>155</sup> In some instances, this analysis is extremely simple. For example, if a Soldier intentionally fires his weapon at an individual and the bullet strikes the targeted individual, who subsequently files a claim for the injury he received, then there is a direct connection between the physical violence and the actions that gave rise to the claim. In most cases, this will be sufficient information to determine that the claim is excluded as combat (assuming that the act was lawful). However, as the degree of connectivity becomes more tenuous, the analysis becomes more difficult. This portion of the analysis resembles the analysis involved in examining issues of proximate cause. Fortunately, the concept of proximate cause is one that should be familiar to most judge advocates because it is one of the key aspects of determining liability for property loss. Army Regulation 735-5 defines proximate cause as

the cause, which in a natural and continuous sequence of events unbroken by a new cause produced the loss or damage. Without this cause, the loss or damage would not have occurred. It is further defined as the primary moving cause, or the predominate cause, from which the loss or damage followed as a natural, direct, and immediate consequence.<sup>156</sup>

This definition can be applied to determine if the physical violence that gave rise to the claim was the proximate cause of the loss, damage, or injury. If it was the proximate cause, then the combat exclusion may apply because there is a sufficient degree of connectivity. This portion

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<sup>155</sup> DA PAM. 27-162, *supra* note 21, para. 10-3.

<sup>156</sup> U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY 178 (28 Feb. 2005).

of the analysis requires the judge advocate to closely examine the evidence and look for possible intervening causes that could have broken the causal chain. Claims that were submitted as a result of an act or omission by a U.S. Soldier or civilian employee of a U.S. military department, but were not proximately caused by an act of intentional physical violence, will generally be a valid payable claim.<sup>157</sup>

Referring again to the introductory scenario, we can see how prong three might be applied. The Soldiers firing at the car that failed to stop for the traffic control point provides a clear example: the Soldiers aimed and fired at the vehicle when it failed to stop and the rounds struck and disabled the vehicle. The firing of the weapons caused the damage in a natural and continuous sequence of events unbroken by a new cause. Accordingly, the combat exclusion may apply and the analysis continues with the next prong. However, if the damage was caused by some intervening cause then the result is different. Hypothetically, assume that the Soldiers fired at the car and missed. However, the driver heard the shots and immediately stopped, exited the vehicle and put his hands up. Shortly after he exited the vehicle, one of the traffic control point signs blew over because the Soldiers forgot to weigh it down, and it dented his car. Here, the proximate cause of the damage is the failure of the Soldiers to properly weigh down the sign. So, even though there is evidence of physical violence related to resisting a perceived enemy, the physical violence was not the proximate cause of the damage. The damage occurred outside the context of resisting or attacking an enemy or preparing for immediate combat with an enemy. Accordingly, the claim would not be excluded as combat and the analysis would end.

D. Prong 4: Criminal Conduct (Acts that are Contrary to the Law or Established Operating Procedures)

Prong four requires examination of whether the act of physical violence that gave rise to the claim was criminal in nature. Now that it has been determined that the claim involves purposeful physical violence that related to resisting or attacking an enemy, or preparing for immediate combat with an enemy and it has been determined that it was the proximate cause of the loss, the focus shifts to the nature of the act. Department of the Army Pamphlet 27-162 notes that “there is no bar to claims arising from off-duty or criminal conduct of U.S. Soldiers or

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<sup>157</sup> AR 27-20, *supra* note 19, para. 10-3.

civilian employees.”<sup>158</sup> In other words, if a Soldier commits a criminal act, there is no bar to paying claims that arise from that act. This is true, even if the criminal act involves physical violence that might otherwise be considered combat. Criminal activity that involves physical violence is not the same as combat. Department of the Army Pamphlet 27-162 specifically addresses numerous instances where the combat exclusion applies, but does not extend the scope of the combat exclusion to cover criminal acts, regardless of their nature, that occur during combat operations.<sup>159</sup> Because DA Pamphlet 27-162 specifically recognizes that there is no bar to claims arising from criminal conduct of U.S. Soldiers and does not extend the scope of combat exclusion to exclude such claims, one must conclude that such claims are payable. This interpretation of the language of DA Pamphlet 27-162 is also the only interpretation that is in line with the purpose of the FCA.<sup>160</sup> Accordingly, claims filed in response to the criminal acts of Soldiers or civilian employees of a U.S. military department that occurred during combat operations should not be excluded as combat.

Unfortunately, due to the complex legal environments found in most military operations, it is often difficult to identify what is and is not a criminal act. In most operational environments, acts that are contrary to the law may include acts that are in violation of the UCMJ, in violation of local law, in violation of international law or the law of war, or in violation of international agreements.<sup>161</sup> Additionally, in some cases, acts that violate well-established operating procedures may also be categorized as criminal if the operating procedures were issued as part of a lawful or general order.<sup>162</sup>

For the most part, experienced FCCs will have a sufficient understanding of the legal environment to identify criminal acts during the claims adjudication process. However, not all FCCs have sufficient experience or legal training to recognize all acts that are contrary to the law. In situations where this is the case, the FCC should begin by scrutinizing the claims packet for indications that the rules of engagement were not complied with. As a general rule, instances of

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<sup>158</sup> DA PAM. 27-162, *supra* note 21, para. 10-3c.

<sup>159</sup> *Id.* para. 10-3b.

<sup>160</sup> See 10 U.S.C. § 2734 (2006).

<sup>161</sup> See INT’L. & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK chs. 2, 15 (2006) [hereinafter OPERATIONAL LAW HANDBOOK].

<sup>162</sup> UCMJ art. 92 (2006), OPERATIONAL LAW HANDBOOK, *supra* note 161, at 196.

noncompliance with the rules of engagement are often indicative of a violation of law that requires further investigation because the rules of engagement incorporate principles of international law as well as customary and conventional law principles regarding the right of self-defense.<sup>163</sup>

The rules of engagement are issued by competent military authority to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with other forces encountered.<sup>164</sup> In other words, the rules of engagement are “the primary tool used to regulate the use of force.”<sup>165</sup> Well-drafted rules of engagement are simply written to ensure that they are understandable, memorable, and applicable.<sup>166</sup> When properly drafted, the rules of engagement should provide clear guidance with regards to what actions to take when confronted with a threat.<sup>167</sup>

Any indications that the rules of engagement were not complied with is cause for concern, reporting, and additional investigation.<sup>168</sup> By using instance of noncompliance with the rules of engagement as the basis for reporting possible violations of the law and initiating additional investigations, this framework can be employed by FCCs with limited experience and it is adaptable enough to be applied to future conflicts that involve either more or less restrictive rules of engagement. It is important to note that not all violations of the rules of engagement equate to an illegal act.<sup>169</sup> Foreign Claims Commissions should simply use the

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<sup>163</sup> OPERATIONAL LAW HANDBOOK, *supra* note 161, at 85.

<sup>164</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DICTIONARY OF ASSOCIATED TERMS 476 (12 Apr. 2001).

<sup>165</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 1-02, OPERATIONAL TERMS AND GRAPHICS 1-65 (Sept. 2004) [hereinafter FM 1-02].

<sup>166</sup> OPERATIONAL LAW HANDBOOK, *supra* note 161, at 79.

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

<sup>168</sup> Department of Defense Directive 2311.01(E) requires that all suspected or alleged violations of the law be reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action. U.S. DEP’T OF DEFENSE, DIR. 2311.01e, DOD LAW OF WAR PROGRAM (9 May 2006) [hereinafter DODD 2311.01e]. Possible violations of the portions of the Rules of Engagement that relate only to fire control measures or other administrative controls generally do not require additional investigation unless otherwise directed. Control measures are defined as directives given graphically or orally by a commander to subordinate commands to assign responsibilities, coordinate fires and maneuver, and control combat operations. FM 1-02, *supra* note 165, at 1-45.

<sup>169</sup> Rules of engagement often incorporate political considerations designed to achieve operational objectives. Violations of these political considerations will not necessarily equate to an illegal act. OPERATIONAL LAW HANDBOOK, *supra* note 161, at 86.

rules of engagement as a starting point for analyzing claims under this prong. When an FCC identifies a possible violation of the rules of engagement, that FCC should consult with attorneys in the military justice section and the international and operational law section to determine if reporting and additional investigation is warranted.

Proper application of this prong should not result in any additional unnecessary investigations, because current policy requires investigation of any violation of the law of war.<sup>170</sup> When an FCC reports an act that is contrary to the law as part of this analysis, that FCC is merely complying with the requirements of DoDD 2311.01(E), which requires reporting and investigation of suspected or alleged violations of the law of war, for which there is credible information.<sup>171</sup> However, it is important for the FCC involved to perform some preliminary investigation to ensure that the claimant's allegations do have some merit to avoid needless investigations. If no credible information exists, then no additional investigation should be conducted.<sup>172</sup>

Because this is a somewhat novel concept with regard to foreign claims, an example may be helpful. In Iraq, in June 2005, an AR 15-6 investigation was convened to investigate an engagement between elements of the 3d Infantry Division and a suspected insurgent group.<sup>173</sup> During the engagements, a platoon was ordered to clear a house in the engagement area.<sup>174</sup> The house was suspected by the Iraqi police of concealing enemy insurgents.<sup>175</sup> According to the investigation, the Iraqi Police informed the U.S. Soldiers that they had taken fire from the rooftop at 2019 hours.<sup>176</sup> The assault on the house by U.S. Soldiers did not commence until 2243 hours.<sup>177</sup> During the one-and-a-half-hour period prior to the assault, no U.S. Soldiers observed direct fire coming from the house and no contact was made with anyone inside.<sup>178</sup> The plan, according to the findings of the AR 15-6 investigating officer, was to crash through the outside gate of the house with a high mobility multi-

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<sup>170</sup> DoDD 2311.01e, *supra* note 168.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Recommendations for AR 15-6 Investigation on 3d PLT, A Co, 184 IN for 01 March 05 Manslaughter Allegations, [http://www.aclu.org/natsec/foia/pdf/Army15461\\_15487.pdf](http://www.aclu.org/natsec/foia/pdf/Army15461_15487.pdf) (last visited Jan. 9, 2009).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

purpose wheeled vehicle (HMMWV), throw a fragmentation grenade into the courtyard, and then suppress the second story of the house with M240B machine gun fire while members of the platoon cleared the first floor of the house.<sup>179</sup> The possibility of noncombatants in the house was never addressed by the unit, despite the lack of evidence that the house was occupied by insurgents.<sup>180</sup> During the house-clearing operation, one local national male was killed and one local national female was injured.<sup>181</sup> Both individuals were unarmed.<sup>182</sup> The AR 15-6 investigating officer found that the unit did not comply with the rules of engagement because it did not positively identify the targets in the house before firing and that the amount of force utilized during the house clearing operation was not necessary and proportionate given the nature of the objective.<sup>183</sup> Generally speaking, the rules of engagement incorporate the international law principle of distinction by requiring positive identification of a target prior to engaging.<sup>184</sup> The principle of distinction requires that combatants be distinguished from non-combatants.<sup>185</sup> An FCC reviewing this claim would likely question the compliance with the rules of engagement when it became clear that two unarmed local nationals were killed during a house clearing operation involving no contact with any insurgent elements. Anyone with this information would automatically wonder if the targets were positively identified prior to being engaged. This clearing operation is an example of a situation where the FCC, if presented with a claim containing this information, would want to perform additional investigation to determine if the rules of engagement were complied with. If the FCC has credible information that the facts, as described above, are true, then this incident should be reported and investigated as required by DoDD 2311.01e.<sup>186</sup>

Now that the fourth prong has been explained, it can be applied to the introductory scenario to complete the analysis of this hypothetical claim. Focusing only on the portion of the claim involving the Soldiers

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Major General William B. Caldwell, Caldwell: Rules of Engagement Not Vague, Feb. 9, 2007, available at [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=9810&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=9810&Itemid=128).

<sup>185</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol I) art. 48, June 8, 1977.

<sup>186</sup> DoDD 2311.01e, *supra* note 168.

who fired at the car, we can conclude that an act of physical violence occurred and that the act related to resisting an attack from a perceived enemy. Additionally, analysis of prong three indicates that the shooting was the proximate cause of the damage of the car and the deaths and injuries of the passengers. Prong four now requires examination of the nature of the act to determine if the Soldier's acts were criminal. The starting point for this analysis begins with an examination of the claim to determine if the rules of engagement were complied with. The initial engagement appears to comply with the rules of engagement because the Soldiers used force, after following force escalation procedures, to engage and eliminate a perceived threat. Accordingly, there does not appear to be any issue with the initial engagement that would require additional investigation or reporting. Any claims resulting from the initial engagement would be excluded as combat.

Unfortunately, the second engagement is more problematic. According to the claims packet, after the initial engagement, the vehicle rolled to a stop approximately 150 meters from the checkpoint, at which time the Soldiers re-engaged the vehicle firing a total of 200 rounds. An FCC examining this claim would likely conclude that re-engagement of the vehicle after it had stopped violated the rules of engagement because the enemy threat had been eliminated. The driver and the occupants of the vehicle were no longer exhibiting any hostile intent or participating in any hostile acts. Firing 200 additional rounds at the stationary vehicle was probably a disproportionate response. Because of the presence of a suspected violation of the rules of engagement, the FCC should conduct additional investigation to ensure that the information is credible. If the information is credible, then the FCC should consult with attorneys assigned to the military justice section and the international and operational law for advice whether additional investigation and reporting under DoDD 2311.01(E) is appropriate. If additional investigation is performed and the investigating officer determines that the second engagement was a criminal act because it was in violation of the law of war, the UCMJ, or other applicable law, then the combat exclusion should not be applied to any death, injury or loss resulting from that portion of the claim.<sup>187</sup>

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<sup>187</sup> This conclusion assumes that the conclusion of the investigation officer, assigned to investigate this incident, reaches the same conclusion that the FCC did in this case; that the Soldier's responded disproportionately to the threat when they fired over 200 hundred rounds at the vehicle. See Foreign Claim 05-IF9-T-022-20 Apr. 2006, *supra* note 3.

#### E. Other Considerations: Interest of the United States and Public Policy Examination

The framework of analysis explained above focuses on the mechanics of the combat exclusion, but other considerations must also be addressed as part of any claims adjudication process. Specifically, FCCs must always consider whether or not payment of the claim is in the best interest of the United States and whether or not payment is supported by public policy.<sup>188</sup> There may be numerous reasons that payment of a claim is not in the best interest of the United States, or is not supported by public policy, but there are a few reasons that relate specifically to the combat exclusion analysis. Foreign Claims Commissions should essentially perform this portion of the analysis twice: first as part of the combat exclusion analysis, and again with a broader focus if it is determined that the combat exclusion does not apply.

Army Regulation 27-20 specifically notes that claims are not payable if the payment is not in the best interest of the United States, is contrary to public policy, or otherwise contrary to the basic intent of the governing statute.<sup>189</sup> However, the regulation does not offer further explanation. Despite the lack of clarifying language in the regulations, we can find additional guidance from the discussion in *Koohi v. United States*.<sup>190</sup> Specifically, the court's discussion on the reasons for the existence of a combat exclusion is extremely relevant.<sup>191</sup>

As previously discussed, the *Koohi* court noted three principal reasons for the combatant activities exception. First, the court pointed out that Congress did not want our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces.<sup>192</sup> Second, the court noted that tort law is based in part on a desire to secure justice.<sup>193</sup> To single out a few for compensation on the basis that they have suffered from the negligence of our military during combat, as opposed to the overwhelming and pervasive violence which each side intentionally inflicts on the other, is not logical.<sup>194</sup> Finally, the court concludes that

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<sup>188</sup> AR 27-20, *supra* note 19, para. 10-4h.

<sup>189</sup> *Id.*

<sup>190</sup> 976 F.2d 1328 (9th Cir. 1992).

<sup>191</sup> *Id.* at 1334, 1335.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1335.

<sup>194</sup> *Id.*

servicemen should not be punished for injuring members of the enemy military or civilian population as a result of actions taken during combat.<sup>195</sup> Again, it is important to note that the *Koohi* case dealt with the combat activities exception of the FTCA. However, the same justifications that the *Koohi* court used to support the existence of the FTCA's combat activities exclusion also support the existence of the combat exclusion of the FCA.

While it is unlikely that a claim will satisfy all four prongs of the combat exclusion analysis and then fail the interest of the United States/public policy test, it is possible. Circumstances may exist where a FCC determines that a claim should not be excluded as combat, yet payment of a claim is counter to the principles discussed by the court in *Koohi*.<sup>196</sup> In this situation, denial of the claim may be warranted because it is not in the best interests of the United States or counter to public policy.

#### F. Review of the Framework of Analysis

The framework of analysis described above is not meant to be a formulaic approach to adjudication of foreign claims. Instead, this framework is designed to provide judge advocates with a method to examine the combat elements of a claim that is based on case law and applicable claims regulations. Ultimately, implementation of such a framework should increase consistency with regards to how the combat exclusion is applied and allow judge advocates to better articulate the reasons for why the combat exclusion does or does not apply to a certain claim. Differences in interpretation will continue to exist so long as the statutory and regulatory definitions of combat remain imprecise, but these differences can be minimized.

We know from the court's decision in *Koohi* that there are legitimate reasons for employing a combat exclusion and that, without such an exclusion, we simply could not afford to operate a foreign claims program during any sort of high intensity conflict.<sup>197</sup> In war, innocent people will suffer and private property is frequently damaged and

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1334, 1335.

<sup>197</sup> *Id.* at 1334, 1336.

destroyed.<sup>198</sup> This is an unavoidable consequence of combat operations. Our foreign claims program will always be a compromise between the desire to create good will and the need to limit U.S. financial obligations. Foreign Claims Commissions must ensure that the program is operated in a manner that is consistent with established legal principles and that when a claim is denied it is not done so in an arbitrary and capricious manner that undermines the purpose of the FCA.<sup>199</sup> No claimant will ever be pleased to hear that his claim has been denied, but real problems occur when the claimant feels that he has been treated unfairly.<sup>200</sup> This perception of unfairness and arbitrary application is also what attracts negative public attention to our FCA as evidenced by the *New York Times* articles mentioned above.<sup>201</sup> These articles do not criticize the existence of the combat exclusion; rather they criticize the manner in which it is applied.<sup>202</sup> If judge advocates would simply consistently analyze and apply the combat exclusion, the negative public attention and the perceptions of arbitrariness and injustice would be significantly reduced. The legal framework proposed here is not the perfect solution that will solve all the problems associated with the combat exclusion of the FCA, but it will increase effectiveness and provide guidance to judge advocates where traditionally little guidance has existed.

### VIII. Conclusion

Despite the creation of CERP, the foreign claims system remains an important fiscal tool for commanders in today's operational environment. Over half a century after its creation, the FCA continues to fulfill the purposes for which it was created. However, the effectiveness of the FCA in any operational environment is dependent on the FCCs that employ it. Arbitrary and inconsistent application of the combat exclusion can undermine the purpose of the FCA and actually create dissension and negative perceptions of U.S. forces. In counterinsurgency operations like Iraq and Afghanistan, any act that unnecessarily damages the credibility and image of U.S. forces can have far reaching negative effects. This is why it is so critical for FCCs to employ some sort of framework to analyze claims involving combat. By focusing the combat

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

<sup>199</sup> *See supra* Part II.B.

<sup>200</sup> Author's Personal Experience, *supra* note 2.

<sup>201</sup> *See supra* Part V.

<sup>202</sup> *See* Cloud, *supra* note 83; Tracy, *supra* note 81.; von Zielbauer, *supra* note 87.

exclusion analysis on the presence of physical violence, the context of physical violence, proximate cause, and lawfulness, FCCs will employ a common approach and reduce instances of inaccurate or improper application of the FCA. Most judge advocates will still experience times when they feel that the exclusion is unfair or unnecessarily strict, but the combat exclusion does place a necessary limitation on the claims paid under the FCA. It is the job of judge advocates to make sure that the combat exclusion is applied fairly and consistently so that the statutory purpose of the FCA is upheld and the effectiveness of the program is maximized by only applying the combat exclusion when appropriate.

Appendix

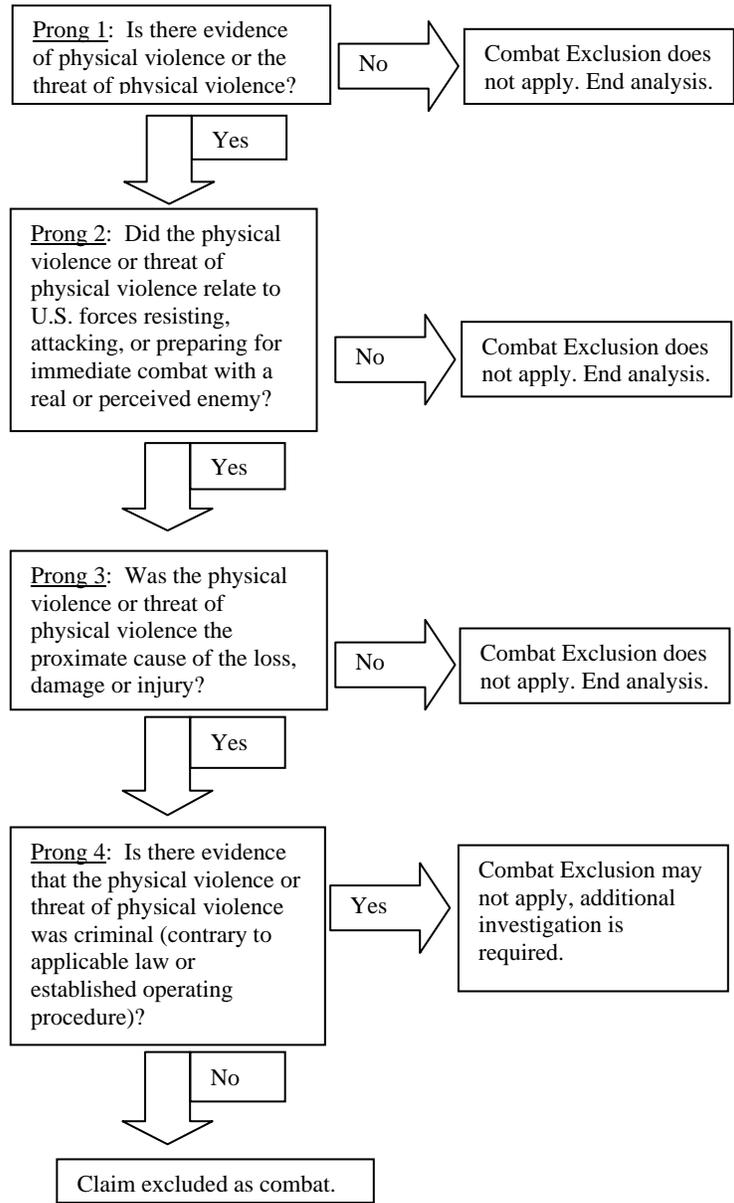


Fig. Combat Exclusion Framework for FCCs

## WHO QUESTIONS THE QUESTIONERS? REFORMING THE VOIR DIRE PROCESS IN COURTS-MARTIAL

MAJOR ANN B. CHING\*

*The jury, passing on the prisoner's life,  
May in the sworn twelve have a thief or two  
Guiltier than him they try.*<sup>1</sup>

### I. Introduction

The above quote, from Shakespeare's *Measure for Measure*, exemplifies an inherent danger in a trial by jury—jurors who are incapable of judging a case in a fair and impartial manner. Both the prosecution and defense want to know whether any jurors are biased, predisposed to a certain result, or otherwise unqualified to sit in judgment on “the prisoner’s life.”<sup>2</sup> Ferreting out unqualified members is accomplished through voir dire, which has been called “the start of a criminal trial,”<sup>3</sup> “a valued and integral part of the adversary process,”<sup>4</sup> and “the most important aspect of the trial.”<sup>5</sup>

Indeed, an impartial jury is a constitutional right.<sup>6</sup> Although voir dire itself is not mentioned in the Constitution, courts have long recognized it

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<sup>1</sup> WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 2.

<sup>2</sup> *Id.*

<sup>3</sup> Editorial, *Trials: The Art of Voir Dire*, TIME, Apr. 7, 1967, available at <http://www.time.com/magazine/article/0,9171,843543,00.html> [hereinafter Editorial] (quoting F. Lee Bailey) (internal quotations omitted).

<sup>4</sup> AM. BAR ASS’N, AM. JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS 73 (2005) [hereinafter ABA PRINCIPLES] (citing *Swain v. Alabama*, 380 U.S. 202, 218–19 (1965)).

<sup>5</sup> Sydney Gibbs Ballesteros, *Don’t Mess with Texas Voir Dire*, 39 HOUS. L. REV. 201, 204 (2002).

<sup>6</sup> See U.S. CONST. amend. VI (guaranteeing, *inter alia*, “an impartial jury of the State and district wherein the crime shall have been committed”).

as the means to achieve the right to an impartial jury.<sup>7</sup> Given that this process is the defendant's best—and perhaps only—chance to ensure an impartial jury, voir dire is an integral aspect of the criminal justice system.

Despite its the vital nature, several jurisdictions significantly limit counsel's ability to participate in voir dire. Notably, in courts-martial the military judge completely controls this key aspect of the trial, with broad discretion to limit or deny direct questioning by counsel.<sup>8</sup> This procedure implicates the competing interests of judge and counsel during voir dire; generally speaking, judges are concerned about efficiency and protecting the record, while counsel may view voir dire as their first opportunity to present their case to the members.<sup>9</sup> Recent military appellate cases, however, have identified some weaknesses in a military judge-controlled approach, going so far as to find abuse of discretion in the military judge's denial of defense counsel's questions.<sup>10</sup>

Having wrestled with similar issues, civilian jurisdictions throughout the United States take various approaches toward the level of control judges and counsel exert over voir dire.<sup>11</sup> Several states follow the military and federal courts' method and place voir dire entirely under the judge's control.<sup>12</sup> Others allow counsel greater control, in some instances even creating a statutory right to counsel-conducted voir dire.<sup>13</sup> States that grant control to counsel recognize several significant legal and policy interests that favor this approach. Chief among these are guaranteeing a defendant's constitutional right to an impartial jury by ensuring that counsel have the most thorough and effective means of challenging biased venire members. The military justice system can benefit from examining these state approaches and adopting their best practices.<sup>14</sup>

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<sup>7</sup> See, e.g., *Pointer v. United States*, 151 U.S. 396, 408 (1894).

<sup>8</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912 (2008) [hereinafter MCM].

<sup>9</sup> See, e.g., Jackson Howard, *Lawyer-Conducted Voir Dire is a Seventh Amendment Right*, VOIR DIRE, Summer 1995, at 40, 40.

<sup>10</sup> See, e.g., *United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005); *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996); *United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993). These cases are discussed further in Part III, *infra*.

<sup>11</sup> See *infra* notes 139–68 and accompanying text.

<sup>12</sup> See *infra* notes 152–60 and accompanying text.

<sup>13</sup> See *infra* notes 164–68 and accompanying text.

<sup>14</sup> See *infra* notes 194–204 and accompanying text.

This article explores the history and purpose of voir dire in the United States, and its crucial role in ensuring a defendant's constitutional right to an impartial jury. Sections III and IV examine the different approaches to voir dire used in federal and state courts, emphasizing the effectiveness of those states that allow counsel to participate significantly in the process.<sup>15</sup> Section V analyzes the applicability of these approaches to the military, keeping in mind notable differences between military and civilian courts, and recommends an amendment to the Rules for Courts-Martial to allow counsel more control over voir dire.<sup>16</sup> Section V further addresses the key counterarguments against changing voir dire in courts-martial, and, in turn, argues that reform can actually improve the process for counsel, judges, and the accused.<sup>17</sup> A thorough examination of this "most important aspect of [a] trial"<sup>18</sup> and its place in the military justice system will demonstrate that, rather than diminishing the efficient administration of justice, granting counsel a statutory right to participate in voir dire will benefit all parties.<sup>19</sup> First, however, this article will step back a few hundred years and examine how voir dire evolved into its current form in our justice system.

## II. Voir Dire: Purpose and Practice

A brief discussion of the evolution of the jury trial sets the backdrop for a greater appreciation of the purpose of voir dire. Prior to the thirteenth century, accusatorial trial practices existed throughout Europe, such as trial by ordeal or trial by battle.<sup>20</sup> Over time, inquisitorial practices and the use of juries became more widespread, although certain practices we now take for granted—such as not punishing jurors for returning a verdict of not guilty—did not develop in England until the late seventeenth century.<sup>21</sup>

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<sup>15</sup> *Infra* notes 63–168 and accompanying text.

<sup>16</sup> *Infra* notes 169–204 and accompanying text.

<sup>17</sup> *Infra* notes 205–34 and accompanying text.

<sup>18</sup> Ballesteros, *supra* note 5, at 204.

<sup>19</sup> *Infra* notes 169–234 and accompanying text.

<sup>20</sup> See LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE* 4–5 (1999). In a trial by ordeal, "[t]he accused underwent a physical trial . . . Cold water, boiling water, and hot iron were the principal ordeals, all of which the clergy administered." *Id.* at 5. It was believed that the innocent would better survive the ordeal. *Id.* In trial by battle, it was thought that the innocent party would prevail, regardless of the circumstances: "Right, not might, would therefore conquer." *Id.* at 6.

<sup>21</sup> See *id.* at 49. This rule was not put into place until 1670, when a juror named Edward Bushell sought a writ of habeas corpus after being confined for "influencing" a jury to

Across the Atlantic, the proper function of a jury became a topic of heated debate between Federalists and Anti-Federalists in 1787.<sup>22</sup> The draft Constitution presented to the thirteen states provided for a right to trial by jury in criminal matters, but allowed for that trial to take place anywhere in the state where the crime occurred.<sup>23</sup> The Anti-Federalists opposed this viewpoint, arguing that only a local jury (drawn from the “vicinage”) could properly dispense justice.<sup>24</sup> Members of the vicinage were thought to be those in the best position to already have an opinion as to the accused’s character, some knowledge of what had occurred, and a greater stake in the outcome of the case.<sup>25</sup> Naturally, the Federalist counterpoint was that a just verdict was one delivered by a disinterested group, free of prior knowledge or bias.<sup>26</sup> The Federalist position prevailed; thus, the concept of trial by an impartial jury displaced the traditional practice of juries of the vicinage.<sup>27</sup>

From this requirement of an impartial jury evolved the practice of voir dire.<sup>28</sup> In modern usage, voir dire refers to the formal process by which judges and attorneys question prospective jurors to determine their qualifications and ability to serve on a jury.<sup>29</sup> Although not specifically referenced in the Constitution, voir dire finds its roots in the Sixth and Seventh Amendments.<sup>30</sup> The Sixth Amendment provides, *inter alia*, that criminal defendants have the right to “an impartial jury of the State and

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return a not guilty verdict. *Id.* at 57–61. The lord chief justice of England, Lord Vaughn, ordered his release, stating in his opinion that such action “subverted the functions of the jury.” *Id.* at 61.

<sup>22</sup> *Id.* at 22–36.

<sup>23</sup> *Id.* at 22.

<sup>24</sup> *Id.* at 22–28.

<sup>25</sup> *Id.* at 27–29. One Anti-Federalist, James Winthrop, argued that “jurors from afar did not know whether the accused was ‘habitually a good or bad man.’” *Id.* at 27.

<sup>26</sup> *Id.* at 25–26. As Massachusetts delegate to the Constitutional Convention Christopher Gore stated, “The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable.” *Id.* at 26 (internal citations omitted).

<sup>27</sup> *Id.* at 36–38. As discussed *infra*, the actual language regarding juries drawn from the state (not the vicinage) became part of the Bill of Rights. *See* U.S. CONST. amend. VI.

<sup>28</sup> Despite the creative pronunciations heard in courtrooms across the country, *voir dire* comes from Old French, and literally means “to speak the truth.” BLACK’S LAW DICTIONARY 1569 (7th ed. 1999).

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.,* Rachel Harris, *Questioning the Questions: How Voir Dire Is Currently Abused and Suggestions for Efficient and Ethical Use of the Voir Dire Process*, 32 J. LEGAL PROF. 317, 317–18 (2008) (discussing the creation of the right to a jury in the U.S. Constitution).

district where in the crime shall have been committed.”<sup>31</sup> Similarly, the Seventh Amendment guarantees an impartial jury in any civil dispute “where the value in controversy shall exceed twenty dollars.”<sup>32</sup> These rights also apply to criminal and civil proceedings in states, through the Due Process clause of the Fourteenth Amendment.<sup>33</sup>

To give these rights meaning, courts use voir dire to determine whether a potential juror is impartial. Following questioning, whether by judge alone, lawyers, or both, parties have the opportunity to request the court to remove prospective jurors.<sup>34</sup> Although the exact method varies among jurisdictions, typically each side may challenge jurors for cause as well as exercise some number of peremptory challenges, for which no stated cause is required.<sup>35</sup>

Although this method seems simple at first glance, in practice judges and lawyers wrestle with the purpose of voir dire. This tension between judges and counsel is not new; an 1891 opinion from the Illinois Supreme Court aptly illustrates the issues that trouble courts to this day.<sup>36</sup> In *Donovan v. People*, the court reversed and remanded a criminal case because of the judge’s denial of the defense request to personally question the jurors.<sup>37</sup> In denying this request, the trial judge stated, “Except you examine the jurors for cause through the mouth of the court, you cannot examine them at all.”<sup>38</sup> In response, the Illinois Supreme Court stated, “To deprive a party, whether the people or defendant, of an intelligent exercise of [peremptory challenges], is practically to take

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<sup>31</sup> U.S. CONST. amend. VI.

<sup>32</sup> *Id.* amend. VII.

<sup>33</sup> *Id.* amend. XIV, sec. 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”). All states provide a constitutional right to jury trials, although they differ in the specific details as to how that right shall be guaranteed. *See, e.g.*, VA. CONST. art. I, sec. 8 (providing that “unanimous consent” is required for a jury to find a criminal defendant guilty, and specifying the number of persons to serve on the jury).

<sup>34</sup> *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 1093 (1999).

<sup>35</sup> *See id.* One exception to the “no cause required” rule, however, is the *Batson* challenge. *See* *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids the exercise of peremptory challenges to eliminate jurors based solely on race).

<sup>36</sup> *Donovan v. People*, 28 N.E. 964 (Ill. 1891). In *Donovan*, the trial court in a grand larceny case denied counsel’s request to personally examine jurors, both for cause and for exercise of peremptory challenges, following the court’s group voir dire. *Id.* at 965.

<sup>37</sup> *Id.* at 966.

<sup>38</sup> *Id.* at 965.

away the right; and every lawyer experienced in the trial of causes knows that to its intelligent exercise a reasonable examination of the juror is frequently absolutely necessary.”<sup>39</sup> The court acknowledged the State’s concern that “exercise of this right by counsel has led to great abuse, and that ‘honest and fair-minded men,’ compelled to attend as jurors, have left the box, after being questioned, feeling as if they had fortunately escaped conviction of some grave offense”; however, the court responded that it was “not disposed to give credence to this caustic criticism.”<sup>40</sup> As this opinion exemplifies, eighteenth-century appellate courts found themselves balancing the oft-competing interests of judges and lawyers concerning voir dire.

The debate continues in the twenty-first century. The American Bar Association (ABA), in its *Principles for Juries and Jury Trials*, states that “[v]oir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.”<sup>41</sup> Other commentators express this principle more firmly: “The *sole* purpose of voir dire is to determine, through questioning, whether any member is not qualified to sit on the court-martial.”<sup>42</sup> Naturally, this is the standard to which judges adhere; after all, these purposes relate directly to the concept of an impartial jury.

Any trial practitioner knows, however, that lawyers prepare for voir dire with several other purposes in mind. As voir dire is the only time that lawyers can potentially interact directly with jurors and discern potential biases, voir dire could make or break a case.<sup>43</sup> Although voir dire “is not to be used as a mini-trial, an opportunity to persuade jurors to a litigant’s point of view, or as a dress rehearsal,”<sup>44</sup> trial advocacy courses routinely coach lawyers on how to “establish rapport” and “preview themes” within the confines of permissible areas of examination.<sup>45</sup> For example, Professor Steven Lubet’s<sup>46</sup> *Modern Trial*

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 966.

<sup>41</sup> ABA PRINCIPLES, *supra* note 4, at 14.

<sup>42</sup> DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE* §15-10(A), at 825 (6th ed. 2004) (emphasis added).

<sup>43</sup> Editorial, *supra* note 3 (quoting famed trial attorney F. Lee Bailey: “If you do it [voir dire] carelessly, you can lose a case by the time you get a jury together.”).

<sup>44</sup> Phylis Skloot Bamberger, *Jury Voir Dire in Criminal Cases*, N.Y. STATE BAR ASS’N J., Oct. 2006, at 24.

<sup>45</sup> See, e.g., Patricia F. Kuehn, *Hot Tips for Jury Selection*, DCBA BRIEF ONLINE, Oct. 1999, <http://www.dcba.org/brief/octissue/1999/art21099.htm>. This article—one of hundreds, perhaps thousands, like it available on the Internet—offers tips such as “use

*Advocacy: Analysis and Practice* specifically cites “Developing Rapport” as one of five permissible purposes of voir dire.<sup>47</sup> Indeed, he describes it as a lawyer’s “best opportunity to develop a positive relationship with the jury,” as it is the “only opportunity to converse directly with” jurors.<sup>48</sup> Professor Lubet does caution practitioners to “avoid inconveniencing or embarrassing members of the venire panel,”<sup>49</sup> and to refrain from objectionable conduct such as contact with the venire,<sup>50</sup> improper questioning,<sup>51</sup> and “impermissible use of peremptory challenges.”<sup>52</sup> Nonetheless, his attitude toward voir dire reflects a wider range of permissible purposes than those envisioned by the American Bar Association or Professor Schlueter.<sup>53</sup>

Given that judges and lawyers approach the voir dire process with conflicting purposes, it is not surprising that some describe voir dire as “a tug-of-war between judges and lawyers with different agendas.”<sup>54</sup> One common complaint among trial lawyers is that judges are overly occupied with “administer[ing] justice in a timely and efficient manner.”<sup>55</sup> This factor is often a driving force behind judges’ decisions to limit, or even disallow, direct questioning of prospective jurors by lawyers. In fact, a 1994 survey of federal district court judges found that fifty percent agreed with the statement “Questioning of prospective

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this opportunity to establish a good rapport,” “[b]e aware of your facial expressions,” and [s]tart with non-threatening questions in order to relax the potential jurors.” *Id.*

<sup>46</sup> Professor Lubet is the Director of Northwestern’s Bartlitt Center on Trial Strategy; he “teaches courses on Legal Ethics, Trial Advocacy, and Narrative Structures.” Northwestern Law, Faculty Profiles: Steven Lubet, <http://www.law.northwestern.edu/faculty/profiles/stevenlubet/> (last visited Mar. 3, 2010).

<sup>47</sup> STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 515–24 (2d ed. 1997). The other purposes are: “Gathering Information,” “Challenges for Cause,” “Testing Reactions,” and “Obtaining Commitment.” *Id.* at 515–23. Note that Lubet defines “Obtaining Commitment” as “an opportunity to gain a commitment from each juror to be fair and to follow the law.” *Id.* at 523. This is not to be confused with questions designed to commit jurors to specific verdict-dispositive facts, whether actual or hypothetical, as discussed by one of the concurring opinions in *United States v. Nieto*, discussed *infra*. See *United States v. Nieto*, 66 M.J. 146, 151 (C.A.A.F. 2008) (Baker & Erdmann, JJ., concurring in the result).

<sup>48</sup> LUBET, *supra* note 47, at 524.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 525.

<sup>52</sup> *Id.* at 526.

<sup>53</sup> See *supra* notes 41–42 and accompanying text.

<sup>54</sup> Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, 47 *JUDGES’ J.* 1 (Winter 2008).

<sup>55</sup> *Id.*

jurors by counsel takes too much time,” while only four percent agreed that counsel-conducted voir dire “[is] less time consuming than voir dire conducted entirely by the judge.”<sup>56</sup> Although timeliness is a laudable goal, it becomes problematic when it leads to denial of time-consuming, but valuable, procedures like individual voir dire.<sup>57</sup>

On the other hand, some judges believe that counsel waste time and create appellate issues through improper questioning.<sup>58</sup> When asked if counsel-conducted voir dire “[r]esults in counsel using voir dire for inappropriate purposes (e.g., to argue their case, or simply to ‘befriend’ jurors),” sixty-seven percent of federal judges agreed.<sup>59</sup> This point of view is not unique to the federal judiciary. For example, in advocating against New York’s attorney-controlled approach, one commentator described the system as “extremely time consuming” and fraught with the danger of “inappropriate trial arguments to the venire.”<sup>60</sup> This point of view was recently echoed by a military judge, who stated that counsel “ask questions that are (1) confusing; (2) already covered by the [military judge], and (3) misstate the law.”<sup>61</sup> These comments reflect legitimate concerns regarding lawyer-controlled voir dire.

The competing approaches and goals of judges and counsel in the voir dire process set the stage for the issues discussed further in this article. As the next section explains, military judges exert a great deal of control

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<sup>56</sup> Memorandum from John Shapard & Molly Johnson, Fed. Judicial Ctr., to Advisory Comm. on Civil Rules & Advisory Comm. on Criminal Rules 4 (Oct. 4, 1994), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/0022.pdf/\\$file/0022.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/0022.pdf/$file/0022.pdf) [hereinafter Shapard & Johnson Memo].

<sup>57</sup> For example, in a case discussed *infra* at Part III, the Court of Appeals for the Armed Forces held that the military judge abused his discretion by refusing to reopen voir dire for the civilian defense counsel to recall three members to question them further about their relationship with trial counsel. One reason the military judge denied this request was that he thought “there’s been enough that’s been brought out [concerning the relationship].” *United States v. Richardson*, 61 M.J. 113, 116 (C.A.A.F. 2005). Although not explicitly discussed, the military judge’s desire to conclude voir dire seems implicit in his actions.

<sup>58</sup> See Shapard & Johnson Memo, *supra* note 56, at 4.

<sup>59</sup> *Id.*

<sup>60</sup> Emily F. Moloney, *As Good as it Gets: Why Massachusetts Should Not Adopt an Attorney-Conducted Voir Dire Process for Civil Trials*, 39 SUFFOLK L. REV. 1047, 1062 (2006).

<sup>61</sup> E-mail from Colonel Timothy Grammel, U.S. Army, Military Judge, to author (Feb. 26, 2010, 10:15 EST) [hereinafter Grammel E-mail].

over voir dire, much more so than in many state jurisdictions.<sup>62</sup> Although it is appropriate for the court to oversee this process, some recent appellate cases demonstrate that sometimes too much control interferes with the accused's right to an impartial panel and a fair trial.

### III. Voir Dire in the Military Justice System

#### A. Voir Dire Practice in Courts-Martial

The Sixth Amendment right to a jury trial in criminal cases does not apply to the military.<sup>63</sup> Nonetheless, the Uniform Code of Military Justice (UCMJ) provides for a court consisting of members who adjudicate the guilt or innocence of the accused.<sup>64</sup> Once granted this statutory right, the Fifth Amendment Due Process clause guarantees that the accused also has the constitutional right to an impartial panel.<sup>65</sup> As in federal courts, however, the accused has no absolute right—constitutional, statutory, or otherwise—to conduct voir dire.<sup>66</sup>

Article 41, UCMJ, and Rule for Courts-Martial (RCM) 912 govern the actual practice of voir dire at courts-martial.<sup>67</sup> Before the parties even enter the courtroom, defense counsel often have access to panel questionnaires.<sup>68</sup> Although not required in every case, as a matter of practice panel questionnaires are routinely used to shape and expedite voir dire.<sup>69</sup> Rule for Courts-Martial 912(a)(1) provides several required questions concerning the member's potential bias (actual or implied).<sup>70</sup>

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<sup>62</sup> See Mize & Hannaford-Agor, *supra* note 54, at 4 (citing a study that shows a majority of states "lean toward attorney-conducted voir dire").

<sup>63</sup> See *United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no Sixth Amendment right to trial by jury").

<sup>64</sup> See UCMJ art. 25 (2008) (describing the requirement and qualification of court-martial members); MCM, *supra* note 8, R.C.M. 501(a) (members are "courts-martial personnel").

<sup>65</sup> U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

<sup>66</sup> See *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) ("Neither the UCMJ nor the *Manual for Courts-Martial*, United States (2000 ed.), gives the defense the right to individually question the members.").

<sup>67</sup> UCMJ art. 41; MCM, *supra* note 8, R.C.M. 912.

<sup>68</sup> MCM, *supra* note 8, R.C.M. 912(a)(1) (stating that trial counsel may, and upon request of defense, shall, submit questionnaires to members).

<sup>69</sup> *Id.* R.C.M. 912(a)(1) discussion ("Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges.").

<sup>70</sup> *Id.* R.C.M. 912(a)(1). Actual and implied bias are discussed at *infra* notes 85–99 and accompanying text.

The trial counsel is not prohibited from going beyond these questions to explore potentially relevant sources of bias.<sup>71</sup> Thus, trial and defense counsel can get a head start on voir dire by carefully examining the questionnaires.

Although not required by the *Manual for Courts-Martial*, pretrial conferences (802 sessions) among counsel and the military judge provide an opportunity to discuss voir dire questions.<sup>72</sup> As stated in the Discussion to RCM 802(a), “conduct of voir dire” is a matter “ultimately in the military judge’s discretion.”<sup>73</sup> Thus, to the extent the topic is not discussed in local court rules, the military judge may explain how she will conduct voir dire and what role the counsel will play in the process. In addition, military judges may require counsel to submit questions in writing before the trial.<sup>74</sup>

By the time the parties get to the courtroom, the actual mechanics of voir dire are left to the military judge’s discretion. The *Military Judges’ Benchbook* provides twenty-eight standard questions for the military judge to ask during group voir dire.<sup>75</sup> In addition, RCM 912(d) provides the following guidance:

(d) *Examination of members.* The military judge *may* permit the parties to conduct the examination of the members or may personally conduct the examination. In the latter event the military judge *shall* permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A

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<sup>71</sup> *Id.*

<sup>72</sup> *See id.* R.C.M. 802(a) (“After referral, the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.”). The Discussion to RCM 802(a) specifically lists “conduct of voir dire” as an item that may be appropriate for discussion. *Id.* R.C.M. 802(a) discussion.

<sup>73</sup> *Id.* R.C.M. 802(a) discussion.

<sup>74</sup> *See, e.g.*, E-mail from Colonel David Conn, U.S. Army, Military Appellate Judge, to author (Feb. 25, 2010, 15:17 EST) [hereinafter Conn E-mail] (describing his requirement, during his tenure as a trial judge, for counsel to “submit their exact questions in advance” for his approval).

<sup>75</sup> U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK 40–42 (1 Jan. 2010) [hereinafter DA PAM. 27-9].

member may be questioned outside the presence of other members when the military judge so directs.<sup>76</sup>

As the emphasized words indicate, the only time the military judge must permit questions for counsel is when the judge personally conducts voir dire. Even in that instance, however, the judge has the discretion to consider whether the supplemental examination is “proper,” and may also choose to ask supplemental questions personally. Thus, RCM 912 does not prohibit a military judge from conducting voir dire in such a manner that lawyers never address the members.<sup>77</sup> Ultimately, the appellate courts will review a military judge’s decisions related to voir dire for abuse of discretion.<sup>78</sup> Questioning the panel is only one part of the process, however; counsel ultimately use information gained through questioning to challenge members whom they believe are biased or otherwise unqualified.<sup>79</sup> The next section discusses the process by which counsel may challenge panel members.

## B. Challenging Panel Members

In courts-martial, trial and defense counsel each have unlimited challenges for cause and one peremptory challenge.<sup>80</sup> Looking first at challenges for cause, RCM 912(f)(1) provides fourteen bases for such challenges.<sup>81</sup> The first thirteen are nondiscretionary—in other words, if the panel member falls into one of those categories, the member must be removed.<sup>82</sup> Examples include accusers, witnesses, counsel, or someone who has acted as the convening authority in the case.<sup>83</sup> Discretionary

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<sup>76</sup> MCM, *supra* note 8, R.C.M. 912(d) (emphasis added).

<sup>77</sup> *Id.* The non-binding Discussion accompanying this section does indicate that, “[o]rdinarily, the military judge should permit counsel to personally question the members.” *Id.* R.C.M. 912(d) discussion. The reality is that voir dire in courts-martial is largely a matter of the judge’s personal preference in most routine cases. One former military judge had a firm rule that counsel did not personally address the members; in his experience, counsel routinely wasted time and asked improper or confusing questions. Interview with Major Wilbur Lee, USMC, Student, 58th Judge Advocate Graduate Course, The Judge Advocate Gen.’s Legal Ctr. & School, in Charlottesville, Va. (Nov. 13, 2009) [hereinafter Lee Interview].

<sup>78</sup> *See, e.g.*, *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999).

<sup>79</sup> MCM, *supra* note 8, R.C.M. 912(d) discussion (“The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges.”).

<sup>80</sup> UCMJ, art. 41 (2008); MCM, *supra* note 8, R.C.M. 912(f).

<sup>81</sup> MCM, *supra* note 8, R.C.M. 912(f)(1).

<sup>82</sup> *Id.* R.C.M. 912(f)(1)(A)–(M).

<sup>83</sup> *Id.*

challenges for cause fall under RCM 912(f)(1)(N), which covers panel members who “[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”<sup>84</sup>

Challenges brought under RCM 912(f)(1)(N) comprise two categories: challenges for actual and implied bias.<sup>85</sup> “The test for actual bias is whether any bias ‘is such that it will not yield to the evidence presented and the judge’s instructions.’”<sup>86</sup> For example, in *United States v. Smart*, a member in a robbery case who had been burglary victim stated that he could not “totally disregard” his prior experience, and that he would “not consider” the option of no punishment.<sup>87</sup> The statement revealed actual bias of the panel member. Actual bias is a factual determination on the part of the military judge; appellate courts use an abuse of discretion standard, and generally defer to the trial judge, who had the opportunity to observe the member and her demeanor.<sup>88</sup> In other words, the military judge’s subjective opinion as to the member’s credibility is the standard by which appellate courts will view the judge’s decision to deny a challenge for cause based on actual bias.<sup>89</sup>

In comparison, challenges based on implied bias do not focus on a subjective determination of a member’s ability to adhere to the evidence and the judge’s instructions. Rather, the test for implied bias is whether “most people in the same position [as the prospective member] would be prejudiced.”<sup>90</sup> In addition, implied bias focuses on the public’s

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<sup>84</sup> *Id.* R.C.M. 912(f)(1)(N).

<sup>85</sup> *See id.*:

The text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the appearance of fairness as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal.

*United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

<sup>86</sup> *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (citation omitted).

<sup>87</sup> *United States v. Smart*, 21 M.J. 15, 16–17 (C.M.A. 1985). These statements demonstrate actual bias because the military judge instructs members that they must consider an entire range of punishments, if any punishment at all. *See* DA PAM. 27-9, *supra* note 75, at 93–100.

<sup>88</sup> *See Bragg*, 66 M.J. 325.

<sup>89</sup> *See United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000).

<sup>90</sup> *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).

“perception . . . of the fairness of the military justice system.”<sup>91</sup> Therefore, the test for implied bias is objective.<sup>92</sup> Furthermore, due to the objective nature of the implied bias test, it does not require an affirmative assertion of bias by the panel member.<sup>93</sup> Thus, challenges based on implied bias outnumber those based on actual bias, although challenges for cause often invoke principles of both actual and implied bias.<sup>94</sup>

A judge’s ruling on implied bias also does not merit the same level of deference on appeal, thereby increasing the case law on the subject. “[I]ssues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*.”<sup>95</sup> Furthermore, implied bias encompasses a broad range of potential issues. Examples include rating chain relationships among panel members,<sup>96</sup> predisposition toward a certain punishment,<sup>97</sup> knowledge of the case,<sup>98</sup> and being or knowing a victim of a similar crime.<sup>99</sup>

Another component of challenges for cause is the liberal grant mandate. In close cases, military judges have a responsibility to liberally

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<sup>91</sup> See *United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001).

<sup>92</sup> See *Daulton*, 45 M.J. 212.

<sup>93</sup> See, e.g., *United States v. Clay*, 64 M.J. 274 (C.A.A.F. 2007). Senior panel member initially indicated that in a rape case he would be “merciless within the limit of the law.” *Id.* at 275. After being asked rehabilitative questions, he indicated that he believed he could follow the judge’s instructions to consider the full range of punishments. *Id.* at 275–76. Although the member did not demonstrate actual bias, because of his subsequent answers to rehabilitative questions, the CAAF still found implied bias. *Id.* at 278.

<sup>94</sup> *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) (“[I]mplied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal.”).

<sup>95</sup> *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004).

<sup>96</sup> See *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001) (holding that the military judge abused discretion by not excusing for cause a member who supervised six other members).

<sup>97</sup> See *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (finding that a member demonstrated an inelastic attitude toward punishment by stating there is “no room in my Air Force for people that abuse drugs” and that “something has to be done”).

<sup>98</sup> See *Bragg*, 66 M.J. 325. In *Bragg*, a panel member could not remember having reviewed a relief for cause packet on accused, but if he had, he would have recommended relief. *Id.* The court held that the member should have been excused based on implied bias. *Id.*

<sup>99</sup> See *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007). *Terry* was a rape trial in which a member had a girlfriend who was raped; under the circumstances, it would be objectively unfair for that member to sit on appellant’s court-martial.

grant defense challenges for cause.<sup>100</sup> The rationale is that the Government has greater control over the panel selection process, especially in the convening authority's ability to personally select members.<sup>101</sup> Therefore, the liberal grant mandate does not apply to government challenges for cause.<sup>102</sup> Although at first glance, it appears that the liberal grant mandate is meant solely to benefit the defense, it actually serves a broader purpose: "[T]he liberal grant mandate exists not just to protect an accused's right to a fair trial, but also to protect society's interest, including the interests of the Government and the victims of crime, in the prompt and final adjudication of criminal accusations."<sup>103</sup>

Although counsel have unlimited for-cause challenges, in courts-martial each side is limited to one peremptory challenge.<sup>104</sup> When exercising a peremptory challenge, counsel does not need to give a reason.<sup>105</sup> However, some limitations exist on the exercise of peremptory challenges. In keeping with *Batson v. Kentucky*,<sup>106</sup> race-based

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<sup>100</sup> See *United States v. Clay*, 64 M.J. 274, 277–78 (C.A.A.F. 2007); *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

<sup>101</sup> See *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005):

Unlike the convening authority, who has the opportunity to provide his input into the makeup of the panel through his power to detail "such members of the armed forces as, in his opinion, are best qualified for duty," the defendant has only one peremptory challenge at his or her disposal. The liberal grant rule protects the "perception or appearance of fairness in the military justice system."

*Id.* at 139 (internal citations omitted).

<sup>102</sup> *Id.* at 139 ("Given the convening authority's broad power to appoint, we find no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause.").

<sup>103</sup> *Terry*, 64 M.J. at 296 (citing *Clay*, 64 M.J. 274).

<sup>104</sup> UCMJ art. 41 (2008) states:

*Procedure.* Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

*Id.*; MCM, *supra* note 8, R.C.M. 912(g)(1).

<sup>105</sup> MCM, *supra* note 8, R.C.M. 912(g)(1) discussion ("Generally, no reason is necessary for a peremptory challenge.").

<sup>106</sup> 476 U.S. 79 (1986).

peremptory challenges are prohibited in military courts.<sup>107</sup> If the opposing party objects, the challenging party has the burden to provide a race-neutral explanation.<sup>108</sup> This explanation cannot be “unreasonable, implausible, or . . . otherwise make[] no sense.”<sup>109</sup> In addition, the prohibition on gender-based peremptory challenges from *JEB v. Alabama*<sup>110</sup> applies to military courts, as well.<sup>111</sup> As with *Batson* challenges, upon objection the challenging party must provide a gender-neutral explanation that is not implausible or otherwise nonsensical.<sup>112</sup>

Whether the military judge or counsel conducts voir dire, once all challenges are ruled on, the remaining members will be impaneled. The buck does not stop there, however. A military accused’s automatic right of appeal ensures that rulings involving voir dire and challenges are subject to scrutiny at the appellate level.<sup>113</sup> As the next section demonstrates, military appellate courts are not reluctant to examine and criticize military trial judges’ decisions regarding voir dire.

### C. Appellate Cases Reviewing Military Judges’ Control of Voir Dire

This section will review two appellate cases where the Court of Appeals for the Armed Forces (CAAF) analyzed the military judges’ decisions regarding the conduct of voir dire at courts-martial. The first, and most recent, is *United States v. Richardson*.<sup>114</sup> This case involved an appellant convicted of drug offenses pursuant to Article 112a, UCMJ.<sup>115</sup> On appeal, he raised a “compound issue”:

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<sup>107</sup> See *United States v. Hurn*, 58 M.J. 199 (C.A.A.F. 2003) (applying *Batson* per se to military courts).

<sup>108</sup> See *id.* The prohibition against race-based challenges applies to both prosecution and defense. See *United States v. Chaney*, 53 M.J. 383 (C.A.A.F. 2000).

<sup>109</sup> *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997). This standard is actually higher than that required in civilian courts, where an implausible explanation is permissible as long as it is not “inherently discriminatory.” See *Rice v. Collins*, 546 U.S. 333 (2006).

<sup>110</sup> 511 U.S. 127 (1994).

<sup>111</sup> *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997).

<sup>112</sup> *United States v. Norfleet*, 53 M.J. 262 (C.A.A.F. 2000).

<sup>113</sup> See UCMJ art. 66 (2008). This right of appeal to the Court of Criminal Appeals applies to every case where “the sentence, as approved, extends to death, dismissal . . . , dishonorable or bad-conduct discharge, or confinement for one year or more . . . .” *Id.*

<sup>114</sup> 61 M.J. 113 (C.A.A.F. 2005).

<sup>115</sup> *Id.* at 114.

Whether the lower court erred when it determined that the military judge did not abuse his discretion during voir dire by applying an “actual bias” standard to deny the defense’s three “implied bias” challenges and by *preventing the defense from fully developing the facts* to support the challenges to members who were or had been trial counsel’s clients.<sup>116</sup>

This article focuses on the second part of the issue emphasized above.

In *Richardson*, four of the ten members admitted knowing the trial counsel in a professional capacity, in response to the military judge’s examination.<sup>117</sup> During defense voir dire, the civilian defense counsel explored the nature of this relationship with the fourth member questioned, but not with the first three.<sup>118</sup> Responding to the civilian defense counsel, the member affirmed that the trial counsel had been a “good” and “trusted legal advisor.”<sup>119</sup> After questioning this member, the civilian defense counsel requested to “‘briefly recall three of the members’ to allow him ‘to look at and to expand on . . . the issue with the relationship with the trial counsel.’”<sup>120</sup> The military judge denied the defense request. Subsequently, the defense challenged, among other members, all four who had indicated a relationship with trial counsel.<sup>121</sup> The military judge denied the challenges for all but one member of those four, whom the defense had not questioned individually about his relationship with trial counsel.

In its discussion, the court reiterated that the right to a “fair and impartial panel” required members to be “test[ed] . . . on the basis of both actual and implied bias.”<sup>122</sup> Further, the court emphasized that voir dire is the “procedural vehicle for testing member bias.”<sup>123</sup> Although the court acknowledged the military judge’s discretion in controlling voir dire, it stated that this discretion “is not without limits.”<sup>124</sup> In examining both issues raised by the appellant, the court bemoaned the lack of facts

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<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 115–16.

<sup>119</sup> *Id.* at 116.

<sup>120</sup> *Id.* (quoting civilian defense counsel).

<sup>121</sup> *Id.* at 117.

<sup>122</sup> *Id.* at 116.

<sup>123</sup> *Id.* at 119.

<sup>124</sup> *Id.* at 116.

on the record for the court to use in analyzing the denial of the defense's challenges for implied bias.<sup>125</sup>

Ultimately, the court concluded that the military judge had abused his discretion when he denied defense counsel's request for further voir dire.<sup>126</sup> In supporting this decision, the court stated:

Finally, our opinion in this case should not be read to necessarily bar the participation of members who might have had previous or current official contact with the trial participants. To the contrary, we recognize that in a close-knit system like the military justice system, such situations will arise and may at times be unavoidable. But where such situations are identified, military judges should not hesitate to test these relationships for actual and implied bias. And a factual record should be created that will demonstrate to an objective observer that notwithstanding the relationships at issue, the accused received a fair trial. *Member voir dire is the mechanism for doing so.*<sup>127</sup>

Thus, the opinion in *Richardson* underscores the importance of thorough voir dire in developing the facts necessary to seat an impartial panel, through the informed exercise of challenges.

The CAAF had addressed a similar issue in 1996 in *United States v. Jefferson*.<sup>128</sup> In *Jefferson*, the appellant argued that he had not received a fundamentally fair trial due to the military judge's limitations on questions and denial of conducting and reopening individual voir dire.<sup>129</sup> When it came to limitations on questions, the appellant specified three topics: "burden of proof . . . members' inelastic attitude towards punishment, and credibility of witnesses."<sup>130</sup> The court ultimately held that the military judge did not abuse his discretion when limiting defense

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<sup>125</sup> *Id.* at 119 ("[T]he military judge had a responsibility to further examine the nature of relationships in the context of implied bias review, particularly when asked to do so by defense counsel.").

<sup>126</sup> *Id.* at 120 ("There was a further abuse of discretion in the denial of counsel's request to reopen voir dire in a case raising implied bias considerations.").

<sup>127</sup> *Id.* at 120 (emphasis added).

<sup>128</sup> 44 M.J. 312 (C.A.A.F. 1996).

<sup>129</sup> *Id.* at 314.

<sup>130</sup> *Id.* at 315.

questions on these topics.<sup>131</sup> Looking at the facts, the CAAF determined that the questions on burden of proof were properly clarified through defense counsel's further questioning; the military judge rehabilitated the members concerning the viability of a "no punishment" option; and that the issue of pre-judging credibility was essentially a non-issue, as all members agreed to adhere to the judge's instruction regarding credibility of witnesses.<sup>132</sup>

The court did, however, conclude that the military judge had abused his discretion by not reopening voir dire upon defense request.<sup>133</sup> After voir dire had concluded, defense counsel requested to reopen voir dire to explore statements by two members that they or a close friend or relative had been a crime victim.<sup>134</sup> Although the court acknowledged that such status is not a per se disqualification, it also stated that it "cannot countenance cutting off voir dire questions as to potential grounds for challenge of members having friends and family who were victims of crimes."<sup>135</sup> The CAAF eloquently summed up the impact of overly restrictive voir dire:

The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial. Central to this right is the need to conduct a full voir dire to determine challenges for cause and peremptory challenges. We recognize that judges are sometimes required to "ride" a circuit and often have crowded dockets. But when co-counsel reminds counsel conducting the voir dire that further inquiry was omitted on a crucial issue, judges should be patient and allow that inquiry to be conducted. We hold that the judge abused his ample discretion by failing to allow counsel to reopen the voir dire to ensure impartial court members. Because of the potential impact of this abuse on the right to a trial by impartial members, corrective action is needed.<sup>136</sup>

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<sup>131</sup> *Id.* at 319.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 320.

<sup>134</sup> *Id.* at 317.

<sup>135</sup> *Id.* at 321.

<sup>136</sup> *Id.* at 321–22 (internal citations omitted).

Thus, just as it would later hold in *Richardson*, the CAAF acknowledged that voir dire is essential to ensuring an accused's right to a fair trial. The court's opinion summed up the tension between counsel and judges over voir dire, as discussed in Part II, *supra*: "[S]ince counsel ask questions that go beyond determining challenges, many judges prefer to conduct the voir dire to prevent wasting valuable time."<sup>137</sup> Nonetheless, the court seemingly admonished military judges by counseling them "to be patient and allow" additional questioning when needed.<sup>138</sup>

The history and purpose of voir dire discussed in Part II provided a backdrop for exploring the military justice system's method of voir dire and jury empanelment. The next part will, in turn, examine how civilian jurisdictions approach voir dire. Careful examination of civilian practices can inform any discussion of whether the military should change to incorporate the techniques of its non-uniformed brethren.

#### IV. Voir Dire in Federal and State Courts

##### A. Civilian Jurisdictions in General

Civilian federal and state courts vary widely in how they approach voir dire. Federal courts, like military courts, reserve complete control to the judge.<sup>139</sup> In comparison, most state courts allow counsel significant participation in voir dire, although in ten states, voir dire is dominated by the judge and in eight states, judges and lawyers play an equal role in questioning the prospective jurors.<sup>140</sup> This section discusses voir dire in federal courts and then examines three representative states: Massachusetts, Texas, and Virginia. In Massachusetts, judges control voir dire.<sup>141</sup> In Texas, counsel have wide latitude to participate and

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<sup>137</sup> *Id.* at 318.

<sup>138</sup> *Id.* at 321–22 (internal citations omitted).

<sup>139</sup> See FED. R. CRIM. P. 24(a) (explaining that the "court may examine prospective jurors or may permit attorneys to do so").

<sup>140</sup> See Mize & Hannaford-Agor, *supra* note 54. In reaching these conclusions, the authors relied on the *State-of-the-States Survey of Jury Improvement Efforts* compiled by the Center for Jury Studies of the National Center for State Courts, published in 2007. *Id.* n.17 (citing GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 29–31 (Apr. 2007)).

<sup>141</sup> See *infra* notes 152–58 and accompanying text.

question the venire.<sup>142</sup> In Virginia, the legislature has actually granted a statutory right to counsel to conduct voir dire.<sup>143</sup>

#### B. Federal Courts

Federal Rule of Criminal Procedure 24(a) states that the “court may examine prospective jurors or may permit the attorneys to do so.”<sup>144</sup> However, this rule also says that if the court conducts voir dire, “it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.”<sup>145</sup>

Although the rule states that the court “may permit” counsel-conducted voir dire, anecdotal evidence indicates that federal courts either do not allow counsel-conducted voir dire, or limit it to a few minutes.<sup>146</sup> A survey of judges by the Federal Judicial Center confirms that belief.<sup>147</sup> The survey found that in forty-six percent of routine criminal cases and in thirty-eight percent of “exceptional” criminal cases, the judge conducted the entire voir dire, not permitting counsel to directly question the jury.<sup>148</sup> At the other end of the spectrum, in only seven percent of routine and six percent of exceptional criminal cases did the judges surveyed allow counsel to “conduct most or all of voir dire.”<sup>149</sup>

Thus, the federal system mirrors the military practice. Not surprisingly, this approach has engendered criticism from trial lawyers, especially criminal defense attorneys.<sup>150</sup> Apparently, these dissenters

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<sup>142</sup> See *infra* notes 161–63 and accompanying text.

<sup>143</sup> See *infra* notes 164–68 and accompanying text.

<sup>144</sup> FED. R. CRIM. P. 24(a).

<sup>145</sup> *Id.* Cf. MCM, *supra* note 8, R.C.M. 912(d).

<sup>146</sup> Dennis G. Terez, *Who Said Voir Dire Wasn't Important?*, NAT'L ASS'N CRIM. DEF. LAW. CHAMPION, Apr. 2006, at 56, available at <http://www.nacdl.org/public.nsf/0/549658461382a8852>.

<sup>147</sup> Shapard & Johnson Memo, *supra* note 56.

<sup>148</sup> *Id.* at 2.

<sup>149</sup> *Id.*

<sup>150</sup> See Terez, *supra* note 146. According to the National Association of Criminal Defense Lawyers (NACDL), restricting voir dire actually prevents “lawyers [from being] advocates.” *Id.* The NACDL is not unique in condemning judge-controlled voir dire. Lawyers and jury consultants roundly criticize this practice because it curtails a lawyer’s ability to accomplish the “unofficial” purposes of voir dire, such as establishing a rapport

have gained some traction over the years; a 1977 survey of federal judges found even lower rates of counsel participation.<sup>151</sup> Those advocating counsel-conducted voir dire have made the most progress in state courts, however. The next section explores three state systems, demonstrating that in some jurisdictions, counsel have gained more control over the voir dire process.

### C. Representative State Systems

Massachusetts parallels the federal system in how judges have total control over voir dire in both criminal and civil cases.<sup>152</sup> In practice, the trial judge has a minimum of six required questions to determine prior knowledge of prospective jurors.<sup>153</sup> The judge may then permit counsel to directly question jurors; “however, judges rarely allow such motions [to question the venire].”<sup>154</sup> Rather, counsel can provide prospective questions ahead of time, which the judge may incorporate into his voir dire, at his discretion.<sup>155</sup> As the trial judge is granted substantial

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and communicating to them a theory of the case. *See, e.g.*, Theresa Zagnoli, Zagnoli McEvoy Foley Ltd., *Jury Selection Without Attorney-Conducted Voir Dire* (2001), available at <http://www.voirdirebase.com/pdfs/juryselect.pdf?eSESSION=5974c004b13e143>.

<sup>151</sup> Shapard & Johnson Memo, *supra* note 56, at 1. The 1977 survey, also conducted by the Federal Judicial Center, found that less than thirty percent of federal district court judges permitted counsel to conduct any questioning. *Id.* The 1994 survey, however, reported that in routine criminal cases, fifty-four percent of judges permitted at least some questioning. *Id.*

<sup>152</sup> *See* Moloney, *supra* note 60, at 1053 (2006) (primarily discussing civil procedure, although Massachusetts has similar laws and procedures for criminal jury trials).

<sup>153</sup> *See* MASS. GEN. LAWS ANN. ch. 234, § 28 (West 2009). Massachusetts’s Rules of Civil Procedure prescribe six questions:

- (1) whether any juror or any member of his family is related to any party or attorney therein; (2) whether any has any interest therein; (3) whether any has expressed any opinion on the case; (4) whether any has formed any opinion thereon; (5) whether any is sensible of any bias or prejudice therein; and (6) whether any knows of any reason why he cannot or does not stand indifferent in the case.

MASS. R. CIV. P. 47.

<sup>154</sup> *See* Moloney, *supra* note 60, at 1054.

<sup>155</sup> *See id.* at 1055.

discretion by statute in conducting voir dire, the Appeals Court reviews any issues for abuse of discretion.<sup>156</sup>

Massachusetts's system has the advantage of maximum efficiency. The judge acts as both examiner and gatekeeper for counsel's questions. Unsurprisingly, however, this practice has generated criticism from lawyers and lawmakers in Massachusetts. One response to this practice was the proposal of a Juror Examination Act by the Massachusetts legislature in 2003 (followed by a Revised Juror Examination Act after the original bill died in the Ways and Means Committee).<sup>157</sup> This Act would have mandated the court to grant a motion from either party to personally conduct voir dire.<sup>158</sup> As of this writing, however, Massachusetts has not revised its voir dire practice.

The staunch refusal of Massachusetts judges to allow counsel-conducted voir dire is viewed by some as the antithesis of a fair trial. In 2008, Neil Entwistle was tried in Massachusetts for charges that he murdered his wife and daughter.<sup>159</sup> One attorney commenting on the case had these scathing comments concerning the Massachusetts system:

In Massachusetts, voir dire is not a tool, but a hoax. Like an apparition, it only gives the appearance of substance. Our "voir dire" amounts to no more than the defense lawyer, and maybe the prosecutor, formally submitting maybe [ten] or [twenty] questions for the judge to ask the jury pool. The judge skims the questions, and if he feels like it, asks the jury pool maybe three or four of them.<sup>160</sup>

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<sup>156</sup> See *id.* at 1054 (citing *Commonwealth v. Lopes*, 802 N.E.2d 97, 102 (Mass. 2004)) (other citations omitted).

<sup>157</sup> *Id.* at 1056.

<sup>158</sup> *Id.* at 1057.

<sup>159</sup> See Franci R. Ellement & Michael Levenson, *Entwistle Convicted of Murder*, BOSTON GLOBE, June 26, 2008, available at [http://www.boston.com/news/local/articles/2008/06/26/entwistle\\_convicted\\_of\\_murder/?page=2](http://www.boston.com/news/local/articles/2008/06/26/entwistle_convicted_of_murder/?page=2).

<sup>160</sup> Posting of Kevin J. Mahoney to Relentless Defense, <http://www.relentlessdefense.com/neil-entwistle.html> (last visited Jan. 3, 2010). Mr. Mahoney is a Cambridge, Massachusetts, defense lawyer, named by the American Trial Lawyers Association as one of America's Top 100 Trial Lawyers. See Am. Trial Lawyer's Ass'n, *The Top 100 Trial Lawyers—Massachusetts*, <http://www.theatla.com/top-100-lawyers-massachusetts.html> (last visited Mar. 3, 2010).

It appears that Massachusetts voir dire, at least in practice, curtails attorney participation even more than federal and military courts. On the other end of the scale is Texas, which by practice has a system of attorney-conducted voir dire for both civil and criminal trials. This practice is “largely judicially created.”<sup>161</sup> Texas case law has established a great deal of latitude for attorneys, both in the method in which they conduct voir dire and the substance of the questions and comments.<sup>162</sup> Thus, Texas experiences an opposite form of pushback than Massachusetts does: anecdotal criticism from lawmakers and judges “regarding alleged abuses of the voir dire system . . . .”<sup>163</sup>

The third approach is that of Virginia. In contrast to the judicially-created concept of expansive voir dire found in Texas, Virginia has actually implemented a statutory right for counsel to personally conduct voir dire. Virginia Code § 8.01-358 states:

The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.<sup>164</sup>

A plain reading of this statute reveals that the Virginia legislature granted counsel the right to conduct voir dire by stating that “counsel for either party *shall* have the right to examine” the venire.<sup>165</sup> Notably, the statute

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<sup>161</sup> See Ballesteros, *supra* note 5, at 207.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.* at 209.

<sup>164</sup> VA. CODE ANN. § 8.01-358 (West 2009).

<sup>165</sup> *Id.* (emphasis added).

itself does not place any limitations on questioning other than to limit questions to those that are “relevant” to determine general bias.

Judicial interpretation of § 8.01-358, however, has set some boundaries when it comes to proper questioning and the judge’s discretion in controlling voir dire. Virginia appellate courts, like military appellate courts, use an abuse of discretion standard to review a judge’s rulings regarding voir dire.<sup>166</sup> Virginia case law further recognizes that judges have considerable discretion in limiting, or even prohibiting, improper or irrelevant questions.<sup>167</sup> As noted in one opinion,

A party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning *ad infinitum*. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors stand “indifferent in the cause,” but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so.<sup>168</sup>

Virginia, therefore, has seemingly struck a balance between recognizing the legal and policy concerns which mandate the use of counsel-conducted voir dire, while still allowing trial judges the discretion to ensure that counsel use this statutory right only to propound questions that go directly toward the goal of seating an impartial panel.

As these three examples demonstrate, states employ widely different practices in conducting voir dire. Determining which method would be best for the military is not simply a matter of picking and choosing, however. Unique features of the military justice system make certain approaches more appropriate than others. The following section will argue that the ultimate goals of voir dire in military justice are to allow the intelligent exercise of challenges and to establish rapport, and that granting counsel the right to personally conduct voir dire is essential to achieving these goals.

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<sup>166</sup> See, e.g., *Bassett v. Commonwealth*, 284 S.E.2d 844, 853 (Va. 1981) (holding that absent a showing that the trial court abused its discretion in limiting voir dire, the court “will not disturb the [trial] court’s ruling”).

<sup>167</sup> See *Chichester v. Commonwealth*, 448 S.E.2d 638, 647 (Va. 1994) (finding that the court has discretion to determine relevancy); *LeVasseur v. Commonwealth*, 304 S.E.2d 644, 653 (Va. 1983); *Barrette v. Commonwealth*, 398 S.E.2d 695 (Va. Ct. App. 1990) (finding that the court may exclude irrelevant questions).

<sup>168</sup> *LeVasseur*, 304 S.E.2d at 653.

## V. Changing the Military's Voir Dire Practice

### A. Direct Questioning By Counsel Will Achieve the Goals of Voir Dire

In order to discuss whether a different approach to voir dire would benefit the courts-martial process, a preliminary question must be addressed: What is the purpose of voir dire in the military justice system? At first blush, it seems the purpose is the same as that in the civilian system—to seat an impartial panel.<sup>169</sup> This simple answer, however, overlooks fundamental distinctions between civilian and military justice.

First, the process by which military panel members are selected supports an approach that permits counsel (particularly defense counsel) to personally question the members. Rather than pulling from a random cross section of the local community, a military panel consists of members hand-picked by the convening authority.<sup>170</sup> The convening authority not only selects panel members, he also refers charges to courts-martial and ultimately acts on the findings and sentence.<sup>171</sup> Furthermore, his authority to personally select members (and the staff judge advocate's authority to excuse up to one-third of the members)<sup>172</sup> reflects the type of control over the process that led to the creation of the liberal grant mandate.<sup>173</sup> Thus, in keeping with the spirit of the liberal grant mandate, judges should also liberally grant defense voir dire to allow greater fairness (actual or perceived) in the process. Furthermore, past appellate cases have demonstrated that liberal voir dire can actually preclude reversal on appeal. For example, in *United States v. Dowty*, the convening authority used a “novel” method of soliciting volunteers to select court-martial members.<sup>174</sup> In affirming the case, CAAF noted that the military judge had allowed liberal voir dire.<sup>175</sup>

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<sup>169</sup> See, e.g., *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) (“The purpose of voir dire and challenges is, in part, to . . . adjudicate the members’ ability to sit as part of a fair and impartial panel.”).

<sup>170</sup> UCMJ art. 25 (2008); MCM, *supra* note 8, R.C.M. 503(a).

<sup>171</sup> UCMJ arts. 34, 60.

<sup>172</sup> MCM, *supra* note 8, R.C.M. 505(c)(1)(B).

<sup>173</sup> See *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005).

<sup>174</sup> *United States v. Dowty*, 60 M.J. 163, 164 (C.A.A.F. 2004). In *Dowty*, the “novel method” involved the Assistant Staff Judge Advocate publishing a notice soliciting volunteers to serve on the panel, rather than calling for nominations from subordinate commanders.

<sup>175</sup> *Id.* at 168.

Another consideration that militates toward liberal voir dire is military counsel's limit of one peremptory challenge.<sup>176</sup> The nature of a court-martial panel versus a civilian venire dictates such a limitation on peremptory challenges.<sup>177</sup> Nonetheless, the peremptory challenge remains as crucial to military counsel as it does in civilian jurisdictions.<sup>178</sup> The careful exercise of this one challenge, even though counsel need not state a reason, requires counsel to obtain as much information as possible from the panel. This aids in determining whether to use for-cause or peremptory challenges on particular members. Permitting counsel thorough voir dire allows them to make this vital decision in an informed, intelligent manner.<sup>179</sup>

Above all, the most compelling argument for counsel-conducted voir dire may be to militate against the impact of the military's rigid hierarchy. The military's rank-based structure impedes two significant aspects of voir dire: rapport-building between counsel and the members, and the members' candor toward the court regarding bases for challenge.

The concept of rapport-building as a legitimate purpose of voir dire is a controversial one.<sup>180</sup> After all, it falls outside of the standard belief that voir dire be used only for intelligent exercise of challenges. However, rapport building can actually enhance both the voir dire process and the member's ability to judge a case impartially on the facts. For one,

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<sup>176</sup> MCM, *supra* note 8, R.C.M. 912(g)(1).

<sup>177</sup> Unlike civilian jurisdictions, which can bring in a "cattle call" of potential jurors, the convening authority personally selects a standing court-martial panel. Allowing more than one peremptory could arguably lead to depleting the members prior to empanelment.

<sup>178</sup> See, e.g., Ballesteros, *supra* note 5, at 231–35. In this article, the author makes a compelling argument that peremptories aid in seating an impartial panel by allowing counsel to challenge members whose "bias slips past the narrow standard of challenges for cause because the standard serves only to eliminate 'categorical' bias." *Id.* at 232 (citation omitted).

<sup>179</sup> One argument is that counsel have superior knowledge of the facts, and can thereby tailor voir dire accordingly in ferreting out bases for challenge. See Lee Smith, *Voir Dire in New Hampshire: A Flawed Process*, 25 VT. L. REV. 575, 579–80 (2001) (arguing that the trial judge "may be unaware of certain facts, issues, or evidence that are crucial to the jury's determination of the case"); see also E-mail from Colonel James L. Pohl, U.S. Army, Military Judge, to author (Feb. 25, 2010, 15:51 EST) [hereinafter Pohl E-mail] (stating that he allows counsel to conduct individual voir dire without justifying it to the court, "because they have access to information [the judge does not] have").

<sup>180</sup> See, e.g., Conn E-mail, *supra* note 74 (stating that he "is not a proponent of the 'rapport building,' 'educating members on the case' theories of voir dire"). Cf. David Court, *Voir Dire: It's Not Just What's Asked, But Who's Asking and How*, ARMY LAW., Sept. 2003, at 32, 33–34.

establishing a rapport with the members diminishes the role of counsel as an authority figure in the courtroom, thereby prompting more candid responses during voir dire.<sup>181</sup> Additionally, building rapport allows jurors the chance to assess the credibility of the advocates themselves, thus enhancing jurors' ability to appropriately weigh the evidence.<sup>182</sup> Finally, rapport-building can allow counsel to diminish potential personality conflicts with panel members, and possibly exercise the preemptory challenge to strike a "hostile" member.<sup>183</sup> This increases the likelihood that the facts, themselves—not the members' attitude toward counsel—influence the panel's decision-making process.<sup>184</sup>

Another benefit of counsel-conducted voir dire is drawing out more candid responses from prospective panel members. A 1987 study in the journal *Law and Human Behavior* concluded that

subjects were considerably more candid in disclosing their attitudes and beliefs about a large number of potentially important topics during an attorney-conducted voir dire. Importantly, in none of the cases were judges more effective than attorneys, a finding that contradict[ed] previous assertions that a judge-conducted voir dire will elicit greater juror candor than an attorney-conducted voir dire.<sup>185</sup>

Among others, one consideration in this study was the nature of different roles and approaches of judges and counsel. The concern is "that the judge will be seen as an important authority figure, and as such, jurors will tend to be concerned about displeasing him or her. Such a concern is likely to cause jurors to be less than honest in their replies."<sup>186</sup> The study concluded that the perception of a judge as an authority figure did, in fact, influence prospective jurors' candor.<sup>187</sup>

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<sup>181</sup> See *infra* notes 185–88 and accompanying text (discussing how jurors are less candid with those perceived as authority figures in the courtroom).

<sup>182</sup> Court, *supra* note 180, at 33–34 ("Each advocate's credibility may be as important to the panel members' decision-making process as the facts themselves.")

<sup>183</sup> See Smith, *supra* note 179, at 581.

<sup>184</sup> See *id.*

<sup>185</sup> Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & HUM. BEHAV. 131, 143 (1987).

<sup>186</sup> *Id.* at 132.

<sup>187</sup> *Id.* at 144.

Practitioners also support the theory that jurors are more open with counsel than with judges. One Utah practitioner commented, “since jurors look upon the judge as an important authority figure, they are reluctant to displease him and therefore tend to respond to his questions with less candor than if the questions were posed by counsel.”<sup>188</sup> One could further argue that the influence of a judge’s role as an authority figure is enhanced in the military setting. Strict hierarchy and obedience to superiors is a cornerstone of military discipline.<sup>189</sup> The Army fraternization policy is one example of the emphasis placed on maintaining the military hierarchy.<sup>190</sup> Adherence to rank structure is so essential to military discipline that the Army criminalizes relationships between Soldiers of different rank for which civilians would not face criminal charges, such as dating, marriage, or business partnerships.<sup>191</sup>

This necessary respect for rank in the military does not disappear in the courtroom. Indeed, a court-martial has a hierarchy which overlays the pre-existing military structure. A military judge is typically a senior field grade officer. Some military judges hold the grade of O-4, although more often the military judge holds the grade of O-5 or O-6.<sup>192</sup> As such, the military judge is likely senior to most, if not all, members of the panel. In contrast, trial and defense counsel tend to be more junior officers. Given the military’s emphasis on deference to one’s seniors (whether by virtue of rank, position, or experience), one can quickly conclude that the influence over juror candor cited in studies of civilian courtrooms is magnified in the military courtroom. Therefore, allowing counsel—the junior officers—more opportunity to question the members could possibly elicit more candid, forthcoming responses. That, of course, directly assists the goal of intelligently exercising challenges.

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<sup>188</sup> Howard, *supra* note 9, at 15 (citing legal psychologist Neal Bush, *The Case for Expansive Voir Dire*, 12 L. & PSYCHOL. REV. (1975)).

<sup>189</sup> See, e.g., U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-1 (18 Mar. 2008) (“Military discipline is founded upon self-discipline, respect for properly constituted authority, and the embracing of the professional Army ethic with its supporting individual values.”). Army Regulation 600-20 also states, “All persons in the military service are required to strictly obey and promptly execute the legal orders of their lawful seniors.” *Id.* para. 4-2.

<sup>190</sup> See *id.* paras. 4-14 to 4-16. Paragraphs 4-14 and 4-15 define prohibited relationships, while 4-16 renders punitive any violations of paragraphs 4-14*b*, 4-14*c*, and 4-15. *Id.*

<sup>191</sup> See *id.*

<sup>192</sup> See U.S. DEP’T OF ARMY, OFFICE OF THE JUDGE ADVOCATE GEN. PUB. 1-1, DIRECTORY 12-16 (2009). Of twenty-two Army military judges in the trial judiciary in 2009, two were majors, eight were lieutenant colonels, and twelve were colonels. *Id.*

Based on these unique features of the military system, counsel's primary purpose in courts-martial should be to elicit information that can aid in making appropriate challenges, both for-cause and peremptory.<sup>193</sup> Yet, a secondary, still vital, purpose is for counsel to establish rapport. The following subsection proposes an amendment to RCM 912 to grant counsel the right to personally question members, and discusses how this amendment would best achieve the above-stated goals while still ensuring the fair and orderly administration of justice in a military environment.

#### B. Proposed Amendment to RCM 912

Allowing counsel to conduct voir dire in courts-martial furthers justice by maximizing counsel's ability to gather information to use in challenging members. Recent military appellate cases, such as *Richardson*, support this argument by demonstrating how restrictive voir dire prevents counsel from discovering facts upon which to properly base challenges for cause.<sup>194</sup> Establishing liberal voir dire can be best accomplished through amending RCM 912 to grant counsel the right to personally conduct voir dire.

Such an amendment could take one of several possible forms. One seemingly simple fix would be to replace "may" in RCM 912(d) with "shall," so that it reads: "(d) *Examination of members.* The military judge shall permit the parties to conduct examination of the members, or the military judge may personally conduct the examination."<sup>195</sup> This approach would cause the least upheaval to the current system. By replacing "may" with "shall," counsel will have a right to personally conduct voir dire. At the same time, the military judge would retain ultimate control over the process, limiting or cutting off questioning when necessary.<sup>196</sup> A significant drawback, however, would be that this change could potentially have little to no impact on the current system. So long as the military judge permits counsel to attempt to question the

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<sup>193</sup> As previously discussed in this article, courts and commentators have cited multiple purposes for voir dire. Based on the unique nature of the military system, however, the Discussion following RCM 912(d) best states the paramount purpose of voir dire: "voir dire should be used to obtain information for the intelligent exercise of challenges . . . ." MCM, *supra* note 8, R.C.M. 912(d) discussion.

<sup>194</sup> *United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005).

<sup>195</sup> *See* MCM, *supra* note 8, R.C.M. 912(d).

<sup>196</sup> *Id.* R.C.M. 912(d) discussion.

prospective members, she may properly restrict or take over voir dire while still complying with the proposed rule.<sup>197</sup>

Another possibility would be to grant counsel the right to personally question the panel, and limit the judge's involvement only in instances where counsel strayed into certain enumerated, off-limits areas. For example, the proposed amendment could state: "(d) *Examination of members*. Both government and defense counsel shall be permitted to personally conduct voir dire. Such right is not to be limited unless, sua sponte or pursuant to an objection, the military judge disallows the following improper forms of questioning: . . . ." The amended RCM 912(d) would then list impermissible questions, such as those that improperly state the law, seek to introduce inadmissible facts, or commit members to verdict-dispositive facts.

Such an amendment would undoubtedly shift control from the military judge to counsel, effectively making the military judge's involvement in voir dire the exception, not the rule. Although allowing counsel ultimate control over voir dire is a direct method to achieve the goals discussed in the previous subsection, a drastic shift like this is unwise for several reasons. First, in the military, trial practitioners tend to be more junior and inexperienced attorneys. Shifting the balance in favor of pure counsel-conducted voir dire would take control of this vital process completely away from the most experienced lawyer in the courtroom and place it solely in the hands of (typically) the most inexperienced. Second, vesting virtually limitless discretion in counsel could lead to abuse of the system—whether by conducting protracted voir dire, or by attempting to explore areas prohibited by the rule in the form of pretextual questions.<sup>198</sup> Finally, the solemnity and decorum of a military courtroom call for the military judge to retain authority during all aspects of trial.<sup>199</sup> For the foregoing reasons, turning complete control of voir dire over to counsel would be an ill-advised reform.

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<sup>197</sup> *Id.* The Discussion to RCM 912(d) states, "The nature and scope of the examination of members is within the discretion of the military judge." *Id.* Assuming this language remains, a military judge could conceivably exercise her discretion to limit counsel's questions, so long as she permitted counsel an attempt to exercise that right.

<sup>198</sup> This concern is not without merit. For example, one senior Army judge states, "Many times I see counsel using voir dire to argue their case, plant their theory, and/or get members to commit." Pohl E-mail, *supra* note 179.

<sup>199</sup> Judge advocates may have a hard time conceiving of voir dire conducted outside the presence of the military judge—yet, at least one civilian jurisdiction has such a method for civil and criminal trials. See Deborah A. Cancado, *The Inadequacy of Massachusetts Voir Dire*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 81, 93 (2000) (describing the Connecticut

Rather than adopt one of the two extremes discussed above, this article advocates a third approach to amending RCM 912 that balances the interests of both counsel and military judges. The ABA's *Principles for Juries and Jury Trials* calls for voir dire to be conducted by both the court and counsel:

1. Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors' legal qualification to sit in the case.
2. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel . . . .<sup>200</sup>

The proposed amendment to RCM 912 would reflect the ABA's balanced approach by requiring the court to make a preliminary examination of the members, then allowing both trial and defense counsel the opportunity to directly question the members. With the amendment, RCM 912 would thus read:

(d) *Examination of members.* The military judge shall initially ask the panel sufficient questions to determine whether any member: (1) has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition; (2) is related to any witness, other court member, or the accused; (3) has an interest, financial or otherwise, in the case; (4) has expressed or formed an opinion on the case; (5) is aware of any personal bias or prejudice regarding the case; and (6) knows of any reason why he or she cannot judge the case fairly and impartially. After the military judge's examination, counsel for each side shall have the right to examine the members, and shall have the right to ask the members directly any relevant question to ascertain bias, prejudice, or any other reason whereby the member may be disqualified. Opposing counsel may object to, and

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voir dire system, in which "[t]he judge generally remains away from the courtroom while the attorneys question the jurors").

<sup>200</sup> ABA PRINCIPLES, *supra* note 4, at 13.

the military judge may limit or disallow, questions that are not directly relevant to ascertaining a member's qualification to sit as an impartial panel member, or are otherwise improper.

In essence, this proposed amendment conforms with the ABA's *Principles* by combining aspects of both Massachusetts's and Virginia's approach to voir dire. The first part of the rule mirrors Massachusetts's rule, which requires the judge to conduct an initial screening of the venire.<sup>201</sup> This will allow the military judge to set the tone, as well as reveal those members who are clearly unqualified to be impaneled. The second part of the rule is drawn from Virginia's statute, and confers upon counsel the right to question the panel regarding qualification to judge a particular case.<sup>202</sup> Crucial to this rule, however, is the notion that counsel can ask only *relevant* questions for *proper* purposes. This proposal specifically leaves these definitions open for judicial interpretation, rather than enumerating a laundry list of irrelevant or improper questions. For one, relevancy will necessarily depend on the facts of each particular case. Furthermore, this rule can allow the military judge to rely on precedent and discretion when supervising voir dire, while also giving counsel latitude to craft case-specific questions.<sup>203</sup>

Granting counsel the right to personally conduct voir dire will not bring the criminal justice system to a halt.<sup>204</sup> On the contrary, creating an

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<sup>201</sup> See MASS. GEN. LAWS ANN. ch. 234, § 28 (West 2009); MASS. R. CRIM. P. 47. In practice, Virginia also requires the trial judge to open voir dire with mandatory questions of the venire, even though the statute does not explicitly require this. See VA. PRAC. CRIM. P. § 16:5 (West 2009).

<sup>202</sup> See VA. CODE ANN. § 8.01-358 (West 2009).

<sup>203</sup> A look at Virginia courts' interpretation of its statute demonstrates that even an open-ended statute is subject to the trial court's discretion and appellate scrutiny. See *LeVasseur v. Commonwealth*, 304 S.E.2d 644, 653 (Va. 1983):

While the 1981 amendment [to § 8.01-358] makes mandatory the formerly discretionary right of counsel to question the prospective jurors directly, it has no effect on the nature of the questions which may be asked. The questions propounded by counsel must be relevant, as always, and the trial court must, in its discretion, decide the issue of relevancy, subject to review for abuse.

*Id.*

<sup>204</sup> See *id.* See generally *Charity v. Commonwealth*, 482 S.E.2d 59 (Va. Ct. App. 1997) (holding that failure to grant counsel the statutory right to conduct voir dire was harmless

affirmative right to conduct voir dire places the burden on counsel to prepare, practice, and perfect their approach to this fundamental trial skill. Furthermore, the military judge will still retain ultimate control of this process, including the ability to restrict improper or irrelevant questioning. Thus, an affirmative right to voir dire will not give counsel free license to abuse the process.

As with any proposal for change, however, compelling arguments exist either to maintain the status quo or eliminate participation of counsel altogether. The following section examines and addresses these counterarguments, concluding that reforming voir dire will not spell disaster; rather, it will improve the process for all parties involved.

### C. Counterarguments and Responses

As previously discussed, the tension between judges and lawyers over voir dire could aptly be described as a “tug-of-war.”<sup>205</sup> Typically, even military judges who allow counsel to conduct voir dire concede that it takes up too much time and often leads to improper, embarrassing, and confusing questions.<sup>206</sup> As one senior Army judge flatly stated, “[A]ny blame lies with counsel asking insipid, repetitive, confusing and inane questions largely unrelated to the issues in the case.”<sup>207</sup> This tension gives rise to four significant arguments against changing the military’s voir dire process: (1) counsel’s inexperience and/or abuse will create appellate issues that a judge could better avoid; (2) as neutral arbiters, judges are better suited to seat an impartial panel; (3) counsel-conducted voir dire will consume too much time, thereby impeding judicial economy; and (4) the current system works well as-is. This subsection will address each counterargument in turn.

The first counterargument is one that merits significant analysis. Critics of a change to RCM 912 may argue that granting counsel the right to conduct voir dire will lead to abuse. For instance, counsel could

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error when it did not deprive the defendant of a fair trial); *supra* notes 161–68 and accompanying text.

<sup>205</sup> See *supra* notes 54–57 and accompanying text.

<sup>206</sup> See Pohl E-mail, *supra* note 179; Grammel E-mail, *supra* note 61 (“Counsel do not do a good job with their current limited role. . . . Improper voir dire questions [are] a common problem.”).

<sup>207</sup> E-mail from Colonel Stephen R. Henley, U.S. Army, Chief Trial Judge, to author (Feb. 25, 2010, 14:46 EST).

misstate the law, discuss inadmissible evidence, or ingratiate themselves in a manner that goes beyond permissible rapport-building.<sup>208</sup> In some instances such antics could be annoying and wasteful, but a greater concern is the creation of appellate issues.

The recent CAAF decision in *United States v. Nieto*<sup>209</sup> illustrates this concern. In *Nieto*, trial counsel posed a hypothetical scenario to the members during individual voir dire concerning the validity of a urinalysis with minor procedural defects. While conducting group voir dire, the trial counsel asked, “Does any member believe that any technical error in the collection process, no matter how small[,] means that the urinalysis is per se invalid?”<sup>210</sup> After receiving an affirmative response from each member, the trial counsel attempted to rehabilitate the members during individual voir dire.<sup>211</sup> His tortuous attempts at

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<sup>208</sup> As previously noted, some military justice commentators believe that using voir dire for purposes such as previewing the theory of the case is improper. See SCHLUETER, *supra* note 42, § 15-10(A), at 825:

The sole purpose of voir dire is to determine, through questioning, whether any member is not qualified to sit on the court-martial. And it is improper for counsel to use voir dire to present information that would not be admissible at trial, and to attempt to educate the jury about his theory of the case. There is obviously a thin line between thoroughly questioning the members and educating them about the case, and possible uses of testimony and other evidence. Prudent counsel should, however, focus primarily on the former and avoid questions and comments which could reasonably be interpreted as an attempt to influence the court members.

*Id.*

<sup>209</sup> 66 M.J. 146 (C.A.A.F. 2008).

<sup>210</sup> *Id.* at 148 (alterations in original).

<sup>211</sup> *Id.* at 148–49. A representative portion of the trial counsel’s attempt at rehabilitation reads as follows:

TC: You believe that any type of deviation from the SOP automatically invalidates that[,] there is no weight to be assigned to it, you didn’t follow procedures so therefore you can’t rely on it, it is unreliable evidence?

MBR ([Chief Warrant Officer 3 (CWO3)] [M]): Any time you have a gap in the chain, sir[,] it makes it a weak link. So it is possible that any part of that gap could have been tampered with. I would like to hear the evidence of why there is a gap there, and based off of that evidence I could make a better determination of whether it is valid or not valid.

rehabilitation resulted in several members further emphasizing that “any violation of the SOP, no matter [how minor]” would, in their opinion, invalidate the urinalysis results.<sup>212</sup>

The appellant argued that the military judge committed plain error by allowing the prosecution to ask questions which “improperly sought to obtain from the panel members a commitment to convict Appellant based on a hypothetical set of facts.”<sup>213</sup> According to the appellant, this attempt at commitment deprived him of his right to an impartial panel.<sup>214</sup> Of significance in this case was defense counsel’s failure to object to these questions at trial. Absent such an objection, the CAAF applied a plain error analysis, whereby the “appellant bears the burden of demonstrating ‘(1) an error was committed, (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to an appellant’s substantial rights.’”<sup>215</sup>

The CAAF noted that, rather than ask the court to analyze a military judge’s ruling on a challenge, the appellant was essentially asking the court to rule on the “scope of permissible questioning” concerning

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TC: Okay. So you are talking about custody issues when you talk about the collection process?

MBR (CWO3 [M]): Yes, sir.

TC: What if it was something else[?] What if there was a particular space where someone didn’t initial, where other wise [sic] they would have? Is that the sort of procedural error that you think would invalidate a urinalysis test per se?

MBR (CWO3 [M]): Only if it is a standard operating procedure for that point in time, yes, sir.

TC: So if there were some body [sic] like the coordinator who was supposed to initial the bottle, and he didn’t, that would necessarily mean that you couldn’t rely on that sample that was collected because he didn’t fulfill the duties he should have?

MBR (CWO3 [M]): Yes, sir.

*Id.* at 148 (alterations in original).

<sup>212</sup> *Id.* at 148.

<sup>213</sup> *Id.* at 149.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

hypotheticals.<sup>216</sup> Acknowledging that this was a “matter of first impression,” and absent an objection at trial, the CAAF determined that the military judge had not committed plain error.<sup>217</sup>

On its face, *Nieto* represents a judge’s voir dire nightmare. Trial counsel asked a confusing hypothetical question and spent valuable court time trying to recover from his mistake.<sup>218</sup> The concurring opinions give rise to another set of concerns for military judges, however. In one concurring opinion, Judges Baker and Erdmann stated that in cases where counsel’s hypothetical questions were “obvious attempts to commit the members,” the “military judge would err in not testing the basis for such questions.”<sup>219</sup> In other words, these judges would seemingly “impose a sua sponte duty on a military judge” to cut off improper questions, such as those presented in *Nieto*.<sup>220</sup>

The prospect of having to frequently step in to “manage” voir dire in order to avoid appellate issues understandably leads some judges to prohibit counsel-conducted voir dire all together.<sup>221</sup> Certainly, this approach would obviate a *Nieto* scenario. Completely eliminating voir dire by counsel is not an appropriate solution, however. For one, counsel cannot improve their ability to conduct voir dire without practice. Operating from the premise that counsel-conducted voir dire is at least sometimes appropriate, military judges may have to endure some stumbling (and the occasional train wreck) to give counsel the opportunity to develop their skills. Second, the psychological benefits discussed above regarding juror candor militate against the complete elimination of counsel-conducted voir dire.<sup>222</sup> Perhaps the most compelling reason to permit counsel-conducted voir dire, however, is that outright denial could lead to its own set of appellate issues.<sup>223</sup> In other words, rather than eliminating an unnecessary evil, denying counsel the chance to conduct voir dire could give rise to a different aspect of the same problem.

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<sup>216</sup> *Id.* at 150.

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

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

<sup>219</sup> *Id.* at 152 (Baker & Erdmann, JJ., concurring in the result).

<sup>220</sup> Major S. Charles Neill, *There’s More to the Game than Shooting: Appellate Court Coaching of Panel Selection, Voir Dire, and Challenges for Cause*, ARMY LAW. Mar. 2009, at 72, 82.

<sup>221</sup> See Lee Interview, *supra* note 77.

<sup>222</sup> See *supra* notes 185–93 and accompanying text.

<sup>223</sup> See, e.g., *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996) (holding that the military judge abused his discretion by refusing to reopen voir dire upon defense request).

The remaining counterarguments can be addressed fairly succinctly. Some critics may argue that judges are in a better position to seat an impartial panel. Proponents of this viewpoint would argue that counsel must advocate for a certain position, thereby lacking impartiality themselves. In other words, rather than seek a “neutral” panel, counsel will seek a “favorable” panel. This counterargument rightly points out that trial and defense counsel step into a courtroom with a decided goal and point of view, one not shared by the judge. Nonetheless, counsel are still in a superior position to exercise challenges in a fashion that leads to an impartial panel. As discussed *infra*, counsel have access to facts about panel members as well as case-dispositive facts that allow for carefully tailored questioning. Furthermore, both case law<sup>224</sup> and the judge’s discretion during voir dire limit the use of questions and challenges to seat a panel that is “favorable” (i.e., biased). For these reasons, allocating the responsibility to conduct voir dire among the judge and counsel will better ensure an impartial panel than voir dire conducted solely by the military judge.

Another counterargument is that granting the right to counsel voir dire would lead to tedious, inartful questioning, thereby wasting valuable court time. Once again, the counterpoint to this critique is the military judge’s overall responsibility for controlling voir dire and protecting the record. As discussed previously, the proposed change to RCM 912 would still require counsel to ask only relevant questions for proper purposes. Therefore, counsel could object, or judges could sua sponte limit questioning, once the limits of relevancy were strained. Furthermore, one could argue that creating a right to conduct voir dire will provide counsel a strong incentive to thoroughly prepare for voir dire. For example, depending on the circumstances, an appellant could argue that failure to request counsel-conducted voir dire resulted in ineffective assistance of counsel.<sup>225</sup> The potential for such an argument

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<sup>224</sup> See *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids the exercise of peremptory challenges to eliminate jurors based solely on race); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (holding that exercising peremptory challenges based solely on sex is unconstitutional).

<sup>225</sup> The test for ineffective assistance of counsel comes from *Strickland v. Washington*:

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the

could energize defense counsel to develop their advocacy skills in this area.

Another consideration when looking at judicial economy is the access that military counsel have to information about the panel. Compared to their civilian counterparts, military counsel can conduct an effective “pre-screening,” thereby eliminating the need to use courtroom time for preliminary questions. First, the convening authority must follow Article 25, UCMJ, criteria when selecting the members.<sup>226</sup> These criteria include age, experience, and judicial temperament.<sup>227</sup> Thus, counsel approach the voir dire process knowing that the members have already been through a screening process more rigorous than those found in civilian jurisdictions.<sup>228</sup> Second, counsel typically have some knowledge of the members prior to trial. Some of that information may be naturally derived from working with the members in the course of regular duties.<sup>229</sup> Unique to the military is the concept that everyone in the courtroom—counsel, members, accused—often work on the same military installation. Furthermore, counsel have access to panel member questionnaires.<sup>230</sup> These documents provide information ranging from basic (e.g., past duty assignments) to complex (if requested by counsel, with the military judge’s approval).<sup>231</sup> Therefore, military trial and

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defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

<sup>226</sup> UCMJ art. 25 (2008).

<sup>227</sup> *Id.* Specifically, Article 25(d)(2) states: “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 by reason of age, education, training, experience, length of service, and judicial temperament.” *Id.* art. 25(d)(2).

<sup>228</sup> *See, e.g.*, 28 U.S.C.A. §§ 1861–1878 (West 2009) (setting forth the criteria for serving on a federal jury). In essence, the default is that any U.S. citizen can serve as a federal juror, absent specific statutory qualifications such as lack of English proficiency, mental or physical infirmity, pending felony charges, or a felony conviction. *Id.* § 1865.

<sup>229</sup> *See United States v. Richardson*, 61 M.J. 113, 119 (C.A.A.F. 2005) (noting that in the military, trial counsel and members of commands they advise can develop close personal and professional relationships).

<sup>230</sup> MCM, *supra* note 8, R.C.M. 912(a)(1).

<sup>231</sup> *Id.* R.C.M. 912(a)(1)(A)–(K). An example of more complex information that could be adduced by a questionnaire would be the member’s prior experience with law enforcement, or as a victim of crime.

defense counsel can approach voir dire already aware of preliminary information which would require a great deal of time to elicit in civilian jurisdictions.

A final criticism of this proposal might be that such a change is wholly unnecessary. Most of the time, regardless of who conducts voir dire and how, the process “works.” If it does not, then the appellate courts can clean it up at their level. This argument, however, focuses on the end result, and not the process. When speaking broadly about the rule of law, crucial to the functioning of a system of justice are the perception of fairness, and the trust of the people in the system.<sup>232</sup> As discussed previously, the concept of trial before an impartial jury is fundamental in the American justice system.<sup>233</sup> Procedures that restrict, or even remove, the ability of government and defense counsel to fully participate in ensuring an impartial jury infringe upon that fundamental right.<sup>234</sup> Even if such a restriction results in harmless error, a perception of unfairness diminishes trust in the process. Therefore, counsel should have the opportunity at courts-martial to fully participate in voir dire.

Given the points and counterpoints discussed above, an amendment to RCM 912(d) granting a right to counsel-conducted voir dire is an appropriate change to the military justice system. The unique nature of the selection of members in courts-martial, the composition of military panels, and the restrictions on peremptory challenges make voir dire crucial for counsel to elicit information to intelligently exercise challenges. Such a change will minimally disrupt the current practice of military justice, because military judges will still retain inherent control over the process. Furthermore, this amendment can motivate counsel on both sides to focus on voir dire and its importance in seating an impartial panel. An additional—and significant—benefit will be an increase in candid responses from members. Finally, this change strengthens the

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<sup>232</sup> See CTR. FOR MILITARY L. & OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., *RULE OF LAW HANDBOOK* 4–5 (2009) (citing Richard H. Fallon, *The Rule of Law as a Concept in International Discourse*, 97 COLUM. L. REV. 1, 7–8 (1997) (citations omitted)). “The final element [of the rule of law] involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.” Fallon, *supra*, at 9.

<sup>233</sup> See *supra* notes 22–28 and accompanying text (discussing the development of an impartial, versus local, jury in the United States in the late eighteenth century).

<sup>234</sup> See, e.g., *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996) (holding that the military judge abused his discretion by refusing to reopen voir dire upon defense request).

military justice system by emphasizing the significance of an impartial jury as a fundamental right in the adversarial trial process.

## VI. Conclusion

The opening quote from *Measure for Measure* demonstrates that the opportunity to be judged by a group of strangers has its inherent dangers. The fundamental right to an impartial jury has existed prior to our country's inception, and is guaranteed by the Constitution. As repeatedly illustrated by courts and commentators, although voir dire is not a fundamental right, it is inextricably linked to enforcing the Sixth Amendment's guarantee. Only by a thorough examination of potential jurors can counsel seek to challenge those jurors "[g]uiltier than him they try."<sup>235</sup>

Although some may argue that the military's current voir dire process is not broken, it certainly can be improved. The current system allows the military judge great latitude to restrict or deny counsel-conducted voir dire. Yet, both judges and courts agree that liberal voir dire can allow for a more informed exercise of challenges, improve counsel's advocacy skills, and even save a case on appeal. An amendment to RCM 912 guaranteeing counsel's right to conduct voir dire can accomplish these goals, while also ensuring that voir dire is conducted uniformly throughout the military.<sup>236</sup>

Whether by means of this article's proposal or some other version, the time has come to re-look how military courts conduct voir dire. Cases like *Donovan v. People* demonstrate that the inherent tensions regarding counsel-conducted voir dire have existed for decades.<sup>237</sup> The states have repeatedly researched, debated, and completely reformed voir dire practice in their courtrooms. And yet, the process used by military courts has remained virtually untouched since 1950. A respected cultural icon once wisely stated, "A change would do you good."<sup>238</sup> In this instance, a change to RCM 912 would benefit courts in the fair administration of

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<sup>235</sup> WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 2.

<sup>236</sup> See Conn E-mail, *supra* note 74 (stating that voir dire may need "more uniformity in practice").

<sup>237</sup> *Donovan v. People*, 28 N.E. 964 (Ill. 1891).

<sup>238</sup> SHERYL CROW, *A CHANGE WOULD DO YOU GOOD* (A&M Records 1996).

justice, protect the fundamental rights of the accused, and strengthen the public's perception of the fairness of military justice. Good, indeed.

**CLEARING THE HIGH HURDLE OF JUDICIAL RECUSAL:  
REFORMING RCM 902(a)**

MAJOR STEVE D. BERLIN\*

*An independent judiciary is indispensable to our system of justice. Equally important is the confidence of the public in the autonomy, integrity and neutrality of our military judiciary as an institution. Army judges must strive to maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives.<sup>1</sup>*

I. Introduction

The military justice system should be efficient and transparent in order to maintain the good order and discipline of servicemembers.<sup>2</sup> Likewise, a transparent system helps maintain public confidence.<sup>3</sup> To enhance the military justice system's efficiency and transparency with regard to military judge recusal, the President should amend Rule for Courts-Martial (RCM) 902(a).

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<sup>1</sup> Memorandum from The Judge Advocate General, U.S. Army, to Army Judges, subject: Army Code of Judicial Conduct (16 May 2008) [hereinafter Army Code of Judicial Conduct Memo].

<sup>2</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, pmbl. para. 3 (2008) [hereinafter MCM] (stating that one of the purposes of military law is to maintain good order and discipline); see also U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-21 (16 Nov. 2005) [hereinafter AR 27-10] (establishing a quick timeline for processing courts-martial). Implied in efficiently maintaining good order and discipline is that servicemembers subject to the Uniform Code of Military Justice (UCMJ) will have a transparent system for them to readily see justice.

<sup>3</sup> In drafting the UCMJ, Congress was concerned with maintaining a positive image in the public's esteem and proscribed service discrediting conduct. MCM, *supra* note 2, pt. IV, ¶ 60c(3).

Recent developments in military jurisprudence demand a closer look at a once-sacrosanct arena: judicial impartiality. In May 2008, the Court of Appeals for the Armed Forces (CAAF) addressed a military judge's recusal duty for implied bias in *United States v. Greatting*<sup>4</sup> and *United States v. McIlwain*.<sup>5</sup> These companion cases involved situations in which military judges made statements that would cause someone to question their impartiality as they sit on related cases.<sup>6</sup> Furthermore, they raise the question of when judicial economy yields to the perception that a military judge is no longer impartial.

This article examines the military judge's sua sponte duty of recusal when an observer would likely believe the judge lacks impartiality. It begins by exploring the basic rules governing judicial recusal and how appellate courts have historically treated cases where judges may have demonstrated a lack of impartiality. It then looks at the increased oversight from appellate courts in the recent term. Finally, this article discusses various theories that would improve the courts' treatment of potential judicial bias.

This article concludes that a party should be able to ask an independent judge to review its challenge to a military judge's impartiality. Instead of allowing appellate review as the only viable alternative for reviewing a military judge's recusal ruling, a party should be able to appeal to the Chief Circuit Judge of the jurisdiction. The Chief Circuit Judge would detail a new military judge to review the initial recusal motion, with the additional review balancing the concerns of the party moving to recuse the military judge and adding only minor delay into the court-martial process.

## II. The High Hurdle of Proving Judicial Bias

In its infancy, the Uniform Code of Military Justice (UCMJ) was seen as a progressive criminal justice statute that gave strong protections to servicemembers.<sup>7</sup> The military justice system continues to provide

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<sup>4</sup> 66 M.J. 226 (C.A.A.F. 2008).

<sup>5</sup> 66 M.J. 312 (C.A.A.F. 2008).

<sup>6</sup> *Greatting*, 66 M.J. at 229; *McIlwain*, 66 M.J. at 313.

<sup>7</sup> NAT'L INST. OF MILITARY JUST., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (May 2001) [hereinafter COX COMMISSION], available at [http://www.wcl.american.edu/nimj/documents/Cox\\_Comm\\_Report.pdf](http://www.wcl.american.edu/nimj/documents/Cox_Comm_Report.pdf). The Cox Commission begins its report by highlighting the

many protections missing in other state and federal systems.<sup>8</sup> To ensure that servicemembers receive these rights, an impartial judiciary must oversee the military justice system.<sup>9</sup>

The system is not without its critics, however. In the fiftieth anniversary of the UCMJ, the National Institute of Military Justice (NIMJ) created a “blue-ribbon panel that examined the military justice system.”<sup>10</sup> This led to the Cox Commission, named after Chief Judge Walter Cox of the CAAF, which concluded that the military judiciary should have greater independence to “preserv[e] public confidence in the fairness of courts-martial.”<sup>11</sup> To determine perceived impartiality of the judges, this article first turns to the underlying rules.

#### A. The Basic Rule Provides Little Guidance on Determining a Military Judge’s Bias

Although a practitioner should be able to turn to the “rules” to find an answer, the RCM offer little help in evaluating the potential bias of a

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development of the UCMJ in its first fifty years. *Id.*

<sup>8</sup> These protections include automatic appellate review, *Care* inquiry, and access to expert witnesses paid at Government expense. Uniform Code of Military Justice (UCMJ) art. 66 (2008); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); MCM, *supra* note 2, R.C.M. 703.

<sup>9</sup> *See* THE FEDERALIST No. 78 (Alexander Hamilton) (advocating for a strong, independent judiciary “to secure a steady, upright, and impartial administration of the laws”).

<sup>10</sup> H.F. “Sparky” Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law*, 193 MIL. L. REV. 178, 193 (2007). *See also* COX COMMISSION, *supra* note 7, at 2. The Cox Commission was led by Judge Walter Cox of South Carolina Supreme Court. *Id.* at 4–5. Judge Cox is a former member of the Court of Military Appeals and the Court of Appeals for the Armed Forces (CCAFA). *Id.* Three other members were retired Air Force and Navy Judge Advocates, including a former Judge Advocate General of the Navy. *Id.* A fifth member serves as a law professor and a member of the Rules Advisory Committee to the CAAF. *Id.*

<sup>11</sup> COX COMMISSION, *supra* note 8, at 9. *But see* Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): “The Cox Commission,”* 52 A.F. L. REV. 233, 256–58 (2002) (criticizing the Cox Commission for its failure to demonstrate cases lacking judicial impartiality, to enumerate powers possessed by civilian judges that are not held by military judges, and to provide references other than “fringe groups”). On the contrary, the Cox Commission listed Citizens Against Military Justice, the United States Council on Veterans Affairs, Sailors United For Self Defense, American Gulf War Veterans Association, and [www.militarycorruption.com](http://www.militarycorruption.com). COX COMMISSION, *supra* note 7, at 3 n.5.

military judge. Under RCM 902(a), with regard to implied bias, unless waived by both parties,<sup>12</sup> “a military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.”<sup>13</sup> The vague language of RCM 902(a) creates a broad standard using implied bias where reasonable minds may differ,<sup>14</sup> as opposed to the specific examples of RCM 902(b), which illustrate scenarios where judges may not preside over a case due to actual bias.<sup>15</sup> For example, recusal is mandatory if the military judge was the accuser, the military judge’s spouse will testify as a material witness, or the military judge has personal knowledge of disputed evidentiary facts.<sup>16</sup> Rule for Court-Martial 902(a)’s meager guidance forces practitioners to look outside the Rule’s text, requiring a review of the drafters’ analysis to glean the Rule’s intent.

From the drafters’ analysis, one learns that the drafters intended to mirror provisions of the U.S. Code.<sup>17</sup> “This rule is based on 28 U.S.C. § 455, which is itself based on Canon III of the *ABA Code of Judicial Conduct*, and on paragraph 62 of MCM, 1969 (Rev).”<sup>18</sup> The current version of 28 U.S.C. § 455 is substantially similar to RCM 902<sup>19</sup> with parallel provisions that allow for persuasive guidance from analogous situations in civilian courts.

To better understand the rules governing judicial implied bias, Professor Leslie Abramson examines the interplay between the obvious mandatory disqualifications and the less-clear cases in which a judge’s

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<sup>12</sup> Neither RCM 902(e) nor 28 U.S.C. § 455(e) gives the authority to waive implied bias to a specific party. MCM, *supra* note 2, R.C.M. 902(e); 28 U.S.C. § 455(e) (2006). Accordingly, the right should belong to both sides.

<sup>13</sup> MCM, *supra* note 2, R.C.M. 902(a).

<sup>14</sup> For example, the CAAF issued a decision of 4–1 in determining whether a military judge’s conversation with the convening authority’s staff judge advocate (SJA) about an ongoing series of companion cases constituted implied bias. *United States v. Greatting*, 66 M.J. 226 (C.A.A.F. 2008). Another example is the CAAF’s 3–2 decision assessing a military judge’s in-court statement that “her participation in companion cases ‘would suggest to an impartial person looking in that [she] can’t be impartial in this case.’” *United States v. McIlwain*, 66 M.J. 312, 312 (C.A.A.F. 2008).

<sup>15</sup> MCM, *supra* note 2, R.C.M. 902(b); *see also id.* R.C.M. 902(e) (prohibiting waiver in RCM 902(b) situations).

<sup>16</sup> *Id.* R.C.M. 902(b).

<sup>17</sup> *Id.* R.C.M. 902 analysis, at A21-52.

<sup>18</sup> *Id.*

<sup>19</sup> Compare 28 U.S.C. § 455 (2006) (including additional provisions with minimal relevance to military judges, such as allowing a judge to divest of a financial disqualification in certain cases), with MCM, *supra* note 2, R.C.M. 902.

“impartiality might reasonably be questioned.”<sup>20</sup> Professor Abramson classifies recusal for implied bias as an “inclusive ‘catch-all’ provision available as the source for evaluating recusal in two situations: (1) when facts do not altogether match the language of the specific examples; or (2) when the situation obviously falls outside the specific scenarios.”<sup>21</sup> On this view, the implied bias rule is “a ‘fall-back’ position for any judge or party considering judicial disqualification.”<sup>22</sup>

Professor Abramson recognizes that implied bias challenges could be abused because of the relative ease of making allegations against a judge.<sup>23</sup> Accordingly, he stresses the need for proof to justify a recusal under the standard that “a reasonable person knowing all the facts [would] conclude that the judge’s impartiality might reasonably be questioned.”<sup>24</sup> Some examples of sufficiency of proof include a judge improperly threatening a witness with contempt charges<sup>25</sup> and a judge’s knowledge of various facts about a case from an improper extrajudicial source.<sup>26</sup>

Although the standard for determining judicial bias is analogous in civilian and military judicial systems, the two systems are not identical.<sup>27</sup> The main difference is the procedures for judicial disqualification.<sup>28</sup> Under 28 U.S.C. § 144, when a party moves to disqualify a federal judge for personal bias or prejudice, the judge shall proceed no further.<sup>29</sup> The military system does not follow the same process: “This procedure is not practicable for courts-martial because of the different structure of the military judiciary and the limited number of military judges.”<sup>30</sup> As one of many distinctions between the two systems, this difference demonstrates the significant logistical differences between the standing

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<sup>20</sup> Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 55 (2000).

<sup>21</sup> *Id.* at 59.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 60.

<sup>24</sup> *Id.* at 72.

<sup>25</sup> *Id.* at 76–77.

<sup>26</sup> *Id.* at 79–81. Knowledge of external facts could include a judge having a pretrial conversation with a witness and learning facts about the case or a judge reading media coverage of the case.

<sup>27</sup> MCM, *supra* note 2, R.C.M. 902 analysis, at A21-52 (basing the rule on 28 U.S.C. § 455 and not 28 U.S.C. § 144).

<sup>28</sup> *Id.*

<sup>29</sup> 28 U.S.C. § 144 (2006).

<sup>30</sup> MCM, *supra* note 2, R.C.M. 902 analysis, at A21-52.

civilian courts and the military courts that existed at the time the rules were created. Today, there are still many distinctions between civilian and military courts, but technology has narrowed the gap.

Unlike most civilian jurisdictions where a judicial center houses multiple judges, military installations still have only a few judges.<sup>31</sup> For example, in the Army, only Fort Campbell, Fort Hood, and an installation in Vilseck, Germany, have multiple judges assigned to one installation.<sup>32</sup> The remaining installations only feature one sitting military judge; other installations require a military judge to travel there to hear cases.<sup>33</sup> Yet, advances in technology may help judges overcome geographic barriers.<sup>34</sup> For example, the President amended RCM 914B in 2007 to allow military judges to “take testimony via remote means,” using technology such as “videoteleconference, closed circuit television, telephone, or similar technology.”<sup>35</sup> Likewise, advancements in digital scanning and electronic mail have reduced the need to wait for postal services to deliver transcripts and documentary evidence. Consequently, these technological and legal developments allow changes to the military justice system because they are closing the geographical gaps between military judges sitting at different installations.<sup>36</sup> Nevertheless, these changes do not eliminate the obstacles faced when a party challenges a military judge for bias. Because a military judge may only use remote means to preside over Article 39a sessions, a military judge from a different installation may use this technology to review recusal motions.<sup>37</sup>

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<sup>31</sup> OFFICE OF THE JUDGE ADVOCATE GENERAL, JAG PUB. 1-1, THE DIRECTORY 2009–2010, at 12–16 (2009 ed.) [hereinafter JAG PUB. 1-1].

<sup>32</sup> *Id.*

<sup>33</sup> *See id.* (listing the numbers and locations of military judges in the Army). One should look to the Army’s First Judicial Circuit for an example of the dispersion of military judges. *Id.* at 13. The circuit only has four active duty military judges. *Id.* Consequently, a smaller installation, like Fort Knox, Kentucky, must have a judge travel to its courtroom.

<sup>34</sup> The analysis to the RCM were originally drafted in 1984. MCM, *supra* note 2, intro. to R.C.M. analysis, at A21-1.

<sup>35</sup> *Id.* R.C.M. 914(B).

<sup>36</sup> These technological advancements spur the argument for changing RCM 902’s recusal adjudication procedures in Part IV.B *infra*.

<sup>37</sup> MCM, *supra* note 2, R.C.M. 805(a).

B. When Looking at a Lack of Impartiality, Appellate Courts Require Substantial Evidence to Overcome the Strong Presumption that a Military Judge is Impartial

The rules governing judicial bias provide little guidance for determining a lack of judicial impartiality. The phrase “might reasonably be questioned” is so broad that it creates an exception that can swallow the rule.<sup>38</sup> With the lack of the authoritative guidance in the Rule’s text, one must turn to case law for much-needed interpretation.

1. *The United States Supreme Court Adds Clarity to the Interplay Between 28 U.S.C. § 455a and 28 U.S.C. § 455b*

The Supreme Court, in *Liljeberg v. Health Services Acquisition Corp.*,<sup>39</sup> drew a distinction between the scenarios that require judicial recusal in § 455b and the broader requirements of § 455a. Although the Court focuses on § 455, it is relevant to military cases because the drafters based RCM 902 on § 455.<sup>40</sup> The facts in *Liljeberg* involved a contract dispute between a corporate promoter and a health service company over the construction of a hospital.<sup>41</sup> Part of the deal included purchasing land from a university.<sup>42</sup> The trial court ruled in favor of the promoter, thus placing the health service company in an advantageous position in its follow-on negotiations.<sup>43</sup> The district court judge who presided at trial was a trustee for the university, but disclaimed knowledge that the university owned the property in question.<sup>44</sup> The trial judge later defended himself against allegations of bias, stating that he had no actual bias because he was unaware of his involvement as a trustee.<sup>45</sup>

The Supreme Court cautioned readers not to confuse § 455(a) and § 455(b),<sup>46</sup> identifying a distinction between implied bias and actual bias.<sup>47</sup>

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<sup>38</sup> *Id.* R.C.M. 902(a). See discussion at note 14 *supra*.

<sup>39</sup> 486 U.S. 847 (1988).

<sup>40</sup> MCM, *supra* note 2, R.C.M. 902 analysis, at A21-52.

<sup>41</sup> *Liljeberg*, 486 U.S. at 850.

<sup>42</sup> *Id.* at 853.

<sup>43</sup> *Id.* at 850.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 851.

<sup>46</sup> *Id.* at 861 n.8.

<sup>47</sup> *Id.*

On one hand, § 455(b) prohibits a judge from presiding over a case in specific factual scenarios as they are tantamount to actual bias, such as knowing of a fiduciary interest in a disputed parcel of property.<sup>48</sup> Here, the parties may not waive judicial disqualification in a § 455(b) situation.<sup>49</sup> On the other hand, where judicial disqualification for implied bias under § 455(a) is much broader, an implied bias disqualification may be waived.<sup>50</sup> In creating this distinction, the Court expanded implied bias by stating that scienter is not an element of a violation of § 455(a).<sup>51</sup> Focusing on the perception of fairness, the Court reasoned that although a judge may genuinely be unaware of a disqualifying circumstance, this “does not eliminate the risk that ‘his impartiality might reasonably be questioned’ by other persons.”<sup>52</sup>

2. *Service Courts Weigh Allegations of a Judge’s Lack of Impartiality in Light of the Totality of the Circumstances*

To determine how a reasonable person would assess a judge’s impartiality, courts must look to all relevant facts. *United States v. Wright* offers additional insight in how military courts ascertain whether a military judge’s impartiality might reasonably be questioned.<sup>53</sup> The military judge in *Wright* had previously served with an investigator who was a key witness in a suppression motion.<sup>54</sup> In voir dire, the judge explained that he had previously served as the senior trial counsel in a jurisdiction serviced by the investigator and he had worked with the investigator on numerous cases over a three-year period.<sup>55</sup> The military judge further explained that he “came to the opinion that [the investigator] was an honest and trustworthy person, and he was a very competent [Naval Criminal Investigative Service] agent.”<sup>56</sup> The military judge then explained that he would weigh the credibility of the investigator’s testimony in the same manner as other witnesses.<sup>57</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 859.

<sup>52</sup> *Id.* (quoting 28 U.S.C. § 455 (2006)).

<sup>53</sup> 52 M.J. 136 (C.A.A.F. 1999).

<sup>54</sup> *Id.* at 137–38.

<sup>55</sup> *Id.* at 138.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

On appeal, the CAAF stated that although the implied bias test is objective, that the military judge's "subjective analysis is a relevant factor in the application of an objective standard."<sup>58</sup> In affirming the judge's decision, the court reasoned, "The military judge's full disclosure, sensitivity to public perceptions, and sound analysis objectively supported his decision not to recuse himself, and these factors contribute to a perception of fairness."<sup>59</sup> Analyzing a military judge's statements of subjective beliefs with objective thought is akin to the fact-finding role that juries face. In essence, appellate courts weigh the military judge's "side" of the events with the surrounding circumstances to determine whether a reasonable person would evaluate the military judge's statements as believable. Accordingly, *Wright* demonstrates the need to look at the totality of the circumstances in evaluating how a "reasonable person" would view a court-martial.

Additionally, to help understand whether one can reasonably question the military judge's impartiality, appellate courts turn to ethics rules for guidance.<sup>60</sup> Two terms after *Wright*, the CAAF gave additional guidance in weighing implied bias in *United States v. Quintanilla*.<sup>61</sup> In *Quintanilla*, the military judge confronted a witness both on and off the record.<sup>62</sup> The military judge initially confronted the witness because he believed the witness delayed another witness from entering the courtroom.<sup>63</sup> The military judge became frustrated at the delay, called a recess, and left the bench.<sup>64</sup> Rather than turn to counsel to resolve the issue, he elected to confront the witness himself.<sup>65</sup> The military judge left the courtroom on three occasions, lasting from four to thirty-nine minutes.<sup>66</sup> Although the record is vague on the nature of the out-of-court interactions between the military judge and the witness,<sup>67</sup> the witness claimed that the military judge pushed him and called him a

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<sup>58</sup> *Id.* at 142.

<sup>59</sup> *Id.*

<sup>60</sup> *See, e.g.,* *United States v. Quintanilla*, 56 M.J. 37, 42 (C.A.A.F. 2001) (looking to ethics rules to assess a judge's conduct).

<sup>61</sup> *Id.* at 47.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 48–50.

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

<sup>67</sup> *Id.* Consequently, the opinion only explains the witness's version of the events and the military judge's response. *Id.* The record is vague because it only captures narration of the out-of-court events as depicted on the record. *Id.*

“m\*\*\*\*\*f\*\*\*\*\*.”<sup>68</sup> The witness became so upset that he called the military judge’s superior in the trial judiciary.<sup>69</sup> The confrontations were so severe that they “not only affected procedural aspects of the trial, but also became the focus of evidence introduced for consideration by the members during trial on the merits.”<sup>70</sup>

To determine the appropriateness of the military judge’s conduct, or lack thereof, the CAAF turned to ethics canons for guidance.<sup>71</sup> Citing Canon 3 of the *American Bar Association’s (ABA) Model Code of Judicial Conduct*, the court admonished military judges: “Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.”<sup>72</sup>

The CAAF stated that all violations of the ethical canons do not require reversal, however.<sup>73</sup> Instead, the court viewed the ethical canons as “principles to which judges should aspire” and that violations of those canons “are enforced primarily through disciplinary action and advisory opinions, rather than through disqualification.”<sup>74</sup> Stressing this point, the court stated, “There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings.”<sup>75</sup>

The CAAF then articulated the standard of assessing implied bias: “Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge’s ‘impartiality might reasonably be questioned’ is a basis for the judge’s disqualification.”<sup>76</sup> In finding evidence that the military judge’s impartiality might reasonably be questioned, the court next articulated

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<sup>68</sup> *Id.* at 50 (asterisks supplied by the court).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 47.

<sup>71</sup> *Id.* at 42.

<sup>72</sup> *Id.* The canon’s warning against inappropriate facial expressions and body language demonstrates the difficulty of using appellate courts to overcome implied bias, because a court transcript will unlikely capture a situation where a judge demonstrates disdain towards a witness.

<sup>73</sup> *Id.* at 42–43.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 44.

<sup>76</sup> *Id.* at 78 (quoting *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982)).

the appellate test for implied bias as whether the military judge's actions would cause an objective observer to question the "court-martial's legality, fairness, and impartiality."<sup>77</sup>

Not surprisingly, the CAAF found that the military judge's actions constituted implied bias.<sup>78</sup> The court reasoned that the military judge's actions created an appearance of partiality and "adversely reflect[ed] on his own professional conduct."<sup>79</sup> *Quintanilla* offers two important lessons. First, and most importantly, courts should look to outside sources to determine appropriate judicial conduct, such as ethical canons or guidance from the judiciary.<sup>80</sup> Second, the CAAF acknowledged its reluctance to find judicial bias by addressing a counsel's burden of demonstrating judicial bias as a high hurdle.<sup>81</sup>

In analyzing whether a military judge's impartiality may reasonably be questioned, military courts require much more than a speculative allegation of bias. Instead, courts will expand the inquiry to all relevant factors surrounding the allegation and make a decision in light of the totality of the circumstances. Courts will examine the salient facts and whether the military judge was acting in a judicial or extrajudicial role.<sup>82</sup> Appellate courts will also review the military judge's subjective statements and willingness to show transparency within the military justice system.<sup>83</sup> The courts will then compare the statements with evidence in the record to determine what a reasonable person apprised of all the facts would perceive by looking into the case.<sup>84</sup> Ultimately, one challenging a military judge under an implied bias theory must expansively develop the record and masterfully marshal the facts to overcome this high hurdle.

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<sup>77</sup> *Id.* (quoting *United States v. Burton*, 52 M.J. 223, 226 (2000)).

<sup>78</sup> *Id.* at 80.

<sup>79</sup> *Id.*; *cf. Liteky v. United States*, 510 U.S. 540, 555–56 (1994) (requiring recusal when a judge displays a "high degree of favoritism or antagonism as to make fair judgment impossible").

<sup>80</sup> *Quintanilla*, 56 M.J. at 46.

<sup>81</sup> *Id.* at 44.

<sup>82</sup> See *Abramson*, *supra* note 20, at 77–78 (describing an extrajudicial source as a judge's source of information about "parties or a litigation issue result[ing] from information discovered outside the judicial proceeding") (citing *Liteky*, 510 U.S. at 554).

<sup>83</sup> See *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999).

<sup>84</sup> *Quintanilla*, 56 M.J. at 78.

C. More Than a Moral Compass: Judicial Ethics Canons Illuminate Places Where a Person Might Reasonably Question a Judge's Impartiality

With disqualification being an extreme remedy, one must consider a different alternative to ensure a military judge is impartial.<sup>85</sup> A potential avenue for enforcing judicial conduct is through the rules of professional responsibility.<sup>86</sup> While each service prescribes different policies to maintain these rules, this article focuses on the Army's rules.<sup>87</sup> Even though the *Army's Code of Judicial Conduct (Army Code)* illustrates appropriate judicial behavior, the professional responsibility system is not well-suited to review scenarios where a judge's actions cause one to question the judge's impartiality.

The Army judiciary recently adopted the *Army Code of Judicial Conduct for Army Trial and Appellate Judges*.<sup>88</sup> The *Army's Code* is similar to the *ABA Model Code of Judicial Conduct* but contains changes that apply specifically to the military courts.<sup>89</sup> One of its goals is to ensure that judges promote "public confidence in the . . . judiciary" and that judges "shall avoid impropriety and the appearance of impropriety."<sup>90</sup> The *Army Code* gives generalized guidance similar to the Army regulations (AR) governing professional responsibility.<sup>91</sup> The *Army Code of Judicial Conduct* states that its rules are binding and may result in disciplinary action.<sup>92</sup> The *Army Code* also outlines its

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<sup>85</sup> *Id.* at 43.

<sup>86</sup> *See id.* at 42–43 (C.A.A.F. 2001) (stating that violations of judicial ethics canons "are enforced primarily through disciplinary action and advisory opinions, rather than through disqualification").

<sup>87</sup> *See generally* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 7 (30 Sept. 1996) [hereinafter AR 27-1] (prescribing the review mechanisms for professional responsibility allegations in the Army).

<sup>88</sup> *See Army Code of Judicial Conduct Memo, supra* note 1 (requiring the Army's military judges to abide by the *Army Code of Judicial Conduct*).

<sup>89</sup> U.S. ARMY TRIAL JUDICIARY, CODE OF JUDICIAL CONDUCT FOR ARMY TRIAL AND APPELLATE JUDGES, Scope para. 1 (16 May 2008), available at [www.jagcnet.army.mil](http://www.jagcnet.army.mil) [hereinafter ARMY CODE OF JUDICIAL CONDUCT] (follow "Military Justice" hyperlink; then follow "Trial Judiciary" hyperlink; then follow "Code of Judicial Conduct 2008" hyperlink); *see* MODEL CODE OF JUDICIAL CONDUCT (2007) [hereinafter MODEL CODE OF JUDICIAL CONDUCT] (listing the ABA's model code).

<sup>90</sup> ARMY CODE OF JUDICIAL CONDUCT, *supra* note 89, R 1.2.

<sup>91</sup> *See generally* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26] (prescribing the rules governing the practice of law in the Army's Judge Advocate General's Corps).

<sup>92</sup> ARMY CODE OF JUDICIAL CONDUCT, *supra* note 89, at scope, para. 5.

disciplinary enforcement mechanisms.<sup>93</sup> Nevertheless, its rules are so broad that the professional responsibility enforcement system is an ineffective method in confronting judicial implied bias.

Like its ABA counterpart, the *Army Code* speaks in broad terms. For example, Rule 2.2 states, “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”<sup>94</sup> When referring to disqualifications, Rule 2.11 states, “Army judges shall disqualify themselves from a proceeding when required by R.C.M. 902 or other provision of law.”<sup>95</sup> Upon reading these rules, it is hard to reconcile *Quintanilla’s* concept of reliance on discipline through professional responsibility with the professional responsibility rules’ ability to regulate judicial decision-making,<sup>96</sup> as these rules provide little guidance other than for judges to do their jobs. Consequently, Rule 2.11 does little more than curb anything but the most severe violations of RCM 902.

While the *Army Code* prohibits more egregious situations, also prohibited by RCM 902(a), such as judges serving as business partners with lawyers who practice in their courts<sup>97</sup> and accepting inappropriate gifts<sup>98</sup> these occurrences are so rare, they provide little help ensuring that judges recuse themselves for implied bias.<sup>99</sup> The rules also prohibit judges from making public statements that may “affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.”<sup>100</sup> This rule would curb some actions that lead to recusal. In particular, Rule 2.10 prevents judges from making public comments on pending or ongoing cases,<sup>101</sup> which strengthens the appearance of impartiality from the bench and removes issues like those in *Greatting*, where a military judge tainted a pending court-martial by

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<sup>93</sup> See *id.* (referring to AR 27-1 and AR 27-10).

<sup>94</sup> *Id.* R 2.2.

<sup>95</sup> *Id.* R. 2.11.

<sup>96</sup> See *United States v. Quintanilla*, 56 M.J. 37, 42–43 (C.A.A.F. 2001) (stating that ethics violations “are enforced primarily through disciplinary action and advisory opinions”).

<sup>97</sup> ARMY CODE OF JUDICIAL CONDUCT, *supra* note 89, R. 3.11(B)(3).

<sup>98</sup> *Id.* R. 3.13.

<sup>99</sup> There are no reported cases involving military judges violating these rules. Instead, the violations are much more amorphous.

<sup>100</sup> *Id.* R 2.10(A).

<sup>101</sup> *Id.*; see also MODEL CODE OF JUDICIAL CONDUCT, *supra* note 89, R. 2.10.

discussing the accused's companion cases with the staff judge advocate (SJA).<sup>102</sup>

Although the *Army Code of Judicial Conduct* prohibits these situations, none will warrant professional responsibility investigations. The Army limits professional responsibility investigations to infractions "that raise a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer."<sup>103</sup> While a military judge's actions could cause someone to question the judge's impartiality, there are few scenarios imaginable where one could argue that the judge's actions call into question the judge's honesty, trustworthiness, or fitness as a lawyer. Indeed, there have been no professional responsibility allegations against a military judge since at least 2006.<sup>104</sup> Accordingly, ethics rules give little relief to a party challenging a military judge's actions for implied bias outside of reliance on the ethical canons while attempting to clear the high hurdle of appellate review.

### III. Lowering the Hurdle: Courts May Be Willing to Question a Military Judge's Impartiality

By allowing military judges, alone, the authority to adjudicate allegations of their own lack of impartiality, the current law gives an accused little recourse other than the appellate courts.<sup>105</sup> The Government has even less recourse because it cannot appeal a military judge's recusal ruling.<sup>106</sup> To determine whether the system needs change, this article examines how appellate courts have been interpreting implied bias allegations. Though these courts have been hesitant to

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<sup>102</sup> *United States v. Greatting*, 66 M.J. 226 (C.A.A.F. 2008); *see also* discussion *infra* Part III.B.1.

<sup>103</sup> AR 27-1, *supra* note 87, para. 7-3.

<sup>104</sup> The Army's Chief Trial Judge is responsible to ensure the Army Judiciary follows the Army Code of Judicial Conduct. Telephone Interview with Colonel Stephen R. Henley, Chief Trial Judge, Army Trial Judiciary (Dec. 15, 2008) [hereinafter Henley Telephone Interview]. He has not received any allegations of implied bias during his tenure as Chief Judge. *Id.* He has served as the Chief Judge since July 2006. JAG PUB. 1-1, *supra* note 31, at 12.

<sup>105</sup> *See generally* MCM, *supra* note 2, R.C.M. 902(d) (granting military judges the authority to rule on their recusal motions).

<sup>106</sup> *See id.* R.C.M. 908(a) (limiting the Government's ability to appeal to narrow circumstances involving "an order or ruling that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings," and other situations involving classified information).

question a trial judge's impartiality, the CAAF was more willing to disqualify trial judges in the 2008 term.<sup>107</sup>

#### A. Beyond Reproach: Appellate Courts Historically Have Been Reluctant to Find that a Military Trial Judge Lacked Impartiality

In 1979, the Court of Military Appeals (COMA) struggled to protect the judiciary from recusal challenges.<sup>108</sup> In *United States v. Bradley*,<sup>109</sup> the court faced a case where a military judge sat as a fact-finder when the accused changed his plea.<sup>110</sup> At trial, the accused pled guilty to eight of eleven charged specifications.<sup>111</sup> The military judge accepted the accused's plea and announced findings of guilty for those eight specifications.<sup>112</sup> During trial on the remaining three specifications, the defense discovered new evidence, prompting the accused to withdraw his plea.<sup>113</sup> The accused then unsuccessfully moved to recuse the military judge.<sup>114</sup>

In a 2–1 decision, the COMA reversed the conviction, creating an exception to the rule that a military judge will rarely be disqualified.<sup>115</sup> The COMA stated that exposure to facts normally does not disqualify a military judge, reasoning “the judge’s ‘philosophical credentials (as a trained jurist) are sufficient to bar the appearance of impurity.’”<sup>116</sup> Nevertheless, the military judge “manifested those conclusions” by accepting the accused’s guilty pleas and entering the findings of guilty.<sup>117</sup>

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<sup>107</sup> See *Greatting*, 66 M.J. 226 (finding error in a military judge’s out-of-court comment to the SJA); see also *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008) (finding error in a military judge’s in-court comment).

<sup>108</sup> *United States v. Bradley*, 7 M.J. 332 (C.M.A. 1979); *United States v. Cooper*, 8 M.J. 5, 6 (C.M.A. 1979).

<sup>109</sup> 7 M.J. 332.

<sup>110</sup> *Id.* at 333.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* After the accused entered a plea of guilty, the defense counsel learned that witness statements that the Government claimed were sworn were actually unsworn. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 334.

<sup>116</sup> *Id.* (quoting *United States v. Hodges*, 47 C.M.R. 923, 925 (C.M.A. 1973) and citing MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 62f(13) (1969) (current version at MCM, *supra* note 2, R.C.M. 902)).

<sup>117</sup> *Bradley*, 7 M.J. at 334.

The COMA revisited the *Bradley* ruling in an analogous case two months later.<sup>118</sup>

In *United States v. Cooper*,<sup>119</sup> the COMA limited *Bradley* in a per curiam opinion.<sup>120</sup> In *Cooper*, the accused pleaded guilty and articulated the necessary facts to establish his guilt.<sup>121</sup> Then, prior to the military judge accepting his plea, the accused stated “that he did not feel in his own mind that he was guilty of the alleged offenses.”<sup>122</sup> Consequently, the military judge did not accept his plea and entered pleas of not guilty on behalf of the accused.<sup>123</sup> The trial defense counsel then voir dired the military judge on whether the military judge formed an opinion to the accused’s guilt or innocence.<sup>124</sup> The military judge responded that he had formed opinions to the accused’s guilt in his judicial capacity, but that he could disregard those facts and refused to recuse himself.<sup>125</sup>

Upholding the military judge’s decision to remain on the case, the COMA distinguished *Bradley* on two bases.<sup>126</sup> First, “[T]he appellant did not fully and unequivocally admit his guilt.”<sup>127</sup> Second, the military judge did not announce that the accused was guilty; instead, the military judge stated that “something may come out later in the inquiry which would also have indicated I should not have accepted his plea of guilty.”<sup>128</sup> In its ruling, the COMA minimized *Bradley* to an extremely narrow circumstance where the military judge has moved beyond an accused’s guilty plea and into the next phase of trial.<sup>129</sup>

Reading the *Bradley* and *Cooper* cases together reveals the COMA’s desire to minimize judicial recusal.<sup>130</sup> Both cases, which are factually similar,<sup>131</sup> involve the military judge’s examination of the underlying factual basis and the accused’s admission to the elements of the charged

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<sup>118</sup> See *United States v. Cooper*, 8 M.J. 5 (C.M.A. 1979).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 7.

<sup>121</sup> *Id.* at 6.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 6–7.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 7.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 6.

<sup>129</sup> *Id.* at 7.

<sup>130</sup> *United States v. Bradley*, 7 M.J. 332 (C.M.A. 1979); *Cooper*, 8 M.J. 5.

<sup>131</sup> *Bradley*, 7 M.J. at 333; *Cooper*, 8 M.J. at 6.

offenses.<sup>132</sup> Both also began as guilty pleas where the military judge sat as factfinder.<sup>133</sup> The difference, however, is that the *Cooper* accused withdrew his plea before the military judge accepted it.<sup>134</sup> The COMA's reasoning for distinguishing the two cases is specious. Although both accused admitted the factual predicates for the charged offenses, the COMA held that a reasonable person would question the military judge's impartiality only after he enters findings of guilty.<sup>135</sup>

These cases not only demonstrate appellate courts' difficulty creating bright-line rules for judicial bias, but also that courts are loathe to question fellow judges. This dichotomy stresses the obstacles that counsel and military judges face when dealing with judicial recusal: On one hand, a military judge should fully disclose any potential issues and enter necessary findings to move the court-martial along;<sup>136</sup> on the other hand, appellate courts seem to punish military judges who make too many statements during the proceedings.<sup>137</sup>

*1. Courts Have Been Equally Hesitant to Require Judges Recuse Themselves Despite the Judge's Previous Involvement With a Case*

The COMA continued its aversion to judicial recusal in *United States v. Kincheloe*.<sup>138</sup> There, an appellate judge, sitting on the Coast Guard Court of Military Review, previously prosecuted the appellant in an unrelated court-martial for unauthorized absence.<sup>139</sup> After completion of that case, the appellant submitted a deferment to his sentence to confinement and went AWOL again.<sup>140</sup> After the appellant returned to military control, a different trial counsel subsequently prosecuted the appellant at a different court-martial; that case was under review.<sup>141</sup> The appellate judge in question was still serving as a trial counsel and gave

<sup>132</sup> *Bradley*, 7 M.J. at 333; *Cooper*, 8 M.J. at 6–7.

<sup>133</sup> *Bradley*, 7 M.J. at 333; *Cooper*, 8 M.J. at 5.

<sup>134</sup> *Cooper*, 8 M.J. at 6.

<sup>135</sup> *Id.* at 7.

<sup>136</sup> See MCM, *supra* note 2, R.C.M. 902(d) (allowing counsel to question military judges for potential grounds for recusal).

<sup>137</sup> This assertion follows the logic in *McIlwain*, where a military judge made an honest, but imprudent, in-court statement concerning her service on companion cases. *United States v. McIlwain*, 66 M.J. 312, 313 (C.A.A.F. 2008).

<sup>138</sup> 14 M.J. 40, 50 (C.M.A. 1982).

<sup>139</sup> *Id.* at 46.

<sup>140</sup> *Id.* at 45–46.

<sup>141</sup> *Id.* at 46.

supporting evidence to the new trial counsel in the case on review, however.<sup>142</sup> Rule for Court-Martial 902 was not yet in effect, so the court turned to 28 U.S.C. § 455 for guidance.<sup>143</sup>

The *Kincheloe* court did not rule that the judge should have recused himself.<sup>144</sup> As a general rule, an appellate judge may not hear a case where he served as a party to the original court-martial.<sup>145</sup> Because the appellate judge prosecuted the accused at a different court-martial, the COMA did not apply the § 455(b) mandatory disqualifications.<sup>146</sup> The court then turned to implied bias under § 455(a).<sup>147</sup> Ultimately, the court relied on the six years that transpired since the first court-martial and found that the appellate judge's actions did not raise sufficient evidence to mandate his recusal.<sup>148</sup>

In his dissent, Judge William Cook demonstrated how reasonable minds may differ—or, perhaps, the lengths appellate courts will go to affirm a military judge's decision to deny recusal.<sup>149</sup> Judge Cook focused on the need to gauge implied bias by an objective standard.<sup>150</sup> That is, what would a reasonable person think of the propriety of the judge hearing the case?<sup>151</sup> He noted that the judge was a source of some evidence in the appeal and was once contemplated as a witness to the court-martial.<sup>152</sup> Thus, Judge Cook could not “see how a reasonable man, upon reading the transcript of the second trial and knowing the evidentiary facts upon which an important issue was resolved, would not question his further participation in the proceeding.”<sup>153</sup> Judge Cook's adept dissent underscores the COMA's hesitance to disqualify a military judge.

Nine years later, the CAAF still remained hesitant to require judicial disqualification in *United States v. Oakley*.<sup>154</sup> The *Oakley* case was the

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 48.

<sup>144</sup> *Id.* at 50.

<sup>145</sup> *Id.* at 49; 28 U.S.C. § 455(b)(3) (2006).

<sup>146</sup> *Id.* at 49.

<sup>147</sup> *Id.* at 50.

<sup>148</sup> *Id.*

<sup>149</sup> *See id.* at 51–54 (Cook, J., dissenting).

<sup>150</sup> *Id.* at 54.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> 33 M.J. 27 (C.M.A. 1991).

last of a series of three companion cases involving stolen property.<sup>155</sup> The military judge denied suppression motions in the two other cases and both resulted in guilty pleas that implicated the accused.<sup>156</sup> The accused's counsel moved to disqualify the military judge, arguing that the military judge had made prior determinations of facts by accepting the companion's guilty pleas that the accused disputed.<sup>157</sup> The defense counsel claimed that the military judge's prior decisions involving the facts of the case would cause a reasonable person to question the military judge's impartiality.<sup>158</sup> The military judge disagreed, and so did the CAAF.<sup>159</sup>

The CAAF's decision reinforced the principle that a military judge's standing should be venerated. In affirming the conviction, the court reasoned that the military judge did not sit as fact-finder.<sup>160</sup> The CAAF also relied on the military judge's "philosophical credentials," which the court had also mentioned in *United States v. Bradley*.<sup>161</sup> The court further rationalized that the evidence in the accused's case was related "only to suppression motions and to providence of guilty pleas tendered by" co-accused at their trials.<sup>162</sup>

*Oakley* continued the trend in which appellate judges defend military judges, maintaining that all judges have "philosophical credentials" that create public confidence in judicial decisions.<sup>163</sup> In its reliance on *Bradley*, the *Oakley* Court relied on the theory that people should find comfort in a judge's training.<sup>164</sup> Yet, there are few mechanisms that enforce this comfort other than judicial proclamations that the public should trust other judges.

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<sup>155</sup> *Id.* at 33.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 33–35.

<sup>160</sup> *Id.* at 34.

<sup>161</sup> *Id.* (quoting *United States v. Bradley*, 7 M.J. 332, 334 (CMA 1979)).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (quoting *Bradley*, 7 M.J. at 334).

<sup>164</sup> *See id.*

## 2. *Circling the Wagons: The Perils of a Government Challenge*

The cases discussed thus far have dealt with an accused's right to challenge a military judge. While RCM 902 applies to both parties, the Government has far fewer remedies and much less sympathy from the courts.<sup>165</sup> Rule for Court-Martial 902(d) vests in the military judge the authority to decide whether the military judge should be disqualified.<sup>166</sup> Thus, if the military judge denies a Government challenge, then the Government has no further recourse because appellate courts then only hear cases brought by the accused.<sup>167</sup> Nevertheless, in 2006, the CAAF confronted an unlawful command influence case that stemmed from a Government motion to disqualify a military judge.<sup>168</sup>

The dispute in *United States v. Lewis* stemmed from the judge's relationship with defense counsel.<sup>169</sup> During the court-martial, the Government questioned the military judge concerning her interactions with civilian defense counsel.<sup>170</sup> The military judge characterized them as limited social interactions involving casual contact at a stable where they both kept horses.<sup>171</sup> Yet, the military judge omitted the fact that she and the civilian defense counsel attended a play together after she detailed herself to the case.<sup>172</sup> After refusing to recuse herself, the Government submitted a motion stating that the two had gone to the play together.<sup>173</sup> The military judge then responded that it had "slipped [her] mind that [she] had gone to that play with [civilian defense counsel]."<sup>174</sup>

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<sup>165</sup> See MCM, *supra* note 2, R.C.M. 902(a)–(b) (using language that favors neither the defense, nor the Government; instead, focusing on the fairness of the proceeding).

<sup>166</sup> See *id.* R.C.M. 902(d).

<sup>167</sup> See UCMJ art. 66 (2008) (granting an accused appellate rights). See also MCM, *supra* note 2, R.C.M. 908 (providing limited rights for appeals by the United States where a military judge issues an "order or ruling that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the disclosure of classified information, or that imposes sanctions for nondisclosure of classified information").

<sup>168</sup> *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006).

<sup>169</sup> *Id.* at 408.

<sup>170</sup> *Id.* at 407–08.

<sup>171</sup> *Id.* at 408.

<sup>172</sup> *Id.* at 409. The SJA testified during the recusal motion and characterized this interaction as a date. *Id.* at 410.

<sup>173</sup> *Id.* at 409.

<sup>174</sup> *Id.*

But the allegations of a relationship did not stop with the single incident.<sup>175</sup> The Government appeared to have made previous attempts to remove the military judge from cases with this civilian defense counsel.<sup>176</sup> The friendship between the civilian defense counsel and the military judge apparently permeated the jurisdiction so strongly that the Government continually attempted to disqualify the military judge when she sat on the civilian defense counsel's cases.<sup>177</sup> During a motion hearing to recuse the military judge, the SJA testified that the evidence of bias existed in the courtroom.<sup>178</sup> The SJA described the bias as civilian defense counsel appearing to be in charge of the court-martial when she was "strolling around the courtroom" while the trial counsel addressed the court.<sup>179</sup> Yet, the military judge did not admonish the civilian defense counsel. Because of the military judge's close relationship with civilian defense counsel, the military judge's attempt to underrate the nature of their contacts to horse-stabling, the military judge's attendance at a play after the military judge detailed herself to the case, and how that fact slipped the military judge's mind, the Government justly believed that the circumstances would cause an objective observer to question the military judge's impartiality.

The military judge in *Lewis* arguably violated the *ABA Model Code of Judicial Conduct*<sup>180</sup> by allowing her relationship with civilian defense counsel to cause others to question her independence.<sup>181</sup> The military judge's violations of ethical conduct should have been a factor in determining the reasonableness of the Government's actions.<sup>182</sup> Yet, the CAAF dismissed the merits of the disqualification in a few sentences

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<sup>175</sup> *Id.* at 410.

<sup>176</sup> During the voir dire, the trial counsel referenced previous courts-martial where the trial counsel voir dired the military judge. *Id.* at 408–09. Likewise, the military judge questioned why she is frequently "voir dired on [her] acquaintance with" the civilian defense counsel whereas other military judges are not. *Id.* at 414.

<sup>177</sup> *Id.* at 410.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 89, R. 2.4. (forbidding a judge from permitting social relationships to influence a judge's judicial conduct or "permit[ting] others to convey the impression that any person . . . is in a position to influence the judge"); see also *id.* R. 3.1(C) (prohibiting a judge from engaging in extrajudicial activities "that would appear to a reasonable person to undermine the judge's . . . impartiality").

<sup>181</sup> See *Lewis*, 63 M.J. at 410.

<sup>182</sup> See *United States v. Quintanilla*, 56 M.J. 37, 42 (C.A.A.F. 2001) (stating that courts will turn to the *ABA Model Code of Judicial Conduct* "for guidance on proper conduct in criminal trials").

without discussing the issue.<sup>183</sup> The CAAF had a great opportunity to send a message to the trial judiciary concerning the appearance of impartiality while maintaining its message to the SJAs and counsel on appropriate decorum on their part.<sup>184</sup> But, by summarily rejecting the Government's concerns, the CAAF sent a message that the Government should have no remedy when military judges show potential implied bias towards the Government.

In the past few decades, courts have disfavored questioning a judge's impartiality. Rather, they have continued to zealously tout the judge's "philosophical credentials."<sup>185</sup> On one hand, an affront on a judge is an affront to the arbiters of the legal profession and an attack on the rule of law. On the other hand, it cuts against the rule of law's need for the public to have confidence that courts will be administered justly. Unfortunately, the Government's lack of remedies forced it to aggressively question the military judge because this was its only chance to seek recusal, causing the court-martial to devolve into an unprofessional proceeding.<sup>186</sup> Ultimately, the accused received a windfall when the CAAF set aside the findings for unlawful command influence.<sup>187</sup>

#### B. Like Pornography, Judges Know Implied Bias When They See It

In the 2008 term, the CAAF revisited implied bias cases in *United States v. Greatting* and *United States v. McIlwain*.<sup>188</sup> Both cases involved companion cases in which military judges made comments about pending cases.<sup>189</sup> More noteworthy is the CAAF's less deferential views toward trial judges handling situations where their impartiality

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<sup>183</sup> See *Lewis*, 63 M.J. at 414.

<sup>184</sup> By no means is this meant to justify the Government's actions.

<sup>185</sup> See, e.g., *United States v. Dodge*, 59 M.J. 821, 826 (A.F.C.C.A. 2004), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004) (demonstrating a court's willingness to go to great lengths to demonstrate the fairness by stressing the case's "27-volume, 3191-page, mixed-plea record" contains nothing "that even remotely suggests that the military judge was anything but the model of judicial probity").

<sup>186</sup> *Lewis*, 63 M.J. at 410–11 (demonstrating the intensity of the Government's challenge from the point of view of the original military judge and the military judge that replaced her after she recused herself).

<sup>187</sup> *Id.* at 416–17.

<sup>188</sup> *United States v. Greatting*, 66 M.J. 226 (C.A.A.F. 2008); *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008).

<sup>189</sup> *Greatting*, 66 M.J. at 230–31; *McIlwain*, 66 M.J. at 314.

might be questioned. The CAAF first grappled with a military judge's private statements concerning companion cases in *United States v. Greatting*.<sup>190</sup> In *Greatting*, a military judge presided over a series of companion cases involving duty-related misconduct.<sup>191</sup> The accused was a staff sergeant and the co-accused were another staff sergeant and three more junior Marines.<sup>192</sup> The accused's case was the fifth and final case to be heard.<sup>193</sup> Prior to hearing the accused's case, the military judge spoke with the SJA about the companion cases.<sup>194</sup> The judge told the SJA that the command was too lenient on the other staff sergeant, but too harsh on the junior Marines.<sup>195</sup> The judge stated that he considered "the level of culpability of [the other staff sergeant] versus the younger Marines who were perhaps more guided or motivated by misguided loyalty to the two staff sergeants that they worked for."<sup>196</sup>

In finding prejudicial error, the court focused on the judge's conversation with the SJA.<sup>197</sup> The court reemphasized that "presiding over companion cases does not alone constitute grounds for disqualification."<sup>198</sup> The CAAF asserted that *ex parte* communication with an SJA on a pending case is a different matter, however.<sup>199</sup> The court noted that the first cases were still pending clemency and that the accused's case was still pending trial.<sup>200</sup> It further stressed that the SJA is the "individual responsible for advising the convening authority on all aspects of the [companion] cases, including the terms of pretrial agreements and clemency recommendations."<sup>201</sup> The military justice system's unique post-trial processing delays finality of a court-martial's findings and sentence, because a convening authority must approve a sentence before it is complete.<sup>202</sup> Thus, the military judge exerted

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<sup>190</sup> *Greatting*, 66 M.J. 230–31.

<sup>191</sup> *Id.* at 228–29.

<sup>192</sup> *Id.* at 227–28.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 229.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 230.

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

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

<sup>200</sup> *Id.* at 230–31.

<sup>201</sup> *Id.* at 231.

<sup>202</sup> See MCM, *supra* note 2, R.C.M. 1107. This unique structure makes it inappropriate for a trial judge to make statements concerning an adjourned court-martial until after the convening authority takes action.

influence on the co-accused's post-trial cases while influencing the accused's pretrial case.

*Greatting* offers a clear example of implied bias. The trial judge made an inappropriate, out-of-court comment during a series of companion cases.<sup>203</sup> The military judge's statement broke the co-accused into two classes: the staff sergeant-leaders and the junior Marines.<sup>204</sup> The military judge made these statements after one of the staff sergeant's cases was complete and after he tried the junior Marines.<sup>205</sup> His statement to the SJA would lead a reasonable person to believe the staff sergeants were more culpable and should receive harsher punishment. In fact, the other staff sergeant received a pretrial agreement that limited his confinement to seventy-five days; whereas, the accused's pretrial agreement limited his confinement to fifteen months.<sup>206</sup> This statement tainted the process by sharing his thoughts of the gravity of the accused's case with the SJA.<sup>207</sup>

Although the CAAF did not rely on ethics rules in reaching its holding, the facts in *Greatting* illustrate the value of using ethics rules to examine a military judge's impartiality.<sup>208</sup> The trial judge's conversation would likely violate the *ABA Model Code of Judicial Conduct*.<sup>209</sup> Rule 2.10 prohibits a judge from making nonpublic statements "that might substantially interfere with a fair trial or hearing."<sup>210</sup> Given the procedural posture of *Greatting's* case, the judge's statements concerning companion cases probably interfered with accused's ability to receive an advantageous pretrial agreement by giving the Government insight into the military judge's deliberative process for the accused's case.<sup>211</sup> If a

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<sup>203</sup> *Greatting*, 66 M.J. at 229.

<sup>204</sup> *Id.* at 229.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 228.

<sup>207</sup> *Id.* at 231. The CAAF's reasoning does not limit itself to *Greatting's* facts. The holding is consistent with the COMA's *Bradley* requirement that the military judge manifest bias by some act or statement. *United States v. Bradley*, 7 M.J. 332, 334 (C.M.A. 1979).

<sup>208</sup> See *United States v. Quintanilla*, 56 M.J. 37, 42 (C.A.A.F. 2001) (stating that courts will turn to the ABA's *Model Code of Judicial Conduct* "for guidance on proper conduct in criminal trials").

<sup>209</sup> See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 89, R. 2.10.

<sup>210</sup> *Id.*

<sup>211</sup> This assertion applies only to the overlap of facts from the cases the military judge previously heard onto the accused's case. Arguably, a military judge's post-trial statement could yield sufficient evidence to question the judge's impartiality on a previously heard case. See generally *United States v. McNutt*, 62 M.J. 16 (C.A.A.F.

court were to apply the ethics canons to the *Greatting* facts, it would likely come to the same outcome.

Two weeks later, the CAAF set-aside another case when a military judge failed to recuse herself in *United States v. McIlwain*.<sup>212</sup> In finding reversible error, the court forces the trial judiciary to carefully consider its word choices when speaking on the record. Like *Greatting*, the facts in *McIlwain* involve companion cases.<sup>213</sup> In *McIlwain*, the accused and two other Germany-based Soldiers sexually assaulted a local national.<sup>214</sup> Prior to calling on the accused to enter his plea, the trial judge announced that she had presided over the companion cases.<sup>215</sup> The judge further stated that she had not formed an opinion to the accused's guilt, but she would only preside over the court-martial if the fact-finder was a panel.<sup>216</sup> She reasoned that "her participation in companion cases 'would suggest to an impartial person looking in that she can't be impartial in this case.'" <sup>217</sup> In talking through the case, the judge articulated that she would manifest implied bias if she presided over the case.<sup>218</sup> In fact, the language she used to explain how an objective person may view the case was the test to determine whether a military judge is impartial.<sup>219</sup>

The CAAF found prejudicial error and set aside the findings.<sup>220</sup> The court relied on the military judge's conclusory statement that a reasonable person could determine that she would not be impartial in the case.<sup>221</sup> The CAAF also reaffirmed the proposition that a judge sitting on

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2005) (using a military judge's post-trial statement concerning extrajudicial information to reduce an accused's sentence).

<sup>212</sup> 66 M.J. 312 (C.A.A.F. 2008).

<sup>213</sup> *Id.* at 313.

<sup>214</sup> *See id.* (stating that court members convicted the accused of "rape, forcible sodomy, and indecent acts"); *see also* Rick Emert, *Last GI Sentenced in Sexual Assault Case Gets 54 Months*, STARS & STRIPES (European ed.), Jan. 18, 2004, *available at* <http://www.stripes.com/article.asp?section=104&article=19914>.

<sup>215</sup> *McIlwain*, 66 M.J. at 313.

<sup>216</sup> *Id.*

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

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

<sup>219</sup> *See id.*; *see also* MCM, *supra* note 2, R.C.M. 902(a); *see also* United States v. Quintanilla, 56 M.J. 37, 78 (C.A.A.F. 2001) (stating, "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification.") (quoting United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982)).

<sup>220</sup> *McIlwain*, 66 M.J. at 315.

<sup>221</sup> *Id.* at 314.

companion cases alone does not require judicial disqualification.<sup>222</sup> The most noteworthy detail is that the military judge stated that in prior cases she made credibility determinations favorable to the accused.<sup>223</sup> Consequently, the appearance of judicial bias does not apply only to bias against the accused, but also to bias in the court-martial process itself.

An additional outcome in *McIlwain* is that the CAAF implicitly overruled a portion of both *United States v. Bradley* and *United States v. Oakley*.<sup>224</sup> The CAAF cited to *Oakley* for the proposition that sitting on companion cases alone does not mandate recusal.<sup>225</sup> But, *Oakley* reaffirmed the proposition in *Bradley* that “when acting on the accused’s recusal motion, the military judge should have either recused himself or, inasmuch as an accused has no absolute right to trial by judge alone, directed a trial by members.”<sup>226</sup> The *McIlwain* judge followed the procedures by refusing to sit as judge alone.<sup>227</sup> This change suggests a shift in the court, demonstrating that it will go further to protect an accused; yet, the CAAF did not express it in those terms.

Reading the 2008 cases together, one sees the history and progression of implied bias in companion cases. The CAAF reaffirmed the proposition that a trial judge sitting on a companion case alone does not mandate recusal.<sup>228</sup> But, each case involved judicial action that would cause a person to question the judge’s impartiality: in *Greatting*, the case relied on the judge’s out-of-court actions and, in *McIlwain*, the case relied on the judge’s conclusory in-court statement.<sup>229</sup> These cases demonstrate that some cases have a triggering event that invites scrutiny.<sup>230</sup> One example of a triggering event is where a judge presides over companion cases. Put another way, the fact that a military judge sat

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<sup>222</sup> *Id.*

<sup>223</sup> *See id.*

<sup>224</sup> *United States v. Bradley*, 7 M.J. 332 (C.M.A. 1979); *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991); *McIlwain*, 66 M.J. at 314.

<sup>225</sup> *McIlwain*, 66 M.J. at 314 (citing *Oakley*, 33 M.J. at 34).

<sup>226</sup> *Oakley*, 33 M.J. at 33–34 (citing *Bradley*, 7 M.J. at 334).

<sup>227</sup> *McIlwain*, 66 M.J. at 313.

<sup>228</sup> *United States v. Greatting*, 66 M.J. 226, 230 (C.A.A.F. 2008); *McIlwain*, 66 M.J. at 314.

<sup>229</sup> *Greatting*, 66 M.J. at 230; *McIlwain*, 66 M.J. at 314.

<sup>230</sup> However, Judge Baker’s dissent in *McIlwain* overstates the case’s effect on companion cases by stating that the case created a “de facto per se rule of recusal, rather than a contextual rule of recusal.” *McIlwain*, 66 M.J. at 318 (Baker, J., dissenting). *McIlwain* does not create a per se rule against trial judges sitting on companion cases. The deeper issue is what type of evidence is needed to raise the issue.

on companion cases factors into the totality of the circumstances for determining impartiality. Another triggering event could be cases of extrajudicial interaction between judges and one of the parties, such as the judge's interactions with the Government in *United States v. Greatting*.<sup>231</sup> Generally, courts will presume impartiality. But in these unique situations, the courts will scrutinize the record for evidence that demonstrates a lack of impartiality.

These cases also demonstrate another lesson: that judges cannot agree on what a reasonable person would believe. The judicial debate on what is reasonable is similar to Justice Stewart's reasoning in his famous concurrence in *Jacobellis v. Ohio*, which involved obscenity.<sup>232</sup> Here, the courts cannot fashion a per se rule concerning impartiality; instead, they'll know it when they see it.<sup>233</sup> The court in *McIlwain* split 3–2 in a case where the trial judge all but admitted to violating RCM 902(a).<sup>234</sup> The court in *Greatting* split 4–1 where a judge influenced the SJA about pending cases.<sup>235</sup> Both of these cases provided ideal facts for the CAAF to stand with a unanimous voice and send a strong message to trial courts, appellate judges, and practitioners alike. Instead, the majority opinions give precedential weight on specific examples of statements by judges. But, the court's splits attenuate the decisions' weight. While the CAAF gave some guidance, it ultimately raises the question, "Who are these reasonable people that can tell us when they would question a judge's impartiality?" Accordingly, the President should consider possible changes to RCM 902(a) to add predictability to the evaluation of implied bias.

#### IV. Proposed Solutions From Scholars and Other Jurisdictions

The Joint Service Commission's annual review of the military justice system views military jurisprudence as a continually evolving area of the

<sup>231</sup> *Greatting*, 66 M.J. at 229–30.

<sup>232</sup> 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In an obscenity case, Supreme Court Justice Potter Stewart stated that a film was not hard core pornography because, "I know it when I see it, and the motion picture involved in this case is not that." *Id.*

<sup>233</sup> *Cf.* Transcript of Oral Argument at 29–30, *Capterton v. Massey Coal Co.* (2009), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-22.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf). Pondering whether a state supreme court judge's implied bias could be a constitutional issue, Justice Stevens stated, "This fits the standard that Potter Stewart articulated when he said 'I know it when I see it.'"

<sup>234</sup> *McIlwain*, 66 M.J. 312.

<sup>235</sup> *Greatting*, 66 M.J. 226.

law.<sup>236</sup> Accordingly, military justice practitioners should critically examine the state of the law and possible changes. This next section examines possible changes to judicial disqualification and compares them against the status quo.

#### A. Independent Adjudication of Disqualification Motions Provides Additional Transparency with Little Burden to the System

The President should amend the recusal rules to allow an independent judge to review a disqualification motion. To this end, New York University's Brennan Center for Justice proposes a model where an independent judge adjudicates recusal motions.<sup>237</sup> The Center suggests adopting a rule like the Texas Rules of Civil Procedure where a judge faced with a recusal motion has two options: instituting self-recusal or forwarding the challenge to a superior judge for adjudication.<sup>238</sup> This method eliminates the tension that appears when judges must make objective decisions concerning a personal challenge.<sup>239</sup> The Brennan Center's proposed procedures are useful in principle, but forwarding the case outright to a different military judge is impractical due to the geographic distance between judges.<sup>240</sup> A modified system could work for the military, however.

Military courts should adopt some components of this system with modifications to meet the military's unique geographic challenges. The current method of challenging a military judge should remain in place, but an unsuccessful challenging party should be able to appeal the military judge's ruling. The military judge should receive the challenge and review the evidence and testimony offered by parties and enter

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<sup>236</sup> See U.S. DEP'T OF DEF., DIR. 5500.17, THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 1 (3 May 2004) [hereinafter DODD 5500.17] (requiring the Joint Service Commission on Military Justice to review the MCM annually).

<sup>237</sup> BRENNAN CTR. FOR JUST., FAIR COURTS: SETTING RECUSAL STANDARDS 31–32, (2008) available at [http://www.brennancenter.org/page/-/Democracy/RecusalPaper\\_FINAL.pdf](http://www.brennancenter.org/page/-/Democracy/RecusalPaper_FINAL.pdf) [hereinafter BRENNAN CTR. REPORT]. The Brennan Center's Fair Courts Project works "to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in our constitutional democracy." *Id.* at intro.

<sup>238</sup> *Id.* at 31 (citing TEX. R. CIV. PROCEDURE 18a(c) (2007) (providing that when a party challenges a judge that "the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion"))).

<sup>239</sup> *Id.*

<sup>240</sup> See discussion at Part IV.B *infra* (discussing the geographic challenges the military judiciary experiences).

findings of fact to rule on the motion. In addition to providing military judges the opportunity to recuse themselves, this procedure would create a record for appellate review and provide counsel and the public with an opportunity to understand the military judge's rationale. If the military judge's rationale satisfies the challenging counsel's concerns, then the inquiry ends.

If the challenging counsel is not satisfied with the military judge's ruling, then the counsel may request that the military judge stay the proceedings and submit a motion for reconsideration to the Chief Circuit Judge.<sup>241</sup> The stay is an important component because the counsel is questioning the propriety of the proceeding.<sup>242</sup> The Government would then prepare a verbatim transcript of the portions of the recusal motion and submit the record to the Chief Circuit Judge.<sup>243</sup> The parties may also file supplemental briefs.

Once a Chief Circuit Judge receives a disqualification motion, she can either personally review the motion or detail another military judge to review the motion. If not satisfied with the evidence in the record, the reviewing judge may call an Article 39(a) session to receive additional evidence either in person or via video teleconference.<sup>244</sup> After receiving all necessary evidence, the reviewing judge should review the challenge *de novo*.<sup>245</sup> The *de novo* standard is less deferential than the current standard of abuse of discretion.<sup>246</sup> It is also less deferential than the "somewhat less deferential standard" that appellate courts grant to military judges when reviewing a challenge under the liberal grant mandate.<sup>247</sup> The reviewing judge then rules on the motion. If there is no

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<sup>241</sup> If the parties believe they may challenge the military judge, then the party must submit the motion along with other pretrial motions. Counsel should not normally submit a motion to recuse the judge the day of trial without good cause, such as counsel learning new information concerning the judge.

<sup>242</sup> See BRENNAN CTR. REPORT, *supra* note 237, at 31 (distinguishing recusal motions from other motions because recusal motions "challenge the fundamental legitimacy of the adjudication").

<sup>243</sup> This procedure is similar to an appeal by the United States. MCM, *supra* note 2, R.C.M. 908.

<sup>244</sup> See *id.* R.C.M. 804, 805, 914B (allowing military judges to conduct Article 39a sessions using video conferencing technology).

<sup>245</sup> See BRENNAN CTR. REPORT, *supra* note 237, at 33 (advocating *de novo* review).

<sup>246</sup> See *United States v. McIlwain*, 66 M.J. 312, 313 (C.A.A.F. 2008) (identifying the current standard in holding that the military judge abused her discretion when she refused to recuse herself).

<sup>247</sup> See *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008) ("Although we review issues of implied bias for abuse of discretion, the objective nature of the inquiry

disqualification, then the reviewing judge returns the case to the trial judge. If there is a disqualification, the Chief Circuit Judge would detail a new trial judge.<sup>248</sup> The text of the proposed revisions appears at the Appendix to this article.

This system benefits all parties—the accused, the Government, the military judge, and the appellate courts. The accused benefits by having timely relief for a denied disqualification motion. Under the current system, if a court finds an accused guilty, the accused may have to wait years for appellate relief.<sup>249</sup> Under this independent review mechanism, a reviewing judge can order relief within days. Likewise, the Government benefits from this procedure. Justice should be blind, and judges should be neutral. Accordingly, a military judge should act impartially toward both the accused and the Government. Unfortunately, the Government has no recourse to disqualify a military judge that denies a Government disqualification motion.<sup>250</sup> This independent review procedure gives the Government a remedy from a military judge that refuses to recuse himself.

The judiciary also benefits from this procedure. If the reviewing judge disqualifies the military judge, then the military judge will not face appellate review scrutinizing the judge's behavior. Additionally, the appellate judges receive the benefit of having an additional factor to weigh on appellate review—the reviewing judge's decision. The reviewing judge provides a fresh look into the allegation while retaining a trial judge's fact-finding ability. This second reviews stacks weight in favor of an argument that a reasonable person would find that the military judge was impartial.<sup>251</sup> This mitigates the burden on an appellate judge faced with the Hobson's choice of either affirming a case

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dictates that we accord 'a somewhat less deferential standard' to implied bias determinations of a military judge.") (quoting *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000)). If appellate courts grant less deference when reviewing a military judge's determination of a panel member's objectivity, then a reviewing court should give no more deference when reviewing a challenge involving a military judge's objectivity.

<sup>248</sup> There is no reason that the reviewing judge could not serve as the trial judge.

<sup>249</sup> See *United States v. Moreno*, 63 M.J. 129, 141–43 (C.A.A.F. 2006) (discussing the length of time to complete appellate review and its effects on due process).

<sup>250</sup> See Part III.A.2 *supra* (discussing the difficulties the Government has in challenging a military judge for implied bias).

<sup>251</sup> In fact, an appellant must successfully argue not only that the trial judge lacked impartiality, but also that the reviewing judge abused his discretion in agreeing with the military judge.

where reasonable minds can argue that the judge appears impartial or releasing a convicted criminal.<sup>252</sup> Yet, the independent review procedure could still suffer criticism.

One potential concern is that the procedure allows counsel to unnecessarily delay the proceedings. Currently, counsel have various methods to delay courts, yet they are rarely abused. A savvy defense counsel, for example, could file repeated motions to compel discovery or request a sanity board. The independent review procedure will also likely not be abused. Professional Responsibility Rule 3.2 reminds lawyers of their “responsibilities to the tribunal to avoid unwarranted delay.”<sup>253</sup> Abuses of the system could lead to a professional responsibility investigation.<sup>254</sup> A counsel’s duty to the tribunal and fear of professional responsibility investigations should deter abuse of the proposed judge recusal procedure.

An additional criticism could be that a reviewing judge will simply rubber-stamp the military judge’s decision. This threat will continue unless someone can reduce measuring impartiality to a mathematical equation. Ultimately, whenever reasonable minds may differ, some judges will always ratify their colleagues. But, other judges will not. This proposal seeks to add a “second set of eyes” that will bolster confidence in the courts-martial process.<sup>255</sup> It addresses the concern that judges are fallible and cannot shake their own biases when judging themselves.<sup>256</sup> A neutral reviewing judge with the fact-finding capabilities of a trial judge is in a much better position to ascertain a military judge’s impartiality than an appellate court reading a cold record.

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<sup>252</sup> The facts in *McIlwain* demonstrate this difficult decision. See *United States v. McIlwain*, 66 M.J. 312, 313 (C.A.A.F. 2008). The appellant and his co-accused gang raped a nineteen-year-old German college student. Emert, *supra* note 214.

<sup>253</sup> See AR 27-26, *supra* note 91, R. 3.2. As the drafters explain in Rule 3.2’s comments, “Dilatory practices bring the administration of criminal, civil and other administrative proceedings into disrepute. The interests of the client are rarely well-served by such tactics. Delay exacts a toll upon a client in uncertainty, frustration, and apprehension.” *Id.*

<sup>254</sup> See generally AR 27-1, *supra* note 87, ch. 7 (providing for review of violations of AR 27-26’s ethical rules).

<sup>255</sup> See *United States v. Wright*, 52 M.J. 136, 142 (C.A.A.F. 1999) (stating that disclosure adds to the “perception of fairness”).

<sup>256</sup> See Debra Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1243–51 (2002) (discussing the difficulties judges face when examining whether they are impartial).

The benefits of an independent review procedure far outweigh its burdens: The system assists both parties in resolving questions of implied judicial bias; the system decreases the time it takes to resolve an allegation of implied bias and provides the Government with potential relief. Of equal importance, the procedure adds transparency to the military justice system, thus ensuring servicemembers and the public have confidence in the military courts.

### B. Other Methods of Challenging Military Judges

Another potential reform is to give both parties—or, perhaps, just the defense—the opportunity to peremptorily strike the trial judge. This system would be similar to the current method of peremptorily striking panel members.<sup>257</sup> A counsel could strike the military judge at arraignment. While this practice may work in civilian courts, it would be difficult to apply in the military. The Brennan Center argued that federal courts already apply this protocol.<sup>258</sup> They highlighted how nineteen states allow peremptory disqualification of judges.<sup>259</sup> Likewise, Professor Debra Bassett urges peremptory strikes.<sup>260</sup> She observes that judges “hesitate to impugn their own standards [and that] judges sitting in review of others do not like to cast aspersions.”<sup>261</sup>

The peremptory strike protocol would be logistically impracticable in military courts. Unlike federal and state courts, which have many judges close in proximity to one another, the military courts have a different structures and logistical challenges.<sup>262</sup> Military judges are often states—or nations—apart.<sup>263</sup> With the exception of three installations, no

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<sup>257</sup> See MCM, *supra* note 2, R.C.M. 912(g) (prescribing procedures and limitations on peremptory challenges to panel members).

<sup>258</sup> BRENNAN CTR. REPORT, *supra* note 237, at 26–27 (arguing for peremptory challenges).

<sup>259</sup> *Id.* (citing RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 76–79 (1996)). Only eleven states allow a pure peremptory strike; the remaining eight require the parties to show some grounds for prejudice. *Id.*

<sup>260</sup> Bassett, *supra* note 256, at 1251. Professor Bassett limits her arguments to appellate courts; nevertheless, the principles apply to trial judges because her research and analysis focus on how judges react to challenges and public perception to those reactions. *Id.*

<sup>261</sup> *Id.* at 1246 (quoting *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)).

<sup>262</sup> See MCM, *supra* note 2, R.C.M. 902 analysis, at A21-52 (noting the different structure of the military judiciary).

<sup>263</sup> See JAG PUB. 1-1, *supra* note 31, at 12–16.

Army base houses more than one military judge.<sup>264</sup> If a counsel removes a military judge with little or no cause, another military judge would have to travel to the installation to hear the case. A counsel in Iraq or Afghanistan could peremptorily strike a judge without cause, forcing another judge to travel to a combat zone, thus adding both costs and delay into the trial.<sup>265</sup> This cost is acceptable to protect an accused's due process rights, but is excessive without good cause.

Another potential problem with applying the peremptory strike protocol is that the counsel may forum shop.<sup>266</sup> That is, defense counsel will strike tough military judges and trial counsel will strike military judges who tend to give lenient sentences. Professor Bassett confronts this concern with respect to appellate courts.<sup>267</sup> To avoid abuse, she proposes a review system that is similar to the protocol suggested in Part IV.A.<sup>268</sup> The Brennan Center also suggests that parties should be required to file an affidavit stating why they believe the judge should recuse himself to minimize potential abuses.<sup>269</sup> Eight of the nineteen states allowing judicial peremptory strikes require counsel to show grounds for prejudice when they make their challenges.<sup>270</sup>

The Brennan Center's proposal could also be viewed as applying the liberal grant mandate to military judges, which requires military judges to liberally grant defense challenges for cause when defense counsel believes a panel member may have implied bias toward the accused.<sup>271</sup> The CAAF explains that "[c]hallenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations."<sup>272</sup> Although some argue that military judges face similar

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<sup>264</sup> *See id.*

<sup>265</sup> For a stateside example: If a counsel stationed at Fort Drum, New York, peremptorily struck the military judge, then a judge from Fort Campbell, Kentucky, may have to travel to hear the case.

<sup>266</sup> *See* Bassett, *supra* note 256, at 1254.

<sup>267</sup> *Id.* at 1254.

<sup>268</sup> *See id.* at 1254–55 (proposing a system where a judge determines whether he should recuse himself and then allowing the other appellate panel members to review the judge's denial).

<sup>269</sup> BRENNAN CTR. REPORT, *supra* note 237, at 27.

<sup>270</sup> *Id.* at 26–27 (citing FLAMM, *supra* note 260, at 76–79).

<sup>271</sup> *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007).

<sup>272</sup> *Id.* at 276–77; *see* UCMJ art. 25 (2008) (describing the convening authority's role in selecting panel members).

pressure from the military establishment as panel members, this contention ignores fundamental differences between the two.<sup>273</sup>

There is a great difference between panel members and military judges. In panel selection, the convening authority—the very same officer charged with commanding an organization—personally selects panel members.<sup>274</sup> These panel members are part of the command, most without legal training.<sup>275</sup> As servicemembers without legal training, panel members will have less understanding of the judicial process than military judges. A 2008 CAAF case illustrates this disparity.<sup>276</sup> In *United States v. Townsend*, a panel member admitted during voir dire that he was wary of defense counsel due to his observations of the television show *Law and Order*.<sup>277</sup> Alternatively, military judges are trained attorneys and subject to professional responsibility rules.<sup>278</sup> As senior judge advocates, military judges are not neophytes.<sup>279</sup>

A liberal grant mandate system will not transfer well to the judiciary because of the vast differences between panel members and military judges. A person who compares both a panel member and a military judge's qualifications and method of appointment cannot reasonably conclude that a military judge faces the same pressures as a panel member. Furthermore, adding the liberal grant mandate ignores the needs of the Government to have a military judge sitting as a neutral

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<sup>273</sup> See Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 667 (2002) (attacking the structure of the military judiciary, claiming that their “promotion and reputation . . . can be significantly affected by their rulings in criminal cases, particularly high profile cases”).

<sup>274</sup> UCMJ art. 25.

<sup>275</sup> See *id.* (listing the panel member selection criteria); see generally *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008) (explaining the types of servicemembers that may sit as panel members.)

<sup>276</sup> *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008).

<sup>277</sup> *Id.* at 462. The panel member was the son of a police officer who wished to be a prosecutor. *Id.* When asked his opinions concerning defense counsel he responded that he respected military defense counsel, but “had ‘lesser of a respect for some of the ones you see on TV, out in the civilian world.’” *Id.* He stated that he came to this opinion because he regularly watched the television show *Law and Order*. *Id.*

<sup>278</sup> See, e.g., ARMY CODE OF JUDICIAL CONDUCT, *supra* note 89.

<sup>279</sup> See JAG PUB. 1-1, *supra* note 31, at 12–16 (indicating that all of the Army trial judiciary are field grade officers).

arbiter, regardless of the challenging party.<sup>280</sup> Accordingly, applying the liberal grant mandate to military judges is not a viable alternative.

Another possible solution is to leave the judicial disqualification system in its current form. The military justice system contains substantial protections that may not exist in some other jurisdictions. Despite the discussion above, the current system maintains the accused's due process rights by offering automatic appellate review in many cases.<sup>281</sup> Military judges also have an informal advisory network, in which the trial judiciary may seek advice on recusal from other military judges.<sup>282</sup> Other than the opportunity for military judges to seek advice from their peers, the current system only corrects errors after a court-martial is adjourned. Further, it only corrects errors for one party and overlooks the Government's need to challenge military judges. Accordingly, instead of patching errors, the President should overhaul the system.

## V. Conclusion

The President should allow for independent judicial review when a party challenges a military judge for implied bias. This procedure will add transparency and additional protections for both the Government and the accused. As a special segment of society that relies on good order and discipline, the military justice system invites scrutiny. Therefore, the military should aspire to be more transparent. This transparency should not only focus on dealing with actual injustice, but also on warding-off perceptions of injustice.

The military justice system has been a progressive system that regularly reviews itself.<sup>283</sup> As a result, the UCMJ offers substantive and procedural protections not seen in most civilian jurisdictions.<sup>284</sup>

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<sup>280</sup> See *United States v. Clay*, 64 M.J. 274, 276 (CAAF 2007) (stating that liberal grant mandates only apply to defense challenges).

<sup>281</sup> See UCMJ art. 66 (2008) (granting appellate review in cases with an adjudged sentence of a punitive discharge or greater than one year confinement).

<sup>282</sup> Henley Telephone Interview, *supra* note 104. The Brennan Center recommends the use of recusal advisory bodies as a possible judicial reform mechanism. BRENNAN CTR. REPORT, *supra* note 237, at 34–35.

<sup>283</sup> See DoDD 5500.17, *supra* note 236, at 1 (requiring the Joint Service Commission on Military Justice to review the *Manual for Courts-Martial* annually).

<sup>284</sup> See UCMJ art. 31(2008) (providing rights in non-custodial questioning); MCM, *supra* note 2, R.C.M. 405(2)(A) (providing defense counsel to accused in pretrial investigations).

Accordingly, the military justice system should not be complacent with the status quo, but should continually examine ways to improve itself. Adding independent judicial review for RCM 902 motions adds fairness to the military justice system. In return, it will remain a progressive justice system that emphasizes an efficient and fair adjudication that maintains good order and discipline in the Armed Forces.

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regardless of ability to pay); *id.* R.C.M. 501(b) (detailing defense counsel in general and special courts-martial regardless of ability to pay); *id.* R.C.M. 701 (granting liberal discovery); *id.* R.C.M. 703 (requiring the Government to produce witnesses for the defense).

**Appendix**

Recommended additions to R.C.M. 902:

(d) *Procedure.*

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(4) If a military judge denies the motion to disqualify himself or herself, then the moving counsel may request that the court reconsider the motion. The moving counsel must request reconsideration by the earlier of 72 hours or prior to the court receiving evidence.

(A) Record. Upon written notice to the military judge under subsection (d)(4) of this rule, trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed.

(B) The military judge shall forward the motion to the Chief, Circuit Judge, who will either personally review the motion or detail another military judge to reconsider the motion.

(C) The military judge reviewing the motion to reconsider shall review the record *de novo*. If necessary, the military judge will consider new evidence during an Article 39a session. The military judge may receive evidence under R.C.M. 804, 805, and 914B.

(D) The military judge reviewing the motion will enter findings of fact and law into the record. If the reviewing judge denies the motion to reconsider, then the original military judge will preside over the case. If the reviewing judge grants the motion to reconsider, however, then the Chief Circuit Judge will detail a new military judge.

**READ ANY GOOD (PROFESSIONAL) BOOKS LATELY?:  
A SUGGESTED PROFESSIONAL READING PROGRAM FOR  
JUDGE ADVOCATES**

LIEUTENANT COLONEL JEFF BOVARNICK\*

*I challenge all leaders to make a focused, personal commitment to read, reflect, and learn about our profession and our world. Through the exercise of our minds, our Army will grow stronger.<sup>1</sup>*

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<sup>1</sup> U.S. ARMY CTR. OF MILITARY HISTORY, CMH PUB. 105-1-1, U.S. ARMY CHIEF OF STAFF'S PROFESSIONAL READING LIST, at 2 (2004), <http://www.history.army.mil/brochures/csareadinglist.pdf> (quoting General Peter J. Schoomaker, former Army Chief of Staff).

### I. Introduction: You Never Know Who May Ask You What You Are Reading

In the fall of 2005, this author and other students attending Command and General Staff College (CGSC)<sup>2</sup> at Fort Leavenworth, Kansas, were summoned to meet their new Commandant and Commanding General (CG)<sup>3</sup>—during a run.<sup>4</sup> Each student ran alongside the CG for a few minutes to tell him what they liked and disliked about the course, and any recommendations they had for change. Another interesting topic came after the run, dips, and pull-ups while we were stretching as a group. The CG said we would go around the circle and each student would name the book they were currently reading, what it was about, and whether they recommended it for others to read. A big caveat was that the book could not be assigned reading from the course.

As we went around the group of a dozen majors, it became apparent many of my non-lawyer classmates neglected the professional extracurricular reading envisioned by the CG. When we were done, the CG discussed the importance of reading on a wide range of subjects for officers in the profession of arms. While I have always been an avid reader,<sup>5</sup> it still made a lasting impression on me to hear that admonishment from the CG in that setting.

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<sup>2</sup> The year-long course is now called ILE/AOWC (Intermediate Level Education/Advanced Operations War fighting Course). See PERSONNEL, PLANS & TRAINING OFFICE, JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES 60 (2009–10).

<sup>3</sup> The Commanding General, U.S. Army Combined Arms Center, is dual-hatted as the Commandant, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas. For an example of the dual-status command position, see Lieutenant General Robert L. Caslen, Jr., *available at* <http://usacac.army.mil/cac2/Repository/Bios/CaslenBio.pdf> (last visited May 10, 2010).

<sup>4</sup> The aide's e-mail required twelve students per morning to run with the CG until the list, organized alphabetically, was exhausted. Interestingly, there was no mention of the distance or pace—a concern of many students who knew the CG had run the Army ten-miler in less than sixty minutes. See RICK ATKINSON, *IN THE COMPANY OF SOLDIERS—A CHRONICLE OF COMBAT* 37 (2005).

<sup>5</sup> Fortunately, I had just completed *April 1865: The Month That Saved America*, and I strongly recommended it to the group. Although not as recognized as July 1776 or September 2001, as the subtitle indicates, April 1865 is one of the most important months in our nation's history. In this well-researched book, the author details the events leading up to and including two well-known historical events: General Robert E. Lee's surrender to General Ulysses S. Grant on 9 April 1865 at Wilmer McLean's house in the town of Appomattox Courthouse, Virginia, and then five days later, on 14 April 1865, the assassination of President Abraham Lincoln by John Wilkes Booth as the President

General David Petraeus's<sup>6</sup> point about professional reading is shared by many senior leaders, to include The Judge Advocate General (TJAG) of the Army, the Chiefs of Staff of the Army and Air Force, the Chief of Naval Operations, the Commandants of the Marines and Coast Guard, and the Commandants of numerous military educational institutions.<sup>7</sup> Military officers have a responsibility to read as a matter of professional development. As part of their daily jobs, most judge advocates read a lot. From regulations and professional journals to court and other legal opinions, judge advocates, perhaps more than any other occupational specialty, have an inherent professional obligation to research issues to ensure they provide sound advice to their commanders or clients. This article adopts a broader approach to professional reading.

### The Challenge

Military members are busy—with their jobs, families, social lives, and exercise. In addition to the “required” reading noted above, there are other categories of reading (such as daily reading to keep abreast of current events, reading for relaxation, or reading to children as a parental activity), all of which leave little time for the extracurricular reading discussed here. Despite the challenge of finding time, there are few, if any, valid excuses that totally absolve a judge advocate from the professional responsibility to read.<sup>8</sup> Admittedly, a suggestion to read every day is unrealistic for many due to outside demands, but reading a chapter or two a week is within the realm of possibility for even the busiest people. Judge advocates who have been less than diligent must find time for professional reading. Additionally, senior judge advocates should devise programs to guide their subordinates through a

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watched the play *Our American Cousin* at Ford's Theater in Washington, D.C. JAY WINK, APRIL 1865: THE MONTH THAT SAVED AMERICA 165–89, 253–58 (2001).

<sup>6</sup> Then-Lieutenant General Petraeus served as the Commandant at the Command and General Staff College from October 2005 until his selection as the Commander, Multi-National Forces, Iraq, and promotion to General (Jan. 2007–Sept. 2008). See also DAVID CLOUD & GREG JAFFE, THE FOURTH STAR: FOUR GENERALS AND THE EPIC STRUGGLE FOR THE FUTURE OF THE UNITED STATES ARMY 217 (2009). On 31 October 2008, General Petraeus assumed command of U.S. Central Command. See U.S. Central Command, U.S. CENTCOM Leadership, available at <http://www.centcom.mil/en/about-centcom/leadership/> (last visited May 12, 2010).

<sup>7</sup> See *infra* notes 87–88 and accompanying text.

<sup>8</sup> In this article, “reading” includes listening to unabridged audiobooks. With thousands of titles available from numerous sources and multiple ways to listen, audiobooks provide the “reader” additional opportunities for professional development.

professional reading plan. The leader's challenge is to find ways that make reading enjoyable by providing a low-stress environment for judge advocates to share their "book reviews" with others.

This article provides suggestions on categories of books for professional reading; a review of military professional reading lists; an overview of the history of book reviews in the *Military Law Review* and *The Army Lawyer*; and, finally, suggestions for the development of a professional reading program.

To assist readers, I have also provided a number of appendices:

A	Recommendations from JAG Corps's Leaders (Summer 2010)
B	Author's Professional Reading List
C	JAG Corps Professional Reading List & Supplemental List for Deployment
D	U.S. Army Professional Reading List
E	Faculty Book Selections for 58th and 59th Graduate Courses
F	<i>Military Law Review</i> Student Book Reviews (2004–2009) and <i>The Army Lawyer</i> Student Book Reviews (2004–2009)
G	History of the Book Review in the <i>Military Law Review</i> and <i>The Army Lawyer</i>

## II. What Should Judge Advocates Read for Professional Development?

Judge advocates should consider three broad categories of material when reading for professional development purposes: (1) military books; (2) law books; and (3) history books. With a large number of sub-categories in each of these groups, all judge advocates can identify interesting books they want to read rather than books that would burden their busy schedules.

## A. “Military” Books

From the first shots fired in our nation’s war for independence<sup>9</sup> to the first shots fired in the Global War on Terror,<sup>10</sup> a staggering number of authors have produced important books about the profession of arms. The “military” category is not limited to the American military, but refers to anything and everything with a connection to any military around the world.

In 2006, TJAG advised our Corps that judge advocates had to be “pentathletes”—warriors, lawyers, diplomats, strategic planners, and cultural experts.<sup>11</sup> Thus, for an officer to attain a high level of professional competence, it can be instructive to read the same books as commanders and colleagues in the other military branches and services. In 1994, when I was trial counsel for the 327th Infantry Regiment in the 101st Airborne Division (Air Assault), a battalion commander<sup>12</sup> picked a book off the coffee table in his office and told me to read it while we were at Joint Readiness Training Center<sup>13</sup> to get a better understanding of

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<sup>9</sup> See DAVID MCCULLOUGH, *1776* (2005). The first shots fired in the Revolutionary War between the colonial minutemen and the British forces occurred at Lexington, Massachusetts, on 19 April 1775. *Id.* at 7.

<sup>10</sup> See DOUGLAS STANTON, *HORSE SOLDIERS: THE EXTRAORDINARY STORY OF A BAND OF U.S. SOLDIERS WHO RODE TO VICTORY IN AFGHANISTAN* (2009). On 7 October 2001, the U.S. Air Force started bombing Taliban soldiers in Afghanistan. *Id.* at 46. Later, on 19 October, Captain Mitch Nelson, Team Leader, ODA 595, 3d Battalion, 5th Special Forces Group, fighting alongside Afghan General Abdul Rashid Dostum and his tribesmen, called in a B-52 airstrike on Taliban militia near the village of Chapchal, Afghanistan (south of Mazar-i-Sharif). *Id.* at xiii–xiv, 144–58.

<sup>11</sup> See Major General Scott C. Black, *JAG Corps Pentathletes*, TJAG SENDS, A MESSAGE FROM THE JUDGE ADVOCATE GENERAL, vol. 37, no. 5 (Feb. 2006) [hereinafter *JAG Corps Pentathletes*]. In this message, Major General (MG) Scott Black, TJAG, highlights the Army’s 2006 “visionary concept” of enabling officers to learn and adapt in complex and uncertain environments by teaching them how to think and not what to think. *Id.*

<sup>12</sup> Lieutenant Colonel (LTC) Lloyd W. Mills was the Commander of 3d Battalion (Battle Force), 327th Infantry Regiment (formerly part of what is now the 1st Brigade Combat Team, 101st Airborne Division (Air Assault)). Around 2030, 2 June 1995, at Range 42, Fort Campbell, Kentucky, LTC Mills, a commander idolized by all of his Soldiers, was killed in a training accident at a live fire small arms range. See First Brigade Trial Counsel Notes and Sketch of Range 42 (June 1995) (on file with author).

<sup>13</sup> The Joint Readiness Training Center (JRTC) is located at Fort Polk, Louisiana. While some focus areas have changed since 11 September 2001, in the mid-1990s, as they do today, light infantry brigades conduct realistic unit-level training at JRTC.

air assault operations. On the Chinook<sup>14</sup> ride from Fort Campbell, Kentucky, to Fort Polk, Louisiana, even the din of the dual rotors could not distract me from reading about the exploits of the 1st Cavalry Division in the Ia Drang Valley in 1965.<sup>15</sup> Reading that particular book well before it became a bestseller, a movie,<sup>16</sup> the subject of several Leadership Professional Development sessions, and a case study at CGSC, served me well over the years.<sup>17</sup>

Libraries and bookstores are replete with books on every major conflict, as well as biographies of all of our great generals and war heroes.<sup>18</sup> From The General of the Army down to a team leader,<sup>19</sup>

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<sup>14</sup> See U.S. Army Helicopter Information, available at <http://tri.army.mil/LC/cs/csa/aadesc.htm#CH47> (last visited May 10, 2010) (describing attributes of the U.S. Army CH-47 Cargo Helicopter, also known as “Chinook”).

<sup>15</sup> LIEUTENANT GENERAL HAROLD G. MOORE (RET.) & JOSEPH L. GALLOWAY, *WE WERE SOLDIERS ONCE . . . AND YOUNG* (1992).

<sup>16</sup> *WE WERE SOLDIERS* (Paramount Pictures 2002).

<sup>17</sup> One evening in 2008, when I was in the 1st Infantry Division, I was watching television with a friend, a retired U.S. Army first sergeant (and the father of a brigade commander who was deployed at the time). By coincidence, *We Were Soldiers* came on. After the scenes turned to Vietnam and the battle at Landing Zone (LZ) X-Ray in November 1965 with artillery support raining in from LZ Falcon, “First Sergeant” (as I called him) said, “I was at Falcon as a firing battery NCO.” I asked about the specifics of his service and sat captivated as he recounted the events of the real battle as the movie scenes played out before us. See also MOORE & GALLOWAY, *supra* note 15, at 122 (describing the 1st Battalion, 21st Artillery Regiment’s support of the 1st Battalion, 7th Cavalry Regiment, from LZ Falcon).

<sup>18</sup> In one classic, the author, himself a war hero, writes about others who exemplified “profiles in courage.” In the Introduction to the 50th Anniversary Edition of the a Pulitzer Prize winning novel, the author’s daughter tells about her father’s heroic efforts after his Patrol Torpedo (PT) boat was rammed by a Japanese destroyer in the South Pacific on the night of 2 August 1943. As one of two survivors, the commander “[clutched] a strap of the injured man’s life jacket in his teeth [and] towed the wounded sailor to the nearest island, three miles away.” JOHN F. KENNEDY, *PROFILES IN COURAGE*, at ix (First Harper Perennial Modern Classics ed., 2006) (1956). Two men have held the positions of U.S. Senator from Massachusetts and U.S. President: John Quincy Adams (JQA) and John Fitzgerald Kennedy (JFK). While he was a sitting Senator, JFK profiled JQA focusing on JQA’s term as Senator (1803–08). History has tempered the rift and hatred between JQA’s father, President John Adams, and his successor, President Thomas Jefferson. In 1807, when President Jefferson called upon Congress to enact a trade embargo against the British—an act that would be “ruinous to Massachusetts, the leading commercial state in the nation”—JFK notes that when JQA rose in support of Jefferson (his father’s arch enemy, the leader of the opposition party, and against his own home state), he sealed his political fate, but by displaying his courage in standing for a higher principle in support of his nation in the face of Britain’s war-like acts earlier that summer, he also sealed his reputation as a man “possessing an integrity unsurpassed among the major political figures of our history.” See *id* at 29–48.

leadership lessons can be learned from triumph, tragedy, and from good and bad leaders.<sup>20</sup> Readers can venture outside the most popular topics

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<sup>19</sup> See, e.g., STEPHEN E. AMBROSE, *THE VICTORS: EISENHOWER AND HIS BOYS: THE MEN OF WORLD WAR II* (1998) (addressing the period when General of the Army Dwight D. Eisenhower was the Supreme Allied Commander in Europe); CLOUD & JAFFE, *supra* note 7 (portraying the following four-star generals: General George Casey, General John Abizaid, General David Petraeus, and General Peter Chiarelli); THOMAS BOOTH, *PARATROOPER: THE LIFE OF GEN. JAMES M. GAVIN* 15, 20, 217–18 (1994) (including the time when the thirty-seven-year-old Gavin was Commander of the 82d Airborne Division and first paratrooper out of the door of his C-47 as the “All Americans” performed the first regimental level parachute assault in history in OPERATION MARKET GARDEN on 17 September 1944); ATKINSON, *supra* note 4, at 181–207, 318 (addressing the period when General Petraeus was the Commander of the 101st Airborne Division (Air Assault) in Iraq from the initial invasion in late March 2003 through February 2004); MOORE & GALLOWAY, *supra* note 15 (describing the time when LTC Hal Moore was the Commander of 1st Battalion, 7th Cavalry Regiment, in Vietnam in 1965); STEPHEN E. AMBROSE, *BAND OF BROTHERS* 13–52, 92–156 (1992) (comparing Captain (CPT) Herbert Sobel when he was the commander of E Company, 506th Parachute Infantry Regiment, 101st Airborne Division from July 1942 until December 1943, with CPT Dick Winters who was in command of the legendary company from D-Day, 6 June 1944, through OPERATION MARKET GARDEN in early October 1944, before, at age twenty-six, he moved up to be the battalion executive officer); ALEX KERSHAW, *THE LONGEST WINTER: THE BATTLE OF THE BULGE AND THE EPIC STORY OF WWII’S MOST DECORATED PLATOON* (2004) (recounting the time when First Lieutenant (1LT) Lyle Bouck was the Platoon Leader for the Intelligence and Reconnaissance Platoon, 394th Infantry Regiment); CRAIG M. MULLANEY, *THE UNFORGIVING MINUTE: A SOLDIER’S EDUCATION* (2009) (recalling the time when the author was a platoon leader in A Company, 1st Battalion, 87th Infantry Regiment, 10th Mountain Division, in Afghanistan in 2004); LARS ANDERSON, *THE ALL AMERICANS* 203–15 (2004) (describing the assault on Omaha Beach in Normandy, France, on D-Day, 6 June 1944, through the eyes of 1LT Henry Romanek, an engineer platoon leader who was wounded in the initial assault); STANTON, *supra* note 10 (exploring the period when CPT Mitch Nelson and CPT Dean Nosorog were Team Leaders in the 3d Battalion, 5th Special Forces Group in Afghanistan in 2001); JOSEPH WHEELAN, *JEFFERSON’S WAR: AMERICA’S FIRST WAR ON TERROR 1801–1805*, at 180–98 (2003) (detailing the heroic exploits of Navy Lieutenant Stephen Decatur at the time he was a squadron commander during the Barbary Wars off the coast of Tripoli in the early 1800s. Decatur’s daring re-capture and burning of the U.S. frigate *Philadelphia* within range of 115 enemy cannons and two warships earned him a promotion to captain (then the Navy’s highest rank) at age twenty-five).

<sup>20</sup> ANTON MYRER, *ONCE AN EAGLE* (First HarperTorch paperback ed. 2001) (1968). In this timeless classic of leadership, the author portrays the characteristics and values of great leaders and bad, through an honor-bound hero, Sam Damon, the epitome of selfless service and care of one’s men, and a villain, Courtney Massengale, the epitome of selfish service. The stark difference is displayed in one exchange when Damon, a Division Commander in WWII, is distraught over the devastating loss of his men in a recent battle, and Massengale, his Corps Commander, who sent the Division into the battle, is unsympathetic about the loss and already thinking about the next battle. Damon is enraged at Massengale’s total lack of sympathy over the loss and total willingness to sacrifice more men for his own glory. *Id.* at 1116–18. Massengale taunts Damon into

like the Revolutionary War, Civil War, and World War II or review those topics through a different lens. Whether studying the victorious Generals Grant<sup>21</sup> and Eisenhower<sup>22</sup> or examining the remarkable hardships endured by our predecessors,<sup>23</sup> or a combination of both in the case of

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striking him while reminding Damon that if he does, he will be disciplined and stripped of his Division Command. As Damon is about to strike Massengale, an emotional exchange occurs illustrating the stark difference in the commanders' leadership traits. Massengale tells Damon his Division needs him. Damon replies, "What Division is that? They're all [killed in action]—and you put them there! . . . Don't be found out there after dark without your retinue. . . . They know, mister." *Id.* at 1119. Undeterred, Massengale replies, "In point of fact I don't care what they think about me as long as they fear me. That's the driving gear that turns the wheels of war":

Damon felt a despair that sank into the marrow of his bones. . . .  
 "You don't know anything, do you? Nothing at all." He started to go  
 on and stopped himself: there was nothing to say. Massengale's  
 sin—there was none greater—was that he had decided neither grace  
 nor nobility nor love existed in this world.

*Id.*

<sup>21</sup> WINK, *supra* note 5. While General Grant and the North were victorious, the author highlights how the "defeated" General Robert E. Lee is also a hero to our nation for his decision to surrender on 9 April 1865:

Thus did Robert E. Lee, so revered for his leadership in war, make  
 his most historic contribution—to peace. By this one momentous  
 decision, he spared the country the divisive guerilla warfare that  
 surely would have followed, a vile and poisonous conflict that would  
 not only have delayed any true national reconciliation for many years  
 to come, but in all probability would have fractured the country for  
 decades into warring military pockets.

*Id.* at 166. *See also* JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988). In preparing for the 58th Graduate Course's Staff Ride to Gettysburg in April 2008, Mr. Fred Borch, the U.S. Army Judge Advocate General's Corps Regimental Historian, commented that McPherson's book is the best single volume work on the Civil War. In his rendition of Lee's surrender to Grant, McPherson relates that, "[a]fter signing the papers, Grant introduced Lee to his staff. As he shook hands with Grant's military secretary Ely Parker, a Seneca Indian, Lee stared a moment at Parker's dark features and said, 'I am glad to see one real American here.' Parker responded, 'We are all Americans.'" *Id.* at 849.

<sup>22</sup> AMBROSE, *supra* note 19.

<sup>23</sup> *See, e.g.*, ROY E. APPLEMAN, EAST OF CHOSIN: ENTRAPMENT AND BREAKOUT IN KOREA, 1950 (1987); DONALD KNOX, THE KOREAN WAR: PUSAN TO CHOSIN: AN ORAL HISTORY (1985); II DONALD KNOX, THE KOREAN WAR: UNCERTAIN VICTORY: AN ORAL HISTORY (1988). One of the commanders highlighted in Knox's two-volume set is Captain Norman Allen, the commander of I Company, 5th Cavalry Regiment, 1st Cavalry Division, during his tour of duty in Korea. Prior to this service in Korea, he served in World War II, where he was awarded two purple hearts in the Pacific Campaign. He

General Washington's leadership of the Continental Army through the winter of 1776–1777,<sup>24</sup> judge advocates will gain a new appreciation and respect for our military heritage.

With our military's involvement in constant armed conflict since late 2001, officers can keep current and maintain situational awareness<sup>25</sup> by reading books on the contemporary "operational environment"<sup>26</sup> (COE). While there may not be a "COE" sign or section in a bookstore or library, any book on Iraq or Afghanistan will suffice. Whether a judge

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went on to get three more purple hearts in Korea. *Id.* at 2. Many judge advocates will recognize the name—Captain Norman Allen. He went on to retire as a colonel and he is the father of Colonel (COL) Norman F. Allen III, Staff Judge Advocate, U.S. Forces Command (as of summer 2010).

<sup>24</sup> DAVID HACKETT FISCHER, *WASHINGTON'S CROSSING* (2004). Before detailing the leadership challenges faced and overcome by General Washington, Fischer describes the history behind the iconic painting that provides the title for, and cover of, his book. *Id.* at 1–6. United States history students may recall the critical role of Thomas Paine's *Common Sense* pamphlet in early 1776, which rallied the colonists behind the call for independence from Great Britain. Fischer reminds us that it was Thomas Paine's first *The American Crisis* pamphlet and its famous opening line: "These are the times that try men's souls" that inspired the colonists and rallied a struggling Continental Army during the "black days" of the winter of 1776 and propelled them to victory in New Jersey. *Id.* at 140–43. Later, Fischer describes how General Washington, on horseback, has to ask underpaid, underfed, under-clothed volunteers to remain and fight after their enlistments expired to keep the Continental Army together during a particularly critical time in the war. Not one man stepped forward after Washington's first plea for volunteers from the New England regiments. "The men watched as Washington 'wheeled his horse about, rode in front of the regiment,' and spoke to them again":

My brave fellows . . . you have done all I asked you to do, and more than could be reasonably expected; but your country is at stake, your wives, your houses, and all that you hold dear. . . . If you will consent to stay one month longer, you will render that service to the cause of liberty, and to your country, which you probably can never do under any other circumstances.

*Id.* at 272–73. Following this call to action, "[t]he drums rolled again [and] about two hundred volunteers [stepped forward]. . . . They knew well what the cost might be . . . [N]early half of the men who stepped forward would be killed in the fighting or dead of disease 'soon after.'" *Id.* at 273.

<sup>25</sup> JAG Corps Pentathletes, *supra* note 11. The Judge Advocate General directed leaders to "[s]tay abreast of current events and always be situationally aware" and to "understand the cultural context in which US forces operate." *Id.*

<sup>26</sup> "Operational environment" (OE) is defined as "[a] composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander." JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 395 (12 Apr. 2001 (*as amended through 31 Oct. 2009*)).

advocate's interest lies in the strategic, operational, or tactical levels—from the “road to war”<sup>27</sup> and major operations<sup>28</sup> down to small unit battles<sup>29</sup>—there are many options. For young judge advocates, books detailing modern day small unit battles provide insight into the combat lives of their clients, whether they are commanders or the accused. For this reason, understanding the contemporary battlefield is essential to advising clients across the spectrum of the JAG Corps's legal disciplines.

While several reading lists will aid those preparing to deploy,<sup>30</sup> judge advocates will find it equally important to continue their education about the COE, especially while they are in it.<sup>31</sup> Although it may be difficult to remember when and where you read a certain book, under certain circumstances, it may be hard to forget—such as reading about the history of the Taliban while in Bagram<sup>32</sup> or the 1st Cavalry Division's

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<sup>27</sup> LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2006); *see also* THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2003 TO 2005* (2006).

<sup>28</sup> *See, e.g.*, SEAN NAYLOR, *NOT A GOOD DAY TO DIE* (2005) (addressing Afghanistan); ATKINSON, *supra* note 4 (addressing Iraq).

<sup>29</sup> *See, e.g.*, MULLANEY, *supra* note 19 (concerning Afghanistan); SEBASTIAN JUNGER, *WAR* (2010) (concerning Afghanistan); MARTHA RADDATZ, *THE LONG ROAD HOME: A STORY OF WAR AND FAMILY* (2007) (concerning Iraq); JOHN KRAKAUER, *WHERE MEN WIN GLORY: THE ODYSSEY OF PAT TILLMAN* (2009). Corporal Pat Tillman, former Arizona Cardinals football star, gave up a multi-million dollar football contract to enlist in the Army and become a Ranger in the 2d Platoon, A Company, 2d Ranger Battalion, 75th Ranger Regiment. Before he was killed by friendly fire at what is now called “Tillman Pass” in Khost Province, Afghanistan, on 22 April 2004, he also served with his unit in Iraq in 2003. *Id.* at xii, 172, 272–73.

<sup>30</sup> *See infra* notes 90 and 99 and accompanying text (discussing deployment reading lists).

<sup>31</sup> For example, one day in December 2004, when General George Casey was the Commander of Multi-National Forces-Iraq, an aide advised him

to go to the [morning] briefing early one day and ask people what they were reading. If it didn't have something to do with Iraq or Arab culture, [General] Casey should tell them to read something that did. [The aide] suggested building a library and stocking it with classic accounts of past counterinsurgency wars. He could start with David Galula's dissection of the French army's war in Algeria against Arab guerillas . . . .

CLOUD & JAFFE, *supra* note 6, at 186 (referring to DAVID GALULA, *COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE* (Praeger Security Int'l ed., 2006) (1964).

<sup>32</sup> *See* AHMED RASHID, *TALIBAN* (Yale University Press 2001) (2000) (originally published in 2000, this best-seller from a reporter that covered Afghanistan since 1978, was re-published with a Prologue in late 2001). *Id.* at vii–xv. *See also* PATRICK COCKBURN, *MUQTADA: MUQTADA AL-SADR, THE SHIA REVIVAL AND THE STRUGGLE FOR IRAQ* (2008).

harrowing experience in Sadr City<sup>33</sup> while serving in the shadow of that infamous subsection of Baghdad.<sup>34</sup> Studies of past wars, including past counterinsurgencies, are particularly relevant for today's COE.<sup>35</sup>

Beyond the books about battles, texts on culture are essential for all who interact with host nation officials in the theater of operations. Books written by the world's foremost scholars on the Middle East can familiarize officers with the region, the religion of Islam, and the Arab

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<sup>33</sup> See RADDATZ, *supra* note 29. See also CLOUD & JAFFE, *supra* note 6, at 148–52 (describing the 4 April 2004 battle in Sadr City from the perspective of General Peter Chiarelli, who was the Commander of the 1st Cavalry Division during the battle).

<sup>34</sup> Forward Operating Base (FOB) Shield, the home of the Law and Order Task Force, is located adjacent to Sadr City. Sadr City, formerly Thawra City, is, despite its name, a subsection of the Thawra District on the Rusafa (or east) side of the Tigris River within Baghdad, Iraq. See COCKBURN, *supra* note 32, at 4.

<sup>35</sup> See, e.g., GALULA, *supra* note 31; LIEUTENANT COLONEL JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM (Univ. of Chi. Press 2005) (2002); BOOTH, *supra* note 20. Compare THE BEAR WENT OVER THE MOUNTAIN: SOVIET COMBAT TACTICS IN AFGHANISTAN (Lester W. Grau trans. & ed., Nat'l Def. Univ. 10th Anniversary ed., 2005) (1995) [hereinafter THE BEAR WENT OVER THE MOUNTAIN], with ALI AHMAD JALALI & LESTER W. GRAU, THE OTHER SIDE OF THE MOUNTAIN: MUJAHIDEEN TACTICS IN THE SOVIET-AFGHAN WAR (1995). Up until 1993, counter-revolutionary warfare, as part of counterinsurgency (COIN) doctrine, was part of the core curriculum at CGSC. In 1993, operations other than war, primarily peace-keeping operations, replaced COIN studies in the core curriculum, relegating COIN studies to an elective for the next twelve years. Interview with Mr. Geoff Babb, Professor, Command and General Staff College, in Charlottesville, Va. (May 10, 2010). When LTG Petraeus became the Commandant of CGSC in the fall of 2005, two of his biggest changes were adding COIN studies back to the core curriculum and the drafting of an updated COIN manual. See THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL: U.S. ARMY FIELD MANUAL NO. 3-24: MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5 (Univ. of Chi. Press 2007) (2006) (containing forewords by General David H. Petraeus, Lieutenant General James F. Amos, and Lieutenant Colonel John Nagl, and with a new introduction by Sarah Sewell). The re-writing of the Army and Marine Corps's combined counterinsurgency field manual was a project initiated by General Petraeus when he was the Commander of the Combined Arms Center at Fort Leavenworth. See CLOUD & JAFFE, *supra* note 6, at 216–20. We did numerous case studies at CGSC and one included the Soviet's unsuccessful COIN campaign against the tribal insurgency that ultimately defeated them. My small group had an infantry officer from the Ukraine, who, even after the breakup of the Soviet Union in 1991, had been trained in Soviet tactics. In the case studies, officers would play various roles to illustrate the battles and strategies of opposing sides. One of my most enduring memories of CGSC was when Major Mikhal Zabrosky played the role of a Russian commander describing the Soviet COIN tactics in Afghanistan. See Russia Home Page, CIA World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html> (last visited May 10, 2010) (discussing the breakup of the Union of Soviet Socialist Republic into fourteen independent republics in 1991).

culture.<sup>36</sup> For example, the phrase “three cups of tea” should have special meaning for any judge advocate who has tried to build a relationship with a counterpart in Iraq or Afghanistan. This term certainly had meaning for an author who traveled through the hinterlands of Afghanistan and Pakistan—the backyard of al Qaeda and the Taliban, unarmed, and with the primary purpose of building schools—for girls.<sup>37</sup> Selections on the topic of culture are not limited to “scholarly” works or even “real world” accounts. For example, entertaining bestsellers, such as one describing life through the eyes of two boys coming of age during Afghanistan’s war-torn years, can be just as useful to judge advocates hoping to gain insight on a culture that is foreign to them in more than one sense of the word.<sup>38</sup>

Among the amazing survival stories throughout history,<sup>39</sup> those involving military personnel during wartime can shape an officer’s

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<sup>36</sup> See, e.g., BERNARD LEWIS, *WHAT WENT WRONG: THE CLASH BETWEEN ISLAM AND MODERNITY IN THE MIDDLE EAST* (2002); BERNARD LEWIS, *THE CRISIS OF ISLAM: HOLY WAR AND UNHOLY TERROR* (2003). Bernard Lewis is Princeton University’s Cleveland E. Dodge Professor of Near Eastern Studies, Emeritus. See Princeton University, Department of Near East Studies Faculty, available at [http://www.princeton.edu/~nes/faculty\\_lewis.html](http://www.princeton.edu/~nes/faculty_lewis.html) (last visited May 10, 2010) (listing the twenty-one books Professor Lewis has written on the Middle East). See also RAPHAEL PATAI, *THE ARAB MIND* (rev. ed. 2003) (1973). Professor Patai, a distinguished cultural anthropologist, folklorist, historian, and biblical scholar who died in 1996, published more than 600 articles and thirty books. *Id.* at ii, iv, and back cover.

<sup>37</sup> GREG MORTENSON & DAVID OLIVER RELIN, *THREE CUPS OF TEA: ONE MAN’S MISSION TO FIGHT TERRORISM AND BUILD NATIONS . . . ONE SCHOOL AT A TIME* (2006). This book is a compelling and remarkable story of one man who lived the concept of having “three cups of tea” with tribal elders and warlords in the most dangerous (and rugged) areas in the world. Despite the immense challenges, through perseverance, Greg Mortenson forged relationships throughout the region and built a network of schools for girls. The book leaves the reader wondering, “What if . . . ?” What if everyone understood the concept related throughout the book—would the situation in Afghanistan be different today? In a recent trip to a bookstore with my kids, I saw the book in the Children’s Section and thought someone had left it there. Upon further inspection, sure enough, *Three Cups of Tea* has been republished in a Young Reader’s edition. GREG MORTENSON & DAVID OLIVER RELIN, *THREE CUPS OF TEA: ONE MAN’S MISSION TO FIGHT TERRORISM AND BUILD NATIONS . . . ONE SCHOOL AT A TIME* (Young Reader’s ed., 2009).

<sup>38</sup> KHALED HOSSEINI, *THE KITE RUNNER* (2004).

<sup>39</sup> Everyone has heard of, and probably read some version of the Herman Melville classic, *Moby Dick*. HERMAN MELVILLE, *MOBY DICK; OR THE WHALE* (1851). Few, however, may know the true story that inspired Melville’s timeless novel—a story that is, at its core, a story of leadership and survival. When the Nantucket whaleship *Essex* was rammed and sunk by an eighty-five-foot sperm whale in November 1820, twenty whalers were set adrift in three small open boats in the middle of the Pacific Ocean with minimal rations thousands of miles from land. What follows is a remarkable (and disturbing)

perspective. Three stories of survival, all from the Pacific Theater during World War II, and all from very different circumstances immediately come to mind. Each story involves multiple Soldiers, Sailors, and Marines surviving one hellacious event, only to be thrown into a second: the survivors of the Bataan Death March spent the next three years in a viciously brutal Prisoner of War Camp in Cabanatuan;<sup>40</sup> the survivors of the U.S.S. *Indianapolis* torpedoing spent the next three-to-five days in the shark-infested waters of the South Pacific;<sup>41</sup> and the Marines who

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account of the sailors' journey, including accounts of cannibalism. NATHANIEL PHILBRICK, *IN THE HEART OF THE SEA: THE TRAGEDY OF THE WHALESHIP ESSEX 80-83*, 91, 164-66 (2001).

<sup>40</sup> HAMPTON SIDES, *GHOST SOLDIERS: THE FORGOTTEN EPIC STORY OF WORLD WAR II'S MOST DRAMATIC MISSION* (2001). The survivors have been honored annually by servicemembers and civilians since 1989 at the Bataan Memorial Death March in White Sands Missile Range, New Mexico. See *The 22nd Annual Bataan Memorial Death March Will be Held March 27, 2011*, available at <http://www.bataanmarch.com/default.htm> (last visited May 20, 2010).

<sup>41</sup> DOUGLAS STANTON, *HARM'S WAY: THE SINKING OF THE USS INDIANAPOLIS AND THE EXTRAORDINARY STORY OF ITS SURVIVORS 319* (Holt Paperbacks ed., 2003) (2001). In the 1975 movie *Jaws*, as Captain Quint, Chief Brody, and Mr. Hooper hunt a man-eating Great White Shark, Captain Quint tells the story of the shark attacks in the aftermath of the sinking of the *U.S.S. Indianapolis*:

Japanese submarine slammed two torpedoes into our side, Chief. We was comin' back from the island of Tinian to Leyte . . . just delivered the bomb. The Hiroshima bomb. Eleven hundred men went into the water. Vessel went down in 12 minutes. Didn't see the first shark for about a half an hour. Tiger. 13-footer. . . . Noon, the fifth day, Mr. Hooper, a Lockheed Ventura saw us. . . . So, eleven hundred men went in the water; 316 men come out and the sharks took the rest, June the 29th, 1945. Anyway, we delivered the bomb.

Memorable Quotes for *Jaws* (1975), available at <http://www.imdb.com/title/tt0073195/quotes> (last visited May 10, 2010) (quoting actor Robert Shaw). See also *JAWS* (Universal 1975). Most, if not all, judge advocates forty years old or older can identify with Douglas Stanton's comment in his Author's Note: "I had heard of the *Indy* before: immortalized by Captain Quint in *Jaws*, the ship occupied a mythical status in American popular history . . . [b]ut, I realized, I knew little about the real-life incident." STANTON, *supra* note 42, at 319. A must read for Sailors, however, this story transcends services. After the Japanese submarine commander fired the first torpedo at the *Indy* and its 1196-man crew at 12:04 a.m. on Sunday, 30 July 1945, it is estimated 200 Sailors were killed at the point of impact before the ship sank within twelve minutes. The story of the 321 survivors' battle with sharks, hysteria, and dehydration until they were rescued between 2 and 4 August, is an amazing account of survival and leadership (four men died at the hospital within a week of rescue). *Id.* at 101, 137, 225-49. See also ANDERSON, *supra* note 19, at 153-76. Chapter 12 of this great book tells a similar story about the sinking of the USS *Meredith* in the South Pacific Ocean on 15 October 1942, and the four-day struggle for survival against sharks and hysteria. Eighty-seven of the 260 men survived.

survived the “assault into hell” at Peleliu were later thrown “into the abyss” at Okinawa.<sup>42</sup>

Whether we turn to the “military” category, which is the foundation of all professional reading, or the “law” and “history” categories with worthwhile selections unconnected to the military, in the end, any professional reading list will bring us back to military topics and their far-reaching insights for military officers. Military topics “provoke critical thinking about Professional soldiering . . . and a deep understanding of the Army and the future of the profession of arms in the 21st Century.”<sup>43</sup>

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<sup>42</sup> E.B. SLEDGE, *WITH THE OLD BREED AT PELELIU AND OKINAWA* (Oxford Univ. Press paperback ed., 1990) (1981). The 1st Marine Division staff predicted about 500 casualties on D-Day (15 September 1944) when the 1st, 5th, and 7th Marine Regiments assaulted the heavily fortified 2200 foot beach front at Peleliu. The 10,000 troops of the Japanese 14th Infantry Division, who “fought until the last position was knocked out,” killed or wounded over 1100 Marines on D-Day alone. *Id.* at 51, 53, 62, & 71. The Marines who survived the assault continued to fight in 115 degree heat until they were relieved on 25 September 1944 at the cost of 3946 casualties. *Id.* at 102–04. Once relieved as fighting unit, the 1st Marine Division was then split to support other units and when the Division’s Marines departed Peleliu on 30 October 1944, they had lost 6526 men (1252 dead and 5274 wounded). Conservative estimates of enemy losses were 10,900 dead and 302 taken prisoner. *Id.* at 155.

While the D-Day (1 April 1945) landing on Okinawa for Sledge’s unit was unopposed, the bloody inland fighting continued for more than two-months and as Sledge notes, “On 8 May [1945,] Nazi Germany surrendered unconditionally. We were told the momentous news, but considering our own peril and misery, no one cared much. . . . Nazi Germany might as well have been on the moon.” *Id.* at 187, 223. For all Sledge and his fellow Marines had been through, including a mad dash across “death valley”—an open field under direct fire from Japanese machine guns—he participated in what would be the final battle on Okinawa (Kunishi Ridge), resulting in the end of organized Japanese resistance on Okinawa. In the last twenty-two hours of fighting, Sledge’s company lost 50 of its 235 Marines and overall, between 11–18 June 1945, the Marines suffered 1150 casualties—a remarkable display of heroism and sacrifice. *Id.* at 244–45, 299–301. In March 2010, HBO released a new 10-part mini-series, *The Pacific*, which features E.B. Sledge. See [www.hbo.com/the-Pacific](http://www.hbo.com/the-Pacific) (last visited Mar. 23, 2010).

<sup>43</sup> Nat’l Def. Univ., Nat’l Def. Univ. Library, available at <http://www.ndu.edu/Library/index.cfm?secID=217&pageID=126&type=section> (last visited May 27, 2010) (describing key attributes of the “The U.S. Army Chief of Staff’s Professional Reading List”). See also *infra* notes 93 and 94.

## B. “Law” Books

Finding a professional reading book in the category of “Law” should be an easy task for any lawyer. From the Boston Massacre in 1770,<sup>44</sup> to the Malmedy Massacre in 1944,<sup>45</sup> to the My Lai Massacre in 1968,<sup>46</sup>

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<sup>44</sup> HILLER ZOBEL, *THE BOSTON MASSACRE* (1970). “It is . . . a familiar story that each of us has known since first we realized that our country’s freedom grew from bloodshed.” *Id.* at 3. Many remember the general story of what took place five years before Lexington and Concord: “the hated Redcoats tramping through the peaceful town of Boston . . . a few schoolboys harmlessly taunting the soldiers; the troops forming a battle line, loading with military precision, fixing bayonets, aiming carefully, and, on direct order deliberately given, firing a deadly volley at the helpless civilians.” *Id.*

To this basic scenario, some of us learn a sequel. It might be called *The Birth of American Justice*, or . . . *Even the Guilty Deserve a Fair Trial*. . . . Here the star is John Adams[.]. We . . . know that purely from a sense of duty, at great risk to his own popularity, lawyer Adams took the impossible case, and somehow convinced an implacably hostile jury to acquit his clients.

*Id.* at 3–4. In 240 pages leading up to the trials, Zobel takes the reader through the history of His Majesty’s Province of Massachusetts Bay in the ten-year period between 1760 and the 1770, including all of the facts leading up to the Boston Massacre on 5 March 1770. Then in fifty-three pages, Zobel chronicles the two Boston trials, *Rex v. Preston* (the trial against the officer) and *Rex v. Wemms et al.* (the trial against all the enlisted men), from opening statements through the verdicts. *Id.* at 241–94. Interestingly, while *John Adams*, the mini-series, portrays scenes of the Boston Massacre and the trial, the book *John Adams*, on which the mini-series is based only devotes four of its 751 pages to the events. See JOHN ADAMS (HBO Mini-Series, Episode 1, Live or Die, 2008) (on file with author); DAVID MCCULLOUGH, *JOHN ADAMS* 65–68 (2001).

<sup>45</sup> While there are many books that describe the events surrounding the Malmedy Massacre, few describe the trial of the perpetrators in detail. See, e.g., JOHN M. BAUSERMAN, *THE MALMEDY MASSACRE*, at xi, 1, 109–10 (1995) (covering specific details of the infamous massacre of eighty-two unarmed American prisoners of war on 17 December 1944 in Malmedy, Belgium, by Kampfgruppe (Battlegroup) Peiper, the 1st SS Panzer Regiment led by Lieutenant Colonel Joachim Peiper, but failing to discuss the trial of Peiper); see also KERSHAW, *supra* note 20, at 263–64 (devoting only two pages of Chapter 17, “Justice,” to the trial). Books containing more in-depth discussion of the trials following the Malmedy Massacre include two works by the same author. See JAMES J. WEINGARTNER, *CROSSROADS OF DEATH: THE STORY OF THE MALMEDY MASSACRE AND TRIAL* (1979) [hereinafter WEINGARTNER, *CROSSROADS OF DEATH*]; JAMES J. WEINGARTNER, *A PECULIAR CRUSADE: WILLS M. EVERETT AND THE MALMEDY MASSACRE* 45, 49, 109 (2000) [hereinafter WEINGARTNER, *A PECULIAR CRUSADE*] (describing the trial in detail from the perspective of Colonel Willis Everett, a civilian attorney activated after World War II to serve as a judge advocate in the War Crimes Department, and six other Army lawyers, who along with six German civilian attorneys defended seventy-four German soldiers, including Peiper at a mass trial designated *United States v. Valentin Bersin et al.* beginning on 16 May 1946 and ending on 16 July 1946). During a period of time in our history when the forum to try war criminals has

books about the trials following these infamous events provide in-depth reviews of the facts of the cases and the legal systems responsible for adjudicating them. Other books about courts-martial throughout history, like General George Armstrong Custer's in 1867,<sup>47</sup> provide an invaluable view of the courtroom prior to the enactment of the Uniform Code of

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been debated, the latter Weingarten book describes the three-tiered system of war crimes justice in Germany after World War II beginning in 1945: "By far the best-known component of this system was the International Military Tribunal sitting in Nuremberg, in which twenty-two German leaders and a number of organizations were tried before a panel of judges drawn from France, the Soviet Union, the United Kingdom, and the United States." *Id.* at 39. Many judge advocates may not be familiar with the other two tiers of the system that followed the adjournment of the International Military Tribunal. The second tier was a series of twelve trials with 185 lesser Nazi leaders tried before American civilian judges in Nuremberg between 1945 and 1949. *Id.* "By far the largest number of defendants, 1,672, would be tried in 489 proceedings conducted between 1945 and 1948 before courts established by the U.S. Army. These trials constituted the third tier. [T]he Malmedy massacre trial [was] among them." *Id.* Within this third tier of courts, the Malmedy defendants were tried before a "General Military Government Court, the highest of three grades of military government courts, reserved for important cases." WEINGARTNER, *CROSSROADS OF DEATH*, *supra*, at 46. Although not stated by the author, it can be assumed based on the name of the court these "three grades" of courts within the third tier were general, special, and summary military government courts. These courts had a law officer and line officers served as the members with the senior member serving as the presiding officer. *Id.* at 99.

<sup>46</sup> Where John Adams is the star of the Boston Massacre, Lieutenant William Calley is the villain in the My Lai Massacre: "On 16 March 1968, in the course of a search-and-destroy mission in a village suspected of harboring crack Vietcong troops, an American infantry officer ordered others to round up, and joined some of them in butchering, unarmed civilians. . . . Hundreds dead when not a shot was fired against American troops." MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL*, at ix (2002). For judge advocates, this book serves the dual-purpose of exposing perhaps the darkest hour of U.S. troops in combat and the details of how the military justice system handled the massacre. The author makes us "feel like we are there, alongside the legal counsel, or with the officers who sat on the bench watching the witnesses and defendants. This is the highest compliment anyone can pay to legal history—that it makes the law live." *Id.* at xi.

<sup>47</sup> LAWRENCE A. FROST, *THE COURT MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER* (3d prtg. 1987) (1968). For Law Day 2008, the 1st Infantry Division Office of the Staff Judge Advocate hosted the 6th Graders from the Fort Riley Middle School and presented a mock trial of the court-martial of General Custer with judge advocates (wearing civil war era cavalry outfits) as the prosecutors, defense counsel, accused, and judge and some of the students sitting as panel members in the tradition of a modern court-martial. Benefitting from Frost's impeccably detailed book, the students (and judge advocates) gained insight into facts underlying Custer's 1867 general court-martial for one specification of absence without leave from his command and seven specifications of conduct prejudicial to good order and discipline including failure to rest his horses after taking them on a long and exhausting march before setting out on a second long march for private business (going to see his wife). *Id.* at 99–103. Based on the book, the students were also educated on how trials were conducted under the Civil War era Articles of War.

Military Justice (UCMJ) in 1950.<sup>48</sup> To this end, there is an interesting nineteen-year period, between 1950 and 1969 when “law officers”—a position created by the UCMJ<sup>49</sup>—provided legal rulings prior the creation of military judge positions in the 1969 amendments to the UCMJ.<sup>50</sup> The court-martial of Marine Drill Instructor Matthew McKeon in 1956<sup>51</sup> represents the Marine Corps’s harsh treatment of its recruits in the 1950s and provides a glimpse of standard courtroom procedure during this relatively short period in court-martial history when law officers “ruled” the courtroom.<sup>52</sup>

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<sup>48</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter 1951 MCM]. Appendix 2 of the 1951 MCM is called “The Act of 1950” and section “a” of that act is the Uniform Code of Military Justice [hereinafter 1950 UCMJ]. *See also* Pub. L. No. 506, 81st Cong., ch. 169 § 1, 64 Stat. 108 (1950); Title 50 U.S.C. (Ch. 22) §§ 551–736. 1951 MCM, *supra*, at 411.

<sup>49</sup> 1950 UCMJ, *supra* note 48, art. 26. Article 26 creates the position of “Law officer of a general court-martial” who shall be appointed by the convening authority; who shall be a member of the bar; who is certified by the Judge Advocate General of his service; who shall not have acted as accuser, witness for the prosecution, or investigating officer in the same case; and who shall not consult with the members (except on the form of the findings in the presence of the accused), the trial counsel, or defense counsel. *Id.* art. 26 §§ a–b.

<sup>50</sup> The 1950 version of the UCMJ was amended on 10 August 1956 and further amended by the Military Justice Act of 1968 (24 October 1968), effective on 1 August 1969. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969) [hereinafter 1969 UCMJ]. Article 26 of the UCMJ, formerly reserved for the position of “law officer” was changed to “Military judge of a general or special court-martial.” *Id.* art. 26 §§ a–e. Article 26 remains relatively unchanged today, with one huge exception: in the 1969, the convening authority detailed judges to general and special courts-martial. *See* 1969 UCMJ, art. 26a. The language of Article 26a requiring the convening authority to detail the military judge was omitted in 1984. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

<sup>51</sup> JOHN C. STEVENS III, COURT-MARTIAL AT PARRIS ISLAND: THE RIBBON CREEK INCIDENT (1999). On the evening of 8 April 1956, Marine Drill Instructor Staff Sergeant Matthew McKeon marched the seventy-five recruits (including many non-swimmers) of Platoon 71, 3d Recruit Battalion, into the dark, marshy waters of Ribbon Creek at Parris Island, South Carolina. His intent when he took them into the swamp was to “shock his men into working as disciplined and cohesive unit.” Within a matter of minutes, six Marines drowned. *Id.* at 1–10.

<sup>52</sup> *Id.* at 66–154. Although the My Lai Massacre occurred in March 1968, 1LT Calley’s general court-martial took place in 1970–71 after military judges were on the bench. *See* Belknap, *supra* note 46, at 148–49 (discussing COL Reid W. Kennedy who sat as the military judge in *United States v. Calley*).

Those interested in the Supreme Court can read about “the great decision” of 1803, *Marbury v. Madison*,<sup>53</sup> through “the challenge” of 2004, *Hamdan v. Rumsfeld*,<sup>54</sup> spanning the Court’s history from its infancy to its current views on the war on terror. Following the September 11th terrorist attacks and President George W. Bush’s authorization of military commissions for those who assisted in the attacks,<sup>55</sup> scholars, including judge advocates, demonstrated renewed

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<sup>53</sup> 5 U.S. (1 Cranch) 137 (1803). See also CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* (2009). The “Charters of Freedom” Hall at the National Archives contains four national treasures:

[A]fter the Declaration of Independence, the Constitution, and the Bill of Rights, is a single Supreme Court decision from 1803: *Marbury v. Madison*. Unlike the other documents, *Marbury* is unknown to many people. The exhibit explains that it is “one of the cornerstones of the American constitutional system,” the first case in which the Supreme Court struck down an Act of Congress as unconstitutional.

*Id.* at ix–x. The authors then ask: “Why is *Marbury* considered the greatest decision in American law?” and “What impact has the decision had on the nation?” *Id.* at x. The authors answer these questions and more and state the historic case “is rightly considered a national treasure, for it is a uniquely American icon that vividly stands for the rule of law.” Every judge advocate studied the case in law school, but now, as practitioners who will likely perform rule of law missions overseas, perhaps “the great decision” warrants further examination. See also WILLIAM H. REHNQUIST, *THE SUPREME COURT* 21–35 (rev. ed., 2001) (1987) (investigating the former Chief Justice’s opinion on the place of *Marbury v. Madison* in the history of the Supreme Court and our country).

<sup>54</sup> 548 U.S. 557 (2006). See also JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* (2008). “The challenge” refers to the seemingly impossible odds faced by a Navy judge advocate (Lieutenant Commander Charles Swift) and Georgetown Law Professor (Neal Katyal) and their challenge of the President’s Military Commissions at Guantanamo Bay, Cuba. The book takes the reader through the drafting of the legal motions up to Katyal’s argument before the Supreme Court in *Hamdan v. Rumsfeld*. The challengers won the case when the Supreme Court held the President did not have congressional authority to set up the Military Commissions and the commissions did not comply with the UCMJ or the Geneva Conventions. *Id.* In an interesting side note, after the *Hamdan* case, Neal Katyal was hired as the Principal Deputy Solicitor General in January 2009 to argue cases for the Government before the Supreme Court. See Editorial, *Katyal Tapped as Principal Deputy in SG’s Office*, *THE BLOG OF LEGAL TIMES* (Jan. 17, 2009), <http://legaltimes.typepad.com/blt/2009/01/katyal-tapped-as-political-deputy-in-solicitor-generals-office.html>.

<sup>55</sup> Military Order of Nov. 13, 2001, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001). See also LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* 159 (2003). For an historical overview and analysis of how past Presidents, Congress

interest in old Supreme Court cases such as *Ex parte Quirin*.<sup>56</sup> Books followed,<sup>57</sup> as did federal litigation over detainee issues and presidential powers,<sup>58</sup> which, in turn, inspired additional authors.<sup>59</sup> Judge advocates surveying this area will find current books providing in-depth analysis of the President, Congress, and the Supreme Court as they operated during the Civil War, World War II, and, now, the Global War on Terror. Of particular importance to judge advocates entering the debate are books that critically evaluate the Government's (mis)interpretation of the law after September 11th.<sup>60</sup>

True crime stories are also suitable for professional reading, particularly for trial attorneys seeking advocacy tips or expertise in a particular area of the law. Morbid curiosity aside, murder novels that cover the investigatory and judicial stages of a trial can be instructive. In addition to timeless true crime classics,<sup>61</sup> judge advocates may find that the story of a former baseball star's murder trial and his lapse into insanity provides insight on the difficulty of defending a client who is not competent to stand trial.<sup>62</sup> From a comparative law perspective, judge advocates unfamiliar with the inquisitorial system can read a gripping account of a mass murderer that terrorized Italians for years, also while learning how a case is processed by an investigative judge.<sup>63</sup> One of the most intriguing true crime stories involves the Green Beret doctor who

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and the Supreme Court viewed military commissions during the Civil War and World War II, see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998).

<sup>56</sup> 317 US 1 (1942).

<sup>57</sup> FISHER, *supra* note 55.

<sup>58</sup> See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>59</sup> See, e.g., LOUIS FISHER, *THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS* (2008); BRIAN MCGINTY, *LINCOLN AND THE COURT* (2008); MAHLER, *supra* note 54; JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

<sup>60</sup> See GOLDSMITH, *supra* note 59; FISHER *supra* note 59.

<sup>61</sup> TRUMAN CAPOTE, *IN COLD BLOOD* (1965). Although written before the majority of judge advocates were born, all judge advocates who have read this book would likely concur that it has stood the test of time. See also HARPER LEE, *TO KILL A MOCKINGBIRD* (1960); ROBERT TRAVER, *ANATOMY OF A MURDER* (1958).

<sup>62</sup> JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006). See also Major Jeff A. Bovarnick & Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, *ARMY LAW.*, June 2002, at 13.

<sup>63</sup> DOUGLAS PRESTON & MARIO SPEZI, *THE MONSTER OF FLORENCE* (2008).

murdered his pregnant wife and two daughters on Fort Bragg on 17 February 1970.<sup>64</sup> Judge advocates may find it interesting that, despite the lower standard of proof required, the accused's military case was dismissed at the Article 32 level.<sup>65</sup> Yet, ten years later, in August 1980, in federal district court in North Carolina, the former Army captain was convicted for murdering his family and sentenced to three consecutive life sentences.<sup>66</sup> Overall, in the category of "Law," there are no bounds to what might interest a life-long student of jurisprudence.<sup>67</sup>

### C. "History" Books

*[T]here is no better way to learn the  
military art than to read history.*<sup>68</sup>

From Sun Tzu<sup>69</sup> to *A Thousand Splendid Suns*<sup>70</sup> to *Snow Falling on Cedars*,<sup>71</sup> the broad category of "history" encompasses the military and law categories and more. Any book about a president,<sup>72</sup> particularly

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<sup>64</sup> JOE MCGINNISS, *FATAL VISION* 7 (1984). This is the story of Captain Jeffrey MacDonald who, to this day, proclaims his innocence and steadfastly stands by his 1970 version of events that a drug-crazed bunch of hippies from Fayetteville, North Carolina, entered his quarters on Fort Bragg and murdered his family. See *The MacDonald Case*, available at <http://www.themacdonaldcase.org/> (last visited Feb. 10, 2010).

<sup>65</sup> MCGINNISS, *supra* note 64, at 196–97.

<sup>66</sup> *Id.* at 578. See also JERRY ALLEN POTTER & FRED BOST, *FATAL JUSTICE: REINVESTIGATING THE MACDONALD MURDERS* (1997). Where McGinniss concludes MacDonald was guilty of the heinous crimes against his wife and daughters, Potter and Bost support MacDonald's proclamation of innocence and provide their own findings to discount the verdicts. *Id.*

<sup>67</sup> For a great legal thriller about a civil lawsuit in Massachusetts, see JONATHAN HARR, *A CIVIL ACTION* (1995).

<sup>68</sup> Jeffrey J. Clarke, Chief of Military History, U.S. Army Ctr. of Mil/Hist. (CMH), available at <http://www.history.army.mil/reading.html> (last visited Feb. 26, 2010) [hereinafter CMH Professional Reading List].

<sup>69</sup> SUN TZU, *THE ART OF WAR* (Samuel B. Griffith trans., Oxford Univ. Press 1963).

<sup>70</sup> KHALED HOSSEINI, *A THOUSAND SPLENDID SUNS* (2007). In his follow-up to *The Kite Runner*, the author takes the reader through Afghanistan's volatile history, this time through the eyes of two women.

<sup>71</sup> DAVID GUTERSON, *SNOW FALLING ON CEDARS* (1995). The backdrop to this murder/love story reveals an ugly blemish in U.S. history—the internment of Japanese-Americans in the United States during World War II.

<sup>72</sup> See, e.g., DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005); DAVID MCCULLOUGH, *JOHN ADAMS* (2001); EDMUND MORRIS, *THEODORE REX* (2001) (representing the second book in a three-part series where the author focuses on Roosevelt's two terms as President from 1901–1909).

those presidents that served during a time of war<sup>73</sup>—or other eminent,<sup>74</sup> or infamous,<sup>75</sup> citizens in our country's history—will enhance an

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<sup>73</sup> See, e.g., JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* (2008); MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES, AND PARTISANSHIP* (2006) (addressing the War of 1812); WHEELAN, *supra* note 19 (discussing the Barbary wars during Jefferson's presidency); H.R. MCMASTER, *DERELICTION OF DUTY: JOHNSON, MCNAMARA, THE JOINT CHIEFS OF STAFF AND THE LIES THAT LED TO VIETNAM* (1997).

<sup>74</sup> See, e.g., DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* (2007) (providing a detailed description of the delegates, including many lawyers in their thirties and forties, that debated the issues of slavery, the scope of the newly created executive, and representation in a one or two-house system that summer in Philadelphia resulting in the September 1787 version of our Constitution); WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* (2003) (providing a view of all of aspects of Franklin's extraordinary life, including his role in the founding of our nation); JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* (2000); STEPHEN E. AMBROSE, *UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON AND THE OPENING OF THE AMERICAN WEST* (1996) (offering an in-depth historical review of the famous Lewis and Clark expedition of the western frontier between 1803–06); BRUCE CHADWICK, *TRIUMVIRATE* (2009) (examining the critical roles played by James Madison, Alexander Hamilton, and John Jay to get the Constitution ratified).

<sup>75</sup> Many readers will remember the great explorers, particularly the European explorers, from history classes in school: Christopher Columbus, Ferdinand Magellan, Ponce de Leon, and, of course, the famous American explorers, Lewis and Clark. See AMBROSE, *supra* note 75. Few Americans today likely remember another great American expedition—an expedition greater in size, scope, challenges (and arguably importance) than the much more famous Lewis and Clark expedition. How could a larger, more important, expedition that took place some thirty years after Lewis and Clark's be relegated to practical obscurity and its leader—Lieutenant Charles Wilkes—virtually unknown? Perhaps because Wilkes's voyage ended in infamy—with a court-martial. The U.S. South Seas Exploring Expedition included six vessels and 346 men that traveled 87,000 miles, including mapping 800 miles of coastline in the Pacific Northwest and 1500 miles of the Antarctic coast, surveying 280 Pacific Islands and creating 180 charts.

Just as important would be its contribution to the rise of science in America. The thousands of specimens and artifacts amassed by the Expedition's scientists would become the foundation of the collections of the Smithsonian Institution. Indeed, without the [Exploring Expedition] there might never have been a national museum in Washington D.C. The U.S. Botanical Garden, the U.S. Hydrographic Office, and the Naval Observatory all owe their existence in varying degrees, to the Expedition.

NATHANIEL PHILBRICK, *SEA OF GLORY: AMERICA'S VOYAGE OF DISCOVERY, THE U.S. EXPLORING EXPEDITION, 1838–1842*, at xvii, xix (2003). Because of his “vain, impulsive, and often cruel” treatment of others, Wilkes's crew hated him. *Id.* at xxiv. When their expedition ended he faced a court-martial of naval officers for “illegally attacking natives, excessively punishing sailors and marines, falsely claiming to have seen Antarctica, dressing as a captain, and flying a commodore's pennant,” among other

officer's professional development. Biographies that cover a great figure's entire life can be unwieldy and difficult to complete, making it enlightening at times simply to read a book focusing on particular period in the person's life. For example, the fascinating story of the convergence (and collision) of a future president and one of the greatest athletes of the twentieth century on a football field in November 1912 could have "dramatically changed the future of America."<sup>76</sup>

"Football was the single-most important thing"<sup>77</sup> in Cadet Eisenhower's life. As Ike was building his legacy at West Point, Jim Thorpe had already secured his at the 1912 Summer Olympics in Stockholm, Sweden. "If [Ike] could stop Thorpe—or, better yet, if he could knock Thorpe out of the game with a blockbuster hit—Ike didn't believe there was any way his team would lose."<sup>78</sup> On Eisenhower's second attempt to take out Thorpe, it was Eisenhower, not Thorpe that was removed from the game. This injury, exacerbated by Eisenhower's refusal to rest his "wounded knee,"<sup>79</sup> ended Eisenhower's football career

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charges. *Id.* at 320. The most important charge was the allegation Wilkes deliberately lied about sighting Antarctica on 19 January 1842, thereby claiming he had discovered a new continent—a claim on which President Martin Van Buren staked the reputation of a nation. *Id.* at 323. A stretch of the eastern coast of Antarctica, "Wilkes Land," bears Wilkes's name, even though he never set foot on the continent owing to stormy weather and ice that blocked the ships. *Id.* at 169–77.

<sup>76</sup> LARS ANDERSON, *CARLISLE V. ARMY: JIM THORPE, DWIGHT EISENHOWER, POP WARNER, AND THE FORGOTTEN STORY OF FOOTBALL'S GREATEST BATTLE* (2007). This is the story of the powerful West Point football team and the Carlisle Indians, led by Jim Thorpe, who had won Olympic gold medals in both the pentathlon and decathlon in July of that summer in Stockholm, Sweden. *Id.* at 234–47. In a 1950 Associated Press poll of sportswriters ranking the greatest athletes of the first half of the twentieth century, Jim Thorpe was #1 followed by (in order) Babe Ruth, the boxer Jack Dempsey, and Ty Cobb. *Id.* at 317. As the twentieth century came to a close, in a December 1999 poll, the Associated Press released its one hundred Athletes of the Century poll with Jim Thorpe coming in third behind Babe Ruth (#1) and Michael Jordan (#2). See Associated Press, Ruth named AP athlete of the century (Dec. 11, 1999), <http://www.usatoday.com/sports/ssat1.htm>.

<sup>77</sup> ANDERSON, *supra* note 76, at 277.

<sup>78</sup> *Id.* at 277–78. In addition to Eisenhower, the author chronicles the legendary career of Pop Warner, an early football innovator and, among other teams, the coach of the Carlisle Indian School (currently the U.S. Army War College at Carlisle Barracks, Pennsylvania). But the star of this book is Jim Thorpe—his rise to fame and his fall from glory, not from the game against Army, but due to the racism against Native Americans and his battle with alcoholism. *Id.* at 317.

<sup>79</sup> *Id.* at 287–90 (discussing Eisenhower's "one-two" plan and failed attempts to take out Thorpe with Eisenhower hitting Thorpe high (in the chest) and his teammate hitting Thorpe low (in the knees)). The author's clever use of "wounded knee" in the title of Chapter 14 is not lost on the reader. The irony of the gridiron battle between the Army

and sent him into deep depression when he pondered dropping out of West Point, leading the reader to wonder, “What if . . .?”

Reaching further back in time, a particularly well-written and researched fictional account can be just as worthy of review as a non-fiction book if it brings a past era to life. Great examples include a couple of “first-hand accounts” of the Battle of Thermopylae<sup>80</sup> and the Peloponnesian War.<sup>81</sup> These vivid narratives recounted by “survivors” of each battle provide convincing accounts of military life and battles during those ancient campaigns.

If the professional reading suggestions above (and below) lead an inquiring judge advocate to new areas of the library or bookstore, then this article has met one of its goals. With that said, this article is not a suggestion for readers to abandon their favorite genre. Judge advocates should consider alternating between reading books for professional development and books for pleasure. Realistically, for newcomers to the professional reading arena, possibly one or two books per year, depending upon their length, is a modest goal. The fact remains that professional reading is suggested as an addition to the onslaught of required reading for those new to a profession. Importantly, for judge advocates with young children, there is one reading program—the Parent Reading Program—that always remains mandatory, covering classics such as *Green Eggs and Ham*,<sup>82</sup> *Charlotte’s Web*,<sup>83</sup> and *Arthur Meets the President*.<sup>84</sup>

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cadets and the Indians is that, in Chapter 2, the author recounts the infamous Wounded Knee Massacre in 1890 where Soldiers of the 7th Cavalry Regiment murdered 180 Lakota Indians on the plains of Wounded Knee, South Dakota. *Id.* at 14–15. The descendants of this infamous event would meet on a different field in 1912 and the memory of Wounded Knee and defeating “the Army” was not lost on the Indians. *See also* ANDERSON, *supra* note 19. *The All Americans* is another great book on the intersection of football and the military. In this story, the author details the football careers of two Army and two Navy players who battled each other in the 29 November 1941 Army-Navy football game only to have their lives changed by the Pearl Harbor attack eight days later.

<sup>80</sup> STEVEN PRESSFIELD, *GATES OF FIRE: AN EPIC NOVEL OF THE BATTLE OF THERMOPYLAE* (1998).

<sup>81</sup> STEVEN PRESSFIELD, *TIDES OF WAR: A NOVEL OF ALCIBIADES AND THE PELOPONNESIAN WAR* (2000). *See also* MICHAEL SHAARA, *THE KILLER ANGELS* (1974) (winning the Pulitzer Prize for its expansive coverage of the Battle of Gettysburg in the Civil War).

<sup>82</sup> DR. SEUSS, *GREEN EGGS AND HAM* (Random House Beginner Book ed. 1960).

<sup>83</sup> E.B. WHITE, *CHARLOTTE’S WEB* (Trophy ed. 1999) (1952).

<sup>84</sup> MARC BROWN, *ARTHUR MEETS THE PRESIDENT* (First paperback ed. 1991).

### III. Professional Reading Lists

It should be no surprise to military officers that numerous reading lists exist. These lists, compiled by senior leaders from all services and various military institutions, provide guidance to officers of different experience levels by recommending books on particular subjects. While almost all lists target non-lawyers, there are a few lists specifically for judge advocates. With the efficiency of Internet searches, it is not necessary to describe every list here, but it may be informative to highlight the primary military professional reading lists and locations where they can be found.

#### A. The Service's Primary Reading Lists

The National Defense University (NDU) has the best website for professional reading lists,<sup>85</sup> mainly because it provides links to the primary (and current) military reading lists of the Army, Navy, Air Force, Marines, and Coast Guard, as well as a recommended Joint Service list.<sup>86</sup> The NDU Commandant also has a professional reading list,<sup>87</sup> as do all the military education institutions of all services.<sup>88</sup> The

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<sup>85</sup> The vast majority of Professional Reading Lists are solely comprised of books. However, there are a few reading lists that contain "non-book" readings. For example, the Navy has a President's Watching List that recommends movies; the U.S. Joint Forces Command has a Pre-Deployment Afghanistan Reading List that contains "Commander's Guidance," a "Tactical Directive," "Field Guides," and a "Culture Smart Card"; and The Judge Advocate General's Corps Professional Reading List contains numerous cases. *See infra* Part III.

<sup>86</sup> *See* The National Defense University's Professional Military Reading List homepage, available at <http://www.ndu.edu/library/ReadingList/PMReadingList.html> (last visited May 10, 2010) [hereinafter NDU Reading List homepage]. This website provides links to The U.S. Army Chief of Staff's Professional Reading List, the U.S. Navy Professional Reading List, the U.S. Marine Corps Reading List, the Chief of Staff of the Air Force (CSAF) Reading List, the Coast Guard Commandant's Reading List, and the Joint Force Staff College Commandant's Professional Reading List. *Id.*

<sup>87</sup> Commandant's Professional Reading List (May 2009), <http://www.ndu.edu/library/ReadingList/JFCSReading2009.pdf>.

<sup>88</sup> The homepages for the primary Army, Navy, Air Force, and Marine Corps educational institutions—with a focus on the War College and Command & Staff College equivalents—and their links to various reading lists are:

##### a. Army:

(1) The National Defense University (NDU) system covers the National War College (NWC) and the Industrial College of the Armed Forces (ICAF). Consequently, the

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reading lists for those two colleges are linked back to the NDU Reading List homepage. See NDU Reading List homepage, *supra* note 86. See also The National War College, available at <http://www.ndu.edu/nwc/> (last visited May 10, 2010) [hereinafter CGSC Reading List]; Industrial College of the Armed Forces, available at <http://www.ndu.edu/icaf/> (last visited May 10, 2010). The NDU's primary link for its "Army" Reading list goes to the U.S. Army Center for Military History. See also *infra* notes 93 and 94 and accompanying text.

(2) The U.S. Army War College at Carlisle Barracks, Pennsylvania, has its own Professional Reading Lists homepage. See Professional Reading Lists, available at [http://www.carlisle.army.mil/LIBRARY/professional\\_reading\\_lists.htm](http://www.carlisle.army.mil/LIBRARY/professional_reading_lists.htm) (last visited May 10, 2010) (providing links to twelve different sub-lists, some of which are outdated, although referenced with updates elsewhere in this article).

(3) The U.S. Army Command & General Staff College at Fort Leavenworth, Kansas, has its own reading list homepage with links to twenty-eight separate reading lists. See Professional Military Reading Lists, available at [http://www.cgsc.edu/carl/gateway/military\\_reading\\_lists.asp](http://www.cgsc.edu/carl/gateway/military_reading_lists.asp) (last visited May 10, 2010) [hereinafter CGSC Reading List homepage].

b. Navy: The Naval War College homepage provides a link to a Professional Reading homepage. See Professional Reading, available at <http://www.usnwc.edu/Academics/Professional-Reading.aspx> (last visited May 10, 2010). This site provides links to two primary reading lists:

(1) The Navy Reading homepage. See Navy Professional Reading Program, available at <http://www.navyreading.navy.mil/> (last visited May 10, 2010); see also Reading List, available at <http://www.navyreading.navy.mil/books.aspx> (last visited May 10, 2010) (providing the Navy Professional Reading Program Book List); Supplemental Reading List, available at <http://www.navyreading.navy.mil/supplemental.aspx> (last visited May 10, 2010) (providing the Navy Professional Reading Program Supplemental List).

(2) U.S. Naval War College Homepage, Professional Reading, available at <http://www.usnwc.edu/Academics/Professional-Reading/Presidents-Club.aspx> (follow "Academics" hyperlink; then follow "Menu" to "President's Club") (last visited June 6, 2010); U.S. Naval War College Homepage, President's Club—Reading List, available at <http://www.usnwc.edu/Academics/Professional-Reading/Presidents-Club/President-s-Club---Reading-List.aspx> (last visited June 6, 2010); U.S. Naval War College Homepage, President's Club—Watching List, available at <http://www.usnwc.edu/Academics/Professional-Reading/Presidents-Club/President-s-Club---Watching-List.aspx> (last visited May 10, 2010) (listing the following thirty-four movies: *Gettysburg*, *Black Hawk Down*, *Rescue Dawn*, *The Last Samurai*, *Saving Private Ryan*, *We Were Soldiers*, *Glory*, *To End All Wars*, *Capitaine Conan*, *Band of Brothers*, *Das Boot*, *The Enemy Below*, *The Sand Pebbles*, *The Great Raid*, *Kingdom of Heaven*, *Gladiator*, *In Harm's Way*, *Twelve O'clock High*, *Midway*, *Master and Commander*, *Letters from Iwo Jima*, *A State of Mind*, *The Final Countdown*, *The Bridges at Toko-Ri*, *Spy Game*, *Zulu*, *The Gallant Hours*, *Reilly Ace of Spies*, *The Immortal Admiral Yi*, *Sun Shin*, *Henry V*, *Horatio Nelson*, *Memphis Belle*, *The Cruel Sea*, *Kayaanisqatsi*). See also Major Ann B. Ching, *Lessons from the Silver Screen: Must-See Movies for Military Lawyers*, ARMY LAW., Jan. 2010,

NDU Reading List homepage is only the starting point to view each of the services' primary reading lists. From the service's or educational institution's reading list homepage, the next step is to visit those websites to see what they have to offer. For example, the Army's CGSC reading list homepage<sup>89</sup> lists twenty-eight different professional military reading lists gathered from a variety of organizations with a focus on deployment preparation for Iraq and Afghanistan.<sup>90</sup> The Marine Corps University

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at 109 (providing reviews of the following five movies: *Judgment at Nuremberg*, *The Caine Mutiny*, *Breaker Morant*, *Paths of Glory*, and *The Best Years of Our Lives*).

c. Air Force: The Air University system includes the Air War College (AWC) and the Air Command and Staff College (ACSC). See, e.g., Welcome to Air University, available at <http://www.au.af.mil/au/index.asp> (last visited May 10, 2010); Coming Events in 2009–2010, available at <http://www.au.af.mil/au/awc/awchome.htm> (last visited May 10, 2010); Welcome to the Air Command and Staff College, available at <http://www.au.af.mil/au/acsc/> (May 10, 2010) (providing links to the Chief of Staff of the Air Force's Professional Reading Program). See also CSAF Professional Reading Program, available at <http://www.af.mil/information/csafreading/index.asp> (last visited May 10, 2010) [hereinafter CSAF Professional Reading Program].

d. Marine Corps: The Marine Corps University (MCU) system includes the Marine Corps War College (MCWAR) and the Marine Command and Staff College (CSC). See Marine Corps University, available at <http://www.mcu.usmc.mil/Pages/College.Schools.aspx> (last visited May 10, 2010).

(1) The MCU homepage provides the link for the comprehensive Marine Corps Professional Reading Program for all of its schools. See Ethics Branch, available at [http://www.mcu.usmc.mil/lejeune\\_leadership/pages/professionalpro.aspx](http://www.mcu.usmc.mil/lejeune_leadership/pages/professionalpro.aspx) (last visited May 10, 2010) [hereinafter MC Professional Reading Program].

(2) The MCWAR homepage provides a link to its Recommended Reading List. See Marine Corps War College, available at <http://www.mcu.usmc.mil/War%20College%20Documents/Recommended%20Reading%20List.pdf> (last visited May 10, 2010).

(3) The Marine CSC homepage utilizes the MC Professional Reading Program, but also provides an optional Marine Command and Staff College reading list, the Academic Year 2011 Selected Book List. See Command and Staff College, available at <http://www.mcu.usmc.mil/Pages/CSC.aspx> (last visited May 10, 2010); see also Selected Book List: 2010-2011, available at <http://www.mcu.usmc.mil/MCU%20Welcome%20Aboard%20Documents/Encl-2%20AY%202011%20-%20Selected%20Book%20List.pdf> (last visited May 30, 2010).

<sup>89</sup> CGSC Reading List homepage, *supra* note 88, at a(3).

<sup>90</sup> *Id.* Thirteen of the twenty-eight reading lists have words such as Iraq, Afghanistan, deployment, counterinsurgency, or cultural awareness in their titles. One example is the Pre-Deployment Afghanistan Reading List published by U.S. Joint Forces Command. See Pre-Deployment Afghanistan Reading List, available at <http://usacac.army.mil/cac2/coin/repository/AFGReadingList.pdf> (last visited May 10, 2010).

Professional Reading Program homepage<sup>91</sup> contains links to seventeen reading lists, including an exceptional 2010 Professional Reading Guide listing seventy-five sources (sixty-seven books and eight doctrinal publications) on one page.<sup>92</sup>

Even though the NDU Reading List homepage calls the Army's list the "U.S. Army Chief of Staff's Professional Reading List"—the old name for the Army's primary list<sup>93</sup>—the link actually goes to the U.S. Army Center of Military History (CMH).<sup>94</sup> The CMH website has the Army's current (as of 5 August 2009) Recommended Professional Reading List which is broken down into four sub-lists based on a Soldier's level of experience.<sup>95</sup> Of all of the services' supplemental reading lists, the Navy's includes the most diverse sub-topics, including books on critical thinking, diversity, management, and strategic planning,

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<sup>91</sup> MC Professional Reading Program, *supra* note 88, at d.(1). The Marine Corps places such an emphasis on professional reading for officers that it is specifically mentioned on Marine Corps officers' fitness reports (the Marine Corps equivalent to the Army's Officer Evaluation Report (OER) (DA Form 67-9)). Under paragraph G, "Intellect and Wisdom," subparagraph 1, "Professional and Military Education (PME)" of the USMC Fitness Report, one clause states: "a personal reading program that includes (but is not limited to) selections from the Commandant's Reading List: participation in discussion groups and military societies." USMC Fitness Report (1610), NAVMC 10835D (Rev. 1-01) (WN 3.1) at 4.

<sup>92</sup> The Marine Corps Professional Reading Program, *available at* [http://www.mcu.usmc.mil/lejeune\\_leadership/Accreditation/2010ProReadingBrochure.pdf](http://www.mcu.usmc.mil/lejeune_leadership/Accreditation/2010ProReadingBrochure.pdf) (last visited May 10, 2010) (providing the U.S. Marine Corps 2010 Professional Reading Guide).

<sup>93</sup> The Center for Military History (CMH), *available at* <http://www.history.army.mil> (providing the Army's Professional Reading List) [hereinafter CMH Home Page]. The Army's list was called "The U.S. Army Chief of Staff's Professional Reading List," but sometime between 2005 and 2009, the name of the list changed to the "The Center for Military History Professional Reading List." *See supra* note 1; CMH Home Page, *supra*.

<sup>94</sup> NDU Reading List homepage, *supra* note 86 (providing a link to "The U.S. Army Chief of Staff's Professional Reading List" [sic], *available at* <http://www.history.army.mil/reading.html>, which is actually the U.S. Army CMH Recommended Professional Reading homepage (last updated 5 August 2009) [hereinafter The Army Professional Reading Lists]. Like the NDU Reading List, some non-government, websites call their posted list the "Chief of Staff's Professional Reading List," but they provide a link to the CMH or they post older versions of the list. For example, one website posts the "2009 Chief of Staff's Professional Reading List," and provides a quote from Eric Shinseki (U.S. Army Chief of Staff from 2001–2003). *See* Eric Shinseki, *available at* [http://en.wikipedia.org/wiki/Eric\\_Shinseki](http://en.wikipedia.org/wiki/Eric_Shinseki) (last visited May 10, 2010).

<sup>95</sup> The Army Professional Reading Lists, *supra* note 88, at a. The list contains the following four sublists: Sublist 1 (Cadets, Soldiers, Junior NCOs); Sublist 2 (Company Grade NCOs, WO1-CW3, and Company Grade Officers); Sublist 3 (Senior NCOs, CW4-CW5, Field Grade Officers); and Sublist 4 (Senior Leaders above Brigade Level). *Id.* *See also* Appendix D.

among others.<sup>96</sup> The Air Force has the simplest approach; its CSAF Professional Reading Program applies to all Airmen and the entire list of twelve books is displayed on one screen on the Reading Program's homepage.<sup>97</sup>

#### B. Reading Recommendations for Judges Advocates by Judge Advocates

The Judge Advocate General of the Army also has a Professional Reading List<sup>98</sup> and a supplemental list for those who are deploying,<sup>99</sup> each compiled by Colonel (Retired) Fred Borch, the JAG Corps Regimental Historian,<sup>100</sup> himself a prolific writer and primary source of information about our Corps and book recommendations.<sup>101</sup> Although not surprising, one of the unique features of TJAG's list are recommendations to read specific court opinions.<sup>102</sup> Another unique

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<sup>96</sup> See The Navy Professional Reading Program Supplemental List, *supra* note 88, at b.(1)(b).

<sup>97</sup> See CSAF Professional Reading Program, *supra* note 88, at c.

<sup>98</sup> The Judge Advocate General's Corps Professional Reading List (prepared by the Regimental Historian & Archivist, TJAGLCS) (Mar. 2010) [hereinafter JAG Corps Professional Reading List]. This list can be accessed from the "JAGC Professional Reading List" link on the U.S. Army JAG Corps homepage at JAGCNet.army.mil. See also Appendix C (providing an abridged version of the JAG Corps Professional Reading List and Supplemental List for Deploying Judge Advocates). Appendix C contains all books and cases that appear in the official list, but it omits the brief summaries of each book and case). In 1971, the first edition of *The Army Lawyer* published a reading list called "Books of Interest to Lawyers." The list included twenty titles from the Recommended Reading List compiled by the Office of The Judge Advocate General in 1970. See *Books of Interest to Lawyers*, 1 ARMY LAW., Aug. 1971, at 26, 26-27.

<sup>99</sup> See Appendix C (providing the Supplemental Reading List for Deploying Judge Advocates) (prepared by the Regimental Historian & Archivist) (Mar. 2010). This list can be accessed from the "JAGC Supplemental Reading List for Deploying JA's" link on the U.S. Army JAG Corps homepage at JAGCNet.army.mil.

<sup>100</sup> See Major General Scott C. Black, *A New Era in JAG Corps History*, TJAG SENDS: A MESSAGE FROM THE JUDGE ADVOCATE GENERAL, vol. 37, No. 6 (Mar. 2006). In his message, then-Major General Black introduced Mr. Borch, "a distinguished author and historian who retired after twenty-five years of service in the JAG Corps," as our first-ever Regimental Historian & Archivist.

<sup>101</sup> See FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001); GARY D. SOLIS & FRED L. BORCH, GENEVA CONVENTIONS (2010). See also *infra* note 184 (detailing Mr. Borch's numerous book reviews published in the *Military Law Review* and *The Army Lawyer*).

<sup>102</sup> While all of the opinions are notable, a few of the fifteen cases listed in the JAG Corps Professional Reading List include: *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (invalidating the use of a military commission to try a civilian); *Ex Parte Quirin*, 317

“reading list,” also compiled by our Regimental Historian, is the one displayed in the halls of The Judge Advocate General’s Legal Center and School (TJAGLCS), including one display case devoted to books written by judge advocates.<sup>103</sup> For those who prefer to purchase books to build their personal library, the “JAG Book Store” and its one shelf of professional reading books is not necessarily the best place to shop.<sup>104</sup>

Another primary source of information on books is the TJAGLCS Librarian, Mr. Dan Lavering, who has been at the library for a quarter century.<sup>105</sup> All judge advocates that have come through TJAGLCS have relied on Mr. Lavering for his incredible assistance over the years. Additionally, Mr. Lavering’s relationship with the University of Virginia has opened up the university’s vast library system and its wealth of resources to judge advocates.<sup>106</sup> For everyone outside Charlottesville,

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U.S. 1 (1942) (upholding the use of a military commission to try enemy saboteurs); *United States v. Calley*, 48 C.M.R. 19, 22 C.M.A. 534 (1973) (court-martial arising out of the My Lai incident in Vietnam). JAG Corps Professional Reading List, *supra* note 98, at 1-2; Appendix C.

<sup>103</sup> In the Spring of 2010, seventeen books published by judge advocates since 1974 were on display. Mr. Borch has been showcasing these books since 2008. Interview with Fred L. Borch, JAG Corps Regimental Historian & Archivist, TJAGLCS, in Charlottesville, Va. (Feb. 26, 2010). One book, not yet on display is *Mark Martins, Paying Tribute to Reason: Judgments on Terror, Lessons for Security, in Four Trials since 9/11* (forthcoming 2010); see also MARK MARTINS, *PAYING TRIBUTE TO REASON: JUDGMENTS ON TERROR, LESSONS FOR SECURITY, IN FOUR TRIALS SINCE 9/11* (2d ed. 2008).

<sup>104</sup> Many judge advocates may be familiar with the “JAG Book Store,” the small post exchange (PX) at TJAGLCS. An inspection of the selection of books on 3 March 2010 revealed a dozen different books, leaving the curious browser to wonder how they got there. I asked both Mr. Borch and the PX manager, and learned that some unknown, unnamed AAFES (Army and Air Force Exchange Service) person just threw these random books in a box and shipped it to TJAGLCS. Mr. Borch has attempted to order specific titles since that time. Interview with Fred L. Borch, JAG Corps Regimental Historian & Archivist, TJAGLCS, in Charlottesville, Va. (Mar. 3, 2010) [hereinafter Borch Interview]. As for the twelve different books at the book store on 3 March, I have read three of them (*We Were Soldiers Once . . . And Young*—of which the PX had three copies—*East of Chosin*, and *Makers of Modern Strategy*). See also *infra* note 118 (for a discussion of *Makers of Modern Strategy*). I also bought a book at the book store—*Victory on the Potomac*—in preparation for a portion of a National Security Law class I teach that discusses the Department of Defense Reorganization Act of 1986. See JAMES R. LOCHER III, *VICTORY ON THE POTOMAC: THE GOLDWATER-NICHOLS ACT UNIFIES THE PENTAGON* (2002).

<sup>105</sup> Interview with Dan Lavering, TJAGLCS Librarian, in Charlottesville, Va. (Mar. 3, 2010) (Mr. Lavering became the JAG School librarian on 1 July 1985) [hereinafter Lavering Interview].

<sup>106</sup> The TJAGLCS Online Library Catalog provides a link to the University of Virginia Law School’s Arthur J. Morris Library Home Page. See The Judge Advocate General’s Legal Ctr. & Sch/Online Library Catalogue, available at <http://jag.iii.com/> (last visited

the easiest way to access professional reading materials is through the Library of Congress's Military Legal Resources homepage,<sup>107</sup> which provides links to selections from the TJAGLCS Library's extensive collections of primary source materials. Resources include every issue of the *Military Law Review* and *The Army Lawyer*; historical monographs and select theses; military justice materials; historical collections from the Civil War, World War II, Korea, and Vietnam; and numerous international and operational law materials.<sup>108</sup>

The undisputed best room at TJAGLCS is the Regimental Reading Room. The room, located just outside the main library, was redesigned and redesignated as the Regimental Reading Room in 1991.<sup>109</sup> In 2000, the JAG Corps received a windfall, and in what Mr. Lavering called "the quickest decision he ever made," the JAG Corps accepted a monumental donation of an incredible collection of 7000 books—perfectly suited for the Regimental Reading Room.<sup>110</sup> The books—the majority of which are out-of-print hardcovers—were donated by Howard S. Levie, who retired as a colonel from the JAG Corps in 1963.<sup>111</sup> The Levie Collection is amazing, not only for its size, but also for its subject matter. Colonel Levie was an international law scholar with an expertise in prisoner of war matters, and the portion of his overall collection he donated to the library focuses on history, military history, and all matters relating to the 1949 Geneva Conventions and the aftermath of World War II. In an interesting twist of history, Colonel Levie sent about the same number of

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Mar. 10, 2010); *see also* Arthur J. Morris Law Library, *available at* <http://www.law.virginia.edu/html/librarisite/library.htm> (last visited Mar. 10, 2010).

<sup>107</sup> Library of Congress Military Legal Resources, *available at* [http://www.loc.gov/tr/frd/Military\\_Law/military-legal-resources-home.html](http://www.loc.gov/tr/frd/Military_Law/military-legal-resources-home.html) (last visited May 10, 2010) [hereinafter LOC Military Resources homepage].

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

<sup>109</sup> Lavering Interview, *supra* note 105. *See also* THE ANNUAL BULLETIN OF THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, 1991–1992, at 11. It was only five years prior to the designation of the Regimental Reading Room: "[o]n 29 July 1986, the JAG Corps became part of the U.S. Army Regimental System, with formal affiliation ceremonies held on 9 October 1986 [when] the JAG School was designated as the "regimental home" of the JAG Corps." THE ANNUAL BULLETIN OF THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, 1987–1988, at 3.

<sup>110</sup> Lavering Interview, *supra* note 105. The donation to TJAGLCS was only a portion of his entire collection. *Id.*

<sup>111</sup> Borch Interview, *supra* note 104. After his retirement, Colonel Levie became a Professor of Law at St. Louis University School of Law and then an instructor at the Naval War College. At the time he died in 2009, COL (Ret.) Levie was 101 years old; no judge advocate from any service has outlived him. *Id.*

volumes back to Thomas Jefferson's hometown as Thomas Jefferson sent out almost 200 years earlier.<sup>112</sup>

### C. A Few Good Personal Reading Lists

While all of the professional reading lists mentioned above are compiled by individuals, they are vetted by the organizations' leaders. A number of individuals have also published their own reading list. Although the Air Force's Professional Reading List only contains twelve books, in the last few years, *The Reporter*, an Air Force Judge Advocate General's Corps publication, has posted reading lists from two officers. In 2006, Brigadier General Charles Dunlap wrote an article recommending thirty-one books.<sup>113</sup> Later, in 2008, a second Air Force officer recommended five books (and a number of other sources) for those preparing to deploy to Iraq.<sup>114</sup> One former Army captain, a graduate of the U.S. Military Academy at West Point and an Oxford University Rhodes Scholar, published his own comprehensive reading list—containing 132 recommendations—as an appendix to his book.<sup>115</sup>

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<sup>112</sup> On 24 April 1800, Congress created the Library of Congress. Initially, the books procured for the library were solely for the use of members of Congress and Supreme Court Justices. The first Librarian of Congress purchased around 3000 volumes during the Library's first twelve years. During the War of 1812, the British burned down the Capitol and the Library and all of the volumes were lost. In 1814, the library collection was replaced when Congress authorized the purchase of Thomas Jefferson's entire library of 6,487 volumes for \$23,940. See Library of Congress Home Page, Preservation, Caring for America's Library: Institutional Growing Pains (Oct. 18, 2006), <http://www.loc.gov/preserv/history/growing.html>.

<sup>113</sup> Brigadier General Charles J. Dunlap, Jr., *Dunlap's Very Subjective Reading List for Air Force Judge Advocates*, THE REPORTER, Mar. 2006, at 4, 4–8 <http://www.afjag.af.mil/shared/media/document/AFD-090107-038.pdf>.

<sup>114</sup> Lieutenant Colonel Douglas B. Cox, *A Suggested Reading List for Deployment in Iraq*, THE REPORTER, Winter 2007–08, at 26, <http://www.afjag.af.mil/shared/media/document/AFD-090107-045.pdf>. Lieutenant Colonel Cox includes the *Rule of Law Handbook* among his suggestions. *Id.* at 28. THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CTR. FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, *RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES* (2009). The *Rule of Law Handbook* is available at the LOC Military Resources homepage. See also *supra* note 107.

<sup>115</sup> MULLANEY, *supra* note 19, at 375–77 (including books on literature and philosophy as well as collections of poetry). In addition to being just one of four books on the Supplemental Reading List for Deploying Judge Advocates, *The Unforgiving Minute* also makes my Professional Reading List. See *supra* note 99 and Appendices A & B. See also Major Jeremy Larchick, *Book Note*, ARMY LAW., Nov. 2009, at 57 (reviewing MULLANEY, *supra* note 19).

Appendix A is a compilation of recommendations from JAG Corps leaders, including all of our general officers as of July 2010 and numerous staff judge advocates.<sup>116</sup> I have also provided a list of recommended professional reading books.<sup>117</sup> It includes only books that I have read (or listened to).<sup>118</sup> Not surprisingly, many of the books on my list are on other lists noted in this article. Some, I specifically chose from a list; some I chose unaware they were on a list;<sup>119</sup> and, some, I read before they appeared on a list.<sup>120</sup> For the discriminating book reader, the act of choosing a good book can be time-consuming—literally hours spent perusing the shelves of bookstores or searching on-line, but by no means a waste of time. Another great means of selecting professional

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<sup>116</sup> See Appendix A.

<sup>117</sup> See Appendix B.

<sup>118</sup> My criteria for choosing a book are simple: it must be interesting and readable. Brigadier General Dunlap also listed “readability” as a factor for his list. Brigadier General Dunlap, *supra* note 113, at 4. I struggle with uninteresting books, especially those that are long (400–500 pages or more). I realize that “uninteresting” is incredibly subjective, but my objective criteria are basic—if I fall asleep after a page or two and I start another book after a few days, then the sleeper book gets relegated to the “uninteresting” category. There are many books on military Professional Reading Lists I put in the “uninteresting” category. With so many books available and everyone’s differing interests, however, it does not matter who thinks what is interesting or not—there is something for everyone. For example, *Makers of Modern Strategy from Machiavelli to the Nuclear Age*, a 941-page volume of essays on great strategists and national strategies, is as close to a “must read” as you can have for field grade officers. Do I own it? Yes. Would I have bought it if it was not required reading at CGSC? Probably not. Are individual chapters fascinating (Machiavelli, Frederick the Great, Napoleon, Jomini, Clausewitz, Mahan and Hart)? Absolutely. Because this book is on so many other lists and is one of twelve books in the JAG Book Store, I did not feel compelled to add it to my list. MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 11–31, 91–105, 123–213, 444–477, 598–623 (Peter Paret ed., 1986). See also *supra* note 95 and Appendix D (*Makers of Modern Strategy* appears on the Army Professional Reading List, Sublist 3 for Senior NCOs, CW4–CW5, and Field Grade Officers).

<sup>119</sup> *Gates of Fire* appears on the Marine Corps 2010 Professional Reading Guide and BG Dunlap’s Reading List. See PRESSFIELD, *supra* note 80, and notes 92 & 113.

<sup>120</sup> MULLANEY, *supra* note 19. When Mr. Borch provided me with the Supplemental Reading List, it was great to see that the *Unforgiving Minute* was one of four books on the list. I found the book while reading the Small Wars Journal Blog where it was recommended by LTC (Ret.) John Nagl, an old friend from the 1st Infantry Division (and the author of *Learning to Eat Soup with a Knife*). See NAGL, *supra* note 35. *The Unforgiving Minute* was recommended on the website, and I went and bought it. When, as a faculty member, I had to select a book for the 58th Graduate Course book review program, *The Unforgiving Minute* was an easy choice. See *infra* notes 138–41 and accompanying text; Appendix E. Four students chose my book and Major Jeremy Larchick’s review of the book was published in the November 2009 edition of *The Army Lawyer*. See also Larchick, *supra* note 115.

reading books is the book review, specifically book reviews published by our colleagues in *The Army Lawyer* and *Military Law Review*. In fact, I learned about one of my new all-time favorite books from a recently published book review.<sup>121</sup>

#### IV. Book Reviews by Judge Advocates Published in the *Military Law Review* and *The Army Lawyer*

While the primary intent of this article is to encourage professional reading within our Regiment, a secondary purpose is to promote book reviews as a supplement to the professional reading lists described above. Reading a peer-written book review can sway a reader toward or away from a particular book. Writing, and potentially publishing, a book review is a great way for judge advocates to build their professional credentials. Another type of book review—the oral book review—as part of an office’s professional reading program is discussed in Part V. This section takes a brief detour to discuss book reviews published in the *Military Law Review* and *The Army Lawyer*, the Army’s two preeminent legal journals. In Appendix F, I have summarized all of the book reviews in both publications from October 2004 to December 2009. A more detailed history of the evolution of the book review as part of the Professional Writing Program (PWP) is contained in Appendix G.

The first *Military Law Review* was published in September 1958,<sup>122</sup> and its first book review appeared in Volume 5 in July 1959.<sup>123</sup> For the next thirty-five years, in its first 143 volumes, the *Military Law Review* published 141 book reviews,<sup>124</sup> which were submitted on a voluntary

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<sup>121</sup> Major Kevin Landtroop, *Book Note*, ARMY LAW., Oct. 2009, at 53 (reviewing CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* (2009)). See also SLOAN & MCKEAN, *supra* note 53.

<sup>122</sup> 1 MIL. L. REV. (1958).

<sup>123</sup> Captain Thomas F. Meagher, Jr., *Book Note*, 5 MIL. L. REV. 129 (1959) (reviewing ALFRED ALVINS, *THE LAW OF AWOL* (1967)). Captain Meagher was a member of the faculty. This fact was not listed in a footnote to his book review, but he published another article in the same volume of the law review immediately preceding his book review. See Captain Thomas F. Meagher, Jr., *Knowledge of Article 92 Offenses—When Pleaded, When Proven?*, 5 MIL. L. REV. 118 (1959). (Captain Meagher provides his credentials at the end of his article: “\*Member of the faculty of The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia; member of the Massachusetts State Bar; graduate of Boston College Law School.”) *Id.* at 128.

<sup>124</sup> See *infra* note 183.

basis by faculty, students, and judge advocates in the field. Students were not required to submit book reviews as part of their academic requirement until the 43d Graduate Course (academic year 1994–1995).<sup>125</sup>

During his first year as Editor of the *Military Law Review* (the 1993–1994 academic year), Captain Stuart Risch realized the law review was in need of articles and one area he considered to increase submissions was the book review.<sup>126</sup> Around the same time (the summer of 1993), Major Fred Borch was completing a tour as a faculty member in the Criminal Law Division. During his three-year tour, Major Borch had personally contributed more than half of the book reviews published in the *Military Law Review*.<sup>127</sup> After talking to Major Borch and his boss, Major David Diner, Captain Risch submitted a written proposal to Colonel Lee Schinasi, the Deputy Commandant, requiring Graduate Course students to submit book reviews as part of their studies. Captain Risch's proposal was approved and students of the 43d Graduate Course were required to write book reviews.<sup>128</sup> With the requirement for student book reviews instituted in 1994, the *Military Law Review* went from publishing an average of four book reviews per year from 1958 through 1994 to an average of eleven Graduate Course student book reviews per year until *The Army Lawyer* began publishing book reviews as well.<sup>129</sup>

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<sup>125</sup> See *infra* note 186.

<sup>126</sup> Interview with COL Stuart Risch, Staff Judge Advocate, III Corps/U.S. Army Forces, Iraq and Deputy Staff Judge Advocate, Military Law and Operations, U.S. Forces-Iraq, in Iraq (July 8, 2010) [hereinafter Risch Interview].

<sup>127</sup> Borch Interview, *supra* note 104. See also *infra* note 184. The JAG School's Divisions became Departments beginning with academic year 1995–1996. See ARMY JUDGE ADVOCATE GENERAL'S SCHOOL ANNUAL BULL., 1995–1996, at 11. The JAG School became The Judge Advocate General's Legal Center and School in 2003. See *infra* note 172. The recommendations from Captain Risch and Major Borch were based on a few reasons: they gave the students a chance to read, write, and get published, and the required book reviews would supply the *Military Law Review* with articles. Borch Interview, *supra* note 104 and Risch Interview, *supra* note 126.

<sup>128</sup> Risch Interview, *supra* note 126. During the period Captain Risch was the Editor of the *Military Law Review*, Captain John Jones was the Editor of *The Army Lawyer* and they both worked under the supervision of Major Diner, a faculty member in the Administrative and Civil Law Division. Colonel Schinasi was the Deputy Commandant and Director, Academic Department. See ARMY JUDGE ADVOCATE GENERAL'S SCHOOL ANNUAL BULL., 1993–1994, at 2. This position is now called the Dean.

<sup>129</sup> See *infra* note 192.

*The Army Lawyer* was first published in August 1971;<sup>130</sup> however, it did not begin publishing book reviews until October 2004 with the 53d Graduate Course.<sup>131</sup> In 2004, Captain Heather Fagan, the Editor of *The Army Lawyer*, suggested, and the Dean approved, the concept of adding book reviews to the journal.<sup>132</sup> From 2004 to the present, both the *Military Law Review* and *The Army Lawyer* have published student-written book reviews<sup>133</sup> with the latter publishing twice as many student-written reviews during that period.<sup>134</sup>

### The Professional Writing Program

Between 1994 and 2004, the first ten years student-written book reviews were required, students chose their own books. Faculty book review graders may or may not have actually read the book.<sup>135</sup> Although unrelated, the addition of book reviews to *The Army Lawyer* and the change to faculty-selected books both came in 2004.<sup>136</sup>

The current Graduate Course “book review program”—the book selection, reading, writing of the book review, and informal book

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<sup>130</sup> 1 ARMY LAW. (Aug. 1971).

<sup>131</sup> See *infra* note 194.

<sup>132</sup> Telephonic Interview with Major Heather Fagan, Admin. & Civil Law Div., Office of The Judge Advocate Gen., in Washington D.C. (Feb. 26, 2010) [hereinafter Fagan Interview]. When Captain Fagan was the Editor from the summer of 2003 through 2004, she also recommended changing the philosophy of *The Army Lawyer* to focus on publishing shorter articles to meet publication deadlines—a change ideally suited to book reviews and it would give more students a chance at publication. The charts at notes 191 and 192 reflect the overall increase in published student book reviews with the addition of *The Army Lawyer* as a publication source and with the students still in the Graduate Course, the final editing process for those worthy of publication was easy. Interview with LTC Gene Baime, Associate Judge, U.S. Army Court of Criminal Appeals, in Washington D.C. (Mar. 1, 2010) [hereinafter Baime Interview]. Through December 2009, six students in the 58th Graduate Course have already had their book reviews published.

<sup>133</sup> See *infra* notes 193 and 194.

<sup>134</sup> See *infra* note 193. Since 2004, *The Army Lawyer* has published sixty-three student-written book reviews compared to thirty-two in the *Military Law Review*.

<sup>135</sup> Baime Interview, *supra* note 132. The current requirement for Graduate Course students to write book reviews is part of the Professional Writing Program (PWP). See ADMIN. & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, PWP MANUAL, 58TH GRADUATE COURSE 14 (Aug. 2009) [hereinafter PWP MANUAL]. See also Appendix G (providing a more in-depth discussion of the PWP).

<sup>136</sup> Interview with Moe Lescault, Associate Dean, in Charlottesville, Va. (Mar. 23, 2010) [hereinafter Lescault Interview].

discussion—was the idea of MAJ Eugene Baime when he became the PWP Director in the summer of 2003.<sup>137</sup> At the start of the 2003–2004 academic year for the 52d Graduate Course, volunteer faculty members were asked to select a book published in the previous year related to the “legal profession, leadership, or war/international relations.”<sup>138</sup> The PWP Director then determines how faculty-selected books get assigned to the students<sup>139</sup> and the reading and writing process starts. For many, the best part of the book review program in the Graduate Course is the informal discussion after the written review is submitted. A low-stress faculty-lead discussion at an off-site location (such as a coffee shop) allows students to openly discuss the book—the good, the bad, the leadership lessons, and the relevance to judge advocates, if any.<sup>140</sup>

Together, the JAG Corps’s two professional legal journals contain a wealth of knowledge to assist judge advocates in all disciplines within our Corps. In addition to the “required” reading of articles within their current area of practice, judge advocates should scan the book reviews in the *Military Law Review* and *The Army Lawyer* for potential leads for their next professional reading book—for suggestions on either what to read or what to avoid. While the focus of this discussion has been student-written book reviews, submissions from the field are equally important for these two journals. Judge advocates in the field that have read a professional reading book published within the past year—whether it is good or bad and whether it chosen from a professional reading list or not—should consider writing a short review. Reviews from the field are not subjected to the stringent page limit requirements of a Graduate Course book review—in fact, a shorter review is better and a great way to get published. Before writing, hopeful authors should check with the legal journal editors to get further guidance.

When developing a Professional Reading Program, the Staff Judge Advocate (SJA) and Deputy Staff Judge Advocate (DSJA) can take certain aspects of the Graduate Course book review program, although a

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<sup>137</sup> Baime Interview, *supra* note 132. *See also infra* note 198.

<sup>138</sup> The requirement for a book published in the previous year could be waived by the PWP Director and frequently was. Also, first year instructors were not required to participate, some did and “there was a strong suggestion that each faculty member choose at least one book during their tenure.” Baime Interview, *supra* note 132.

<sup>139</sup> *See* Appendix E (providing a list of the faculty selected books for the 58th and 59th Graduate Courses).

<sup>140</sup> Group Book Reviews are also discussed in Part V *infra*.

written product is not recommended, some offices may consider that aspect of the program.

## V. A Suggested Professional Reading Program

### A. Be Flexible, Be Innovative, Be Creative

While virtually all Offices of the Staff Judge Advocate (OSJAs) implement some form of a Leadership Professional Development (LPD) program,<sup>141</sup> the addition of a Professional Reading Program<sup>142</sup> to supplement the LPD program will benefit the judge advocates by expanding their professional horizons. While it is trite to say “reading can be fun,” SJAs and DSJAs can certainly create a program that will make professional reading something to look forward to rather than something to dread. It is nearly impossible to please everyone, so a program that appeals to the vast majority of the office should be the goal. The following is an example of one program that was fairly well-received<sup>143</sup> at the 1st Infantry Division (IID) from 2006–2008.<sup>144</sup>

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<sup>141</sup> Leadership Professional Development programs that combine “classroom” instruction with practical training and other team-building exercises, all within diverse settings, in and out of the office and on and off the installation, have the potential to be the most successful programs. These programs appeal to the participating officers and have the best chance of developing a cohesive office and future leaders.

<sup>142</sup> At the 1st Infantry Division (IID), our program involved all judge advocates (including those assigned to Brigades), civilian attorneys, the Legal Administrator, and our Command Paralegal Noncommissioned Officer. As the DSJA, I ran the program, but it was approved by both SJAs during my two-year tour at IID: COL (Ret.) Robert Teetsel (2006–2007) and COL Scott Arnold (2007–2008).

<sup>143</sup> Three officers who participated in the program at the IID responded to three questions as part of an informal survey: (1) Whether they enjoyed the program (yes or no); (2) why or why not; and (3) what they read. The results of the first question were unanimous—all three enjoyed and “loved” the program. The three responses on why they enjoyed the program differed. An officer who read *Not a Good Day to Die* stated that the highlight of the program was the group discussion—“the act of reviewing the book with others, offering comments on their review, and taking challenges to your point of view was very rewarding. The most professional development came in the discussion, the reading of the book was secondary.” A second officer who read *Dereliction of Duty* stated, “[w]e gain great insights into our profession . . . by professional reading. It is important that we have an understanding of history and entertain alternative views on leadership to help us expand our personal abilities.” The third officer, who read *The New Face of War*, replied:

It was a good opportunity to think about operational law issues that were outside my lane . . . . [O]ne of the challenges for Judge

All attorneys had to read two books over the course of a year, which, based on the Permanent Change of Station season, ran from summer to summer. One book was required for an Individual Book Review and one book was for a Group Book Review. Attorneys had anywhere from four to ten months to present their Individual Book Review and everyone had about eleven months to complete the book required for the Group Book Review. A brief description of the program follows.<sup>145</sup>

#### B. The Individual Book Review

The Individual Book Review, an informal ten-minute oral presentation, benefits not only the officer conducting the review but the entire group. The essential element for success with the Individual Book Review is to make it as fun as possible, or at least something the participants actually look forward to. It all starts by clearly identifying the program's intent; describing the requirement; providing a timeline; and being as precise as possible on the expectation—all-the-while ensuring it does not appear as an onerous additional task. Because lengthy e-mails from the DSJA tend to have a negative effect, it is best to first discuss the professional reading program at an LPD session. Remind the officers of the purpose behind professional reading, particularly the types of books to be considered, and describe the program to be implemented. This initial discussion provides an open forum for wary officers to ask questions about what will undoubtedly, at first glance, be viewed as an unwelcome intrusion on their free time.

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Advocates [JAs] is maintaining visibility of big picture Army issues while also focusing on the legal nuances necessary for the immediate job. A professional reading program can push [JAs] to think beyond short-term duties and projects, and consider significant military concerns.

The three officers I surveyed were MAJ Jeffrey Dietz, Student, 58th Graduate Course, MAJ Shane Reeves, Assoc. Professor, Int'l and Operational Law Dep't, TJAGLCS, and MAJ Chuck Neill, Assoc. Professor, Criminal Law Dep't, TJAGLCS. *See also* NAYLOR, *supra* note 28; MCMASTER, *supra* note 73; BRUCE BERKOWITZ, *THE NEW FACE OF WAR: HOW WAR WILL BE FOUGHT IN THE 21ST CENTURY* (2003).

<sup>144</sup> The program was continued by the next DSJA, LTC Susan Arnold.

<sup>145</sup> In reviewing this article for accuracy, LTC Eugene Baime noted that when he was the DSJA at U.S. Army Recruiting Command from the summer of 2006 through the summer of 2008, his office had a similar reading program, although the participants were required to choose a book that appeared on the Chief of Staff of the Army's Reading List. Baime e-Mail, *infra* note 199.

With the program adequately described, the next hurdle is to allay fears on the book selection process itself. Provide the participants with wide latitude when picking their books. Provide lists or information on how to access the numerous lists discussed earlier in this article. In the end, I found the shelves in my office provided about seventy-five percent of the books chosen by the readers.<sup>146</sup> Some may view this as a double-edged sword—it was easy to obtain a book from my office, but the readers also knew I had read the book. Allow the readers the freedom to choose any book they want, subject to DSJA approval if someone chooses a book that does not appear on any reading list.

Once the books are selected (and a suspense date must be set for this initial step), then publish the Reading Program calendar with three columns: Reader / Book / Date (of their review). The biggest challenge for the DSJA is to synchronize the Reading Program calendar with the office's overall LPD calendar. A Reading Program session should be held at least once a month. Even if a full LPD session is not devoted to the reading program, consider reserving twenty minutes at the end of one session per month for a couple of reviews.

Solicit volunteers to go first, but at a minimum, those first few readers need at least four months to read their books. Sometime prior to the first session, where the officers are required to present their book reviews, the DSJA should lead by example and present a "sample" review. This "demonstration" will go a long way to reducing everyone's apprehension about the program.<sup>147</sup>

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<sup>146</sup> All of the books on my list that remain in my current library are always available for loan from the shelves in my office, currently located at TJAGLCS.

<sup>147</sup> For example, when initiating the new "1st Infantry Division OSJA Professional Reading Program," I started off with two "sample" presentations in October 2005 with discussions of *The Longest Winter* and *Flags of Our Fathers* to compare and contrast the battles waged in two theaters during World War II. Compare KERSHAW, *supra* note 19, with JAMES BRADLEY, *FLAGS OF OUR FATHERS* (2000). *The Longest Winter* includes accounts of the Battle of the Bulge and the Malmedy Massacre and how the platoon led by 1LT Bouck fought, survived, and were captured during the winter of 1944–45. See KERSHAW, *supra* note 19. *Flags of Our Fathers* and the iconic picture that adorns its cover is about more than the flag raising on Iwo Jima that was immortalized by Joe Rosenthal's photograph on 23 February 1945. It is about the six flag-raisers to be sure, but—more like Eugene B. Sledge's account of Pelelui and Okinawa—it is about the real heroes not captured in the picture on top of Mount Surabachi. It is about the 70,000 Marines in the 3d, 4th and 5th Marine Divisions and their thirty-six day battle for Iwo Jima, and the "25,851 U.S. casualties, including nearly 7,000 dead." BRADLEY, *supra*, at 10. Like Iwo Jima, "[m]ost of the 22,000 defenders fought to their deaths." *Id.* at 151, 210–11.

The best advice for DSJAs running a program is: be flexible, be innovative, and be creative. Be prepared to adjust the schedule—often—when an officer is not ready. Depending on the number of officers in the program, flexibility allows the DSJA to have anyone who has finished a book present their review early. Even if some attorneys ultimately do not present the book review to the office, at least they have read a book and met the primary goal of professional reading. If the DSJA requires one thing, it has to be that the reviews must be short and sweet and without fanfare. Ensure the over-achieving officers keep it simple—no slides, no hand-outs. The essence of the program is its simplicity.

What about the actual review? Basically, once a month, perhaps near the end of day at a neutral location, the attorneys gather, and a pre-determined number of people provide a simple review of their book—the main thesis of the book, what they liked, did not like, any leadership lessons, and an opinion on whether they recommend it to others. All of this can be accomplished in less than ten minutes and the DSJA, as the moderator, must ensure the time limit is followed. Even if the DSJA has not read the book, she should be able to generate a couple of points of discussion if the reviewer has not already done so.

Be creative. The location of the book discussion session is a key factor in creating a relaxed environment. Depending on the size of the office, a variety of sites outside the actual office should be considered: an outdoor setting if the weather permits; the installation club; the SJA's or DSJA's quarters; a museum; a coffee shop; the courtroom—anything but the work environment. A location that allows a transition from business to pleasure helps set the overall tone. Also, depending on the books chosen, each session may have a particular theme, such as Afghanistan, leadership, or history.

A couple of the more memorable moments from the IID Reading Program include a session when two West Point graduates regaled the office with tales of their matriculation at the U.S. Military Academy (USMA) and—totally separate, and equally entertaining—a couple of other officers provided dramatic readings from their selections. West Point graduates can consider using *The Long Gray Line*<sup>148</sup> or the *Unforgiving Minute*<sup>149</sup> as a backdrop to lead an informative discussion of

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<sup>148</sup> RICK ATKINSON, *THE LONG GRAY LINE: THE AMERICAN JOURNEY OF WEST POINT'S CLASS OF 1966* (1989).

<sup>149</sup> MULLANEY, *supra* note 19.

life at the Military Academy and provide non-USMA officers a better appreciation for the background of their fellow officers and the majority of the Army leadership. Perhaps the most memorable moment was when a judge advocate unexpectedly launched into a dramatic reading of a book passage. This caught on and, in the next session, another officer gave an encore performance.

Be innovative. Consider pitting officers against each other for a friendly “debate.” In this regard, an astute DSJA will recognize books that present opposing views, or at least contain topics worthy of debate, whether for fun or to stir up controversy. For example, *The Terror Presidency v. War by Other Means*<sup>150</sup> (separation of powers v. the unitary Executive); *Fatal Vision v. Fatal Justice*<sup>151</sup> (Was Jeffrey MacDonald guilty or not guilty?); or *Washington v. Eisenhower* (Who was the greater general?).<sup>152</sup> The discussions and give-and-take between participants can prove to be the most worthwhile and entertaining part of the program.

The benefit for the individual officer who has read a professional book and presented views to a peer group is self-evident. However, the reviews expose the entire group to many new books, new topics, and new ideas. It also gives judge advocates an opportunity to present a topic of interest to their peer group, which they may not otherwise have the opportunity to do. As with the dramatic reading mentioned above, peers may gain a new appreciation for someone’s hidden talents. If done in the right setting, a book review session can be a good segue to other events that lend themselves to camaraderie and team building. In a busy office, as most are, a relaxed reading program that includes these informal individual reviews provides a good break from the hectic pace.

### C. The Group Book Review

The Group Book Review is slightly different from the Individual Book Review, although the concept of a low threat environment still applies. This second book—chosen by SJA or DSJA—should be more focused on a specific topic the leadership believes is relevant for the

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<sup>150</sup> See GOLDSMITH, *supra* note 59; see also YOO, *supra* note 59.

<sup>151</sup> See MCGINNIS, *supra* note 64; see also POTTER & BOST, *supra* note 66.

<sup>152</sup> See FISCHER, *supra* note 24 (discussing *Washington’s Crossing*); see also AMBROSE, *supra* note 19 (discussing *The Victors*).

office. For example, if the office is pending a deployment, a book relevant to the area of operations may be appropriate. The topic of leadership, and a well-chosen book, is always an excellent choice. Depending on the size of the OSJA, it may be advisable to have two group book reviews with half the office reviewing one book and half doing a second; this gives the participants an option, even if it is just choosing one of two books. If the office is considering two books, one book on the contemporary operational environment and one book on the unit's history is a good mix. For example, for one group book review at the 11D OSJA, the officers could choose either *The Looming Tower*<sup>153</sup> or *The Fighting First*.<sup>154</sup>

The general concept for the group book review is that everyone gets almost a year to read the book—which is purchased by, and will remain with, the office. This puts some pressure on the SJA/DSJA to choose a book that is considered a “timeless classic” and which will be of use for future officers. The Group Book Review itself is moderated by the SJA or DSJA. If the office is split between two books, then the SJA and DSJA can each lead a discussion (with the entire office sitting in on both sessions). To lead a focused discussion, the moderator can designate certain judge advocates to focus on particular aspects of the book or provide some thought-provoking points in advance to guide the session. Start the group book review session with a five-minute overview of the book for the benefit of those who did not get the chance to read it. While the Group Book Review may seem more burdensome than the Individual Book Review, a good book followed by a spirited discussion makes it worthwhile. At the end of the day, the main idea is to expose judge advocates to professional reading and these suggested reading programs provide options for leaders and judge advocates in this endeavor.

## VI. Conclusion

The existence of professional reading lists from the leaders of all military services and military educational institutions' emphasis on those lists provides judge advocates with a clear message that the military expects its leaders in the profession of arms to read more than what is

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<sup>153</sup> WRIGHT, *supra* note 27.

<sup>154</sup> FLINT WHITLOCK, *THE FIGHTING FIRST: THE UNTOLD STORY OF THE BIG RED ONE ON D-DAY* (2004).

required for their daily job. This article highlights general topics suitable for judge advocates with a few suggested readings along the way. If the suggestions here are not of interest, the reader should be able to find something enticing on one of the aforementioned lists or in one of the appendices to this article. In addition to book stores, both actual and on-line, book reviews published in the *Military Law Review* and *The Army Lawyer* provide judge advocates a glimpse of what their peers are reading and recommendations on what to read (or not to read). Reading programs culminating in simple presentations can provide an entire OSJA exposure to numerous good books and provoke interesting discussions on professional topics relevant to military officers.

Consider the question: Have you read any good professional books lately? Now imagine a judge advocate is asked this question by a boss, a commander, a peer, a colleague on the staff, or a subordinate seeking a recommendation.

There are two possible answers.

I would surmise that any judge advocate—a professional military officer and lawyer—would hope to reply in the affirmative and then launch into a lively discussion of the book he is reading.<sup>155</sup> The alternative seems bleak.

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<sup>155</sup> For example, if a commander asked a number of officers to discuss the current professional books they were reading, it would be nice to be able to discuss whether General Lee was a hero when he surrendered to General Grant in April 1865, rather than let his Confederate troops engage in hit and run tactics forcing the Union to fight a bloody counterinsurgency battle for many more years. *See supra* notes 5 and 21.

## Appendix A

Recommendations from JAG Corps Leaders (Summer 2010)<sup>156</sup>

LTG Dana Chipman The Judge Advocate General	Colvin, Geoff. <i>Talent is Overrated: What Really Separates World-Class Performers from Everybody Else</i> (2008); Cloud, David & Jaffe, Greg. <i>The Fourth Star</i> (2010); Mullaney, Craig. <i>The Unforgiving Minute</i> (2009)
MG Butch Tate Deputy Judge Advocate General & Commander U.S. Army Legal Services Agency	Keough, Donald. <i>The Ten Commandments for Business Failure</i> (2008)
BG John Miller <sup>157</sup> Commander & Commandant, TJAGLCS	McPherson, James. <i>Tried By War</i> (2008); Hammes, Colonel Thomas X. <i>The Sling and the Stone: On War in the 21st Century</i> (2006); MacDonald, Charles B. <i>Company Commander</i> (1947)
BG Mark Martins Deputy Commanding General (Detainee Ops) Joint Task Force 435, Afghanistan	Coll, Steve. <i>Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001</i> (2004)
BG Thomas Ayres Assistant JAG for Military Law and Operations	Massie, Robert. <i>Dreadnought: Britain, Germany, and the Coming of the Great War</i> (1991)

<sup>156</sup> Recommendations were solicited by e-mail or in person between May and July 2010. If a book is listed elsewhere in this article, the short title is used. The *Bluebook* format is used for books within the text. If an officer recommended more than three books, the additional recommendations appear in a footnote.

<sup>157</sup> Brigadier General Miller also recommended: CHARLES ACQUISTO, WISDOM TO GROW ON (2007); JOHN GRISHAM, THE INNOCENT MAN (2006); MITCH ALBOM, THE FIVE PEOPLE YOU MEET IN HEAVEN (2003); KHALED HOSSEINI, THE KITE RUNNER (2003); HAMPTON SIDES, GHOST SOLDIERS (2001); HAROLD COYLE, TEAM YANKEE: A NOVEL OF WORLD WAR II (1998); BERYL BAINBRIDGE, MASTER GEORGIE (1998); SPENCER JOHNSON, WHO MOVED MY CHEESE?: AN AMAZING WAY TO DEAL WITH CHANGE IN YOUR LIFE AND YOUR WORK (1998); ALEKSANDR SOLZHENITSYN, THE GULAG ARCHIPELAGO (1973).

COL David Diner Dean, JAG School	Sajer, Guy. <i>The Forgotten Soldier</i> (1971)
COL Kevan Jacobson <sup>158</sup> Director, Legal Center	Sledge, E.B. <i>With the Old Breed: At Peleliu and Okinawa</i> (1981); Remarque, Erich Maria. <i>All Quiet on the Western Front</i> (1929); Kipling, Rudyard. <i>Kim</i> (1901)
COL Richard Gross <sup>159</sup> SJA, CENTCOM	Kissinger, Henry. <i>Diplomacy</i> (1994); Ellis, Joseph J. <i>American Creation</i> (2007); Kilcullen, David. <i>The Accidental Guerilla</i> (2008)
COL Norman Allen SJA, FORSCOM	Halberstam, David. <i>The Coldest Winter: America and the Korean War</i> (2007); Maaniss, David. <i>They Marched Into Sunlight: War and Peace, Vietnam and America, October 1967</i> (2003)
COL Katherine Spaulding-Perkuchin SJA, PACOM	Baker, James E. <i>In the Common Defense: National Security Law for Perilous Times</i> (2007)
COL Renn Gade SJA, SOCOM	Chaleff, Ira. <i>Courageous Followers</i> (2009); Wright, Lawrence. <i>The Looming Tower</i> (2006)
COL Scott Arnold LEGAD, ISAF Joint Command, Afghanistan (July 2009-July 2010)	Jones, Seth. <i>Graveyard of Empires: America's War in Afghanistan</i> (2009)

<sup>158</sup> Colonel Jacobson also recommended: WILLIAM MANCHESTER, *GOODBYE, DARKNESS: A MEMOIR OF THE PACIFIC WAR* (1979); GUY SAJER, *THE FORGOTTEN SOLDIER* (1971); BARBARA TUCHMAN, *STILLWELL AND THE AMERICAN EXPERIENCE IN CHINA, 1911-45* (1970); CHARLES B. MACDONALD, *COMPANY COMMANDER* (1947).

<sup>159</sup> Colonel Gross also recommended: FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008); ZBIGNIEW BRZEZINSKI & BRENT SCOWCROFT, *AMERICA AND THE WORLD: CONVERSATIONS ON THE FUTURE OF AMERICAN FOREIGN POLICY* (2008); FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2003); JOSEPH J. ELLIS, *FOUNDING BROTHERS* (2000); BENSON BOBRICK, *ANGEL IN THE WHIRLWIND: THE TRIUMPH OF THE AMERICAN REVOLUTION* (1997).

COL Walter Hudson SJA, I Corps	West, Bing. <i>The Strongest Tribe</i> (2008)
COL Stuart Risch <sup>160</sup> SJA, III Corps and DSJA, MLO, US Forces-Iraq	Atkinson, Rick. <i>The Liberation Trilogy</i> ; Moore, Harold and Joseph Galloway. <i>We Were Soldiers Once . . . and Young</i> (1992); Ambrose, Stephen. <i>Band of Brothers: E Company, 506th Regiment, 101st Airborne: From Normandy to Hitler's Eagle's Nest</i> (1992)
COL Stephen Berg SJA, XVIII Airborne Corps	McPherson, James. <i>Battle Cry of Freedom</i> (1988)
COL Charles Pede <sup>161</sup> Chief, Criminal Law Div, OTJAG	Morris, Lawrence. <i>Military Justice: A Guide to the Issues</i> (2010); McCullough, David. <i>Mornings on Horseback: The Story of an Extraordinary Family, a Vanished Way of Life and the Unique Child Who Became Theodore Roosevelt</i> (1981); Philbrick, Nathaniel. <i>The Last Stand: Custer, Sitting Bull, and the Battle of Little Big Horn</i> (2010)

<sup>160</sup> Colonel Risch also recommended: MICHAEL GORDON & BERNARD TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ (2006); DAVID MCCULLOUGH, 1776 (2005); ELIOT COHEN, SUPREME COMMAND: SOLDIERS, STATESMAN, AND LEADERSHIP IN WARTIME (2002); MICHAEL USEEM, LEADING UP: HOW TO LEAD YOUR BOSS SO YOU BOTH WIN (2001); MARK BOWDEN, BLACKHAWK DOWN (1999); H.R. MCMASTER, DERELICTION OF DUTY: JOHNSON, MCNAMARA, THE JOINT CHIEFS OF STAFF AND THE LIES THAT LED TO VIETNAM (1997); JOHN KOTTER, LEADING CHANGE (1996); CHARLES A. HELLER & WILLIAM A. STOFFT, AMERICA'S FIRST BATTLES, 1776-1965 (1986); MICHAEL SHAARA, THE KILLER ANGELS (1974); CHARLES B. MACDONALD, COMPANY COMMANDER (1947). See also *The Liberation Trilogy* by Rick Atkinson. 1 RICK ATKINSON, AN ARMY AT DAWN: THE WAR IN NORTH AFRICA, 1942-1943 (2002); 2 RICK ATKINSON, THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943-1944 (2008).

<sup>161</sup> Colonel Pede also recommended: RON CHERNOW, ALEXANDER HAMILTON (2004); PAUL COELHO, THE ALCHEMIST (1993); and any Agatha Christie Hercule Poirot Mystery written prior to 1950.

COL Michael Smidt SJA, 1st Infantry Div, Iraq	Myrer, Anton. <i>Once an Eagle</i> (1968); Moore, Harold and Joseph Galloway. <i>We Were Soldiers Once . . . and Young</i> (1992)
COL Jon Guden SJA, 3d Infantry Div, Iraq	Maxwell, John C. <i>Leadership 101</i> (2001); <i>The 17 Essential Qualities of a Team Player</i> (2006)
COL Michael Lacey SJA, 10th Mountain Div	Mortensen, Greg. <i>Three Cups of Tea</i> (2006)
COL William Kern SJA, 101st Airborne Div, Afghanistan	Moore, Harold and Joseph Galloway. <i>We Were Soldiers Once . . . and Young</i> (1992)
LTC Ian Corey SJA, 1st Armored Div, Iraq	McPherson, James. <i>Tried By War</i> (2008); Myrer, Anton. <i>Once an Eagle</i> (1968)
LTC George Smawley SJA, 25th Infantry Div	Cole, Juan. <i>Engaging the Muslim World</i> (2009); Stromseth, Jane, David Wippman, and Rosa Brooks. <i>Can Might Make Rights?: Building the Rule of Law After Military Interventions</i> (2006); Richards, Peter. <i>Extraordinary Justice: Military Tribunals in Historical and International Context</i> (2007)
LTC Lori Campanella SJA, 82d Airborne Div	Gladwell, Malcolm. <i>Outliers: The Story of Success</i> (2008)
LTC Randy Swansiger SJA, US Army Medical Center and School	Bryson, Bill. <i>A Short History of Everything</i> (2003)
LTC Michelle Ryan FG Assignments Officer, PP&TO	Boot, Max. <i>Savage Wars of Peace: Small Wars and the Rise of American Power</i> (2002)
LTC Susan Arnold Military Judge, Third Judicial Circuit	Churchill, Winston. <i>The River War</i> (1899); Oren, Michael. <i>Power, Faith and Fantasy: America in the Middle East: 1776 to the Present</i> (2007)

Fred Borch Regimental Historian	McPherson, James. <i>Tried By War</i> (2008)
LTC Jeff Bovarnick Chair, Int'l & Op Law Dep't	Junger, Sebastian. <i>War</i> (2010); Stewart, David. <i>Summer of 1787: The Men Who Invented the Constitution</i> (2007); Rashid, Ahmed. <i>Taliban</i> (2000)
LTC Dan Brookhart Chair, Criminal Law Dep't	Bugliosi, Vincent & Curtis Gentry. <i>Helter Skelter: The True Story of the Manson Murders</i> (1974)
LTC Mike Mueller Chair, Contract & Fiscal Law Dep't	Karsh, Efraim. <i>Palestine Betrayed</i> (2010)
LTC Jack Ohlweiler Chair, Admin. & Civil Law Dep't	Krakauer, Jon. <i>Where Men Win Glory: The Odyssey of Pat Tillman</i> (2009)
LTC Jon Howard Director, Professional Communications Branch	Joseph, Sister Miriam. <i>The Trivium: The Liberal Arts of Logic, Grammar, and Rhetoric</i> (1937); Heinrichs, Jay. <i>Thank You for Arguing: What Aristotle, Lincoln, and Homer Simpson Can Teach Us About the Art of Persuasion</i> (2007)
MAJ Laura Calese Assistant Dean, JAG School	Egan, Timothy. <i>The Worst Hard Time: The Untold Story of Those Who Survived the Great American Dust Bowl</i> (2006)
COL James Robinette Director, Combat Developments	Phillips, Melanie. <i>The World Turned Upside Down: The Global Battle Over God, Truth, and Power</i> (2010)
COL Michael Sainsbury Director, Training Developments	Atkinson, Rick. <i>The Long Gray Line: The American Journey of West Point's Class of 1966</i> (1989)
LTC Rodney Lemay Director, Center for Law and Military Operations	Wittes, Benjamin. <i>Law and the Long War: The Future of Justice in the Age of Terror</i> (2008)
LTC Jay McKee Director, Future Concepts	Frederick, Jim. <i>Black Hearts: One Platoon's Descent into Madness in the Triangle of Death</i> (2010)

**Appendix B****Author's Professional Reading List****Military**

Junger, Sebastian. *War*. New York: Hachette Book Group, 2010.

Cloud, David and Greg Jaffe. *The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army*. New York: Random House, 2009.

Krakauer, Jon. *Where Men Win Glory: The Odyssey of Pat Tillman*. New York: Doubleday, 2009.

Mullaney, Craig. *The Unforgiving Minute: A Soldier's Education*. New York: Penguin, 2009.

Stanton, Douglas. *Horse Soldiers: The Extraordinary Story of a Band of U.S. Soldiers Who Rode to Victory in Afghanistan*. New York: Simon & Schuster, 2009.

Kilcullen, David. *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*. Oxford: Oxford University Press, 2008.

Raddatz, Martha. *The Long Road Home: A Story of War and Family*. New York: G.P. Putnam's Sons, 2008.

Atkinson, Rick. *In the Company of Soldiers: A Chronicle of Combat*. New York: Henry Holt & Co., 2005.

Naylor, Sean. *Not a Good Day to Die: The Untold Story of Operation Anaconda*. New York: The Berkley Publishing Group, 2005.

Anderson, Lars. *The All Americans*. New York: St. Martin's Press, 2004.

Kershaw, Alex. *The Longest Winter: The Battle of the Bulge and the Epic Story of World War II's Most Decorated Platoon*. Cambridge, MA: Da Capo Press, 2004.

Kershaw, Alex. *Bedford Boys: One American Town's Ultimate D-Day Sacrifice*. Cambridge, MA: Da Capo Press, 2003.

Nagl, John. *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam*. Westport, CT: Praeger Publisher, 2002.

Boot, Max. *The Savage Wars of Peace: Small Wars and the Rise of American Powers*. New York: Basic Books, 2002.

Sides, Hampton. *Ghost Soldiers: The Forgotten Epic Story of World War II's Most Dramatic Mission*. New York: Doubleday, 2001.

Stanton, Douglas. *In Harm's Way: The Sinking of the USS Indianapolis and the Extraordinary Story of its Survivors*. New York: Henry Holt & Co., 2001.

Pressfield, Steven. *Tides of War: A Novel of Alcibiades and the Peloponnesian War*. New York: Doubleday, 2000.

Bowden, Mark. *Blackhawk Down: A Story of Modern War*. New York: Atlantic Monthly Press, 1999.

Ambrose, Stephen. *The Victors: Eisenhower and His Boys: The Men of World War II*. Helena, MT: Ambrose-Tubbs, Inc., 1998.

Pressfield, Steven. *Gates of Fire: An Epic Novel of the Battle of Thermopylae*. New York: Doubleday, 1998.

Ambrose, Stephen. *D-Day: June 6, 1944: The Climactic Battle of World War II*. Helena, MT: Ambrose-Tubbs, Inc., 1994.

Ambrose, Stephen. *Band of Brothers: E Company, 506th Regiment, 101st Airborne: From Normandy to Hitler's Eagle's Nest*. New York: Touchstone, 1992.

Moore, Harold C. Lt. Gen (Ret.) and Joseph Galloway. *We Were Soldiers Once ... and Young*. New York: HarperCollins, 1992.

Atkinson, Rick. *The Long Gray Line: The American Journey of West Point's Class of 1966*. New York: Henry Holt & Co., 1989.

Sledge, E.B. *With the Old Breed: At Peleliu and Okinawa*. Novato, CA: Presidio Press, 1981.

Myrer, Anton. *Once an Eagle*. New York: HarperCollins, 1968.

Galula, David. *Counterinsurgency Warfare: Theory and Practice*. Praeger Security International, 1964.

MacDonald, Charles B. *Company Commander*. Random House Publishing, 1979 (1947).

### Law

Sloan, Cliff and David McKean. *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court*. New York: Public Affairs, 2009.

Fisher, Louis. *The Constitution and 9/11, Recurring Threats to America's Freedoms*. Lawrence, KS: University Press of Kansas, 2008.

Mahler, Jonathan. *The Challenge: Hamdan v. Rumsfeld and the Fight over Presidential Power*. New York: Farrar, Straus, and Giroux, 2008.

Preston, Douglas and Mario Spezi. *Monster of Florence*. New York: Hachette Book Group, 2008.

Wittes, Benjamin. *Law and the Long War: The Future of Justice in the Age of Terror*. New York: Penguin Press, 2008.

Goldsmith, Jack. *The Terror Presidency: Law and Judgment Inside the Bush Administration*. New York: W.W. Norton & Co., 2007.

Grisham, John. *The Innocent Man: Murder and Injustice in a Small Town*. New York: Doubleday, 2006.

Belknap, Michael R. *Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*. Lawrence, KS: University Press of Kansas, 2002.

Stevens, John C. III. *Court-Martial at Parris Island: The Ribbon Creek Incident*. Naval Institute Press, 1999.

Rehnquist, William. *All the Laws But One: Civil Liberties in Wartime*. New York: Random House, 1998.

Harr, Jonathan. *A Civil Action*. New York: Random House, 1995.

Potter, Jerry Allen and Fred Bost. *Fatal Justice, Reinvestigating the MacDonald Murders*. New York: W.W. Norton & Co., 1995.

Rehnquist, William. *The Supreme Court*. New York: Random House, 1987.

McGinnis, Joe. *Fatal Vision*. New York: G.P Putnam's Sons, 1984.

Zobel, Hiller. *The Boston Massacre*. New York: W.W. Norton & Co., 1970.

Frost, Lawrence A. *The Court-Martial of General George Armstrong Custer*. Norman, OK: University of Oklahoma Press, 1968.

Capote, Truman. *In Cold Blood*. New York: Random House, 1965.

Lee, Harper. *To Kill a Mockingbird*. New York: HarperCollins, 1960.

Wouk, Herman. *The Caine Mutiny: A Novel of World War II*. Boston, MA: Little, Brown and & Co., 1951.

### **History**

Chadwick, Bruce. *Triumvirate: The Story of the Unlikely Alliance that Saved the Constitution and United the Nation*. Naperville, IL: Sourcebooks, Inc., 2009.

McPherson, James. *Tried by War: Abraham Lincoln as Commander in Chief*. New York: Penguin Group, 2008.

Anderson, Lars. *Carlisle v. Army: Jim Thorpe, Dwight Eisenhower, Pop Warner, and the Forgotten Story of Football's Greatest Battle*. New York: Random House, 2007.

Hosseini, Khaled. *A Thousand Splendid Suns*. New York: Penguin Group, 2007.

Stewart, David. *Summer of 1787: The Men Who Invented the Constitution*. New York: Simon & Schuster, 2007.

Mortenson, Greg & David Oliver Relin. *Three Cups of Tea: One Man's Mission to Fight Terrorism and Build Nations . . . One School at a Time*. New York: Penguin Group, 2006.

Wright, Lawrence. *The Looming Tower: Al-Qaeda and the Road to 9/11*. New York: Random House, 2006.

Langguth, A.J. *Union 1812: The Americans Who Fought the Second War of Independence*. New York: Simon & Schuster, 2006.

Goodwin, Doris Kearns. *Team of Rivals: The Political Genius of Abraham Lincoln*. New York: Simon & Schuster, 2005.

McCullough, David. *1776*. New York: Simon & Schuster, 2005.

Fischer, David Hackett. *Washington's Crossing*. Oxford: Oxford University Press, 2004.

Whitlock, Flint. *The Fighting First: The Untold Story of the Big Red One on D-Day*. Boulder, CO: Westview Press, 2004.

Hosseini, Khaled. *The Kite Runner*. New York: Penguin Group, 2003.

Isaacson, Walter. *Benjamin Franklin: An American Life*. New York: Simon & Schuster, 2003.

Lewis, Bernard. *The Crisis of Islam: Holy War and Unholy Terror*. New York: Random House, 2003.

Philbrick, Nathaniel. *Sea of Glory: America's Voyage of Discovery: The U.S. Exploring Expedition, 1838-1842*. New York: Penguin Group, 2003.

Seierstad, Anse. *The Bookseller of Kabul*. Boston, MA: Little, Brown and & Co., 2003.

Wheelan, Joseph. *Jefferson's War: America's First War on Terror, 1801-1805*. New York: Carroll & Graf, 2003.

McCullough, David. *John Adams*. New York: Simon & Schuster, 2001.

Morris, Edmund. *Theodore Rex*. New York: Random House, 2001.

Winik, Jay. *April 1865: The Month That Saved America*. New York: HarperCollins, 2001.

Bradley, James. *Flags of Our Fathers*. New York: Random House, 2000.

Philbrick, Nathaniel. *In the Heart of the Sea, The Tragedy of the Whaleship Essex*. New York: Penguin Group, 2000.

Rashid, Ahmed. *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia*. New Haven, CT: Yale University Press, 2000.

McPherson, James. *Battle Cry Freedom: The Civil War Era*. Oxford: Oxford University Press, 1988.

Frazier, Charles. *Cold Mountain*. New York: Grove Press, 1997.

McMaster, H.R. *Dereliction of Duty: Johnson, McNamara, the Joint Chiefs of Staff, and the Lies That Led to Vietnam*. New York: HarperCollins, 1997.

Ambrose, Stephen. *Undaunted Courage: Meriwether Lewis, Thomas Jefferson, and the Opening of the American West*. New York: Touchstone, 1996.

Booth, T. Michael and Duncan Spencer. *Paratrooper: The Life and Times of General James Gavin*. New York: Simon & Schuster, 1994.

Guterson, David. *Snow Falling on Cedars*. New York: Harcourt Brace & Co., 1994.

United States Army. *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975*. Washington, D.C.: Government Printing Office, 1975.

Kennedy, John F. *Profiles in Courage: Decisive Moments in the Lives of Celebrated Americans*. New York: Harper & Brothers, 1956.

### Appendix C

#### JAG Corps Professional Reading List & Supplemental List for Deployment<sup>162</sup>

##### Cases

*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)  
*Ex parte Quirin*, 317 U.S. 1 (1942)  
*Application of Yamashita*, 327 U.S. 1 (1946)  
*Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804)  
*Reid v. Covert*, 354 U.S. 1 (1957)  
*Solorio v. United States*, 483 U.S. 435 (1987)  
*Trial of Sawada*, V Law Reports of Trials of War Criminals 1 (1946)  
*Weiss v. United States*, 510 U.S. 163 (1994)  
*Loving v. United States*, 517 U.S. 748 (1996)  
*United States v. Jacoby*, 29 C.M.R. 244 (1960)  
*United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979)

##### Classic military justice cases

*Swaim v. United States*, 165 U.S. 553 (1897)  
*United States v. Calley*, 48 C.M.R. 19, 22 C.M.A. 534 (1973)  
*United States v. Cruz*, 25 M.J. 326 (1987)  
*United States v. Von Leeb* (Judgment of the Tribunal) (1948)

##### Books<sup>163</sup>

FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001).

JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959 TO 1975 (Combat Studies Institute, 2003).

THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975 (1975).

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<sup>162</sup> See *supra* notes 99 and 100 (In the official published versions of both lists, Mr. Borch provides brief descriptions following each item.).

<sup>163</sup> I am using the *Bluebook* format for books within the text.

PATRICIA A. KERNS, *FIRST 50 YEARS: THE AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT* (2004).

GEORGE S. PRUGH, *LAW AT WAR: VIETNAM, 1964–1973* (1975).

GARY SOLIS, *MARINES AND MILITARY LAW: TRIAL BY FIRE* (1989).

WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920).

### **International Law and Law of Armed Conflict**

MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004).

LEON FRIEDMAN (ed.), *THE LAW OF WAR: A DOCUMENTARY HISTORY* (1972).

JOSHUA GREENE, *JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR* (2003).

DANIEL LANG, *CASUALTIES OF WAR* (1969).

GUENTHER LEWY, *AMERICA IN VIETNAM* (1969).

WILLIAM R. PEERS, *THE MY LAI INQUIRY* (1979).

JEAN S. PICTET, *COMMENTARY, GENEVA CONVENTIONS I – IV* (1952–58).

EDWARD F. L. RUSSEL, *KNIGHTS OF THE BUSHIDO: A SHORT HISTORY OF JAPANESE WAR CRIMES* (2002).

EDWARD F. L. RUSSEL, *SCOURGE OF THE SWASTIKA: A SHORT HISTORY OF NAZI WAR CRIMES* (2002).

GARY SOLIS, *SON THANG: AN AMERICAN WAR CRIME* (1997).

TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS* (1992).

UNITED KINGDOM, MINISTRY OF DEFENSE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* (2004).

**Administrative, Civil (including Litigation), Constitutional, Contract and Environmental Law**

AKHIL R. AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005).

JONATHAN HARR, *A CIVIL ACTION* (1995).

THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (1988).

JAMES W. MCELHANEY, *MCELHANEY'S TRIAL NOTEBOOK* (1995).

**Military Justice**

JACK H. CROUCHET, *VIETNAM STORIES: A JUDGE'S MEMOIR* (1997).

JOSEPH.DIMONA, *GREAT COURT-MARTIAL CASES* (1972).

EUGENE R. FIDELL & DWIGHT SULLIVAN, *EVOLVING MILITARY JUSTICE* (2002).

WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* (1973).

Kenneth J. Hodson, *Military Justice: Abolish or Change*, 22 KAN. L. REV. 31 (1973).

WILLIAM B. HUIE, *THE EXECUTION OF PRIVATE SLOVIK* (1954).

JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775 TO 1980* (2001).

MARY MCCARTHY, *MEDINA* (1972).

CHARLES M ROBINSON, *THE COURT-MARTIAL OF LIEUTENANT HENRY FLIPPER* (1994).

ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970).

JAMES E. VALLE, *ROCKS AND SHOALS* (1980).

**Supplemental Reading List for Deploying Judge Advocates**

CRAIG M. MULLANEY, *THE UNFORGIVING MINUTE: A SOLDIER'S EDUCATION* (2009).

DAVID FINKEL, *THE GOOD SOLDIERS* (2009).

James Gant, *A Strategy for Success in Afghanistan: One Tribe at a Time*, available at <http://blog.stevenpressfield.com>.

Warner F. Volney, *Afghanistan: Context and What's Next*, *JOINT FORCES Q.* vol. 56, at 18-24 (Jan. 2010), available at [http://www.ndu.edu/inss/Press/jfq\\_pages/i56.htm](http://www.ndu.edu/inss/Press/jfq_pages/i56.htm).

**Appendix D****U.S. Army Professional Reading List<sup>164</sup>****Sublist 1 (Cadets, Soliders, Junior NCOs)**

Atkinson, Rick. *An Army at Dawn: The War in Africa, 1942–1943* (2002).

Boot, Max. *The Savage Wars of Peace: Small Wars and the Rise of American Power* (2002).

Crane, Stephen. *The Red Badge of Courage* (1982).

Constitution of the United States.

Hogan, David W. Jr. *Centuries of Service: The U.S. Army, 1775–2005* (2005).

Keegan, John. *The Face of Battle* (1985).

Kindsvatter, Peter S. *American Soldiers: Ground Combat in the World Wars, Korea, and Vietnam* (2003).

McCullough, David. *1776* (2006).

McPherson, James M. *For Cause and Comrades: Why Men Fought in the Civil War* (1997).

Moore, Harold G. and Joseph L. Galloway. *We Were Soldiers Once . . . and Young* (2004).

Stewart, Richard W. *American Military History, Vol. II: The United States Army in a Global Era, 1917–2003* (2005)

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<sup>164</sup> See *supra* notes 94 and 95 (in the official version, the CMH provides brief descriptions following each book). The same format followed in the official version (alphabetical by author, book title, and date published) is used in the text.

**Sublist 2 (Company Grade NCOs, WO1-CW3, and Company Grade Officers)**

Atkinson, Rick. *The Day of Battle: The War in Sicily and Italy, 1943-1944* (2008).

Appleman, Roy E. *East of Chosin: Entrapment and Breakout in Korea, 1950* (1987).

Bolger, Daniel. *Savage Peace: Americans at War in the 1990's* (1995)

Brown, Todd S. *Battleground Iraq: Journal of a Company Commander* (2007).

Fischer, David Hackett. *Washington's Crossing* (2003).

Galula, David. *Counterinsurgency Warfare: Theory and Practice* (2005).

Heller, Charles E. and Stofft, William A., eds. *America's First Battles: 1776-1965* (1986).

Knox, MacGregor and Murray, Williamson, eds. *The Dynamics of Military Revolution, 1300-2050* (2001).

MacDonald, Charles B. *Company Commander* (1947).

Parker, Geoffrey, ed. *Cambridge Illustrated History of Warfare* (2000).

Van Creveld, Martin. *Supplying War: Logistics from Wallenstein to Patton* (1977).

**Sublist 3 (Senior NCOs, CW4-CW5, Field Grade Officers)**

Birtle, Andrew J. *U.S. Army Counterinsurgency and Contingency Operations Doctrine, 1942-1976* (2006).

Clodfelter, Mark A. *The Limits of Air Power: The American Bombing of North Vietnam* (2006).

Dobak, William A. and Thomas D. Phillips. *The Black Regulars, 1866–1898* (2001).

Gordon, Michael and Bernard Trainor. *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* (2007).

Grossman, Dave. *On Killing: The Psychological Cost of Learning to Kill in War and Society* (1995).

Grotelueschen, Mark E. *The AEF Way of War: The American Army and Combat in World War I* (2006).

Linn, Brian McAllister. *The Philippine War, 1899-1902* (2000).

McPherson, James. *Battle Cry of Freedom: The Civil War Era* (1988).

Neustadt, Richard E. and Ernest May. *Thinking in Time: The Uses of History for Decision Makers* (1986).

Palmer, Dave R. *Summons of the Trumpet: U.S.–Vietnam in Perspective* (1995).

Paret, Peter, ed. *Makers of Modern Strategy: From Machiavelli to the Nuclear Age* (1986).

#### **Sublist 4 (Senior Leaders above Brigade Level)**

Cohen, Eliot A. *Supreme Command: Soldiers, Statesmen, and Leadership in Wartime* (2002).

D'Este, Carlo. *Eisenhower: A Soldier's Life* (2002).

Habeck, Mary. *Knowing the Enemy: Jihadist Ideology and the War on Terror* (2007).

Huntington, Samuel. *The Clash of Civilizations and the Remaking of World Order* (1996).

McMaster, H.R. *Dereliction of Duty* (1998).

Reid, Michael. *The Forgotten Continent: The Battle for Latin America's Soul* (2008).

Segal, David R. *Recruiting for Uncle Sam: Citizenship and Military Manpower Policy* (1989).

Slim, Viscount William. *Defeat Into Victory: Battling Japan in Burma and India 1942–45* (2000).

Stoler, Mark A. *George C. Marshall: Soldier-Statesman of the American Century* (1989).

Strassler, Robert., ed. *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War* (1998).

Yates, Lawrence A. *The U.S. Military Intervention in Panama* (2008).

**Appendix E**<sup>165</sup>**E-1. 58th Graduate Course (2009–2010) Faculty Book Selections**

*Accidental Guerilla*, David Kilcullen

*American Lion: Andrew Jackson in the White House*, Jon Meacham

*Bad Advice: Bush's Lawyers in the War on Terror*, Harold Bruff

*The Challenge: Hamdan v. Rumsfeld and the Fight over Presidential Power*, Jonathan Mahler

*A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before*, Cass Sunstein

*The Crisis of Islamic Civilization*, Ali Allawi

*A Failure of Capitalism: The Crisis of '08 and the Descent into Depression*, Richard A. Posner

*The Forever War*, Dexter Filkins

*Gallipoli*, Robin Prior

*The Gamble*, Thomas Ricks

*The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court*, Cliff Sloan and David McKean

*The Green Zone: The Environmental Costs of Militarism*, Barry Sanders and Mike Davis

*Hunting Eichmann*, Neal Bascomb

*In a Time of War*, Bill Murphy

*Joker One*, Donovan Campbell

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<sup>165</sup> I am only listing the book title and author in this appendix.

*Kesslering's Last Battle: War Crimes Trials and Cold War Politics*, Kerstin von Lingen

*The Limits of Power: The End of American Exceptionalism*, Andrew Bacevich

*The Mission, The Men, and Me: Lessons from a Former Delta Force Commander*, Pete Blaber

*Outliers*, Malcolm Gladwell

*Prisoner of the State: The Secret Journal of Premier Zhao, Ziyang Zhao*, Ziyang

*Reagan's Secret War: The Untold Story of His Fight to Save the World from Nuclear Disaster*, Martin Anderson

*A Safe Haven: Harry S. Truman and the Founding of Israel*, Ronald Radosh

*Seven Deadly Scenarios: A Military Futurist Explores War in the 21st Century*, Andrew F. Krepinevich

*The Scientific Way of Warfare: Order and Chaos on the Battlefields of Modernity*, Antoine J. Bousquet

*Tanker War*, Lee Alan Zatarain

*The Tokyo War Crimes Trial*, Yuma Totani

*Triumvirate*, Bruce Chadwick

*The Unforgiving Minute*, Craig Mullaney

*Warrior King*, Nathan Sassaman

*War of Necessity, War of Choice*, Richard Haass

*Wired for War*, P.W. Singer

**E-2. 59th Graduate Course (2010–2011) Faculty Book Selections**

*American Civil-Military Relations: The Soldier and the State in a New Era*, Suzanne C. Nielsen (editor) and Don M. Snider (editor)

*Black Hearts: One Platoon's Descent into Madness in the Triangle of Death*, Jim Frederick

*Counterinsurgency*, David Kilcullen

*Court-Martial at Parris Island: The Ribbon Creek Incident*, John Stevens

*Cyber War*, Richard Clarke

*Dogface Soldier: The Life of General Lucian K. Truscott, Jr.*, Wilson Heefner

*The Ends of Life: Roads to Fulfillment in Early Modern England*, Keith Thomas

*Forces of Fortune: The Rise of the New Muslim Middle Class and What It Will Mean for Our World*, Vali Nasr

*The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army*, Greg Jaffe and David Cloud

*The Good Soldiers*, David Finkel

*Greetings from Afghanistan, Send More Ammo*, Benjamin Tupper

*The Guantanamo Lawyers: Inside a Prison Outside the Law*, Jonathan Hafetz

*In the Graveyard of Empires: America's War in Afghanistan*, Seth Jones

*Jefferson's War: America's First War on Terror 1801–1805*, Joseph Wheelan

*The Last Stand*, Nathaniel Philbrick

*Makers of Ancient Strategy*, Victor David Hansen

*The Most Dangerous Place: Pakistan's Lawless Frontier*, Imtiaz Gul

*Operation Mincemeat: How a Dead Man and a Bizarre Plan Fooled the Nazi and Assured an Allied Victory*, Ben Macintyre

*Palestine Betrayed*, Efraim Karsh

*Rocks and Shoals: Naval Discipline in the Age of Fighting Sail*, James E. Vale

*The Secrets of Abu Ghraib Revealed: American Soldiers on Trial*, Chris Graveline

*Tortured: When Good Soldiers Do Bad Things*, Justine Sharrock

*The Ultimate Weapon is No Weapon: Human Security and the New Rules of War and Peace*, Shannon D. Beebe and May H. Kaldor

*The Untold War: Inside the Hearts, Minds, and Souls of Our Soldiers*, Nancy Sherman

*War*, Sebastian Junger

*The War Lovers: Roosevelt, Lodge, Hearst, and the Rush to Empire, 1898*, Evan Thomas

*Where Men Win Glory*, John Kraukauer

*The World Turned Upside Down: The Global Battle over God, Truth, and Power*, Melanie Phillips

## Appendix F

Student Book Reviews Since October 2004<sup>166</sup>**F-1. *Military Law Review* (October 2004–December 2009) (32 student book reviews)<sup>167</sup>**

*Solving the War Puzzle: Beyond the Democratic Peace*, Major Rich DiMeglio, 182 MIL. L. REV. 152 (Winter 2004).

*The Mission, Waging War and Keeping Peace with America's Military*, Major Julie Long, 182 MIL. L. REV. 160 (Winter 2004).

*Imperial Hubris: Why the West is Losing the War on Terror*, Major Jeremy Ball, 183 MIL. L. REV. 187 (Spring 2005).

*Washington's Crossing*, Major Jonathan Cheney, 183 MIL. L. REV. 199 (Spring 2005).

*The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*, Major Deon Green, 184 MIL. L. REV. 202 (Summer 2005).

*The Darkest Jungle*, Major Charles Ormsby, Jr., 184 MIL. L. REV. 212 (Summer 2005).

*Lost Triumph, Lee's Real Plan at Gettysburg—And Why it Failed*, Major Timothy Hayes, Jr., 186 MIL. L. REV. 188 (Winter 2005).

*Gettysburg July 1*, Major Jerrett Dunlap, Jr., 186 MIL. L. REV. 195 (Winter 2005).

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<sup>166</sup> October 2004 was the month that student book reviews were published in both the *Military Law Review* and *The Army Lawyer*. In this section of the appendix, book reviews appear in chronological order in the following format: book title, student reviewer, publication volume, page, and date.

<sup>167</sup> The four non-student book reviews published in the MLR during these five years are: Colonel David A. Wallace, *Pierce O'Donnell's In Time of War*, 188 MIL. L. REV. 96 (Summer 2006) (book review); Fred L. Borch III, *Stanley Weintraub's 15 Stars: Eisenhower, MacArthur, Marshall: Three Generals Who Saved the American Century*, 193 MIL. L. REV. 202 (Fall 2007) (book review); Mitchell McNaylor, *A.J. Liebling's World War II Writings*, 196 MIL. L. REV. 170 (Summer 2008) (book review); and Fred L. Borch III, *David Zabecki's Chiefs of Staff: The Principal Officers Behind History's Great Commanders*, 200 MIL. L. REV. 208 (Summer 2009) (book review).

*Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*, Major Emily Schiffer, 187 MIL. L. REV. 174 (Spring 2006).

*America's Splendid Little Wars*, Major Keith Parrella, 187 MIL. L. REV. 174 (Spring 2006).

*Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933-34*, Major Jimmy Bagwell, 188 MIL. L. REV. 174 (Summer 2006).

*Cobra II: The Inside Story of the Invasion and Occupation of Iraq*, Major Daniel J. Sennott, 189 MIL. L. REV. 112 (Fall 2006).

*American Theocracy: The Peril and Politics of Radical Religion, Oil, and Borrowed Money in the 21<sup>st</sup> Century*, Major Bruce Page, Jr., 190/191 MIL. L. REV. 175 (Winter 2006/Spring 2007).

*Scapegoats of the Empire, The True Story of Breaker Morant's Bushveldt Carbineers*, Lieutenant Commander David Furry, 192 MIL. L. REV. 127 (Summer 2007).

*A War like No Other: How the Athenians and Spartans Fought the Peloponnesian War*, Major Eric Young, 192 MIL. L. REV. 134 (Summer 2007).

*Hubris: The Inside Story of Spin, Scandal, and the Selling of Iraq*, Major Geoffrey DeWeese, 194 MIL. L. REV. 170 (Winter 2007).

*The Shia Revival: How Conflicts Within Islam Will Shape the Future*, Major Joseph Jankunis, 194 MIL. L. REV. 179 (Winter 2007).

*Mayflower: A Story of Courage, Community, and War*, Major Doug Choi, 194 MIL. L. REV. 189 (Winter 2007).

*The Looming Tower: Al-Qaeda and the Road to 9/11*, Major Jeffrey Thurnher, 195 MIL. L. REV. 203 (Spring 2008).

*The Fall of Carthage: The Punic Wars 265-146 BC*, Major Brian Harlan, 195 MIL. L. REV. 211 (Spring 2008).

*Andrew Jackson and the Politics of Martial Law: Nationalism, Civil Liberties and Partisanship*, Major Paul Golden, 196 MIL. L. REV. 163 (Summer 2008).

*Not a Suicide Pact: The Constitution in a Time of National Emergency*, Major Matthew Hover, 197 MIL. L. REV. 164 (Fall 2008).

*Copperheads: The Rise and Fall of Lincoln's Opponents in the North*, Major Scott Dunn, 197 MIL. L. REV. 173 (Fall 2008).

*The Terror Presidency: Law and Judgment Inside the Bush Administration*, Major Brian Gavula, 198 MIL. L. REV. 210 (Winter 2008).

*The Post-American World*, Major Walter Kwon, 198 MIL. L. REV. 219 (Winter 2008).

*Mirror of the Arab World: Lebanon in Conflict*, Major Ronen Shor, 199 MIL. L. REV. 135 (Spring 2009).

*The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, Major Kevin McCarthy, 199 MIL. L. REV. 144 (Spring 2009).

*Private Sector, Public Wars: Contractors in Combat—Afghanistan, Iraq and Future Conflicts*, Major Steve Berlin, 199 MIL. L. REV. 153 (Spring 2009).

*Culture and Conflict in the Middle East*, Major J. Nelson, 200 MIL. L. REV. 217 (Summer 2009).

*Sway: The Irresistible Pull of Irrational Behavior*, Major Michael O'Neill, 201 MIL. L. REV. 217 (Fall 2009).

*7 Deadly Scenarios*, Major Ann B. Ching, 202 MIL. L. REV. 283 (Winter 2009).

*The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Major Jennifer Neuhauser, 202 MIL. L. REV. 291 (Winter 2009).

**F-2. *The Army Lawyer* (October 2004–December 2009)<sup>168</sup> (64 student book reviews)<sup>169</sup>**

*The Bowden Way*, Major John P. Jurden, Oct. 2004, at 30.

*Brothers in Arms: The Epic Story of the 761st Tank Battalion, WWII's Forgotten Heroes*, Major Italia A. Carson, Nov. 2004, at 27.

*Founding Mothers: The Women Who Raised Our Nation*, Captain Heather J. Fagan, Nov. 2004, at 33.

*The Bedford Boys: One American Town's Ultimate D-Day Sacrifice*, Major John G. Baker, Feb. 2005, at 25.

*Imperial Hubris: Why the West Is Losing the War on Terror*, Captain Brian C. Baldrate, Feb. 2005, at 29.

*Solving the War Puzzle: Beyond the Democratic Peace*, Major Billy B. Ruhling, II, Feb. 2005, at 35.

*Founding Mothers: The Women Who Raised Our Nation*, Captain Alyssa M. Schwenk, Mar. 2005, at 43.

*The Carolina Way: Leadership Lessons from a Life in Coaching*, Major Michael S. Devine, Apr. 2005, at 89.

*The Carolina Way: Leadership Lessons from a Life in Coaching*, Major Jayanth Jayaram, Apr. 2005, at 94.

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<sup>168</sup> In this section of the appendix, *The Army Lawyer* book reviews appear in chronological order by book title, reviewer, publication date, and page).

<sup>169</sup> The five non-student book reviews published in the *Army Lawyer* since it began publishing book reviews are: Lieutenant Colonel Anthony R. Tempesta, *Scott Waddell's The Right Thing*, ARMY LAW. 24 (Oct. 2004) (book review); Colonel Thomas D. Arnhold, Paul Dickson & Thomas B. Allen's *The Bonus Army: An American Epic*, ARMY LAW. 95 (Sept. 2005) (book review); Lieutenant Colonel Walter M. Hudson, *Jack L. Goldsmith & Richard Posner's The Limits of International Law*, ARMY LAW., Sept. 2006, at 31 (book review); Lieutenant Colonel John Siemietkowski, *Michael J. Durant & Steven Hartov's In the Company of Heroes*, ARMY LAW., Nov. 2006, at 61 (book review); and Major James A. Barkei, *David E. Mosher et al.'s Green Warriors: Army Environmental Considerations for Contingency Operations from Planning Through Post-Conflict*, ARMY LAW., Dec. 2008, at 86 (book review).

*Founding Mothers: The Women Who Raised Our Nation*, Major Mary E. Card, May 2005, at 99.

*In Harm's Way: The Sinking of the USS Indianapolis and the Extraordinary Story of Its Survivors*, Major Eric R. Carpenter, June 2005, at 48.

*The Darkest Jungle: The True Story of the Darién Expedition and America's Ill-Fated Race to Connect the Seas*, Major Susan E. Watkins, July 2005, at 52.

*Washington's Crossing*, Major Devin A. Winklosky, Aug. 2005, at 55.

*Spy Handler: Inside the World of a KGB "Heavy Hitter,"* Major John C. Johnson, Oct. 2005, at 60.

*Lincoln's War: The Untold Story of America's Greatest President as Commander in Chief*, Captain Tamar Tavory, Oct. 2005, at 65.

*A Question of Loyalty: Gen. Billy Mitchell and the Court-Martial that Gripped the Nation*, Captain Jennifer L. Crawford, Nov. 2005, at 46.

*The Boys of Pointe du Hoc: Ronald Reagan, D-Day and the U.S. Army 2nd Ranger Battalion*, Major Michael Freyermuth, Dec. 2005, at 72.

*Three Nights in August: Strategy, Heartbreak, and Joy: Inside the Mind of a Manager*, Major Roseanne Bleam, Feb. 2006, at 29.

*First In: An Insider's Account of How the CIA Spearheaded the War on Terror in Afghanistan*, Major Howard H. Hoege, Feb. 2006, at 33.

*In Time of War: Hitler's Terrorist Attack on America*, Major Christine M. Schverak, Mar. 2006, at 23.

*Gulag: A History*, Major William J. Dobosh, Jr., Apr. 2006, at 95.

*Gettysburg July 1*, Major Robert A. Broadbent, May 2006, at 28.

*The Vietnam War on Trial*, Major Andras M. Marton, June 2006, at 74.

*General George Washington, A Military Life*, Captain Sean M. Condrón, July 2006, at 35.

*Lost Triumph: Lee's Real Plan at Gettysburg—and Why It Failed*, Major Jason M. Bell, Aug. 2006, at 35.

*Guests of the Ayatollah: The First Battle in America's War with Militant Islam*, Major Patrick D. Pflaum, Oct. 2006, at 39.

*AWOL: The Unexcused Absence of America's Upper Class from Military Service—and How It Hurts Our Country*, Major Charles Kuhfahl Jr., Feb. 2007, at 38.

*His Excellency: George Washington*, Major Robert A. Vedra, Mar. 2007, at 47.

*Team of Rivals The Political Genius of Abraham Lincoln*, Major Aaron Wagner, Mar. 2007, at 52.

*Grant and Sherman: The Friendship that Won the Civil War*, Major Olga M. Anderson, Apr. 2007, at 46.

*James Madison and the Struggle for the Bill of Rights*, Lieutenant Commander David M. Gonzalez, Apr. 2007, at 51.

*Washington's Spies*, Captain Robert L. Martin, June 2007, at 76.

*Confessions of an Economic Hit Man*, Major Kay K. Wakatake, June 2007, at 80.

*State of War: The Secret History of the CIA and the Bush Administration*, Major Danyele M. Jordan, Aug. 2007, at 67.

*Revolutionary Characters: What Made the Founders Different?*, Major Kyle D. Murray, Aug. 2007, at 72.

*Just Americans: How Japanese Americans Won a War at Home and Abroad*, Major Jason S. Wrachford, Sept. 2007, at 42.

*Charlie Wilson's War: The Extraordinary Story of the Largest Covert Operation in History*, Major Eric D. Magnell, Oct. 2007, at 94.

*Nixon and Kissinger: Partners in Power*, Major Shane Reeves, Nov. 2007, at 79.

*American Patriot: The Life and War of Colonel Bud Day*, Major Kirsten M. Dowdy, Dec. 2007, at 81.

*Blood Money: Wasted Billions, Lost Lives, and Corporate Greed in Iraq*, Major Timothy Austin Furin, Feb. 2008, at 50.

*This Mighty Scourge: Perspectives on the Civil War*, Major William E. Mullee, Feb. 2008, at 56.

*Band of Sisters: American Women at War in Iraq*, Major Tyesha E. Lowery, Mar. 2008, at 46.

*The Price of Liberty: Paying for America's Wars*, Major S. Charles Neill, Mar. 2008, at 51.

*Lincoln the Lawyer*, Major Tonya L. Jankunis, Apr. 2008, at 51.

*Nuclear Sphinx of Tehran*, Major Tom F. Jasper Jr., USMC, May 2008, at 43.

*State of Denial: Bush at War, Part III*, Major Daniel A. Woolverton, Aug. 2008, at 72.

*Palestine: Peace Not Apartheid*, Major Marc B. Washburn, Nov. 2008, at 67.

*Final Salute: A Story of Unfinished Lives*, Major Patricia K. Hinshaw, Jan. 2009, at 59.

*Contractor Combatants: Tales of an Imbedded Capitalist*, Major Patricia K. Hinshaw, Jan. 2009, at 64.

*Setting the Desert on Fire*, Major Jennifer Clark, Apr. 2009, at 62.

*Descent into Chaos: The United States and the Failure of National Building in Pakistan, Afghanistan, and Central Asia*, Major William Johnson, Apr. 2009, at 69.

*The Dirty Dozen*, Major Jonathan Hirsch, June 2009, at 50.

*How Judges Think*, Major Casey Z. Thomas, June 2009, at 55.

*Standard Operating Procedure*, Major Kenneth Bacso, July 2009, at 55.

*Lincoln and the Court*, Major Robert C. Stelle, Aug. 2009, at 54.

*The Day Freedom Died: The Colfax Massacre, The Supreme Court and The Betrayal of Reconstruction*, Major Phillip Griffith, Aug. 2009, at 59.

*Retribution: The Battle for Japan, 1944–45*, Major Bailey W. Brown, III, Sept. 2009, at 48.

*Your Government Failed You: Breaking the Cycle of National Security Disasters*, Major Matthew Kemkes, Sept. 2009, at 53.

*The Great Decision*, Major Kevin W. Landtroop, Oct. 2009, at 53.

*The Limits of Power: The End of American Exceptionalism*, Lieutenant Paige J. Ormiston, Oct. 2009, at 57.

*The Unforgiving Minute: A Soldier's Education*, Major Jeremy M. Larchick, Nov. 2009, at 57.

*War of Necessity, War of Choice: A Memoir of Two Iraq Wars*, Major Jeri Hanes, Nov. 2009, at 62.

*Gallipoli, The End of the Myth*, Lieutenant Commander Brian W. Robinson, Dec. 2009, at 47.

*Prisoner of the State: The Secret Journal of Zhao Ziyang*, Major E. John Gregory, Dec. 2009, at 52.

### Appendix G

#### History of the Book Review in the *Military Law Review* and *The Army Lawyer*

Judge advocates in the 1st Judge Advocate Officer Advanced Course (1952–53) did not have to submit a book review, yet every student in the 58th Graduate Course (2009–10) had to submit one.<sup>170</sup> This appendix provides a brief history of the book review as a Graduate Course requirement within the Professional Writing Program and the publication of select student written reviews in the *Military Law Review* and *The Army Lawyer*.

##### *From the Advanced Course to the Graduate Course*

Although the JAG Corps has provided legal services to the Army since 1775, formal legal training and instruction did not begin until 1942<sup>171</sup> and later, the permanent home of the JAG School was established in Charlottesville, Virginia, in 1951.<sup>172</sup> During its first year,

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<sup>170</sup> PWP MANUAL, *supra* note 135, at 14–15.

<sup>171</sup> REPORTS OF THE JUDGE ADVOCATE GENERAL'S SCHOOL, 1951–1968, at 1 (This book is a compilation of The Judge Advocate General's School records from 1951–1968 bound together in one volume. The first section of the bound volume contains a report entitled *The Judge Advocate General's School, 1951–1961*. Thereafter, there are annual reports for each academic year from 1961–62 through 1967–68.) [hereinafter JAG SCHOOL REPORTS]. The National University Law School, now George Washington University National Law Center, was the initial site used for judge advocate legal training in February 1942. ARMY JUDGE ADVOCATE GENERAL'S SCHOOL ANNUAL BULL., 1977–1978, at 1 [hereinafter 1977–1978 ANNUAL BULL.]. The “Home of the Army Lawyer” moved to the University of Michigan Law School in Ann Arbor in August 1942, but was “deactivated in 1946 during the general demobilization after World War II.” *Id.* With the passage of the UCMJ in 1950 and the start of the Korean War, a temporary school was established at Fort Meyer, Virginia, and Colonel Charles L. Decker began the search to establish a permanent JAG School. Colonel Decker narrowed the search to the University of Tennessee and the University of Virginia. “Ultimately, the invitation from President Colgate W. Darden, Jr., was accepted . . . [because the] University of Virginia possessed the most ideal facilities, . . . reasonable rental costs, and a location in close proximity to the Office of the Judge Advocate General in Washington D.C.” *Id.* On 30 July 1951, the Department of the Army signed a year-to-year lease with the University of Virginia to rent space for \$46,000 per year and by 27 August, the JAG School began operations in Charlottesville JAG SCHOOL REPORTS, *supra*, at 3.

<sup>172</sup> JAG SCHOOL REPORTS, *supra* note 171, at 3. The JAG School was originally located in the Hancock House on the main campus of the University of Virginia campus. *Id.* at 24. The JAG School's current location on the North Grounds next to the University of Virginia's School of Law was completed and dedicated in June 1975 (during the same

the JAG School ran a series of eight week courses in military law.<sup>173</sup> The 1st Judge Advocate Officer Advanced Course was held from October 1952 through May 1953.<sup>174</sup> The name changed to the “Graduate Course” with the start of the 28th Judge Advocate Graduate Course in August 1979.<sup>175</sup>

From the 1st Advanced Course in the early 1950s through the Graduate Courses in the late 1970s, there was a competitive selection process for attendance at the Advanced/Graduate Course.<sup>176</sup> This

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month as the JAG Corps’ 200th birthday). 1977–1978 ANNUAL BULL., *supra* note 171, at 1–2. The U.S. Army Judge Advocate General’s School became The Judge Advocate General’s Legal Center and School in July 2003. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL ANNUAL BULLETIN, 2003–2004, at 3 [hereinafter 2003–2004 ANNUAL BULL.].

<sup>173</sup> The “Regular Course” was held twenty-seven times between 1951 and 1955. It was later expanded to an eleven week “Special Course.” JAG SCHOOL REPORTS, *supra* note 171, at 6.

<sup>174</sup> The Advanced Course retained its name from the 1st Advanced Course (1952–53) through the 8th Advanced Course (1959–1960). *Id.* at 65–69. Although the 8th Advanced Course retained its name, “[d]uring 1959–60, the Advanced Course was redesignated, by the Continental Army Command, as the Judge Advocate Officer Career Course.” *Id.* at 9. The “Career Course” designation was used for the 9th Career Course (1960–61) through the 14th Career Course (1965–1966) and then was changed back to Advanced Course for the 15th Advanced Course (1966–1967). *Id.* at 69 (within the 1951–1961 Report), 10 (within the 1965–1966 Annual Report, and 12 (within the 1966–1967 Annual Report).

<sup>175</sup> ARMY JUDGE ADVOCATE GENERAL’S SCHOOL ANNUAL BULL., 1978–1979, at 9 and 17 [hereinafter 1978–79 ANNUAL BULL.]. Unrelated to the students, another interesting change for the 1978–79 academic year was that a “sabbatical program was established for instructors to be relieved of other duties for a period of up to six weeks for scholarly research and writing.” *Id.* at 4. The following chart displays the course name changes between 1952 and 2010.

<i>Academic Years (Course No.)</i>	<i>Course Name</i>	<i>Length</i>
1952–53 (1st) to 1959–60 (8th)	Advanced Course	32–35 weeks (Oct–May)
1960–61 (9th) to 1965–66 (14th)	Career Course	35–36 weeks (Sep–May)
1966–67 (15th) to 1978–79 (27th)	Advanced Course	41 weeks (Aug–May)
1979–80 (28th) to 2009–10 (58th)	Graduate Course	41 weeks (Aug–May)

The data for the chart was compiled from a review of the JAG School’s Annual bulletins. In 1956, the course was increased from thirty-two to thirty-four weeks. In the 1960s, the course was increased to nine months beginning in September rather than October. In the early 1970s, the course started in August as it remains today.

<sup>176</sup> See 1977–1978 ANNUAL BULL., *supra* note 171; 1978–1979 ANNUAL BULL., *supra* note 175, which both state: “Attendance at the [Advanced Course/Graduate Course] is competitive, with selection of Army lawyers made by a board of officers convened by The Judge Advocate General.” *Id.* at 9 (for both bulletins). The selection rate was approximately one-third of the eligible officers. As expected in any competitive process,

“competitive selection” process ended in the early 1980s when essentially all eligible active duty Army judge advocates were required to attend the Graduate Course.<sup>177</sup> The addition of sister service students, reservists and international students came at different times.<sup>178</sup> Although

those who attended the Advanced/Graduate Course were among the vast majority of those selected for promotion. Borch Interview, *supra* note 104. The number of active duty Army judge advocates attending the Advanced/Graduate Course has dramatically increased over its fifty-eight year history. In the 1950s there was an average of twenty active duty Army judge advocates (out of an average class size of twenty-five students). The overall average class size rose steadily to an average of fifty to sixty students per year from the late 1970s through the mid-1980s. In 1986, the overall average rose to between sixty and eighty-five students per class. Recently, the 57th and 58th Graduate Courses (2008–2009 and 2009–2010) both had approximately 115 students (data compiled from reviewing Graduate Course “Facebooks”) (on file with author).

<sup>177</sup> As late as 2002–2003, the *Annual Bulletin* retained the comment that “[s]election at the Graduate Course is competitive.” While the statement is true in the sense that promotion to Major is “competitive,” it is a different connotation than that conveyed in the annual bulletins through the late 1970s where only a third (and not all) of the eligible officers were selected to attend the Graduate Course. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL ANNUAL BULLETIN, 2002–2003, at 10. *See also* Borch Interview, *supra* note 104.

<sup>178</sup>

Student Enrollment at TJAGLCS by First Year of Matriculation				
<i>Matriculation Source</i>	<i>First Year of Matriculation</i>	<i>No. of Students</i>	<i>Course Name</i>	<i>2009–2010*</i>
Army	1952–53	19	1st Advanced Course	80
Navy	1955–56	5	4th Advanced Course	6
Marine Corps	1957–58	1	6th Advanced Course	9
International	1957–58	1 <sup>†</sup>	6th Advanced Course	4 <sup>‡</sup>
Coast Guard	1957–58	1	6th Advanced Course	1
Females	1964–65	2	12th Career Course	30
Army Reserve	1989–90	2	38th Graduate Course	3
National Guard	1989–90	1	38th Graduate Course	2
Air Force	1990–91	1	39th Graduate Course	10
DA Civilian	1996–97	1	45th Graduate Course	0

\* 58th Graduate Course

† Philippine Army

‡ Egypt, Israel, Tunisia, and Turkey

*See* JAG SCHOOL REPORTS, 1951–1968, *supra* note 171, at 66 (for Naval student data), 68 and 85 (for international student data, including app. XII with a list of all international students to attend courses during the JAG School’s first ten years), 68 (for Marine Corps and Coast Guard student data), and 11–12 (within the 1963–1964 *Annual Bulletin* for female student data). While the JAG Corps Personnel Directory does not list National Guard and Army Reserve students with their active duty Graduate Course classmates until 2000-01 and 2001-02, respectively, interviews revealed National Guard and Reserve students first attended the 38th Graduate Course in 1989–1990. Interview with Dan Lavering, TJAGLCS Librarian, in Charlottesville, Va., Mar. 23, 2010 (an e-mail from

the 28th Graduate Course was “comparable to an LL.M. program,”<sup>179</sup> the first LL.M. was awarded upon successful completion of the 37th Graduate Course in 1988.<sup>180</sup>

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COL John Hoffman, a member of the 38th Graduate Course confirmed that his wife, Sharon, then a U.S. Army Reservist, also attended the 38th Graduate Course—the first to do so—along with another student who was in the USAR and a student from the Minnesota National Guard) (on file with author). Mr. Lavering also provided the data on the U.S. Air Force student’s attendance in the Graduate Course. *See also* JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, JAG PUB 1-1, at 174–75 (2000–2001) (for National Guard student data); and JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, JAG PUB 1-1, at 163 (2001–2002) (for Army Reserve student data). *See* JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, JAG PUB 1-1, at 143 (1996–1997) (for DA civilian student data).

<sup>179</sup> Along with the name change from the “Advanced Course” to the “Graduate Course” there was also a slight change in the description of the studies. The *1977–1978 Bulletin* for the 27th Advanced Course states: “The Advanced Course is comparable to a graduate law degree study program.” *See* 1977–1978 ANNUAL BULL., *supra* note 171, at 9. The *1978–79 Bulletin* for the 28th Graduate Course states: “The Graduate Course is comparable to an LL.M. program.” *See* 1978–1979 ANNUAL BULL., *supra* note 175, at 9.

<sup>180</sup> Although the LL.M. was first awarded to the 37th Graduate Course, this topic is complicated (and perhaps contentious) when discussed with graduates of the 35th and 36th Graduate Courses. “On December 4, 1987, The Judge Advocate General’s School became the nation’s only government agency statutorily authorized to confer the degree of Master of Laws (LL.M.) in Military Law.” Editorial, *TJAGSA Gains Statutory Authority to Award a Master of Laws (LL.M.) in Military Law*, ARMY LAW., Jan 1988, at 3 (while no author is listed on this two-page article, it was drafted by Mr. David Graham, Deputy Director, TJAGLCS). Interview with Mr. David Graham, Deputy Director, TJAGLCS, in Charlottesville, Va. (Mar. 15, 2010). *See also* ARMY JUDGE ADVOCATE GENERAL’S SCHOOL ANNUAL BULLETIN, 1988–1989.

Following receipt of this statutory authorization [in December 1987], the School awarded an LL.M. to graduates of the 36th Graduate Course (1987–1988). In August 1988, the ABA formally acceded to the award of the degree, with specific provision for award of an LL.M. in military law. Graduates of the 37th Graduate Course (1988–1989) and all subsequent graduates have been awarded an LL.M. in military law.

Memorandum For Record, Maurice A. Lescault, Jr., Assoc. Dean, TJAGLCS, Retroactive Award of TJAGSA LL.M. para. 1 (Apr. 10, 2006). After students from the 35th Graduate Course (1986–1987) inquired about a retroactive award of the LL.M., the School inquired with the ABA and the ABA denied the request for a retroactive award of the degree they accredited. *Id.* para. 2. As a result of the ABA’s accreditation of the LL.M. and subsequent disapproval of any retroactive award of the degree, the JAG School implemented the following policy for transcripts of students that attended the Graduate Course in 1986–1987 (35th), 1987–1988 (36th) and 1988–1989 (37th): “1987 transcripts do not reflect award of an LL.M. 1988 transcripts reflect award of an LL.M. with a “military law” characterization, and 1989 transcripts reflect award of the LL.M. in military law.” *Id.* para. 3.

*Book Reviews in the Military Law Review and The Army Lawyer*

Since the first *Military Law Review* was published in September 1958,<sup>181</sup> there have been 202 volumes published through the Winter 2009 issue.<sup>182</sup> As discussed in Section IV, above, the first 141 book reviews published in the *Military Law Review* between July 1959<sup>183</sup> and mid-2004 were voluntarily submitted by students, faculty, and other judge advocates. Based on the suggestion of Major Fred Borch and the approved proposal of Captain Stuart Risch,<sup>184</sup> the first “required” student book reviews were published in the Spring 1994 edition (Volume 144) of the *Military Law Review*.<sup>185</sup>

Volume 144 contained a total of six book reviews, including three from the 43d Graduate Course students.<sup>186</sup> With the new requirement

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<sup>181</sup> See *supra* note 122. See also Fred L. Borch, *The Military Law Review: The First Fifty Years (1958–2008)*, 197 MIL. L. REV. 1 (2008) (providing a detailed history of the *Military Law Review*, including its origins, editors and staff, and content).

<sup>182</sup> 202 MIL. L. REV. (Winter 2009).

<sup>183</sup> The total number of book reviews (141) in the first 143 volumes of the *Military Law Review* (from 1958–1994) was determined by reviewing the Book Review Indices for Volumes 1–96 and then scanning each individual volume from Volume 97–143. See 81 MIL. L. REV. 381 (Summer 1978); 91 MIL. L. REV. 270 (Winter 1981); and 96 MIL. L. REV. 201 (Spring 1982). The practice of publishing book review indices ended with Volume 96 (Spring 1982). See 101 MIL. L. REV. 167 (Summer 1983) (stating that indices will be published in every tenth issue, however, “the book review indices have been discontinued.”). *Id.*

<sup>184</sup> See *supra* notes 126–28. Research of all the book reviews published in the *Military Law Review* revealed that Major Borch wrote a staggering twenty-one of the thirty-seven total book reviews published during his tenure on the faculty between 1991–1994. He wrote a review for nearly every volume of the *Military Law Review* between Volumes 131–142, including multiple reviews in some volumes. The breakdown of Major Borch’s book reviews, appearing by volume and number within a published volume of the *Military Law Review*, is: 131 (1), 133 (1), 134 (2), 135 (2), 136 (5), 137 (1), 138 (1), 139 (5), 141 (1), and 142 (2).

<sup>185</sup> Even though Volume 144 of the *Military Law Review* is designated “Spring 1994” and Volume 145 is “Summer 1994,” the volumes were not published until late 1994 because they include book reviews from the 43d Graduate Course that began in August 1994.

<sup>186</sup> See Major Douglas S. Anderson, 144 MIL. L. REV. 168 (1994) (reviewing PICKETT’S CHARGE! EYEWITNESS ACCOUNTS (Richard Rollins ed., 1994)); Major Jackie Scott, 144 MIL. L. REV. 174 (1994) (reviewing SHE WENT TO WAR: THE RHONDA CORNUM STORY (Presidio Press, 1992)); and Major Vickia K. Mefford, 144 MIL. L. REV. 180 (1994) (reviewing HAROLD LIVINGSTONE, NO TROPHY, NO SWORD: AN AMERICAN VOLUNTEER IN THE ISRAELI AIR FORCE DURING THE 1948 WAR OF INDEPENDENCE (1994)) (Majors Anderson and Mefford were Air Force students and Major Scott was an Army student). Volume 144 also included a review from LTC Borch who had moved on to the Criminal Law Division at the Office of The Judge Advocate General. See Lieutenant Colonel Fred

set, fifteen students from the 43d Graduate Course went on to publish book reviews in the *Military Law Review*.<sup>187</sup> The length of the early student-required book reviews is comparable to current book reviews (about five pages), but there is a striking difference in the number of footnotes: an average of five footnotes in the 43d Graduate Course book reviews,<sup>188</sup> compared to an average of forty-nine footnotes in the 58th Graduate Course reviews.<sup>189</sup> After the requirement for student book reviews was set in 1994, the *Military Law Review* published 114 student books up through 2004<sup>190</sup> when *The Army Lawyer* was opened up for book reviews as well.

*The Army Lawyer*, first published in August 1971,<sup>191</sup> began to publish book reviews in October 2004 with the 53d Graduate Course.<sup>192</sup> Since 2004, book reviews have been published in both legal journals,<sup>193</sup>

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L. Borch, *Red Reeder's Born at Reveille: The Memoirs of an American Soldier*, 144 MIL. L. REV. 178 (Spring 1994) (book review).

<sup>187</sup> The 43d Graduate Course published seven more book reviews in Volume 145 and five in Volume 146. See also 145 MIL. L. REV. 179–207, 211–17 (Summer 1994) and 146 MIL. L. REV. 275–93, 297–301 (Fall 1994).

<sup>188</sup> Not counting the asterisks annotating information about the book (its number of pages and cost) and the review's author, Major Anderson's six page review had seven footnotes, Major Scott's four page review had no footnotes; and Major Mefford's four page review had one footnote. See Anderson, *supra* note 186, at 168–74; Scott, *supra* note 186, at 174–77; and Mefford, *supra* note 186, at 180–83. The low number of footnotes in these early student book reviews was clearly the norm at the time considering even LTC Borch's review in the same volume had no footnotes. See Borch, *supra* note 186, at 178–80.

<sup>189</sup> Through December 2009, six students in the 58th Graduate Course have published book reviews, two per volume in the October, November and December 2009 issues. See ARMY LAW., Oct. 2009, at 53 and 57; ARMY LAW., Nov. 2009, at 57 and 62; and ARMY LAW., Dec. 2009, at 49 and 54.

<sup>190</sup> During the first forty-six years of the *Military Law Review* (1958–1994) when student book reviews were not required, 141 reviews were published in volumes 1–143. Over the next ten years (1994–2004), after student book reviews were required, there was a total of 151 book reviews (including 114 student written reviews from the 43d to the 52d Graduate Course) published in volumes 143–182 of the *Military Law Review*. The yearly average for the non-student written reviews has remained relatively stable: just over three book reviews published per year from 1958–1994 (141 reviews in the forty-six years) and just under four per year from 1994–2004 (37 non-student written book reviews in ten years).

<sup>191</sup> 1 ARMY LAW. (Aug. 1971).

<sup>192</sup> There was actually one carry-over from the 52d Graduate Course that made Volume 182 (Fall 2004). See Major John P. Jurden, ARMY LAW., Oct. 2004, at 30 (reviewing BOBBY BOWDEN, *THE BOWDEN WAY* (2001)).

<sup>193</sup> The following chart depicts all book reviews published in both the *Military Law Review* and *The Army Lawyer*, including how many were student-required reviews:

with *The Army Lawyer* publishing twice as many Graduate Course student written book reviews during that period.<sup>194</sup>

### *The Professional Writing Program*

From their inception in 1958 and 1971, respectively, through 1997, the *Military Law Review* and *The Army Lawyer* were published under the direction of the Developments, Doctrine, and Literature (DDL) Department.<sup>195</sup> The “Writing Program” (which was not under DDL) was expanded during the 1994–95 academic year when intermediate level research and writing were added to the curriculum.<sup>196</sup> In July 1998, the Literature section of DDL split out and became a new fifth academic department: the Legal Research and Communication (LRC) Department

Book Reviews						
Date	Military Law Review (1958–2009)		The Army Lawyer (1971–2009)		Total	
	All	Student	All	Student	All	Student
1958–1994	141	0			141	
1994–2004	151	114			151	114
2004–pres.	35	32	69	63	104	95
TOTAL	327	146	69	63	396	209

<sup>194</sup> The following chart depicts breakdown by publication for each Graduate Course book review published after *The Army Lawyer* was added as a source beginning with the 53d Graduate Course and halfway through the 58th Graduate Course in December 2009:

Graduate Course	Academic year	Military Law Review	The Army Lawyer	Total
53d	2004–2005	6	14	20
54th	2005–2006	5	10	15
55th	2006–2007	5	12	17
56th	2007–2008	7	10	17
57th	2008–2009	7	11	18
58th	2009–2010	2	6	8

For the 43d through the 52d Graduate Course, an average of eleven student book reviews per year were published for each Graduate Course. See chart, *supra* note 193. For the 53d through 57th Graduate Course, the average increased to seventeen book reviews published per Graduate Course (the 58th is not included since the year is not complete). The overall average of student written book reviews published per year is thirteen since the requirement began with the 43d Graduate Course through the 57th Graduate Course.

<sup>195</sup> 1977–78 ANNUAL BULL., *supra* note 171, at 3.

<sup>196</sup> Risch Interview, *supra* note 126. See also ARMY JUDGE ADVOCATE GENERAL’S SCHOOL ANNUAL BULLETIN, 1996–1997, at 15.

which assumed responsibility for the Professional Writing Program (PWP) as well as control of the *Military Law Review* and *The Army Lawyer* publications.<sup>197</sup>

In 2003–2004, the LRC was discontinued as a separate academic department and the *Military Law Review* and *The Army Lawyer* were placed under the Journals and Periodicals section within the Administrative and Civil Law Department.<sup>198</sup> In June 2004, prior to the 2004–05 academic year, PWP assumed full responsibility for the *Military Law Review* and *The Army Lawyer*.<sup>199</sup> This final step completed the synchronization of efforts for current requirement Graduate Course book review program, including the publication of select reviews in the two legal journals.<sup>200</sup>

With the faculty requirement to select books, the TJAGLCS librarian was authorized to purchase multiple copies of each book for the faculty member and the students. The PWP Director limited each book selection to no more than five students so the workload among the faculty would

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<sup>197</sup> ARMY JUDGE ADVOCATE GENERAL'S SCHOOL ANNUAL BULLETIN, 1998–1999, at 6–7, 17.

<sup>198</sup> ARMY JUDGE ADVOCATE GENERAL'S SCHOOL ANNUAL BULLETIN, 2003–2004. The LRC remained an independent section responsible for the *Military Law Review* and *The Army Lawyer* publications from 1998–2003 (the three Directors during this five-year period were LTC Jackie Little (1998–99), LTC Alan Cook (1999–2001), and MAJ Michael Boehman 2001–03)). See generally Army Judge Advocate General's School Annual Bulletins from 1998–1999 through 2002–2003. During the 2003–2004 academic year, the Journals and Periodicals section fell under the supervision of the Vice-Chair of the Administrative and Civil Law Department, LTC Tim Tuckey, and the Professional Writing Program (PWP) fell under MAJ Gene Baime within the Administrative and Civil Law Department where it remains today. E-mail from LTC Gene Baime, Associate Judge, U.S. Army Court of Criminal Appeals (Apr. 23, 2010, 12:41 EST) [hereinafter Baime e-mail] (on file with author) and Interview with Chuck Strong, Technical Editor, *Military Law Review* and *The Army Lawyer*, Prof'l Commc'ns Branch, in Charlottesville, Va. (Mar. 8, 2010) [hereinafter Strong Interview].

<sup>199</sup> Baime e-mail, *supra* note 198; Strong Interview, *supra* note 198.

<sup>200</sup> Baime Interview, *supra* note 132, and Lescault Interview, *supra* note 136. See also Fagan Interview, *supra* note 132. Major Baime was the PWP Director within the Administrative and Civil Law Department from 2003–2006. With the approval of the Department Chair, LTC Moe Lescault, and the Dean, COL Jim Gerstenlauer, MAJ Baime and his team of editors, implemented the changes. Although book reviews were not added during her tenure as the Editor of *The Army Lawyer*, CPT Fagan's suggestions to open the journal to shorter, more current articles from the field, paved the way for the addition of book reviews. One of the first few student book reviews to be published in *The Army Lawyer* came from CPT Fagan when she was a student in the 53d Graduate Course. See Captain Heather J. Fagan, ARMY LAW., Nov. 2004, at 27 (reviewing COKIE ROBERTS, FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION (2004)).

be somewhat balanced. The final challenge was figuring out a fair way for students to select their book, which was now from a limited pre-selected pool with some books more popular than others. Lieutenant Colonel Baime “tried a race to the library (that did not go well) and a lottery system, which went better, but still left students who got later choices upset.”<sup>201</sup> The most recent selection process, implemented by Major Daniel Sennott, was a random lottery for coveted seat selection in the Graduate Course room, where students sit for the entire academic year. Then, the book selection process was simply the reverse order of seat selection—with the last person to select their seat being the first to choose their book.<sup>202</sup>

For the incoming 2010 class, Lieutenant Colonel Jonathan Howard plans to implement a different system of assigning books not tied to seat selection. Regardless of the book assignment process, the core concepts of the book review program will be maintained: faculty-selected books,<sup>203</sup> a written book review, and a small group discussion. Additionally, select students will get their book reviews published in either the *Military Law Review* or *The Army Lawyer*, thus benefitting all judge advocates searching for their next book for professional reading.

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<sup>201</sup> *Id.*

<sup>202</sup> There are 115 students in the 58th Graduate Course (academic year 2009–2010). Thirty-one faculty members participated in the book review program. A maximum of five students could choose the same book. The thirty-one books were laid out in room 130 and in reverse order of their seat selection, students came into the room and chose their books. Interview with LTC Jonathan Howard, Director, Prof'l Commc'ns Branch, in Charlottesville, Va. (Mar. 8, 2010). See Appendix E (providing a list of the thirty-one faculty selected books reviewed by the 115 students in the 58th Graduate Course).

<sup>203</sup> See Appendix E (providing a preliminary list of faculty-selected books for the incoming 59th Graduate Course (academic year 2010–2011)).

**THE FIFTEENTH HUGH J. CLAUSEN LECTURE IN  
LEADERSHIP\*:  
LEADERSHIP IN HIGH PROFILE CASES**

PROFESSOR THOMAS W. TAYLOR<sup>†</sup>

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\* This is an edited transcript of a lecture delivered by Professor Thomas W. Taylor to members of the staff and faculty, their distinguished guests, and officers attending the 58th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on 12 May 2010. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, U.S. Army, from 1981 to 1985 and 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, The Judge Advocate General (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.

<sup>†</sup> Professor Taylor assumed his current position, teaching graduate students at Duke University's Sanford School of Public Policy, upon retiring in June 2006 as the senior career civilian attorney in the Department of the Army. He served as the senior leader of the Army legal community during extended transition periods between successive political appointees. Professor Taylor provided legal and policy advice to seven Secretaries and seven Chiefs of Staff of the Army. During his twenty-seven years in the Pentagon, Professor Taylor addressed a wide variety of operational, personnel, and intelligence issues, including military support to civil authorities following the attacks on 11 September 2001, and during disaster relief operations.

Professor Taylor received a B.A. in history with high honors from Guilford College, Greensboro, North Carolina, in 1966, and a J.D. with honors in 1969 from the University of North Carolina at Chapel Hill, where he was a Morehead Fellow and a member of the *North Carolina Law Review* and the Order of the Coif. He was the Distinguished Graduate (first in class) of the Graduate Legal Course, The Judge Advocate General's School, in 1979, and graduated from the Industrial College of the Armed Forces in 1987.

Professor Taylor began his legal career as an Army Judge Advocate General's Corps (JAG Corps) officer, trying criminal cases in Alaska and Germany, before serving as an Associate Professor in the Law Department of the U.S. Military Academy at West Point, where he was promoted to Major. His first Pentagon assignment was in The Judge Advocate General's Administrative Law Division before he joined the Office of the General Counsel, where he was promoted to lieutenant colonel before leaving active duty in 1982 to accept a civilian position in that office. He served in successive positions of greater responsibility following his appointment in the Senior Executive Service in 1987. Meanwhile, as a Reserve colonel during annual training, he served as the Academic Department Director of The Judge Advocate General's Legal Center and School until he retired from the U.S. Army Reserve. He has lectured at law schools and professional conferences throughout his career and published law review notes and articles.

Professor Taylor served as the senior legal official of the Army during various transition periods since the Reagan Administration, including a one-year period during the Bush and Clinton Administrations. Upon his retirement, he received the National

## I. Introduction

At the outset, it is an honor and privilege to be here this morning in Charlottesville. This event commemorates the career and contributions of Major General Hugh J. Clausen, The Judge Advocate General of the Army from 1981 to 1985. The first lecture in this series was given to the 43d Judge Advocate Officer Graduate Course and the 136th Judge Advocate Officer Basic Course on 22 February 1995, for the dedication of the Hugh J. Clausen Academic Chair of Leadership. Since that time, speakers invited to give this lecture have come from various backgrounds and positions, but all of us share a common respect and admiration for General Clausen and his enormous and lasting contributions to the Army legal community.

I am grateful to your commander, Brigadier General Miller, and to your Dean, Colonel Burrell, for their invitation to speak today, and especially grateful to the Deputy Judge Advocate General, Major General Tate, for suggesting today's topic of providing leadership and advice in high profile cases. General Tate recommended that I provide you some practical advice based on my years in the Pentagon handling high profile cases, rather than a more theoretical lecture about leadership. I am honored that Lieutenant General Chipman, The Judge Advocate General of the Army, drove down from Washington to be with us today. I would like to provide special recognition and thanks to Major General (retired) Altenburg for his presence this morning; John and I were classmates in the 27th Graduate Course, where we formed a life-long personal and professional friendship. He was my battle buddy in the Pentagon during his years serving in the position now known as the Deputy Judge Advocate General. I would also like to thank my long time friends and colleagues, John Sanderson and David Graham, for their intellectual and leadership contributions to the Army and The Judge Advocate General's Legal Center and School over many years. I am

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Intelligence Distinguished Service Medal, the Department of Defense Medal for Distinguished Civilian Service, and his fourth award of the Army's Decoration for Exceptional Civilian Service. He also received four Presidential Rank Awards under three different Presidents, as well as numerous military decorations, including the Legion of Merit. He is a consultant to the General Counsel of the Army and an active participant in national security matters. At Duke, graduating students have elected him twice as their faculty speaker for Masters in Public Policy hooding ceremonies, and his faculty colleagues have elected him to serve on both the Academic Council of Duke University and the Executive Committee to the Dean of the Sanford School. He chairs the Sanford School of Public Policy Honor Board and received Sanford's outstanding teacher-mentor award for graduate students in 2009.

honored to have two special outside guests: Colonel (retired) Tom Strasburg, a former Commander of this School at critical times, and Colonel (retired) Greg Block, a former Dean here at the School.

My introduction to the Army and the JAG Corps occurred here in Charlottesville many years ago at the old JAG School, located on the historic part of Mr. Jefferson's grounds, where I completed the basic course. Those were exciting times, as the Army rushed us into courtrooms around the world to implement changes to the *Manual for Courts-Martial* that mandated more attorneys in the legal system, including the then-revolutionary concept of requiring that the accused have a lawyer at every special court-martial. Of course, I have returned many times since then at various stages of my military and civilian career, including a year at the Graduate Course and several active duty training tours as the Individual Mobilization Augmentee (in reality, the Reserve backup) for the Dean. However, I never tire of this place and always look forward to coming here to talk with other lawyers, greet old friends, and make new ones.

As I indicated, I want to share with you some lessons learned from my twenty-seven years of Pentagon experience providing advice to our most senior Army and Department of Defense (DoD) leaders on managing high profile cases. However, my first experience with high profile events came while teaching at West Point in 1976, when the U.S. Military Academy both admitted the first women cadets and endured the largest cheating scandal in Academy history, neither of which was related to the other. Since leaving the Pentagon four years ago, I have continued to provide advice as a consultant to the Army General Counsel on management, intelligence, and personnel issues, as well as legislative and public affairs. Given the size and composition of our force, as well as the missions that our Soldiers perform, the Army will likely continue to have a significant number of these cases.

The reality is that, by the time a case becomes of concern to our senior leaders in the Pentagon, it is already a high profile case in some respects. Otherwise, we wouldn't be talking about it. On the other hand, as I always cautioned my clients, not all cases that come to the Pentagon's attention deserve—or even require—the help of higher headquarters to manage them properly. I have reminded my bosses in every Administration that lawyers could help them address their concerns, that there must be no hint of command influence, and that sometimes their best course of action is patience—a virtue in short

supply in Washington—allowing normal rules and procedures that we all understand to control the process and work toward an outcome. It is a fact of life that our senior leaders generally want to be personally and professionally involved in handling high profile cases, and your job as lawyers is to provide them comprehensive advice and often to serve as a buffer for the system to work as designed. For example, you may recall that the Secretary of the Army and the Chief of Staff travelled to Fort Hood to demonstrate their concern for the Soldiers, civilians, and families, and held a press conference on 6 November 2010, just one day after the tragic shootings.<sup>1</sup> However, they carefully refrained from speculating about the details.<sup>2</sup>

## II. First Things First: Identifying a High Profile Case

You are probably already asking yourself a key question at this point: How do you identify a high profile case—one of those special cases that will dominate newspaper, television, and radio coverage; light up the blogosphere; and provoke extensive public interest? Some facts and circumstances are so compelling that you will know immediately that the case will achieve a high profile status. A recent example is the Fort Hood shootings that I just mentioned. Just look at a few of the many elements of the case: the cruel irony of the deaths of soldiers and civilians going through a processing station on a stateside military installation; the heroism of the first responders; the professional background and alleged ideology of the accused; the questions about intelligence failures at various levels; and the promotion and assignment policies governing a highly-stressed force.

Another example is the alleged Christmas Day bomber last December, who attempted to ignite explosives during a flight bound for Detroit. This case contained some of the same elements that marked the Fort Hood case: the heroism of the passengers on board; the background and ideology of the accused; the question of intelligence failures at various levels; and the oversight of air transportation safety. And, finally, just eleven days ago, another botched terrorist bombing occurred

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<sup>1</sup> C. Todd Lopez, McHugh, Casey, *Entire Army Family Stand with Fort Hood After Unthinkable Tragedy* (Nov. 7, 2009), available at <http://www.army.mil/-news/2009/11/07/29998-mchugh-casey-entire-army-family-stand-with-fort-hood-after-unthinkable-tragedy/> (last visited May 18, 2010).

<sup>2</sup> *Id.*

in Times Square, with many of the same factors: alert street vendors and professional first-responders and police work; the background and ideology of the accused; the oversight of air transportation safety and coordination of threat information; and, eventually, the question of whether there were intelligence failures, now that government officials suspect that the Pakistani Taliban appear to have had a role in the planning and execution of the failed attempt.<sup>3</sup>

#### A. Look Under the Radar

It is far more difficult to identify the other category of high profile cases, those that begin with a somewhat random news story, grow under the radar for awhile, and emerge full-blown as high profile cases. The challenge for us as lawyers is to spot just that kind of case, one that first appears routine but—as the media would say—has “legs” and continues to play out day after day. Although I’ll say more later about dealing with the media in high profile cases, my point is that some high profile cases don’t start that way, but surface routinely in the clutter of other news and information. For example, the Abu Gharib cases were first reported on 16 January 2004, through a U.S. Central Command press release: “An investigation has been initiated into reported incidents of detainee abuse at a Coalition Forces detention facility. The release of specific information concerning the incidents could hinder the investigation, which is in its early stages. The investigation will be conducted in a thorough and professional manner.”<sup>4</sup> Although *The New York Times* and *Philadelphia Inquirer* reported this news contemporaneously, there was certainly no particular media interest or splash. Meanwhile, investigations continued throughout the spring by the Criminal Investigation Division, General Taguba, and the Army Inspector General. However, the story largely disappeared from the public eye until the CBS news program, *60 Minutes II*, “broke” the story in a television broadcast, complete with lurid pictures, on 28 April 2004.<sup>5</sup> Once again proving the old adage that a picture is worth a thousand words, the story and its images haunted the Bush Administration and

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<sup>3</sup> Kathleen Hennessey & Richard A. Serrano, *Militants Believed Behind N.Y. Bomb*, L.A. TIMES, May 10, 2010, at A1.

<sup>4</sup> Sherry Ricchiardi, *Missed Signals*, AM. JOURNALISM REV., Aug./Sept. 2004, at 22 (citing press release).

<sup>5</sup> *Id.*

DoD for months and became part of the continuing national conversation about the conduct of the war and the treatment of detainees.

But this is not just a military phenomenon. Recall the example from the civilian world just three years ago, when Don Imus made a racially and sexually derogatory comment about the Rutgers University women's basketball team that lost the NCAA championship game. The comment might have gone unnoticed, but for a media watchdog organization that posted the video on YouTube. The video prompted protests by some African-American leaders, but it took another week before the mainstream media brought the matter to the attention of the wider public audience. Although Don Imus lost his nationally-syndicated radio show as a result of the kerfuffle, the subsequent discussion about the roles of race, hip-hop culture, and the media created a firestorm of controversy.<sup>6</sup>

Similarly, several years earlier, Senator Trent Lott made a comment about Senator Strom Thurmond at a party celebrating Thurmond's 100th birthday. Referring to Thurmond's presidential bid in 1948, Lott said: "I want to say this about my state: When Strom Thurmond ran for president, we voted for him. We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years, either."<sup>7</sup> Of course, the problem was that Thurmond had run as a Dixiecrat on a segregationist platform that would have continued denying fundamental rights to people of color. Although the mainstream media initially ignored or downplayed Lott's comments, the story thrived in the blogosphere and made its way back into a high profile case that cost Senator Lott his leadership role in the Senate.<sup>8</sup> Thus, the challenge is not only to recognize the high profile case as early as possible when it occurs, but also to spot the case that at first appears routine, but rapidly develops into a high profile case.

As I tell my graduate students at Duke, in our information age and twenty-four-hour news cycle, supplemented by blogs, tweets, and various social media, you can never assume that a bad-news story will

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<sup>6</sup> See generally ESTHER SCOTT, KENNEDY SCH. OF GOV'T CASE PROGRAM STUDY C15-08-1920.0: CROSSING THE LINE: DON IMUS AND THE RUTGERS WOMEN'S BASKETBALL TEAM (2008).

<sup>7</sup> Allen Johnson, *Harry Reid's Tangled Tongue Told Us a Lot More Than You Might Think*, NEWS & REC. (Greensboro, N.C.), Jan. 17, 2010, at H2

<sup>8</sup> See generally ESTHER SCOTT, KENNEDY SCH. OF GOV'T CASE PROGRAM STUDY C14-04-1731.0: "BIG MEDIA" MEETS THE "BLOGGERS": COVERAGE OF TRENT LOTT'S REMARKS AT STROM THURMOND'S BIRTHDAY PARTY (2004).

stay under the radar. Rather, you must assume just the opposite: That someone, somewhere, sometime, will have a cell-phone camera photo, e-mail, text message, or some other record of practically every questionable event that occurs, just waiting for the right moment to burst on to the public stage and play itself out in the media. For example, recall how the “macaca moment” hurt the senatorial campaign of Senator George Allen of Virginia in 2006.<sup>9</sup> I’ll say more about how to avoid that mistake later in my remarks.

#### B. Typical Fact Patterns for High Profile Cases

For now, I would urge you, as you go about your daily work, to remain alert for the facts and circumstances that will propel a local issue into the national media. As you might have already concluded, as a very practical matter, almost every case you handle as lawyers could have the potential for turning into a high profile case if enough public interest develops. However, we have learned from experience that certain types of cases always have potential for that level of scrutiny that I have described. Here are some of the types of cases with potential to achieve a high-profile status.

First, suicides and friendly fire incidents are prime examples of potential high profile cases. Families are usually reluctant to accept the finding that death resulted from either. It is commonplace for families to suspect foul play, a conspiracy, or a cover-up. Their feelings are understandable, so we must go the extra mile to leave no stone unturned in finding the truth. A recent example is the Tillman friendly fire investigation, now the subject of Jon Krakauer’s latest book, *Where Men Win Glory: The Odyssey of Pat Tillman*, which dissects and criticizes decisions made at all levels.<sup>10</sup> Unfortunately, almost all of you in this room has probably been, or will be, involved in one of these tragic cases during the course of your professional careers.

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<sup>9</sup> Editorial, *Allen Concedes in Virginia Senate Race*, MSNBC.COM, Nov. 9, 2006 <http://www.msnbc.msn.com/id/15635543/>. A turning point in Senator Allen’s unsuccessful campaign for re-election, according to many analysts, was his use of “macaca,” a racially-charged epithet captured on video, to refer to a student of Indian descent who was videoing Allen on the campaign trail while supporting his opponent, Senator Jim Webb. *Id.*

<sup>10</sup> JONATHAN R. KRAKAUER, *WHERE MEN WIN GLORY: THE ODYSSEY OF PAT TILLMAN* (2009).

Second, crimes which involve the abuse of a special relationship are always disconcerting. These crimes might involve misconduct by chaplains, doctors, recruiters, cadre, teachers, or guards—anyone with a special obligation to provide services in a protected setting where there is an unequal status. Because these crimes involve an abuse of a trusted relationship, often in addition to some other underlying crime (such as sexual assault), we can predict an outpouring of media and congressional interest. The recurring stories of detainee abuse are prime examples, but stories persist about abuse of our own military personnel in training and recruiting environments, as well.

A third example includes crimes that involve racist, extremist, and similar motives, often referred to generically as “hate crimes.” Because these motives are contrary to the core values of our country and our military, when they surface as part of a crime, everyone pays attention. You may recall allegations of these types of crimes at Fort Bragg and Fort Campbell several years ago. Moreover, whenever skinhead, neo-Nazi, or militia groups make the news, investigative reporters always focus on any group members who might have served in the military or received military-type training in some other setting, such as law enforcement courses.

A fourth example consists of crimes or other types of misconduct that involve high-ranking officials, officers, non-commissioned officers (NCOs), and civilians. During 2005 alone, the Pentagon had cases involving improper sexual relationships that embarrassed a former Air Force TJAG<sup>11</sup> and an Army four-star commanding general.<sup>12</sup> Of course, each year brings a new rogues’ gallery of government officials: governors like Mark Sanford of South Carolina, who gave us a whole new connotation to “walking the Appalachian Trail,” and former senators like John Edwards of North Carolina, whose personal lives become fodder for *Oprah* and *GQ*. Again, these leaders occupied positions of

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<sup>11</sup> Josh White, *General Is Sanctioned for “Unprofessional” Affairs*, WASH. POST, Jan. 11, 2005, at A13. An inspector general investigation found that Major General Thomas J. Fiscus had affairs with several women, including active duty judge advocates and paralegals, over a ten-year period. Because of his misconduct, he was retired as a colonel. *Id.*

<sup>12</sup> David S. Cloud, *Adultery Inquiry Costs General His Command*, N.Y. TIMES, Aug. 11, 2005, at 16. General Kevin P. Byrnes had commanded the U.S. Army Training and Doctrine Command prior to being relieved. General Byrnes reportedly had been separated from his wife and filed for divorce; his lawyer stated that General Byrnes’s relationship was “with a woman who is not in the military, nor is a civilian employee of the military or the federal government.” *Id.*

special trust, and the public rightfully expects them to follow the highest standards of conduct in their personal and professional lives.

Finally—and this by no means exhausts the list—there are cases that become high profile because of the way that we may have handled or mishandled an otherwise-routine case that catches the public’s attention and sympathy. Some typical examples that perennially lurk just under the radar include the following: holiday displays and public prayers in military settings, which raise freedom of religion issues; compelling Soldier stories about child custody issues during deployments and services for wounded warriors at home; claims of discrimination based on the usual suspect categories of race, gender, religion, and so forth; and, of course, investigations leading to discharges based on controversial personnel policies, such as “Don’t Ask, Don’t Tell.”

### III. Two Questions

My first and most important tip in handling high profile cases is to ask yourself and your client two questions: First, what would we normally do in a situation like this? And, second, why would we do anything different in this case? I have found that these two questions put most cases in perspective and are the best possible protection against claims arising later that someone got special treatment. In other words, begin with the presumption that the normal rules will prevail.

Those claims of special treatment usually arise in one of two ways. Either someone got especially good treatment, and thus got away with something for which they should have been held accountable; or someone got especially bad treatment, and thus was unfairly investigated and punished by the system. You can probably think of instances where that claim was made in the last several years in both military and civilian contexts at home and abroad. For example, I can recall a number of Army cases in which someone claimed that a family or staff member of the commanding general was stopped on post by the military police, but not charged, or otherwise treated, as any other person would have been. This happens in the civilian community, as well. Just last month, a North Carolina highway patrol captain was stopped while driving extremely drunk early in the morning. After his supervisor arrived at the scene, the two officers had the captain’s Mustang towed, drove him to a local hotel,

and filed no report. The captain and the two officers were fired following an investigation.<sup>13</sup>

Another variation on this theme is that lower ranking Soldiers or officials were held accountable, in a way that senior officers and officials were not. The public watches for examples of favored treatment, application of the so-called double standard, and scapegoating in either the investigation or disposition of allegations. The number of cases where this claim arises is too numerous to mention, but I'll point to Abu Gharib in the military world and the Scooter Libby case in the civilian world. But I'll say more about accountability later in my remarks.

For now, the thing to remember is that someone is always watching to see whether we will do the right thing. A quick story to illustrate this point: One of my best friends and former Pentagon clients, Mike Ackerman, was a three-star general and Inspector General of the Army a few years back. He was flying back from Korea to Washington, coach class, which is a government requirement, and had a seat in the middle of the plane, even though he had recently undergone back surgery and could clearly have justified a better seat if he had been willing to ask for a doctor's approval. Several hours later, as Mike hobbled to the restroom, a sergeant who had served under Mike years earlier, said, "Hey, Sir. You won me a case of beer." When Mike asked how that could be the case, the story unfolded of a bet between the sergeant and his seatmate, also a non-commissioned officer.

After the plane was loaded and ready for takeoff, the sergeants (also in coach but several rows back from Mike) observed a flight attendant offer Mike an upgrade to business class because he was a three star general and the flight was long. The sergeant who did not know Mike had bet his seatmate a case of beer that he would take the upgrade. The sergeant who had served under Mike knew about his character and bet that Mike would not accept the upgrade. In addition to being a great illustration of the idea is that someone is always watching, this is also a great story about leadership and integrity: Doing the right thing when no one is watching, because—you know what—someone is always watching.

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<sup>13</sup> Cullen Browder, *State Trooper, Police Officers Fired After DWI Probe*, WRAL.COM, May 13, 2010, <http://www.wral.com/news/local/story/7599024/>.

#### A. The Rule of Law

Following the normal rules also means that we maintain both the appearance and the reality of the most important and critical aspect of the criminal and administrative process: the rule of law. The public expects its officials to adhere to the laws, rules, and regulations that govern the normal disposition of allegations. After all, as Americans, we have professed our belief in the rule of law and equal justice under law. And, as Soldiers and lawyers, you have dedicated your professional lives to making that vision a reality.

Why am I placing so much emphasis on the importance of following the rules? In every case in which you deviate from your normal rules, you will probably be called upon to explain why you did not follow your normal rules and to justify why you made an exception. Your best defense almost all the time is that you handled the high profile case just like any other case. Hence, my advice is to follow the rules that normally apply and to consider carefully the rationales for any exceptions. Moreover, any exceptions may also set precedents that could prove troubling in future cases.

#### B. Questioning Authority

I do not mean to imply, however, that lawyers should blindly accept standard solutions or conventional wisdom without questioning whether the laws, regulations, and policies that might govern the disposition of allegations make sense as they apply to a particular case. Rather, lawyers should be the ones asking the hard and critical questions to ensure that the processes are transparent and the outcomes, just. Among the reasons this Nation came into existence was the suspicion that Americans have harbored toward the exercise of authority. You may recall from our history that King George III's abuse of judicial and police powers contributed to the American Revolution. Our Founding Fathers were so suspicious of the potential authority of a centralized government that many states would not ratify the Constitution until there was agreement that the Bill of Rights would be added, guaranteeing rules that some of you have provided advice on every day, such as the Fourth Amendment protections against unreasonable searches and seizures and the Fifth Amendment protections against self-incrimination. My point is that you have a responsibility as lawyers to question authority, especially when the questions may not be welcomed. After all, even Thomas

Jefferson, when he was President, blamed his problems with the Congress on “one hundred and fifty lawyers, whose trade it is, to question everything, yield nothing, and talk by the hour.”<sup>14</sup> Thus, lawyers have a proud heritage of asking bothersome questions.

In fact, military lawyers arguably have a greater obligation than most Soldiers and civilians to raise questions about authority because of the hierarchical rank structure of a military organization that does not always appreciate or encourage questions, the special staff relationship that military lawyers have with their commanders, and our responsibility as licensed attorneys to uphold the rule of law. It is clear that the current leadership of DoD wants you to ask questions. Just last month, in a speech at the U.S. Naval Academy, Secretary of Defense Gates encouraged the midshipmen to challenge conventional wisdom and institutional tradition. Secretary Gates pointed to examples of junior officers who had the nerve and courage to push for the development of amphibious landing craft, aircraft carriers, and nuclear submarines in the face of opposition or indifference from their more senior leaders.<sup>15</sup>

### C. Liberty v. Security

We also must recall that one of the basic tensions in our society is that Americans are conflicted about the extent to which we want our government to solve our problems. On the one hand, we want our civil liberties and our privacy protected by and from the government; on the other, we want government to provide us security, law and order. Indeed, a debate has raged since 9/11 about where to strike this balance between liberty and security. The frontline issues for the debate have included the vexing question of what to do with detainees, including whether a special terrorist court should be formed to authorize preventive detention without trial for those too dangerous to release; what level of interrogation can be justified to avert the “ticking time bomb” scenario; and how much surveillance of our e-mails and library records we are willing to accept to have a greater sense of security.

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<sup>14</sup> Thomas Jefferson, 1821, *available at* [http://www.dojgov.net/Liberty\\_Watch.htm](http://www.dojgov.net/Liberty_Watch.htm) (last visited May 19, 2010).

<sup>15</sup> Earl Kelly, *Gates: Defy Authority When Needed*, THE CAP. (Annapolis, Md.), Apr. 8, 2010, at A1.

Just look at the reaction to the attempted attack on Northwest Flight 253 outside Detroit on Christmas Day. Five days later, former Vice-President Cheney claimed that America is less safe because President Obama was “trying to pretend we are not at war.”<sup>16</sup> Others criticized law enforcement authorities for advising the accused of his rights and processing his case through the Federal system instead of turning him over to a special interrogation team and using a military commission to try him. The Obama Administration was forced to defend itself on all these counts in the weeks that followed. And similar grumbling about treatment of the alleged Times Square bomber is already on the airwaves.

Thus, the public policy discussion about where to draw the line between civil liberties and security is alive and well. A current example of the debate has centered on the recent Arizona law requiring law enforcement officers to check immigration documents based on a reasonable suspicion.<sup>17</sup> While some argue that, given the failure of the Federal Government to address the problem of illegal immigration, the Arizona law is the best policy solution, others contend that this law attempts to usurp Federal authority and legitimize racial profiling. As you know, a number of lawsuits have already been filed, and the Administration seems to find itself on the hook to do something, even though the law has not yet taken effect.

The fact is that our society is interested in what our justice system does and how we lawyers manage the system. Our civilian and military justice systems are not “bottom-line” organizations where the only thing that counts is the results. We are given a special trust when we become officers of the court as licensed attorneys, in addition to the special trust and responsibility as military officers. In exchange, we have a special obligation to support the rule of law.

Hence, my bottom line up front consists of the two questions that will generally lead you to follow your own rules and depart from them rarely, if ever, with full knowledge that you will have to account to someone, somewhere, for why you did not follow your own rules. The central theme becomes adherence to the rule of law, which requires

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<sup>16</sup> Mike Allen, *Cheney: Obama ‘Trying to Pretend,’* POLITICO, Dec. 30, 2009, <http://www.politico.com/news/stories/1209/31054.html>.

<sup>17</sup> Editorial, *Arizona Governor Signs Immigration Bill*, CNN.COM, Apr. 24, 2010, <http://www.cnn.com/2010/POLITICS/04/23/obama.immigration/index.html>.

lawyers and our clients to make independent and impartial judgments to maintain the credibility of our system of justice.

#### IV. Who Else Needs to Know?

My second tip for handling high profile cases is to ask yourself this question: “Who else needs to know?” We must pay attention to the old adage that bad news never improves with age. Of course you should ensure that your supervisors, your own command public affairs office, your own technical legal channels, and your higher headquarters are tightly in the loop. They will be able to coordinate notifications to the Pentagon’s oversight community, as well as the oversight committees of Congress. I mentioned some examples of these types of cases earlier—those involving suicides, friendly fire, abuses of trusted relationships, hate crimes, and high-level officials. While laws and policy directives may require some of these reports, I recommend that you always err on the side of reporting in close cases. You may be surprised how much help you can receive from other investigative organizations, like the Federal Bureau of Investigation (FBI) and your DoD counterparts.

##### A. Report Early and Often

Why is it so important to keep your higher headquarters up to speed on bad news? Reporting unfolding crises gives them the heads-up they need in our information age. Your bosses will be receiving calls from the senior Pentagon leadership, the Hill, and the media asking what is going on. They need the information to help ensure that others will have confidence in your investigation and disposition of the allegations. As a by-product of our information age, the days are long past when leaders can delay breaking the bad news to the boss until they have “all the facts” or a “solution.” Additionally, your credibility increases when you achieve a reputation for reporting the bad news, as well as the good.

Moreover, your higher headquarters can leverage support from their oversight bodies, and get their buy-in on your strategies to some extent. I have seen some controversies fizzle, instead of blossom, when you can show that you made a timely notification of a problem that appeared routine to all at the time, but turned out to be high profile. When one of those “sleeping giant” cases suddenly achieves a high profile, everyone starts asking the proverbial question, “What did you know, and when did

you know it?” That was the very type of question that made the Pat Tillman and Jessica Lynch cases so explosive.

Wholly aside from any actual requirements to report incidents to higher headquarters, it just makes good sense for you to be the first one to deliver the bad news. It gives you the opportunity to identify the potential crimes, frame the issues, lay out your investigative plan, and establish timelines for, and obstacles to, completing the investigation. Your oversight bodies will be more inclined to let your investigation proceed without their interference if they see that you have a plan in which they have confidence.

For at least the past thirty years, the Army has generally been diligent in disclosing unfavorable stories to senior DoD officials, the DoD Inspector General, and oversight committees on the Hill. No matter how unfortunate or ill-advised the incident may be that is the subject of the report, at least the Army could take some credit for being forthright, rather than facing accusations of a lack of candor, or worse yet, a cover-up. High-profile crises are particularly susceptible to the charge of cover-ups, because many details may not be immediately apparent or releasable to the general public and may, in fact, be privileged or classified.

#### B. Learn from the Experience of Others

There is a second compelling reason to ask who else needs to know: You can tap into the expertise and experience of others. Experts from outside of your command can help you begin to size the situation and provide you additional resources or a school solution. The idea is to tap into their experience, as well as expertise. Rarely are there situations that someone has not seen before, although when they happen, they challenge all of us. I suppose that the attacks on 9/11, the devastation of Hurricane Katrina, and the massive oil spill in the Gulf last month would be in that category. As someone once said, experience is what you find—when you are looking for something else.

The perhaps apocryphal story attributed to Sam Walton—the extremely rich founder of WalMart—describes a conversation at Harvard Business School between a student and Mr. Walton during a question-and-answer session, as follows:

Student: What's your secret? How did you become the richest man in America?

Walton: It's easy. Good decisions.

Student: But how? How do you know the good decisions?

Walton: That's easy too. Experience.

Student: Well, then, how do you get that kind of experience?

Walton: That's the easiest part of all. Bad decisions.<sup>18</sup>

The point is to learn from the mistakes that others have made, as well as our own. In other words, you need not bruise your own leg on every rock to learn that rocks are hard. Is there anyone among us, who has not silently thought, when we hear of someone else's mistake, "There, but for the grace of God, go I." In fact, the worst thing you can do is try to handle the many aspects of a high profile case by yourself. The tragic story of Karl Wallenda is an example of a leader's taking on too much responsibility and not trusting others to help. He led a famous circus family called the "Flying Wallendas," which thrilled audiences by their bold acrobatics and balancing acts on wires high above the center ring. He eventually would not let anyone else perform all the crucial checks before each performance that would ensure the safety of the equipment. His insistence on doing everything himself eventually caused him to fall to his death, because he did not discover during his checks that several ropes securing the wire were not properly connected.<sup>19</sup>

Teamwork is the key, and all of us are players. And you can never tell where you will find the best idea. Hence, reaching out to others becomes an imperative. During a speech a couple of years ago at West Point, Secretary Gates said that he had found it invaluable in his trips to the field to meet with and listen to lower-ranking soldiers to help shape his approach to decisions. He advised everyone in senior positions to

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<sup>18</sup> Versions of this apocryphal story appear in various sources. See, e.g., Pat Williamson, *Delivery Route*, Sept. 17, 2008, available at <http://www.mufranchisee.com/article/457/> (last visited July 28, 2010).

<sup>19</sup> MARSHALL SASHKIN & MOLLY G. SASHKIN, *LEADERSHIP THAT MATTERS: THE CRITICAL FACTORS FOR MAKING A DIFFERENCE IN PEOPLE'S LIVES AND ORGANIZATIONS' SUCCESS* 47 (2003).

“listen to enlisted soldiers, NCOs, and company and field-grade officers. They are the ones on the frontline, and they know the real story.”<sup>20</sup>

I can guarantee that you can expect to make mistakes if you are engaged in the front lines of our business. The key is to identify the mistakes early on. I have found that the best way to do that is to cultivate open and honest relationships with your subordinates, peers, and superiors, who will keep you out of trouble by pointing out something you missed. In other words, always listen to the other players, especially in high profile cases. You can never tell who will have the best idea, but it may be from the player on the field, who is closest to the action and understands the terrain.

And don't be wedded to a course of action that you previously supported, especially when facts and circumstances begin to shift in a way that makes you question whether your initial assumptions or previous judgments are still correct. For example, after I had objected to a course of action proposed by one of my Pentagon client organizations, their staff members would occasionally show me a somewhat similar action that I had approved years earlier in an effort to persuade me (or perhaps embarrass me) so that I would withdraw my objection. When that happened, thankfully not too often, I usually told them that I was not bound by my previous opinions because one of three things could have happened: the law and regulations could have changed, the facts and circumstances might be different, or I had learned from my earlier mistake and would not repeat it for the sake of being consistent.

#### V. Be Prepared for an Investigation of the Investigation

That gets me to the third tip: Handle your case as if you might have to explain your investigative plan, decisions, and results to outside organizations, such as the DoD Inspector General or FBI, or to a House or Senate Committee conducting their own investigation into what you did. I have been in the position of having to account to every one of these organizations for some Army investigation during my time in the Pentagon. You need to expect oversight by others, and plan for it, so that when someone comes to “investigate the investigators,” you are prepared

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<sup>20</sup> *Text of Secretary of Defense Robert Gates' Speech at West Point*, STARS & STRIPES, Apr. 22, 2008, <http://www.stripes.com/news/text-of-secretary-of-defense-robert-gates-speech-at-west-point-1>.

to show that you followed the rules. The price of your independence is your accountability to the rule of law, which involves answering questions posed by others with some authority and responsibility over your organization. Don't resent the questions or the questioners, even if you are tempted to do so as a normal human response.

#### A. Congressional Relations

I mentioned earlier that one of the first notifications should be to your congressional oversight committees. Depending on the relationships between the President's Administration and the Congress—and these relationships vary greatly from Administration to Administration (and sometimes within the same Administration when there is a change in the composition of the Congress)—you might be able to leverage both internal and external congressional support for your position. Public statements of support from key congressional leaders can provide a public shield for your investigations and their results. For example, information, such as classified documents, that you cannot release to the public might be legitimately shared with oversight committees, enabling them to affirm to the public that they have looked into the matter and are satisfied that the military's handling of the situation was reasonable under the circumstances, even if they too disagreed with the ultimate outcome.

Sharing information about high profile cases early on, and regularly thereafter, with congressional oversight committees serves other overlapping purposes. First, it gives our congressional oversight community a heads-up about a subject that will eventually be on their radar screens anyway. My experience is that you can either take the initiative and give the members and staff a chance to prepare a hopefully-supportive statement about a case, or, instead, you can wait until they call and complain about being blindsided about a case that falls within their jurisdiction. Second, the military should take advantage of every opportunity to educate members and staff about what you do. A shrinking number of veterans serve as elected representatives, and many staffers have no firsthand understanding—and therefore no contextual knowledge—of the military or of the military judicial system. Thus, each case can become a famed “teachable moment” and learning experience about the role of a general court-martial convening authority and the central relationship between that responsibility and good order and discipline. If members and staff understand the independent nature

of your prosecutorial, defense, and judicial functions, and how well insulated they are from unlawful command influence, they may be willing to forego, or at least postpone, their own inquiry or investigation into the matters at hand.

Several encouraging signs have emerged over the past few years. First, the debate over various versions of military commissions bills has exposed members and staff to the details of the court-martial system and people like you who make it work. Second, we are now seeing more and more former military members seek elective office and staff positions on the Hill, trends that should bode well for the future support for our military forces. Third, the recent elevation of the Military Service Judge Advocates General to Lieutenant General is clear evidence and affirmation of the important role that military lawyers play in our system of justice. However, the lesson I learned is that we have a continuing duty to educate others. We cannot take for granted that everyone understands and accepts the need for independence that we follow as our fundamental operating principle.

#### B. Congressional Investigations

A recurring challenge in ongoing investigations, especially if there is intense media or congressional interest, is handling requests from congressional oversight committees for access to information before the criminal investigation and proceedings are complete. According to news reports in the past few weeks, for example, Senator Lieberman has demanded access to certain information regarding the investigations surrounding the Fort Hood shootings. Although the Pentagon reportedly has made some information available, other information and witnesses have not been made available so as not to interfere with the ongoing criminal investigation. In many cases, some compromise can be reached, but if not, congressional subpoenas are possible.<sup>21</sup> If the military is participating with the FBI in a joint investigation, I have also found it useful to request that FBI officials visit with members and staff to explain our joint concerns.

Full-blown congressional investigations are always a possibility in high profile cases. A recent example is the exhaustive inquiry by the

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<sup>21</sup> Otto Kreisher, *Oversight Panel Leaders Push on Fort Hood Inquiry*, CONG. DAILY, Apr. 28, 2010, <http://www.govexec.com/dailyfed/0410/042810cdpm2.htm>.

Senate Armed Service Committee into the abuse of detainees. Their report, issued in December 2008, detailed the history of policies and procedures from the White House, Department of Justice, DoD, and Central Intelligence Agency based on comprehensive interviews and document searches. The report concluded that “senior officials in the 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>22</sup> On the other hand, a spokesman for Secretary Rumsfeld called it “regrettable that Senator Levin has decided to use the committee’s time and taxpayer dollars to make unfounded allegations against those who have served our nation,” based on a “false narrative . . . unencumbered by the preponderance of the facts.”<sup>23</sup>

### C. Plan for Full Transparency

No matter where you come out on the report’s conclusions, the point is very clear that you need to prepare for intense outside scrutiny in any high profile case. For planning purposes, you must assume that eventually all the information surrounding an incident, including your own legal advice and opinions, will surface and be made public. No matter how confidential, classified, or privileged you may think that discussions you have about investigations and their disposition may be, count on everything becoming public some day and act accordingly.

During the years that I worked on intelligence operations and projects, many of the most secret and highly classified operations on which I provided advice eventually became public for one reason or another. An example is the then-secret underground facility built during the construction of the West Virginia Wing of the Greenbrier Hotel in West Virginia. The new wing provided cover for an independently functional, concealed alternative site for the relocation of the senior leaders of the Federal Government in the event of a nuclear strike. Conceived during the Eisenhower Administration, the contingency facility was built from 1959 to 1962 and remained a closely guarded

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<sup>22</sup> SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, EXECUTIVE SUMMARY, at xii (Dec. 2008), *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).

<sup>23</sup> Joby Warrick & Karen DeYoung, *Report on Detainee Abuse Blames Top Bush Officials*, WASH. POST, Dec. 12, 2008, at A1.

secret until *The Washington Post* broke the story in 1992.<sup>24</sup> This story illustrates that we should never assume that, because something is known by only a few select individuals today, the world won't know it by tomorrow. E-mails, text messages, and social media virtually guarantee transparency, if mainstream media do not.

## VI. Help the Media Frame the Story

My fourth tip is for you to consider how to frame the story, to handle press inquiries, and to provide enough information so that news organizations will be able to understand and report on your story. As a general rule, the Army routinely publicizes most of its activities and seeks forums in which to tell Soldier stories. As an exception, the Army generally does not comment on operational matters, ongoing investigations and litigation, even in response to media inquiries. However, there are times when comments may be appropriate, and in those times, you must be careful to consider three basic principles:

### A. Be Honest and Open with the Media

First, tell the media as much as you can as soon as possible. If information and records would be releasable under the Freedom of Information Act, you generally should encourage your clients to initiate the release of those facts, rather than require the media to submit a written request. If you don't know the answer, say that you don't. Despite efforts by your clients to "go directly to the public" with their story, the media will inevitably interpret the story based on their own understanding. As a lawyer, you can provide valuable background and legal context that will educate the media and enable fair and balanced reporting. Indeed, legal background by subject matter experts became routine for high profile cases during my time at the Pentagon. Although the media may not report the story the way that you framed it for them, you will be on the record with your interpretation of the events.

For obvious ethical and practical reasons, your clients should never lie to, or mislead, the media. I even recommend against "spinning" a story in such a way that might call your credibility into question. The

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<sup>24</sup> Ted Gup, *The Ultimate Congressional Hideaway*, WASH. POST, May 31, 1992, <http://www.washingtonpost.com/wp-srv/local/daily/july/25/brier1.htm>.

long term trust between the DoD and the media is more important than the temporary advantages one may think will accrue from parsing the truth in a particular case. We Americans remain sensitive to the notion that our government, and especially our military, might somehow try to manage the news that we receive. The lessons learned from the fall-out of the Jessica Lynch and Pat Tillman stories, during the course of which many felt that false stories either were propagated, or allowed to linger, should always be at the forefront of our minds.

Just look at the concern generated by media reports in August 2009 that DoD had a contract with a public relations firm, whose job was to review applications by reporters to embed with our military units and grade their past reporting as neutral, positive, or negative. Although the Pentagon denied that these reports were crucial to decisions about future embeds, the controversy surfaced again the following December during the confirmation process of Douglas Wilson, the nominee for Assistant Secretary of Defense for Public Affairs. Mr. Wilson told the Senate Armed Services Committee that he opposed the rating system for reporters' coverage, as well as any discrimination against "unfriendly reporters" during the credentialing process for reporters who want to embed with our troops. In his written statement to the Committee, Mr. Wilson said, "In my view, we should never be a party to efforts to place so-called 'friendly reporters' into embeds while blocking so-called 'unfriendly reporters.'"<sup>25</sup> The Senate confirmed him in February 2010, but the message is clear that fairness and credibility are essential in dealing with the media at all times, especially in high-profile cases.

Most of us recognize that strategic information and communications operations are crucial to our fight against threats posed by al Qaeda and its affiliates, who use the Internet and other media to promote their propaganda, mobilize support, and radicalize followers. As several pundits have humorously observed, the U.S. often seems to be out-communicated by folks whose material originates from caves in Afghanistan and Pakistan. Despite our desperate need for better communications strategies, the Pentagon has reportedly ordered at least two reviews in the past six months of their information operations programs to get a better handle on how much money is spent and for what, especially in light of the recent allegations that contractors were

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<sup>25</sup> Leo Shane III, *Pentagon Nominee Promises Reporters Won't Be Rated Before Embeds*, STARS & STRIPES, Dec. 18, 2009, <http://www.stripes.com/news/pentagon-nominee-promises-reporters-won-t-be-rated-before-embeds-1.97430>.

locating insurgents while pretending to be gathering information.<sup>26</sup> A recurring theme in these reviews is the extent to which information operations overseas are openly attributed to the U.S. Government and apparent to the consumers of the information.

#### B. Defend the System

Second, step up the plate and defend our system of justice, even when it is difficult to understand or justify a particular result. In any legal system governed by the rule of law, but administered by all of us humans, you will sometimes get results that are unpopular and hard to accept, as when a jury seems to ignore evidence establishing guilt, or a commander decides to take little or no apparent action in a case where others are screaming for heads to roll. At those times, particularly in high profile cases, the public understandably may question whether we have a fair and independent system that reaches the right results.

This push for a public explanation often presents a dilemma. For a lot of reasons that have to do with the way that our government leaders have made decisions in the past, the public and the Congress demand a fair amount of transparency, arguing for the maximum disclosure of information. On the other hand, there are legitimate privacy interests at stake, as well as the independence of those exercising judicial and administrative authority. Should we put those who play critical roles in our judicial system—judges, juries, and commanders exercising judicial functions—in the position of having to defend the exercise of the discretion allowed them by law to do justice, especially if the public doesn't like the outcome? Isn't that one reason that Federal judges have lifetime appointments, so that they can do the right thing and uphold the rule of law without fear of recriminations? On the other hand, don't we expect public officials to be held accountable for their exercise of authority, especially when justice is at stake? Again, the key is to strike the right balance between providing as much information as possible to ensure public confidence in the military and its decisions, on the one hand, and preserving important principles, on the other.

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<sup>26</sup> Walter Pincus, *Pentagon Reviewing Strategic Information Operations*, WASH. POST, Dec. 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/26/AR2009122601462.html>; Craig Whitlock, *Gates Seeks Review of Information Programs*, WASH. POST, Mar. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/23/AR2010032302787.html>.

This will be a test of your leadership. These dilemmas require you as lawyers to step up as leaders and make the case on behalf of the system in which you work, a system based on the rule of law. When it comes to talking about or defending the outcomes in particular cases or classes of cases, you should say as much as you comfortably can, within the rules of professional conduct and privacy considerations. But here is the key point: You should be able to defend and explain the system even when you have difficulty explaining the specific outcome that has aroused the public's interest or, perhaps, anger. As I mentioned earlier, any public statements of support from key congressional leaders can also help reassure the public that the system was working as designed and in accordance with the rule of law.

As a practical matter, that means that your leaders at your immediate commands and your higher headquarters must continue to rely—as they have in the past—on the outstanding work that you do as leaders and lawyers every day in your locations around the world. They must rely on, and have faith in, the premise that you are following the laws, regulations, and policies that control the procedures and outcomes in all cases—routine and high profile. When it is necessary for your senior leadership to explain to the Office of the Secretary of Defense, the DoD IG, the Congress, the media, and the general public what you have done in a particular case, they will have faith that you will have done the right thing, and no one will be embarrassed. They will have faith that you have followed the rules, even when the rules were time consuming and seemed to impede the progress of your work at the time.

### C. Calculate Your Media Responses

Third, take the long view of media issues. Time and again, I have advised public affairs officers not to respond to a frivolous one-day story in the paper. I have found that some stories interest only folks inside the Capital Beltway, and there will be little or no interest outside the Beltway. Responding will only make this kind of story a two or three day story, because, once you respond, the reporter will write another story. Some stories will die of their own weight if you let them. As always, the most difficult task is identifying which story has “legs” and high-profile potential.

## VII. Coordinate Multiple Investigations and Ensure Their Credibility

My fifth tip is for you to assume leadership in coordinating the multiple and overlapping investigations that almost always accompany a high profile case. Your command sometimes must begin to examine a management, safety, or leadership problem before you have had time to investigate fully the allegations that brought the problem to the command's attention. This happens often in safety investigations following aircraft accidents or friendly fire incidents. Although it is important to know who or what was responsible for the mishap, the most immediate challenge is to prevent another tragic recurrence. As lawyers, you are in the best position to exercise leadership and influence involving investigations, to give advice about the types of investigations that may be appropriate, and to avoid conflicts among ongoing investigations.

If it is fairly certain that the incident might lead to criminal charges, you can ensure that any informal inquiry, Army Regulation 15-6 or other administrative investigation, or IG investigation will not muddy the water and interfere with your criminal investigation and eventual prosecution. Lawyers are uniquely positioned to coordinate investigations so that they complement each other, pursue the proper lines of inquiry, and preserve the option of prosecution where appropriate. Otherwise, investigators may be tripping over each other, creating conflict among witnesses, and otherwise breeding evidentiary problems. A recent example of this unfortunate outcome involved the infamous shootings by private security contractors, resulting in the deaths of fourteen Iraqi citizens in a traffic circle in Baghdad in September 2007. Judge Urbina dismissed the charges against five Blackwater employees in January 2010 because of the botched investigations and prosecutions.<sup>27</sup> Although the Department of Justice is appealing the dismissal, the lesson about coordinating multiple investigations is clear. Where several investigative efforts are proceeding simultaneously, my advice is simple and to the point: The criminal investigative effort should have a green light, and every other investigation should have a flashing yellow caution, which requires the lawyer's approval to proceed.

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<sup>27</sup> Del Quentin Wilber, *Charges Dismissed Against Blackwater Guards in Iraq Deaths*, WASH. POST, Jan. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/31/AR2009123101936.html>.

Another factor to think about as you decide how to approach the investigation is whether your organization can investigate the allegations at all with any credibility. Depending on the size and scope of the case, the President or Secretary of Defense may form a commission of outsiders, typically former senior officials from all three branches of Government with the background and experience to lend credibility to their findings and recommendations. The deliberations of these commissions may be subject to the provisions of the Federal Advisory Committee Act, a point often overlooked at the beginning in the eagerness to buy the time and cover that these commission often provide.

Even so, because the military is often criticized for investigating itself, you should consider whether you should refer the matter to higher headquarters or another appropriate agency, such as the FBI or the Defense Criminal Investigative Service. As unfair as this criticism may be, and although our clients understandably resent having some outsiders come into their organizations and take care of their dirty laundry, I have recommended to my Pentagon clients from time to time that the most practical and efficient course of action was to ask the FBI, DoD Inspector General, or a sister service to come in and conduct an investigation. This was because I knew that the Congress and the public would never accept the credibility of an investigation by any Army element. On the other hand, you must remain alert to discourage other investigative agencies without clear authority from expanding their jurisdiction creatively into Army activities when the Army is clearly capable of a credible investigation. A comfortable middle ground in some cases might be a joint investigation with the FBI or other agencies with which there is overlapping jurisdiction.

When your organization is conducting an investigation, watch for conflicts that may develop for investigating officers and agents because of preexisting relationships. If an agency is—or had been—too close to the functions or people under investigation, look for alternatives. Similarly, you should alert investigative officers to identify issues uncovered during the course of their investigations that are not within the scope of their inquiry but should be referred to another agency or office for follow up.

## VIII. Whom Do You Hold Accountable?

Finally, my sixth tip is to think about accountability as you come to closure. When you think about accountability in today's environment, you cannot ignore the events of the past couple of years. Consider the public interest in accountability in our national security community:

--the questions raised about the National Security Agency's terrorist surveillance program, and the issues of how much information was shared and who objected during high level briefings to a small number of key congressional leaders;

--the questions raised by the Judiciary and Armed Services Committees of the Senate about senior leaders' and lawyers' accountability for the interrogation rules and policies that the Senate Armed Service Committee found contributed to coercive interrogation practices;

--the continuing questions about who was responsible for intelligence and air safety failures in connection with the alleged Detroit bomber; and

--the questions under review by a special prosecutor about whether Central Intelligence Agency (CIA) agents violated Federal laws during overseas interrogations of detainees.<sup>28</sup> (You may recall that former Vice President Cheney opposed the decision as a political move to satisfy the liberal wing of the Democratic Party and expressed concern that the review might hamper the willingness of agents in the future to do their jobs.<sup>29</sup> On the other hand, the appointment of the special prosecutor was based on the findings of the CIA's own Inspector General that agents had exceeded the limitations in effect at the time of the interrogations and used

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<sup>28</sup> Siobhan Gorman et al., *Special Prosecutor to Probe CIA Handling of Terror Suspects*, WALL ST. J., Aug. 25, 2009, at A3, col. 1.

<sup>29</sup> Editorial, *Cheney: Justice Review of Interrogation Methods Is Political*, CNN.COM, Aug. 25, 2009, <http://www.cnn.com/2009/POLITICS/08/30/cheney.cia.interrogations>.

“inhumane” tactics, justifying the review by a special prosecutor.<sup>30</sup>)

My point is that we cannot afford to overlook the accountability piece of the equation. There are a lot of Monday morning quarterbacks out there, and as Norman Augustine, former Chief Executive Officer of Lockheed Martin, once wrote about people like auditors, inspectors, and Monday morning quarterbacks, “Murphy taught that if anything can go wrong it will, but it was left to Evans and Bjorn to point out in their law, ‘No matter what goes wrong, there will always be someone who knew it would.’”<sup>31</sup>

If you look at the track record of the current Secretary of Defense, you will see clear evidence of his willingness to hold senior officials accountable. Secretary Gates remarked back in February, when he replaced the major general in charge of the Joint Strike Fighter program, “If I’ve set one tone at the Department of Defense, it’s that when things go wrong, people will be held accountable.” Indeed, the list of senior officials he has relieved is impressive, including the top U.S. commander in Afghanistan in 2009, the Air Force Secretary and Chief of Staff (on the same day) in 2008 in connection with the control of nuclear weapons, and the Secretary of the Army in 2007 as an outgrowth of the treatment of wounded warriors at Walter Reed Army Medical Center.<sup>32</sup>

What this means to us—as practicing lawyers—is that we should think through accountability issues and identify them for our leaders and clients. This requires brutal honesty, at times, because our leaders—and even we—may bear some responsibility. I believe that our clients in the highest levels of the Executive Department and our officials in the oversight community expect and deserve our best effort—a procedure for fair investigation, analysis, and review. They will be more likely to accept our judgments, even if they do not agree with them, if we can show that the accountability process was open and even-handed.

A word of caution: All of us who are players get roughed up from time to time. This is especially a problem for lawyers. When things go

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<sup>30</sup> Peter Finn et al., *CIA Report Calls Oversight of Early Interrogations Poor*, WASH. POST, Aug. 25, 2009, at A1.

<sup>31</sup> NORMAN R. AUGUSTINE, *AUGUSTINE’S LAWS* 316 (6th ed. 1997).

<sup>32</sup> Craig Whitlock, *Gates to Major General: You’re Fired*, WASH. POST, Feb. 2, 2010, at A4.

wrong, our clients have an annoying and predictable tendency to blame us, in addition to relying on us to get the command or them out of a box. As unfair as this often may be, we cannot turn away from the action; we cannot play it so safe that we become irrelevant and ineffective. We must not be intimidated by those looking over our shoulders, but must continue to do what government attorneys always should do: Speak truth to power.

#### IX. Conclusion

So to summarize my thoughts, I am leaving you with six suggestions about how you can exercise leadership and provide advice after you have identified a case with high profile potential:

1. Ask what the normal rules are and why you would not follow them in the high profile case. That becomes your best defense against later claims of preferential treatment or double standards.
2. Ask the question, "Who else needs to know?" Keep your headquarters and oversight bodies in the information loop. Err on the side of over-reporting to enhance your credibility. And take advantage of the expertise and experience of others who have "been there, done that, and have the t-shirt."
3. Conduct your investigation as if you will have to account to an oversight authority for every decision and action you take.
4. Consider how to frame stories and handle press inquiries without misleading the media. Step up to defend the system, even when you cannot defend the specific decision.
5. Exercise leadership in coordinating multiple investigations, and keep a balanced perspective on who should conduct investigations.
6. Think carefully about accountability.

In closing, I want to thank all of those who made the arrangements for this event and for your hospitality during my stay here. I also want to thank the staff and faculty for the outstanding service that you provide our legal community and our Nation. This Legal Center and School has clearly become the epicenter of military legal education. I wish to

congratulate all the members of the 58th Graduate Course, to thank you for your continuing service, and to wish you the best in your new assignments around the world. And, finally, I want to offer a word of special thanks to those who have served in harm's way, and those going to assignments where an overseas deployment is on your radar. You and your families will always have our deepest appreciation for your sacrifices and will remain in our prayers.

**D-DAY: THE BATTLE FOR NORMANDY<sup>1</sup>**REVIEWED BY FRED L. BORCH III<sup>2</sup>

This is an outstanding book. Anthony Beevor, whose prize-winning *The Battle for Spain*,<sup>3</sup> *Stalingrad*,<sup>4</sup> and *The Fall of Berlin 1945*<sup>5</sup> earned him accolades from both professional historians and readers generally, has written another superb book that will appeal to all judge advocates and is certain to be a best-seller.

While Max Hastings (*Overlord*<sup>6</sup>), Cornelius Ryan (*The Longest Day*<sup>7</sup>) and others have written about the Allied invasion of 6 June 1944, what sets *D-Day: The Battle for Normandy* apart from these earlier works is that Beevor views the landings as merely the beginning of a larger, and more important story: the fierce, bloody, and unbelievably destructive battle for Normandy that culminated in the liberation of Paris more than two months later.

This explains why only the first third of the book is devoted to securing the Omaha, Utah, Gold, Juno, and Sword beachheads while the next 300 pages examine the Allied march across France to Paris. The value of this approach is it allows Beevor to place the amphibious landings—which are well known—in the context of a larger event, the Normandy campaign—about which much less has been written.

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<sup>1</sup> ANTHONY BEEVOR, *D-DAY: THE BATTLE FOR NORMANDY* (2009).

<sup>2</sup> Presently assigned as Regimental Historian and Archivist, U.S. Army, Judge Advocate Gen.'s Corps, The Judge Advocate Gen.'s Legal Ctr. & Sch. (TJAGLCS), Charlottesville, Va.; M.A., History, 2007, University of Virginia, Charlottesville, Va.; M.A., National Security Studies, *highest distinction*, 2001, Naval War College, Newport, R.I.; LL.M., 1988, TJAGLCS, Charlottesville, Va.; LL.M., *magna cum laude*, International and Comparative Law, 1980, University of Brussels, Belg.; J.D., 1979, University of North Carolina, Chapel Hill, N.C.; A.B., 1976, Davidson College, Davidson, N.C. Fred Borch is the author of a number of books and articles on legal and non-legal topics. See, e.g., FRED L. BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* (2001); FRED L. BORCH, *JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA* (2004). His latest book, *For Military Merit: Recipients of the Purple Heart* was published by Naval Institute Press in 2010.

<sup>3</sup> ANTHONY BEEVOR, *THE BATTLE FOR SPAIN: THE SPANISH CIVIL WAR 1936–1939* (1982).

<sup>4</sup> ANTHONY BEEVOR, *STALINGRAD* (1998).

<sup>5</sup> ANTHONY BEEVOR, *THE FALL OF BERLIN 1945* (2002).

<sup>6</sup> MAX HASTINGS, *OVERLORD: D-DAY & THE BATTLE FOR NORMANDY* (1984).

<sup>7</sup> CORNELIUS RYAN, *THE LONGEST DAY: THE CLASSIC EPIC OF D-DAY JUNE 6, 1944* (1959).

Beevor understands the interrelationship between strategy, operations, and tactics, and this means that *D-Day: The Battle for Normandy* tells a complex story of planning and execution in a complete yet nuanced manner. While this alone makes the book worth reading, Beevor's narrative is further enriched by his examination of topics that are not usually covered by military historians writing about 6 June 1944—but which will be of great interest to judge advocates.

First, Beevor shows that the French inhabitants of Normandy suffered horrific casualties: Allied bombing killed 15,000 French civilians and wounded another 19,000 *before the invasion*,<sup>8</sup> and there were 3000 French civilians killed in the *first twenty-four hours of the invasion*—twice the number of U.S. dead.<sup>9</sup> Prime Minister Winston Churchill was particularly alarmed by these civilian deaths, as he feared that this collateral damage might “easily bring about a great revulsion in French feeling towards their approaching United States and British liberators.”<sup>10</sup> Roosevelt, however, rejected Churchill's plea that French civilians be spared, and instead sided with General Dwight D. Eisenhower and other military commanders who insisted that collateral damage from Allied aerial attacks was the price that must be paid for a successful invasion of Normandy. While Churchill's fears of French rage against the Allies never materialized, Beevor does record that some Frenchmen and women were less than enthusiastic about being freed from their German occupiers. When one remembers that 300 civilians died during the Allied bombing of St. Lo on 6 June, and “well over half the houses in the town were razed to the ground,”<sup>11</sup> this makes perfect sense. Since a total of 19,890 French civilians were killed by the Allies just in Normandy *after the invasion* (and an even greater number injured),<sup>12</sup> one has to question whether the customary international law principles of distinction, military necessity, and proportionality were ever considered by Allied war planners.<sup>13</sup> Whether French civilian casualties were excessive, however, is a forgotten issue today, as memories have faded and only the good about D-Day is remembered.

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<sup>8</sup> BEEVOR, *supra* note 1, at 49.

<sup>9</sup> *Id.* at 112.

<sup>10</sup> *Id.* at 49.

<sup>11</sup> *Id.* at 123.

<sup>12</sup> *Id.* at 519.

<sup>13</sup> For a discussion of these principles, see GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 250–300 (2010).

Second, *D-Day: The Battle for Normandy* shows convincingly that the fighting in north-west France was “certainly comparable to that of the eastern front.”<sup>14</sup> Since a popular belief (promoted by post-war Soviet propagandists and still shared by some military historians) is that Germany’s best troops were on the Soviet-German front and all the heavy fighting occurred in the east, this is an important point. Beevor shows that, from June through August 1944, the Wehrmacht alone suffered nearly 240,000 killed and wounded;<sup>15</sup> another 200,000 men were taken prisoner.<sup>16</sup> Average losses on both sides in Normandy, in fact exceeded those for German and Soviet divisions during an equivalent period on the Eastern Front.<sup>17</sup>

Combat was fierce and it was brutal, and both sides committed war crimes. A paratrooper who served in the 82d Airborne is quoted as remembering that he was to “get to the drop zone as fast as possible” and “take no prisoners as they will slow you down.”<sup>18</sup> A sergeant in the 508th Parachute Infantry was “horrified” when he learned that members of his platoon were using German dead for bayonet practice.<sup>19</sup> Some American Soldiers unfortunately also practiced “ear-hunting”—mutilating the bodies of dead German soldiers by collecting their ears.<sup>20</sup> But the enemy was equally savage (Beevor reports that the Germans mutilated some U.S. Soldiers by cutting off their “privates”),<sup>21</sup> and Free French troops also repeatedly disregarded the law of armed conflict in refusing to accept the surrender of German soldiers and in executing enemy combatants they had taken prisoner.<sup>22</sup> While judges familiar with World War II know that there was little regard for the Geneva Conventions of 1929 on the Eastern Front, *D-Day: The Battle for Normandy* shows that war crimes go hand-in-hand with combat, and that even the best trained and best led Soldiers commit them.

Third, Beevor’s comparison of American, British, and Canadian soldiers with their German counterparts is particularly instructive. The Canadians (who often are overlooked in the story of 6 June 1944) played

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<sup>14</sup> *Id.* at 522.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 67.

<sup>19</sup> *Id.* at 68.

<sup>20</sup> *Id.*

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

<sup>22</sup> *Id.* at 434.

an important role in the invasion; their junior officers in particular provided British units with much needed leadership. The British, having been in combat since 1940, were seasoned, experienced, and “stubborn in defense.”<sup>23</sup> But, while they were battle-hardened, they were exhausted from years of combat and this “decline in boldness and initiative” was reflected in their performance in offensive operations: “a growing reluctance to make sacrifices in attack” meant that “time after time they were checked or even induced to withdraw by boldly handled packets of Germans of greatly inferior strength.”<sup>24</sup>

The Americans, still relatively fresh, learned quickly after the landings and, with aggressive leaders like General George S. Patton, advanced promptly and decisively. But not without considerable suffering, including thousands and thousands of Soldiers suffering from “battle shock.”<sup>25</sup> Beevor writes that American “medical services in Normandy were almost overwhelmed at times” by these cases of combat exhaustion (today’s Posttraumatic Stress Disorder (PTSD)) and it took some time before Army psychiatrists were able to create a treatment program for these psychologically damaged Soldiers that would get them back to the front lines.<sup>26</sup>

Today’s judge advocates will be interested in learning that Soldier suicides—as a direct result of battlefield stress—are nothing new in our Army (although one might assume otherwise given the media reports about suicides in the Army today). For example, a report from the 4th Infantry Division (shortly after that unit’s arrival in Normandy in June 1944) lamented the fact that Soldiers arriving as replacements “were definitely inadequately prepared, both psychologically and militarily, for combat duty . . . the majority of suicides were committed by replacements.”<sup>27</sup> Beevor reports that a female American Red Cross worker remembered that, to reduce suicides among these new and untested Soldiers, “belts and ties were removed from some of these younger men” before they went across the Channel to France.<sup>28</sup>

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<sup>23</sup> *Id.* at 323.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 260.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 258.

<sup>28</sup> *Id.*

Interestingly, there were “apparently few cases of psychoneurosis” among German soldiers.<sup>29</sup> Beevor explains that this may be because German authorities refused to acknowledge the existence of this illness. It may also be explained by the fact that Nazi propaganda had better prepared the Germans for battle. But Beevor also writes that the Germans had little time for weakness: a soldier who shot himself in the hand or foot was simply executed by firing squad. Perhaps this explains, in some way, the fewer number of German troops suffering from PTSD.

At the time of the Allied landings in Normandy, “almost everyone at every level was acutely conscious of taking part in a great historical event.”<sup>30</sup> *D-Day: The Battle for Normandy* tells the story of this truly pivotal event in 20th century history, and the book’s superb writing, good photographs, and excellent maps make it a “must read” for judge advocates.

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<sup>29</sup> *Id.* at 262.

<sup>30</sup> *Id.* at 75.

THE CRISIS OF ISLAMIC CIVILIZATION<sup>1</sup>REVIEWED BY MAJOR JOHN R. MALONEY<sup>2</sup>

*If Muslims do not muster the inner resources of their faith to fashion a civilizing outer presence, then Islam as a civilization may indeed disappear . . . Islam will simply be another motif in a consumer-driven, self-obsessed, short attention-span global culture; another 'player' in the marketplace for ideas and religions. The retreat of Islam into the private, individual sphere will be complete. The much-heralded Islamic 'awakening' of recent times will not be a prelude to the rebirth of an Islamic civilization; it will be another episode in its decline. The revolt of Islam becomes instead the final act of the end of a civilization.*<sup>3</sup>

## I. Introduction

*The Crisis of Islamic Civilization* is an exploration of the nature of Islamic civilization, the forces which have resulted in its progressive decline, and the various means by which the Islamic world may come to grips with modernity. It is within this context that Mr. Ali A. Allawi<sup>4</sup> addresses the issue of "political Islam" or "Islamism," which he uses to characterize Islam as a political ideology that emphasizes religious and

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<sup>1</sup> ALI A. ALLAWI, *THE CRISIS OF ISLAMIC CIVILIZATION* (2009).

<sup>2</sup> Judge Advocate, U.S. Army. Presently assigned as Litigation Attorney, Torts Branch, U.S. Army Litigation Division, Arlington, Virginia.

<sup>3</sup> ALLAWI, *supra* note 1, at 273.

<sup>4</sup> Ali A. Allawi formerly served as Minister of Finance, Defense, and Trade in Iraq's post-war government. He is currently a Senior Visiting Fellow at Princeton University. Born in Baghdad in 1947, Mr. Allawi graduated from MIT in 1968 with a BSc in Civil Engineering. He went on to do postgraduate studies in regional planning at the London School of Economics, and then obtained an MBA from Harvard University. Mr. Allawi was active in the opposition to the Baathist regime from 1968 onwards. He spent a number of years in finance in various positions outside Iraq, including a position at the World Bank. In 1978, he co-founded Arab International Finance, a merchant bank based in London. In 1992, he founded Fisa Group, which manages two hedge funds. From 1999–2002, he was a Senior Associate Member at St. Anthony's College, Oxford University. Ali A. Allawi, [http://www.cceia.org/people/data/ali\\_a\\_allawi.html](http://www.cceia.org/people/data/ali_a_allawi.html) (last visited Sept. 8, 2009).

rigid perspectives in all aspects of the public life.<sup>5</sup> Mr. Allawi's analysis has great relevance for judge advocates and military professionals.

Though *The Crisis of Islamic Civilization* comprehensively incorporates history, philosophy, theology, sociology, economics, and politics,<sup>6</sup> three primary arguments form Mr. Allawi's thesis. First, Islamic civilization is fundamentally different from other civilizations, and, in particular, from Western civilization.<sup>7</sup> Second, European encroachment on the East thwarted Islamic civilization from developing its own pathways to modernity.<sup>8</sup> Third, Islamic civilization must come to grips with modernity by first reconnecting with the spiritual dimension of Islam, and then developing political, legal, and economic models which are rooted in an authentic understanding of Islam.<sup>9</sup>

## II. Analysis

### A. Islamic Civilization is Different

Mr. Allawi believes that the world of Islam is distinguishable from other civilizations in its emphasis on a spiritual dimension that informs every other aspect of Islamic civilization.<sup>10</sup> By contrast, modern Western civilization is defined by a starkly secular perspective and an emphasis on the individual.<sup>11</sup> The strict separation of spiritual authority from secular authority—characteristic of modern Western civilization, has no basis in historical Islam.<sup>12</sup> To the contrary, Islamic civilization holds that the secular and the spiritual can, and should, be harmonized.<sup>13</sup> Islam does not conceive of the concept of the individual or of individual rights; instead, Islam views the individual as being completely dependent upon God, unable to exercise free will and individual choice, except by reference to God.<sup>14</sup> In Islam, no one, either individually or collectively, can assume the authority to determine an ethical or moral standard of

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

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

<sup>7</sup> *Id.* at xiv.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at xiv.

<sup>10</sup> *Id.* at 10.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 11.

conduct without reference to God, as any objective ethical or moral standard is necessarily derived from God.<sup>15</sup>

Mr. Allawi's contention that Islamic civilization is different because it is founded upon a spiritual dimension glosses over the fact that Western civilization, for much of its history, was similarly founded. Within a few centuries of the fall of the Roman Empire, Europe witnessed the coalescence of a new geopolitical, cultural, and religious order.<sup>16</sup> This new order would come to be called "Christendom,"<sup>17</sup> founded upon a feudal system that incorporated Roman Catholic Christianity, Roman legal tradition, and the Germanic ideal of liberty.<sup>18</sup> This spiritually-founded Western civilization of Christendom endured until the Protestant revolts of the sixteenth century.<sup>19</sup> Protestantism provided a framework for subordinating the Church to the State.<sup>20</sup> Within two centuries, this subordination led to the doctrine of separation of church and state; within two centuries more, it led to the irrelevance of church to state.<sup>21</sup> It may be that the process of de-sacralizing Western civilization was a necessary step on the path to modernity. If so, then it may also be that the differences between Islamic and Western civilization have less to do with the presence or absence, respectively, of a spiritual dimension than they do with the fact that these civilizations are simply at different stages of development along the same general trajectory.

#### B. European Encroachment Thwarted Islam's Path to Modernity

In Mr. Allawi's view, the failure of the Muslim world to find an alternate path to modernity resulted, in large part, from the fact that Islam proved unable to meet the challenges presented by engagement with the modern West.<sup>22</sup> In the nineteenth century, the Muslim world was suddenly and compellingly confronted with the dramatic reversal that had taken place with respect to the relative power of the civilizations of

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<sup>15</sup> *Id.* at 13.

<sup>16</sup> H. W. CROCKER III, TRIUMPH: THE POWER AND GLORY OF THE CATHOLIC CHURCH—A 2,000-YEAR HISTORY 116 (2001).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 117.

<sup>19</sup> *Id.* at 235.

<sup>20</sup> *Id.*

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

<sup>22</sup> ALLAWI, *supra* note 1, at 9.

Islam and the West.<sup>23</sup> Until the late seventeenth century, Islamic civilization had, in the main, been in the ascendant.<sup>24</sup> Despite occasional defeats,<sup>25</sup> some of which were nothing less than catastrophic,<sup>26</sup> Islamic civilization had generally proved more than equal to the challenge posed by other civilizations, particularly the West.<sup>27</sup> It was a bedrock belief of Islamic civilization that the Muslim world would ultimately triumph in the clash of civilizations.<sup>28</sup> During the eighteenth and nineteenth centuries, however, Islam was suddenly everywhere on the retreat.<sup>29</sup> The nature and impact of this reversal was devastating:

The projection of European imperial power in an almost effortless demonstration of its superiority in military, technical, material, organizational and governance matters challenged the core assumptions that underlay the world view of Islam. Nearly all contemporary Muslim observers of the unfolding drama of European conquest and expansion would bemoan the huge chasm which had opened between the capabilities of the two civilizations and the helplessness of Islam in front of the European juggernaut.<sup>30</sup>

Confronted with what appeared to be an almost unbridgeable civilizational gap, the Muslim world experienced a crisis of self-confidence with respect to the merits of its own specifically Islamic political, legal, and economic models.<sup>31</sup> But for European encroachment, Mr. Allawi believes that Islamic civilization might have sought a means

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<sup>23</sup> *Id.* at 24.

<sup>24</sup> *Id.* at 26.

<sup>25</sup> Islam suffered a temporary reverse with the arrival of the Crusaders in the Levant, and more permanent reverses through the loss of Spain, Portugal, and Sicily. These were, however, more than compensated for by the capture of Constantinople and Turkish advances into southeastern Europe. BERNARD LEWIS, *THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS* 274 (1995).

<sup>26</sup> Consider the sack of Baghdad by the Mongols in 1258. The Mongols razed the city, massacred most of the population (estimated to have been several hundred thousand people), and murdered the last Abbasid caliph. JAMES CHAMBERS, *THE DEVIL'S HORSEMEN* 143–46 (1979).

<sup>27</sup> LEWIS, *supra* note 25, at 274.

<sup>28</sup> ALLAWI, *supra* note 1, at 26.

<sup>29</sup> The nineteenth century saw the establishment of a French North African empire in Muslim Algeria, the absorption of Muslim Egypt into the British dominion, and the displacement of Muslim rule in India in favor of British imperial authority. *Id.* at 24.

<sup>30</sup> *Id.* at 25.

<sup>31</sup> *Id.* at 33.

to modernize on its own terms.<sup>32</sup> The Muslim world might have developed models specific to the demands of Islamic civilization that would have permitted them to close the civilizational gap while at the same time, preserving their core cultural perspective and values. Instead, the Muslim world jettisoned, in whole or in part, the political, legal, and economic models which had previously served Islamic civilization and attempted to import Western models in their place.<sup>33</sup>

This argument is also problematic—a fact that Mr. Allawi recognizes in his comparison of Japan's experience in confronting Western civilization and the process of modernization with the response of Islamic civilization to these same forces:

Here the case of the successful modernization of Japan, which commenced in earnest only in 1868 after the Meiji Restoration,<sup>34</sup> represents a serious counter-example and raises a dilemma concerning the apparent failure of modernization in the nineteenth-century Muslim world . . . At the end of the century, Japan was well on the way to joining the advanced powers, while Egypt languished under British rule. In Japan, the emphasis was on strengthening the bonds of Japanese exclusiveness through education, through state Shintoism and through the traditional virtues of thrift, diligence and loyalty in order to construct a modern economy. These were the legacies of Japan's Tokugawa past, and they were not discarded or questioned in the Meiji reformer's plans.<sup>35</sup>

The dilemma raised by the Japanese experience with Western encroachment and modernization is that it directly contradicts Mr. Allawi's argument that these same forces deprived Islamic civilization of the opportunity to find an Islamic path to modernity. Japan was

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<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.* at 33.

<sup>34</sup> The political revolution that brought about the fall of the Tokugawa shogunate and returned control of the country to direct imperial rule under the emperor Meiji, beginning an era of major political, economic, and social change known as the Meiji period (1868–1912). This revolution brought about the modernization and westernization of Japan. W. SCOTT MORTON & J. KENNETH OLENIK, *JAPAN: ITS HISTORY AND CULTURE* 147–67 (2005).

<sup>35</sup> ALLAWI, *supra* note 1, at 34.

confronted with the overwhelming military and technical superiority of the West when a squadron of American warships, commanded by Commodore Matthew C. Perry, sailed up to Uraga near the mouth of Edo Bay and delivered to Japanese officials a letter outlining a series of American demands.<sup>36</sup> Though Japanese authorities were deeply concerned, and were impressed by the technological superiority of the American ships and weapons, they did not experience a moral collapse or crisis of confidence in the merits of their own civilization.<sup>37</sup> To the contrary, Japan rapidly found ways of reconciling the core values of its civilization with the demands of modernization. What, then, does this example say about the failure of Islam to adapt in a similar fashion when confronted by the same forces? Mr. Allawi raises this question, but provides no answer.

### C. Islamic Civilization Must Find an Alternate Path to Modernity

Mr. Allawi contends that the Muslim world must find a way to harmonize modernity with the core values and perspectives of Islamic civilization.<sup>38</sup> This will require the development of alternative political, legal, and economic models—ones that are consonant with the spiritual foundation of the civilization.<sup>39</sup> The need for alternative models derives from the fact that Muslim leaders, in their haste to close the civilizational gap, failed to assess whether Western models would function in a civilization which had not undergone the transformational experiences that led to the development of these models in the West in the first instance.<sup>40</sup> These Western models, e.g., industrial manufacturing, secular commercial law, the nation-state as a unit of political organization, etc., were alien to a civilization that had not experienced the Reformation, the Enlightenment, or the Industrial Revolution.<sup>41</sup> More importantly, in light of the fact that these models were the product of a largely secular culture, many would prove to be incompatible with the spiritual dimension which forms the basis of Islamic civilization.<sup>42</sup>

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<sup>36</sup> MORTON & OLENIK, *supra* note 34, at 138.

<sup>37</sup> *Id.* at 139.

<sup>38</sup> ALLAWI, *supra* note 1, at 271.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 35.

<sup>41</sup> *Id.* at 20–21.

<sup>42</sup> *Id.* at 213.

As was the case with Mr. Allawi's argument regarding the impact of Western encroachment on Islamic civilization, Japan's experience with modernization seems to contradict Mr. Allawi's argument that Islam must develop alternative political, legal, and economic models for modernization if it is to preserve its core values and perspectives. Japan's approach to the reformation of its army and navy is exemplary:

The Japanese leaders intended not to Westernize, but to modernize; that is to say, they decided to choose the best model in each field of technology and administration which would make Japan powerful and a match for other nations. They did not intend to sacrifice or to alter fundamentally "the spirit of Old Japan," *yamato-damashii*, the soul of the nation, or the basic structure of their society under the emperor through which this spirit was expressed. Deputations of leading statesmen were sent abroad to bring back information and ideas upon which reforms could be based.<sup>43</sup>

If Japan was able to chart a course to modernity through the implementation of Western models, while at the same time preserving the core values and perspectives of Japanese civilization, why did Islam prove unable to do so? Again, Mr. Allawi offers no answers.

#### D. Political Islam

Mr. Allawi believes that the first step in the process of developing an alternative path to modernity is for the Muslim world to reconnect with the spiritual dimension of Islamic civilization.<sup>44</sup> Ironically, Mr. Allawi sees political Islam (Islamism)—an ideology that promotes outward expressions of Islamic observance in all aspects of the public life—as standing squarely in the way of this reconnection with the spiritual dimension.<sup>45</sup>

According to Mr. Allawi, "[W]hen Islamists proclaim that Islam 'is a total way of life,' what they really mean is that Islamic forms should shroud the modern world. There is no serious questioning about the

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<sup>43</sup> MORTON & OLENIK, *supra* note 34, at 151.

<sup>44</sup> ALLAWI, *supra* note 1, at 272.

<sup>45</sup> *Id.* at 253.

underlying conceptual framework of this world.”<sup>46</sup> In other words, while political Islam seeks to superficially impose an Islamic veneer on Western models, it has little or nothing to say about the validity of the models themselves.

Despite its apparent elevation of form over substance, political Islam nevertheless wields considerable influence in the Muslim world.<sup>47</sup> It is for this reason that *The Crisis of Islamic Civilization* may have some relevance for judge advocates and other military professionals operating in the Muslim world. Mr. Allawi provides a valuable insight into historical and contemporary Islamic civilization. In particular, his explication of the tension between the desire for modernization and the desire for an Islamic culture in the Muslim world can assist judge advocates involved with the reorganization of legal systems and civil government in Iraq and Afghanistan. Understanding that Islamic forms, as opposed to Islamic substance, are what seem to matter most to Muslim societies can inform decisions concerning implementation of political, legal, or economic models and the means by which acceptance of these models by the Muslim population can be facilitated.

### III. Conclusion

*The Crisis of Islamic Civilization* is an impressive attempt to explain the current state of Islamic civilization and to propose a means by which the Muslim world might recover from the decline of the last two centuries. Well-written, well-researched, and remarkably informative, *The Crisis of Islamic Civilization* is a valuable resource for anyone seeking a more nuanced understanding of the ways in which modernization has shaped contemporary Muslim society.

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<sup>46</sup> *Id.* at 252.

<sup>47</sup> *Id.* at 270.