Volume 207 **Spring 2011**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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CONTENTS

ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW—VOLUME 207

Since 1958, the *Military Law Review* has been published at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import to military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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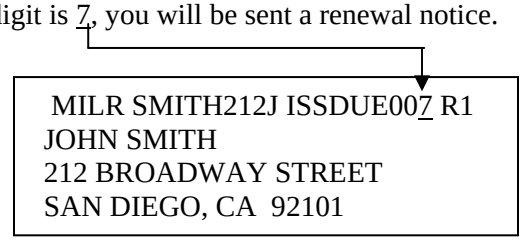

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MILITARY LAW REVIEW

Volume 207 **Spring 2011**

UNITED STATES v. DUBAY AND THE EVOLUTION OF MILITARY LAW

THE FOURTH GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY[*]

ANDREW S. EFFRON[**]

This is an extraordinary time to serve as a judge advocate. We are at war. Novel legal issues confront you in a highly challenging environment. Many of you have deployed to the combat arena in Iraq and Afghanistan. You have demonstrated great courage in the field, in the courtroom, and in the corridors of power, earning the deep respect of a grateful Nation.

Your leaders place a high value on continuing professional education. The faculty at the Legal Center and School infuses your courses with historical perspective, providing inspiration and guidance for perilous times.[1] Honoring the past, the School has built upon the foundation established by leaders such as Major General (MG) George S. Prugh (1920–2006), who initiated this lecture series.[2]

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[*] This article expands upon remarks delivered on April 28, 2010, to members of the staff and faculty, distinguished guests, and officers attending the 58th Graduate Course and the 53d Military Judges Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. The chair is named in honor of Major General (MG) George S. Prugh (1920–2006).

[**] Chief Judge, U.S. Court of Appeals for the Armed Forces. J.D., 1975, Harvard Law School; B.A., 1970, Harvard College.

[1] *Cf.* JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 20 (2007) (emphasizing enduring constitutional values in the context of addressing contemporary national security issues).

[2] General Prugh's many contributions to the law, our national defense, and the Judge Advocate General's Corps (JAGC) included service as The Judge Advocate General (TJAG) of the Army from 1971–1975, and a distinguished career on the faculty of the McGeorge School of Law. *See infra* Appendix A (biographical summary).

This morning we shall discuss a case from the Vietnam era that has continuing contemporary significance, *United States v. DuBay*.[3] I thank the Regimental Historian, Fred L. Borch III, the faculty, and the Prugh family for the great privilege of presenting the Prugh lecture.[4]

Part I. Prologue

> "*Although many reasons dictate that cases such as* DuBay *should be given the highest visibility,* DuBay *is characterized by near obscurity.*"[5]

In appellate proceedings, attorneys and judges frequently refer in shorthand terms to "*DuBay* hearings"—the procedure for post-trial factfinding—much as they might cite a statute or rule.[6] Notwithstanding its current practical import, *DuBay* at first blush would appear to offer little of historical interest. The text of the short per curiam decision in *DuBay* does not even occupy two pages in volume 17 of the decisions published by the Court of Military Appeals. The content of *DuBay*, which is closer to an order than an opinion, simply describes the mechanism to be used in post-trial factfinding proceedings. The case does not set forth any groundbreaking legal analysis. The text barely discusses precedent, and contains only a fleeting reference to litigation leading up to the decision.

But there is more to *DuBay* than appears on the face of the opinion—a point emphasized to me by a former judge advocate I met in Topeka, Kansas, during a Project Outreach visit to Washburn Law School.[7] While

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[3] 37 C.M.R. 411 (C.M.A. 1967). In treating *DuBay* as an example of evolutionary change in military law, I have drawn upon the approach to military law suggested in Walter T. Cox, III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987).

[4] I thank Rose Bennett, Fred L. Borch III, John S. Cooke, William A. DeCicco, Scott Goldman, Francis A. Gilligan, Captain (CPT) Madeline Gorini, Elizabeth Parker, Michele Pearce, Mary Rohmiller, Kevin Scott, Scott L. Silliman, Charles J. Strong, and Malcolm H. Squires, Jr., for helpful comments during the preparation of the lecture and this article.

[5] HOMER E. MOYER, JR., JUSTICE AND THE MILITARY 767 (1972).

[6] *See* 2 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 25-12.20, at 25-7 (3d ed. 2006); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE, § 15-2[B][3], at 820 (7th ed. 2008).

[7] *See* United States v. Macomber, 67 M.J. 214, 215 n.1 (C.A.A.F. 2009) (noting the Project Outreach hearing at Washburn Law School). The Dean of Washburn, Thomas J.

in Topeka, the Justices of the Kansas Supreme Court graciously invited us to a meeting in their courthouse. One of our hosts, Justice Robert Davis, mentioned his service as a judge advocate in the 1960s, which included a tour in Korea and a later assignment with the Government Appellate Division. He told us that he had worked on command influence litigation that established a new form of post-trial proceeding. When we asked if the case might have been named *DuBay*, he broke into a big smile and told us that it was, indeed, *DuBay*—a case that generated national controversy and consumed more than a year of his legal career.[8] When Fred Borch kindly mentioned the Prugh lecture, I thought of the excitement in the eyes of Justice Davis when he described *DuBay* and decided to explore the history behind that two-page opinion.[9]

Romig, served as TJAG of the Army from 2001–2005, retiring in the grade of MG. *See* Biography of Thomas J. Romig, http://www.washburnlaw.edu/faculty/romig-thomas.php (last visited Aug. 17, 2011).

[8] *See DuBay*, 37 C.M.R at 411 (listing Robert Davis as one of the counsel for Appellee, United States). Robert Davis served in the Army from 1964–67, and returned to his home state of Kansas to practice law. He was appointed to the bench in 1984, and served on the Kansas Supreme Court for seventeen years, serving as Chief Justice at the time of his death on August 4, 2010. *See* www.kscourts.org/kansas-courts/supreme-court/justice-bios/davis.asp; http://www.kscourts.org/Court-Administration/News-Releases/Davis-Services-2010.pdf.

[9] MOYER, *supra* note 5 (containing substantial information and commentary about the *DuBay* litigation). *See id.* at 701–02, 715–16, 745–46, 755–68. In discussing the "near obscurity" of *DuBay* in 1972, Moyer attributed that condition to "the near-total lack of a reported, public record," and to the issuance of a brief appellate opinion that did not set forth the underlying facts or circumstances of the case pertinent to the decision. *Id*. at 767–68. *See also* Luther C. West, *Military Justice—Fort Leonard Wood Style in* CONSCIENCE & COMMAND 122–35 (J. Finn ed. 1971) (relating his observations about the litigation, supplemented with extracts from various filings in the *DuBay* cases).

The obscurity of the underlying facts and circumstances of the *DuBay* litigation has been compounded by the difficulty in assembling official records of the pertinent proceedings. During the 1966–68 period, *DuBay* and the litigation would encompass nearly one hundred cases. *See infra* Part VII. The appellate proceedings primarily involved three lead cases: (1) United States v. Phenix, No. CM 414832 (A.B.R. Mar. 17, 1967) (unpublished) (discussed *infra* Part III.A); (2) United States v. DuBay, 37 C.M.R 411 (C.M.A. 1967) (remanding *Phenix*, *DuBay*, and twelve other cases for further proceedings) (discussed *infra* Parts III–IV); and (3) United States v. Berry, 37 C.M.R 428 (C.M.A. 1967) (remanding for further proceedings), 39 C.M.R. 541 (A.B.R. 1968) (review following remand) (discussed *infra* Part VII.A). The Clerk of Court for the U.S. Army Judiciary, who serves as the official custodian of the pertinent records of trial and intermediate appellate records, has advised the author that the Army cannot locate the official copies of the proceedings and decisions at trial and before the board of review in *Phenix*, *DuBay*, and *Berry*. E-mail from Malcolm Squires, Clerk of Court for the U.S. Army Judiciary, to the author (25 January 2011, 16:55:00 EST) [hereinafter Squires e-mail] (copy on file with author). Fortunately, the clerk's office was able to locate the records in a number of other cases coming out of Fort Leonard Wood at the same time, in

Part II. The Path to *DuBay*: The Military Justice Environment from World War II to Vietnam

> *I can recall hearing conversations between members of boards along this line: "What does the Old Man want us to do?" Now, that only illustrates the fact that these court-martial boards are not attempting to decide one way or another—is the man guilty or innocent. They are only trying to find out what the captain of a ship, or the commanding officer of a station, wants done with the man.*
>
> —Rep. Gerald R. Ford (1949)[10]

* * * *

> *You see, the difficulty is you just cannot legislate good conduct; and if a commander is going to do something that is illegal, anything that the Congress can put out in the way of law—it would be very difficult to stop him. If you prohibit the general from talking or influencing his subordinates he would not act directly but if he wanted to do it he would do it through his aide or something of that sort. But I want to assure you that that is not the disposition of commanders.*
>
> —Major General Thomas A. Green (1949)[11]

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which the parties had filed extensive extracts of the transcripts and documents from the three leading cases. *See infra* note 257. In addition, the Court of Appeals for the Armed Forces retains custody over the record of appellate documents filed before the Court of Military Appeals in the *Phenix*, *DuBay*, and *Berry* cases. E-mail from William DeCicco, Clerk of Court, U.S. Court of Appeals for the Armed Forces, to the author (11 Mar. 2011, 09:06 EST) [hereinafter DeCicco e-mail] (copy on file with author). The records of trial and appellate proceedings available at the U.S. Army Judiciary and the Court of Appeals for the Armed Forces have provided an extensive but incomplete picture of the *DuBay* litigation. In that context, the observations made herein may well be subject to clarification and modification should the complete underlying records become available in the future.

[10] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 825–26 (1949) [hereinafter 1949 House Hearings] (testimony of Rep. Gerald R. Ford). Representative Ford noted that he based his testimony "upon my experience of some 46 months in the United States Navy during World War II and on . . . the treatment that a constituent of mine has received since I took office on January 3, 1949." *Id.* at 825. Representative Ford subsequently served in the House for twenty-five years, rising to become the Minority Leader; and he later served as Vice President and President of the United States. *See* http://www.whitehouse.gov/about/presidents/geraldford.

The *DuBay* litigation focused on an acrimonious dispute between the commander of Fort Leonard Wood, Missouri, and his staff judge advocate.[12] The conflict, which surfaced during appellate litigation, primarily involved differing views on relative responsibilities of two officials: (1) the president of the court-martial; and (2) the law officer—a position held by the predecessor of today's military judge.[13] The appellate litigation, which would encompass nearly one hundred appellate cases coming out of Fort Leonard Wood, ignited a controversy that included front-page headlines in the national media.[14]

At the time of the *DuBay* litigation, the great military justice controversies of the World War II era remained fresh in the minds of many experienced officers. In the aftermath of World War II, longstanding disagreements about the nature of military justice had become the subject of a significant national debate, which led to passage of the Uniform Code of Military Justice (UCMJ) in 1950.[15] Enactment of

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[11] *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong. 265–66 (1949) [hereinafter 1949 Senate Hearings] (testimony of MG Thomas A. Green, Judge Advocate General of the Army). Major General Green served as the Judge Advocate General from December 1945 through November 1949. *See* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 189–91 (1975) [hereinafter JAGC HISTORY] (summarizing MG Green's career).

[12] *See* MOYER, *supra* note 5, at 701–02.

[13] *See id.* at 702. The position of president—the senior officer at the court-martial—dated from the earliest days of American military law. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 170, 967 (Government Printing Office 2d ed., 1920) (1895). By contrast, the law officer occupied a relatively new position created by Congress in the aftermath of World War II as part of the Uniform Code of Military Justice (UCMJ). Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 108, 117 (art. 26) [hereinafter UCMJ 1950]. *See* MOYER, *supra* note 5, at 534–36; Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49, 52–55 (2009).

A number of contemporary treatises provide informative overviews of the broader historical development and current status, authority, and jurisdiction of courts-martial, including 1 GILLIGAN & LEDERER, *supra* note 6, at 1-1 to -37; SCHLUETER, *supra* note 6, at 3-51. *See also* John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1 (2000) (providing a concise description of the history and purposes of military law).

[14] *See infra* Parts IV.D, IV.E, V.B, VII.B.

[15] The post-World War II reforms occurred in two stages. Congress first amended the Articles of War, focusing solely on the legislation governing the Army. Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627. *See* Andrew S. Effron, *The Fiftieth Anniversary of the UCMJ: The Legacy of the 1948 Amendments*, THE REPORTER, December 2000, at 3–5, *reprinted in* EVOLVING MILITARY JUSTICE 169 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002) [hereinafter Effron, *1948 Amendments*]. Over the next two years, the Department of Defense developed a proposal, which Congress considered

the legislation did not end the debate about the relative roles of lawyers and commanders in the military justice system, which continued well into the Vietnam era, setting the stage for the *DuBay* litigation. We begin by summarizing the post-World War II UCMJ debate, focusing on two issues critical to the *DuBay* cases: first, the development of judicial authority through separation of the law officer from the court-martial panel; and second, the establishment of appellate bodies with the power to issue authoritative judicial rulings.[16]

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and modified, to reform and unify military justice in a single law applicable to all the armed forces—the Uniform Code of Military Justice. UCMJ 1950, *supra* note 13. In the UCMJ, Congress enacted major reforms (such as restrictions on command influence, enhanced participation by lawyers in representing the parties, and performing judicial functions at trial and on appeal) while retaining the core disciplinary features of military law (such as providing for criminal proscription of unique military offenses, and preserving the role of the commander in exercising prosecutorial discretion, selecting of the court-martial panel, and taking action on the results of trial). *See* 1 GILLIGAN & LEDERER, *supra* note 6, at 1-14 to -15; SCHLUETER, *supra* note 6, at 40–41; ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 10–13 (1956); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, ARMY LAW., June 2000, 1 at 3–4 [hereinafter Effron, *Historical Perspective*].

[16] The following focuses on procedures applicable to general and special courts-martial under the UCMJ as enacted, and as in effect during the *DuBay* litigation in the mid-1960s. A general court-martial during that period consisted of a law officer and a panel composed of at least five members of the armed forces, and could impose any punishment, including death, authorized for the charged offenses. Both the prosecution and the defense were represented by qualified counsel before general courts-martial. *See* JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 89, 96–106, 191–92 (1953). A special court-martial during that period consisted of a panel composed of at least three members of the armed forces, and could adjudge a sentence including confinement and forfeitures for not more than six months, a bad-conduct discharge, and a number of other punishments. In a special court-martial, if the prosecution was represented by qualified counsel, the defense was entitled to similar representation. Otherwise, the parties could be represented at a special court-martial by non-attorneys. *See id.* at 89–90, 97–106, 192–93. *See also infra* Part VIII.A (noting legislative changes pertinent to general and special courts-martial enacted shortly after completion of the *DuBay* litigation). *See generally* UCMJ arts. 16–19, 25a, 26, 27, 38 10 U.S.C. § 816–819, 825a, 826, 827, 838 (2006) (regarding the current structure and jurisdiction of general and special courts-martial and qualifications of counsel).

A. Establishment of Judicial Authority: Transformation of the "Law Member" under the Articles of War into the "Law Officer" under the UCMJ

Congress enacted the UCMJ to address widespread concern about the administration of military justice during World War II.[17] The massive expansion of the armed forces during the war subjected more than 16 million individuals to court-martial jurisdiction.[18] The services conducted over 1.7 million trials, carried out over 100 executions, and held over 45,000 members of the armed forces in prison at the end of the war.[19] A variety of studies during and after the war identified significant problems, primarily involving undue command influence and insufficient use of qualified counsel.[20]

Notwithstanding a general consensus about the need for change, the debates about the proposed legislation produced competing proposals, ranging from minor adjustments to complete civilianization of the military justice system.[21] Within the Department of Defense, an interservice group chaired by Professor Edmund Morgan prepared draft military justice reform legislation.[22]

The drafting committee in the Department of Defense began by reviewing the existing, separate laws pertinent to the Army and Navy, as well as the numerous reports on the operation of those laws during World War II.[23] For each matter of procedure or substantive law, the Committee then decided whether the new uniform law should adopt the language followed by the Army or the Navy, or whether a new or modified text should be employed.[24]

Although the drafting group reached consensus on most issues, the group divided sharply on a number of points. Two areas of disagreement directly related to the *DuBay* litigation—allocation of the responsibility

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[17] *See, e.g.*, S. REP. NO. 81-486, at 3 (1949) [hereinafter 1949 S. REP.].
[18] John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 MIL. L. REV. 39 (1972).
[19] *See* JONATHAN LURIE, ARMING MILITARY JUSTICE 128 (1992).
[20] *See id.* at 128–49; WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 14–21 (1973).
[21] *See* Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 28–38 (1970).
[22] *See* LURIE, *supra* note 19, at 157–70; Felix Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7, 8–9 (1965).
[23] *See* GENEROUS, *supra* note 20, at 40–42.
[24] *See id.*

for deciding legal issues at trial, and establishment of appellate bodies with judicial powers.[25]

1. Divided Views on the Power to Decide Legal Issues at Trial

a. Pre-UCMJ Practice

In reviewing the procedure for deciding legal issues at trial, the drafting committee focused on the pre-UCMJ procedure employed by the Army. Under the Army's procedure, one of the officers detailed as a panel member in a general court-martial served as the "law member."[26] The law member, who did not preside over the court-martial, sat as a member of the panel for all purposes, including deliberation and voting on findings and sentence.[27] The president of the court-martial, not the law member, served as the presiding officer at all phases of the trial.[28] Although the law member issued rulings on interlocutory matters other than challenges, the panel members, by majority vote, could overrule the law member except on certain evidentiary issues.[29] As noted in one commentary, the law member "was not a judicial officer, but merely an 'evidentiary referee.'"[30]

In the pre-UCMJ Navy, courts-martial did not have a law member. The court-martial panel as a whole ruled on the admissibility of evidence

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[25] *See id.*

[26] Act of June 4, 1920, ch. 227, 41 Stat. 787, 788 (art. 8); MANUAL FOR COURTS-MARTIAL, U.S. ARMY ¶ 40 (1928 ed.) [hereinafter 1928 *MCM*]. Although the Articles of War expressed a preference for appointment of a judge advocate to serve as law member, the convening authority could appoint an officer from another branch to serve as the law member if a judge advocate was not available. *Id.* In the initial post-war amendments to the Articles of War, popularly known as the Elston Act, Congress mandated appointment of a lawyer as the law member for courts-martial in the Army. Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627, 628–29 (art. 8).

[27] *See* MOYER, *supra* note 5, at 534; Henry A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge?*, 9 CAL. W. L. REV. 57, 73 (1972).

[28] 1928 *MCM*, *supra* note 26, ¶ 39.

[29] *See* MOYER, *supra* note 5, at 534. In the 1948 amendments to the Articles of War, Congress limited the power to overrule the law member under the Articles of War in three matters: a ruling on a motion for a finding of not guilty, a ruling as to the accused's sanity, and challenges. *See* Cretella & Lynch, *supra* note 27, at 72.

[30] Cretella & Lynch, *supra* note 27, at 69.

and other interlocutory matters.[31] The panel received legal advice from the judge advocate—the officer assigned to prosecute the case.[32]

b. Internal Divisions

During the drafting of the proposed UCMJ, the services were divided on the question of whether to retain the Army's practice (a law member who deliberated with the panel) or whether to provide for a law officer who acted solely in a judicial capacity.[33] The Army and Air Force favored retention of the Army's practice of having a "law member" who deliberated with the panel, while the Navy and Professor Morgan favored creation of a new position, a "law officer" separate from the panel with the power to issue authoritative rulings. Secretary of Defense Forrestal included the position of "law officer" separate from the panel in the official legislative proposal forwarded to Congress.[34]

c. Congressional Consideration

During congressional hearings, the most vigorous opposition to the proposed new law officer position came from the Judge Advocate General of the Army, MG Thomas H. Green, who expressed concern that the law officer would likely be junior in rank to the president of the court-martial—the "senior line officer in charge of the court."[35] In his view, providing for a law officer who might be junior to the court-martial president ran the danger of producing tensions that would "not be in the best interests of the Army, either the line or my department."[36] The

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[31] *See id.* at 70.
[32] *See* NAVAL COURTS AND BOARDS § 465, at 241 (1937).
[33] *See* LURIE, *supra* note 19, at 166–69, 192; Cretella & Lynch, *supra* note 27, at 76–77; 1949 Senate Hearings, *supra* note 11, at 57, 308–09 (testimony of Mr. Morgan); *id.* at 160–61 (testimony of Mr. Larkin); *id.* at 257, 261–62 (testimony of MG Thomas H. Green, Judge Advocate General of the Army); *id.* at 286–87 (testimony of Rear Admiral George L. Russell, Judge Advocate General of the Navy); *id.* at 288 (testimony of Major General Reginald C. Harmon, Judge Advocate General of the Air Force).
[34] *See* Cretella & Lynch, *supra* note 27, at 77.
[35] *See* 1949 Senate Hearings, *supra* note 11, at 261.
[36] *Id.* The Judge Advocate General of the Air Force also favored retention of the authority for a law member to deliberate and vote with the court-martial, and opposed creation of the new law officer. *See* Cretella & Lynch, *supra* note 27, at 78. *See also id.* at 77–78 (summarizing a variety of views from other witnesses who opposed creation of the law officer position).

congressional proceedings indicate that his views, as well as those of numerous other witnesses, received serious consideration in Congress; but, in the end, both the House and Senate decided to eliminate the position of law member and establish the position of law officer.[37]

The UCMJ, as enacted, mandated appointment of a law officer for each general court-martial with the authority to issue final rulings of law on most interlocutory matters and to take other authoritative judicial actions.[38] In contrast to the role of the law member under the Articles of War, the law officer of a general court-martial under the UCMJ would occupy a position similar to a judge in civilian proceedings and would not participate as a voting member of the court-martial panel.[39]

d. Seeds of Conflict: The Simultaneous Presence of the Law Officer and the President of the Court-Martial

Although Congress took a step toward creating a military judiciary by establishing the position of law officer, the UCMJ did not expressly place the law officer in charge of trial proceedings at a general court-martial. Congress retained the position of "president" of a court-martial without clearly specifying the nature of the relationship between the law

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[37] UCMJ 1950, *supra* note 13, arts. 16(1), 26. *See* 1949 House Hearings, *supra* note 10, at 1152–54; 1949 Senate Hearings, *supra* note 11, at 308–09; H.R. REP. NO. 81-491, at 6, 16, 18, 26–27 (1949) [hereinafter 1949 H. REP.]; 1949 S. REP., *supra* note 17, at 6, 15, 18, 22–23. During consideration of the proposed UCMJ on the floor of the Senate, Senator Kem, who played a leading role in promoting the 1948 amendments, vigorously questioned Senator Kefauver, the floor manager of the bill, regarding the proposed transformation of the Army's law member into a judicial law officer; ultimately, Senator Kem did not offer an amendment to strike the new position of law officer. 96 CONG. REC. 1359–61 (1950). Senator Tobey filed, but did not offer, an amendment providing for a law member along the lines of the Army's system under the Articles of War. 96 CONG. REC. 1293–94 (1950); UCMJ 1950, *supra* note 13 (arts. 16(1); 26).

[38] UCMJ 1950, *supra* note 13 (arts. 16(1), 26); *see* SNEDEKER, *supra* note 16, at 96–97.

[39] *See id.*; 1949 House Hearings, *supra* note 10, at 607 (testimony of Edmund M. Morgan, Jr., Chair of the Dep't of Def. interservice committee that drafted the proposed uniform code); *id.* at 1154 (testimony of Mr. Larkin, representing the Dep't of Def.); 1949 Senate Hearings, *supra* note 11, at 40–41, 57 (testimony of Mr. Morgan). The UCMJ, however, did not authorize the law officer to rule on challenges, motions for a finding of not guilty, and rulings regarding the accused's sanity, nor did it authorize judge-alone proceedings before the law officer. *See* SNEDEKER, *supra* note 16, at 96–97, 396, 402. The law officer lacked a variety of other powers typically possessed by a civilian judge. In the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, Congress created the military judiciary and provided additional powers over these and other matters. *See* Part VIII.A *infra.*

officer of a general court-martial and the president of the court-martial.[40] For special courts-martial, no such clarification was needed. Because the legislation did not provide for assignment of a law officer to special courts-martial, the rulings on interlocutory matters and other matters of law remained within the responsibility of the special court-martial president.[41]

As a result of these developments, the legislation produced a situation in which an officer might serve in one case as the president of a special court-martial with broad powers over the proceedings, while serving in another case as the president of a general court-martial with limited, vaguely defined powers.[42] Over time, the existence of two distinct roles would contribute to the tensions that culminated in the *DuBay* litigation.

2. The Debate over Appellate Review under the UCMJ

The *DuBay* cases also involved another controversial innovation under the UCMJ—legal review by appellate bodies empowered to issue authoritative judicial rulings.[43] Prior to enactment of the UCMJ, the review of courts-martial largely relied on review by commanders and

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[40] The UCMJ, as enacted, identified a number of duties for the president of a court-martial. When the accused was represented by civilian counsel, and did not wish to have detailed military counsel act as additional counsel, the president of the court-martial would excuse the detailed counsel. UCMJ 1950, *supra* note 13 (art. 27(b)). In addition, the legislation provided for authentication of a general court-martial record by the president and the law officer. *Id.* at 125 (art. 54). When Congress established the position of military judge in the Military Justice Act of 1968, 82 Stat. 1335, 1338, the legislation provided that in cases in which a military judge had been detailed, these responsibilities would be exercised solely by the military judge. *See* 10 U.S.C. §§ 837(b), 854(a) (2006) (arts. 37(b), 54(a)).

[41] *See* SNEDEKER, *supra* note 16, at 293. The members of the special court-martial panel, by majority vote, could overrule the president. *See id.* at 293–94.

[42] *See infra* Part II.B.

[43] *See* UCMJ 1950, *supra* note 13 (art. 66) (providing for appellate proceedings within each military department by a board of review for all cases in which the sentence included capital punishment, a punitive separation, confinement for a year or more, and certain other cases (codified as amended at 10 U.S.C. §§ 866 (designating the intermediate court as the Court of Criminal Appeals))); *id.* (art. 67) (providing for appeal of board of review decisions to an Article I civilian court, the Court of Military Appeals, composed of judges appointed by the President and confirmed by the Senate (codified as amended at 10 U.S.C. §§ 867, 941–946 (designating the court as the U.S. Court of Appeals for the Armed Forces))).

senior civilian officials, and each service employed different procedures.[44]

During the drafting of the UCMJ, significant differences emerged from within the Department of Defense regarding establishment of appellate courts. The disagreements focused primarily on two proposals that were ultimately endorsed by Secretary of Defense Forrestal and enacted by Congress: first, empowering the Boards of Review to issue judicial rulings binding on the Judge Advocate General and executive branch officials, and second, creating a civilian court that would review the legality of decisions made by the Boards of Review.[45]

Although the congressional hearings contained numerous expressions of support for the proposed reform of the appellate process, the hearings also reflected the continuing opposition within some elements of the Department of Defense.[46] Major General Raymond H. Fleming, presenting the views of the National Guard Bureau, opposed the establishment of new Boards of Review under Article 66 because "the Judge Advocate General is excluded from participation in their decisions . . . ."[47] He advocated retention of the Army's "highly

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[44] *See* William F. Fratcher, *Appellate Review in Military Law*, 14 MO. L. REV. 15, 44–55, 62–67 (1949); R. Pasley & F. Larkin, *The Navy Court-Martial: Proposal for Its Reform*, 33 CORNELL L.Q. 195, 217–29 (1947); Willis, *supra* note 18, at 51–54. Following well-publicized military justice controversies during World War I, the Army developed a regulatory procedure for obtaining opinions from a board of judge advocates prior to completing action in cases involving significant punishments. *See* LURIE, *supra* note 19, chs. 3, 4; Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 32 (1967); Fratcher, *supra*, at 40–43; Sherman, *supra* note 21, at 15–28; Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989). Subsequently, in the 1920 Articles of War, Congress provided statutory authority for the Army's review process, requiring the Judge Advocate General of the Army to establish one or more Boards of Review to review specified types of cases. Act of June 4, 1920, ch. 2, 41 Stat. 759 (art. 50½). Although these Boards employed procedures similar to those of appellate courts, their opinions could be treated as advisory by the Judge Advocate General. *Id. See* Morgan, *supra* note 15, at 181. In the 1948 amendments to the Articles of War, Congress established a body above the board of review, known as the Judicial Council, composed of judge advocates at the general officer level, whose opinions also could be treated as advisory in nature by the Judge Advocate General. Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627, 635–37 (art. 50); *see* Fratcher, *supra*, at 62–67 (discussing the functions of the Judicial Council).

[45] *See* LURIE, *supra* note 19, at 169–206; Willis, *supra* note 18, at 57–63.

[46] *See* Willis, *supra* note 18, at 65–68.

[47] 1949 House Hearings, *supra* note 10, at 772. Major General Fleming noted that the testimony had been prepared by MG Kenneth F. Cramer, Chief, National Guard Bureau,

efficient" appellate structure which, in his view, "insures compliance with the law" and which, "through participation in action by the Judge Advocate General, insures justice and prevents undue interference with disciplinary powers of troop commanders."[48]

Major General Fleming also contended that establishment of a civilian appellate court to review decisions from the Boards of Review would constitute "a diversion from present procedures which would endanger the security of our country in time of war."[49] A civilian appellate court "would be a hazardous interference with the duties of the proper military authorities" and would constitute "a deterrent to swift and sure justice in the armed forces."[50] In his view, if Congress decided to create an avenue to appeal board of review decisions, the appellate court should be composed of general and flag officers with a legal background, not civilians.[51]

Major General Thomas Green, the Judge Advocate General of the Army, advocated limiting the powers of the Boards of Review to questions of legal sufficiency.[52] He recommended retention of then-current provisions in the Army's Articles of War under which decisions of the boards would not be treated as authoritative rulings but would instead be subject to concurrence by the Judge Advocate General.[53] In his view, the power to take authoritative action should reside with the Judge Advocate General and other senior officials, "all of whom have far greater responsibility with respect to the accomplishment of the military mission than do the boards of review."[54] Major General Green also strongly opposed creation of a civilian Court of Military Appeals and advocated that Congress revise the proposed Article 67 so that the Court would be composed of three military officers—the Judge Advocates General of the Army, Navy, and Air Force.[55]

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and that it represented the views both of the Bureau and the National Guard Association. *Id.* at 771.

[48] *Id.* at 772.

[49] *Id.*

[50] *Id.* at 773.

[51] *Id.* 773–74.

[52] 1949 Senate Hearings, *supra* note 11, at 262.

[53] *Id.* at 271–72.

[54] *Id.* at 258–59.

[55] *Id.* at 260. He added that if Congress were to conclude that civilian review should be established, he would prefer review in the U.S. Court of Appeals for the District of Columbia Circuit, as opposed to creating a new court. *Id.* at 264. The Judge Advocates General of the Navy and Air Force expressed varying degrees of support for and concern

Ultimately, the views in opposition to appellate reform did not prevail in the legislative process.[56] In the UCMJ, Congress provided the newly established Boards of Review and Court of Military Appeals with the authority to issue binding judicial decisions on a wide range of issues, including the legality of court-martial proceedings.[57] The tenor of the opposition to the legislation, however, underscored the challenges that lay ahead in implementing the new appellate structure.

B. Implementing Rules

During the year between the enactment of the UCMJ[58] and the effective date of the new law,[59] a working group within the Department of Defense prepared for presidential consideration a draft *Manual for Courts-Martial* (*MCM*) containing implementing rules and guidance.[60] The published drafting history of the 1951 *MCM* set forth a brief discussion of the relationship between the law officer and the president of a general court-martial.[61] After quoting extracts from the hearings on

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about the proposed changes in the appellate process, but did not present their views with the degree of opposition or level of detail expressed by General Green. *See, e.g.*, *id.* at 279–88 (testimony of Rear Admiral Russell, Judge Advocate General of the Navy); *id.* at 288–92 (testimony of Major General Harmon, Judge Advocate General of the Air Force).

[56] *See* GENEROUS, *supra* note 20, at 142–53; LURIE, *supra* note 19, at 206–55; Willis, *supra* note 18, at 63–71. Senator Tobey filed a series of amendments that included a provision reflecting the views of MG Green with respect to the boards of review, as well as a provision that would place civilian review in the U.S. Court of Appeals for the District of Columbia Circuit rather than in the proposed Court of Military Appeals. *See* LURIE, *supra* note 19, at 249–50. He did not offer these proposals as amendments to the bill during the debate on the UCMJ. *See id.*

[57] *See* UCMJ 1950, *supra* note 13, arts. 66, 67 (codified as amended at 10 U.S.C. §§ 866, 867). Review of courts-martial under the UCMJ also includes the initial review of courts-martial by commanders and staff judge advocates, *see* Article 60, UCMJ, 10 U.S.C. § 860; review of cases not subject to automatic appeal under Article 66, *see* Articles 65, 69, UCMJ, 10 U.S.C. §§ 865, 869; and review of certain types of cases that require action by senior civilian officials following the completion of judicial review, *see* UCMJ art. 71, 10 U.S.C. § 871 (2006).

[58] UCMJ 1950, *supra* note 13

[59] *Id.* § 2. *See* Executive Order 10,214 (1951).

[60] *See* UCMJ 1950, *supra* note 13 (art. 36) (current version at 10 U.S.C. § 836 (2006)) (authorizing the President to promulgate rules of evidence and procedure similar to the rules applicable to the trial of criminal cases in federal district court to the extent that they would "not be contrary to or inconsistent with" the UCMJ); CHARLES L. DECKER ET AL., DEP'T OF DEFENSE, LEGAL AND LEGISLATIVE BASIS**,** MANUAL FOR COURTS-MARTIAL**,** UNITED STATES, at v–vi (1951); GENEROUS, *supra* note 20, at 56–57.

[61] DECKER ET AL., *supra* note 60, at 69–70.

the UCMJ analogizing the law officer to a judge, the drafting history stated: "Because the legislative intent is so clear on this point, the law officer has been charged generally with the responsibility for the fair and orderly conduct of the proceedings."[62] By contrast, the drafting history described the president of a general court-martial as occupying "a position similar to that of the foreman of a jury" except for a "few listed" duties under paragraph 40b(1) of the 1951 *MCM*.[63] Reflecting the potential for tension between the law officer and the president of a general court-martial, the drafting history noted that the diminished status of the president might be viewed by some as an affront to the "dignity" of the officer.[64] Notwithstanding this concern, the drafters concluded that the change was desirable "to eliminate the embarrassing possibility that a ruling of the president, purportedly as presiding officer, would be overruled by the law officer by virtue of his power to rule finally on almost all interlocutory questions."[65]

The rules, promulgated in the 1951 *MCM*,[66] incorporated the statutory duties of the law officer of a general court-martial[67] and the statutory duties of the president of a special court-martial.[68] The 1951 *MCM* also provided guidance on the duties of the president of a general court-martial, as well as the president's relationship to the law officer. The *MCM* described the president of the court-martial—not the law officer—as "the presiding officer of the court," and set forth a number of specific duties regarding the management of the proceedings:

> (a) After consultation with the trial counsel and, when appropriate, the law officer, he sets the time and place of trial and prescribes the uniform to be worn.
>
> (b) As the presiding officer of the court, he takes appropriate action to preserve order in the open sessions of the court in order that the proceedings may be conducted in a dignified, military manner, but, except for his right as a member to object to certain rulings of the law officer, he shall not interfere with those rulings

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[62] *Id.* at 69.
[63] *Id.*
[64] *Id.* at 69–70.
[65] *Id.*
[66] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951 ed.) [hereinafter 1951 *MCM*].
[67] *Id.* ¶¶ 39, 57, 73, 74.
[68] *Id.* ¶¶ 41, 57.

> of the law officer which affect the legality of the proceedings.
>
> (c) He administers oaths to counsel.
>
> (d) For good reason, he may recess or adjourn the court, subject to the right of the law officer to rule finally upon a motion or request of counsel that certain proceedings be completed prior to such recess or adjournment, or that a continuance be granted. Whether a matter of recess or adjournment has become an interlocutory question will be finally determined by the law officer.[69]

In short, the 1951 *MCM* provided for a system in which the "law officer" of a general court-martial would exercise many of the powers vested in a civilian judge, but would not serve as the "presiding officer" of the court-martial. The responsibility for "presiding," including specific duties in the management of the proceedings, would be vested in the "president," who would likely be a line officer with substantial contemporary experience in the exercise of judicial powers in special courts-martial. Although the 1951 *MCM* provided a framework for resolving conflicts between the law officer and president, the military justice system under the UCMJ, as implemented by the 1951 *MCM*, retained the potential for a clash of wills between individuals with differing personalities, perspectives, and experiences.

C. The Debate Continues

During the 15-year period between the effective date of the UCMJ and the initiation of the *DuBay* cases, debate continued over the underlying structure and purposes of military justice—particularly with respect to the constitutional rights of military personnel and the relative balance of command and judicial roles.[70] In that period, differences

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[69] *Id.* ¶ 40(b)(1)(b) (internal cross-references omitted). The *MCM* also sets forth the duties of the president with respect to the closed deliberations of the court-martial panel and as spokesman for the panel. *Id.* ¶ 40(b)(1)(e)–(f).

[70] *See, e.g.*, *Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, Hearings Pursuant to S. Res. 260, Constitutional Rights of Military Personnel*, 87th Cong. *passim* (1962) [hereinafter 1962 Senate Hearings]; GENEROUS, *supra* note 20, at 122–54; Gordon D. Henderson, *Courts-Martial and the Constitution:*

among the services regarding the training and assignment of law officers—as well as decisions by the Court of Military Appeals enhancing the judicial role of law officers—generated appreciation, apprehension, and congressional attention.[71]

The interest of Congress in military justice intensified in the mid-sixties as our Nation's deepening involvement in Vietnam produced a major increase in the size and impact of the armed forces, as reflected in the following table.[72]

The Original Understanding, 71 HARV. L. REV. 293 (1957); Frederick B. Wiener, *Courts-Martial and the Constitution: The Original Practice* pts. 1 & 2, 72 HARV. L. REV. 1, 266 (1958). *See also* 1962 Senate Hearings, *supra*, at 859–64 (setting forth then–contemporary bibliographies regarding military law and constitutional rights). Commentators on the first two decades under the UCMJ have described the tense and sometimes acrimonious disagreements over judicial decisions issued during that era. *See, e.g.*, LURIE, *supra* note 19, at 154–56; GENEROUS, *supra* note 20, at 133–45.

[71] *See, e.g.*, Cretella & Lynch, *supra* note 27, at 79–87; Robert E. Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39, 64–77 (1959); MOYER, *supra* note 5, at 535–36. *See generally* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE S. COMM. ON THE JUDICIARY, 88TH CONG., CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL, SUMMARY REPORT OF HEARINGS 26–32 (1963); *Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, U.S. Senate*, 87th Cong. *passim* (1962). The Subcommittee staff included an Air Force veteran, Robinson O. Everett, who would assist Senator Ervin with a second set of hearings in 1966, and later became Chief Judge of the U.S. Court of Military Appeals. *See* 1962 Senate Hearings, *supra* note 70, at 1; Memorial Proceedings for the Honorable Robinson O. Everett, 68 M.J. LXIII, LXIV, LXIX, LXXIX–LXXX, XCIII–XCIV (2009) [hereinafter Memorial Proceedings]

[72] The laws applicable to veterans' benefits define the Vietnam era, for purposes of service in Vietnam, as covering the period from February 28, 1961, to May 7, 1975. 38 U.S.C. § 101(29)(A) (2006). The year 1964, in the chart, represents the year prior to the major buildup of American forces in Vietnam. *See* LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE, THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 3 (1978). The year 1966 represents the year in which the appellate courts commenced review of the *DuBay* cases, and 1968 represents the year in which the appellate courts completed review of those cases. *See infra* Part VII.

	1964	1966	1968
Active Duty End Strength[73] (Annual Draft Inductions)[74]	2,690,141 (112,386)	3,229,209 (382,010)	3,489,588 (296,406)
American Forces in Vietnam[75]	17,280	317,007	537,377
Casualties in Vietnam[76] (Deaths)	1,186 (147)	35,101 (5,008)	107,412 (14,592)
General and Special Courts-Martial[77]	43,668	41,780	65,114

In January 1966 Senator Sam Ervin, a senior member of a series of both the Armed Services and Judiciary Committees of the Senate, conducted detailed hearings on the rights of military personnel.[78] At the outset of the hearings, Senator Ervin introduced a number of military justice reform bills that proposed a significant restructuring of the roles

[73] Dep't of Def., Statistical Information Analysis Div., DoD Personnel & Procurement Statistics (Sep. 9, 2010, 08:32 AM), http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/309hist.htm [hereinafter DoD Personnel & Procurement Statistics].

[74] Selective Serv. Sys., Induction Statistics (Sep. 9, 2010, 09:34 AM), http://www.sss.gov/induct.htm.

[75] Dep't of Def., Statistical Information Analysis Div., DoD Personnel & Procurement Statistics (Sep. 9, 2010, 08:32 AM), http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/309hist.htm.

[76] Office of the Sec'y of Def., Directorate for Statistical Servs., Selected Manpower Statistics 54 (1969).

[77] Compiled from COURT OF MILITARY APPEALS, ANNUAL REPORT PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE (1964, 1966, 1968). In comparison, for the Fiscal Year 2009, with an active duty end strength of 1,488,511 and 230,500 deployed in Iraq and Afghanistan, there were a total of 2,950 general and special courts-martial. Compiled from U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE (2009) and Dep't of Def. Statistical Info. Analysis Div., DoD Personnel & Procurement Statistics. DoD Personnel & Procurement Statistics, *supra* note 73.

[78] *Military Justice: Joint Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary and a Special Subcomm. of the S. Comm. on Armed Services, U.S. Senate*, 89th Cong. (1966) [hereinafter 1966 Senate Hearings]. Lawrence Baskir, who served as counsel to the Judiciary Subcommittee, would later co-author one of the leading studies of military service in the Vietnam era. *See supra* note 72. He would also serve as General Counsel of the Army, and currently serves as a judge on the U.S. Court of Federal Claims. *See* Biography of Lawrence M. Baskir, http://www.uscfc.uscourts.gove/node/21. Robinson O. Everett also provided consulting and staff assistance for the hearings. *See supra* note 15.

of lawyers and commanders in the system.[79] The proposed bills included legislation "to enhance the independence, impartiality and competence of law officers who preside over courts-martial by creating in each service an independent 'field judiciary' made up of experienced, full-time legal officers assigned and responsible directly to the Judge Advocate General of the service."[80] Although the Ervin legislation reflected a positive view of contributions that law officers could make to the administration of military justice, the tenor of the proposals and the hearings underscored concern that law officers under the UCMJ lacked sufficient judicial authority and independence.[81]

Part III. *Dubay* and the Fort Leonard Wood Cases at the Army Board of Review

> *Manifestly the issues raised by the assignment of errors are of grave importance not only to the appellants in this case but also to other accused tried before courts similarly appointed at Fort Leonard Wood.*[82]

The *DuBay* litigation took place during the middle years of the Vietnam era, 1966-1968. Force levels and court-martial rates were on the rise as America's involvement in Vietnam deepened.[83] There were many courts-martial, but no military judges.[84] The transformation of military

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[79] *See* 1966 Senate Hearings, *supra* note 78, at 3–8 (remarks of Senator Ervin summarizing the proposed legislation).

[80] *Id.* at 3. *See* S. 746, S. 749, S. 752, S. 757, 89th Cong. (1966), *reprinted in* 1966 Senate Hearings at 475, 508, 558, 601. *See also* S. 748, *reprinted in* 1966 Senate Hearings, at 497 (transforming the Boards of Review into Courts of Military Review). These bills provided the foundation for the establishment of the military judiciary in the Military Justice Act of 1968. *See infra* Part VIII.B.

[81] *See* 1966 Senate Hearings, *supra* note 78, at 3.

[82] United States v. DuBay, No. 415047, slip op. at 12 (A.B.R. Mar. 17, 1967) (emphasis omitted). A copy of the opinion is on file at the U.S. Court of Appeals for the Armed Forces in the records of the proceedings before the U.S. Court of Military Appeals for the cases consolidated with *United States v. DuBay*. 37 C.M.R 411 (C.M.A. 1967) [hereinafter USCAAF *DuBay* Records]. *See supra* note 169 (listing the cases consolidated with *DuBay*). MOYER, *supra* note 5, at 755–63, summarizes the proceedings in *DuBay* before the Board of Review, and includes a significant portion of the Board's opinion.

[83] *See supra* Part II.C.

[84] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, which established the military judiciary, took effect on August 1, 1969. Exec. Order No. 11,476 (June 19, 1969).

law, as mandated by Congress in the aftermath of World War II, remained incomplete—a work in progress.[85]

In the Nassif Building, located just outside Washington, D.C., in the area known as Bailey's Crossroads, the Defense and Government Appellate Divisions litigated numerous appeals before the Army Board of Review.[86] The docket of cases before the Board in late 1966 included the court-martial of a soldier, Private DuBay, whose appeal ultimately would serve as the lead case in the landmark decision by the Court of Military Appeals.[87] As we shall see, the appellate history of the Fort Leonard Wood cases did not begin with the appeal filed by Private DuBay, nor did it end with the final disposition of his case.[88] The appellate history of *DuBay* began when another case tried at Fort Leonard Wood, *United States v. Phenix*,[89] landed on the desk of an appellate defense counsel in late 1966.[90]

A. The *Phenix* Inquiry

On first reading, appellate defense counsel may well have viewed the *Phenix* record as an ordinary guilty plea case involving a routine

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[85] *See supra* Part II.C.

[86] *See* JOINT REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF TRANSPORTATION FOR THE PERIOD JANUARY 1, 1967 TO DECEMBER 31, 1967, at exhibit A (noting that the Army Board of Review considered 1,424 cases during the period July 1, 1966 to June 30, 1967).

[87] *DuBay*, 37 C.M.R 411.

[88] *See infra* Part VII.B.

[89] United States v. Phenix, No. CM 414832 (A.B.R. Mar. 17, 1967) (copy on file with USCAAF *DuBay* Records, *supra* note 82). As described in note 9, above, the Army cannot locate the records in *Phenix*. The description herein of the proceedings in *Phenix* at the Board of Review is taken primarily from the discussion of *Phenix* in briefs filed by the parties at the Court of Military Appeals in *DuBay* (copies on file with the USCAAF *DuBay* Records, *supra* note 82).

[90] The available records do not include the briefs filed at the Board of Review in *Phenix*, and the filings do not otherwise identify the initial counsel assigned to the case. The initial Board of Review decision in *Phenix* identifies three counsel for *Phenix* (Major (MAJ) David J. Passamaneck, Lieutenant Colonel Martin S. Drucker, and Colonel (COL) Daniel T. Ghent) and three counsel for the Government (CPT Louren R. Wood, MAJ John F. Webb, Jr., and COL Peter S. Wondolowski). In the *DuBay* proceedings before the Board, the same counsel represented the Government, while the defense had two different counsel (CPTs Anthony F. Cilluffo and Frank J. Martin, Jr.) and two of the same counsel as in *Phenix* (Drucker and Ghent). *See DuBay*, Army Board of Review, *supra* note 82, at 1.

disciplinary matter, a standard plea inquiry, and an unremarkable sentence.[91] A more detailed examination of the documents attached to the record, however, revealed something that piqued the interest of appellate defense counsel—the use of a nonstandard format in the convening order.[92]

The typical convening order from that era listed the personnel of the court-martial under three headings in the following order: (1) "LAW OFFICER"; (2) "MEMBERS"; and (3) "COUNSEL."[93] By contrast, the Fort Leonard Wood convening order, which deviated from the standard format, included a new heading—"PRESIDENT"—at the top of the list.[94]

The Fort Leonard Wood order contained a further unique feature, designating a specific officer by name to serve as president.[95] The Fort Leonard Wood order differed from the standard court-martial convening

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[91] At his 1966 court-martial, Private Phenix pled guilty to two periods of unauthorized absence. United States v. Phenix, Commander, Fort Leonard Wood, Fort Leonard Wood, Missouri, Gen. Court-Martial Order No. 71 (Oct. 18, 1966) (on file with USCAAF *DuBay* Records, *supra* note 82). The adjudged sentence included a dishonorable discharge, total forfeitures, two years' confinement, and grade reduction to the lowest enlisted grade. *Id.* The convening authority approved the findings and reduction, and reduced the balance of the sentence to a bad-conduct discharge, confinement for one year, and forfeitures of $75 per month for twelve months. *Id*.

[92] At the time of the *DuBay* litigation, the *Manual for Courts-Martial* (*MCM*) used the term "appointing order" to refer to the official document establishing a court-martial and its membership. 1951 *MCM*, *supra* note 66, ¶ 36a. For ease of reference, this article employs the term currently used in military practice, "convening order." *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504(d) (2008 ed.) [hereinafter 2008 *MCM*). In this article the terms "Fort Leonard Wood convening order" and "*DuBay* convening order" refer to the orders contained in the USCAAF *DuBay* Records, *supra* note 82.

The briefs of the parties before the Court of Military Appeals indicate that appellate defense counsel at the Board of Review in *Phenix* raised the initial concern about the text of the convening order employed at Fort Leonard Wood. *See* Brief for Appellant at 14, United States v. DuBay, 27 C.M.R. 411 (C.M.A. 1967) (on file with USCAAF *DuBay* Records, *supra* note 82) [hereinafter Government CMA *DuBay* Brief]; Brief for Appellee at 3, 6, United States v. DuBay, 27 C.M.R. 411 (C.M.A. 1967) (on file with USCAAF *DuBay* Records, *supra* note 82) [hereinafter Defense CMA *DuBay* Brief]. The Government CMA DuBay Brief, at 14, refers to the similarity between the convening order in *Phenix* and the order in *DuBay*. The unpublished Board of Review decision in *DuBay*, note 82 *supra*, contains the text of the convening order.

[93] 1951 *MCM*, *supra* note 66, app. 4, para. a.

[94] *DuBay* convening order, *supra* note 92 (on file with the USCAAF *DuBay* Records, *supra* note 82).

[95] *Id.*

order for that era, which did not list the president by position or name.[96] Under standard practice, as set forth in the MCM, the position of president was not designated by the convening authority.[97] Under the *MCM*, the most senior member of the panel present at trial served as president—even if not the most senior member listed on the convening order.[98] The *MCM*'s focus on the most senior member present, rather than the most senior member listed on the convening order, recognized the potential for removal of the most senior member listed on the convening order due to excusals or challenges.

The Fort Leonard Wood convening order included an additional nonstandard provision stating that the court-martial would be convened "at the call of the president."[99] This provision inexplicably omitted the requirement in the 1951 *MCM* for the president to confer with the law officer prior to fixing a date and time for the court-martial.[100]

Did these anomalies have any legal significance? Appellate defense counsel might well have wondered whether the nonstandard convening order raised any legal issue warranting an appellate challenge. Did the variations constitute anything more than cosmetic changes in the text of a routine order? Did Appellant suffer any prejudice from inclusion of these provisions in the convening order?[101] In the context of a guilty plea case with no indication of a defect in the plea proceedings, and where the convening authority had granted considerable sentence relief, did the convening order in *Phenix* warrant any further inquiry?

An appellate counsel who did not appreciate the historical background and controversies over the relationship between the law officer and the president of a general court-martial might well have viewed the nonstandard entries in the convening order as inconsequential and as not prejudicial. In the context of the then-recent history of military justice, however, the novel use of a nonstandard convening order from

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[96] 1951 *MCM*, *supra* note 66, app. 4, para. a.
[97] *See id.*
[98] *See id.* (providing a standard form for general court-martial convening orders); *id.* para. 40a (recognizing the possibility that the most senior member listed on the convening order might be excused, the *MCM* noted that "the senior member present at a trial, whether or not he is the senior member appointed to the court, is president of the court for the trial of that case").
[99] *DuBay* convening order, *supra* note 92 (on file with the USCAAF *DuBay* Records, *supra* note 82).
[100] 1951 *MCM*, *supra* note 66, para. 40b.
[101] *See* UCMJ art. 59(a) (2008).

Fort Leonard Wood apparently sparked appellate defense counsel's curiosity. Appellate defense counsel, who apparently determined that the anomalies at least warranted further inquiry into the relationship between law officers and court-martial presidents at Fort Leonard Wood, requested that Fort Leonard Wood provide documentation explaining the basis for the pertinent convening orders.[102] The answer from the Staff Judge Advocate (SJA) at Fort Leonard Wood did not allay counsel's concern. According to the SJA's response, the Fort Leonard Wood order had been prescribed on a Disposition Form by the Assistant Chief of Staff, G-1.[103] The SJA further stated that he could not provide appellate defense counsel with a copy of the Disposition Form because it was an "intra-staff paper."[104]

The nature of the response from Fort Leonard Wood apparently convinced appellate defense counsel in *Phenix* that the issue warranted further attention. After receiving the response, appellate defense counsel filed a supplemental assignment of errors at the Board of Review, focusing on the failure of an official at Fort Leonard Wood to provide a substantive response to the inquiry regarding the unusual convening order.[105]

B. The *Dubay* Impasse

During the period in which the Board of Review was considering the record in *Phenix*, the Board also had under review a number of other cases from Fort Leonard Wood containing similar convening orders, including *United States v. DuBay*.[106] After the defense in *Phenix*

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[102] *See* Defense CMA *DuBay* Brief, *supra* note 92, at 3–4 (chronicling requests for documents).
[103] *See id.*
[104] *See id.*
[105] *See id.* at 5–6.
[106] *See DuBay*, Army Board of Review, *supra* note 82, at 1. *Cf.* United States v. Phenix, Army Board of Review, *supra* note 89 (treating *Phenix* as a trailer to *DuBay*). Pursuant to his pleas of guilty, DuBay had been convicted of absence without leave (AWOL), escape from confinement, wrongful appropriation of a shotgun, and assault of a military police officer. The adjudged sentence included a dishonorable discharge, confinement for eighteen months, total forfeitures, and reduction to the lowest enlisted grade. The convening authority, in taking action on the case, changed the dishonorable discharge to a bad-conduct discharge, and otherwise approved the balance of the sentence. United States v. DuBay, Commander, Fort Leonard Wood, Missouri, Gen. Court-Martial Order, No. 85 (Nov. 25, 1966) (on file with USCAAF *DuBay* Records, *supra* note 82). The available

informed the Board of the unsuccessful attempt to obtain information from Fort Leonard Wood, the Board in *DuBay* ordered the Government to produce the Fort Leonard Wood Disposition Form and any other related documents prescribing the format of court-martial convening orders.[107] The Government complied and filed copies of the requested documents with the Board.[108]

In the interval between the Board's order and the production of documents, the defense filed an assignment of errors in *DuBay*.[109] The defense contended that the convening authority had exercised unlawful command influence over the law officer and the panel members through a series of actions, including by his alteration of the format of the convening order.[110]

After considering the defense filings and the documents provided by the Government, the Board concluded that the record of trial contained "little or no evidence" on the purpose or effect of the non-standard convening order.[111] The Board determined that it was necessary to obtain "additional evidence, outside the entire record of trial, in order to make a full and complete disposition of the assigned errors."[112] Although the Board identified nine specific areas of inquiry that required factual development, the Board concluded that it did not have the authority under then-existing law either to conduct a hearing at the Board level or to order a court-martial to conduct a hearing to resolve factual disputes on matters outside the record of trial.[113]

The Board then took the unusual step of returning the record of trial in *DuBay* to the Judge Advocate General without reaching a decision on

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appellate records do not indicate why the Board of Review chose *DuBay* as the lead case for addressing the command influence issues at Fort Leonard Wood.

[107] *See* Government CMA *DuBay* Brief, *supra* note 92, at 3 (quoting a portion of the Board's order dated December 21, 1966); *DuBay*, Army Board of Review, *supra* note 82, at 9–10 (recounting the order for information to supplement the record).

[108] *See* Government CMA *DuBay* Brief, *supra* note 92, at 3 (summarizing documents filed on January 5 and January 16, 1967, in response to the Board's order).

[109] *See id.* (describing defense filing on January 13, 1967).

[110] *See DuBay*, Army Board of Review, *supra* note 82, at 3–4 (listing Appellant's assigned errors).

[111] *Id.* at 9.

[112] *See id.*; Government CMA *DuBay* Brief, *supra* note 92, at 3 (describing the Board's order issued on January 16, 1967). MOYER, *supra* note 5, at 755–56.

[113] *DuBay*, Army Board of Review, *supra* note 82, at 9–11.

the merits of the findings and sentence.[114] The Board directed the Judge Advocate General to obtain statements from witnesses at Fort Leonard Wood to illuminate factual issues regarding the origin, purpose, intent, and effect of the novel convening orders.[115]

At that point, the Board of Review and the Judge Advocate General of the Army entered into an unprecedented confrontation. Treating the Board's transmission as a mere "request" and not as a court order, the Judge Advocate General returned the record to the Board, asserting that the Board must first consider the Government's response before taking any action.[116] Shortly thereafter, the Government unsuccessfully sought an enlargement from the Board for the purpose of obtaining affidavits on the issues raised by the Board.[117] Subsequently, the Government filed its response to the defense assignment of errors.[118] Thereafter, the Board once again transmitted the record to the Judge Advocate General "for such action as is necessary to accomplish the taking of testimony and receiving evidence consistent with the intent of the [prior] Order of the Board of Review . . . ."[119]

The terse transmissions between the Board of Review and the Judge Advocate General raised a number of questions. Did the Board have the authority to conduct factfinding proceedings at the Board level? Did the Board have authority to order the Judge Advocate General to conduct factfinding as part of a UCMJ proceeding? Did the Judge Advocate General have the authority to conduct such independent factfinding? If so, what procedures would be used?

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[114] *See id.* at 11.

[115] *See id.* (setting forth an extract from the Board's order dated January 16, 1967). MOYER, *supra* note 5, at 755 (stating that the Board directed an inquiry "by a panel composed of the commissioner of the board and the directors of the Defense and Government Appellate Divisions"). According to Moyer, the Board's order may have been stimulated not only by the unusual convening order, but also by an affidavit prepared by a defense counsel at Fort Leonard Wood. *See id.* (citing West, *supra* note 9, at 128, 133).

[116] *See* Government CMA *DuBay* Brief, *supra* note 92, at 4 (describing the Judge Advocate General's response, dated January 24, 1967).

[117] *Id.* (describing the Government's filing on January 26, 1967, and the Board's action on January 27). The Board also rejected the Government's motions for reconsideration and oral argument on the motion. *See id.*

[118] *Id.*

[119] *Id.* (quoting the Board's order dated January 31, 1967).

For several weeks, the record and the unanswered questions remained with the Judge Advocate General.[120] Eventually, the Government filed a motion asking the Board to recall the record from the Judge Advocate General and reach a decision on the merits of the appeal.[121] In a further effort to address the Board's substantive concerns about courts-martial at Fort Leonard Wood, the Government also moved to file affidavits from some of the participants at the command level.[122] Defense counsel objected, contending that the use of affidavits would deprive the defense of the opportunity to cross examine the affiants about matters exclusively within their knowledge.[123] The Board denied the Government's motion to file the affidavits as well as the motion to recall the record from the Judge Advocate General.[124]

At that point, the Office of the Judge Advocate General once again returned the record to the Board.[125] After stating that the Judge Advocate General had "denied" the Board's factfinding request, the Chief of Military Justice, on behalf of the Judge Advocate General, added the following blunt directive: "The record of trial . . . is returned for review pursuant to . . . Article 66, in accordance with the initial referral of 15 December 1966."[126]

C. The Board's *Dubay* Decision

In March 1967, the Board of Review concluded that any further attempt to enlist the cooperation of the Judge Advocate General would be unavailing.[127] At that point, the Board faced a dilemma. How could it decide critical appellate issues involving disputed facts if it could not order post-trial factfinding?

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[120] *See id.*
[121] *See id.* at 5 (describing the Government's motions filed on February 21, 1967).
[122] *See id.*
[123] *See DuBay*, Army Board of Review, *supra* note 82, at 10.
[124] *See* Government CMA *DuBay* Brief, *supra* note 92, at 5–6, (describing the filings by the parties on February 23, 24, and 27, and the Board's order issued on March 1, 1967).
[125] *See DuBay*, Army Board of Review, *supra* note 82, at 12.
[126] *See* MOYER, *supra* note 5 at 755–56 (describing events leading up to the Board's decision in *DuBay* as an "institutional tug of war" involving "friction" between the Board and the Judge Advocate General).
[127] *DuBay*, Army Board of Review, *supra* note 82, at 12–13.

1. The Absence of a Factfinding Procedure

After recounting the development of the command influence issue on appeal, the Board of Review focused on the need to reach a decision on the merits, noting the "grave importance" of the issues not only to the appellant, but also to all other servicemembers tried under similar orders at Fort Leonard Wood.[128] The Board then focused on post-trial factfinding:

> An examination of the record before us, together with a limited consideration of the affidavits offered by the government, convinces us that the issues are real and warrant a hearing on the matter where sworn testimony can be taken, with each party enjoying the right of cross-examination in matters which are largely subjective in nature and exclusively within the personal knowledge of the respective witnesses.[129]

The Board determined, however, that it lacked the authority to either hold or order such a hearing under then applicable case law.[130] In the Board's view, "we have been denied the tools with which to work."[131] Recognizing that a different approach would be needed to resolve the merits of the appeal, the Board employed the only power that it viewed as viable—the application of an appellate standard of review to assess the alleged error:

> Under these circumstances, we have no choice but glean what we can from the record before us and resolve all doubtful issues in favor of the appellants.[132]

2. The Merits of the Appeal

With respect to the merits of the appeal, the Board characterized the nonstandard convening order as improper, noting that the *MCM* made no provision for naming a "president" in convening orders.[133] After

[128] *Id.* at 12.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 6–7.

comparing the orders recently issued at Fort Leonard Wood with those previously issued at that installation, the Board determined that the new orders constituted a "radical and sudden change"[134] and that the change "was deliberate and with intent."[135]

The Board next considered whether issuance of the improper orders constituted unlawful command influence. The Board observed that the convening order had elevated the status of the presiding officer, which permitted an inference "that the convening authority intended to subordinate the law officer to the president and make the 'PRESIDENT' the dominant figure of the court-martial."[136] Noting that the president "on at least six different occasions interjected himself into matters normally considered to be within the province of the law officer," the Board addressed the underlying issue presented by the record by asking, rhetorically: "Could [the president's] conduct be mere coincidence? We think not. He was simply exercising what he thought to be the prerogative of his newly emphasized status."[137] The Board added a pointed observation about the consolidated cases from Fort Leonard Wood: "Interestingly, the sentence imposed on each appellant was the maximum authorized pursuant to the law officer's instructions."[138]

Underscoring the unique procedural setting of the case, the Board concluded: "[W]e are constrained to find, under the total circumstances with which we are faced and on the record before us, that improper command influence so permeates this record of trial as to require the setting aside of the findings of guilty and the sentence."[139] The Board set aside the findings and sentence and authorized a rehearing.[140]

3. The Systemic Deficiency

To ensure that both the Judge Advocate General and the Court of Military Appeals would focus on the underlying problem for the military justice system posed by this type of case, the Board added a postscript. The Board's *DuBay* opinion expressly observed that "a different result

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[134] *Id.* at 7.
[135] *Id.*
[136] *Id.* at 13.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*

might be reached had we been able to secure the sworn testimony of the various witnesses who could shed some light on the issues involved…."[141]

D. The Government Requests a Factfinding Hearing

With further review likely at the Court of Military Appeals, the parties continued to focus on the underlying developments at Fort Leonard Wood. In the course of making further inquiries, the defense obtained an affidavit from the recently retired Fort Leonard Wood Staff Judge Advocate (SJA), James C. Starr.[142]

The affidavit described a series of disagreements between Colonel (COL) Starr and the installation commander, Major General T.H. Lipscomb, about the administration of military justice, including the circumstances leading to the development of the unique format for convening orders at Fort Leonard Wood.[143] In the affidavit, COL Starr stated that he "was of the opinion that the format of the . . . order conflicted with the pertinent Army regulation," but he believed that his opinion would have no impact on the commanding general "because he had informed me on a number of occasions that the violation of Army regulations did not concern him as long as it did not constitute a violation of statute."[144] Colonel Starr viewed the convening order as "an undisguised attempt to warn the law officer not to overstep the duties and prerogatives of his position and to impress upon the law officer, counsel, and the other members of the court the importance and influence of the president."[145]

Although COL Starr stated that he had been troubled by these developments, he decided to not voice his objections because he assumed that no law officer "would be cowed into abdicating any of the duties imposed on him by the law and I believed that the influence exercised by a president over the other members depended more on his personality than on his rank or position."[146]

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[141] *Id.*
[142] *See* First Affidavit of Colonel James C. Starr (Mar. 24, 1967) (No. CM 415047) [hereinafter First Starr Affidavit] (on file with USCAAF *DuBay* Records, *supra* note 82).
[143] *Id.* at 1–4.
[144] *Id.* at 3.
[145] *Id.*
[146] *Id.*

Colonel Starr also attached affidavits from a trial counsel at Fort Leonard Wood and a panel member presenting differing recollections as to whether the commanding general had encouraged members to return maximum sentences so that he would have "plenty of room to operate when making deals."[147] The balance of the affidavit reflected the commanding general's dissatisfaction with the state of military justice at Fort Leonard Wood, COL Starr's concern about the potential impact of those mattters particularly in the area of sentencing, and his efforts to avoid implementing actions that would result in unlawful command influence.[148]

The Starr affidavit, and its attachments, prompted a major change in the Government's position regarding the nature of the Fort Leonard Wood cases. Up to that point, the Government sought to focus attention on the written record, suggesting that the format of the convening orders involved nothing more than an inconsequential administrative alteration. The Starr affidavit, however, placed the issue in a different context because it raised significant questions of fact that could not be answered on the face of the record. Did the actions of the commanding general constitute an attempt to improperly influence the conduct of the law officer or members of the court-martial panel? Did the Staff Judge Advocate succeed in ensuring that the actions of the convening authority would not prejudice the rights of the accused servicemembers? If not, did any of those actions inject unlawful command influence into particular cases?

Faced with those questions, and more, the Government filed a motion requesting that the Board of Review reconsider its decision in *DuBay* in light of the Starr affidavit.[149] The Government "conceded that this additional information 'raises the possibility of the appearance of command influence and warrants further inquiry into the issue of whether or not in fact there was command influence in the case at bar.'"[150] In its petition for reconsideration, the Government contended that the circumstances did not call for setting aside the findings and

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[147] *Id.* Appendix B (Affidavit from Captain Glover setting forth the allegation); *id.* (Affidavit from COL Wilson denying the allegation). *See also* First Starr Affidavit, *supra* note 142, at 9–10 (relating COL Starr's partial agreement with some but not all aspects of the allegations).

[148] First Starr Affidavit, *supra* note 142, at 4–10.

[149] *See* Government CMA *DuBay* Brief, *supra* note 92, at 18 (describing Government Motion for Reconsideration before the Board of Review).

[150] *See id.* (quoting Government Motion for Reconsideration at the Board of Review).

sentence, but instead warranted a limited hearing upon remand to decide whether command influence existed as a matter of fact.[151] The Board denied the Government's motion for reconsideration.[152]

Acting through Panel No. 2, which issued the decision in *DuBay*, the Board subsequently acted on a number of other cases involving similar convening orders from Fort Leonard Wood, including the case that had ignited the controversy, *United States v. Phenix*.[153] As in *DuBay*, the Board set aside the findings and sentence in each case and authorized a rehearing.

E. The *Moore* Alternative

On April 24, 1967, five weeks after Panel No. 2 issued *DuBay*, a different panel, Panel No. 3, issued an opinion in *United States v. Moore*,[154] presenting an alternative perspective on the events at Fort Leonard Wood. The Board in *Moore* viewed the Starr affidavit and the related filings as reflecting "friction" between the SJA and the commanding general.[155] *Moore* concluded that such evidence, without specific allegations of improper actions, did not demonstrate that the "appearance of unlawful command influence" had been "factually, reasonably raised."[156] *Moore* perceived that the convening authority had been "think[ing] out loud" with his legal adviser as to matters under the

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[151] *See id.* at 18–19.
[152] *See id.* at 7 (providing *DuBay* chronology).
[153] Among the cases remanded under the Board's *DuBay* order, the Clerk of Court, U.S. Army Judiciary, has located the records in *United States v. Scott*, No. 415325 (A.B.R. Apr. 7, 1967) and *United States v. Farmer*, No. 415214 (A.B.R. Apr. 18, 1967), but has been unable to locate the records in *United States v. Baxter*, No. 415530 (A.B.R. Apr. 21, 1967); *United States v. Johnson*, No. 415354 (A.B.R. Apr. 18, 1967); *United States v. Buchanan*, No. 415138 (A.B.R. Apr. 7, 1967); *United States v. Richmire*, No. 414957 (A.B.R. Apr. 7, 1967); *United States v. Jones*, No. 414896 (A.B.R. Mar. 17, 1967); *United States v. Phenix*, No. 414832 (A.B.R. Mar. 17, 1967); *United States v. Tell*, No. 414862 (A.B.R. Mar. 17, 1967). Squires e-mail, *supra* note 9.
[154] United States v. Moore, No. 414897, slip op. at 6 (A.B.R. Apr. 24, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82).
[155] *Id.* at 2.
[156] *Id.* at 3. *See id.* at 5–6. The opinion distinguished the Board's decision to order a rehearing in another Fort Leonard Wood case, *United States v. Christmas*, CM 415475, (A.B.R. Apr. 7, 1967), in which the Government had conceded prejudicial error based upon case-specific post-trial evidence from the trial counsel concerning unlawful command influence in the form of communication by the commanding general to a panel member. *Moore*, No. 414897, slip op. at 6.

convening authority's control, which fell short of taking an action that would result in unlawful command influence.[157] *Moore* also described the defense view of the convening orders as a "previously unnoticed molehill" that "cannot be converted to resemble a constitutional Mount Everest."[158]

In the course of rejecting the issues raised by the appellant, the Board in *Moore* offered the following view of the defense case: "[W]e decline the implied invitation to imagine an impropriety and then act fearlessly on the basis of an assumption apparently spun out of the purest gossamer."[159] The opinion gave even less attention to the opinion issued by Panel No. 2 in *DuBay*, treating that case as not worthy of substantive analysis: "This Board is aware of the decision in the case of CM 415047, *DuBay*, et al., but declines to follow its rationale."[160] In that light, the Board affirmed the findings and sentence in *Moore*.[161]

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[157] *Id.* at 3–4.
[158] *Id.* at 6.
[159] *Id.* at 3.
[160] *Id.* at 6.
[161] *Id.* Panel No. 3 affirmed the findings and sentence in at least one other Fort Leonard Wood case that has been located by the Clerk of Court for the U.S. Army Judiciary. United States v. Keller, No. CM 414830, slip op. at 6 (A.B.R. May 4, 1967) (on file with the Clerk of Court, U.S. Army Judiciary). In *Keller*, the Board rejected a defense motion to take sworn testimony on the command influence issue. Following receipt of the First Starr Affidavit, the defense sought reconsideration. Although the Government opposed the motion for reconsideration, the Government's response stated that the Board should order a factfinding hearing by a different convening authority if the Board viewed the filing as raising the issue and if the Board viewed the factual record as inadequate. Government Reply, April 4, 1967 (attached to the *Keller* record retained by the Clerk of Court, U.S. Army Judiciary). Subsequently, the Government filed a Supplemental Reply, stating: "The information contained in the affidavit of Colonel James C. Starr, together with the inclosures thereto, raises the possibility of the appearance of command influence and warrants further inquiry into the issue of whether or not in fact there was command influence in the case at bar." Supplemental Reply for Reconsideration of the Board's Denial of Motion to Take Sworn Testimony and Other Evidence and for Stay of Proceedings (Apr. 10, 1967) [hereinafter Supplemental Reply] (attached to the *Keller* record retained by the Clerk of Court, U.S. Army Judiciary). The Government, in *Moore*, also submitted a supplemental filing with the Board of Review, stating that the Starr affidavits and related materials warranted further factual inquiry into the issue of unlawful command influence. *See* Brief for Appellee before the Court of Military Appeals in *Moore*, at 2 n.1 (June 5, 1967) [hereinafter Government CMA Moore Brief] (on file with USCAAF *DuBay* Records, *supra* note 82). The Board, in both *Keller* and *Moore*, disagreed with both the Government and the Defense and affirmed the findings and sentence without authorizing any further factual inquiry.

Part IV. *DuBay* at the Court of Military Appeals

> *In the nature of things, command control is scarcely ever apparent on the face of the record . . . .*[162]

A. The *DuBay-Moore* Split and the Government's Dilemma

The sharply divergent panel decisions in *DuBay* and *Moore* appeared to provide good candidates for review by the Court of Military Appeals, either upon petition filed by the accused or upon certification by the Judge Advocate General.[163] In *DuBay*, the decision as to whether an appeal should be filed in that case rested primarily with the Judge Advocate General.[164] In *Moore*, where the Board of Review ruled against the accused, further review of the case would depend on whether: (1) the accused filed a petition for review, or (2) the Judge Advocate General decided to certify the case irrespective of the action taken by the accused.

The differing evaluations in *DuBay* and *Moore* of the events at Fort Leonard Wood provided the Judge Advocate General with both an opportunity and a dilemma. The opportunity: to select an approach that would meet the best interests of the Army. The dilemma: how to define the best interests of the Army in the face of the following considerations.

First, was it possible to identify an outcome that satisfactorily addressed the immediate Fort Leonard Wood cases while also furthering

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[162] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967), *quoted in* Calley v. Callaway, 519 F.2d 184, 214 (5th Cir. 1975).

[163] At the time of the *DuBay* litigation, the Boards of Review did not have statutory authority for en banc reconsideration by the full Board of decisions made by individual panels, such as the divergent opinions by the separate panels in *DuBay* and *Moore*. *See* United States v. Henderson, 52 M.J. 14, 19–20 (C.A.A.F. 1999) (describing developments leading to the enactment of such en banc authority in the Military Justice Act of 1983, Pub. L. No. 98-209, § 7(b), 97 Stat. 1402 (art. 66(f)). In that context, if the Judge Advocate General wished to obtain further review of the panel decisions, the opportunity to do so would come through direct review by the Court of Military Appeals either upon petition by the accused or upon certification by the Judge Advocate General. UCMJ 1950, *supra* note 13, art. 67. Similar procedures apply under current law. *See* UCMJ art. 67 (2008) (concerning appeals from the Courts of Criminal Appeals to the Court of Appeals for the Armed Forces).

[164] As the prevailing party before the Board of Review, it was unlikely that Private DuBay would have sought further review. DuBay could have sought review of the Board's decision to authorize a rehearing rather than dismiss the charges, but he did not do so.

the long-term interests of the Army in the administration of military justice? Second, would the interests of the Army be served best by focusing solely on the competing analyses offered by the different panels in *DuBay* and *Moore*, or should the Judge Advocate General recommend an approach not taken by either panel? Third, should the Judge Advocate General promptly certify the cases to the Court of Military Appeals, or should that decision be deferred pending clarification as to whether the accused would file a petition in *Moore* and, if so, whether the Court of Military Appeals would grant review of any issues in that case?

These questions, in turn, presented the Judge Advocate General with at least three significant options.[165] First, the Judge Advocate General could decide to not certify any case, with a view toward confining the impact of the litigation to the Board of Review, where the views expressed by Panel No. 3 in *Moore*, rather than the views of Panel No. 2 in *DuBay*, might prevail in future cases. This option would require the Government to oppose successfully the anticipated defense petition for review in *Moore* at the Court of Military Appeals. As a practical matter, it would also require the Government to accept the result in *DuBay* and the trailer cases decided by Panel No. 2, while enabling the Government to focus its efforts on persuading the Board of Review to reject *DuBay* and apply *Moore* as a precedent in future cases.

As a second option, the Judge Advocate General could certify both *DuBay* and *Moore*, an attractive option if it appeared likely that the Court of Military Appeals would grant the petition in *Moore*. Under this option, the Government would attempt to persuade the Court of Military Appeals to apply the reasoning in *Moore* to affirm *Moore* and reverse *DuBay*.

The third option also would involve certification of both *DuBay* and *Moore*, but with use of the briefs to underscore the Government's position on the desirability of further factfinding in the event that the Court viewed the cases as raising the issue of unlawful command influence.[166]

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[165] The following illustrates various options and is not meant to suggest that the Judge Advocate General focused either directly or exclusively on these particular options.

[166] The Government had taken a similar position in *Keller*, a case reviewed by Panel No. 3—the Panel that rejected the defense position in *Moore*. *See supra* note 161.

B. The Judge Advocate General's Choice

The responsibility for sorting through these variables and options rested with Major General Robert McCaw, the Judge Advocate General of the Army.[167] Major General McCaw, who was no stranger to the military justice controversies at Fort Leonard Wood,[168] settled upon a certification strategy that maximized the Government's flexibility in litigating the various Fort Leonard Wood cases before the Court of Military Appeals. Seizing upon the differing results in *Moore* and *DuBay*, the Judge Advocate General certified different issues in each case.

In *DuBay*, the certified issue asked: "Was the Board of Review correct in denying the government the opportunity to litigate the interlocutory issue of improper command influence in an appropriate judicial forum?"[169] In *Moore*, the issue certified by the Judge Advocate

[167] Major General McCaw served as the Judge Advocate General from January 1964 through June 1967. *See* JAGC HISTORY, *supra* note 11, at 238–39 (summarizing MG McCaw's career).

[168] According to testimony during subsequent proceedings in the *DuBay* cases, MG McCaw had discussed the developing military justice problems at Fort Leonard Wood with the installation commander, MG Lipscomb, and the SJA, COL Starr. *See Berry* Record, *infra* note 257, at 440–43 (recording testimony of MG McCaw). Additionally, MG McCaw had dispatched the Chief of the Military Justice Division in the Office of the Judge Advocate General to undertake an on-site examination of the ongoing military justice issues at Fort Leonard Wood. *See id.*

[169] Certificate for Review (May 4, 1967) (filed by the Judge Advocate General of the Army in the Court of Military Appeals on May 4, 1967, in *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967)) (capitalization omitted) (on file with USCAAF *DuBay Records*, *supra* note 82). On the same day, the Judge Advocate General filed a similar certificate in the following cases, which subsequently were consolidated with *DuBay* at the Court of Military Appeals: United States v. Lieurance, No. 20,149 (docketed with *DuBay*); United States v. Liverar, No. 20,149 (docketed with *DuBay*); United States v. Fitzgerald, No. 20,150; United States v. Jones, No. 20,151; United States v. Phenix, No. 20,153; United States v. Tell, No. 20,154; United States v. Buchanan, No. 20,158; United States v. Richmire, No. 20,161; United States v. Scott, No. 20,163; United States v. Baxter, No. 20,174; United States v. Farmer, No. 20,175; and United States v. Johnson, No. 20,177. *See* Order, *DuBay*, *supra* (May 29, 1967) (consolidating the aforementioned cases with *United States v. Moore*, No. 20,179). Subsequently, the defense, which had filed a cross-petition for grant of review, withdrew its petition and the proceedings focused solely on the certified issue. *See* Order, Dubay (June 19, 1967) (granting motion) (on file with USCAAF *DuBay* Records, *supra* note 82).

General asked: "Was the board correct in affirming the findings and sentence?"[170]

The dual certification approach created two different scenarios under which the Government might prevail. Under the issue certified in *Moore*, if the Court of Military Appeals decided to affirm the conclusion of Panel No. 3—that the Fort Leonard Wood situation did not reasonably raise the issue of unlawful command influence—such a conclusion would end the litigation on terms favorable to the Government. If, however, the Court viewed the record as establishing an open question, the issue certified in *DuBay* would provide a vehicle for the Government to demonstrate in a post-trial factfinding hearing that the circumstances either did not amount to unlawful command influence, or that such actions had not tainted the cases at issue. Although the dual certification strategy ran the risk that the Court of Military Appeals would agree with Panel No. 2 and set aside the findings and sentence in both cases, the Judge Advocate General apparently decided that the circumstances warranted the risk in view of the opportunity to obtain appellate approval of a factfinding procedure to address the number of cases still on appeal from Fort Leonard Wood.

The issue certified in *DuBay* also reflected an opportunity for the Judge Advocate General to focus attention on the ongoing systemic concern identified by the Board of Review—how to address issues central to the fairness of the military justice system, such as allegations of unlawful command influence, in which critical information often did not emerge until after the completion of the trial. In such cases, the absence of a factfinding procedure, combined with the application of appellate standards of review, could result in Board decisions setting aside the results of trial in a significant number of cases. Each rehearing resulting from such a decision would require an extensive commitment of time on the part of commanders, staff judge advocates, panel members, law officers, counsel, and witnesses. If, however, the post-trial questions of fact could be resolved in a carefully circumscribed proceeding before a single decision-maker—the law officer—the proceedings would be less burdensome than full rehearings on findings and sentence. In the midst of the Vietnam War, with its huge commitment of manpower and resources, the *DuBay* litigation provided

[170] Certificate for Review of the Judge Advocate General of the Army filed with the Court of Military Appeals in *United States v. Moore*, No. 20,179 (May 4, 1967) (capitalization omitted) (on file with USCAAF *DuBay Records*, *supra* note 82).

the Judge Advocate General with an opportunity to obtain appellate approval of a procedure for conducting limited post-trial hearings restricted narrowly to specific issues before a single factfinder.

C. Briefing *Moore* and *Dubay* at the Court of Military Appeals

1. High Stakes, Swift Action

The Judge Advocate General filed the certified issues in both *Moore* and *DuBay* on May 4, 1967. On May 26, the Government filed a consolidation motion that underscored the significance of the case to the Army.[171] In the motion, which requested consolidation of *Moore*, *DuBay*, and the related cases certified by the Judge Advocate General, the Government also requested "an order advancing the oral argument" so that the cases could be "heard in the present term."[172]

In support of the motion, the Government focused attention on the volume of cases affected by the certified issues:

> The allegation of unlawful command influence is being leveled at every court-martial tried since 1 August 1966 at Fort Leonard Wood, Missouri, and it is anticipated that said allegation will continue[] to be leveled at all subsequent cases coming out of the Fort Leonard Wood jurisdiction. Fort Leonard Wood is one of the most active general court-martial jurisdictions in the country.[173]

The Government also addressed the broader impact of the certified issues, contending:

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[171] Motion for Leave to Consolidate for Purposes of Oral Argument and for an Order Advancing the Oral Argument so it may be Heard in the Present Term [hereinafter Motion for Leave] (filed May 24, 1967) (on file with USCAAF *DuBay Records*, *supra* note 82).

[172] *Id.* at 1. The Judge Advocate General also filed a "petition for writ in the nature of certiorari and mandamus" in an effort to compel the different panels within the Army Board of Review to employ a uniform approach in addressing the *DuBay* litigation. *See* United States v. Board of Review Nos. 1, 2, 4, 37 C.M.R. 414 (C.M.A. 1967); MOYER, *supra* note 5, at 763. *See infra* note 247 (noting the Court's disposition of the writ petition).

[173] *Id.* at 2.

> If this cause is not heard during the present term, and an orderly disposition made of the question of unlawful command influence at Fort Leonard Wood, disruption of chaotic proportions will be visited upon . . . the orderly administration of military justice in the Army.[174]

Defense counsel did not dispute the significance of the cases, but offered a different perspective on the question of consolidation. Appellate defense counsel in *Moore*, for example, urged the Court to reject the consolidation motion, contending that *DuBay* and *Moore* rested upon different factual and legal grounds.[175]

The Court granted the Government's motion to consolidate.[176] In the order, the Court called for separate briefing in the two lead cases, treating the Government as the appellant in *DuBay* and the defense as the appellant in *Moore*.[177] Reflecting the time sensitivity of the cases, the Court established a briefing schedule providing for all submissions by June 22, and set June 30, 1967, as the date for oral argument.[178] The schedule enabled the Government to tailor its arguments to fit the differing Board decisions in each case, and enabled the defense to shape the arguments to meet both the differing Board decisions and any unique interests of the separate clients.

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[174] *Id.*

[175] Opposition to Motion, *supra* note 171, at 2 (filed May 24, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82). The Defense contrasted the Board's final decision in *Moore* with the interlocutory posture of *DuBay* in an effort to separate the two cases. The Defense, however, did not oppose hearing the case during the present term of the Court, and suggested scheduling oral argument in both sets of cases on the same day. *Id*.

[176] Order, May 29, 1967, at 2 (on file with USCAAF *DuBay* Records, *supra* note 82). The Order, which applied to all of the Fort Leonard Wood cases certified by the Judge Advocate General, stated that briefs would be filed only in *Moore* and *DuBay*. *Id.*

[177] *Id.*

[178] Under the schedule, each party would have the opportunity to submit an initial brief (the Government in *DuBay* and the Defense in *Moore*), and each party would have an opportunity to submit a responsive brief (the Government in *Moore* and the defense in *DuBay*). *See id.*

2. The Government's First Brief—A Preference for Factfinding

On June 2, 1967, the Government filed its brief as Appellant in *DuBay*.[179] The Government first sought to undermine the legal basis for the Board's decision to disapprove the findings and sentence, asserting that the Board had improperly exhibited a "fixed and inflexible" attitude;[180] that it had acted hastily; and that the Board's orders reflected a bias against the Government.[181] In particular, the Government argued that the Board had erroneously rejected the Government's appellate affidavits;[182] conflated weight with admissibility;[183] presumed error instead of placing the burden on the defense;[184] erred in precluding the Government from showing an absence of prejudice;[185] acted on the basis of "suspicion, innuendo, and speculation";[186] and improperly sought to "embroil" the Judge Advocate General "in the internal operations of the Boards of Review on interlocutory matters."[187] In the Government's view, the Board had acted in an arbitrary and imperious fashion, as exemplified by its repeated rejection of the Government's motions to file certain documents, to obtain additional time for briefing, and to proceed through oral argument.[188]

Although the Government viewed the Board of Review as without authority to conduct a post-trial factfinding hearing,[189] the brief contended that the Board's authority to order such a hearing at the court-martial level presented a different question.[190] In that regard, the Government took the position that the Board could order a limited rehearing on the question of unlawful command influence at the court-martial level without first setting aside both the findings and sentence. After noting that the UCMJ did not contain express statutory authority

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[179] Four counsel signed the Government's brief: Captains William R. Steinmetz and Robert E. Davis; MAJ John F. Webb; and COL Peter S. Wondolowski. Government CMA *DuBay* Brief, *supra* note 92.
[180] *Id.* at 8–9.
[181] *Id.* at 19–20.
[182] *Id.* at 9–10.
[183] *Id.*
[184] *Id.* at 23–24.
[185] *Id.* at 24–25.
[186] *Id.* at 26.
[187] *Id.* at 39.
[188] *Id.* at 7–20.
[189] *Id.* at 27–40.
[190] *Id.* at 41.

for such a remand,[191] the Government contended that ample authority could be found in the Court's decisions authorizing the Board to remand cases for sentence-only rehearings even though the UCMJ did not have express statutory authority for such limited rehearings.[192] The Government also relied on cases in which the Court of Military Appeals had ordered post-trial factfinding by Boards of Review in cases involving allegations of inadequate representation by counsel and defective post-trial processing.[193] In addition, the Government cited two cases in which the Supreme Court ordered limited rehearings when post-trial developments warranted further consideration of discrete issues.[194]

The Government urged the Court to take the following action in *DuBay* and the related cases that had granted similar relief: (1) reverse the decisions of the Board of Review; (2) order the Board to consider pertinent affidavits and the Government's concessions in those cases; (3) direct the Board to determine whether "as a matter of fact an issue of unlawful command influence is raised which requires further inquiry"; (4) authorize the Board, if it determined that such an inquiry is required, to order "a rehearing for the limited purpose of determining whether command influence did exist"; and (5) authorize the Judge Advocate General to remand the case to a new convening authority for a limited hearing before a new court-martial.[195] Under the procedure proposed by the Government for a limited rehearing, the factfinding would "be conducted by the law officer with the accused present."[196] The convening authority would be empowered to take a variety of actions based upon the results of the limited hearing.[197]

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[191] *Id.*

[192] *Id.* at 41–42 (citing, inter alia, United States v. Miller, 27 C.M.R. 370 (C.M.A. 1959)).

[193] *Id.* at 32–33 (citing United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957) and United States v. Hardy, 29 C.M.R. 337 (C.M.A. 1960)).

[194] *See id.* at 43 (citing Giles v. Maryland, 386 U.S. 66 (1967) (remanding to consider impact of evidence previously undisclosed by the Government); Jackson v. Denno, 378 U.S. 368 (1964) (remanding for state court to hold limited hearing on the voluntariness of a confession)).

[195] *See* Government CMA *DuBay* Brief, *supra* note 92, at 45–46.

[196] *Id.* at 46.

[197] *Id.* (recommending that, upon a finding of unlawful command influence, the convening authority could dismiss the charges or order a full rehearing; and if the hearing did not result in such a finding, the case would be forwarded to the Board of Review for the completion of appellate proceedings).

Emphasizing that the litigation involved an "active general court-martial jurisdiction" where the issue of command influence involved "numerous cases" and "many witnesses," the Government urged the Court to view a limited rehearing as "the only feasible and practicable solution."[198] The Government contended that the proposed procedure was "in conformity with the law"; that it would employ "all attendant powers" of a court-martial for acquiring and evaluating evidence; and, most important, that it would establish a procedure for addressing authoritatively the facts concerning allegations of command influence, "an issue which the Government has the right to have . . . litigated." [199] In that context, the Government emphasized the value of a limited rehearing in circumstances where the issue of command influence was "raised for the first time on appeal," where affidavits were "insufficient to determine whether an issue is raised requiring further inquiry," and where the Board of Review otherwise lacked the means to obtain and evaluate additional evidence.[200]

Beyond the position advocated by the Government in *DuBay*, the brief is particularly notable for what it did not say. The Government did not cite or otherwise discuss the decision by the Board in *Moore;* it did not assert that the Board erred by considering post-trial submissions; nor did it assert, as did Panel No. 3 in *Moore*, that the post-trial filings did not warrant a further inquiry into the issue of unlawful command influence.

3. The First Defense Brief: A Preference for Dismissal of Charges

Three days after the Government filed its brief as the appellant in *DuBay*, the defense filed its brief as the appellant in *Moore*.[201] In contrast to the Government's approach in *DuBay*, defense counsel in *Moore* sought to tie the two cases together. Not surprisingly, the defense in *Moore* asserted that developments in the *DuBay* case required reversal of the *Moore* decision by Panel No. 3. The defense cited the Government's recognition, in the supplementary pleading filed with the Board of

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[198] *Id.* at 44.
[199] *Id.* at 46.
[200] *Id.* at 45.
[201] Brief for Appellant (Defense) at 46, United States v. Moore, 27 C.M.R. 411 (C.M.A. 1967) [hereinafter Defense CMA Moore Brief] (on file with USCAAF *DuBay* Records, *supra* note 82). The following counsel signed the defense brief: Captains Anthony F. Cilluffo and Paul V. Melodia; and COL Daniel T. Ghent.

Review, that the convening order and the post-trial affidavits warranted a factual inquiry on the subject of unlawful command influence.[202] The defense brief in *Moore* set forth a detailed analysis of the Starr affidavit and other post-trial filings to illustrate the disintegrating relationship between the staff judge advocate and commanding general at Fort Leonard Wood on military justice matters, including remarks that led the staff judge advocate to have concern that the commanding general had engaged in improper discussions with court-martial panel members regarding the severity of sentences.[203]

The defense, which described the affidavits submitted by the Government from the commanding general and others as incomplete and misleading, suggested that the existence of unlawful command influence had been demonstrated by the "coincidence of complaints by general courts-martial presidents against the law officer, threats against challenging counsel, the belligerency between president and law officer, and the General's actual contact with a court president . . . ."[204]

The defense in *Moore*, having cited with approval the Government's concession of the need for a factfinding inquiry into the possibility of command influence, did not expressly reject the possibility of addressing the situation in *Moore* through further factfinding, noting that "[m]inimally, these affidavits raise the issue of command influence which may be resolved by further inquiry."[205] The defense, however, declined to request factfinding as a form of relief, and instead focused on the consequences of the proceedings, particularly the fact that Moore had already completed his adjudged sentence.[206] In that context, the defense contended that the charges should be dismissed on the grounds that Appellant's "state of military limbo should not be perpetuated by a belated investigation and ultimately a rehearing at this late date."[207]

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[202] *Id.* at 2 n.1.
[203] *Id.* at 4–8.
[204] *Id.* at 13. Later in the brief, the defense offered a detailed list of alleged instances of unlawful command influence. *Id.* at 17–19.
[205] *Id.* at 20.
[206] *Id.* at 22.
[207] *Id.*

4. The Government's Answer in Moore*: Preserving the Potential for Affirming the Findings and Sentence with or without Factfinding*

On June 22, 1967, the Government, as Appellee, filed its brief in *Moore*.[208] The Government's position reflected an unwillingness to express agreement with the analysis of the Board of Review in *Moore*, in which Panel No. 3 had held that the facts alleged in the post-trial filings were insufficient to warrant further inquiry into the issue of unlawful command influence.[209] Instead, the brief reminded the Court that in the aftermath of the Starr affidavit, the Government had urged the Board of Review in *Moore* to undertake a further inquiry into the issue of unlawful command influence.[210] The brief then cited the Government's brief in *DuBay*, noting that the "Government has urged and continues to urge in this case and other cases in which further inquiry into the issue of unlawful command influence is warranted, that inquiry be by a limited hearing at the trial level before properly constituted court[s]-martial."[211]

Although expressing a preference for factfinding, the Government sought to keep alive the possibility that the Court would affirm the Board of Review in *Moore*, thereby affirming the findings and sentence. The Government observed that the Court of Military Appeals was not bound to accept the Government's earlier concession before the Board that the issue of command influence had been raised by the Starr affidavit, nor was the Court required to agree with the Government's position in other cases that a limited hearing was required.[212] In the Government's view, the Court was bound to accept the decision of the Board in *Moore* so long as "it cannot be said that . . . no reasonable man could reach the conclusion reached by the intermediate appellate court."[213] On that basis, the Government contended that the Court could affirm the Board's decision in *Moore* without the necessity of agreeing with the Board's view of the evidence, so long as "the decision reached can be sustained by the operation of reasonable minds."[214] The Government endeavored to

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[208] The following counsel signed the brief: Captain William R. Steinmetz, MAJ John F. Webb, and Lieutenant Colonel David Rarick. Government CMA Moore Brief, *supra* note 161, at 34.
[209] The Government argued that the convening order, although irregular, did not establish the existence of unlawful command influence, *id.* at 7–8; but also recognized that the Starr affidavit had raised the issue. *Id.* at 9.
[210] *Id.* at 2
[211] *Id.* at 2 n.1.
[212] *Id.* at 3–4.
[213] *Id.* at 5 (citations, capitalization, and internal quotation marks omitted).
[214] *Id.* at 13.

portray the Board's view of the facts as within the realm of reason, even if both the Government and the Court might not agree with the Board's view of the facts.[215]

Recognizing, however, that the Court might reject the Board's decision in *Moore* if the Court determined that "reasonable men could not differ on the import of the matters placed before them in the post-trial proceedings," the Government argued in the alternative that the Court should order a limited factfinding hearing on the issue of unlawful command influence.[216] Seeking to counter the defense request for dismissal of charges, the Government emphasized that it had not conceded the existence of unlawful command influence and had agreed only that the information in the Starr affidavit warranted "further inquiry into the issue of whether or not in fact there was command influence in the case at bar."[217] In short, the Government's brief sought to preserve two options for upholding the findings and sentence: (1) a decision by the Court of Military Appeals affirming the Board's decision in *Moore*; and (2) a decision by the Court of Military Appeals to order a factfinding hearing in *Moore* that might produce a result favorable to the Government.

5. The Defense Opposes Factfinding in DuBay

On June 22, the same day that the Government filed its *Moore* brief, the defense filed its answer in *DuBay*.[218] The defense in *Moore*—the losing party before the Board—had sought to preserve the option of a factfinding hearing. By contrast, the defense in *DuBay*—the prevailing party in a Board decision dismissing the charges—vigorously opposed the Government's suggestion that the Court of Military Appeals could order a factfinding hearing.

In language reflecting the increasingly tense nature of the litigation, the defense sharply criticized the Government's suggestion that the Board's approach in *DuBay* demonstrated a lack of impartiality—describing that portion of the Government's brief as an "attempted back-

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[215] *Id.* at 30.
[216] *Id.* at 6, 30.
[217] *Id.* at 31 (capitalization omitted).
[218] Defense CMA *DuBay* Brief, *supra* note 92.

door assassination by innuendo" that was "baseless" and that had "no place before this Honorable Court."[219]

The defense launched two substantive challenges to the Government's proposal for a limited hearing on command influence. First, the defense contended that factfinding by the Board of Review could not include any matters external to the record of the court-martial submitted to the Board under Article 66.[220] The defense, however, did not address the merits of the Government's reliance on cases in which the Court of Military Appeals had authorized post-trial factfinding where adequacy of counsel and post-trial processing issues were involved.[221] Instead, the defense simply noted that the Government had opposed factfinding in those cases, and that the refusal of the Judge Advocate General to engage in factfinding in *DuBay* as ordered by the Board reflected a pattern of treating the Board as lacking judicial powers.[222] The defense characterized the actions of the Judge Advocate General as constituting an illegal effort to "set himself up as a supervisory authority" over the Board.[223]

The defense described the Government's proposal for a limited factfinding hearing before a law officer as a "pseudo-court" for which there was no precedent.[224] The defense added that a hearing limited to factfinding on the issue of command influence would constitute a waste of time because it would address only one narrow question without addressing the remaining issues in the case.[225] The defense also rejected the Government's reliance on case law permitting sentence-only rehearings on the grounds that command influence at Fort Leonard Wood had infected both the findings and the sentence.[226]

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[219] *Id.* 6.
[220] *Id.* at 13–15.
[221] *See supra* Part IV.C.2.
[222] Defense CMA *DuBay* brief, *supra* note 92, at 13–15.
[223] *Id.* at 16.
[224] *Id.* at 18.
[225] *Id.*
[226] *Id.* at 19.

In terms of relief, the defense asserted that the Government's approach to the case had resulted in unlawful appellate delay, warranting dismissal of the findings in the sentence without any further proceedings.[227] In the alternative, the defense asked the Court to affirm the decision of the Board, which had set aside the findings and sentence and ordered a full rehearing.[228]

6. The Second Starr Affidavit

Following the submission of briefs, the appellate counsel in both *DuBay* and *Moore* each filed a second affidavit from COL Starr, the retired judge advocate who had been the SJA at Fort Leonard Wood during the trial of the cases at issue in the pending appellate proceedings.[229]

The new affidavit provided additional details of an incident, briefly mentioned in the prior affidavit, in which the SJA stated that he had been directed by the commanding general to provide specific instructions to court-martial members and counsel at special courts-martial regarding the standards and procedures for the disposition of speedy trial motions.[230] After much consternation, the SJA provided such guidance, only to be informed that the General subsequently rescinded his guidance.[231] The defense did not draw a direct link between the guidance and any particular court-martial, but instead contended that the affidavit provided further information on matters previously briefed by the parties.[232]

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[227] *Id.* at 21.
[228] *Id.*
[229] James C. Starr, Affidavit (June 14, 1967) [hereinafter Second Starr Affidavit]. The second Starr Affidavit is attached to the Motion to File Additional Appendices (June 23, 1967) (filed in *DuBay* and in *Moore*). The Court granted the motion to file in each case on June 26, 1967 (copies of the pertinent documents are on file with USCAAF *DuBay Records*, *supra* note 82).
[230] Second Starr Affidavit, *supra* note 229, at 1–2. Colonel Starr provided additional details concerning this incident during his testimony in subsequent proceedings. *See* Part V.B.5.e *infra*.
[231] *Id*. at 2.
[232] Motion to File Additional Appendices (June 23, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82).

D. Oral Argument at the Court of Military Appeals

The oral argument, held on June 30, 1967, received significant press attention.[233] In a front page story, *New York Times* legal correspondent Fred Graham offered the following summary of the case: "The commander of the Army base at Fort Leonard Wood, Mo., was accused today of using his rank to influence court-martial officers to impose generally heavy sentences."[234] Graham reported that defense counsel told the Court that the commander "had admitted as much" to Army investigators.[235] The story recounted defense assertions to the Court that the Secretary of the Army and the Judge Advocate General of the Army had been aware of the problems "and had not acted to stop them."[236]

Graham further reported that the defense had submitted an affidavit from counsel at Fort Leonard Wood containing evidence of conversations between the convening authority and a panel member to the effect that the convening authority was pleased with heavy sentences because it put him in "a much better position to grant deals in future cases."[237] According to Graham, other issues explored at trial included allegations of threats to censure defense counsel for challenging senior panel members and systemic exclusion of junior officers from court-martial panels.[238]

Graham added that he had contacted the commanding general at Fort Leonard Wood who "admit[ted] getting in touch with court-martial officers about their sentences, but he said 'there is no truth whatsoever that I tried to influence the court.'"[239] The commanding general told Graham that he contacted the court members after reducing sentences in accordance with pretrial agreements so that the officers would

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[233] The Clerk of Court for the U.S. Court of Appeals for the Armed Forces advises that the Court does not have in its files a recording or transcript of the oral argument in *DuBay*. DeCicco e-mail, *supra* note 9.

[234] *See* Fred P. Graham, *Pressure on Courts Charged to General*, N.Y. TIMES, July 1, 1967, at A1. *The Washington Post* carried a similar, but less detailed story. *Lawyer Says General Demanded Harsh Courts Martial Rulings*, WASH. POST, July 2, 1967, at A10.

[235] Graham, *supra* note 234. at Al.

[236] *Id.* at A7.

[237] *Id.*

[238] *Id.*

[239] *Id.*

understand that he had not acted out of displeasure with their heavier sentences.[240]

E. The Court of Military Appeals Decides *United States v. Dubay*[241]

The differing Board of Review decisions in *DuBay* and *Moore*, as well as the variety of views expressed in the briefs, provided the Court of Military Appeals with an array of choices in deciding the case. The primary options included: (1) follow the approach taken by Panel No. 3 in *Moore* on the grounds that none of the activity at Fort Leonard Wood constituted error, or that none of the errors constituted material prejudice to the substantial rights of the accused in any particular case;[242] (2) affirm the decision issued by Panel No. 2 in *DuBay*, which would set aside the findings and sentence, without further factfinding, by applying a presumption of prejudice to the allegations of unlawful command influence; (3) follow the approach suggested by Government in *DuBay* by concluding that the issue of command influence warranted factfinding, and by deferring a decision on the validity of the findings and sentence pending completion of a limited factfinding hearing at the trial level into the factual aspects of the unlawful command influence allegations.

The Court also needed to consider the manner in which it would set forth its decision. The primary options included: (1) a full opinion discussing the court-martial proceedings, the Board of Review decisions, the arguments of the parties, and other pertinent points of law; (2) a short opinion focusing on the primary legal issues in the context of the appeals; or (3) a short order or per curiam decision announcing the result and any further actions that might be required.

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[240] *Id.* In the aftermath of the oral argument, the parties engaged in a vigorous dispute as to the accuracy of various accounts of the events at Fort Leonard Wood. In the course of this disagreement, the defense filed an affidavit from Fred Graham of the *New York Times* recounting further details of his conversations with the commanding general. Motion to File Instanter Affidavit (July 7, 1967) (attaching affidavit executed July 3, 1967). The Court granted the motion on July 20, 1967 (copies of the pertinent documents are on file with USCAAF *DuBay* Records, *supra* note 82)).

[241] 37 C.M.R. 411 (C.M.A. 1967).

[242] *See* UCMJ art. 59(a), 10 U.S.C. § 859(a) (2006) (setting forth the appellate test for prejudicial error).

The decision was not long in coming. Three weeks after oral argument, on July 21, 1967, the Court of Military Appeals issued *United States v. DuBay*,[243] a short per curiam opinion. The court made three brief points. First, "Both parties are agreed that, at the very least, a serious issue is raised concerning whether there was such command interference with these judicial bodies."[244]

Second,

> In the nature of things, command control is scarcely ever apparent on the face of the record, and, where the facts are in dispute, appellate bodies in the past have had to resort to the unsatisfactory alternative of settling the issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims.[245]

Third, the Court ordered a limited factfinding hearing in the command influence cases from Fort Leonard Wood and "in future cases in which a similar issue may be raised either here or before a board of review."[246]

The Court, which did not take action on the findings and sentence, set forth the following procedure for use in a limited hearing: (1) a remand to a convening authority higher than the one who referred the case to trial; (2) the new convening authority would send the case to a new court-martial, where the law officer would hold an out-of-court hearing, take testimony, and render findings of fact and conclusions of law; (3) if the law officer determined that the case was "infected with command control," the law officer could dismiss the findings, sentence, or both "as the case may require" and proceed with a rehearing; (4) if the law officer determined that command influence did not exist, the law officer would return the case to the convening authority, who would review the case and forward it for appellate review; and (5) in the alternative, if the convening authority determined a rehearing to be impractical, the convening authority could dismiss the case.[247]

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[243] *DuBay*, 37 C.M.R. 411.
[244] *Id.* at 413.
[245] *Id.*
[246] *Id.*
[247] *Id.* The Court stated in a footnote:

The brief per curiam opinion did not address the specific nature of the command influence allegations, nor did the opinion discuss most of the issues raised by the parties in the appeal, such as the alleged retaliatory actions, the tension between the Board of Review and the Judge Advocate General, and the competing views of the parties regarding the authority to order factfinding hearings.

Why did the Court issue such a bare-bones opinion in a case that had attracted significant national attention? The public record does not contain an express answer, but it is not unusual for appellate courts to decide, from time to time, that a case is best handled without much discussion, particularly when it involves an interim action such as an order for a limited hearing. Although the Court did not explain why it chose to issue a brief opinion, it is likely that in this hotly contested case, with so many ancillary issues and where further proceedings would enable both parties to have their say, the brief opinion served to resolve the issues at hand and set the tone for future proceedings in the same case as well as in future litigation.[248]

The press treatment of the *DuBay* decision reflected the austere tone of the Court's opinion. Fred Graham's page one story in the New York Times largely tracked the content of the opinion, along with a summary of the developments that led to the decision.[249] According to Graham,

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> Normally, collateral issues of this nature would, on remand in civil courts, be settled in a hearing before the trial judge. The court-martial structure, under the Uniform Code of Military Justice, however, is such that this cannot be accomplished. Accordingly, it is necessary to refer the matter to a court as such, although it is to be heard by the law officer alone.

Id. at 413 n.2. The Court's mandate, issued on the same day as the opinion—July 21, 1967—briefly recited the procedural history of the case and then ordered the case to be remanded to the Judge Advocate General of the Army "for proceedings not inconsistent with the opinion attached." (Mandate on file with USCAAF *DuBay* Records, *supra* note 82). Part VI.B *infra* discusses the subsequent modification of the mandate.

On the same day as the Court issued its decision in *DuBay*, the Court disposed of the Judge Advocate General's petition for extraordinary relief, see *supra* note 172, by ordering the Board of Review "to follow the procedures outlined in *United States v. DuBay* . . . ." United States v. Bd. of Review Nos. 1, 2, 4, 37 C.M.R. 414 (C.M.A. 1967).

[248] MOYER, *supra* note 5, at 767–68 (suggesting that the opinion should have set forth the facts and circumstances so as to deter future incidents of unlawful command influence).

[249] *See* Fred P. Graham, *Court Orders Army to Weigh Charges Against a General*, N.Y. TIMES, July 22, 1967, at A1. *See also Courts-Martial Hearings Slated*, BALT. SUN, July 22, 1967, at A2; *Court Orders Hearings on Army Trials*, CHI. TRIB., July 22, 1967, at B8.

Army sources indicated that the hearings would likely be held under the authority of the Fifth Army Commander, located at Fort Sheridan, Illinois.[250] The identification of a potential hearing site at that point indicated that the Army had undertaken the necessary preparations in the event that the Court granted Government's request for a limited rehearing.

Part V. The First *Dubay* Hearing

> *"When proceedings resumed this morning, Maj. David J. Passamaneck, attorney for the soldiers, said General Lipscomb confronted him in a hall outside the courtroom an hour earlier and 'sought to intimidate defense counsel by use of his rank.*
>
> *"'He gestured with his right index finger,' Major Passamaneck told the court, 'and said, "I want you to know, young man, that many of your questions yesterday did not conform to ethics set forth in the manual."*
>
> *"'The general advised me,' the major said in the hushed courtroom, 'that he did not want to bring this up in court and that was why he was speaking to me privately.'*
>
> *"The 54-year-old general, called to the witness chair, received a lecture from Col. John Barr, the law officer who is conducting the hearing.*
>
> *"'Defense counsel is entitled to be aggressive in exploring every possibility, including reliability of witnesses,' he said. 'I must consider you as any other witness and permit counsel to be forceful in questioning and probing.'*
>
> *"'Counsel was engaging in trickery yesterday,' the general responded, 'by deliberately misquoting what I had said and then asking if I had said it. I met him in the hall and told him that this was not the candor and fairness required by the manual."'*

[250] Graham, *supra* note 249, at 4.

> *The Army's Manual for Courts-Martial requires that 'the conduct of counsel before the court and with each other should be characterized by candor and fairness.' It admonishes counsel to 'treat adverse witnesses . . . with fairness and due consideration.'*
>
> *"Colonel Barr instructed the general that the law officer was responsible for enforcing proper conduct at the hearing.*
>
> *"'The defense counsel has not in any way overstepped his bounds,' he said.*[251]

A. Selecting Cases for the Limited Factfinding Hearing

The responsibility for supervising the implementation of *DuBay* fell to Major General Kenneth J. Hodson, the newly appointed Judge Advocate General of the Army.[252] Major General Hodson, an expert in military law, was well-suited to supervising the task through his temperament and experience.[253] The requirement in *DuBay* for factfinding hearings not only addressed the named parties in the proceedings before the Court of Military Appeals, but also expressly referenced other similarly situated cases—thereby potentially involving scores of courts-martial tried at Fort Leonard Wood.[254] As the defense in *Moore* had noted in its brief before the Court of Military Appeals during the consolidated hearing, "the lives and fortunes of many soldiers [were]

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[251] Donald Janson, *Accused General Rebuked in Court*, N.Y. TIMES, Oct. 13, 1967, at 11. *See Berry* Record, *supra* note 257, at 313–24.

[252] Major General Hodson served as the Judge Advocate General of the Army from July 1967 to June 1971. JAGC HISTORY, *supra* note 11, at 243, 255.

[253] In his previous assignment, MG Hodson had been the Assistant Judge Advocate General for Military Justice. In that capacity, he represented the Army in the 1962 and 1966 congressional hearings on military justice, and represented the interests of the Department of Defense in the development of the Military Justice Act of 1968. *See* JAGC HISTORY, *supra note* 11, at 245; Michael J. Nardotti, *The Twenty-Fifth Annual Kenneth J. Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202, 208–11 (1996).

[254] *See DuBay*, 37 C.M.R. at 413. *See also* United States v. Berry, 37 C.M.R. 428 (C.M.A. 1967) (remanding for proceedings in accordance with *DuBay*); United States v. Keller, 37 C.M.R. 429 (C.M.A. 1967) (same); United States v. Staton, 38 C.M.R. 36 (C.M.A. 1967) (same).

at stake."[255] For the Government, the proceedings not only concerned the findings and sentences in the individual cases, but also involved the impact of the cases on the very public debate regarding the fairness of the military justice system.[256]

The choices facing the Army included: (1) providing a separate fact-finding hearing in each case; (2) providing a single consolidated hearing for all cases; or (3) providing an initial consolidated hearing for a selected number of cases while deferring action on the balance of the cases pending the outcome of the hearing. In considering these options, the Army faced the potential for hearings in which numerous officers who had exercised command and staff responsibilities at Fort Leonard Wood during 1966 would be called to testify—including witnesses who had moved to other assignments or left the Army by the time of the 1967 proceedings.

The Army chose the third approach, designating six cases for a limited consolidated factfinding hearing.[257] Of note, the parties to the first *DuBay* hearing did not include either Private DuBay, whose court-martial had served as the lead case in the appellate proceedings, or Private Phenix, whose case had triggered the appellate inquiry.[258]

B. The Hearing at Fort Sheridan

As anticipated, the Army sent the cases to the Commanding General of Fifth Army Headquarters, Lieutenant General Michaelis, Fort Sheridan, Illinois, for a consolidated rehearing limited to the issue of

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[255] *See* Brief for Appellant at 22, United States v. Moore, 27 C.M.R. 411 (C.M.A. 1967) (No. 20,179) (on file with USCAAF *DuBay* Records, *supra* note 82).
[256] *See supra* Parts II.C. IV.B and *infra* VIII.B.
[257] The hearing consolidated the following cases: United States v Berry, Gen. Ct.-Martial, No. 53379538; United States v. Buchanan, Gen. Court-Martial, No. 16748964; United States v. Farmer, Gen. Court-Martial, No. 55866321; United States v. Johnson, Gen. Court-Martial, No. 16868350; United States v. Richmire, Gen. Court-Martial, No. 19852616; and United States v. Stanton, Gen. Ct.-Martial, No. 13853291). *See* Cover Page, Transcript of Record, United States v. Berry, Gen. Court-Martial, No. 53379538 (Ft. Sheridan, Ill., Sept. 26–Oct. 26, 1967) (copy attached to the record in *United States v. Farmer*, Gen. Court-Martial No. 55866321 (on file with the Clerk of Court, U.S. Army Judiciary)) [hereinafter *Berry* Record]. In this article, the citations to the *Berry* Record refer to the hand-entered pagination on the copy contained in the *Farmer* record.
[258] *See Berry* Record, *supra* note 257, on cover page. *See* MOYER, *supra* note 5, at 765.

command influence.[259] The hearing, which was conducted from September 26 to October 26, 1967, drew the attention of newspapers from around the Nation.[260]

Colonel John Barr served as the law officer for the hearing, with a mandate to "hear respective contentions of the parties . . . , permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon."[261] Each party had multiple counsel.[262] The law officer quickly identified the central question for the limited proceeding: whether the actions of Major General Thomas H. Lipscomb, the Commanding General at Fort Leonard Wood, violated the prohibition against unlawful command influence in Article 37 of the Uniform Code of Military Justice.[263]

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[259] *See* United States v. Farmer, No. 415214, Review of the Staff Judge Advocate at 2 (Ft. Sheridan, Ill., Jan. 10, 1968) (copy on file with Clerk of the Court, U.S. Army Judiciary).

[260] *See, e.g.*, *Courts-Martial Hearings Slated*, *supra* note 249, at A2; *Court Orders Hearings on Army Trials*, *supra* note 249, at B8; *Hearings Set on Influence of Lipscomb*, SPRINGFIELD LEADER & PRESS, July 22, 1967; Donald Janson, *General Admits Procedure Shifts*, N.Y. TIMES, Oct. 12, 1967, at 24; Charles Mount, *General Tells Deals Made at GI Trials*, CHI. TRIB., Oct. 12, 1967, at 14.

[261] *Berry* Record, *supra* note 257, at 151.

[262] Major David Passamaneck, who had represented the defense before the Court of Military Appeals, served as lead defense counsel for all six accused involved in the hearing. Captain Jay J. Madrid appeared as Assistant Defense Counsel on the first day of the hearings. In subsequent proceedings, Captain James A. Badami served as Assistant Defense Counsel. Captain Michael Davis served as Trial Counsel, and Captain Arthur M. Sussman served as Assistant Trial Counsel. *Id.* at 6, 11, 12. At the beginning of the hearing, the law officer addressed on the record the inherent difficulties and potential conflicts of interest associated with simultaneous representation and conducted an inquiry to determine whether each accused had knowingly waived any objections. *Id.* at 17.

[263] *Id.* at 152–53. Article 37, as then in effect, provided:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . .

1. Pretrial Motions

Early in the proceedings, the defense filed numerous motions, including motions to dismiss the charges; to disqualify the new SJA and convening authority; to disqualify the original convening authority; to obtain discovery; to sever individual accused from the joint proceeding; and to suppress or exclude evidence.[264] The defense also challenged the authority of the law officer to conduct the proceeding on the grounds that a rehearing could not be conducted unless appellate authorities set aside the findings and sentence, which had not been done in this case.[265]

The defense then urged the law officer to dismiss the "novel proceeding," contending that the hearing was "an empty ceremonial" exercise because the law officer did not have authority either to determine the guilt or innocence of the accused or to act on the sentence.[266] In response, the Government characterized the defense as attempting to reargue issues that had been addressed by the Court of Military Appeals, contending that the law officer was "without the power to question the validity" of the appellate court's legal conclusions.[267] The Government added: "The mandate of the Court of Military Appeals is clear. We are here to do one thing and one thing only—to decide whether the Commanding General, Fort Leonard Wood, did violate Article 37 of the Uniform Code of Military Justice in that he did exercise unlawful command influence."[268]

The Government further asserted that the new convening authority at Fort Sheridan was not bound by the actions taken by the convening authority at Fort Leonard Wood because the Board of Review in *DuBay* and the related cases had set aside the actions by the convening authority at Fort Leonard Wood on the findings and sentence.[269] As such, the

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[264] *See Berry* Record, *supra* note 257, at 23–24 (listing defense motions). The copy of the *Berry* record, as attached to the *Farmer* record, does not contain the text of the various motions.
[265] *Id.* at 38–40, 45, 69.
[266] *Berry* Record, *supra* note 257, at 48, 69.
[267] *Id.* at 50–52. The Government, during argument, highlighted the fact that their brief, the amicus brief, and the defense reply brief all commented on this issue. In the defense argument on rebuttal, MAJ Passamaneck noted the irony that the Government's position was contrary to the position taken by the amicus representing the Judge Advocate General in the *DuBay* appellate litigation which the defense submitted as an exhibit to the motion. *Id.* at 62.
[268] *Id.* at 52–53.
[269] *Id.* at 55.

doctrine of res judicata did not apply, and the factfinding hearing had legal authority to address the issues mandated by the Court of Military Appeals without being bound by the actions of the prior court-martial.[270] Most significantly, the Government contended that the procedure adopted by the Court of Military Appeals properly incorporated the constitutional requirements for further proceedings established by the Supreme Court in cases such as *United States v. Wade*.[271] According to the Government, the defendants at the rehearing would not be denied any pertinent protections.[272]

The law officer agreed with the Government and denied the defense motion.[273] At that point, having determined that the limited hearing could take place, the law officer deferred ruling on the remaining defense motions in order to "proceed with the matter, the principle matter, that this hearing [was] intended for."[274]

2. Allocation of the Burden of Going Forward and the Burden of Proof

At the conclusion of the motions proceeding, the law officer asked for views on the question of which party had the burden of producing evidence, a matter not expressly addressed by the Court of Military Appeals in its *DuBay* decision.[275] The question involved an assessment of the prior appellate proceedings: had the defense in the prior proceedings established sufficient evidence to shift the burden on to the Government? If so, the Government would be required to either disprove the existence of unlawful command influence or demonstrate that there was no prejudicial effect. If not, then the defense would have to produce

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[270] *Id.* at 57. The Government cited *United States v. Kepperling*, for the proposition that the law officer lacked authority to "alter, reverse, modify or change [the] mandate" of the Court of Military Appeals. 29 C.M.R. 96, 101 (C.M.A. 1960). *Kepperling* held that when an appellate court has ordered a rehearing, "[T]he usual rule in civilian jurisdictions is to the effect that unless and until the appellate court releases the trial forum from the obligation imposed, there is no power residing in the lower tribunal except to enforce the mandate."

[271] 388 U.S. 218 (1967).

[272] *See Berry* Record, *supra* note 257, at 55.

[273] *Id.* at 74.

[274] *Id.* at 137–38. The law officer advised the defense that he would entertain the motions later if the defense so requested. At the conclusion of the hearing, the law officer considered and denied the remaining motions.

[275] *Id.* at 141–43.

evidence on the record as to the existence of unlawful command influence.

At a pretrial session on October 4, 1967, the defense asserted that the prior appellate record established that there was "a concerted and consistent pattern of behavior on the part of General Lipscomb . . . to control the operation and the administration of military justice at Fort Leonard Wood according to his own ideas and views of how they should be done."[276] The defense cited five instances of unlawful command influence which they viewed as improperly impacting the independent administration of military justice. According to the defense, the convening authority engaged in deliberate efforts to: (1) increase or ensure maximum sentences were adjudged at courts-martial; (2) control defense counsel; (3) deemphasize the role of the law officer and to elevate the role of the president beyond the authority provided in the UCMJ; (4) control the admissibility of evidence in courts-martial; and (5) apprise panel members of his desires and wishes.[277] The defense contended that its submissions during the appellate proceedings had fulfilled the defense burden, and that the burden of going forward at the limited hearing now rested with the Government.[278]

The novel procedural questions regarding the allocation of burdens of proof and persuasion at a limited rehearing presented the law officer with a set of difficult issues. After a brief period of consideration, he decided not to set forth a detailed legal analysis of the issues, but to instead offer a practical approach. He advised the defense:

> I intend to consider this, more or less, as a clean slate and . . . I will rule that you are to proceed. . . . [T]his gives you . . . the opportunity to present any matters you desire to present and are pertinent to the issues. The government will be able to answer those, and, of course, you may rebut[] any matters the government presents.[279]

In response to a defense question regarding matter previously presented during appellate review, the law officer said:

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[276] *Id.* at 143–44.
[277] *Id.* at 144.
[278] *Id.* at 154–55.
[279] *Id.* at 174.

> I will take into consideration any matters that you place before me, but . . . just as a matter of vehicle here to get this thing under way, and to afford both sides the opportunity to . . . support their contentions, I'm asking you to go forward with the evidence, then the burden, the real burden, falls on the government to show that there was no such command influence. Your burden is only to go forward.[280]

When the defense expressed concern that the ruling might shift the "burden of proof" to the defense, the law officer responded:

> [Y]ou only have to present your case . . . go forward with the evidence, present some evidence, some substantial evidence, in support of your contention.[281]

3. Parties and Witnesses

At the request of MG Lipscomb, who had been the convening authority at Fort Leonard Wood, the Government presented a motion requesting that the law officer designate the General as a party to the proceedings.[282] The Government stated that MG Lipscomb had requested to be designated as a party to the proceedings in view of the broad challenge to his conduct of military justice affairs under his command.[283] The Government made it clear that the presentation had been made at the General's request and did not reflect the position of the Government.[284] Counsel for both parties noted that there was no precedent for designating a person as a party to a court-martial proceeding absent referral of charges.[285] The law officer agreed and denied the motion.[286] The law officer then turned to the presentation of witnesses, and reached an understanding with the parties that after several days recess the

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[280] *Id.* at 175.
[281] *Id.* at 177.
[282] *Id.*
[283] *Id.* at 178–79.
[284] *Id.*
[285] *Id.*
[286] *Id.* The military judge noted that his ruling did not preclude MG Lipscomb from requesting a Board of Inquiry under proper channels. *Id.* at 178. *See* UCMJ art. 135, 10 U.S.C. § 935 (2006).

defense would begin its case with the testimony of COL Starr, who had been the SJA at Fort Leonard Wood during most of the trials at issue.[287]

4. A Claim of Privilege and a Shift in the Burden of Going Forward

The hearing reconvened on October 11, 1967.[288] As agreed at the prior session, the defense called the former SJA, COL Starr as its first witness.[289] The Government, however, interjected a new issue into the proceedings. The Government asked the law officer to restrict the questioning of COL Starr on the grounds that all of the conversations between the SJA and the convening authority were subject to the attorney-client privilege.[290] The Government asserted that the convening authority, MG Lipscomb, held the privilege, and that COL Starr could not testify as to any of his conversations with MG Lipscomb unless MG Lipscomb waived the privilege.[291] The law officer temporarily excused COL Starr so that MG Lipscomb could address the question of privilege.[292]

Major General Lipscomb took the stand and stated that he viewed his conversations with the SJA as privileged, citing not only his personal situation, but also the interests of commanding generals and staff judge advocates "all over the Army" who would benefit from a ruling clarifying the opportunity to engage in communications protected by the privilege.[293] After excusing MG Lipscomb, the law officer received a legal memorandum from the defense and provided trial counsel with an opportunity to review the defense position.[294]

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[287] *See Berry* Record, *supra* note 257, at 203–05. The hearing covered a wide variety of witness requests from the defense and disagreements between the prosecution and defense as to the necessity for certain witnesses, including those that had retired and had been assigned overseas. The law officer granted a number of the requests and deferred others pending the development of evidence at the hearing. *See id.* at 180–204.

[288] At the outset of the proceedings on October 11, the trial counsel noted the apparent absence without leave of two of the accused, and the law officer engaged in a detailed inquiry regarding the procedure for moving the hearing forward in their absence. *Id.* at 207–08. The law officer, after addressing several other preliminary matters, invited the defense to proceed with its case. *Id.* at 212.

[289] *Id.* at 212.

[290] *Id.* at 212–13.

[291] *Id.* at 213.

[292] *Id.* at 214

[293] *Id.* at 217.

[294] *Id.* The memorandum is not attached to the record of the Berry proceedings attached to the Farmer record. *See supra* note 257. *Cf.* STEPHEN A. SALTZBURG, LEE D. SCHINASI,

When the proceeding reconvened, the law officer advised the parties that the Government's motion on the question of privilege had caused him to reconsider his earlier and separate ruling in which he had held that the defense bore the burden of going forward in the presentation.[295] Upon reconsideration, he stated that that evidence proposed to be presented by the defense essentially replicated the evidence that the defense had submitted to the Board of Review and Court of Military Appeals in the prior appellate proceedings.[296] From that perspective, and in light of the claim of privilege by MG Lipscomb, the law officer decided that it would be inappropriate to place the burden of going forward on the defense.[297]

The Government, perhaps realizing that its belated request to treat COL Starr's testimony as privileged had constituted one motion too many, asked the law officer if he would take a different position on the burden of going forward if MG Lipscomb withdrew his claim of privilege.[298] The law officer responded that he would "reconsider my decision again if he [MG Lipscomb] wanted to take a complete reversal at this time."[299] At that point, he asked whether the Government would be "prepared to reconvene this afternoon and either present your position or your witnesses," and the Government responded that they would be "prepared to go forward this afternoon."[300]

DAVID A. SCHLUETER, 2 MILITARY RULES OF EVIDENCE MANUAL 5-21 (2006) and GILLIGAN & LEDERER, *supra* note 6, at 5-54 to 5-58 (discussing the definition of "client" in an organizational setting). Although the law officer proceeded on the assumption that MG Lipscomb might seek to invoke the privilege during the hearing, he permitted extensive examination of MG Lipscomb regarding his interaction with the SJA on military justice issues, while limiting certain questions without ruling expressly on the claim of privilege. *See, e.g.*, *Berry* Record, *supra* note 257, at 226, 228–29, 231–33, 235–49. *See also id*. at 463 (statement by the law officer that he had not yet ruled on the claim of privilege).

[295] *Id.* at 281.

[296] *Id.*

[297] *Id.* at 217–18. *See also id.* at 305–11 (setting forth a further dialogue between the parties and the law officer regarding the decision to place the burden of going forward on the prosecution, and the implications of that decision with respect to the scope of issues that the prosecution would be required to address).

[298] *Id.* at 219.

[299] *Id.*

[300] *Id.*

5. Presentation of Evidence

Over the next two weeks, the parties would call over twenty witnesses, record hundreds of pages of testimony, and present dozens of documents in support of their respective positions.[301] The primary focus of the testimony involved the views of the two key participants at Fort Leonard Wood: MG Lipscomb, the Commanding General, and COL Starr, the Staff Judge Advocate.[302]

a. The Testimony of the Installation Commander

On the afternoon of October 11, 1967, the preliminaries came to an end and the Government accepted the responsibility of going forward.[303] The Government called MG Lipscomb as the Government's first witness.

Major General Lipscomb emphasized the substantial challenges he faced in commanding one of the Army's largest training centers in the midst of the personnel turbulence caused by the Vietnam buildup and its impact on the Army and the Nation.[304] From the time he took command in 1965 until the time he issued the convening orders at issue in the litigation, the Army had grown from 980,000 to 1,500,000, with Fort Leonard Wood's military population increasing from 25,000 to 38,000—including many draftees or, as he described his trainees—"people who

[301] *Id.* at 1–5 (listing the witnesses and exhibits).
[302] A useful summary of the testimony and documentary evidence appears in the post-hearing memorandum prepared by the Staff Judge Advocate at Fort Sheridan, which is appended to the record in *United States v. Farmer*. *See supra* note 259. As reflected in that summary, the law officer heard testimony from a wide variety of witnesses, including the Commanding General, his staff judge advocate, law officers, counsel, panel members, and others, including MG McCaw, the recently retired Judge Advocate General of the Army. The testimony presented differing accounts and perspectives regarding a series of incidents involving the Commanding General that reflected his deep interest in the details of court-martial proceedings and outcomes, as well as his interactions with his legal staff, panel members, and others. The record contains extensive material concerning the conduct of military justice proceedings during that era, as well as detailed accounts of interactions between installation officials and the Judge Advocate General and his staff, that would appear to be worthy of further review and historical analysis. A detailed account or evaluation of the factual issues is beyond the scope of this article. The following material highlights aspects of the hearing, reflecting the tenor of the proceedings and matters addressed in subsequent appellate proceedings.
[303] *Id.* at 220.
[304] *See Berry* Record, *supra* note 257, at 229, 267, 286–88.

had joined the Army involuntarily and who might then be inclined to go absent without leave."[305]

The post's stockade population increased from 300 in 1965 to 437 in May 1967, and included not only soldiers assigned to Fort Leonard Wood, but also many assigned to other posts who had been picked up in Detroit, Chicago, and St Louis, and who were awaiting trial at Fort Leonard Wood.[306] Major General Lipscomb also testified that a shortage of trained officers compounded these challenges.[307]

In the midst of this buildup, MG Lipscomb became concerned about the pace of military justice actions, as well as complaints from officers about the impact of courts-martial service on their other duties.[308] Major General Lipscomb stated that he decided to address the role of the president in courts-martial proceedings as a means of improving efficiency.[309] Major General Lipscomb testified that—

> I was not very familiar with the court martial manual up to that time, but I got a copy and I read it and I kept it on my desk . . . and I learned that many of the responsibilities of the convening authority explicitly may not be delegated. I then began to execute them to a greater degree personally.[310]

He viewed his issuance of unique convening orders as necessary under the circumstances, and as consistent with the *MCM*.[311]

The defense vigorously questioned MG Lipscomb during cross-examination about adherence to Army Regulations; military justice lectures; exclusion of junior officers from court-martial panels; his statements about military justice during an Army Inspector General investigation into military justice practices at Fort Leonard Wood; his

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[305] *Id.* at 287–88.
[306] *Id.* at 287, 289.
[307] *Id.* at 286–88.
[308] *Id.* at 251.
[309] *Id.* at 293.
[310] *Id.*
[311] *Id.* Major General Lipscomb further explained, "I relied on my Staff Judge Advocate but I could not delegate to him the power and responsibility which had been assigned to me as the convening authority and I feel that this was a necessary thing to do, although I regret that it has caused me to be here today." *Id*.

communications with court-martial members after the conclusion of cases about the nature of the sentences; alleged negative comments to the staff judge advocate about the performance of defense counsel; and the increase in severity of sentences following implementation of various military justice initiatives from the convening authority.[312]

b. Revisiting the Claim of Privilege

During defense counsel's cross examination of MG Lipscomb, one of the most contentious areas involved his role in detailing defense counsel to particular cases.[313] Major General Lipscomb indicated that he typically deferred to the recommendations of his staff judge advocate. Defense counsel asked MG Lipscomb if he had expressed displeasure to his SJA about the trial tactics of defense counsel at Fort Leonard Wood—particularly the instances of challenges to presidents of general courts-martial.[314] The prosecution objected that the questions improperly asked MG Lipscomb to reveal discussions with his SJA that, in the prosecution's view, were protected by the attorney-client privilege.[315] At that point, the law officer advised the parties that he needed further time to review application of the privilege to the questions raised by the defense, and he recessed the proceedings until the next day.[316]

c. The Hallway Confrontation

The next morning, the law officer announced that he had decided to excuse MG Lipscomb temporarily while he gave further consideration to the claim of privilege.[317] The law officer then noted that Major Passamaneck, the defense counsel, had a matter that he wished to place

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[312] *See id.* at 225–78, 293–311, 572–80.
[313] *See, e.g.*, *id.* at 295–305. Under the UCMJ as enacted, and as in effect during the *DuBay* cases, the responsibility for appointing trial and defense counsel rested with the convening authority. UCMJ 1950, *supra* note 13 (art. 27(a). Congress later amended the statute to provide for appointment of counsel under departmental regulations, see Military Justice Act of 1983, Pub. L. No. 98-209, 3(c)(1)(A), codified at 10 U.S.C. § 827 (art. 27). Under current practice, the detail of counsel to a court-martial typically occurs through judge advocate channels rather than through command authorities. *See* SCHLUETER, *supra* note 6, at 435.
[314] *See Berry* Record, *supra* note 257, at 300.
[315] *Id.*
[316] *Id.* at 311.
[317] *Id.* at 312.

on the record.[318] At that point, Major Passamaneck reported to the law officer that MG Lipscomb, in a confrontation outside the hearing, had challenged Major Passamaneck's courtroom behavior as unethical.[319] The law officer then provided an opportunity for MG Lipscomb to give his version of the incident, and the General explained that he viewed counsel's cross-examination as inconsistent with the degree of candor and fairness required of counsel by the *MCM*.[320] The law officer emphasized that he, as the law officer, was responsible for the conduct of proceedings, that the defense counsel was entitled to aggressively explore the reliability of witnesses, and that defense counsel had not exceeded the bounds of propriety in questioning the General.[321]

d. The Balance of the Prosecution's Case

The prosecution proceeded to present the balance of its case. In an effort to demonstrate that MG Lipscomb's actions had not produced improper influence in any courts-martial at Fort Leonard Wood, the prosecution offered testimony from a variety of witnesses involved in military justice matters at the installation.[322]

One of the prosecution witnesses, a law officer who had presided over cases at Fort Leonard Wood, testified as to the highly challenging environment facing law officers in that era. The law officer described his

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[318] *Id.* at 313.
[319] *Id.*
[320] *Id.* at 323. *See* 1951 *MCM*, *supra* note 66, para. 42.
[321] *Berry* Record, *supra* note 257, at 323.
[322] *See, e.g.*, *id.* at 326–57, 358–77, 495–513, 537–51 (testimony of COLs Martin, Jensen, Piper, and Wilson concerning their military justice experiences, including service as presidents of general courts-martial); *id.* at 377–422 (testimony of (COL) Tobin regarding his experiences as a law officer); *id.* at 423–36 (testimony of COL Morrell concerning his role as the assistant chief of staff, G-1, responsible for administrative functions, including court-martial assignments); *id.* at 514–17, 551–67 (testimony of former CPT Glover concerning his experiences as a trial counsel and Chief of Military Justice at Fort Leonard Wood); *id.* at 520–28 (testimony of MAJ Cook concerning his experiences as a general court-martial panel member). The testimony of former CPT Glover involved an incident in which CPT Glover, as trial counsel, engaged in a conversation with a court-martial president that left him with concern about possible improper conversations between the president and the convening authority about court-martial sentences. *See also id.* at 673–75 (testimony of the former SJA, COL Starr, regarding the issues raised by CPT Glover); *id.* at 699–700 (testimony of LTC McDonough, Deputy SJA at the time of the incident, and the current SJA at the time of the hearing, regarding the issues raised by CPT Glover).

experience in dealing with the court-martial president who had "difficulty" in receiving instructions from the law officer;[323] the court-martial president who acted "mad at the world";[324] and the court-martial president who filled "the voids with the golden tones of his own voice, which is a danger in our system of jurisprudence."[325] In one case, the law officer found it necessary to document his difficulties with the court-martial president by placing the following comment on the record: "I am getting sick and tired of having to fight to keep control of the bench when the man across from me just will not accept the fact that he is nothing but a jury foreman."[326] He also described in detail the repeated efforts of the command, over his objection, to provide the court-martial president with an elevated platform in the courtroom.[327] When asked whether these problems were unique to Fort Leonard Wood, he responded: "I have had trouble with presidents of courts just about everywhere."[328]

The issue of privilege arose once again when the prosecution presented the testimony of the recently retired Judge Advocate General, MG Robert McCaw, who had discussed the Fort Leonard Wood situation with the installation commander, MG Lipscomb.[329] Major General McCaw stated that he had dispatched COL Waldemar Solf, his chief military justice officer, to Fort Leonard Wood "to help unscramble" the problems at the installation and that COL Solf also had participated in discussions with MG Lipscomb.[330]

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[323] *Id.* at 387.
[324] *Id.* at 393.
[325] *Id.*
[326] *Id.* at 397.
[327] *Id.* at 413–16. He eventually obtained success in precluding the command from physically elevating the president above the other court members by ordering installation officials to remove the president's raised lectern. *Id.* at 416.
[328] *Id.* at 400. Contrasting his views with those of COL Starr, the former SJA, COL Tobin, indicated that he viewed the difficulty of dealing with court-marital presidents as part of the environment in which he operated, rather than as expressions of unlawful command influence. *Id.* at 400–12.
[329] *Id.* at 442–43.
[330] *Id.* at 443–44.

During defense counsel's cross-examination, MG McCaw stated that he could not discuss his conversations with MG Lipscomb in view of MG Lipscomb's claim of privilege.[331] The defense proceeded to question the former Judge Advocate General on a variety of matters, but when it became clear that the claim of privilege substantially limited defense counsel's ability to cross-examine the witness, the law officer apparently realized that he could no longer defer addressing the scope of the privilege.[332]

After temporarily excusing the witness and engaging the parties in a detailed discussion, the law officer noted that the existence of the privilege would be highly contextual, but it could potentially affect the testimony of key witnesses, including the current and former SJAs at Fort Leonard Wood, MG McCaw, COL Solf, and a variety of other judge advocates.[333] He then outlined the consequences for the case, taking note of the Government's contention that MG Lipscomb had not exercised unlawful command influence, and further noting that MG Lipscomb's claim of privilege addressed conversations that "would be very important in determining the issue before us today, whether there was, in fact, any improper command influence."[334]

The law officer advised the trial counsel that "unless the government is willing to disclose all these matters, and here air them before this court, I will have to take the position that it must be strongly inferred, and rule[] for the defense, that there was improper command influence."[335] After stating that he would give the Government an opportunity to discuss the situation with MG Lipscomb and the various attorneys, he added:

> [I]f they're willing to come in and present the evidence to me, I'll listen to it and make my determination on all of the evidence presented. If they [are] not willing to open up and give me the information I will have to say that the government has failed to meet the burden of

[331] *Id.* at 444–45.
[332] *Id.* at 446–47.
[333] *Id.* at 455–56.
[334] *Id.* at 456.
[335] *Id.* at 456–57.

> proof that there is no command influence, and hold for the defense.[336]

At the next session, the law officer ruled that the conversations between MG Lipscomb and his SJA were not privileged.[337] He also ruled, as a preliminary matter, that MG Lipscomb could claim the privilege with respect to his discussions with MG McCaw and COL Solf, subject to receiving further evidence on the circumstances of the conversations.[338] After considering the impact of the law officer's ruling, Major General Lipscomb stated that he would waive the privilege regarding his discussions with MG McCaw and COL Solf.[339] At that point, the defense completed its cross-examination of MG Lipscomb, and the Government completed the presentation of its case.[340]

e. The Defense Perspective[341]

The defense began its case with testimony from COL Starr, the former SJA to MG Lipscomb.[342] Colonel Starr provided an extensive description of his interactions with MG Lipscomb on military justice matters.[343] One incident illustrated the difficulty faced by the SJA in convincing the commander that the responsibility for ascertaining the

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[336] *Id.* at 457. In further dialogue with the prosecution, the law officer noted that his ruling did not preclude the Government from presenting its case, and that he would reserve final judgment until hearing the presentations by both parties. *Id.* at 460. The law officer also emphasized that he had not yet ruled as to whether MG Lipscomb had established the existence of a valid attorney-client relationship for purposes of claiming the privilege. *Id.* at 463–64. The hearing then received further testimony from MG McCaw, focusing largely on MG Lipscomb's claim of privilege, *id.* at 469–76. Following that testimony, the parties and the law officer engaged in a lengthy discussion regarding the procedure for addressing the privilege, including the question of whether MG Lipscomb should be provided with counsel to advise him on the question of privilege. *Id.* at 476–89.

[337] *Id.* at 491–92. The military judge's written ruling is not included in the version of the *Berry* record that is attached to the Farmer record. *Supra* note 257.

[338] *Berry* Record, *supra* note 257, at 491–92.

[339] *Id.* at 571.

[340] *Id.* at 579–80.

[341] Although the following discussion focuses primarily on the evidence presented during the defense case on the merits, it also includes information that the defense developed during cross-examination of the prosecution's witnesses.

[342] *Id.* at 583–685.

[343] *Id.* at 583–685. Colonel Starr's Deputy SJA, LTC McDonough, who succeeded Starr as SJA, testified that he had the "best of relations" with MG Lipscomb, and did not have problems with MG Lipscomb in terms of communicating legal advice. *Id.* at 704–07.

admissibility of evidence rested with the law officer, not the chain of command. COL Starr had advised MG Lipscomb of the weakness of a case due to the likely inadmissibility of certain test results.[344] According to COL Starr, when he told MG Lipscomb that it was likely that the law officer would not permit admission into evidence of the test results at issue, the following dialogue ensued: "He [MG Lipscomb] said 'Well, then I'll order him [the law officer] to do so' and I said, 'Well, General, he's not in your command. He's not a member of your command and I'm sure he'll not do so.' He said 'Whose command is he in" and I said 'Well, I suppose you'd say he's under the Judge Advocate General's Command.' He said, 'Well, I'll write him and tell him to do so and have it admitted.' I said, 'General McCaw [the Judge Advocate General] wouldn't do that, General. I feel certain,' at which time he said 'Who's the Judge Advocate General's boss' and I said 'Well, I suppose the Chief of Staff of the United States Army.' He said 'All right. I'll write him and have it done.'"[345]

Another dispute involved differing views on the effect of Army regulations regarding military justice. Colonel Starr described a proposal from MG Lipscomb that the SJA give a lecture to the officers at the installation on the subject of court-martial sentences.[346] According to COL Starr, he advised MG Lipscomb that the proposed lecture, even if permissible under applicable case law, contravened pertinent Army regulations.[347] The General responded that he was free to disregard the regulation: "I showed the regulation to him. However, he told me that he was well aware of the regulation and that the regulation prohibited this. He said he wasn't concerned and that if anybody should inquire as to why I was giving these [lectures] contrary to the regulations, I was to tell them that this was "directed by the General; that he considered it to be a matter of military discipline and that military discipline was a matter of his concern and nobody else's, as Commanding General at Fort Leonard Wood."[348]

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[344] *Id.* at 584–98.
[345] *Id.* at 587–88. Colonel Starr's testimony indicates that although the case in question went to trial, MG Lipscomb did not communicate his views to the law officer either directly or through the SJA, Judge Advocate General, or the Chief of Staff. According to COL Starr's testimony, the law officer excluded the evidence, and the trial resulted in an acquittal. *See id.* at 589–94, 680–81.
[346] *Id.* at 598–604, 640–44.
[347] *Id.* at 599–600.
[348] *Id.* at 599.

Colonel Starr added that MG Lipscomb "told me on various occasions, and this was primarily in the field of military justice, by the way, that regulations did not concern him. . . . Unless the regulation . . . [was] an implementation of statute . . . he felt free to violate them, if necessary, because he was the Commanding General."[349] Colonel Starr testified that he handled the situation by giving the lectures in a manner that, in his view, avoided any issues that might raise the specter of unlawful command influence.[350] In a similar manner, he managed to avoid implementing direction from MG Lipscomb that he discuss with court-martial presidents the relationship between sentences and pretrial agreements in particular cases.[351]

A further disagreement arose out of MG Lipscomb's insistence that the SJA issue a directive to both trial counsel and defense counsel as to how they should address the burden of proof in speedy trial cases.[352] Major Genral Lipscomb's concern grew out of a case in which the law officer had dismissed the charge based upon a speedy trial motion.

According to COL Starr, MG Lipscomb disagreed with COL Starr's view that the law officer properly placed the burden of proof on the Government.[353] The General then directed COL Starr to issue an instruction to all trial and defense counsel that the burden of proof in cases involving unauthorized absences would fall on the defense to prove that the Government had not used all reasonable care in preparing the necessary documentation in such cases.[354] Colonel Starr testified that he "went home that night and worked on a draft until 12 o'clock or one or so. I wasn't satisfied with it, but I went to bed and I couldn't sleep so I got up about four and did a complete new draft, based on the old one. This was a Saturday morning. . . . I handed it to him [the General] and asked him if this was the order he wanted. He read it carefully and he said no. He said, 'Let me dictate it.'"[355]

Colonel Starr stated that when he attempted to explain the legal issues associated with the order and further attempted to obtain a delay in

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[349] *Id.* at 600.
[350] *Id.* at 600–01.
[351] *See, e.g.*, *id.* at 678–79.
[352] *Id.* at 629–40. Colonel Starr had referred to this matter in his second affidavit. *See supra* Part IV.C.6.
[353] *Berry* Record, *supra* note 257, at at 629–30.
[354] *Id.*
[355] *Id.* at 631.

issuing the order so that he could discuss it with the Judge Advocate General, MG Lipscomb responded: "No, you cannot delay. The Judge Advocate General is not the commander of this post; I am."[356] In the midst of attempting to obtain assistance from the Office of the Judge Advocate General, COL Starr received a further direction from MG Lipscomb's deputy to issue the order, and he did so.[357] Shortly thereafter, MG Lipscomb reversed himself. Based upon advice he had received directly from the Judge Advocate General, MG McCaw, MG Lipscomb directed COL Starr to rescind the order.[358]

A primary subject of COL Starr's testimony concerned the complaints he received from court-martial presidents who "felt that they were being bypassed [by law officers] and treated as an inferior by what was—or maybe I should say a Junior, a junior officer . . . [and] [t]his bothered them."[359] Colonel Starr testified that he was "quite surprised" by the issuance of the unusual convening orders regarding the role of the court-martial president, particularly because the orders had not been coordinated with his office.[360] At the time the orders were issued, he did not express concern to MG Lipscomb because he viewed the orders as sufficient to confer jurisdiction on a court-martial.[361] Although he subsequently became concerned with a noticeable increase in the severity of court-martial sentences following the various actions taken by MG Lipscomb, he did not raise this concern in view of MG Lipscomb's prior comments that he did not feel bound by regulations unless required by statute.[362]

Following COL Starr's testimony, the defense presented testimony from others regarding issuance of the unusual convening orders,[363]

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[356] *Id.* at 632.
[357] *Id.* at 634–36.
[358] *Id.* at 636. The record does not indicate that this controversy ripened into a legal issue at any of the Fort Leonard Wood courts-martial.
[359] *Id*. at 607. *See id*. at 604–09, 644–48, 661–65, 673. During the presentation of the prosecution's case, an officer said, "I felt in fact that I was perhaps the guest of the legal system as opposed to being presiding officer in a court." *Id.* at 501–02.
[360] *Id.* at 610–11.
[361] *Id.*
[362] *Id.* at 616–17, 659–61, 668, 679–80. Colonel Starr also testified as to changes ordered by MG Lipscomb in the criteria for appointing court-members, including the exclusion of Lieutenants. *Id.* at 611–13, 622–24, 648–56, 669–72. Lieutenant Colonel McDonough, the Deputy SJA, and later SJA at the time of the hearing, subsequently testified that he did not notice an increase in the severity of sentences during this period. *Id*. at 711–13.
[363] *Id.* at 687–94 (testimony of COL Starke).

comments regarding counsel who challenged court-martial presidents,[364] and direction from MG Lipscomb to a defense counsel to provide information regarding defense counsel's investigation into potential unlawful command influence.[365]

6. The Law Officer's Findings and Conclusions

After receiving the extensive testimony offered by the defense and the Government, and after disposing of the remaining motions, Colonel Barr, the law officer, issued his ruling regarding command influence. The law officer prefaced his ruling by stating: "The factors most important for the success of the court-martial system employed by the Armed Forces are the complete independence of individual court members and the law officer and the integrity of all persons exercising a role within the system . . . ."[366]

The law officer specifically addressed each of the major points of contention, summarized the testimony, and outlined the perspective of the convening authority, his lawyers, court-martial participants, and the various defendants.[367] He did not endeavor to resolve the points in dispute as to the underlying factual circumstances, but instead issued a ruling that took the different perceptions into account. In addition, he sought to put the matter into perspective by describing with care the underlying purposes of military law, the vital application of civilian principles of justice, and the importance of the protections against unlawful command influence.[368]

The law officer offered the following observation regarding the convening authority's actions:

> [I]t is apparent from the evidence presented that General Lipscomb, in his endeavor to maintain the discipline and morale of the thousands of trainees under his command, took an active role in the administration of military justice, and that the concepts he had acquired from his

[364] *Id.* at 702–04, 708–10, 714 (testimony of LTC McDonough).
[365] *Id.* at 731–44 (testimony of CPT Beck).
[366] *Id.* at 850.
[367] *Id.* at 850–60.
[368] *Id.*

> early experience and training in military justice were not easily shaken. It was difficult for him to visualize the importance of the law officer and the limited role of the president in trials by general courts-martial. Although he had several misunderstandings and disagreements with his staff judge advocate, he fully understood his role as convening authority and at all times respected the right and duty of each member of a court-martial to arrive at his decision on the findings and sentence in each case based upon the member's understanding of the evidence, the law, as explained by the law officer, and his own conscience.[369]

He concluded:

> [F]or the vast majority of reasonable persons who realize the first and most important interest of any commander is for the well being of his troops, the evidence presented would establish beyond all doubt that General Lipscomb properly exercised his duties as a convening authority and did not exercise unlawful command influence in any case during the time he was in command at Fort Leonard Wood.[370]

On that basis, the law officer held that the court-martial proceedings in the six underlying cases were "properly appointed by competent authority," that the General "did not violate Article 37 of the Uniform Code of Military Justice, and that the proceedings by which the accused [were] originally tried [were] not infected with command control."[371]

The ruling made national news, with headlines in both the *New York Times* and *Chicago Tribune* reporting that the proceedings had "cleared" the General on the allegations of unlawful command influence.[372] Both papers quoted extensively from COL Barr's ruling.[373]

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[369] *Id.* at 859.
[370] *Id.* at 860.
[371] *Id.*
[372] Donald Janson, *General Is Cleared of Swaying Courts*, N.Y. TIMES, Oct. 27, 1967, at 1; Charles Mount, *Army Review Board Clears Gen. Lipscomb*, CHI. TRIB., Oct. 27, 1967, at 14.
[373] *See* sources cited *supra* note 372.

Part VI. The Court of Military Appeals Modifies *DuBay*

A. The Government's Request for Modification

In December 1967, the Army confronted two separate phases of the *DuBay* proceedings. The six cases considered in the consolidated post-trial hearing at Fort Sheridan now were subject to appellate consideration by the Board of Review. In addition, the Army had to decide what to do about the remaining cases from Fort Leonard Wood, which now amounted to more than seventy cases that had been remanded for post-trial hearings at Fort Sheridan in the aftermath of *DuBay*.[374]

In the course of considering the cases pending further action at Fort Sheridan, the Army realized that the mandate from the original *DuBay* decision, as requested by the Government before the Court of Military Appeals, may not have provided a sufficiently broad range of options for dealing with the remaining cases. Under the original *DuBay* decision issued by the Court of Military Appeals on July 21, 1967, the convening authority had only two options for addressing the remaining cases: (1) ordering a rehearing on unlawful command influence, or (2) dismissing the charges if the convening authority determined such a limited hearing would be impractical.[375] As a consequence, unless the Government moved to dismiss the charges in the remaining cases, it would have to go through lengthy factfinding hearings in all remaining cases. Although some consolidation might have been possible, the reality faced by the Government at this point involved the likelihood of dozens of lengthy factfinding hearings with extensive testimony from commanders, staff officers, defendants, administrative personnel, and judge advocates.

To resolve the dilemma, the Government filed a motion with the Court of Military Appeals on December 19, 1967, to modify the Court's original mandate and provide two additional options in situations where the convening authority determined that it would be impractical to order a limited factfinding hearing on the issue of unlawful command influence.[376] First, the Government asked the Court to permit the

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[374] *See* Motion for Appropriate Relief, United States v. DuBay, 27 C.M.R. 411 (filed Dec. 19, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82).
[375] *See DuBay*, 37 C.M.R. at 413.
[376] *See* Motion for Appropriate Relief, United States v. DuBay, at 1–2, 27 C.M.R. 411 (filed Dec. 19, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82).

convening authority to order a completely new rehearing on the findings and sentence in cases where the accused had pled not guilty at trial. Second, the Government asked the Court to permit the convening authority to order a new sentencing proceeding in cases where the accused had pled guilty at trial. The Government contended that these options would put the accused in as favorable a position as the accused would be in if the accused prevailed at a limited factfinding rehearing on the issue of unlawful command influence.[377] The Government would not gain a litigation advantage, but would forego the costs of the factfinding hearing and move directly to a proceeding focused on the merits of the underlying case. The Government's request reflected its reluctance to engage in repeated post-trial proceedings for each of the seventy-one accused.[378] The Government subsequently expanded its request to provide an additional option for guilty plea cases so that the convening authority could return the case to the Board of Review for sentence reassessment, an option that the Court had authorized in other command influence cases involving sentencing issues in the context of a guilty plea cases.[379]

While the defense had some reservations, it also faced a dilemma. At that point in time, many of the accused apparently had completed their terms of confinement, with a strong interest in leaving the Army, not in having another hearing. Therefore, the defense added the following paragraph to the Government's motion: "To avoid further delay in the disposition of 'guilty plea' cases such as that which further rehearings on sentence would entail, appellants join in only so much of the Government's Motion to Amend as provides for remand to boards of review for reassessment of the sentences."[380]

B. The Court of Military Appeals Amends the *Dubay* Mandate

The Court, in response to the Government's request, issued an order on January 3, 1968, modifying the July 21, 1967, mandate in *DuBay*.[381]

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[377] *Id.*
[378] *Id.*
[379] Motion for Leave to File Instanter Amendment at 2 (filed on December 27, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82) (citing United States v. Cole, 38 C.M.R. 94 (C.M.A. 1967) and United States v. Kitchens, 31 C.M.R. 175 (C.M.A. 1961)).
[380] *Id.* at 3 (portion of motion signed by defense counsel).
[381] United States v. DuBay, 17 C.M.A 678 (1968) (amending the mandate). Although reported in Volume 17 of the DECISIONS OF THE UNITED STATES COURT OF MILITARY

The order provided a series of options if the convening authority determined that it was impracticable to conduct a limited post-trial rehearing on command influence in any of the remaining cases.[382] In cases involving a plea of not guilty, the convening authority could: (1) order a rehearing on the merits and the sentence; or (2) dismiss the charges. In cases involving a guilty plea, the convening authority could: (1) order a rehearing on the sentence; (2) terminate the proceedings with no sentence; or (3) send the case to the Board of Review, which would have the further options of reassessing the sentence or ordering a rehearing.[383]

Part VII. Completion of Appellate Review

> *The Army has closed the books on its most extensive case of "command influence" by reducing the court-martial sentences of 93 soldiers who charged that their base commander had used his rank to see that they received stiff sentences.*[384]

APPEALS (the official reporter of the Court's decisions from 1951–1975, cited as "C.M.A."), the amended mandate does not appear in the more widely available COURT MARTIAL REPORTS (popularly known as the "Red Books," cited as "C.M.R."), and is not currently available on either Westlaw or Lexis. Appendix B contains excerpts of the pertinent portions of the original decision in *DuBay*, the first mandate, and the amended mandate.

[382] *Id.*

[383] *Id. E.g.*, In *United States v. Keller*, No. 414830, slip op. at 6 (A.B.R. May 4, 1967), a case involving a not guilty plea at the original trial, the convening authority at Fort Sheridan determined that a rehearing was impracticable and provided relief by dismissing the charges. Headquarters, Fifth U.S. Army, Gen. Court-Martial Order, No. 35 (Dec. 19, 1967). In a number of cases involving guilty pleas at the original trial, the convening authority chose the option of returning the case to the Board of Review. *See, e.g.*, United States v. Jacobson, 39 C.M.R. 516, 517 (1968) (addressing the remand through reassessment of the sentence). In *Jacobson*, the defense challenged the convening authority's action on the grounds that Jacobson had not received the assistance of counsel during the period in which the convening authority was considering the various options under *DuBay*. 39 C.M.R. at 517–18. The Board rejected the defense position, relying, *inter alia*, on the subsequent availability of counsel to address all issues in the appellate process. *Id.* at 518.

[384] Fred P. Graham, *93 Who Said General Swayed Trials Win Appeals*, N.Y. TIMES, June 25, 1968, at 3.

A. The First Appellate Review of a *DuBay* Hearing

The Board of Review, in *United States v. Berry*,[385] addressed the issues raised on appeal by the defense in the aftermath of the post-trial factfinding hearing at Fort Sheridan. Private First Class Berry had been convicted of absence without leave. The approved sentence included a bad-conduct discharge, confinement for one year, total forfeitures, and reduction to pay grade E-1. On initial appeal, the Board of Review had affirmed the findings and sentence, and on further review the Court of Military Appeals had remanded the case for further proceedings under the initial *DuBay* decision.[386] The convening authority at Fort Sheridan, acting pursuant to the remand, had consolidated *Berry* with the five other cases considered at the initial post-trial factfinding proceeding in the fall of 1967.[387]

The Board's discussion of unlawful command influence focused on the treatment of command influence by Congress and the courts, noting the developments in the post-World War II legislation, the enactment of the prohibition on unlawful command influence in Article 37, and the precedent applicable to the appearance as well as the existence of unlawful command influence.[388]

The Board chose not to recount the full details of the Fort Leonard Wood cases, as developed in the prior proceedings, but simply observed:

> We have most carefully reviewed the record of the original trial and the record of rehearing, and have taken judicial notice of the other cases from Fort Leonard Wood with this same issue before the boards of review.[389]

Based on that review, the Board stated:

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[385] 39 C.M.R. 541 (A.B.R. 1968).
[386] *See id.* at 541–42.
[387] *See supra* Part V. The Clerk of Court, U.S. Army Judiciary, who serves as the custodian of the pertinent records, reports that the records in *Berry* cannot be located. *See supra* note 9. As a result, we do not have the benefit of the arguments made by the parties upon appeal of the *DuBay* officer's ruling in *Berry*. Our consideration of *Berry* is based on the reported decision and the material contained in the related records of the consolidated post-trial fact-finding hearing at Fort Sheridan in the companion case, *United States v. Farmer*, as discussed above. *Supra* note 257.
[388] *Berry*, 39 C.M.R. at 543–55.
[389] *Id.* at 545–46.

> We find, as a matter of fact, that the appearance of unlawful command influence exists in this case and provides a presumption of prejudice; and that the prosecution has not met its burden to rebut the presumption of prejudice.[390]

In terms of relief, the Board noted that in the context of a guilty plea case, it would focus on the sentence.[391] The Board disapproved the punitive discharge, reduced the forfeitures, and cut the confinement period in half to six months.[392] In taking its action, the Board observed that the appellant was a two-year draftee who encountered family problems after the death of his father, that he expressed remorse for his misconduct, and that he had been restored to duty in July 1967, and had "served honorably since his restoration, even past his adjusted ETS."[393]

B. Review of the Remaining Fort Leonard Wood Cases

At the time of the *Berry* decision, many other cases from Fort Leonard Wood were pending before the Board of Review, including the *DuBay* cases remanded from the Court of Military Appeals and new cases arriving from Fort Leonard Wood in the aftermath of *DuBay*. Following the release of *Berry*, the Board of Review provided relief in the pending Fort Leonard Wood cases.[394]

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[390] *Id.* at 546. The appeal of the factfinding proceeding in panel was considered by the full Board of Review sitting as a panel. Six Board members concurred in the decision. Two Board members concurred in the decision on the grounds that the appearance of unlawful command influence required the relief ordered by the Board, but wrote separately to note their view that the actions at issue were not intended to influence the court-martial and did not actually influence the trial. *Id.* One member concurred in the finding of an appearance of unlawful command influence, but would have denied relief on the grounds that the Government could rebut the presumption of prejudice by demonstrating the absence of actual command influence, and that the Government had done so in this case. *Id.* at 546–47.

[391] *Id.* at 546. Appellant was originally sentenced to a dishonorable discharge, reduction to the grade of E-1, total forfeitures, and confinement at hard labor for one year. *Id.* at 541. The convening authority reduced the discharge to a bad-conduct discharge and approved the sentence. *Id.*

[392] *Id.* at 546.

[393] *Id.*

[394] *See* MOYER, *supra* note 5, at 765. In *DuBay*, the convening authority decided that a rehearing would be impracticable and transmitted the case to the Board of Review for sentence reassessment under the provisions of the amended *DuBay* mandate. See Part VI.B. *supra*. The Board reassessed the previously approved sentence, *see* note 106 *supra*,

The actions by the Board of Review, which were published in late June, received widespread national media attention. On June 25, 1968, Fred Graham reported in the *New York Times* that the actions affected 93 cases and that a "Pentagon spokesman said it was the largest number of trials that had been declared prejudiced by the actions of a single commander" since enactment of the UCMJ.[395] An Associated Press story carried by *The Baltimore Sun* noted that Board of Review had reduced the sentences in 53 cases thus far and that "[f]orty other cases are expected to be affected by an Army Board of [R]eview."[396]

Before the Board of Review actions in *Berry* and the related cases could "close the books" on the *DuBay* litigation, one more decision remained. The Judge Advocate General of the Army had to decide whether to appeal the Board's actions to the Court of Military Appeals. He could have certified one or more of the cases to the Court of Military Appeals, asking the Court to determine, for example, whether the Board should have overruled the decision of the law officer who conducted the *DuBay* hearing at Fort Sheridan.[397] The Judge Advocate General, however, accepted the actions of the Board, bringing the *DuBay* litigation to a close.

Part VIII. Epilogue

As we have seen, *DuBay* is not just a two-page order. It is but one part of a fully litigated set of proceedings, from *Phenix* to *Berry*, under the glaring lights of national publicity. With the understanding that the

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by reducing the punishment to a bad-conduct discharge, confinement for nine months, and total forfeitures. United States v. DuBay, No. 415047 (A.B.R. June 12, 1968) (copy on file with USCAAF *DuBay* Records, *supra* note 82).

[395] Graham, *supra* note 384, at 3.

[396] *Court Terms Cut by Army*, BALT. SUN, June 26, 1968, at A4. The *Chicago Tribune* carried a similar story from the UPI (United Press International). *Army Reduces Sentences of 53 Soldiers*, CHI. TRIB., June 26, 1968, at A4. The Board of Review in *Jacobson*, 39 C.M.R. at 517 stated that ninety-three cases had been remanded to the Board pursuant to *DuBay*. In view of the missing Army records, it is not possible to identify with precision the number of cases actually affected by the *Berry* decision. *See supra* note 9.

[397] *See* UCMJ 1950, *supra* note 13, art. 67 (current version codified as UCMJ art. 67(a)(2), 10 U.S.C. § 867(a)(2) (2006) (setting forth the authority of the Judge Advocate General to certify cases for review by the Court of Appeals for the Armed Forces)).

full story remains to be told,[398] let me offer a few concluding observations.

A. Aftermath

As the *DuBay* cases were winding down, Congress turned to the subject of military justice reform.[399] The Judge Advocate General of the Army—Major General Kenneth Hodson—served as the primary representative of the Department of Defense in the legislative process, working with Congress on the pending legislation growing out of Senator Ervin's hearings on Military Justice.[400]

The eventual legislative product—the Military Justice Act of 1968—transformed the law officer into the military judge and recast the Boards of Review into the Courts of Military Review.[401] The legislation, which was not controversial, made important changes, but the changes were largely evolutionary rather than revolutionary in nature. The 1968 reforms evolved from the firm foundation established by the Board members and law officers who had demonstrated the value of performing judicial functions in the military justice system, as illustrated in the *DuBay* litigation.[402] Although not denominated as a "court," the Army Board of Review that heard the Fort Leonard Wood cases demonstrated in cases such as *DuBay*, *Moore*, and *Berry* that judge advocates could

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[398] *See supra* note 9 (regarding missing records).

[399] *See* Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 78–82 (1969); Joseph E. Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG J. 125, 128 (1969).

[400] *See supra* note 253.

[401] Military Justice Act of 1968, Pub. L. No. 90-632. *See* Homer E. Moyer, Jr., *The Military Justice Act of 1968: Its Content and Implementation*, 23 JAG J. 131, 132, 135 (1969). In addition to establishing the military judiciary at the trial and appellate level, the legislation included a number of other significant changes, such as enhanced power of the military judge to issue authoritative rulings, the opportunity to request judge-alone trials in non-capital cases, provisions for court-martial sessions on interlocutory matters without the participation of the panel members, the requirement for certified counsel and military judges at most special courts-martial, authority to defer the running of sentences, and additional protections against unlawful command influence. *See id.* at 132–36; Ervin, *supra* note 399, at 83–84.

[402] The legislation also built upon the administrative structure created by the Army and Navy in the late 1950s and early 1960s to enhance the independence of law officers. *See* John Jay Douglass, *The Judicialization of Military Courts*, 22 HASTINGS L.J. 213, 214–15 (1971) (noting the administrative actions taken by the Army and Navy in 1958 and 1962 to strengthen the law officer program).

exercise a wide range of judicial powers in the interests of justice. Likewise, although the law officer at the post-trial factfinding hearing in *Berry* was not designated as a "military judge," COL Barr demonstrated that a judge advocate could preside over a hotly contested high-profile hearing with the skill, dignity, and authority of a seasoned judicial officer.

B. Subsequent Developments

When the Government asked the Court of Military Appeals to approve post-trial factfinding in *DuBay*, it was apparent that the Government sought not only to address the case at hand, but also to provide a procedure that could be used to address similar problems in the future. In that regard, the case has fulfilled the initial expectations and continues to provide the mechanism used for post-trial factfinding.[403] As is typical with an opinion that provides a framework for addressing procedural issues, the *DuBay* opinion does not resolve the question of whether any particular case requires post-trial factfinding, nor does it resolve the numerous questions that may arise concerning the conduct of such a proceeding.[404]

C. Historical Perspective

The *DuBay* narrative underscores the evolution of the military system through the interaction of individual servicemembers, commanders, lawyers, and judges. A commander of a large military installation sought to maintain good order and discipline among large numbers of conscripts and draft-motivated volunteers in the midst of a massive increase in basic training requirements during an increasingly controversial war. An appellate defense counsel initiated a simple inquiry

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[403] *See, e.g.*, SCHLUETER, *supra* note 6, § 17-15[B], at 1115; Jerry W. Peace, *Post-Trial Proceedings*, ARMY LAW., Oct. 1985, at 20, 22–23.

[404] *See, e.g.*, Grace M.W. Gallagher, *Don't Panic!* DuBay*s and Rehearings Are Not the End of the World*, ARMY LAW., June 2009, at 5–6. *Cf.* United States v. Denedo, 129 S. Ct. 2213, 2229 (2009) (Roberts, C.J., dissenting) (noting the difficulties that may occur when military appellate courts "resort to the procedures invented by *United States v. DuBay* . . . ."). From time to time, questions are raised as to whether the procedures for post-trial factfinding should be addressed by judicial decision, congressional enactment, or regulatory treatment in the *MCM*. *See, e.g.*, H.F. Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 255 (2005); REPORT OF THE COMMISSION ON MILITARY JUSTICE 11 n.9 (Oct. 2009). Such matters are beyond the scope of this article.

in a guilty plea case that generated relief in scores of appellate proceedings. A Government counsel developed a creative proposal to provide fair treatment for all parties during post-trial factfinding. A law officer conducted the limited factfinding proceeding with a sense of dignity and fairness that engendered considerable respect for military justice at a time when the system was under intense public scrutiny. Members of a Board of Review, in the final act, put the proceedings in perspective and reached a decision that achieved finality in the litigation. Their examples stand as a reminder of our solemn responsibility, on a daily basis, to put forth our best efforts to provide the men and women of the armed forces with a military justice system worthy of their service and their sacrifices.

Appendix A

Major General George S. Prugh[405]

Major General George S. Prugh was born in Norfolk, Virginia, on June 1, 1920. In 1941, he graduated from the University of California at Berkeley, receiving a B.A. in Political Science. From January 11, 1939, until August 6, 1940, he served as an enlisted soldier in the 250th Coast Artillery Regiment, California National Guard, but was discharged to enter ROTC at the University of California. At Berkeley, he commanded the Coast Artillery ROTC Regiment and received his commission as a second lieutenant, Coast Artillery Corps, Officer Reserve Corps, in March 1942, while in law school at Boalt Hall, University of California. He entered active duty on July 10, 1942, at San Francisco, California.

Then–Lt. Prugh's initial assignment was with a 155-mm gun battery, 19th Coast Artillery Regiment, located at Fort Rosecrans, San Diego, California. In 1944, he joined the 276th Coast Artillery Battalion as a battery commander in New Guinea and served there and on Leyte and Luzon in the Philippine Islands. He returned to the United States in February 1945, was separated from active duty in May, and entered Hastings College of the Law, University of California, in San Francisco. While still a student, he accepted a Regular Army commission in November 1947. In May 1948, he received his J.D. and, after admission to the California Bar, reported for duty in the Office of the Judge Advocate General (OTJAG), at the Pentagon. After a year's duty with the Military Justice and Claims and Litigation Divisions, he was reassigned to the Wetzlar Military Post in Germany. In 1951, he became the Executive Officer and subsequently the Staff Judge Advocate, Rhine Military Post, Kaiserslautern, Germany. He returned to OTJAG in June 1953, where he served as a member of the Board of Review, and then in the Opinions Branch, Military Justice Division.

In 1956–57, then–Major Prugh attended Command and General Staff College, Fort Leavenworth, Kansas, and upon graduation reported for duty as Deputy Staff Judge Advocate, 8th U.S. Army, Korea. In 1958, he began a three-year tour as Deputy Staff Judge Advocate, Presidio of San

[405] The program for the Fourth Annual George S. Prugh Lecture in Military History (April 28, 2010) included the following biographical summary prepared by Mr. Fred L. Borch III, Regimental Historian and Archivist, The Judge Advocate General's Corps, United States Army.

Francisco, California, and then attended the U.S. Army War College, Carlisle, Pennsylvania, graduating in 1962. In that same year, he became Chief of OTJAG's Career Management Division (today's Personnel, Plans and Training Office), and then Executive to The Judge Advocate General in 1963.

In November 1964, then–Colonel Prugh became Staff Judge Advocate, U.S. Military Assistance Command, Vietnam. During his tenure in Saigon, he persuaded his South Vietnamese counterpart that applying the Geneva Prisoners of War Convention to Viet Cong captives was in South Vietnam's best interest—a key factor in that government's subsequent decision to construct prison camps for enemy captives and to ensure their humane treatment during imprisonment. Prugh also authored the first-ever directive on how violations of the Law of War should be investigated and who should conduct them.

In August 1966, he assumed duties as Legal Advisor, U.S. European Command, in St-Germain-en-Laye, France, and later Stuttgart, Germany. On May 1, 1969, he became the Judge Advocate, U.S. Army, Europe and 7th Army, Heidelberg, Germany. Later that year, he was promoted to Brigadier General.

Then–Brigadier General Prugh returned to Washington, D.C., in June 1971 and became The Judge Advocate General on July 1, 1971. During his four years in office, he provided legal advice to the Army's leadership on the Calley war crimes trial, appeals, and presidential pardon. In 1972, he was a member of the U.S. delegations to two conferences of experts meeting in Geneva, Switzerland, to review the Geneva Conventions Relative to the Law of Armed Conflict. In 1973, he participated in the Diplomatic Conferences on the Law of War that resulted in the two Additional Protocols to the Geneva Conventions. General Prugh retired from active duty in the summer of 1975 and returned to California. He subsequently taught law at the Hastings College of the Law, University of California, until retiring in 1982. General Prugh died on July 6, 2006.

Shortly before his death, General Prugh provided The Judge Advocate General's Legal Center and School with a generous donation that permitted the establishment of this annual Lecture in Military Legal History.

Appendix B

Excerpt from the July 21, 1967 decision in *United States v. DuBay,* 17 U.S.C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967):

> "[T]he record will be remanded to a convening authority other than the one who appointed the court-martial concerned and one who is at a higher echelon of command. That convening authority will refer the record to a general court-martial for another trial. Upon convening the court, the law officer will order an out-of-court hearing, in which he will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon. [footnote omitted] If he determines the proceedings by which the accused was originally tried were infected with command control, he will set aside the findings or sentence, or both, as the case may require, and proceed with the necessary rehearing. If he determines that command control did not in fact exist, he will return the record to the convening authority, who will review the findings and take action thereon, in accordance with Code, supra, Articles 61 and 64, 10 USC §§ 861, 864. The convening authority will forward the record, together with his action thereon, to the Judge Advocate General for review by a board of review, in accordance with Code, supra, Article 66, 10 USC § 866. From the board's decision, the accused may appeal to this Court on petition, or the decision may be certified here by the Judge Advocate General, under the provisions of Code, supra, Article 67, 10 USC § 867."
>
> "In each of the above-styled cases, such disposition is ordered, without prejudice to the new convening authority's right to take appropriate action under Code, supra, Article 67(f) or Code, supra, Article 66(e), if he deems a rehearing on the issue of command control impracticable."

Excerpt from the unpublished mandate in *DuBay,* July 21, 1967 (retained in the appellate files at the U.S. Court of Appeals for the Armed Forces):

> "[T]his case . . . is hereby remanded to The Judge Advocate General of the Army for proceedings not inconsistent with the opinion attached."

Excerpt from the amended mandate in *DuBay,* January 3, 1968, published at 17 C.M.A. 678:

> "ORDERED, that the mandate of the Court in United States v DuBay et al., is hereby amended to provide:
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> "In the event the Commanding General, Fifth Army, or other superior convening authority to whom these cases may be referred for action, deems a rehearing limited to the issue of command control impracticable, he may, in the case of those records involving pleas of not guilty, order a rehearing on the merits and sentence, or dismiss the charges. In those cases involving pleas of guilty, he may order a rehearing on the sentence; terminate the proceedings without approval of any sentence; or return the case to the Judge Advocate General, who will refer the record to the board of review in order that the error may be purged of prejudice by reassessment of the sentence, or in the board's discretion, by ordering a rehearing thereon."

BREAKING THE GROUND BARRIER: EQUAL PROTECTION ANALYSIS OF THE U.S. MILITARY'S DIRECT GROUND COMBAT EXCLUSION OF WOMEN

MAJOR JEFFREY S. DIETZ*

The distinction between combat and noncombat is purely descriptive and never definitive. The only reason it is made at all is to say where women may serve or where they may not serve. The line between the two is always drawn arbitrarily.[1]

I. Introduction

Heavy machine gun fire and a deadly barrage of rocket-propelled grenades rain down on your vehicle. It is March 20, 2005, near noon in Iraq, and you are a team leader in a military police squad, patrolling and providing security to a sustainment convoy. The fifty enemy fighters are ambushing your convoy using irrigation ditches and an orchard for their well-planned complex attack. They intend to destroy your convoy, inflict numerous casualties, and kidnap sustainment convoy drivers or U.S. soldiers. While flames engulf the lead vehicle trapping the convoy, your squad maneuvers around the trapped vehicles and you direct your gunner to fire into the orchard and trench line. Even though enemy fighters outnumber your squad five to one, you leave the safety of your vehicle to engage them with small arms fire. While still outside the protection of the vehicle, you use your M203 grenade launcher to further suppress the

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* Judge Advocate, U.S. Army. Presently assigned as Personnel Law Attorney, Office of The Judge Advocate General, U.S. Army, Washington, D.C. LL.M., 2010, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2005, University of Houston Law Center; B.S., 1998, U.S. Military Academy. Previous assignments include Brigade Judge Advocate, 2nd Heavy Brigade Combat Team, 1st Infantry Division, Fort Riley, Kansas 2007–2009 (Baghdad, Iraq 2008–2009); Trial Counsel, 3d Brigade, 1st Armored Division, Fort Riley, Kansas, 2007; Chief, Operational Law, Legal Assistance Attorney, 1st Infantry Division, Fort Riley, Kansas 2006; Squadron Personnel Officer, Scout Platoon Leader, Tank Platoon Leader, 3d Squadron, 3d Armored Cavalry Regiment, Fort Carson, Colorado, 1999–2002 (Bosnia, 2000). Member of the State Bar of Texas. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course. The views expressed in this article are the author's alone and in no way represent the views of the Department of Defense or its components.

[1] BRIAN MITCHELL, WOMEN IN THE MILITARY: FLIRTING WITH DISASTER 347 (1997) (quoting his own testimony to the 1992 Presidential Commission on the Assignment of Women in the Armed Forces). Mr. Mitchell advocates complete exclusion of women from the armed forces. *Id.* at 343–44.

heavy attack. You and your squad leader then throw fragmentation grenades into the trench before going over the berm and into the trench. There you begin clearing the trench with your M4 carbine. In the dangerously confining space of the trench, you personally kill three enemy fighters at close range. You and your squad leader then clear the trench and secure the ambush site.[2]

Your name is Sergeant (SGT) Leigh Ann Hester, and you are the first woman to earn the Silver Star Medal in Iraq for "exceptionally valorous achievement during combat operations."[3] More recently, Specialist (SPC) Monica Brown earned the Silver Star Medal while serving as a Combat Medic on a combat patrol in Afghanistan in April 2007, by pulling wounded soldiers out of a burning tracked vehicle, treating them amid intense enemy fire, and shielding the casualties from the enemy fire with her body.[4]

Sergeant Hester and SPC Brown earned the Silver Star Medal for their heroism despite the policy on the assignment of women in the military, titled the Direct Ground Combat Definition and Assignment Rule (referred to by the author as the "exclusion policy").[5] The 1994 exclusion policy prohibits (1) assigning women to units that collocate with direct ground combat units,[6] (2) assigning women to direct ground combat units below the brigade level, and (3) assigning women to a

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[2] Compiled from Sergeant Leigh Ann Hester's Silver Star Award Narrative. *See* HomeOf Heroes.com, U.S. Army Citations for Awards of the Silver Star in the Global War on Terrorism, http://www.homeofheroes.com/valor/08_WOT/ss_GWOT/citations_USA-G.html (last visited Feb. 25, 2010) [hereinafter Hester Citation] (publishing citation and award narrative for Hester, Leigh Ann).

[3] *See id.*

[4] *See* HomeOfHeroes.com, U.S. Army Citations for Awards of the Silver Star in the Global War on Terrorism, http://www.homeofheroes.com/valor/08_WOT/ss_GWOT/citations_USA.html (last visited Feb. 25, 2010) [hereinafter Brown Citation] (publishing citation for Brown, Monica).

[5] *See* Memorandum from Sec'y of Def. Les Aspin, to the Sec'ys of the Army, Navy, and Air Force et al., subject: Direct Ground Combat Definition and Assignment Rule (13 Jan. 1994) [hereinafter Aspin Memo 1994].

[6] The exclusion policy permits, but does not require, the services to exclude women based on collocation, and both the Army and the Department of the Navy, which includes the Marine Corps, specifically prohibit women from assignment to collocating units. *See* U.S. DEP'T OF ARMY, REG. 600-13, ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS para. 1-12 (Feb. 2008) [hereinafter AR 600-13]; *see* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1300.12C, CHANGE TRANSMITTAL 1, ASSIGNMENT OF WOMEN IN THE DEPARTMENT OF THE NAVY para. 6e (14 May 2009) [hereinafter SECNAVINST 1300.12C CH-1].

combat arms military occupational specialty (MOS).[7] Since the exclusion policy's implementation, the direct ground combat experiences of thousands of women in Afghanistan and Iraq, along with changes to doctrine and personnel policies, have undermined the justifications for exclusion.

Along with the contradiction inherent in the service of SGT Hester and SPC Brown, the exclusion policy erodes the military effectiveness of U.S. ground forces. Because they are women, the top two graduates of the U.S. Military Academy (USMA) class of 2010, Second Lieutenants Liz Betterbed and Alex Rosenberg,[8] cannot be commissioned as infantry officers, or as military intelligence officers assigned to an armor battalion. Despite their demonstrated military, physical, leadership, and academic skills, the exclusion policy deprives direct ground combat units the leadership capabilities of not only these two newly commissioned officers, but also every other qualified female Soldier.

In addition, the status-based exclusion policy, centered on the assumption that women generally lack the capability for direct ground combat, undermines the military as a merit-based organization. The exclusion policy sends the message that women in the military are subordinate to men due to their gender. Further, while the Army has transformed its force to meet the needs of the current conflicts in Iraq and Afghanistan,[9] the strains of an Army at war push commanders who do not completely understand the exclusion policy to test the limits of a policy written for a different conflict.

On the other hand, advocates of exclusion justify the policy based on concerns about a woman's individual ability, how her presence undermines unit cohesion, and the negative social implications of sending women to combat.[10] While other nations like Canada and Denmark have opened all ground combat positions to women, the United

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[7] Aspin Memo 1994, *supra* note 5.

[8] *See Obama Praises West Point Cadets, Lays Out Challenges*, CNN.COM, May 22, 2010, *available at* http://www.cnn.com/2010/POLITICS/05/22/obama.west.point/index.html. From West Point's class of 2010, the Number 1 overall cadet, Liz Betterbed, and the valedictorian, Alex Rosenberg, are women. *Id.*

[9] MARGARET C. HARRELL ET AL., RAND NAT'L DEF. RESEARCH INST., ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN 9–10 (2007) [hereinafter HARRELL, 2007 RAND STUDY].

[10] *See infra* Part III.B–G.

Kingdom also continues to exclude women.[11] The British Ministry of Defence recently released its study of women in combat and concluded that while women are physically capable to perform ground combat, the presence of women in combat units may harm unit cohesion.[12] Whatever the social, political, or popular reason for the U.S. policy, it must comply with the Equal Protection clause of the U.S. Constitution.

In 1996, when the Supreme Court held in *United States v. Virginia*[13] that Virginia's exclusion of women from the Virginia Military Institute (VMI) was unconstitutional, it ruled that Equal Protection requires that any policy that excludes willing and capable women must be based on an exceedingly persuasive justification.[14] The justifications for the exclusion policy rely on predicting how women will perform in direct ground combat and how their presence will affect the units in which they are assigned. However, new data since 2001 demonstrates that women have actually performed in direct ground combat and how their presence actually affected their units.[15] In over nine years of conflict, women have fought, died, been captured, and earned combat distinction.[16] The unconventional nature of combat on the nonlinear battlefields of Afghanistan and Iraq has produced performance data of women who found themselves in direct ground combat.[17] Additionally, changes in combat doctrine, [18] the increase in the maximum age of enlistment,[19] the

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[11] *See infra* Part III.G.2.(4).

[12] *See* U.K. MINISTRY OF DEFENCE, REPORT ON THE REVIEW OF THE EXCLUSION OF WOMEN FROM GROUND CLOSE-COMBAT ROLES (Nov. 2010) [hereinafter UK 2010 REPORT].

[13] 518 U.S. 515 (1996).

[14] *Id.* at 534.

[15] *See infra* Part III.G.

[16] Lizette Alvarez, *G.I. Jane Stealthily Breaks the Combat Barrier*, N.Y. TIMES, Aug. 16, 2009, at A1.

[17] As all male and female troops are exposed to attack, many more women have performed in direct ground combat than ever before. *Compare* Colonel Christopher R. Farley, *The US Army Assignment Policy for Women: Relevancy in 21st Century Warfare* 8 (2009) (Master's Thesis prepared for the Sch. of Advanced Military Studies, U.S. Army Command and Gen. Staff Coll., Fort Leavenworth, Kan.) (noting that over 40,000 women served in the Gulf War), *with* Colonel Robert J. Botters, *How the Army Can Meet the Intent of Policy and Statute on Ground Combat Exclusion for Women*, *in* WOMEN IN COMBAT COMPENDIUM 72 (Colonel Michele M. Putko & Douglas V. Johnson II eds., 2008) (noting that over 60,000 women have served in Iraq where direct ground combat may occur anywhere in Iraq).

[18] Botters, *supra* note 17, at 72.

[19] Congress increased the maximum age of enlistment to forty-two years old in 2006, effectively lowering the minimum physical requirements for performance in all military occupational specialty (MOS). Lisa Burgess, *Army Raises Maximum Enlistment Age*,

end of the Navy's ban on women serving on submarines,[20] and the Don't Ask, Don't Tell Repeal Act of 2010 (DADT) and its related reports[21] provide a new perspective from which to evaluate the exclusion justifications.

Using the framework of *Virginia*, and considering the new data and changes since 2001, the exclusion policy violates the Equal Protection clause of the Constitution.[22] The services, the Department of Defense (DoD), and Congress if necessary, must act to update the assignment policy because military commanders need a clear rule that comprehends modern combat and continues to account for the physical demands of direct ground combat. Despite some political opposition, a majority of the American public supports a policy that would allow women to break the ground combat barrier in order to have the opportunity to serve in ground combat units and engage in direct ground combat.[23]

This article evaluates the current exclusion policy based on the *Virginia* Equal Protection analysis, applying the modern factors. As the U.S. Army comprises the majority of U.S. ground forces,[24] this article

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STARS & STRIPES, June 23, 2006, *available at* http://www.military.com/features/0,15240, 102539,00.html.

[20] Phil Stewart & Susan Cornwell, *Pentagon OKs Lifting Ban on Women in Submarines*, REUTERS, Feb. 23, 2010, http://www.reuters.com/article/idUSTRE61M6LW20100224.

[21] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) [hereinafter DADT Repeal Act]; U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" (Nov. 30, 2010) [hereinafter CRWG REPORT]; U.S. DEP'T OF DEF., SUPPORT PLAN FOR IMPLEMENTATION (Nov. 30, 2010) [hereinafter CRWG SUPPORT PLAN]. The DADT was effectively repealed on September 20, 2011. Memorandum fro
m Clifford Stanley, Under Sec'y of Def. for Personnel and Readiness, to the Sec'ys of the Army, Navy, and Air Force et al., subject: Repeal of "Don't Ask, Don't Tell" (20 Sept. 2011) [hereinafter Certification Memo].

[22] The Fifth Amendment of the U.S. Constitution provides "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1. The Supreme Court has held that the Fifth Amendment imposes an equal protection duty on the federal government, similar to the Fourteenth Amendment equal protection guarantee. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[23] Alvarez, *supra* note 16, at A1; *see also* Mady Wechsler Segal & Chris Bourg, *Professional Leadership and Diversity in the Army*, *in* THE FUTURE OF THE ARMY PROFESSION 705, 706 (Lloyd J. Matthews ed., 2d ed. 2005).

[24] *See, e.g.*, *The Future of U.S. Ground Forces Before the U.S. Senate Armed Services Committee, Airland Subcommittee: The Future of U.S. Ground Forces* (Mar. 26, 2009),

will focus primarily on Army doctrine and implementation. The scope is limited to ground combat, but includes how the exclusion policy applies to all U.S. ground forces, including Army and Marine Corps[25] troops. This article will use "combat arms MOS" and "direct ground combat unit" to describe the MOSs and units currently closed to women. This article will use "combat support MOS" and "combat support unit"[26] to describe the MOSs and units open to women. Part II of this article introduces a history of the gradual integration of women into the armed forces. Part III evaluates the modern factors in the context of the *Virginia* decision to determine the validity of the exclusion policy foundation. Part IV recommends courses of action for the services and DoD to systematically and deliberately end the exclusion policy and implement a sustainable and progressive policy on women in combat.

II. A History of Gender Integration

A. The Doctrine of Military Deference

The exclusion policy's historical foundation and the Doctrine of Military Deference[27] provide a basis with which to evaluate the policy. The U.S. military is a specialized society where military success in

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available at http://www.csbaonline.org/wp-content/uploads/2011/02/2009.03.26-The-Future-of-US-Ground-Forces.pdf (testimony of Andrew F. Krepinevich, President, Ctr. for Strategic and Budgetary Assessments) ("My testimony is focused primarily on the Army, given the dominant position it holds in providing ground forces for our country."); *see also* David S. Cloud, *Defense Chief Gates Orders Review of Marines' Role*, L.A. TIMES ONLINE, August 12, 2010 (ordering a review of the Marine Corps mission because the Marines have become a "second land army").

[25] The Marine Corps is a component of the Department of the Navy. 10 U.S.C. § 5063 (2006).

[26] Although the Army commonly breaks support units into combat support and combat service support, this article will refer to both as combat support. A revision to Army doctrine in 2008 ended the use of the terms combat arms, combat support, and combat service support. U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 2-7 (Feb. 2008) [hereinafter FM 3-0]. However, the rules for an Army Ranger assignment distinguish between combat support and combat service support soldiers. *See* U.S. DEP'T OF ARMY, REG. 614-200, ENLISTED ASSIGNMENTS AND UTILIZATION MANAGEMENT paras. 5-4i, j. (26 Feb. 2009) [hereinafter AR 614-200].

[27] *See generally* Jeffrey S. Dietz, *Getting Beyond Sodomy:* Lawrence *and Don't Ask, Don't Tell*, 2 STAN. J. C. R. & C. L. 63, 70–74 (2005) (discussing the doctrine of military deference as the heightened level of deference the courts give to Congress and the military when reviewing military regulations).

combat requires unit cohesion, discipline, morale, and integrity.[28] Military regulations and policies create the framework to effect necessary discipline, and to help commanders build the required unit cohesion for success on the battlefield.[29] Similarly, the regulations and policies currently in place limit the exercise of constitutional rights by requiring a level of discipline that civilian society would find unacceptable.[30]

Because constitutional power over the military lies with Congress and the President, and not the Judiciary, the courts often exercise the Doctrine of Military Deference, generally deferring on military personnel decisions.[31] However this deference does not lead to "a blanket presumption of constitutionality."[32] Instead, while deference is high in the case of First Amendment analysis, the courts exercise much less deference in Equal Protection and Due Process claims.[33] An additional hurdle for those attempting to challenge military regulations is the *Feres* Doctrine, which prohibits members of the armed forces from seeking "damages in a suit against the government for constitutional violations."[34] Although the courts do not assume to know better than the military, Congress, or the President, what constitute important military objectives, the courts assess the logical connections between the regulations and the asserted objective of the regulations.[35]

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[28] *See* Parker v. Levy, 417 U.S. 733, 743 (1974) ("specialized society"); Rostker v. Goldberg, 453 U.S. 57, 71 (1981) (quoting Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953)) ("specialized community"); *see* Dietz, *supra* note 27, at 70.

[29] *See* Dietz, *supra* note 27, at 73.

[30] *See* Chappell v. Wallace, 462 U.S. 296, 300–01 (1983) ("[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."); *see* Dietz, *supra* note 27, at 70.

[31] U.S. CONST. art. I, § 8, cl. 12-14; *id.* art. II, § 2, cl. 1.; *see also* Dietz, *supra* note 27, at, 71.

[32] Dietz, *supra* note 27, at 72.

[33] *Id.*; *see also* Tomasson v. Perry, 80 F.3d 915, 933 (1996) (indicating that First Amendment challenges to Don't Ask, Don't Tell require higher deference than Due Process and Equal Protection claims). *But see* Log Cabin Republicans v. United States, Case No. CV 04-08425-VAP (Ex) (C.D. Cal. 2010) (finding "Don't Ask, Don't Tell" violates First Amendment).

[34] Dietz, *supra* note 27, at 72; *see* Feres v. United States, 340 U.S. 135 (1950) (holding no liability for the Government under the Federal Tort Claims Act for military service injury); *see Chappell*, 462 U.S. at 304–05 (extending Feres by barring redress in civilian courts for members of the armed forces claiming constitutional wrongs suffered in the course of military duty).

[35] Dietz, *supra* note 27, at 73.

Courts have not shied away from assessing the constitutionality of military regulations or congressionally mandated rules. In 1973, the Supreme Court reversed a statutory scheme that treated female military personnel with dependents differently from male personnel with dependents.[36] Later, courts invalidated regulations mandating discharge for pregnant Marines, and overturned a statute prohibiting the Navy from permanently assigning women only to Navy hospital ships or transport vessels.[37] Even in deference, there is no presumption of constitutionality.[38] Most recently, a federal district court held that the statute and regulations underlying the military's homosexual conduct policy unconstitutional on Fifth Amendment Substantive Due Process grounds and First Amendment Free Speech grounds.[39] Change to the policy of excluding women from direct ground combat units is most likely going to come from outside the courts.[40]

B. Expanding Military Roles For Women

While Congress and the President have gradually integrated women into the military since the end of World War II, the military still maintains various levels of gender-based exclusion. Although women have always played a role in the success of U.S. combat forces,[41] Congress did not establish permanent positions for women until 1901 with the creation of the Army Nurse Corps.[42] In World War II, Congress created the Women's Army Auxiliary Corps (WAAC) and then the Women's Army Corps (WAC), but made these positions temporary.[43]

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[36] Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (holding on Due Process grounds).
[37] Crawford v. Cushman, 531 F.2d 1114, 1125–26 (2d Cir. 1976) (finding the Marine Corps regulations violated Due Process guarantees); Owens v. Brown, 455 F. Supp. 291, 309-10 (D.D.C. 1978).
[38] Dietz, *supra* note 27, at 74.
[39] Log Cabin Republicans v. United States, Case No. CV 04-08425-VAP (Ex) (C.D. Cal. 2010).
[40] *See* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 159 (2008) ("Extrajudicial actors, rather than courts, may answer the many questions that women's military status raises from the perspective of the constitutional law of sex equality.").
[41] *See* Farley, *supra* note 17, at 3–5.
[42] *Id.* at 4.
[43] *Id.* at 5–6. The WAAC created a "small group of women *attached to rather than in* the Army." *Id.* The WAC "gave full military status to women" but kept set the duration of the WAC as "duration of the war plus six months. *Id.* at 6.

The first major integration of women into the military, with broad limitations, came after the end of World War II with the Women's Armed Services Integration Act of 1948 ("Integration Act").[44] The act ended the traditional male monopoly on soldiership by authorizing female service in the Women's Army Corps, Navy, and Marine Corps.[45] On the other hand, the act, coupled with service regulations, clearly excluded women from combat, including from combat aircraft and naval vessels.[46] The Integration Act also infringed on women's ability to provide for their families, achieve promotion, and assume command.[47] It capped the percentage of women in the armed forces at two percent of the overall force and capped the highest rank for women at colonel.[48] The Integration Act also required women to be three years older than men in order to enlist without parental permission.[49] It limited women's ability to claim husbands and children as dependents and prohibited women from having command authority over men.[50]

In 1951, the President and the services overtly made a woman's role in the home superior to her role in the armed forces by automatically discharging any pregnant woman or mother who stayed at home with a minor child at least thirty days a year.[51] In 1967, Congress provided some relief by lifting the two percent cap and opening general officer rank to women.[52] In 1971, the Air Force instituted more change by allowing waivers to otherwise automatic pregnancy discharges and opening enlistment to women with dependent children.[53] As previously

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[44] Women's Armed Service Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356.

[45] Women's Research & Education Institute, *Chronology of Significant Legal & Policy Changes Affecting Women in the Military: 1947-2003*, *available at* http://www.wrei.org/Women in the Military/Women in the Military Chronology of Legal Policy.pdf [hereinafter Chronology]; *see generally* Captain Stephanie L. Stephens, Combat Exclusion: An Equal Protection Analysis 11–13 (1997) (LL.M. Thesis, Judge Advocate General's School).

[46] Chronology, *supra* note 45; *see* Stephens, *supra* note 45, at 11–13. However, the Department of Defense (DoD) did not provide a unified definition of combat until 1978. *See* Chronology, *supra* note 45.

[47] *See* § 107, 62 Stat. at 361; *see also* Chronology, *supra* note 45; *see also* JUDITH HICKS STIEHM, ARMS AND THE ENLISTED WOMAN 109 (1989); *see* Chronology, *supra* note 45.

[48] *See* § 107, 62 Stat. at 357–58.

[49] *See id.* § 107, 62 Stat. at 360.

[50] *See* § 107, 62 Stat. at 361; *see also* Chronology, *supra* note 45; *see also* STIEHM, *supra* note 47, at 109.

[51] Exec. Order No. 10,240, 16 Fed. Reg. 3689 (Apr. 27, 1951) (permitting discharge for natural and adoptive mothers and stepmothers); *see also* Chronology, *supra* note 45.

[52] *See* Chronology, *supra* note 45; *see also* STIEHM, *supra* note 47, at 110.

[53] Chronology, *supra* note 45.

mentioned, in the 1970s, the courts ended the practice of superior dependent benefits for male troops, invalidated rules on mandatory pregnancy discharges, and quashed statutory exclusion of women from permanent assignment to various Navy vessels.[54]

C. Assignment Policies: All-Volunteer Force to the Persian Gulf War

In addition to the change ushered in by the courts and the Air Force, the 1970s also brought the All-Volunteer Force (AVF) and cultural change.[55] The end of the draft in 1973 forced the services to find new ways to fill the AVF.[56] While the Chief of Naval Operations opened new positions to Navy women, the service chiefs and several high-ranking officers balked at admitting women to the federal service academies.[57] Even the former head of the Women Airforce Service Pilots during World War II, Jacqueline Cochran, asserted that "a woman's primary function in life is to get married, maintain a home and raise a family," and not to fight in combat.[58] Although by 1972, women could enter the Air Force, Army, and Navy Reserve Officer Training Corps (ROTC), critics equated allowing women to attend the U.S. Military Academy at West Point ("West Point") as parallel to allowing women to fight in ground combat.[59] Despite the objections, Congress opened the academy doors to women in 1976, allowing women to prove their mettle and achieve success.[60] By 1977, women qualified for noncombat aviation.[61]

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[54] Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973); Crawford v. Cushman, 531 F.2d 1114, 1126 (2d Cir. 1976); Owens v. Brown, 455 F. Supp. 291, 309–10 (D.D.C. 1978).

[55] *See* Farley, *supra* note 17, at 8; *see* Lance Janda, *'A Simple Matter of Equality': The Admission of Women to West Point*, *in* A SOLDIER AND A WOMAN: SEXUAL INTEGRATION IN THE MILITARY 305, 306, 318 (Gerard J. DeGroot & Corinna Peniston-Bird eds., 2000).

[56] *See* Farley, *supra* note 17, at 8; *see* Janda, *supra* note 55, at 305, 318 (arguing that the creation of the AVF forced recruiter to recognize the heavy need for female troops).

[57] Chronology, *supra* note 45; Janda, *supra* note 55, at 307.

[58] Janda, *supra* note 55, at 307 (quoting Jacqueline Cochran from her Hearings Before Subcommittee No. 2 of the House Committee on Armed Services, 93d Congress, 2d Session (1974).

[59] Chronology, *supra* note 45; Janda, *supra* note 55, at 305, 313.

[60] Department of Defense Appropriation Authorization Act, Pub. L. No. 94-106, tit. VIII, sec. 814(a), (b), 89 Stat. 531 (1975); *see also* Janda, *supra* note 55, at 319. The Coast Guard Academy allowed women to enroll in 1975. Chronology, *supra* note 45. For additional discussion on the integration of the Service Academies, see Janda, *supra* note 55, at 305. *See generally* DONNA M. MCALEER, PORCELAIN ON STEEL: WOMEN OF WEST POINT'S LONG GRAY LINE (2010) (describing the hardships and successes of women graduates of USMA).

In the next two years, Congress dissolved the WAC and allowed permanent assignment of women to noncombat ships, and the Navy opened more shipboard jobs to women, including diving and salvage positions.[62]

Prior to the end of the draft, in 1972, Congress passed the Equal Rights Amendment (ERA).[63] Once ratified by the states, the ERA would have given women a constitutional guarantee of equal rights under the law.[64] However, debate highlighted widespread concern that the ERA would take wives from husbands and force mothers into combat.[65] Prior to the 1979 deadline, President Jimmy Carter urged ratification and assured critics that women would not serve in combat positions.[66] Although President Carter pushed a gender-neutral draft registration, Congress passed the male-only requirements of the Military Selective Service Act (MSSA) in 1980.[67] This eventually led to the Supreme Court's decision in *Rostker v. Goldberg*[68] upholding the male-only registration while presuming, without discussion, that the exclusion of women from combat roles was constitutional.[69]

In the following years, women in 1989 led units in combat into Panama, commanded a Navy ship in 1990, and then entered combat zones in the largest military operation since the inception of the AVF.[70] Over 40,000 women also served in Operation Desert Shield and Operation Desert Storm.[71] Women and the nation paid the price of the increased numbers of women in the conflict, with thirteen women killed

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[61] Chronology, *supra* note 45 (noting the Navy in 1973, the Army in 1974, and the Air Force in 1977).
[62] Tit. VII, secs. 803, 820, 92 Stat. 1611; Chronology, *supra* note 45; MARGARET C. HARRELL & LAURA L. MILLER, RAND NAT'L DEF. RESEARCH INST., NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE 2 (1997) [hereinafter HARRELL & MILLER, 1997 RAND STUDY].
[63] Hasday, *supra* note 40, at 113.
[64] Proposed Amendment to the Constitution of the United States, H.R.J. Res. 208, 92d Cong., § 1, 86 Stat. 1523, 1523 (1972).
[65] Hasday, *supra* note 40, at 110.
[66] *Id.* at 113–14.
[67] Military Selective Service Act, 50 U.S.C. App. § 451–473 (2000); *see* Hasday, *supra* note 40, at 115; *see* Major Scott E. Dunn, *The Military Selective Service Act's Exemption of Women: It is Time to End It*, 2009 ARMY LAW., Apr. 2009, at 9–10.
[68] 453 U.S. 57 (1981).
[69] *Id.* at 81–83.
[70] *See* HARRELL & MILLER, 1997 RAND STUDY, *supra* note 62, at 2.
[71] Chronology, *supra* note 45.

and two taken as prisoners of war.[72] However, even though America's fear of having its daughters captured by the enemy came true, the Gulf War also provided a new perspective for those who doubted a woman's capability in combat. When Major (MAJ) Rhonda Cornum and SGT Troy Dunlap recounted their experiences as prisoners of war (POW) together, SGT Dunlap declared, "'She can go to combat with me anytime,'" even though he clearly considered MAJ Cornum the exception.[73]

The gradual integration of women into the armed forces since 1948 contributed to the increased numbers of women who, although broadly excluded from combat and combat roles, experienced the tragedies of combat. Their experiences changed the way the American society viewed military women and their role in combat. However, the view that women should not see direct combat remained steadfast with respect to women's roles in direct ground combat.

D. Assignment Policies Following the Gulf War

Following the 1992 Presidential Commission on the Assignment of Women in the Military (1992 Presidential Commission), in 1993, Congress abolished separate personnel systems for men and women servicemembers, repealed the combat aircraft ban, and lifted the combat ship exclusion, although submarines and some smaller combat ships still remained closed to women.[74] Then in 1994, Secretary of Defense Les Aspin issued his Direct Ground Combat and Assignment Rule memorandum (Aspin Memo), which opened all combat aviation to women, ended the "Risk Rule," and directed the Army and Marine Corps to study opening more assignments to women.[75]

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[72] *Id.*

[73] MELISSA S. HERBERT, CAMOUFLAGE ISN'T ONLY FOR COMBAT: GENDER, SEXUALITY, AND WOMEN IN THE MILITARY 121 (1998) (quoting Sergeant Dunlap's statements in an interview to *Dateline NBC* in 1992). Major Cornum deployed in Operation Desert Storm as a flight surgeon in the 101st Airborne Division. RHONDA CORNUM AS TOLD TO PETER COPELAND, SHE WENT TO WAR: THE RHONDA CORNUM STORY 3, 5 (1992).

[74] Chronology, *supra* note 45.

[75] Aspin Memo 1994, *supra* note 5; *see also* Memorandum from Sec'y of Def. Les Aspin, to the Sec'ys of the Army, Navy, and Air Force et al., Policy on the Assignment of Women in the Armed Forces (Apr. 28, 1993).

Prior to 1994, the Risk Rule excluded women from units or positions "if their risks of exposure to direct combat, hostile fire, or capture are equal to or greater than the risks for land, air, or sea combat units with which they are associated in a theater of operations."[76] In 1988, the Risk Rule actually opened approximately 30,000 new positions to women by setting one clear standard for exclusion.[77] By ending the Risk Rule in 1994, the Aspin Memo opened yet another 32,700 Army positions and 48,000 Marine Corps positions to women.[78]

1. The Aspin Memo and the Service Policy

The Aspin Memo, Secretary of the Navy Instruction (SECNAVINST) 13001.12C CH-1,[79] and Army Regulation (AR) 600-13[80] comprise the current exclusion policy. The Aspin Memo excludes women "from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground."[81] It also permits the services to exclude women from units and positions that "are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women," units "engaged in long range reconnaissance operations and Special Operations Forces missions," and units and positions "where job related physical requirements would necessarily exclude the vast majority of women Service members."[82] The Aspin Memo defines direct ground combat as

> engaging the enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.[83]

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[76] ROBERT T. HERRES ET AL., THE PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT 36 (1992).
[77] Chronology, *supra* note 45.
[78] *Id.*; *see* Aspin Memo 1994, *supra* note 5.
[79] SECNAVINST 1300.12C CH-1, *supra* note 6.
[80] AR 600-13, *supra* note 6.
[81] Aspin Memo 1994, *supra* note 5.
[82] *Id.*
[83] *Id.*

Navy policy, reflected in SECNAVINST 1300.12C CH-1, mirrors the Aspin Memo on direct ground combat and collocation, and excludes women in the Department of the Navy, including the Marine Corps, from assignment to billets as members of the following types of units:

> infantry regiments and below; artillery battalions and below; any armored units (tanks, amphibious assault vehicles, and light armored reconnaissance); units and positions which are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women; or units engaged in long-range reconnaissance operations or Special Operations Forces missions, when such billets are inherently likely to result in being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel."[84]

Additionally, the Instruction specifies that "[w]omen may be assigned in combat service support roles for deployed Naval Special Warfare forces," and details several Special Operations billets that are exclusive to men.[85]

Due to a broad 1992 Army definition of direct ground combat[86] the resulting policy is even more exclusive than the Aspin Memo and the Navy Instruction.

> Engaging an enemy with individual or crew served weapons while being exposed to direct enemy fire, a high probability of direct physical contact with the enemy's personnel and a substantial risk of capture. Direct combat takes place while closing with the enemy by fire, maneuver, and shock effect in order to destroy or capture the enemy, or while repelling the enemy's assault by fire, close combat, or counterattack.[87]

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[84] SECNAVINST 1300.12C CH-1, *supra* note 6, para. 6e.
[85] *Id.*
[86] Army Regulation 600-13 uses direct combat while the DoD policy uses direct ground combat. *Compare* AR 600-13, *supra* note 6, at pt. II, *with* Aspin Memo 1994, *supra* note 5. This article will use the term direct ground combat to refer to the same concept in both policies.
[87] AR 600-13, *supra* note 6, at pt. II.

The Army adds defensive language to the definition by including "repelling the enemy's assault." While the Aspin Memo and Navy Instruction prohibit assignment to units below the brigade level with a "primary mission" to engage in direct ground combat, the Army prohibits assignment to units below the brigade level with a "routine mission" to engage in direct ground combat.[88] Additionally, although the Aspin Memo merely allows, but does not require, the services to exclude women based on collocation, the Army, like the Navy, adopts collocation as an exclusion basis. Rather than look to whether a unit is "doctrinally required" to collocate, as the Aspin Memo and Navy Instruction do, the Army regulation requires exclusion from units and positions that "collocate routinely."[89]

However, the RAND National Defense Research Institute published its study in 2007, *Assessing the Assignment Policy for Army Women* (2007 RAND Study)[90] and found no common definition of collocation.[91] The Army collocation seems to mean placing "two or more units in close proximity so as to share common facilities."[92] On the other hand, the Aspin Memo collocation seems to refer to "a high level of interaction and interdependency between the units, rather than just physical proximity."[93]

In the end, the exclusion policy restricts assignment, but not employment; commanders may employ properly assigned soldiers in the way they deem most effective, regardless of gender.[94] The Army codes each position as open or closed to women according to the position's duties, the MOS's area of concentration, the unit's mission, and collocation.[95] An MOS such as medic may be open to women except when the position is in a direct ground combat unit below the brigade

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[88] Aspin Memo 1994, *supra* note 5; SECNAVINST 1300.12C CH-1, *supra* note 6, at para. 5a; AR 600-13, *supra* note 6, para. 1-12.
[89] Aspin Memo 1994, *supra* note 5; SECNAVINST 1300.12C CH-1, *supra* note 6, at para. 6e; AR 600-13, *supra* note 6, para. 1-12.
[90] HARRELL, 2007 RAND STUDY, *supra* note 9, at 6–9.
[91] *Id.* at 18.
[92] *Id.* While the Aspin Memorandum does not define collocation, AR 600-13 does: "Collocation occurs when the position or unit routinely physically locates and remains with a military unit assigned a doctrinal mission to routinely engage in direct combat." *Compare* AR 600-13, *supra* note 6, pt. II, *with* Aspin Memo 1994, *supra* note 5.
[93] HARRELL, 2007 RAND STUDY, *supra* note 9, at 18.
[94] AR 600-13, *supra* note 6, para. 1-12; HARRELL, 2007 RAND STUDY, *supra* note 9, at 4; Farley, *supra* note 17, at 13.
[95] AR 600-13, *supra* note 6, para. 2-1; HARRELL, 2007 RAND STUDY, *supra* note 9, at 4.

level or is in a combat support unit that routinely collocates with a direct ground combat unit.

A combat arms MOS like armor crewman or infantryman is closed to women.[96] Women are excluded from serving as an officer in armor, infantry, and special forces.[97] In addition to all armor, infantry, and special forces MOSs, enlisted women are excluded from all but three MOSs in field artillery;[98] from the Bradley linebacker crew member MOS of air defense artillery;[99] from the combat engineer MOS; from tank, Bradley, and artillery mechanics of mechanical maintenance; and from the ground surveillance system operator MOS of military intelligence.[100]

The exclusion policy attempts to both exclude women from exposure to the enemy and to exclude women from roles where their mission is to locate and engage the enemy. In doing so, the exclusion policy has three prongs of exclusion: (1) exclusion from assignment to a unit that collocates with a direct ground combat unit (collocation prong); (2) exclusion from assignment to a direct ground combat unit below the brigade level (below brigade prong); and (3) exclusion from assignment to specific combat arms MOS (combat arms MOS prong). The combat arms MOS prong can further be divided into an exclusion of women from assignment to conventional combat arms MOSs and an exclusion of women from assignment to the special forces MOSs. Although the exclusion policy has no statutory foundation, Congress now requires notification when the DoD proposes to change the status quo of the exclusion policy.[101]

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[96] *See* HARRELL, 2007 RAND STUDY, *supra* note 9, at 79-101 (providing a complete list of positions closed to women); *see also* SECNAVINST 1300.12C CH-1, *supra* note 6.

[97] HARRELL, 2007 RAND STUDY, *supra* note 9, at 95–96. Warrant officer women are only excluded from Special Forces; there are no Armor or Infantry Warrant Officer positions for men or women. *Id.* at 91–95. *See also* SECNAVINST 1300.12C CH-1, *supra* note 6.

[98] Surveyor, meteorological crewmember, and senior sergeant MOS in Field Artillery remain open to women. HARRELL, 2007 RAND STUDY, *supra* note 9, at 81.

[99] A Bradley linebacker is a modified Bradley Fighting Vehicle, an armored and tracked personnel carrier and fighting vehicle, with a Stinger anti-aircraft missile launch system. Bradley Linebacker Short Range Air Defense Vehicle, USA, ARMY-TECHNOLOGY.COM (last visited Sept. 2, 2011), at http://www.army-technology.com/projects/linebacker.

[100] *Id.* at 79–101.

[101] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541, 119 Stat. 3136. Not less than thirty days before implementing a change to military assignment polices of women, the Secretary of Defense shall submit notice, in writing, of the proposed change to the Congress. *Id.* Changes that require notice are changes that

Accordingly, women may not serve in the infantry, armor, special forces, and some other specified MOSs. While women may serve in a military intelligence MOS, they may not serve as a military intelligence officer on a battalion staff. Women may serve in forward support companies (FSCs) as a gender-neutral mechanic, but the exclusion policy prohibits assignment to a forward support company that collocates with its supported direct ground combat battalion.

2. Army Force Transformation

When the Army and DoD created the exclusion policy after the Gulf War, the main military configuration upon which it focused was the Division.[102] The focus was linear major combat operations (MCO) that included "large and heavily armed conventional forces fight[ing] for military supremacy."[103] The irregular and unconventional conflicts of insurgency in Afghanistan and Iraq forced the Army to adapt to the non-contiguous nature of combat in those theaters.[104] Now, all units are subject to attack and may engage in direct ground combat.[105] Collocation was designed to give geographical separation between mixed-gender combat support units and the enemy, but the non-linear aspect of combat erases the distinction between rear areas and forward areas.[106] The Army responded to the changing environment by developing the modular brigade combat team (BCT).[107]

The BCT was designed for organizational flexibility, so the BCT commanders can internally task organize its personnel and assets to fight in full spectrum operations that include both MCO and counterinsurgency operations (COIN).[108] In February 2008, the Army modified its operations doctrine with Field Manual (FM) 3-0, elevating the importance of stability operations to the same level as offensive or

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open or close a unit or position to women, or open or close any military career designator to women. *Id.* Notice must include an analysis of the effect the proposed change may have on the constitutionality of the Military Selective Service Act. *Id.* The Navy most recently exercised the notification process when it modified its rules excluding women from submarine service. Stewart & Cornwell, *supra* note 20.

[102] *See* Farley, *supra* note 17, at 17.
[103] FM 3-0, *supra* note 26, para. 2-7.
[104] *See* Farley, *supra* note 17, at 16.
[105] *See id.* at 23.
[106] *Id.* at 29.
[107] *Id.* at 18.
[108] *Id.*

defensive operations.[109] The new doctrine forces commanders to recognize that "each situation requires a different mix of violence and restraint," and that they must use "lethal and nonlethal actions together [to] complement each other and create dilemmas for opponents."[110] The COIN challenges soldiers to be disciplined, versatile professionals, capable of violence and restraint.[111]

The modular structure also altered the doctrine of support. The latest Army doctrine uses FSCs to support the direct ground combat battalions of the BCT.[112] The doctrine gives battalions operational control over their supporting FSC.[113] The FSCs are mixed-gender combat support units assigned to the BCT's brigade support battalion, but Army doctrine and practice involves collocation of the FSCs and the FSCs' subordinate mixed-gender field maintenance teams with their supported direct ground combat battalions and companies.[114] As commanders have more discretion in employment of properly assigned women, doctrine and practice also advocate the use of women in direct ground combat units to pat-down and search civilians and detainees in culturally sensitive situations.[115] The 2007 RAND Study assessed the Army's use of women

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[109] FM 3-0, *supra* note 26, paras. 3-2 to -3. "Army forces combine offensive, defensive, and stability or civil support operations simultaneously as part of an interdependent joint force to seize, retain, and exploit the initiative, accepting prudent risk to create opportunities to achieve decisive results." *Id*. para. 3-2. "Offensive and defensive operations place a premium on employing the lethal effects of combat power against the enemy." *Id*. para. 3-18. "Stability and civil support operations emphasize nonlethal, construction actions by Soldiers working among noncombatants." *Id*. para. 3-26. Within the United States, the third element is civil support, while overseas the third element is stability. *Id*. para. 3-3.

[110] *Id.* para. 3-17.

[111] Farley, *supra* note 17, at 16 (citing the Army's 2006 Game Plan, describing future leaders as "multi-skilled pentathletes").

[112] *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.5, THE COMBINED ARMS BATTALION para. 2-1 (Apr. 2008) [hereinafter FM 3-90.5]; *see also* Farley, *supra* note 17, at 18.

[113] *See, e.g.*, FM 3-90.5, *supra* note 112, para. 2-1; *see also* Farley, *supra* note 17, at 18.

[114] Author's personal observation and experience while serving as the Brigade Judge Advocate of the 2nd Heavy Brigade Combat Team, 1st Infantry Division in Baghdad, Iraq 2008–2009. *See also* Farley, *supra* note 17, at 18–20, 39.

[115] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. A-35 (Dec. 2006) [hereinafter FM 3-24]; *see* FM 3-90.5, *supra* note 112, para. 8-72; *see* Farley, *supra* note 17, at 23; Alvarez, *supra* note 16, at A1 (discussing the Marine's use of female searchers).

in FSCs, and, as searchers, found the Army in compliance with the exclusion policy.[116]

All soldiers develop the Warrior Ethos and train on warrior tasks, such as proficiency on personal and crew served weapons, room clearing, and hand-to-hand combatives.[117] All Marines take an annual combat fitness test that includes maneuver under fire, throwing a dummy grenade, and dragging, lifting, and carrying a casualty.[118] This training is essential as women continue to serve in direct ground combat. As of August 2006, the Army has awarded the combat action badge to over 1,800 women.[119] The combat action badge recognizes "Soldiers who personally engage the enemy, or are engaged by the enemy during combat operations," except soldiers eligible for the combat infantry badge or the combat medic badge.[120] Since 1994, with the conflicts in Iraq and Afghanistan, soldiers in the Army develop the Warrior Ethos; Marines take the combat fitness test; combat arms and combat support troops are exposed to direct ground combat; and actual ground combat has tested the mettle of more women than ever before.

III. Equal Protection Analysis

> *Women are in combat now. We're not inferior, or less capable or emotionally weak. I think it's funny that we even need a study to say that.*[121]

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[116] HARRELL, 2007 RAND STUDY, *supra* note 9, at 32–40. The study suggested that the Army may have violated its own policy, but that it was in compliance with the Aspin Memo. *Id.*

[117] *See* Farley, *supra* note 17, at 25; *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.75, THE WARRIOR ETHOS AND SOLDIER COMBAT SKILLS (Jan. 2008) [hereinafter FM 3-21.75].

[118] Rod Powers, *Marine Corps Combat Fitness Test*, ABOUT.COM, Nov. 9, 2008, http://usmilitary.about.com/od/marines/a/cft.htm.

[119] HARRELL, 2007 RAND STUDY, *supra* note 9, at 143-46.

[120] Farley, *supra* note 17, at 26.

[121] Catherine Pearson, *Women Handle Combat Stress As Well As Men, Study Shows*, HUFFPOST.COM (June 8, 2011), *available at* http://www.huffingtonpost.com/2011/06/08/women-combat-stress_n_873381.html (quoting Michelle Wilmont, who served on the first female team attached to Marine infantry units to perform combat operations in Iraq from 2004 to 2005, referring to a study concluding that women are as resilient as men to the effects of combat stress).

A. The *Virginia* Standard

In 1996, the Supreme Court decided *United States v. Virginia*, holding that the state of Virginia violated the Equal Protection clause when it excluded women from Virginia Military Institute (VMI).[122] The Equal Protection clause of the U.S. Constitution prohibits the government from discriminating on the basis of gender, except when the gender classification serves important governmental objectives.[123] In applying this heightened scrutiny, the "discriminatory means employed" must be "substantially related to the achievement of those objectives."[124] In *Virginia*, the state failed to demonstrate an "exceedingly persuasive justification" for excluding willing and capable women.[125]

The state of Virginia argued that gender integration would destroy VMI's stature as a physically and mentally challenging educational institution that produces citizen-soldiers.[126] Specifically, the state argued that the admission of women would alter physical training programs as women are generally not as strong as men, would require alterations of living facilities, and would destroy VMI's unique adversative system.[127] However, the Court found that physical differences may justify discrimination, but the justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[128] Because "some women can meet the physical standards," and more specifically that "some women are capable of all of the individual activities required of VMI cadets," the Court found the state's justification of physical strength unpersuasive.[129] Instead, the Court required a "'hard look' at generalizations or 'tendencies.'"[130] The Court looked to the successful integration of women into the federal military academies as evidence that the state's "fears for the future of VMI may not be solidly grounded."[131] The Court ultimately found that

[122] United States v. Virginia, 518 U.S. 515, 534 (1996).
[123] *Id.* at 533.
[124] *Id.*
[125] *Id.* at 535–36.
[126] *Id.* at 521–22, 542.
[127] *Id.* at 540.
[128] *Virginia*, 518 U.S. at 533.
[129] *See id.* at 523, 541.
[130] *Id.* at 541.
[131] *Id.* at 544–45.

Virginia could not constitutionally exclude willing and capable women from VMI.[132]

As a result, any justification for the exclusion of willing and capable women from direct ground combat must be exceedingly persuasive. Generalizations, tendencies, and fixed notions of gender roles shall not constitute exceedingly persuasive justifications.[133] Additionally, each prong of exclusion must substantially relate to an exceedingly persuasive justification. The successful integration of the federal military academies demonstrated VMI's justifications for exclusion were unfounded. Similarly, successful integration of combat support units and other comparable fields like firefighters, emergency medical technicians, and police undermine direct ground combat exclusion justifications, absent a unique characteristic of direct ground combat.[134] If a justification is not unique to direct ground combat, and if mixed-gender combat support units successfully overcome the stated justification, then that justification fails to substantially relate to the exclusion policy.

In the 1981 case of *Rostker v. Goldberg*, the Supreme Court assumed the constitutionality of excluding women from combat when it upheld the MSSA.[135] More recently, a three-judge panel of the U.S. Court of Appeals for the First Circuit dismissed a case brought by male former federal employees who failed to register for Selective Service and who

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[132] *Id.* at 542 (noting that the issue was "whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords").

[133] *Id.* at 534 (Noting that "classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women"); *id.* at 541 (noting that the state "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'" (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982))).

[134] *See* Colonel Katherine M. Cook, *Integration and Role of Soldiers Who are Women*, *in* WOMEN IN COMBAT COMPENDIUM 63 (describing the success of the combat support unit in combat); *see, e.g.*, Riverside County Fire Department, n.d., at http://www.rvcfire.org/opencms/facilities/Camps/ (last visited Sept. 2, 2011) (noting that "[f]ire crews are the infantry of any fire department. . . . [and] [w]omen fire crew firefighters have proven their effectiveness in working equally well with male crews."); *see, e.g.*, Daniel Hipp & Jenny Rizo, *Females in Policing: Strides and Future Challenges in a Male-Dominated Profession*, April 30, 2010, *available at* http://aurora.edu/documents/academics/special-programs/honors/Jenny%20Rizo%20-%20Women%20In%20Policing.pdf (noting that "women in policing have proven time and time again that they can be just as effective, if not more, than males at their jobs").

[135] Rostker v. Goldberg, 453 U.S. 57, 81–83 (1981).

argued that the MSSA violated equal protection guarantees.[136] While the majority dismissed the case without reaching the Equal Protection question, the concurring opinion addressed whether the *Rostker* holding is still good law considering changes in the military, the increased service of women in combat, and *Virginia*'s impact on the equal protection standard.[137] While acknowledging that "the current reality of the armed forces represents a marked shift from 1981, when *Rostker* was decided," the concurrence found that "[n]o part of *Rostker* has been overruled."[138]

Nevertheless, this MSSA analysis is distinct from analysis under *Virginia*. Analysis regarding the all-male draft evaluates whether combat roles are open to women and whether the government would be able to force women as well as men into direct ground combat roles, regardless of whether they are willing. This article, using the *Virginia* analysis, evaluates whether the government may constitutionally exclude capable women who willingly choose direct ground combat assignments.[139]

For all arguments in support of the exclusion policy, including collocation, the below brigade analysis, and the combat arms MOS justification, the overarching and most important objective is military effectiveness. In the DADT Repeal Act of 2010, Congress required that the military policies drafted to implement the repeal of DADT be "consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces."[140] In the same way, military policy on the assignment of women should be consistent with these standards. The life of the individuals involved and the security of the nation depend on the military effectiveness of the armed forces.

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[136] Elgin v. U.S. Dept. of the Treasury, 2011 WL 1332171 (C.A.1 Mass. Apr. 8, 2011). While the district court initially found the draft's purpose is to fill combat positions and so it dismissed the Equal Protection challenge to the all-male draft of the Military Selective Service Act (MSSA). Elgin v. United States, 594 F. Supp. 2d 133, 147 (D. Mass. 2009).

[137] *Elgin*, 2011 WL 1332171, at *16–17.

[138] *Id.* Judge Stahl also noted that "it would not be for this court to determine what, if any, impact these developments had on the continued vitality of *Rostker*, a task left solely to the Supreme Court. *Id.*

[139] *See Virginia*, 518 U.S. at 542 ("The issue, however, is not whether "women—or men—should be forced to attend VMI; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.").

[140] DADT Repeal Act, *supra* note 21.

Exclusionists argue six justifications based on concerns about individual performance ability, unit cohesion, and social implications: (1) women are not psychologically suited to kill[141] (psychological justification); (2) women are not suitable combat leaders[142] (combat leaders); (3) U.S. society will not accept women as killers, targets, or captives[143] (social perceptions); (4) Women menstruate and get pregnant[144] (pregnancy); (5) the military is unable to provide the necessary personal privacy to reduce sexual tension[145] (personal privacy and sexual tension); and (6) women are not physically capable of direct ground combat[146] (physical strength).

The questions are whether these proposed justifications are exceedingly persuasive, and whether they uniquely apply to direct ground combat. Arguments that would also justify excluding women from all units deploying to combat, including combat support units, are overly broad. Women serving in combat support units have served with distinction.[147] The mixed-gender units have overcome these perceived hurdles.[148] Absent a justification that is unique or specific to either direct ground combat units or combat arms MOSs, the justification is unpersuasive.

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[141] *See e.g.*, KINGSLEY BROWNE, CO-ED COMBAT: THE NEW EVIDENCE THAT WOMEN SHOULDN'T FIGHT THE NATION'S WARS 28 (2007).
[142] *See, e.g.*, *id.* at 154; *see also* HERRES ET AL., *supra* note 76 at 25.
[143] *See, e.g.*, Tom Bowman, *Military, Congress Ponder How to Deploy Female Troops in Iraq, Rule to Keep Them out of Combat Doesn't*, BALT. SUN, June 12, 2005, at 1A (quoting Representative Duncan Hunter, "The American people have never wanted to have women in combat and this reaffirms that policy."); *see also* HERRES ET AL., *supra* note 76, at 25.
[144] *See, e.g.*, Mitchell, *supra* note 1, at 148–49; *see also* HERRES ET AL., *supra* note 76, at 25.
[145] *See e.g.*, S. REP. NO. 103-112, at 195–96 (1993) (statement of General (GEN) Powell) ("One of the factors in dictating the pace of increasing the opportunities for women in the armed forces has been the need to accommodate sexual privacy with respect to living, rest room, and bathing facilities for deployed troops."); *see also* HERRES ET AL., *supra* note 76, at 25.
[146] *See, e.g.*, Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815, 835 (2007); *see also* HERRES ET AL., *supra* note 76, at 25.
[147] *See infra* note 161 (discussing praise for women in their combat support roles and as leaders).
[148] Cook, *supra* note 134, at 63 ("Gender made no difference in any of the situations we encountered. Americans can be rightly proud of this Army.").

B. Psychological Justification

Exclusionists like Kingsley Browne, professor of law at Wayne State University Law School, argue that women do not possess the necessary psychological traits for success in combat.[149] The justification is unfounded, fails to qualify as exceedingly persuasive, and is contradicted by the actual performance of women in direct ground combat.

Professor Browne argues that women are more fearful than men and less likely than men to take risks.[150] He asserts that while men are more physically aggressive and dominant than women, women are more nurturing and empathetic than men.[151] However, as Browne concedes, the data demonstrates trends and "is not by itself sufficient to warrant women's exclusion."[152] The *Virginia* Court emphasized that "overbroad generalizations" of "talents, capacities, or preferences" are unpersuasive justifications.[153] Browne and others have merely demonstrated that studies support the existence of stereotypes and that, on average, men generally possess traits often popularly associated with warfare. Browne focuses on the willingness to kill,[154] but soldiers are by definition not killing machines. Members of the armed forces are disciplined fighters who must equally understand and restrain the urge to kill as well as they quickly employ lethal force, especially in today's counterinsurgency

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[149] *See* BROWNE, *supra* note 141, at 28; *see also* MITCHELL, *supra* note 1, at 170–72. Browne also argues that women are cognitively inferior to men regarding combat ability. BROWNE, *supra* note 141, at 36. Though he concedes that women have superior verbal abilities, he believes that verbal abilities are not useful in combat. *Id.* at 37. However, a key component of success in counterinsurgency operations is communication FM 3-24, *supra* note 115, paras. 3-52 to 54.

[150] BROWNE, *supra* note 141, at 29–31.

[151] *Id.* at 32–33.

[152] *Id.* at 34–35 (emphasis of underestimate removed).

[153] United States v. Virginia, 518 U.S. 533 (1996).

[154] *See* BROWNE, *supra* note 141, at 33 (asserting that empathy and nurturance inhibit the willingness to kill).

operations.[155] The trait of empathy may actually be more beneficial to modern military leaders than aggressiveness and dominance.[156]

Retired Lieutenant Colonel Dave Grossman, author of *On Killing* and *On Combat*, is an expert on the psychology of killing and combat.[157] He travels the world "training military units, such as Green Berets, Rangers, Marines . . . and law enforcement officers" on the subjects.[158] His work demonstrates the trainability of the traits for combat success, including killing the enemy.[159] He advocates that women are just as able to kill in combat as men, and recognizes that women deserve "the dubious honors of war."[160]

When it comes to the effects of combat stress, men are no more resilient than women, according to a recent study published in the *Journal of Abnormal Psychology*.[161] Despite the researchers' initial hypothesis that they would find combat stress to have a more negative impact on women than men, the data led them to a different conclusion.[162] The research even accounted for the exclusion policy, noting that "[t]he difference between men's and women's exposure to combat in Iraq and Afghanistan is actually relatively small among veterans returning from Iraq and Afghanistan. . . .[because] [e]xposure to combat is not just restricted to people in ground combat roles."[163]

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[155] *See* FM 3-24, *supra* note 115, para. 1-150 (discussing the paradox that in counterinsurgency operations that more lethal force may be less effective); *see also* DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 226 (1st ed. 1995) (recognizing that returning veterans are "less likely to use their deadly skills than non-veterans of the same age and the same sex," because "[d]iscipline is the safeguard in a warrior's life."). *Id.*

[156] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para. 2-15 (Oct. 2006) [hereinafter FM 6-22] ("Three major factors determine a leader's character: values, empathy, and the Warrior Ethos.").

[157] *See* GROSSMAN, *supra* note 155, at xvi; *see* DAVE GROSSMAN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE, at xi (1st ed. 2004).

[158] GROSSMAN, *supra* note 157, at xvi.

[159] *See id.* at 141 ("Warriors like these do not just happen: They are built; they are crafted; they are nurtured every day.").

[160] *See id.* at xiv (quoting Gwynne Dyer).

[161] Catherine Pearson, *Women Handle Combat Stress As Well As Men, Study Shows*, HUFFPOST.COM (June 8, 2011), *available at* http://www.huffingtonpost.com/2011/06/08/women-combat-stress_n_873381.html.

[162] *Id.*

[163] *Id.*

Professor Browne also asserts that men are significantly braver than women, but bases his claims on bravery awards that exclude police, emergency responders, and servicemembers.[164] His evidence conveniently excludes the pool of women most likely to demonstrate bravery. The heroism of women like SGT Leigh Ann Hester, SPC Monica Brown, and the more than 1,800 women who earned the Combat Action Badge in Iraq and Afghanistan[165] disprove his point. The psychological differences between men and women amount to generalizations and fail to constitute an exceedingly persuasive justification for any prong of exclusion.

C. Combat Leaders and Cohesion Justification

Exclusionists argue that women are not suitable leaders and that men will not accept women as leaders in combat. The justification is unfounded, fails to qualify as exceedingly persuasive, and is contradicted by evidence of gender integration in combat support units.

Professor Browne asserts that women do not evoke followership behavior to the same extent that men do.[166] He says that "[m]en are more likely to adopt an autocratic or directive style and women a more democratic or participatory style."[167] However, Army doctrine recognizes that leadership for team building and unit cohesion requires "persuasion, empowerment, motivation, negotiation, conflict resolution, bargaining, advocacy, and diplomacy."[168] A direct style may be appropriate in some combat situations, but "persuasion and openness" are keys to teambuilding and unit cohesion.[169]

Additionally, women have proven themselves as capable leaders in combat. As Secretary of Defense Robert M. Gates asserted in November 2007, "there are few areas of our military where women have not established themselves as skilled and dedicated leaders."[170] Women serve

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[164] BROWNE, *supra* note 141, at 35.
[165] HARRELL, 2007 RAND Study, *supra* note 9, at 143-46.
[166] BROWNE, *supra* note 141, at 154.
[167] *Id.* at 155.
[168] FM 6-22, *supra* note 156, para. 11-7.
[169] *Id.* para. 11-22 (noting that the "[w]ell-developed skills of persuasion and openness to working through controversy in a positive way").
[170] Robert M. Gates, *10th Anniversary Message*, STARS & STRIPES, http://www.stripes.com/shop_pages/pages/WM/10thAnniversaryMessage.html (last

in and lead Army military police (MP) companies that conduct "route security, cordon and search operations, [and] raids," which are many of the same direct ground combat tasks executed by infantry and armor units.[171] An engineer battalion commander from Operation Iraqi Freedom who was part of the initial invasion indicated, "What I also saw were the desired leader attributes in female leaders that were indistinguishable from those of their male counterparts – their patriotism, technical and tactical expertise, leadership, and professionalism."[172]

Professor Browne also asserts that the most powerful reason that men fight is male bonding.[173] He suggests gender integration will cause men in the unit to compete for the attention of the women and breed situations where men would be overprotective of women to the detriment of the unit.[174] Additionally, in November 2010, the United Kingdom decided to continue its exclusion policy, not based on the physical

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visited Mar. 1, 2010); *see also* John J. Kruzel, *Gates Honors Military Women During Memorial Celebration,* AM. FORCES PRESS SERV., Nov. 3, 2007, http://www.defense.gov/news/newsarticle.aspx?id=48035. Other leaders have noted the contributions of female soldier leaders. *See* Colonel Paul L. Grosskruger, *Women Leaders in Combat: One Commander's Perspective*, *in* WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 43, 47.

> While other female leaders supported combat formations on the attack, First Lieutenant Sarah Sinclair, a quiet, hands-dirty kind of leader and expert equipment operator in her own right, planned and executed the battalion's lifeline─the supply convoys running back and forth from forward units to Camp Virginia in Kuwait. She single-handedly led her support platoon through hundreds of kilometers of dangerous terrain and ensured that the critical classes of supply got through. In the final attack on Baghdad in early April, the 3d ID directed the 94th to link up with one of its forward elements, 1st Brigade Combat Team, to support it in the seizure and clearance of Baghdad International Airport. On April 5, 2003, after the roller coaster ride supporting 3d ID during their attack north, the 94th Engineer Battalion arrived at Baghdad International Airport (BIAP).

Id.

[171] *See* Lieutenant Colonel Randall E. Twitchell, *The 95th Military Police Battalion Deployment to Iraq—Operation IRAQI FREEDOM II*, *in* WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 69, 69; Colonel Michele M. Putko, *The Combat Exclusion Policy in the Modern Security Environment*, *in* WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 27, 32.

[172] Grosskruger, *supra* note 170, at 49.

[173] BROWNE, *supra* note 141, at 7.

[174] *See id.* at 7–8 (asking rhetorical questions about the impact of women on unit cohesion).

abilities of women, but based "on the potential risks associated with maintaining cohesion in small mixed-gender tactical teams engaged in highly-dangerous close-combat operations."[175]

Alternatively, the 1997 RAND National Defense Research Institute study, *New Opportunities for Military Women* (1997 RAND Study), found that gender integration in U.S. units had a minimal effect on morale, cohesion, or readiness.[176] The study found that rank was as likely as gender to divide a group, and that in some cases rank was even more detrimental to unit cohesion than gender.[177] Instead of undermining morale, the study found that gender integration in U.S. units had a positive effect on a unit's morale.[178] Concerns that men will be overprotective of women are likely a common but emotional conclusion, based on a person's instinct and assumption that military men are chivalrous and that chivalry would require them to defend women first. Such conclusions ignore the experience of U.S. mixed-gender units and the evidence in the 1997 RAND Study. Additionally, former POW MAJ Rhonda Cornum insists that unit bonding occurs regardless of gender, and that she felt as protective of her male POW comrades as they did of her.[179]

As women "have earned the confidence and respect of male colleagues. . . . Iraq has advanced the cause of full integration for women in the Army."[180] Assertions that women do not possess the leadership capability or that they will destroy unit cohesion are overbroad generalizations, and are disproved by the actual successful combat performance of mixed-gender combat support units. Additionally, the United Kingdom report and conclusion, when compared with the 1997 RAND Study, is more persuasive of cultural differences between the two nations than of the appropriateness of exclusion. Accordingly, a justification based on women's leadership capabilities and effect on unit cohesion is not exceedingly persuasive.

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[175] UK 2010 REPORT, *supra* note 12, para. 13.
[176] *See* HARRELL & MILLER, 1997 RAND STUDY, *supra* note 62, at 99.
[177] *See id.* at xviii ("Any divisions caused by gender were minimal or invisible in units with high cohesion. Gender appeared as an issue only in units with conflicting groups, and then it took a back seat to divisions along work group or rank lines."); *id.* at 85, 97.
[178] *See id.* at 100.
[179] CORNUM, *supra* note 73, at 198–99.
[180] Alvarez, *supra* note 16, at A1 (quoting COL Peter R. Mansoor, former executive officer to GEN David H. Petraeus while GEN Petraeus was the American commander in Iraq).

D. Social Perceptions Justification

Exclusionists argue that U.S. society is not prepared to accept women as killers, targets, or captives. Popular opinion and the reaction of the American public contradict this assertion, making it an invalid justification for exclusion.

Republican Congressman Duncan L. Hunter introduced legislation to increase exclusion in May 2005 and boldly asserted, "The American people have never wanted to have women in combat and this reaffirms that policy."[181] Yet over eighty percent of those polled in a December 2003 Gallup poll "think women should either be required to serve in the same combat assignments as men, or should at least have the opportunity to do so."[182] The most support came from Americans eighteen to twenty-nine years old, the recruiting pool for the armed forces, and "the nation's future civilian leaders, policy-makers, and voters."[183] A July 2009 *New York Times*/*CBS News* poll found similar results with fifty-three percent of respondents favoring women "join[ing] combat units, where they would be directly involved in the ground fighting."[184]

Elaine Donnelly, president of the Center for Military Readiness and a long-time advocate of excluding women from combat and other parts of the armed forces, argues that deploying "single mothers and moms with large families" to combat creates "emotional scars in military families."[185] However, deploying fathers in similar situations may be equally harmful to a military family. In 2009, Congress and the DoD recognized the importance of fathers in a family with the paternity leave policy, demonstrating a shift in the cultural view of men's and women's roles.[186] Even with the direct ground combat exclusion, record numbers

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[181] Bowman, *supra* note 143, at 1A; *see also* Farley, *supra* note 17, at 14–15. Army leaders opposed the amendment, including then Vice Chief of Staff of the Army, GEN Richard Cody, who said, "The proposed amendment will cause confusion in the ranks, and will send the wrong signal to the brave young men and women fighting the Global War on Terrorism." Ann Scott Tyson, *Panel Votes to Ban Women From Combat*, WASH. POST, May 12, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/11/AR2005051101867.html.

[182] Segal & Bourg, *supra* note 23, at 706.

[183] *Id.*

[184] Alvarez, *supra* note 16, at A1.

[185] Donnelly, *supra* note 146, at 936.

[186] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 532, 122 Stat. 4356 (2008); U.S. DEP'T OF DEF., INSTR. 1327.06, LEAVE AND LIBERTY POLICY AND PROCEDURES encl. 2, para. 1.k(5) (16 June 2009).

of women, many of them mothers, have deployed to combat zones away from their families. Deployments of fathers may be just as destructive as deployments of mothers, and exclusion of women from direct ground combat fails to prevent either.

Exclusionists assert that "[e]ngaging the enemy in this uncivilized thing we call war is a job for men, not women,"[187] that "there is a deeply rooted belief that women should be protected rather than protectors,"[188] and that the "prevailing view" is that "female soldiers should not be needlessly exposed to the risk of capture by serving in close proximity to close combat units."[189] As the poll results demonstrate, these views do not represent the prevailing belief of the American public. Even so, the Constitution prohibits exclusionists from using seemingly fixed notions about a mother's role in her family or a woman's role in society to perpetuate the legal and social inferiority of women.[190]

Representative Hunter asserts that the "deadly aspects of war will make no distinction between women and men on the front lines."[191] Ms. Donnelly claims that the capture of women by the enemy "was a surprise to many Americans, including the parents of female soldiers."[192] However, the fighting, dying, and capture of women on the battlefield have not caused any significant public outcry.[193] The public understands the risks, and they continue to support and celebrate women's continued service in risk-adverse roles. In Iraq and Afghanistan, all units are subject to direct attack,[194] and therefore the exclusion policy does not substantially relate to preventing the enemy from targeting or capturing

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[187] *See* HARRELL, 2007 RAND Study, *supra* note 9, at 20 (quoting Kate O'Bierne, Washington editor of the *National Review*, *quoted in* Sharon Cohen, *Women Take on Major Battlefield Roles*, A.P., Dec. 3, 2006).
[188] *See id.* at 20 (quoting David Moniz, *Female Amputees Make Clear That All Troops Are on the Front Lines*, USA TODAY, April 28, 2005).
[189] *See id.* (quoting the CTR. FOR MILITARY READINESS, WOMEN IN LAND COMBAT REP. NO. 16 (Apr. 2003).
[190] *See* United States v. Virginia, 518 U.S. 515, 534 (1996).
[191] *See* Farley, *supra* note 17, at 14.
[192] Donnelly, *supra* note 146, at 830–31.
[193] Colonel Jimmie O. Keenan, The DoD Combat Exclusion Policy: Time for a Change?, *in* WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 21, 24 ("It does not appear that women are being excluded from combat, but instead are being recognized and honored for their valor in combat."); Colonel Mark R. Lindon, *Impact of Revising the Army's Female Assignment Policy*, *in* WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 37, 40.
[194] Farley, *supra* note 17, at 23.

women. Accordingly, social concerns are unpersuasive justifications for exclusion.

E. Applying *Virginia* to the Pregnancy Justification

Exclusionists argue that pregnancy removes women from the fight.[195] Reasoning that because a woman has a uterus, menstruates, and may become pregnant, she is therefore a liability to her unit, and a possible drain on the unit's resources.[196] However, mixed-gender combat support units already mitigate concerns about a soldier's womanhood through leadership, training, and discipline. Although the possibility of pregnancy is an issue for military leaders, it would affect direct ground combat units no differently than combat support units, and therefore fails to substantially relate to the Exclusion Policy.

Exclusionists also assert that menstruation is incompatible with a combat environment.[197] Shortly after becoming Speaker of the House, Newt Gingrich suggested that a woman's menstrual cycle causes her health problems and prevents combat service.[198] While exclusionists like Professor Browne point to a 2001 article from the Journal of the American Academy of Nurse Practitioners in support of Mr. Gingrich's position,[199] the article merely concludes that military field time makes personal hygiene management difficult and time consuming, and that difficulty cleaning may contribute to "embarrassment, odor, moodiness, [and] insecurity."[200] The evidence supports a position that women have additional challenges, but not that the menstrual cycle creates a dangerous health problem for women deployed in remote locations or somehow prevents effective combat service.[201]

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[195] *See, e.g.*, BROWNE, *supra* note 141, at 247–48.
[196] *Id.* at 246–53.
[197] *See, e.g.*, *id.* at 257.
[198] *See id.*
[199] *See id.* at 258.
[200] *Id.* at 259.
[201] *See also* HERRES ET AL., *supra* note 76, at 90–92 (Dissent on Ground Combat) (noting that women already train and fight under conditions where cleanliness and fresh clothing are merely inconveniences in prolonged combat); *but see* Lynch v. Freeman, 817 F.2d 380, 388 (6th Cir. 1987) (finding disparate impact by company providing unclean portable toilets which caused female worker to hold her urine and develop a bladder infection).

A soldier's pregnancy does require her evacuation from a combat zone for appropriate medical care.[202] An undetected pregnancy could delay critical treatment for ectopic pregnancy or other pregnancy complications, jeopardizing the soldier's life and the life of her baby.[203] Combatant commanders find their female soldiers "absolutely invaluable," and perceive a pregnant soldier as a loss of combat power.[204]

As part of Operation Desert Spring and later Operation Iraqi Freedom, COL Katherine M. Cook commanded the 203d Forward Support Battalion, 3d Brigade Combat Team, 3d Infantry Division, a mixed-gender combat support unit.[205] Colonel Cook considered deployment readiness due to pregnancy an important issue, but one of personnel management.[206] She effectively minimized the issue through pregnancy testing, frank discussions on sex and unit cohesion, sex education, and chaplain sensing sessions.[207] At the conclusion of her deployment, she assessed, "Gender made no difference in any of the situations we encountered. Americans can be rightly proud of this Army."[208]

Major General (MG) Tony Cucolo, commander of 3d Infantry Division, Task Force Marne, in Iraq, considered the female soldiers assigned to his unit to be a valuable part of his combat power.[209] To address combat readiness, he issued a general order on November 4, 2009, that prohibited soldiers from "becoming pregnant, or impregnating a soldier, while assigned to the Task Force Marne [Area of Responsibility], resulting in the redeployment of the pregnant Soldier."[210] Major General Cucolo considered the male soldier to be just as responsible for taking a soldier out of the fight and reducing the unit's combat power as the pregnant female soldier who must leave the combat

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[202] *See* Cook, *supra* note 148, at 56.
[203] *See id.*
[204] *See Defense Department Conference Call with Major General Tony Cucolo, U.S. Army, Commander, 3rd Infantry Division via Teleconference from Iraq: Pregnancy Provision in His Recent General Order*, FEDERAL NEWS SERV., Dec. 22, 2009, [hereinafter Conference Call with MG Cucolo].
[205] Cook, *supra* note 148, at 53.
[206] *See id.* at 54.
[207] *Id.* at 59–60.
[208] *Id.* at 63.
[209] Conference Call with MG Cucolo, *supra* note 204.
[210] Major General Anthony A. Cucolo III, Gen. Order No. 1 para. 3.s (4 Nov. 2009), *available at* http://documents.nytimes.com/general-order-no-1-prohibited-activities-for-soldiers.

zone, and intended to get soldiers thinking about the impact of their decisions.[211] His order was controversial, and subsequently rescinded by General (GEN) Raymond Odierno, then-commander of U.S. Forces, Iraq.[212]

While sex is a voluntary act that may deplete a unit of combat power, so is playing organized sports or conducting physical fitness.[213] Sports injuries may also deplete a unit of combat power, and recreational sports activities are voluntary and dangerous on the sandy or rocky grassless sports fields of Iraq.[214] A fertile uterus does not hurt military effectiveness; ineffective leadership and careless behavior does.

Exclusionists may argue that the exclusion policy is necessary because the closer a woman is to the enemy, the more difficult it will be to evacuate her. However, whether or not women are either collocated with male troops, or assigned to a direct ground combat unit, all units "are subject to attack and even direct combat."[215] Army leaders accept the pregnancy risk by operationally employing mixed-gender units as collocated combat support for direct ground combat units.[216] When it comes to evacuation, the task is no more difficult and likely requires less urgency for pregnant women than for any other serious medical condition. There is no reason that direct ground combat units cannot deal with pregnant soldiers as effectively as combat support units have in ground combat. Pregnancy presents no greater challenge than any other medical condition that depletes combat power. Menstruation and pregnancy fail to constitute exceedingly persuasive justifications for any prong of exclusion.

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[211] Conference Call with MG Cucolo, *supra* note 204.

[212] Sarah Netter & Luis Martinez, *Pregnant Soldiers in War Zone Won't Be Punished*, ABC NEWS, Dec. 25 2009http://abcnews.go.com/print?id=9422998.

[213] E-mail from female Army captain serving in Iraq, to author (Dec. 23, 2009) (on file with author) ("Pregnancy and broken legs take you out of the fight so treat them the same! Playing football in Iraq is just as much a choice as having sex.").

[214] *But see* BROWNE, *supra* note 141, at 246–47 (arguing that sports injuries are less detrimental than pregnancy to readiness).

[215] Farley, *supra* note 17, at 23.

[216] Author's personal observation and experience while serving as the Brigade Judge Advocate of the 2nd Heavy Brigade Combat Team, 1st Infantry Division in Baghdad, Iraq 2008–2009. Additionally, "the most recent BCT doctrine states that 'FSC's are assigned to the BSB, but usually are OPCON to their supported battalions." HARRELL, 2007 RAND STUDY, *supra* note 9, at 30-31. Also consider the assertions of COL Farley that Army doctrine contemplates collocating mixed-gender Field Maintenance Teams with direct ground combat companies. Farley, *supra* note 17, at 18–20, 39.

F. Privacy and Sexual Tension Justification

Leaders of direct ground combat units are capable of providing personal privacy and reducing sexual tension, even with women in their units. Exclusionists argue that the introduction of women into and around direct ground combat units will destroy unit cohesion by leading to sexual tension, inappropriate relationships, and sexual misconduct. Simultaneously, they argue that the military will be unable to provide the personal privacy necessary for basic dignity.[217]

General Colin Powell testified in hearings focused on the military's homosexual conduct policy that "[o]ne of the factors in dictating the pace of increasing the opportunities for women in the armed forces has been the need to accommodate sexual privacy with respect to living, restroom, and bathing facilities for deployed troops."[218] Providing personal privacy reduces sexual tension, improves a commander's ability to enforce good order and discipline, and reduces inappropriate relationships.[219] Personal privacy also contributes to increasing a soldier's feeling of safety while decreasing incidences of sexual assault and sexual harassment.[220] This is not the same privacy as the right to be secure from unreasonable search and seizure, and is instead the privacy and modesty that preserves individual dignity.[221]

The justification for exclusion is not that gender segregation for personal privacy is impossible in either a garrison environment or on an established forward operating base (FOB). Exclusionists like Professor Kingsley Browne imply that integration will lead to co-ed open bay showers,[222] where naked male and female soldiers bathe together like in

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[217] *See* York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."); *see also* John Dwight Ingram, *Prison Guards and Inmates of Opposite Genders: Equal Employment Opportunity versus Right of Privacy*, 7 DUKE J. GENDER L. & POL'Y 3, 21 (2000).

[218] *See* S. REP. NO. 103-112, at 196 (1993) (statement of GEN Powell).

[219] *See id.* ("The separation of men and women is based upon the military necessity to minimize conditions that would disrupt unit cohesion, such as the potential for increased sexual tension that could result from mixed living quarters.").

[220] *See* U.S. Army Sexual Assault Prevention and Response Program, As an Army Leader, What Can I Do to Help Prevent Sexual Assault in My Unit, http://www.sexualassault.army.mil/leader_prevent.cfm (last visited Mar. 3, 2010) (indicating measures to prevent sexual assault that include securing living areas).

[221] *See* Ingram, *supra* note 217, at 21.

[222] *See* BROWNE, *supra* note 141, at 3.

the shower scene from the movie *Starship Troopers*.[223] However, integration of combat support units has not led to such a degree of shared facilities in garrison or in the field.[224] Instead, the privacy justification is based on the difficulty of providing adequate personal privacy in a deployed environment during military combat operations, with the enemy. In such a case, the government cannot reasonably provide a garrison environment without interfering with the unit's ability to effectively fight the enemy.

Recently, a survey of 236 U.S. Army War College students from the Class of 2006 revealed that fifty-nine percent believe that "a lack of co-ed life support facilities" should not be a bar to assigning women to combat units.[225] Mixed-gender units have successfully overcome issues of sexual tension, inappropriate relationships, and sexual misconduct through leadership, discipline, and by providing personal privacy.[226] Direct ground combat commanders are capable of the same dynamic leadership using the same disciplinary tools as combat support commanders; the mission to locate and destroy the enemy does not somehow prevent a leader from enforcing the standard. In order to demonstrate that privacy is an exceedingly persuasive justification to exclude women from direct ground combat, exclusionists must identify the difference between mixed-gender combat support units and direct ground combat units that makes mixed-gender operations successful for the former, but detrimental for the latter.

1. Baseline Personal Privacy

The first step in evaluating the capacity to provide personal privacy is identifying the baseline necessary to maintain human dignity and unit cohesion while reducing sexual tension. Baseline personal privacy demands a means to prevent observation while changing clothes, while eliminating waste, and while bathing, and the means to provide at least a

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[223] *See* STARSHIP TROOPERS (Tristar Pictures 1997).
[224] *See e.g.*, Cook, *supra* note 148, at 59.
[225] Colonel Christopher Putko, *USAWC Women in Combat Survey Interpretation*, *in* WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 1, 10. Of the class of 300, 236 took the survey. *Id.* at 1. The Army made up seventy-six percent of the volunteers, eight percent Air Force, six percent Marine Corps, five percent Navy, three percent Department of the Army Civilian, one percent Coast Guard, and one percent Department of State. *Id.* The volunteers were eighty-nine percent male and eleven percent female. *Id.*
[226] *See* Cook, *supra* note 148, at 63.

slight degree of physical separation while sleeping.[227] Even under extreme conditions, soldiers use standard issue items like ponchos and sleeping bags to achieve that privacy.

While deployed as part of Operation Desert Spring and later Operation Iraqi Freedom, COL Cook shared a tent with her male command sergeant major, "as usual in such arrangements," and used "a partition between our areas for privacy."[228] Her forward support battalion "had mixed gender tents with privacy screens fashioned from poncho liners or similar make-shift screens in the company areas."[229] Not only did the unit normally train and live in this manner, she found that keeping the mixed-gender sections intact was better for cohesion and reduced discipline problems.[230] Men and women "shared and took [] turns in the showers and latrines; there was no need for separately designated shower stalls as the construction of most showers were individual compartments."[231] She described how soldiers met the challenge of having vehicles with mixed-gender crews during the invasion of Iraq:

> Travel conditions were Spartan. Some modesty was going to be lost as we moved through Iraq; soldiers of both genders were in vehicles that often did not stop for several hours. Emergency bodily relief during movement was usually remedied by cutting off the top off a water bottle and throwing on a poncho or poncho liner over the head, and throwing the waste out the window.[232]

In contrast, courts have found work conditions for plant and construction sites with similarly austere provisions unacceptable and as

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[227] *See* Forts v. Ward, 621 F.2d 1210, 1216-17 (2d Cir. 1980); *see* Cook, *supra* note 148, at 59.
[228] Cook, *supra* note 148, at 59. Colonel Cook's experience is not unique. *See* e-mail Responses to Survey of 58th Graduate Course Students, The Judge Advocate Gen.s Legal Ctr. & Sch. (Feb. 11-22, 2010) [hereinafter Grad Course Survey] (on file with author). The informal survey asked 111 officers from the Army, Navy, Air Force, Marines, and Coast Guard about their experiences with mixed-gender living conditions. *Id.* Over thirty officers responded with various personal experiences, including several that mirror COL Cook's. *Id.*
[229] Cook, *supra* note 148, at 59.
[230] *Id.*
[231] *Id.*
[232] *Id.* at 64.

having a disparate impact on women.[233] In one case, the court rejected a practice of requiring workers, including women, "to urinate off the side of a crane in lieu of bathroom breaks."[234] Although the court considered "the obvious anatomical and biological differences between men and women and the unique hygienic needs of women, including those during menstrual cycles,"[235] the court suggested that it would have come to a different conclusion if the practice and conditions of the workplace were business necessities.[236] In the same way that employers may articulate a business necessity to excuse austere conditions in Title VII[237] cases, "[o]nce an individual has changed his or her status from civilian to military, that person's duties, assignments, living conditions, privacy, and grooming standards, are all governed by military necessity, not personal choice."[238]

More instructive to determine the baseline level of personal privacy are Title VII prison cases. Just as soldiers face reduced privacy expectations in a deployed environment or a combat zone,[239] courts found inmates have reduced privacy expectations due to security concerns and guards' Title VII equal employment rights. Courts have recognized a prison's obligation to provide female inmates the opportunity to briefly cover cell windows while changing clothes or using the toilet, and to provide translucent shower screens.[240] One court articulated the standard privacy the prison must provide as the ability to

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[233] *See* Johnson v. AK Steel Corp., No. 1:07-cv-291, 2008 WL 2184230, at *8 (S.D. Ohio May 23, 2008) (finding disparate impact by not providing bathroom breaks to crane operators); *see* Lynch v. Freeman, 817 F.2d 380, 388 (6th Cir. 1987) (finding disparate impact by company providing unclean portable toilets which caused female worker to hold her urine and develop a bladder infection).

[234] *Johnson*, 2008 WL 2184230, at *8.

[235] *See id.*

[236] *See* Lynch v. Freeman, 817 F.2d 380, 389 (6th Cir. 1987) ("TVA made no attempt to prove business necessity"); *see Johnson*, 2008 WL 2184230, at *8 ("defendants have not demonstrated a business necessity for the practice in question").

[237] Civil Rights Act of 1964 § VII, 42 U.S.C. § 2000e-2(a) (2006) (prohibiting gender discrimination in employment) [hereinafter Title VII]. Title VII does not apply to members of the armed forces for national security reasons. *See id.* § 2000e-2(g).

[238] *See* S. REP. NO. 103-112, at 191 (1993) (statement of GEN Gordon Sullivan, Chief of Staff of the Army) (summarizing the difference between military and civilian life in testimony on the military's homosexual policy).

[239] *Id.* (statement of GEN Powell) ("[T]he potential for involvement in actual combat frequently require[s] . . . living conditions [that] are spartan and primitive, characterized by forced intimacy and little or no privacy.").

[240] Forts v. Ward, 621 F.2d 1210, 1216–17 (2d Cir. 1980).

"be free from the unrestricted observation of their genitals and bodily functions" by those of the opposite gender.[241]

Military necessity requires a lower level of privacy considerations than would be acceptable for civilians or even for soldiers in a garrison or established forward operating base (FOB) environment. Even so, combat support units have a successful record of providing personal privacy while maintaining unit cohesion. The tools of personal privacy are as simple as ponchos, make-shift screens, make-shift bedpans, and sleeping bags.[242] Soldiers in mixed-gender units already share sleeping and living space in confined vehicles and spaces, and professional privacy considerations for each other. They do so while performing their mission, even while in as close proximity to the enemy as soldiers in direct ground combat units.

2. Personal Privacy and Sexual Tension

Mixed-gender combat support units have the same tactics, techniques, and procedures of privacy and the logistical tools to do so, even when they physically locate with direct ground combat units. The act of collocation does not change or inhibit their ability to continue to provide personal privacy for male and female soldiers. Mixed-gender units already physically locate with direct ground combat units.[243] Whether or not it is a violation of the current policy, military commanders view mixed-gender units as both necessary and beneficial to unit cohesion and mission accomplishment.[244]

The function and structure of a battalion staff are conducive to personal privacy provisions. The exclusion policy authorizes a mixed-

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[241] *See* Bowling v. Enomoto, 514 F. Supp. 201, 203–04 (N.D. Cal. 1981) (noting that "people do not undress, bathe, or defecate in the presence of strangers of the opposite sex").

[242] *See* Cook, *supra* note 148, at 64; *see* Catherine Ross, *Home Fires: Women's Work*, N.Y. TIMES, Feb. 15, 2010, http://opinionator.blogs.nytimes.com/2010/02/15/womens-work/?hp (describing how she and her fellow soldiers "perfected the art of getting dressed while completely encased in one's sleeping bag"); *see* Grad Course Survey, *supra* note 228.

[243] Author's personal observation and experience while serving as the BJA of the 2d Heavy Brigade Combat Team, 1st Infantry Division in Baghdad, Iraq 2008–2009. *See also* Farley, *supra* note 17, at 18–20, 39 (noting that some Army doctrine collocates mixed-gender Field Maintenance Teams with direct ground combat companies).

[244] *See, e.g.*, Cook, *supra* note 148, at 59.

gender BCT staff, but not a mixed-gender subordinate direct ground combat staff. The relevant difference between the two may be the amount of equipment and the number of soldiers on the staff,[245] but not the ability to provide privacy. Both staffs establish command posts using tents, vehicles, and other equipment.[246] Just as a combat support unit is able to use the equipment to meet the privacy needs of soldiers, so may a direct ground combat battalion staff.

Army doctrine has contemplated collocating mixed-gender field maintenance teams in the company trains of the direct ground combat company they support.[247] Doctrinally, the Army accepts and promotes women living and operating at the company level of direct ground combat units. The military leadership recognizes the valuable contributions of women[248] and finds the privacy capabilities at the company level adequate for unit cohesion and morale. Whether collocated with the company trains of a direct ground combat unit, or assigned to a direct ground combat company, the Army recognizes that direct ground combat units are capable of overcoming personal privacy concerns and issues of sexual tension.

Although more equipment for privacy is available at the company level than in a subordinate platoon, combat arms MOS soldiers are also capable of maintaining the baseline level of privacy. Infantry operations are not an obstacle to personal privacy. Men and women train side-by-side on infantry tasks and in infantry missions during the grueling Sapper Leader Course.[249] The Army trains mixed-gender ROTC cadets and Basic Officer Leader Course officers on infantry operations and in field conditions.[250] Soldiers recount successful and professional pairing into

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[245] *Compare* U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM paras. 2-7 to -9 (Aug. 2006) [hereinafter FM 3-90.6] (describing the BCT staff organization), *with* FM 3-90.5, *supra* note 112, ch. 2 (describing the CAB staff organization).

[246] *See* FM 3-90.6, *supra* note 245, ch. 3, sec. II (describing the makeup of the BCT command posts); *see* FM 3-90.5, *supra* note 112, para. 3-8 (describing the CAB command post organization).

[247] *See* Farley, *supra* note 17, at 39.

[248] *See* Conference Call with MG Cucolo, *supra* note 204 (noting that female soldiers are "absolutely invaluable.").

[249] SAPPER LEADER COURSE, SAPPER LEADER COURSE PAMPHLET 7 (Feb. 2011) [hereinafter SAPPER LEADER COURSE PAM.], *available at* http://www.wood.army.mil/sapper/document_frames/Sapper Pamphlet 2011.pdf.

[250] *See* U.S. Army Maneuver Ctr. of Excellence, *Basic Officer Leader Course II*, https://www.benning.army.mil/BOLC/index.htm (last visited Mar. 3, 2010) (describing

opposite gender battle buddy teams, sharing living and sleeping space in tents and vehicles, sharing space in fighting positions, and sharing use of latrines and bathing facilities.[251] Soldiers routinely string up ponchos, take turns in vehicles changing, change clothes in sleeping bags, use make-shift barriers, and generally find ways to maintain a baseline of personal privacy.[252]

Similarly, armored vehicle operations are not an obstacle to personal privacy. Just as COL Cooke's mixed-gender vehicles eliminated waste, the crew of a tank or a Bradley Fighting Vehicle (BFV) has the same capabilities for elimination and privacy. Just as the crew of a mixed-gender vehicle has the opportunity to sleep in and around the vehicle in sleeping bags that provide physical separation, the crew of a tank or BFV sleeps in and around the tank or BFV in individual sleeping bags. Just as combat support soldiers have "perfected the art of getting dressed while completely encased in one's sleeping bag,"[253] armor and mechanized soldiers can maintain privacy and dignity.

Military leaders though do not unanimously accept these living arrangements. One Armor battalion commander resisted COL Cook's recommended living accommodations with his attached maintenance support team (MST).[254] Instead of keeping the MST together, the Armor battalion commander crammed all men into a mixed MOS male tent, and put the female team leader with one other woman in a tent the same size as the men's.[255] Although mixed-gender tents increase cohesion and decrease discipline issues, the Armor battalion commander severed a team and forced cramped living conditions on the unit. In the end though, the Armor commander found a way to address the presence of women in his unit.

Ms. Donnelly argues that one of the reasons for excluding women from service on submarines is that the cramped living conditions do not allow for it.[256] In 2000, the Navy identified that living space was already

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the mixed-gender course, including a field training exercise, and advising candidates to read the manual for the infantry rifle platoon and squad); *see* Grad Course Survey, *supra* note 228.

[251] *See* Grad Course Survey, *supra* note 228.

[252] *Id.*; Ross, *supra* note 242.

[253] Ross, *supra* note 242.

[254] Cook, *supra* note 148, at 59.

[255] *Id.*

[256] Donnelly, *supra* note 146, at 859-60.

cramped on submarines and that accommodating mixed-gender crews would reduce the standards below an acceptable level.[257] However, on February 23, 2010, the Navy and the DoD notified Congress of its intent to open submarine service to women.[258] The Navy and DoD have now identified that it is possible to maintain unit cohesion and provide a baseline personal privacy even in the cramped living conditions of a submarine. The Navy's new position on female service on submarines undermines the exclusionist arguments that armor and infantry living conditions are unsuitable for mixed-gender units.

In 1993 testimony on the military's homosexual policy, then-Chairman of the Joint Chiefs of Staff, GEN Colin Powell, argued that allowing homosexuals to serve openly created sexual tension, violated personal privacy, and hurt unit cohesion because of the necessarily intimate living conditions.[259] In doing so, he equated homosexual integration with mixed-gender integration.[260] More recently, Retired GEN Powell said that "attitudes and circumstances have changed" in support of repealing the "Don't Ask, Don't Tell policy."[261] On November 30, 2010, the DoD's Comprehensive Review Working Group (CRWG) published its report and implementation plan.[262] Subsequently, Congress passed and President Barack Obama signed into law the "Don't Ask, Don't Tell Repeal Act of 2010."[263] The President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certified on July 22, 2011 that the armed forces are prepared for the implementation of the repeal of DADT.[264] Accordingly, DADT was effectively repealed on September 20, 2011.[265] If living conditions no longer create unmanageable personal privacy or sexual tension issues for direct ground combat units with openly gay, lesbian, or bisexual troops, then the living conditions should also no longer present an obstacle for mixed-gender direct ground combat units.

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[257] *Id.*
[258] Stewart & Cornwell, *supra* note 20.
[259] *See* S. REP. NO. 103-112, at 196 (1993) (statement of GEN Powell) ("The separation of men and women is based upon the military necessity to minimize conditions that would disrupt unit cohesion, such as the potential for increased sexual tension that could result from mixed living quarters.").
[260] *See id.* (statement of GEN Powell).
[261] Martina Stewart, *Powell in Favor of Repealing 'Don't Ask, Don't Tell'*, CNN, Feb. 3, 2010, http://www.cnn.com/2010/POLITICS/02/03/powell.gays.military/index.html.
[262] CRWG REPORT, *supra* note 21.
[263] Repeal Memo, *supra* note 21.
[264] Certification Memo, *supra* note 21.
[265] *Id.*

Similar to commanders of mixed-gender combat support units and Navy submarines, direct ground combat unit commanders are capable of the leadership and of providing the baseline personal privacy to maintain unit cohesion, reduce sexual tension, and reduce sexual misconduct. Accordingly, personal privacy and sexual tension are not exceedingly persuasive justifications for any of the prongs of exclusion.

G. Physical Requirements Justification

The Aspin Memo permits the services to restrict the assignment of women "where job related physical requirements would necessarily exclude the vast majority of women service members."[266] Accordingly, advocates of exclusion argue that women are physically inferior to men, and that women's lack of physical strength and stamina makes them unsuited for ground combat.[267] However, the Supreme Court in *Virginia* found that while physical differences may justify discrimination, the justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[268] Additionally, the Court found the state's justification of physical strength unpersuasive because "some women can meet the physical standards," and more specifically that "some women are capable of all of the individual activities required of VMI cadets."[269]

When assessing whether the physical capabilities of women as compared with the physical requirements of direct ground combat constitute an exceedingly persuasive justification, it is important to distinguish between evidence of actual performance and predictive evidence. Where "some women" have actually performed in "all of the individual activities required of"[270] soldiers in direct ground combat, as have women in combat support units in Afghanistan and Iraq, a court would likely apply *Virginia* to find the physical strength justification unpersuasive as it applies to that prong of direct ground combat.

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[266] Aspin Memo 1994, *supra* note 5.
[267] *See* BROWNE, *supra* note 141, at 21–22.
[268] United States v. Virginia, 518 U.S. 515, 533 (1996).
[269] *See id.* at 523, 541.
[270] HARRELL, 2007 RAND STUDY, *supra* note 9, at 143-46 (noting that as of August 2006, the Army has awarded the combat action badge to over 1,800 women); United States v. Virginia, 518 U.S. 515, 541 (1996) (finding the state's justification of physical strength unpersuasive because "some women can meet the physical standards," and more specifically that "some women are capable of all of the individual activities required of VMI cadets")

Alternatively, when using evidence that predicts how women will perform as a basis for exclusion, a court may apply the Doctrine of Deference and use the Aspin Memo's "vast majority" standard to evaluate the Government's physical requirements justification. The failure, though, of the Aspin Memo and other DoD publications to define "vast majority"[271] highlights the arbitrariness of the standard and its application. Courts that look to the way other jurists have used the phrase are likely to settle on eighty percent or more as the "vast majority" standard.[272] Accordingly, this article will consider predictive evidence exceedingly persuasive when it demonstrates that eighty percent or more of willing and capable women fail to meet the direct ground combat physical requirements.

In addition to the "vast majority" standard, courts will also likely consider how closely the test measures job performance and whether such a test could be part of the battery of other entrance exams to which military applicants are subject. Along those lines, excluding all women based on predictive evidence is likely unpersuasive when the services individually screen and test all applicants for a particular job, as is the case with Special Forces MOS and certain Special Operations Forces assignments.

Direct ground combat certainly requires physical strength, and the government is justified in excluding people who lack the required physical strength for direct ground combat. The greater issue, and the appropriate standard, is whether willing and otherwise capable women possess the required level of physical strength for a MOS or overall job

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[271] Aspin Memo 1994, *supra* note 5. A search by the author for "vast majority" in current Department of Defense publications results in five documents with the phrase, but none with a definition or clear meaning of the intended percentage. *See, e.g.*, U.S. DEP'T OF DEFENSE, INSTR. 1015.11, LODGING POLICY, at E2.10 (6 Oct. 2006).

[272] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 892-94 (1992) (rejecting Respondent's conclusion and selected controlling class, but accepting Respondent's assertion that the statute "imposes almost no burden at all for the vast majority of women seeking abortions," because the effects of the statute "are felt by only one percent of the women who obtain abortions."); Callery v. New York Dep't of Parks and Recreation, 326 N.Y.2d 640, 641 (N.Y. App. Div 1971) (noting that lifeguard height and weight standards excluded a "vast majority of women" of over 90%, considering that 90% did not meet minimum height and 60% did not meet minimum weight); Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works, 947 F.2d 292, 303 (7th Cir. 1991) ("the vast majority were women (over 80%)"); The People v. Randy Eugene Garcia, 2011 WL 3715535 (25 August 2011) ("Most telling, however, is that the vast majority of the final jury was female, to wit, 10 of 12, or 83 percent.").

performance, and not whether women, as a general proposition, are equally as strong as men.

1. Below Brigade and Collocation

The most persuasive data regarding whether the physical requirements of direct ground combat justify the below brigade prong or the collocation prong is the evidence of actual performance. All women soldiers and Marines already train for and perform basic warrior tasks, more than 1,800 women have earned the combat action badge, and "some women" have actually performed in "all of the individual activities required of" combat support soldiers in direct ground combat.[273] Exclusionists instead continue to argue that women lack the physical capabilities to perform the tasks necessary to repel the enemy's assault.[274] They argue that the below brigade prong and the collocation prong are important and necessary to reduce women's exposure to direct ground combat because women's physical limitations would lead to disastrous results.[275]

Professor Kingsley Browne points to the devastating enemy attack on the 507th Maintenance Company that led to the capture of six U.S. soldiers, including Private First Class Jessica Lynch and SPC Shoshana Johnson, as support for excluding women from combat support units that face exposure to direct ground combat.[276] Browne correctly observes that units besides Infantry and Armor must be prepared to fight.[277] After the incident with the 507th, the Army increased training and qualification requirements for personal and crew-served weapons for all soldiers, and established the Warrior Tasks on which all soldiers would train.[278]

Women already train on and perform direct ground combat tasks. The Warrior Tasks train all soldiers on weapons qualification, "reacting to indirect fire, reacting to direct fire, man-to-man contact (combatives),

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[273] HARRELL, 2007 RAND STUDY, *supra* note 9, at 143-46; United States v. Virginia, 518 U.S. 515, 541 (1996).
[274] *See* BROWNE, *supra* note 141, at 63–70.
[275] *Id.*
[276] *Id.* at 64 (suggesting the failure proved that training had been dumbed down by the introduction of women); *see* Farley, *supra* note 17, at 25 (describing the attack on the 507th Maintenance Company).
[277] *See* BROWNE, *supra* note 141, at 63.
[278] *See id.* at 25.

engaging targets during an urban operation, and entering a building during an urban operation."[279] The Marine Corps Combat Fitness Test includes an 880 yard run, a thirty pound ammo can lift, and a 300 yard maneuver under fire event that incorporates scurrying, high crawling, dragging a casualty, lifting and carrying a casualty, carrying two thirty pound ammo cans, accurately tossing a dummy grenade, and push-ups.[280]

Notwithstanding, Anna Simons, a professor at the Naval Postgraduate School, argues that women endanger soldiers' lives because they lack the strength and ability to carry their wounded male comrades to safety.[281] Krystyna Cloutier, a former Marine who has advocated for the creation of all-female platoons of combat troops, described her experience as a Marine in Iraq. Her own ninety pounds of combat gear was enough to "cause [her] hips to become numb, [her] lower back to ache, and blisters to form on [her] feet."[282] Elaine Donnelly also asserts that most women do not have the ability to "physically lift and evacuate a wounded infantryman or Marine who has been injured and might die without immediate medical help."[283]

Instead, the actual combat experiences of soldiers like SPC Monica Brown contradict such fears. SPC Brown earned her Silver Star while serving as a combat medic with a patrol of the 4th Squadron, 73d Cavalry Regiment, a direct ground combat battalion.[284] After the trail vehicle of the patrol hit an improvised explosive device (IED) and was engulfed in flames, and as the enemy began to fire small arms and mortars at the patrol, SPC Brown immediately moved to the burning vehicle under intense enemy fire.[285] At the vehicle, she treated two casualties, and as the enemy fire continued, she "used her body to shield the casualties from enemy fire, as well as the explosions of ammunition."[286] She assisted in moving the casualties to a more protected position, where she continued to use her body to shield the

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[279] *See* Putko, *supra* note 171, at 31 (noting that the training is incorporated into basic training).
[280] Powers, *supra* note 118.
[281] *See* HARRELL, 2007 RAND Study, *supra* note 9, at 21.
[282] Krystyna M. Cloutier, Note: *Marching Toward War: Reconnoitering the Use of All Female Platoons*, 40 CONN. L. REV. 1531, 1561 (2008).
[283] Donnelly, *supra* note 146, at 835.
[284] *See* Brown Citation, *supra* note 4.
[285] *Id.*
[286] *Id.*

wounded soldiers from the heavy fire.[287] On September 14, 2003, MAJ Kellie McCoy demonstrated her courage and strength in direct ground combat.[288] She was then an engineer platoon leader in Iraq, and she ran through enemy fire to save a wounded soldier, and then returned to the enemy's kill zone to rescue remaining wounded soldiers.[289] Actual performance of women in direct ground combat is more persuasive than and overcomes the asserted fears of exclusionists.

Women have also demonstrated the physical ability to save the life of another. All soldiers and Marines train on casualty evacuation, including the techniques to lift, carry, or drag a casualty.[290] In 1991, the Firefighter Combat Challenge began as a competition based on a job-related, physical-performance examination for firefighters developed by the University of Maryland with a 1975 grant from the U.S. Fire Administration.[291] In the individual competition, firefighters "climb[] a five-story tower, hoist[] and chop[] an item, drag[] hoses and rescue[] a life-sized 175-pound 'victim,' all while wearing their full bunker gear, including an air-breathing apparatus."[292] At the 2009 Scott Firefighter Combat Challenge, Air Force Staff Sergeant Jessica Packard, a woman and a firefighter from Goodfellow Air Force Base, Texas, scored the fastest course time among both genders, ranking her first in the Air Force and third in the world.[293]

Other women have demonstrated the strength and heroism to repel the enemy. One woman, given the alias of Private First Class (PFC) Silverina, was assigned as a driver in an Infantry battalion's maneuver platoon and effectively responded to an enemy attack in Afghanistan, as reported in February 2009.[294] The company executive officer's sanitized report details how PFC Silverina maneuvered her vehicle to establish fire

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[287] *Id.*; *see* Farley, *supra* note 17, at 26 ("Specialist Brown assisted moving the injured soldiers to a safer location and provided medical treatment while exposed to heavy fire.").
[288] Alvarez, *supra* note 16, at A1.
[289] *Id.*
[290] Putko, *supra* note 171, at 31; Powers, *supra* note 118
[291] Jared Council, *Firefighters Compete in Firefighter Combat Challenge*, COURIER PRESS.COM, 18 October 2010, http://www.courierpress.com/news/2010/oct/18/heated-rivalry/ [hereinafter Jared Council].
[292] Technical Sergeant Matthew McGovern, *Air Force Firefighters Demonstrate Skills at 2009 Scott Firefighter Combat Challenge*, U.S. AIR FORCE, 20 November 2009, http://www.af.mil/news/story.asp?id=123178858.
[293] *Id.*
[294] Farley, *supra* note 17, at 41.

superiority, "cross leveled ammunition throughout the platoon," and personally "fired one AT-4 killing two [enemy fighters] from 600 meters away and returned fire with her M4 throughout the engagement."[295]

These heroic examples, in addition to the 1,800 other women who earned the combat action badge, constitute exceedingly persuasive evidence that women actually do possess the physical capacity to serve in and around direct ground combat units, and effectively undermine the physical requirements justification for the below brigade and collocation prongs.

2. Conventional Combat Arms MOS

Soldiers in the conventional combat arms MOS fill the direct ground combat battalions with the mission to close with and destroy the enemy.[296] Mission accomplishment requires high upper body strength to lift tank rounds into the breach of a tank, change thrown tank track, lift a soldier's own body encumbered by a combat load off the ground, or kick in a door during a raid.[297] It also requires a high degree of physical stamina to load multiple rounds into a tank or to conduct a forced march to find, fix, and fight the enemy.[298]

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[295] *Id.*

[296] *See id.* at 21 (citing to the Modified Tables of Organization and Equipment for Infantry, Combined Arms Battalion, Reconnaissance Surveillance and Target Acquisition, and Fires Battalions). The Infantry and Armor Battalions have identical missions: "To close with and destroy enemy forces using fire, maneuver, and shock effect, or to repel his assault by fire and counterattack." *Id.* This definition closely mirrors the definition of direct ground combat. Additionally, women are excluded from the combat engineers MOS and assignment to combat engineer Sapper Companies due to the combat engineer direct ground combat mission. SAPPER LEADER COURSE PAM., *supra* note 249, at 5 (indicating that the engineer missions of a Sapper Company include specialized engineer and infantry tasks).

[297] *See* HERRES ET AL., *supra* note 76, at C-10 (describing Marine Corps infantry requirements); *see* U.S. DEP'T OF ARMY, SOLDIER'S MANUAL, MOS 19K M1/M1A1/M1A2 ABRAMS ARMOR CREWMAN: SKILL LEVEL 1, at 2-288, 2-505 (30 July 2004) [hereinafter STP 17-19K1-SM] (describing tasks for armor crewmen, including loading tank rounds and changing thrown tank track); *see* U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.8, THE INFANTRY RIFLE PLATOON & SQUAD para. 7-137 (Mar. 2007) [hereinafter FM 3-21.8] (instructing on a tactical raid).

[298] *See* STP 17-19K1-SM, *supra* note 297, at 2-505 (describing loading tank rounds); *see* FM 3-21.8, *supra* note 296, at para. D-58 (describing dismounted forced marches).

While the unconventional battlefields of Afghanistan and Iraq have created the environment for actual evidence of women in combat support MOSs engaging in direct ground combat, the exclusion policy has ensured that there is no evidence of women performing in the U.S. combat arms MOS. Accordingly, advocates of exclusion must use predictive evidence from various tests and studies. While women in the United States have not been assigned to combat arms MOSs, other nations have opened their combat arms positions to women. Additionally, U.S. women in the combat support MOS of engineers and military police (MP) not only have many of the same physical tasks for job performance as Infantry or Armor, they have actually performed those tasks in combat.

a. Actual Evidence

Women in Army MP units conduct some of the same direct ground combat tasks as men in combat arms MOS, including route security, cordon and search, and raid.[299] Despite SGT Hester's petite size, she and her MP squad used individual and crew served weapons to locate and close with the attacking enemy, and defeated the enemy with fire and maneuver.[300] In 2004 in Iraq, First Lieutenant Brittany Meeks, a female platoon leader of the 230th MP Company, 95th MP Battalion, led a quick reaction force, suppressed the enemy with fires, evacuated the wounded, called close air support, secured a downed Apache helicopter, and conducted cordon and search operations that resulted in the discovery of several weapons.[301] She and other female soldiers of the 95th MP Battalion "were extremely competent and able to successfully engage and defeat the enemy," while they "took charge, organized patrols, escorted convoys, manned checkpoints, defended base camps, and worked with the Iraqi Highway Patrol or police."[302]

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[299] Putko, *supra* note 171, at 32.
[300] *See id.* at 33 (referring to SGT Hester as a "petite MP woman"); *see* Hester Citation, *supra* note 2; *see* Aspin Memo 1994, *supra* note 5 (defining Direct Ground Combat).
[301] Twitchell, *supra* note 171, at 70.
[302] *Id.*

Women attend and graduate from the Army's Sapper Leader Course. The Sapper Leader Course is "a demanding 28-day course" that is the premier leadership course for Army combat engineers. Half of the training missions are infantry missions and half are engineer missions. The course includes basic combat patrolling techniques and battle drills, "urban operations, breaching, patrol organization and movement, and reconnaissance, raid and ambush tactics." Additionally, "[a]ll personnel must arrive in excellent physical condition," because a typical physical training session includes both upper and lower body exercises done to muscle failure, a "[d]istance run of 3 – 7 miles, at a 7.0 minute per mile pace" in formation, a requirement that all students complete "6 chin-ups, complete a 12-foot horizontal ladder, and climb a 30-foot rope before each meal and after each [physical training] session," and a requirement that all students "complete a 12-mile foot march, with weapon, [load bearing equipment] and 35 pound pack within 3 hours." In the end, Sapper Leader Course students complete the course as "hardened combat engineers [who] are better prepared to fight on today's modern battlefield with increased leadership skills."[303]

b. Predictive Evidence

In spite of persuasive actual evidence that some women are capable of many of the same individual physical job performance activities required of combat arms MOS soldiers, exclusionists continue to use predictive evidence to justify the combat arms MOS prong. Since even before the 1994 Aspin Memo, exclusionists have based their physical requirements argument on a study of Army Physical Fitness Test (APFT) data, the Army's previous use of the Military Entrance Physical Capacity Test (MEPSCAT), data from an Air Force lift study, and data from studies conducted by foreign militaries.

Title VII physical test cases provide a framework for evaluating minimum physical requirements tests and studies. Although Title VII does not apply to the armed forces,[304] the cases are instructive in determining what constitutes a fair evaluation of a person's ability to perform a job. When evaluating data against a minimum physical job requirement, "a discriminatory cutoff score must be shown to measure the minimum qualifications necessary to perform successfully the job in

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[303] SAPPER LEADER COURSE PAM., *supra* note 249, at 7-11.
[304] 42 U.S.C. § 2000e-2(g) (2006).

question," and the test itself must be "a reasonable measure of job performance."[305] When evaluating predictive data used to justify the combat arms MOS prong, the relevance of the evidence depends on how well it compares the strength or stamina required for actual job performance with the minimum qualification necessary for successful job performance.

(1) APFT

While some have called the APFT "the worst test for physical capabilities that you can imagine,"[306] it is the only established physical standard available in the military that also allows for a comparison between male and female results.[307] Soldiers who fail to meet the APFT minimum standards may face administrative action, including separation from the service.[308] The APFT uses push-ups to evaluate upper-body strength, sit-ups to evaluate core strength, and a two-mile run to evaluate

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[305] *See* Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 493 (3d Cir. 1999) (preventing employers with physical requirements from using unnecessarily high cutoff scores "to exclude virtually all women by justifying this facially neutral yet discriminatory practice on the theory that more is better"); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431, 432, 436 (1971) (establishing the burden in disparate impact cases for the employer to show its practice is "related to job performance"; "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used"; has "a manifest relationship to the employment in question"; and is "demonstrably a reasonable measure of job performance").

[306] Joe Gould, *Soldiers Want More Combat-Relevant PT Test*, ARMYTIMES.COM, July 20, 2010, http://www.armytimes.com/news/2010/07/army_pt_test_071810w/ (quoting Lieutenant General Mark Hertling, commander of the Army's Initial Military Training). Additionally, Command Sergeant Major John Troxell, the Army's I Corps Command Sergeant Major, developed Physically Mentally Emotionally Hard Gauntlet training because the APFT was not "designed for the rigors of combat." Lindsey Kibler*, I Corps CSM Builds Physically, Emotionally Strong 'Tractical Athlete'*, DVIDSHUB.NET, April 29, 2011, *at* http://www.dvidshub.net/news/69602/corps-csm-builds-physically-emotionally-strong-tactical-athletes.

[307] In contrast, the U.S. Marine Corps uses a different upper-body event for men than for women. U.S. MARINE CORPS, ORDER P6100.12, MARINE CORPS PHYSICAL FITNESS TEST AND BODY COMPOSITION PROGRAM MANUAL 2-9 (10 May 2002) [hereinafter U.S. MARINE CORPS, ORDER P6100.12]. Male Marines are tested on pull-ups, but female Marines are tested on the arm-hang. *Id.*

[308] U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 1-24c(2) (18 Dec. 2009) [hereinafter AR 350-1] ("Soldiers must meet the physical fitness standards (as measured during the Army Physical Fitness Test (APFT)) set forth in FM 21–20 and this regulation. Soldiers who are unable to meet these standards or the mission-related physical fitness standards required of their duty assignment may be subject to administrative action.").

strength and stamina.[309] Soldiers must score a minimum of sixty points on each of the tested events.[310] The required minimum number of push-ups to be performed in two minutes and sit-ups in two minutes varies by age of the soldier, as does the speed at which the soldier must run two miles.[311] The minimum number of required push-ups is greater for men than for women, and the minimum required time to complete the two-mile run is faster for men than for women, but the number of sit-ups is the same for both genders.[312] Thus, a male soldier and a female soldier of the same age will achieve the same score for the same number of sit-ups, but the female does not have to perform as many push-ups or run as fast as the male to achieve the same score. The minimum number of push-ups and sit-ups and the minimum time required for the run decrease as a soldier gets older and moves to different age brackets.[313]

The 1992 Presidential Commission considered the report of Lieutenant Colonel (LTC) W.J. Gregor, who evaluated published studies and data on Army ROTC cadets.[314] He concluded that cadet women, who were physically superior to Army women in general, could not achieve the basic male physical standard on the APFT.[315] He found only three percent of the cadet women could achieve the male mean, and sixty-eight percent of the cadet women failed under the same-age male standards altogether.[316]

First, this APFT data fails to demonstrate that a "vast majority" of women were incapable of meeting the minimum physical standard for job performance. The test data demonstrated that only sixty-eight percent of the cadet women failed to meet the minimum standard required of the men their same age.[317] A court applying the "vast majority" standard of eighty percent is not likely to find a failure of sixty-eight percent exceedingly persuasive.

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[309] U.S. DEP'T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS TRAINING para. 14-1 (1 Oct. 1998) [hereinafter FM 21-20].
[310] *Id.* at 1-15. Soldiers in basic training need only score fifty points per event. *Id.*
[311] *See* DA Form 705, *infra* note 322.
[312] *See id.*
[313] *See id.*
[314] HERRES ET AL., *supra* note 76, at C-14.
[315] *Id.*
[316] *Id.*
[317] *Id.*

Second, this APFT data compared the performance of cadet women against the minimum standard required of men the same age, rather than the minimum standard required of men presumed physically capable of combat arms service. Because the military presumes that all men are qualified for service in the combat arms MOS,[318] a male who passes the basic physical fitness test is presumed physically qualified to serve in the conventional combat arms MOS.[319] Following congressional authorization, the Army in 2006 increased the maximum enlistment age for new recruits to forty-two years old.[320] Accordingly, soldiers like Jeffery Williamson enlisted in the infantry at age forty-one. Williamson, who is now forty-five, serves as an infantry sergeant in a scout platoon in the 101st Airborne Division.[321] In raising the age limit, the Army set the physical standard and minimum qualification necessary for the combat arms MOS as at least that required of a male age forty-two: thirty push-ups in two minutes, thirty-two sit-ups in two minutes, and a two-mile run time of eighteen minutes and forty-two seconds.[322] If the Army considers a forty-two-year-old man capable of service in the combat arms, then the minimum physical standard to which he is held on the APFT should also be the minimum physical standard to which a female soldier is held.

Third, evidence that the women held to one standard failed to meet an unknown higher standard is an unpersuasive justification for exclusion. The cadet women took their test knowing the number of

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[318] Neither the Army nor the Marine Corps have a specific physical test for assignment to a conventional combat arms MOS. *See id.* at C-16 (indicating no Marine Corps MOS specific test); *see* U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS chs. 2, 3 (14 Dec. 2007) (describing the physical standards for Enlistment and for Retention, none of which include MOS specific testing); *see generally* U.S. DEP'T OF DEF., INSTR. 6130.4, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE ARMED FORCES (18 Jan. 2005) (describing standards for all the services).

[319] *See, e.g.*, Stew Smith, *Army Basic Training PFT*, MILITARY.COM, http://www.military.com/military-fitness/army-fitness-requirements/army-basic-training-pft (last visited Mar. 3, 2010) (describing the physical requirements to attend infantry training); *see* AR 350-1, *supra* note 308, app. G, para. G-9a(13)(a) ("Fitness testing ensures the maintenance of a base level of physical fitness essential for every Soldier in the Army, regardless of MOS or duty assignment."); *see* FM 21-20, *supra* note 309, ch. 14 (describing the Army Physical Fitness Test); *see* U.S. MARINE CORPS, ORDER P6100.12, *supra* note 307, at 2–3 (describing the Marine Corps physical fitness standards).

[320] Burgess, *supra* note 19. While Congress increased the age from thirty-five to forty-two, the Army initially raised the age to forty, and then later to forty-two. *Id.*

[321] Saeed Shah, *Age No Limit for Infantryman*, CHI. TRIB., Sept. 26, 2010, at 40.

[322] *See* U.S. Dep't of Army, Form 705, Army Physical Fitness Test Scorecard (June 1999) [hereinafter DA Form 705] (establishing the required repetitions and time for different scores for different age groups and genders).

repetitions and the speed they needed to run based on their scale. Later pointing out that the women did not meet a higher standard is like moving the football goal posts after the ball has been kicked and calling it a miss. The data might be persuasive if it demonstrated that women failed to meet a known standard.

Alternatively, data demonstrating that women passed the male standard, even when not held to that standard, persuasively demonstrates that the physical requirements justification lacks basis. Recent cadet APFT data demonstrate that a vast majority of willing and capable women met or exceeded the minimum physical standard for direct ground combat assignment. Of the 206 women in their first year at West Point who took the APFT in the fall of 2011, more than ninety-one percent passed the test at the forty two-year-old standard for men, with more than ninety-eight percent passing the run, and more than ninety-two percent passing the push-up event.[323] In comparing the 138 cadet women in their third year who tested in the spring of 2010 to the forty-two-year-old standard for men, over ninety-six percent passed, with more than ninety-eight percent passing the run, and over ninety-seven percent passing the push-up event.[324]

Even comparing the women's data against the higher seventeen-year-old male standard[325] fails to support exclusion. At the seventeen-year-old male standard, a fifty-four percent simple majority of the first-year cadet women did not meet this standard, but over fifty-two percent of the third-year cadet women passed at the same standard.[326] Additionally, at this higher male standard, over sixty-four percent of the first-year women passed the run and over sixty-six percent passed the push-up event, while over fifty-seven percent of the third-year women passed the run and over eighty-four percent passed the push-up event.[327] Rather than provide an exceedingly persuasive justification for the combat arms MOS prong, the APFT data, especially using recent results, demonstrates how the physical requirements justification is merely a manufactured and contrived excuse for exclusion.

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[323] *See* 2010–2011 U.S. Military Academy APFT Data (on file with author).
[324] *See id.*
[325] The minimum standard for men ages seventeen to twenty-one is forty-two push-ups in two minutes, fifty-three sit-ups in two minutes, and a two-mile run time of fifteen minutes and fifty-four seconds. *See* DA Form 705, *supra* note 322.
[326] *See id.*
[327] *See id.*

(2) MEPSCAT

Exclusionists also point to the Army's previous use of the MEPSCAT.[328] The Army developed the MEPSCAT after 1977, using Department of Labor lifting standards to evaluate an enlistee's physical capability to perform specific MOS strength tasks.[329] However, the Army eliminated the MEPSCAT after disagreements over whether it should "reflect peacetime or wartime requirements."[330] Brian Mitchell, an author who advocates for full exclusion of women from the armed forces, points to early MEPSCAT results at Fort Jackson, South Carolina.[331] He asserts that the data showed only eight percent of women were able to perform work rated heavy, and only three percent of women were able to perform work rated very heavy.[332] He points out that of those women working in the heavy or very heavy MOS, forty-nine percent did not complete their enlistment and suggests that those who did merely performed duties unrelated to their MOS.[333]

However, he does not produce the evidence to support his conclusion that women did not perform their MOS duties. If only forty-nine percent of women failed to complete their enlistment, as opposed to eight percent, then the MEPSCAT did not likely correlate well with the actual job requirements. Instead, the data demonstrates that more than half of the women in heavy and very heavy MOS remained in their MOS, and a failure of forty-nine percent is not even a majority, let alone a "vast majority." Rather than evaluate an applicant's capability to perform in combat, the test was designed to improve a recruiter's ability to assign the right person with the right MOS in peacetime.[334] In addition, the MEPSCAT used Department of Labor lifting standards, rather than standards developed by the Department of Defense, without evidence that they represented a "reasonable measure of job performance." Instead, the MEPSCAT was eliminated because it did not fully or accurately test job requirements. Finally, if the MEPSCAT was an accurate predictor of performance, then it should be easily reinstated.[335]

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[328] *See* HERRES ET AL., *supra* note 76, at C-13.
[329] *Id.*
[330] *Id.* at 7.
[331] MITCHELL, *supra* note 1, at 109–10.
[332] *Id.* at 110.
[333] *Id.*
[334] *See* HERRES ET AL., *supra* note 76, at C-13.
[335] As previously mentioned, the MEPSCAT was eliminated, not because of the cost or difficulty in implementing it, but because the test did not reflect the right standard.

Accordingly, the MEPSCAT data is an unpersuasive justification for exclusion.

(3) Air Force Lift Study

The 1992 Presidential Commission considered the results of an Air Force lift study that tested lifting capacity. The study found that all men but only about thirty percent of women could lift seventy pounds; over ninety percent of men but less than ten percent of women could lift ninety pounds; and only sixty-eight percent of men but less than one percent of women could lift the maximum amount of one hundred and ten pounds.[336] While the study demonstrates that more men than women can lift different weights, it fails to demonstrate that women lack the physical strength required of a conventional combat arms MOS. Considering that all men are presumed capable of the physical requirements of direct ground combat, the relevant data pertains to the failure of women to lift the amount all men can lift. Accordingly, the study merely demonstrates a failure of seventy percent of the women tested, less than the eighty percent required to constitute a "vast majority." Even though an Air Force study does not clearly correlate with conventional combat arms MOS job requirements, if it were an accurate representation, then implementation of the simple lift test as part of the other entrance exams for applicants would obviate any requirement to exclude all women. Accordingly, the Air Force lift study is likely not an exceedingly persuasive basis to justify exclusion.

(4) Foreign Military

To further support exclusion, Professor Browne points to a report of an Israeli armored brigade commander who allowed two female tank instructors to join the male crewmen in advanced tank crew training.[337] The commander related that the women were physically exhausted after loading a few tank shells, and therefore quit from exhaustion.[338] However, the failure of two women thrown into the middle of a training program amounts to an interesting anecdote, but is not evidence to justify exclusion. Professor Browne also cites to a 2003 Israeli study that

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[336] HERRES ET AL., *supra* note 76, at C-15 to 16.
[337] BROWNE, *supra* note 141, at 66.
[338] *Id.*

"recommended that women continue to be excluded from infantry, armor, and artillery units because of their weakness."[339] Although the study found that women could not safely carry as much a percentage of their bodyweight or walk as far as men, the Israel Defense Forces (IDF) decided to increase the number of women in specialized combat infantry units.[340] More recently, a 2007 study, commissioned by the head of the IDF personnel department, recommended that women be allowed to serve in all army units.[341] A court is not likely to find the overly broad and generalized 2003 study exceedingly persuasive, especially when it was partly ignored and subsequently contradicted.

Notwithstanding the Israeli reports, the trials of other nations are instructive. Professor Browne points to the British 2002 evaluation of women's ability to serve in ground combat positions.[342] While the British Army's director of infantry suggested the trials had been watered down to allow more women to pass, the Ministry of Defence countered that "the tests were not intended to recreate actual battle conditions as this would have put the women, who are not trained for infantry warfare, at an unfair advantage."[343] Most relevant is that the British ultimately concluded that "evidence of women's lower physical capacity should not, in itself, be a reason to maintain" their policy of excluding women from ground close-combat roles. Instead, they kept their exclusion policy, after evaluations in 2002 and 2010, based on concerns about unit cohesion.[344]

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[339] *Id.* at 68.

[340] Abraham Rabinovich, *Israeli Women Won't See Combat*, WASH. TIMES, Oct. 20, 2003, at A01 (reporting that "the medical study has determined [women] are, after all, the weaker sex"); Margot Dudkevitch, *IDF to Increase Women in Combat Roles*, JERUSALEM POST, Oct. 20, 2003, *available at* http://www.thehighroad.org/archive/index.php/t-45751.html. The specialized combat unit, known as a Caracal or Wildcat unit, "is a highly operational combat force which combines both male and female soldiers, tasked with guarding the borders of Israel with Egypt and Jordan. The unit undergoes training like any combat infantry…." *See* Dudkevitch, *supra*; Women in the IDF, Israel Defense Forces, http://idfspokesperson.com/2011/03/07/women-in-the-idf/ (posted Mar. 7, 2011).

[341] *IDF Commission to Recommend Women Soldiers Serve in All Units*, HAARETZ SERVICE, Sept. 17, 2007, http://www.haaretz.com/news/idf-commission-to-recommend-women-soldiers-serve-in-all-units-1.229482.

[342] *Id.* at 65.

[343] *Row Over Frontline Women Troops*, BBC NEWS, Mar. 26, 2001, http://news.bbc.co.uk/2/hi/uk_news/1243288.stm.

[344] UK 2010 REPORT, *supra* note 12; *see* Part III.C.

In 1987, Canada evaluated women in infantry training, and graduated one out of 103, but "none of the women were prescreened or required to meet any minimum standard before being assigned to a unit."[345] Though the results indicate a vast majority of over ninety-nine percent failed, the small sample size was made up of willing but not otherwise fit women. More importantly, the tests led to Canada opening all combat roles to women in 1989, and women have actually served in ground combat roles in Afghanistan.[346]

In the 1980s, Denmark tested integration of women into ground combat roles, but thirty-nine of the seventy women tested, amounting to fifty-six percent, left early due to the physical difficulties of the training program.[347] This again was a small sample size, but only a mere majority, not a vast majority, failed the Danish tests. Denmark subsequently altered its physical standards and admitted women into combat roles.[348]

The collective evidence demonstrates that women are physically capable of entering the combat arms MOS. The successful performance of women actually executing combat arms MOS tasks in direct ground combat, the data demonstrating that over ninety percent of West Point cadet women exceeded the minimum physical standard for the combat arms MOS, and the results of trials and implementation in the United Kingdom, Canada, and Denmark outweigh contrary anecdotes and inconclusive or unrelated tests. The evidence in total supports the conclusion that any physical limitation of women is not an exceedingly persuasive justification for exclusion. Instead, an arbiter could conclude that willing and fit women are physically capable of serving in the conventional combat arms MOS.

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[345] HERRES ET AL., *supra* note 76, at C-23.

[346] *See Women in the Canadian Military*, CBC NEWS, May 30, 2006, http://www.cbc.ca/news/background/cdnmilitary/women-cdnmilitary.html (noting that Canada opened all positions, including submarines, in 2000). In 1989, Canada added Private Heather R. Erxleben as the first female Regular Force infantry soldier. *Id.* In 1991 the first female officers in the combat arms graduated from artillery training. *Id.* About fifteen percent of the Canadian military are women and two percent of Canadian combat troops are women. *Id.*

[347] HERRES ET AL., *supra* note 76, at C-24.

[348] *Id.* at C-23.

3. Special Forces and Special Operations

As opposed to the conventional combat arms MOS, the Special Forces MOS does have a specific entrance physical standard and qualification course.[349] Similarly, assignment to a Special Operations unit, like an Army Ranger battalion, requires a special qualification earned at an Army school, and the units include soldiers with conventional combat arms MOS and combat support MOS.[350] Whether it is assignment to a Ranger battalion or the Special Forces MOS, permanent assignment requires a physical screening and completion of a physical qualification course. Because the Army already individually tests a soldier to ensure that soldier meets the "qualifications necessary to perform successfully the job in question," predictive evidence is unnecessary and unpersuasive to justify excluding an entire class of soldiers from Special Forces MOS and Special Operations unit assignment.

Soldiers assigned to the Special Forces MOS include "highly specialized elements to accomplish specially directed strategic missions in times of peace, conflict, and war, in support of national interests and/or security . . . . Training for, and participation in, these missions is arduous, somewhat hazardous, and often sensitive in nature."[351] Many of the physical requirements of the Special Forces MOS likely exceed the capability of a vast majority of men and women. Professor Browne argues that the relevant physical differences between men and women include muscular strength, size, speed, and endurance.[352] He argues that men are physically superior to women, as evidenced by the performance of elite athletes.[353] Just as the sports that require size, strength, and speed separate male athletes from female athletes, so should the armed forces.[354] As described in Sean Naylor's *Not A Good Day To Die*, Special Forces operators in elite units are expected to perform at extremely high physical standards in combat situations, climbing up and down mountains over two kilometers high, carrying "eighty-pound rucksacks

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[349] AR 614-200, *supra* note 26, para. 5-5c(7).
[350] *See id.* paras. 5-3 to -4; *see* U.S. SPECIAL OPERATIONS COMMAND, FACT BOOK 4, 7, 11–13 (n.d.) (last visited Mar. 3, 2010) [hereinafter FACT BOOK], *available at* http://www.socom.mil/SOCOMHome/newspub/pubs/Documents/FactBook.pdf (describing the mission and organization of Special Operations Forces).
[351] AR 614-200, *supra* note 26, para. 5-2c.
[352] BROWNE, *supra* note 141, at 22.
[353] *Id.* at 19, 25, 26.
[354] *Id.* at 19; FACT BOOK, *supra* note 348 (describing the various missions).

uphill through thick snow at high altitude," while trying to avoid detection by the enemy.[355] Special Forces conduct the most "physically demanding operations undertaken by the military."[356]

For assignment in the Special Forces MOS, a soldier must meet screening requirements, pass the Army's Special Forces Assessment and Selection (SFAS) course, and then complete the Special Forces Qualification Course (SFQC).[357] All phases include some evaluation of an applicant's physical capabilities in order to determine whether the applicant meets the "qualifications necessary to perform successfully" in the Special Forces MOS.[358] The SFAS Program requires soldiers to climb obstacles (by use of a rope) 20 to 30 feet high, swim while in uniform, and travel great distances cross-country while carrying a rucksack with a minimum of 50 pounds."[359]

The Army excludes women from assignment to Ranger units, even though combat support MOS and combat arms MOS soldiers fill Ranger assignments. Not all soldiers must be Ranger qualified for assignment, but must complete the physically rigorous Ranger School training for permanent assignment.[360] Even before attending Ranger School, applicants must meet screening requirements to be "ranger-qualified."[361] Additionally, Ranger School is open to all combat support MOS and combat arms MOS male soldiers for service in all types of units, because the school now serves as a leader-training course for the entire Army as

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[355] SEAN NAYLOR, NOT A GOOD DAY TO DIE: THE UNTOLD STORY OF OPERATION ANACONDA 5, 109–17 (2005) (referring to the Delta Special Operators as "athlete-warriors").
[356] HERRES ET AL., *supra* note 76, at 34 (mentioning Special Operations Forces).
[357] AR 614-200, *supra* note 26, para. 5-5.
[358] *Id.*
[359] U.S. ARMY RECRUTING COMMAND, PAM. 601-25, IN-SERVICE SPECIAL FORCES RECRUITING PROGRAM (OFFICER AND ENLISTED) para. 4-2 (14 Nov. 2006).
[360] AR 614-200, *supra* note 26, para. 5-4. All combat arms MOS soldiers and the traditional combat support MOS soldiers in the grade of E-5 and above must attend Ranger training prior to assignment to a Ranger unit. Soldiers E-4 and below and traditional combat service support MOS soldiers are assigned to a Ranger unit, and then attend Ranger training once they meet the Ranger School requirements. *Id.* para. 5-4i, j. The physical requirements of Ranger School are rigorous. Stew Smith, *Preparing for Army Ranger School*, MILITARY.COM, http://www.military.com/military-fitness/army-special-operations/army-ranger-school-prep (last visited Mar. 1, 2010) (describing the minimum requirements for Army Ranger School and the recommended physical standard for achieving success).
[361] AR 614-200, *supra* note 26, at para. 5-4e(3).

much as it is a qualification course for assignment to a Ranger unit.[362] A soldier need only be male to apply for and undergo screening. Accordingly, women are denied the ability to attend Ranger School, even though they are allowed to attend the physically rigorous Sapper Leader Course that includes infantry missions, and even though one of the purposes of Ranger School is to produce leaders for the entire Army in all MOSs. The individual physical screening process required to attend Ranger School and the rigorous physical test of Ranger School undermine the physical requirements justification to exclude women from Ranger School attendance and Ranger unit assignments.

Soldiers must individually pass physically demanding screening, testing, and training in order to earn an assignment to either a Special Forces MOS or a Special Operations unit. It is therefore irrelevant whether a vast majority of women servicemembers are capable of the job-related physical requirements for those assignments. It is only relevant whether an individual woman passes the tests at the set standards. Accordingly, the physical requirements of the Special Forces MOS and Special Operations units are unpersuasive justifications for all prongs of exclusion.

4. The Wounded Warrior Contradiction

While exclusionists argue that the weakness of women endangers their fellow soldiers in combat, the Army assigns wounded warriors to direct ground combat units below the brigade level and deploys them to combat. MAJ David Rozelle, then a captain, lost his leg below the knee in Iraq in June 2003 when an IED destroyed his vehicle.[363] In June 2004, MAJ Rozelle demonstrated the courage and strength to return to combat in Iraq as a direct ground combat company level commander in the 3rd Armored Cavalry Regiment.[364] "Other amputees who have returned to

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[362] *See* Message, R091738Z Feb 05, Dep't of the Army Washington, DC, subject: ALARACT 028/2005, Selection and Scheduling of Soldiers for United States Army Ranger School para. 1 [hereinafter Ranger School Guidance] (indicating that soldiers may attend Ranger School even if they are not assigned against a Ranger assignment); *See* Ranger Training Brigade, Ranger School Brief slide 5, https://www.benning.army.mil/rtb/ranger website brief.ppt (last visited Mar. 4, 2010) (describing the Ranger Training Brigade mission as "Produce as many Ranger and RSLC leaders as possible within standards.").

[363] CAPTAIN DAVID ROZELLE, BACK IN ACTION: AN AMERICAN SOLDIER'S STORY OF COURAGE, FAITH, AND FORTITUDE 1–7 (2005).

[364] *Id.* at 227.

combat, ranging from infantry grunts to special forces soldiers, have conducted door-to-door searches, convoy operations and other missions in [Iraq and Afghanistan]."[365] Some estimate approximately twelve amputees have returned to duty in the combat zones of Iraq and Afghanistan.[366]

If an amputee has the physical capacity for assignment to a direct ground combat battalion or to perform direct ground combat tasks in a combat arms MOS, then a physically fit woman surely has the physical capacity. If the Army has the capability to individually determine whether a wounded warrior is physically capable of returning to duty in a combat arms MOS, then the Army has the capability to individually determine whether a woman is physically capable of serving in that combat arms MOS in a way that exclusion of an entire class is unnecessary. The amazing heroism of the wounded warriors who return to combat is beyond praiseworthy; however, this wounded warrior contradiction demonstrates the fallacy inherent in arguing that direct ground combat physical requirements justify female exclusion. Generalizations and stereotypes of female physical strength limitations only serve to perpetuate perceptions of inferiority, and fail to persuasively justify exclusion under all prongs of exclusion.

IV. Ending Exclusion

We're going to integrate the entire force.[367]

While the exclusion policy violates the Equal Protection clause of the U.S. Constitution, there are also several policy reasons to open the doors to women. Ending exclusion restores the integrity of the merit-based nature of the armed forces, improves leadership diversity and career advancement opportunities, and removes the confusion associated with an arbitrary definition of combat and who participates in combat. In consideration of fairness and military readiness benefits, the Secretary of the Navy in April 2011 announced his opposition to any gender-based

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[365] Michelle Roberts, *Amputee Soldiers Return to Active Duty*, HUFFINGTON POST, May 30, 2007, http://www.huffingtonpost.com/huff-wires/20070530/amputee-soldiers/.
[366] David Zucchino, *A Long Walk Back: A Year after Losing His Leg in Iraq, A Marine Is Again in a Combat Zone*, L.A. TIMES, Aug. 6, 2008, at 1.
[367] Sam Fellman, *SECNAV: All Communities Should Be Open to Women*, NAVY TIMES, Apr. 14, 2011, at 24 (quoting Sec'y of the Navy Ray Mabus).

ban in the Navy.[368] He asserted that "women ought to have whatever opportunities men do."[369] He further explained that the Navy planned to evaluate how its integration of female officers on submarines goes in order to determine the course for further integration of women and opening more assignment opportunities to women.[370] In doing so, he suggested that the Department of the Navy, including the Marine Corps and the SEALs, may consider opening direct ground combat doors to women.[371]

According to Dr. Lawrence Korb, a senior fellow at the Center for American Progress "with an extraordinary background in military preparedness and national security issues," whom the court in Log Cabin Republicans v. United States found to be "an extraordinarily well-credentialed and powerfully credible witness," the merit-based nature of the military contributes to military preparedness.[372] He asserted that "in order for the military to perform its mission successfully, it must mold persons from vastly different backgrounds who join it into a united and task-oriented organization."[373] He testified that 10 U.S.C. § 654, commonly known as Don't Ask, Don't Tell, "detracts from the merit-based nature of the [military] organization, because discharges under [10 U.S.C. § 654] are not based on the servicemember's failure to perform his or her duties properly, or on the effect of the soldier's presence on the unit's morale or cohesion."[374] In the same way, the exclusion policy undermines the military meritocracy because exclusion is not based on the willing and capable soldier's failure to perform her duties properly, or on the effect of her presence on the unit's morale or cohesion. She is not excluded simply because she is a woman, but because she is presumed incapable. Accordingly, ending the exclusion policy increases military readiness and effectiveness by restoring confidence in the merit-based nature of the military.

In March 2011, the Military Leadership Diversity Commission (MLDC) concluded that eliminating the exclusion policy would enhance military performance by eliminating barriers to career advancement for

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[368] *Id.*
[369] *Id.*
[370] *Id.*
[371] *Id.*
[372] Log Cabin Republicans v. United States, Case No. CV 04-08425-VAP (Ex), 46 n. 26 (C.D. Cal. 2010).
[373] *Id.* at 49.
[374] *Id.*

women, and increase the gender diversity of senior leadership.[375] The MLDC further recommended that DoD and the services eliminate the exclusion policy in a time-phased approach, by first eliminating the collocation and below brigade rationales, and then taking "deliberate steps in a phased approach to open additional career fields and units involved in 'direct ground combat' to qualified women."[376] The phased approach would allow the services the opportunity to think through all potential issues, "including how to best implement new policies."[377] Because the exclusion policy effectively bars women from entering the career fields and units associated with advancing to general officer grades, "women [are] at a disadvantage compared with men in terms of career advancement potential."[378] While not an absolute bar to advancement, the exclusion policy is "a structural barrier whose removal could help improve both the career advancement potential of qualified women and, ultimately, the demographic diversity of senior leaders."[379]

Additionally, confusion regarding the exclusion policy undermines readiness and hurts veterans. As reported by the RAND Study, many commanders are confused about the policy and its application.[380] Additional confusion regarding whether women actually engage in ground combat has contributed to the Veteran's Administration inconsistently providing benefits to men compared with women combat veterans.[381] Eliminating the prongs of exclusion would provide clarity for military commanders and ensure women veterans are treated with the respect that they earned in direct ground combat.

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[375] MILITARY LEADERSHIP DIVERSITY COMMISSION, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY, EXECUTIVE SUMMARY 7, 13, 19–20 (Mar. 15, 2011) [hereinafter MLDC FINAL REPORT] (on file with author).

[376] *Id.* at 19–20. Military Leadership Diversity Commission advocated not lowering standards with the elimination of the Exclusion Policy. *Id.* at 71.

[377] *Id.* at 73. While a majority of MLDC Commissioners advocated a phased approach, a small number of Commissioners "favored further study," and another small number "would have preferred a more forceful recommendation to immediately eliminate the policies." *Id.*

[378] *Id.* at 74.

[379] *Id.*

[380] HARRELL, 2007 RAND STUDY, *supra* note 9, at 19.

[381] Meg McLagan & Daria Sommers, *The Combat Ban and How It Negatively Affects Women Veterans*, Mar. 22, 2010, at http://www.pbs.org/povregardingwar/conversations/women-and-war/the-combat-ban-and-how-it-negatively-affects-women-veterans.php; Zinie Chen Sampson, *Report: Women Missing Out on Post-War Benefits*, Jan. 10, 2011, at http://carenetwv.org/?content=activity-new&articlenumber=52.

These policy reasons make it even more appropriate that the executive or legislative branches end the exclusion policy, rather than wait for a proper plaintiff and a court ruling. Accordingly, the services, the DoD, and Congress all have roles to play in ending a policy that degrades military capability. While the Army and the Navy may take immediate action, the DoD should begin by establishing a gender integration oversight panel[382] to ensure effective integration of women while maintaining the high military standards of the U.S. ground forces. The oversight panel could function in a similar way to the DoD Comprehensive Review Working Group (CRWG), established by Secretary of Defense Robert Gates to develop an implementation plan for new policy following the repeal of DADT.[383] In the same way, the DoD gender integration oversight panel should develop a department-wide implementation plan for the repeal of each prong of the exclusion policy and the opening of direct ground combat roles to women.[384] Because the exclusion policy is instantly unconstitutional, some may advocate immediate implementation of gender-neutral assignment policies.[385] On the other hand, opening ground combat roles to women represents a cultural change in the armed forces, and eliminating the policy while simultaneously implementing an orderly, sequenced, and deliberate change is likely a constitutional solution that accounts for the important governmental objectives of ensuring that "all potential issues, including how to best implement the new policies, can be thought through."[386]

A. Ending Collocation and Opening Ranger School

The collocation argument's destiny is in the hands of the Army and the Navy, as long as they notify Congress through the Secretary of Defense that they intend to change their assignment policies. In addition to the Secretary of the Navy and the MLDC, several senior Army

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[382] *Cf.* Keenan, *supra* note 193, at 24 (recommending a "DoD-congressional commission [to] examine the roles of women in the 21st century military").

[383] *See* Memorandum from Sec'y of Def. Robert Gates, to the Gen. Counsel and Commander, U.S. Army Europe, subject: Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. § 654 (2 Mar. 2010) [hereinafter CRWG Terms of Reference].

[384] The purpose of the oversight panel would not be to determine whether integration should happen, but how to best implement integration. *See id.* (indicating that the CRWG's purpose is not to determine whether repeal should happen, but to assess implications of repeal and develop an implementation plan for any new statutory mandate).

[385] *See* MLDC FINAL REPORT, *supra* note 375, at 73.

[386] *See id.*

leaders, including 165 students of the 2006 graduating class of the U.S. Army War College, already advocate changing or ending the collocation justification for gender exclusion.[387] Additionally, collocation is the most clearly unconstitutional justification for exclusion. All units are subject to attack and there are no rear areas. Therefore, the collocation justification accomplishes no important objective.[388] Instead, it inhibits military effectiveness and confounds military leaders.

The Army should also immediately open Ranger School to all genders, just as it has opened the course to all male MOSs, and just as the Sapper Leader Course is open to all genders. While ending collocation would require congressional notification, opening Ranger School to both genders would not.[389] If the Army is serious about having women leaders, then it should put willing and capable women to the test in one of the Army's most challenging leadership courses. However, once any of the physical standards of Ranger School change, critics will likely argue either that the standards have been artificially raised to exclude women, or that the standards have been lowered to allow weaker women to pass. Both results are detrimental to the important training that Ranger School provides. In opening Ranger School, the Army must set deliberate controls to maintain the rigorous nature of Ranger School without appearing to compromise for female inclusion. Title VII physical test cases provide a way to incorporate women into Ranger School and maintain high standards without compromising the integrity of the course.[390]

The proposed DoD gender integration oversight panel would evaluate physical testing for Ranger School, combat arms MOS physical evaluation, or SFAS to ensure that high standards continued to be applied

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[387] Farley, *supra* note 17, at 31–32 (advocating an end to the Collocation Prong, but advocating no change to the below brigade prong); Putko, *supra* note 225, at 2 (indicating that seventy percent of the survey respondents believed the rule against collocation should be changed); Putko, *supra* note 171, at 34 (advocating a total change to the Exclusion Policy); Lindon, *supra* note 193, at 40 (ending Collocation Prong and opening more positions to women); Grosskruger, *supra* note 170, at 51 (ending Collocation Prong); Cook, *supra* note 148, 67–68 (ending Collocation Prong); Botters, *supra* note 17, at 72–73 (ending Collocation Prong).

[388] Botters, *supra* note 17, at 72–73.

[389] Congressional notification is only required when the change opens or closes a unit or position to women, or opens or closes any military career designator to women. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541, 119 Stat. 3136.

[390] *See* discussion Part III.B.6.

and enforced to both genders. In the same way that the Title VII disparate impact analysis evaluates whether physical standards are excessively high, the panel would evaluate the standards to ensure they are appropriately linked to the mission objectives of Ranger School. The government may not constitutionally exclude women from attending Ranger School, but the Army must ensure that integration of Ranger School does not undermine the important place it holds in leader development for the Army.

If one or either service fails to act, DoD should take the lead to ensure that direct ground combat units, regardless of the branch of service, are no longer constrained by an unconstitutional and ineffective policy. Concurrent with ending the collocation rationale, the Army should open Ranger School to women in order to increase the quality of all leaders across the Army.

B. Ending the Below Brigade Justification for Gender Exclusion

Immediately following the end of the collocation argument, the DoD should end the below brigade rationale, with notification to Congress. Effective integration[391] of women below the brigade level requires a clear plan for ensuring baseline personal privacy. Although Army doctrine already conceives of integration below the brigade level in direct ground combat units, service leaders owe subordinate commanders integration guidance. The guidance may be as simple as sharing the tactics, techniques, and procedures already employed by mixed-gender combat support units. Direct ground combat commanders have not had the same experiences as COL Cook or other combat support commanders, and will need direction in order to implement effective integration. Through the DoD gender integration oversight panel, service leaders must arm direct ground combat commanders with the guidance and tools to effectively ensure baseline personal privacy for all soldiers. Integration will then ensure that direct ground combat battalions and companies have access

[391] Integration of women in combat support MOS below the brigade level is different from opening the combat arms MOS to women. While integration indicates that assignment or denial of assignment of combat support MOS soldiers to units below the brigade level is gender-neutral, opening the combat arms MOS to women does not result until willing and capable women choose to enlist or commission into the combat arms MOS.

to "some of [the] most brilliant and creative intelligence analysts,"[392] and other talented female combat support soldiers.

C. Ending Exclusion From Combat Arms MOSs

Once positions in direct ground combat units below brigade level are opened for gender-neutral assignment of combat support MOS soldiers, then DoD, with notification to Congress, should end the unconstitutional exclusion of women from the combat arms MOS. As with ending the below brigade prong, direct ground combat commanders deserve clear guidance to ensure baseline personal privacy protection. While the physical requirements of the combat arms MOS is an unpersuasive justification for exclusion, the best way to guarantee physically qualified soldiers serve in the combat arms MOS is to institute gender-neutral MOS-specific physical standards.[393] Although the screening and testing standards already exist for special forces assignments, the gender integration oversight panel would ensure the relevance of any conventional combat arms tests and the minimum standard to actual performance of the conventional combat arms MOS tasks.

In 1997, as an Army Judge Advocate officer, Captain (CPT) Stephanie Stephens advocated gender-neutral testing of troops during initial entry training.[394] Subsequently, only those men and women who met the minimum physical standards would be eligible for advanced training in their combat arms MOS.[395] Captain Stephens further recommended additional regular testing after initial assignment to ensure fitness for the combat arms specialty.[396] In the alternative, testing could be accomplished at the military entrance processing stations (MEPS) before the soldiers enlist in the combat arms MOS. While MEPS testing would ensure a soldier does not enlist for an MOS without being physically qualified, testing during initial entry training would more fairly test the applicants after they all had some baseline training in strength and endurance techniques.

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[392] Conference Call with MG Cucolo, *supra* note 204.
[393] HERRES ET AL., *supra* note 76, at 7 (recommending the services adopt specific gender-neutral standards for specialties that require muscular strengh, endurance, and cardiovascular capacity).
[394] Stephens, *supra* note 45, at A-1.
[395] *Id.*
[396] *Id.*

Although critics may argue that developing a standard or conducting additional testing for conventional combat arms MOS assignments will be too burdensome for the military, the Army already evaluates soldiers' ability to perform in their MOS. Through the MOS/Medical Retention Board process, physicians evaluate wounded soldiers to continue service in their specialty.[397] The various soldier's manuals already identify MOS specific requirements.[398] As the standards and process already exist, the military need only now ensure fair implementation while upholding the standards that guarantee a superior fighting force. Just as a 1975 grant to the University of Maryland from the U.S. Fire Administration led to the development of the Firefighter Combat Challenge course,[399] a similar initiative could lead to a relevant and effective testing procedure to determine strength eligibility for the conventional combat arms MOS.

All of these gradual and sequenced steps could also be implemented through legislation. However, Congress is not likely to act without DoD leadership in reform and implementation. Action to end the exclusion policy is consistent with the standards of military readiness, military effectiveness, and unit cohesion. A failure to act is unconstitutional.

V. Conclusion

> *No longer is a soldier's value measured by how close he or she is to the front line—there are no front lines on today's battlefield. Every soldier is a warrior; every soldier has to embody not only the Army Values every day but take to heart the soldier's Creed and, most specifically right now, the Warrior Ethos that will be around that soldier's neck and lived by soldiers every day.*[400]

Breaking the ground barrier for women is not about social engineering, political correctness, mandating integration, or quotas.

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[397] *See* U.S. DEP'T OF ARMY, REG. 600-60, PHYSICAL PERFORMANCE EVALUATION SYSTEM para. 2-1.a (28 Feb. 2008) (requiring the board to base its recommendations on a Soldier's "physical ability to reasonably perform the duties of his or her primary military occupational specialty").

[398] *See, e.g.*, STP 17-19K1-SM, *supra* note 297 (describing the MOS requirements for an armor crewman).

[399] Jared Council, *supra* note 291.

[400] General Peter J. Schoomaker, Army Chief of Staff, Address at the Association of the U.S. Army Convention (Oct. 6, 2003).

Instead, ending the direct ground combat exclusion policy is a way to open the door so that willing and capable women can demonstrate their ability to fully serve their nation. It is also a way to ensure that the military operates as a merit based organization and that soldiers in all military units benefit from the assignment of the best and brightest to those units, regardless of gender. Ending the direct ground combat exclusion is consistent with the Equal Protection clause of the U.S. Constitution, increases military effectiveness, and ensures that the United States military will have the most effective and talented ground forces to fight and win the nation's wars.

TO TARGET, OR NOT TO TARGET: WHY 'TIS NOBLER TO THWART THE AFGHAN NARCOTICS TRADE WITH NONLETHAL MEANS

MAJOR EDWARD C. LINNEWEBER*

Sherman's advance toward Savanna [sic] in the American war between the north and south was not in search of combat, it was to burn and plunder all along the way. It was a measure used to destroy the economy in the southern army's rear area, to make the southern populace and the southern army lose the ability to resist, thus accomplishing the north's war objective. This is an example of the successful use of unlimited measures to achieve a limited objective.[1]

I. Introduction

The Taliban extracts hundreds of millions of dollars from the Afghan opium trade, fueling that country's insurgency.[2] Recognizing a threat to Afghanistan's stability, the United States has focused on reducing the flow of drug profits to insurgent groups.[3] Some military leaders warn that "the Taliban cannot be defeated and good government cannot be established without cutting off the money generated by Afghanistan's

* Judge Advocate, U.S. Army. Presently assigned as Plans Officer in the Office of the Judge Advocate General's Personnel, Plans, and Training Office. LL.M., 2010, Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; J.D., 2005, University of Virginia School of Law; B.S., 1998, U.S. Military Academy. Previous assignments include Brigade Judge Advocate, 3d Heavy Brigade Combat Team, 1st Cavalry Division, Fort Hood, Texas, and Mosul, Iraq, 2008–2009; Chief of Military Justice, 1st Cavalry Division, Fort Hood, Texas, 2008; Trial Counsel, 2d Brigade Combat Team, 1st Cavalry Division, Fort Hood, Texas, and Baghdad, Iraq, 2007–2008; Administrative and Operation Law Attorney, 1st Cavalry Division, Fort Hood, Texas, 2006–2007, Platoon Leader, Executive Officer, and Adjutant, 2nd Battalion, 504th Parachute Infantry Regiment, 82d Airborne Division, Fort Bragg, North Carolina, 1999–22001. Member of the bar of Indiana. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE, CHINA'S MASTER PLAN TO DESTROY AMERICA 181 (Foreign Broad. Info. Serv. trans., Pan Am. Publ'g 2002) (1999).

[2] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., AFGHANISTAN'S NARCO WAR: BREAKING THE LINK BETWEEN DRUG TRAFFICKERS AND INSURGENTS 1 (Comm. Print 2009) [hereinafter STAFF OF S. COMM. ON FOREIGN RELATIONS].

[3] *Id.*

opium industry, which supplies more than 90 percent of the world's heroin and generates an estimated $3 billion a year in profits."[4]

This flow of billions of dollars thoroughly corrupts Afghan society. For example, police chiefs collect hundreds of thousands of dollars in narcotics bribes, permitting them to pay the $100,000 kickbacks required to obtain their $150-a-month jobs.[5] Allegedly, this corruption even goes to the highest levels of the Afghan government and includes President Karzai's brother, Ahmed Wali Karzai.[6] This widespread drug-related corruption "undermines legitimate political and economic development by promoting a culture of corruption and squeezing out licit agricultural growth."[7] Furthermore, the insurgents and drug traffickers developed a symbiotic relationship: "Drug traffickers benefit from terrorists' military skills, weapons supply, and access to clandestine organizations. Terrorists gain a source of revenue and expertise in illicit transfer and laundering of money."[8]

Recognizing a significant threat posed by the narcotics industry, the U.S. military placed fifty drug traffickers on a target list for kill or capture.[9] In the Senate Foreign Relations Committee Report on the matter, a U.S. officer reports that the commanders can "put drug traffickers with proven links to the insurgency on a kill list . . . . [that] places no restriction on the use of force with these selected targets, which means they can be killed or captured."[10]

The United States apparently does not target all drug traffickers, just ones supporting the Taliban and the insurgency. The traffickers on the kill-or-capture list are called "nexus targets" and are ones who provide money to the Taliban militants.[11] The U.S. military also strikes the drugs

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[4] *Id*.
[5] *Id*. at 11.
[6] *Id*.
[7] *Id*. at 13 (quoting e-mail from Ambassador Karl Eikenberry).
[8] Elizabeth Peterson, Note: *Two Sides of the Same Coin: The Link Between Illicit Opium Production and Security in Afghanistan*, 25 WASH. U. J.L. & POL'Y 215, 229 (2007).
[9] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 1; James Risen, *U.S. to Hunt Down Afghan Drug Lords Tied to Taliban*, N.Y. TIMES, Aug. 10, 2009, at A1.
[10] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 15. These targets "can be captured or killed at any time." Risen, *supra* note 9, at A1.
[11] Jason Straziuso, *50 Drug Barons on US Target List in Afghanistan*, ASSOCIATED PRESS, Aug. 10, 2009, http://abcnews.go.com/International/wireStory?id=8291554. Apparently early plans were to lethally target drug traffickers without links to the Taliban, but this

themselves; in one instance, the United States destroyed 300 tons of poppy seeds by dropping a series of 1000 pound bombs.[12]

United States officials believe this targeting furthers their mission in Afghanistan, but that does not necessarily make it legal or right. This article looks through several lenses to analyze the U.S. military's targeting of two distinct sets: the people (the drug traffickers) and the things (the opium plants and processing laboratories). This article uses three lenses: the lens of the widely accepted Additional Protocols to the Geneva Conventions; the lens of the International Committee of the Red Cross (ICRC); and the lens of the United States. The analysis will show that this targeting fails when observed through the lenses of the Additional Protocols and the ICRC and that this targeting represents a troubling policy decision when observed through the U.S. lens.

After analyzing the targeting through these lenses, this article discusses several second-order implications, including contradictions within U.S. counterinsurgency doctrine, reciprocity in targeting of economic objectives, and risks to humanity from expanding the definition of military objective. Ultimately, this article concludes that problems exist with claiming narcotics traffickers are taking a direct part in hostilities; that difficulties exist with claiming narcotics related items are valid military objectives; and that, even if no legal problems existed, targeting of the opium trade may be unwise policy.

II. Narcotics Trafficker: A Criminal, but also a Combatant?

The Afghan opium industry in 2008 produced an export commodity worth $3.4 billion and employed approximately ten percent of the Afghan population.[13] Approximately eighty percent of this income,

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plan ran into stiff resistance among the NATO allies. Tom Coghlan, *NATO Split Over Order to Strike Afghanistan Drug Smugglers*, THE TIMES (LONDON), Jan. 30, 2009. The NATO disagreement apparently resulted in limitations on the initial plan to ensure agreement. Judy Dempsey, *NATO Chief Presses Afghan Drug Fight*, N.Y. TIMES, Feb.12, 2009, http://www.nytimes.com/2009/02/12/world/asia/12nato.html.

[12] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 12; CNN, *U.S. Bombs Poppy Crop to Cut Taliban Drug Ties*, July 21, 2009, http://www.cnn.com/http://www.cnn.com/2009/WORLD/asiapcf/07/21/afghanistan.poppy.strike/index.html#cnnSTCText.

[13] U.N. OFFICE ON DRUG & CRIME, *Afghanistan: Opium Survey 2008*, at 2–5 (Nov. 2008), *available at* http://www.unodc.org/documents/afghanistan//Afghanistan_Opium_Survey_

roughly $2.7 billion, went to the drug traffickers, while the farmers received about $700 million.[14] The Taliban imposes a "tax" of approximately ten percent on the farmers and traffickers, generating between $200 and $400 million in annual revenue.[15] With Taliban insurgent fighters being paid only about ten dollars a day,[16] $200 million can keep over 50,000 insurgents fighting for an entire year.

The $700 million garnered by the opium farmers results in an income of $307 per capita in opium growing households, which is actually less than the nationwide per capita Gross Domestic Product (GDP) of $415.[17] Per capita income from opium appears quite low, but opium generates many times the income of wheat. In 2007, on a per acre basis, wheat brought a price just one-tenth that of opium.[18] One farmer explained why he grows opium instead of wheat: "Of course we know it's illegal, but we have no other option. I can't earn enough to live with wheat."[19]

Having turned to an illicit crop, Afghan opium farmers cannot then look to their government for help but must instead turn to the Taliban.[20] In response, the Taliban provides loans for seeds in the spring, loans for living expenses during the growing season, security for the crops (security from criminals, government officials, and foreign soldiers), workers for the harvest, and transportation of the finished product.[21] One

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2008.pdf [hereinafter U.N. OFFICE ON DRUG & CRIME]. The "farm gate" value was $1 billion, with the refined opium raising the value to $3.4 billion. *Id.*

[14] U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 29.

[15] *Id.* at 2. Things improved slightly in 2009, with a decrease in farm gate receipts for opium from $730 million in 2008 to $438 million in 2009, but opium remains a significant source of revenue. U.N. OFFICE ON DRUG & CRIME, *Afghanistan Opium Survey 2009 Summary Findings* 1 (Sep. 2009) [hereinafter U.N. OFFICE ON DRUG & CRIME], *available at* http://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan_opium_survey_2009_summary.pdf.

[16] Risen, *supra* note 9, at A1. Other reports indicate insurgents earn between $200 and $500 a month. Eric Schmitt, *A Variety of Sources Feed Into Taliban's War Chest*, N.Y. TIMES, Oct. 19, 2009, at A1.

[17] U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 5.

[18] Phil Azbriskie, *The World's Toughest Job?*, FORTUNE, Oct. 12, 2009, at 121, 124. Current data for 2008 and 2009 indicates this multiple has shrunk (now just three to one), but this is still a significant incentive for farmers to grow opium instead of wheat. U.N. OFFICE ON DRUG & CRIME, *supra* note 15, at 25.

[19] Azbriskie, *supra* note 18, at 124 (quoting Hamid Hakmal).

[20] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 7.

[21] *Id.* at 7–8; *see also* GRETCHEN PETERS, SEEDS OF TERROR: HOW HEROIN IS BANKROLLING THE TALIBAN AND AL QAEDA 5 (2009) (noting that the Taliban does not just profit from the opium trade, but rather "they service it, working for opium smugglers and the mammoth international organized crime rings behind them").

witness told the Senate Committee on Foreign Relations that the "Sopranos are the real model for the Taliban."[22] The insurgents raise money from the traffickers, and the traffickers buy protection and intimidation from the insurgents.[23] In fact, the insurgents may be focused more on protecting and facilitating the opium trade than on retaking Kabul.[24]

Traffickers are certainly criminals,[25] but that does not necessarily make them legitimate military targets. This section will review the protections of civilians under international law, explaining how civilians cannot be targeted unless they are taking a direct part in hostilities. This section will also outline the different policy interpretations of direct participation and apply those understandings to traffickers in Afghanistan.

A. Who is a Combatant?

1. Basic Rule of Distinction

A fundamental principle of the law of armed conflict is distinction.[26] The International Court of Justice expressed this fundamental principle as, "States must never make civilians the object of attack."[27] W. Hays Parks agrees, noting that at "the heart of the Just War Tradition and the modern law of war lies the principle of discrimination which, in simple terms, means noncombatant immunity."[28] Codified in Article 48 of Additional Protocol I, this principle dictates that belligerents must "distinguish between the civilian population and

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[22] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 9 (quoting Gretchen Peters).
[23] *Id*. Some reports suggest that the Taliban generate between $70 million and $400 million a year from the illict drug trade. Schmitt, *supra* note 16, at A1.
[24] PETERS, *supra* note 21, at 5.
[25] Hamid Karzai reinforced the Afghan ban on opium soon after taking power. Serge Schmemann, *A Nation Challenged: The Drugs, Afghanistan Issues Order Taking Hard Line on Opium Production*, N.Y. TIMES, Jan. 17, 2002, at A1.
[26] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 27 (2004) (noting a "fundamental principle of distinction between combatants and non-combatants (civilians)").
[27] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (Jul. 8) (noting also that the "cardinal principles . . . are the following. The first . . . establishes the distinction between combatants and non-combatants.").
[28] W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 4 (1990).

combatants and between civilian objects and military objectives and . . . direct their operations only against military objectives."[29] While it is clear that civilians must not be targeted, one must first determine who is a civilian.

During international armed conflict, a conflict between two high contracting parties,[30] Article 50 of Additional Protocol I defines "civilians" in the negative, as anyone who is not a lawful combatant..[31] The ICRC simplifies this, noting in international armed conflict that "all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levee en masse* are civilians."[32] Additional Protocol I makes clear in Article 51 that civilians cannot be targeted "unless and for such time as they take a direct part in hostilities."[33]

For non-international armed conflicts, Common Article 3 of the Geneva Conventions of 1949 protects from targeting those not taking an "active part in hostilities."[34] Article 13 of Additional Protocol II outlines protections afforded to civilians in non-international armed conflict.[35] Additionally, the commentary to Article 13 incorporates by reference Article 51 of Additional Protocol I and its commentary.[36] According to the ICRC, civilians in non-international armed conflict are "all persons who are not members of State armed forces or organized armed groups

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[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3, 37–38 [hereinafter Protocol I].

[30] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

[31] Protocol I, *supra* note 29, art. 50. When in doubt about an individual's civilian status, "that person shall be considered to be a civilian." *Id.*

[32] INT'L COMM. FOR THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 20 (2009).

[33] Protocol I, *supra* note 29, art. 51.

[34] GC I, *supra* note 30, art. 3.

[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (noting that civilians "shall enjoy general protection against the dangers arising from military operations", that civilians "shall not be the object of attack", and that "acts or threats of violence . . . to spread terror among the civilian population are prohibited").

[36] CLAUDE PILLOUD ET AL., COMMENTARY OF THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1448 (Yves Sandoz et al. eds., 1987).

of a party to the conflict."[37] In conclusion, civilians generally cannot be targeted in either international or non-international armed conflict.

2. Protection of Civilians is Not Absolute; Civilians Taking an Active or Direct Part in Hostilities May Be Targeted

Civilians generally cannot be targeted, but civilians can forfeit their protections by direct participation in hostilities. Although the English version of Common Article 3 protects civilians taking no "active part" in hostilities, the English versions of the Additional Protocols switches terms and uses the words "direct part."[38] Regardless, these words are considered coterminous as the "equally authentic French text" uses "*participent directement*" in both Common Article 3 and the Additional Protocols.[39] Additionally, the International Criminal Tribunal for Rwanda concludes the words are synonymous,[40] and the U.S. Army Judge Advocate General's School teaches that the controlling test is the "direct part" test.[41]

The commentaries to the Additional Protocols provide one interpretation of direct participation. The commentary to Article 51(3) (protecting civilians not taking a direct part in hostilities)[42] defines direct

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[37] INT'L COMM. FOR THE RED CROSS, *supra* note 32, at 27. The International Committee for the Red Cross (ICRC) also recommends that members of organized armed groups be targeted for direct participation in hostilities only if they engage in a continuous combat function. *Id*. at 70–72.

[38] Protocol I, *supra* note 29, arts. 43, 51; Protocol II, *supra* note 35, art. 13.

[39] INT'L COMM. FOR THE RED CROSS, *supra* note 32, at 43.

[40] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 629 (Sept. 2, 1998) ("These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous.").

[41] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, 58TH GRADUATE COURSE DESKBOOK I-7–8 (2009) [hereinafter DESKBOOK] (citing Additional Protocol I, art. 51(3)). The *Deskbook* notes that "the Department of Defense previously identified those civilians who may be directly targeted as those taking an 'active part' in hostilities, derived from the language of Common Article 3 of the Geneva Conventions." *Id*. at I-8 n.17 (citing Memorandum of Law, W. Hays Parks, Office of The Judge Advocate Gen., U.S. Army, subject: Law of War Status of Civilians Accompanying Military Forces in the Field (May 6, 1999) [hereinafter Law of War Memorandum]). Interestingly, the Military Commissions Act of 2009 uses the term "active" instead of "direct." National Defense Authorization Act for Fiscal year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2606 [hereinafter Military Commissions Act of 2009] ("'Protected person' means . . . include[es] civilians not taking an active part in hostilities.").

[42] Protocol I, *supra* note 29, art. 51.

participation as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[43] The commentary to Article 43 provides a temporal and geographic limit to the definition of direct participation, noting the harm to the enemy must occur when and where the individual's acts occur.[44]

Under the Additional Protocols, the same definition would apply in both international and non-international armed conflict. Additional Protocol II, Article 13, reiterates the required protection of civilians almost verbatim as stated in Article 51 of Additional Protocol I, indicating the same protection of civilians in both international and non-international armed conflict.[45] The commentary to Additional Protocol II, Article 13, however, also suggests that direct participation includes preparation for combat and return from combat.[46]

While grappling with drawing a line between civilians and combatants, the commentaries make clear that general participation in the war effort is on the civilian side of the line, noting:

> There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole . . . Without such a distinction the effort made to reaffirm and develop international humanitarian law could become meaningless . . . many activities of the nation contribute to the conduct of the hostilities, directly or indirectly; even the morale of the population plays a role in this context.[47]

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[43] PILLOUD ET AL., *supra* note 36, at 619.

[44] *Id*. at 516 ("Direct participation . . . implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."); *see also* FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON WAGING WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 99 (3d ed., Mar. 2001) (stating that it "must be interpreted to mean that the person in question perform hostile acts, which, by their nature or purpose, are designed to strike enemy combatants or material; acts, in other words, such as firing at enemy soldiers, throwing Molotov-cocktails at an enemy tank, blowing up a bridge carrying enemy war materiel . . .").

[45] Protocol II, *supra* note 35, art. 13.

[46] PILLOUD ET AL., *supra* note 36, at 1453.

[47] *Id*. at 619. The commentaries appear to draw a line between two poles of conduct (clearly civilian and clearly hostile). The Israeli high court described these poles as the

While the commentaries establish one interpretation of direct participation, the commentaries are not binding law. In fact, no binding definition of direct participation exists. Neither Common Article 3 nor the Additional Protocols provides a definition of direct participation in their texts. Additionally, while customary international law protects civilians who are not taking a direct part in hostilities,[48] customary international law provides no definition of direct participation.[49]

Defining and interpreting the meaning of direct participation is instead left to policy makers. Reviewed above, the commentaries provide one interpretation of direct participation. The ICRC has provided a different interpretation, and the United States has its own interpretation. The next subsections will review the differing ICRC and U.S. interpretations.

3. The International Committee of the Red Cross Recommendations for Interpreting Direct Participation in Hostilities

In 2009, the International Committee for the Red Cross published its interpretation of the meaning of direct participation in hostilities derived from the views of numerous international humanitarian law experts.[50] This eighty-five-page document culminated several years of meetings among international experts in the law of war. Although a plethora of

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two "extremes" of a civilian's possible conduct. The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 28 HCJ 769/02 para. 34 (2005), 46 I.L.M. 375, *available at* http://e1yon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf. The commentary to Article 43 notes the tension: "[T]o restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad." PILLOUD ET AL., *supra* note 36, at 516.

[48] The United States agrees that customary international law protects civilians. *See The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POLICY 416, 426 (1987) [hereinafter Matheson Remarks] (transcript of remarks made by Michael Matheson, U.S. Dep't of State Deputy Legal Advisor) ("We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threat of violence.").

[49] Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS NO. 857, 175, 197 (2005) ("The study also reveals areas where the law is not clear and points to issues which require further clarification, such as . . . the concept of direct participation in hostilities . . . .").

[50] INT'L COMM. FOR THE RED CROSS, *supra* note 32, at 43.

experts participated in the meetings, the resulting document "is an expression solely of the ICRC's views."[51] The ICRC acknowledges that their document is not intended to change the law; rather, the ICRC intends only to recommend how to interpret existing law.[52]

Within the report, the ICRC published a three-part cumulative test for direct participation in hostilities: "(1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict."[53] The ICRC posits that direct participation should be interpreted the same in international armed conflict as in non-international armed conflict.[54]

Analyzing the first prong of the test, the ICRC defines the "threshold of harm" as harm "likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack."[55] The lack of actual harm is irrelevant; one must evaluate the likelihood of harm, or what "may reasonably be expected to result from an act in the prevailing circumstances." [56]

The second prong is expanded as "a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part."[57] The ICRC makes clear that general war effort support and indirect support have insufficient causation to justify targeting.[58] The ICRC recommends

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[51] *Id*. at 6. Many of the expert participants requested their names be removed from the publication, evincing the highly charged disagreements among the many interested parties. *See, e.g.*, W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT'L LAW & POLITICS 769, 785 n.56 (2010) ("The number of participants who requested deletion of their names was at least one-third.").

[52] *Id*. at 9 (explaining their study as "how existing [law] should be interpreted"). Additionally, by issuing their interpretive guidance, the ICRC implicitly admits that no binding definition currently exists.

[53] *Id*. at 46.

[54] *Id*. at 44 (noting in its interpretive guidance that "direct part in hostilities . . . should be interpreted in the same manner in international and non-international armed conflict").

[55] *Id*. at 46.

[56] *Id*. at 47.

[57] *Id*. at 46.

[58] *Id*. at 51.

that there be a "sufficiently close causal relation between the act and resulting harm."[59] The ICRC notes that the "harm in question must be brought about in one causal step."[60] The ICRC gives numerous examples of conduct that they do not consider direct participation, to include general war efforts[61] and war sustaining efforts.[62]

Finally, the third nexus prong requires an act be "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."[63] In other words, action that may satisfy the first two prongs is not direct participation if not designed to "harm a party to the conflict . . . in support of another party."[64] Belligerent acts must be more than just random or criminal outbursts of violence; they must support a party to the conflict.

Additionally, the ICRC recommends temporal limits on the duration of an individual's direct participation and corresponding loss of civilian protections. In addition to the actual execution of the hostile act, the ICRC states that any "measures preparatory to the execution . . . [and] deployment to and return from the location of its execution" may be considered direct participation when these acts "constitute an integral part of such a specific act or operation."[65]

The one exception to this temporal limit exists in non-international armed conflict for "members of organized armed groups . . . whose continuous function it is to conduct hostilities."[66] The ICRC envisioned that this would address the asymmetry in non-international armed conflict that "encourage[s] organized armed groups to operate as farmers by day and fighters by night."[67] However, the ICRC makes clear that mere membership in an armed group is not sufficient: "Individuals who continuously accompany or support an organized armed group, but

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[59] *Id*. at 52.
[60] *Id*. at 53.
[61] *Id*. at 51 (citing "design, production and shipment of weapons . . . repair of roads, ports, bridges . . . and other infrastructure outside the context of concrete military operations").
[62] *Id*. (including "political propaganda, financial transactions, production of agriculture or non-military goods").
[63] *Id*. at 46.
[64] *Id*. at 59.
[65] *Id*. at 65.
[66] *Id*. at 70.
[67] *Id*. at 72.

whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL."[68]

4. The U.S. Functionality Test

The United States rejects the predominant "direct part" interpretation[69] and takes a broader view of direct participation in hostilities.[70] The United States has never stated an official position on direct participation in hostilities, but commentators point to a 1999 memo by W. Hays Parks[71] as the clearest statement of the United States' functionality test.[72] In his memo, Mr. Parks notes that "[a] civilian entering the theater of operations in support or operation of sensitive, high value equipment, such as a weapons system, may be at risk for intentional attack because of the importance of his or her duties."[73] Accordingly, this functionally test evaluates a civilian's role and function to determine that civilian's importance.[74]

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[68] *Id*. at 34. This distinction is meant to prohibit targeting of members of armed groups who serve in only administrative or other non-combat roles (similar to civilians serving in non-military branches of a legitimate government). *Id*. at 33–34 ("[I]t distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized bases, or who assume exclusively political, administrative or other non-combat functions.").

[69] DESKBOOK, *supra* note 41, at I-7 to I-8.

[70] *Id*. at I-8.

[71] W. Hays Parks is currently the Law of War Chair in the Office of the General Counsel, Department of Defense, and has spent over forty years in public service as a law of war expert. UVa Legal and Policy Issues of the Indochina War—Guest Speakers, http://faculty.virginia.edu/jnmoore/vietnam/vietnam-guest-speakers.html (last visited Jan. 14, 2010). Mr. Parks participated in the ICRC's expert meetings discussing direct participation in hostilities; his presentation to that conference is posted on the ICRC's webpage. W. Hays Parks, Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces, Oct. 2005, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation- expert-paper-icrc. pdf.

[72] *See e.g.*, Major Douglas W. Moore, *Twenty-First Century Embedded Journalists: Lawful Targets?*, ARMY LAW., July 2009, at 1, 20–21. The United States Judge Advocate General's School teaches that the U.S. functionality test analyzes the importance of the function served by the civilian. DESKBOOK, *supra* note 41, at I-8 (noting that a "person whose function remains critical at all times" is always a lawful target and a "person whose function is critical only while performing" is a lawful target only during such performance).

[73] Law of War Memorandum, *supra* note 41,at 4.

[74] Moore, *supra* note 72, at 21.

W. Hays Parks expressed a slightly different view a decade earlier in an *Army Lawyer* article, noting that "there is no agreement as to the degree of participation necessary to make an individual civilian a combatant."[75] Mr. Parks outlined four types of participants: (1) non-participants; (2) war effort participants ("activities which by their nature and purpose would contribute to the military defeat of the adversary"); (3) military effort participants ("activities by civilians which objectively are useful in defense or attack in the military sense, without being the direct cause of damage"); and (4) military operations participants.[76] Mr. Parks then posited that policy—not law—dictates which categories of participants qualify as targets.[77] Mr. Parks advanced this same argument in his seminal *Air War and the Law of War* article, rejecting the Additional Protocol I "direct part" language and noting that determining what constitutes direct participation "has been a policy decision made by national leaders."[78]

With no binding definition of direct participation, national interpretations will necessarily become policy decisions. There must, however, be some limit to interpretations of direct participation; otherwise, an overly broad interpretation could eviscerate the rule.[79] At a minimum, it would seem that the U.S. interpretation for offensive targeting should be consistent with the U.S. interpretation of targeting directed at its own citizens.

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[75] W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4–6.

[76] *Id*.

[77] *Id*. Mr. Parks states that this policy decision is also made in counterinsurgencies. *Id*. at 7.

[78] Parks, *supra* note 28, at 134.

[79] Currently, the United States' interpretation of "direct part" faces no binding independent review. As the United States is not a party to the International Criminal Court (ICC), the United States need not overly worry about conflicting interpretations. INT'L CRIM. CT., The State Parties to the Rome Statute, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Feb. 21, 2010) (listing the 110 countries, not including the United States, that are parties to the ICC).

This may not last, however, as the chief prosecutor at the ICC has begun investigating potential war crimes in Afghanistan. Louis Charbonneau, *ICC Prosecutor Eyes Possible Afghanistan War Crimes*, REUTERS, Sep. 9, 2009, http://www.reuters.com/article/idUSTRE58871K20090909. As Afghanistan is a party to the ICC, the chief prosecutor claims jurisdiction over all war crimes in Afghanistan, including any committed by U.S. forces. Daniel Schwammenthal, *Prosecuting American "War Crimes*," WALL ST. J., Nov. 27, 2009, at A21. In a worst case scenario, U.S. servicemembers might have to defend their actions in Afghanistan with a policy decision made in Washington.

B. Are Drug Traffickers Taking a Direct Part in Hostilities?: A Look Through Three Lenses

Looking through the three lenses of direct participation—Additional Protocol I, the ICRC Direct Participation Interpretive Guidance, and the U.S. functionality test—this article analyzes the U.S. targeting of drug traffickers in Afghanistan. To accomplish this analysis, we must first establish hypothetical facts about the fifty drug traffickers on the kill-or-capture target list. Drawing solely from the media and congressional reports about the operations, one can deduce several basic facts. First, the targets are called "nexus" targets and not Taliban drug dealers.[80] Accordingly, we can assume the drug traffickers' nexus is that they provide money to the Taliban in exchange for some combination of protection, labor, and transportation. Second, we can assume the targets are not actual members of the Taliban or insurgency. If they were members of the Taliban, they would not be called "nexus," but rather "members."[81] Third, U.S. forces can lethally engage targets on the kill-or-capture list at any time or place.[82] Finally, we can infer from these facts that the transfer of money to the Taliban triggers the targeting. The mere involvement in the opium trade is not enough; otherwise the U.S. would not require a Taliban nexus for inclusion on the target list.

1. Through the Lens of Additional Protocol I, Drug Traffickers Pose No Direct Threat to U.S. Personnel and Therefore Are Not Taking a Direct Part in Hostilities

The drug traffickers do not take a direct part in hostilities under the Additional Protocol I standard. First, no direct link exists between the traffickers' activities and harm to the enemy. Merely providing financial resources to the Taliban, traffickers do not cause direct harm to the enemy. With these financial resources, the Taliban could fund a number of different things, including purely civilian activities (such as aiding the United Nations' polio vaccination program).[83] Additionally, the need to

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[80] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 15.

[81] Apparently, 367 targets appear on the Afghanistan kill-or-capture list, of which fifty are "nexus" targets. *Id.*

[82] *Id*. at 1; Risen, *supra* note 9, at A1.

[83] Yaroslav Trofimov, *Risky Ally in War on Polio: The Taliban*, WALL ST. J., Jan. 11, 2010, at A14 (describing how the Taliban assists the U.N. polio vaccination teams working in Afghanistan).

transform financial resources into military resources further illustrates the lack of a causal link.

Second, even if a direct causal link existed, no harm would occur at the time and place of the traffickers' activities.[84] The interactions between the traffickers and the Taliban are temporally separated from any potential harm to the enemy. The traffickers provide the Taliban money at one point in time, but only at a later time (after some conversion from monetary resources into military resources) does the enemy potentially suffer harm.

Additionally, the U.S. Army teaches that this Additional Protocol I commentary test is "closely analogous" to self defense to an "immediate threat."[85] Without unduly stretching the meaning of "immediate," the transfer of money from the drug traffickers to the Taliban cannot be reasonably considered an immediate threat triggering the right to self-defense.

2. Through the Lens of the ICRC, Drug Traffickers Fail on All Three Prongs and Therefore Are Not Taking a Direct Part in Hostilities

a. No Threshold of Harm

The activities of the drug traffickers appear neither to affect the military capabilities of the United States nor to inflict injury or death upon protected people or places. Accordingly, they do not meet the threshold of harm prong. The drug traffickers merely provide financial resources to the Taliban. Providing money to the Taliban does not, on its face, appear to harm the U.S. military; it only helps the Taliban by improving their resource base and, indirectly, their military capabilities.

The activities of the drug traffickers could harm civilians, notably the users of the end product, but the U.S. military does not target the traffickers for their criminal activities. Rather, the U.S. military targets the traffickers because they have a nexus to the Taliban. Additionally,

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[84] PILLOUD ET AL., *supra* note 36, at 516 (noting that "direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place").

[85] DESKBOOK, *supra* note 41, at I-8 (noting that "the Additional Protocol I test is closely analogous to a self-defense response to an immediate threat").

the U.S. military targets only fifty of the drug traffickers.[86] Thousands more Afghans participate in the trafficking of opium, harming the civilian end users, but the United States does not apparently target them.

One could argue that the drug traffickers' actions are detrimental to the United States because the drug traffickers control numerous opium processing laboratories and poppy fields. In their recommendations, the ICRC notes that the threshold of harm "may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary."[87] Controlling the poppy fields (territory), the opium processing laboratories (objects), and the finished refined opium (objects), the traffickers may harm the U.S. by undermining the Afghan government and contributing to the insurgency. However, if the drug traffickers instead farmed dates, bribed local officials for protection, and provided proceeds to the Taliban, one could make a similar argument about the date fields, the date processing equipment, and the dates themselves. Accordingly, a fairer reading of the ICRC's recommendation would have the adjective "military" modifying not just "personnel" but also "object and territory." It would then note that the threshold of harm "may also arise from capturing or otherwise establishing or exercising control over military personnel, [military] objects and [militarily relevant] territory to the detriment of the adversary."[88] Dates and date trees are not items of military equipment, and neither are opium and poppy fields. Although the geographic location could have military significance, its significance is independent from the particular cash crop being cultivated.

As the drug traffickers do not adversely affect the military capabilities of the United States or Afghanistan, the threshold of harm prong fails. But even if harm existed, the other two prongs must also be met.

b. No Direct Causation

No causal link appears to exist between the transfers of money and any potential harm to the United States. The ICRC's interpretation requires "a direct causal link between the act and the harm likely to result

[86] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 15.
[87] INT'L COMM. FOR THE RED CROSS, *supra* note 32, at 48.
[88] *Id*.

. . . from that act."[89] Fungible, the money provided by the traffickers does not directly harm the United States. Even if the traffickers were providing weapons and ammunition as payment for protection, there would be no direct causal link to any later harm to the United States. The drug traffickers simply provide the Taliban with resources.

The ICRC gave several examples of activities that were *per se* not a causal link to harm, to include "economic . . . activities supporting the general war effort" such as "political propaganda, financial transactions, production of agriculture or non-military goods."[90] The drug traffickers simply provide financial resources, and their actions appear to be nothing more than an economic effort supporting the general war effort. U.S. taxpayers pay income taxes to the state for, among many things, protection from foreign and domestic enemies. Similarly, Afghan drug traffickers pay protection money (taxes)[91] to the Taliban.

Commentators support this view: A.P.V. Rogers notes that "[t]aking a direct part in hostilities must be more narrowly construed than making a contribution to the war effort and it would not include taking part in arms production or military engineering works or military transportation."[92] His interpretation would likely find drug trafficking not a direct enough cause of harm. Although the ICRC and A.P.V. Rogers would likely agree that the traffickers' activities do not meet the causal link prong, one must still consider if a belligerent nexus exists.

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[89] *Id*. at 46.
[90] *Id*. at 51.
[91] The United Nations calls this tax levied by the Taliban an "ushr." U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2.
[92] A.P.V. ROGERS, LAW ON THE BATTLEFIELD 8–9 (2d ed. 2004). Others find the same thing, to include Hans-Peter Gasser who notes:

> Not only direct and personal involvement in such activities but also preparation of a military operation, or of a personal participation therein, may suspect the immunity of a civilian. Such activities, however, must be directly related to acts of hostilities, in other words, they must represent a direct threat to the other party to the conflict. . . [cannot] be understood too broadly. . . Employment in the (civilian) armament industry, for example, does not mean that its employees are necessarily taking an active part in hostilities.

HANS-PETER GASSER, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 261–62 (Deiter Fleck ed., 2d ed. 2008).

c. A Belligerent Nexus? Probably Not

The drug traffickers could have a variety of reasons for paying money to the Taliban. Perhaps the traffickers seek a simple business arrangement. The traffickers could be paying for labor and access to markets.[93] Perhaps the traffickers seek protection or an authorization to operate (remembering that the Taliban, when in control of Afghanistan, banned opium production).[94] The traffickers could be paying for a permit to operate (similar to a legitimate corporation paying taxes and fees to a sovereign for a charter). Or, as a third alternative, perhaps the drug traffickers provide money to the Taliban for ideological reasons (similar to how the Taliban receives funding from radical Islamic charities).[95] The traffickers can give the same amount of money, providing the Taliban with the same amount of financial resources, for a variety of reasons.

The ICRC definition of belligerent nexus requires an act be "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."[96] While this sounds like a subjective intent or *mens rea* criterion, the ICRC clarifies, stating that the "belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act and does not depend on the mindset of every participating individual."[97] In practical application, the ICRC notes that acts must be "specifically designed to support one party to the conflict by causing harm to another."[98] Additionally, merely engaging in criminal acts, according to the ICRC, is not enough to warrant targeting.[99]

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[93] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 7–8.
[94] Barbara Crossette, *Taliban's Ban on Poppy a Success, U.S. Aides Say*, N.Y. TIMES, May 30, 2001, at A1.
[95] General McChrystal submitted a report noting that the Taliban raised a significant amount of money from foreign donors. Memorandum from Commander, U.S. Forces-Afg., to Sec'y of Def., subject: COMISAF's Initial Assessment 2–8 (Aug. 30, 2009) [hereinafter McChrystal Memo], *available at* http://media.washingtonpost.com/wp-srv/politicis/documents/Assessment_Redacted_092109.pdf. Although General McChrystal was subsequently relieved of command (for unrelated reasons), no media reports have indicated a change in the U.S. targeting policy.
[96] INT'L COMM. FOR THE RED CROSS, *supra* note 32, at 46.
[97] *Id*. at 59.
[98] *Id*. at 61.
[99] The ICRC notes: "Loss of protection against direct attack within the meaning of IHL, however, is not a sanction for criminal behavior . . . ." *Id*. at 62.

Regardless of the purpose of the drug traffickers' payments (business transaction, protection money, or ideological support), the money does not harm the other party to the conflict—it only benefits the Taliban and the insurgents. Additionally, the drug traffickers apparently care less about who governs and more about maintaining their freedom to engage in the lucrative opium trade. Reports indicate that senior members of the Afghan government accept narcotics bribes,[100] indicating the traffickers will bribe anyone they can. This demonstrates that they just want to maintain their control of the opium market and that they do so without a belligerent nexus.

d. No Continuous Combat Function

The kill-or-capture list permits military forces to engage selected "nexus" drug traffickers with lethal force at any time.[101] This means the United States could kill these selected drug traffickers not only when they are paying the Taliban, but also when they are resting at home, visiting with friends and relatives, or overseeing their narcotics trade activities.

Assuming the conflict is a non-international armed conflict and the Taliban is considered an "organized armed group,"[102] using the ICRC recommendations, such continuous targeting would only be authorized if the drug traffickers fulfill a continuous combat function for the Taliban.[103] One could argue that everything these drug traffickers do somehow relates to the illicit narcotics trade, and this trade provides the financial resources for the Taliban. Even if true, this would not distinguish the daily function of these "nexus" targets from the daily function of the thousands of other drug traffickers in Afghanistan.

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[100] Thomas Schweich, *Is Afghanistan a Narco-State?*, N.Y. TIMES MAG., July 27, 2008, at 45 ("[President Karzai] appointed a convicted heroine dealer, Izzatulla Wasifi, to head his anticorruption commission.").

[101] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 1; Risen, *supra* note 9, at A1.

[102] The Additional Protocol II regime is triggered by "organized armed groups which, under responsible command, exercise such control over a part of [a State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Protocol II, *supra* note 35, art. 1.

[103] *See* discussion *supra* Part II.B.2.

Logically, the "nexus" targets differ from the other traffickers because they pay the Taliban. These "nexus" targets must do something more than merely traffic drugs to become targets of the United States. However, these "nexus" drug traffickers apparently only interact with the Taliban on a very limited basis (spending most of their time trafficking drugs). If they did more than just interact with the Taliban, they could be considered members of the Taliban, negating the need to call them "nexus" targets. In short, their continuous function is to oversee the narcotics drug trade.

Consequently, using the ICRC construct of "continuous combat function," the nexus drug traffickers cannot be legally targeted at all times and locations (even if they could be targeted while interacting with and paying off the Taliban). The traffickers are not engaging in a combat function for the Taliban; rather, they are engaging in financial deals for and with the Taliban. Courts in Israel and the Organization of American States reached similar conclusions in analogous cases involving individuals providing financial support to terrorist organizations.[104]

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[104] The Israeli Supreme Court, hearing a case from the Israeli conflicts in Gaza and the West Bank, addressed the question of whether individuals providing indirect support to terrorist groups are taking a direct part in hostilities. The Israeli court recognized the difficulties in drawing a line between two poles (clear participation and innocent civilian activity). While providing no definitive test, the Israeli court noted several activities that were clearly direct participation: ordering or planning attacks; collecting intelligence on the army; transporting combatants to and from an attack; and operating or supervising the operation of weapons used by unlawful combatants. The court also gave several examples of activities that are not direct participation in hostilities: selling food or medicine to unlawful combatants; distributing propaganda, and providing support, to include monetary aid. HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [Dec. 11, 2005] slip op. para. 37, *available at* http://e1yon1.court.gov.il/Files_ENG/02/690/007/a34/ 02007690.a34.pdf.

Ravaged by a war between the government and the Revolutionary Armed Forces of Columbia (FARC) guerrillas tied to the cocaine trade, the Columbia government faced a similar issue in trying to determine how to treat those who provided support, to include financial support, to the FARC guerrillas. The Inter-American Commission on Human Rights, part of the Organization of American States (OAS), issued a country report on Colombia in 1999 and commented on targeting of individuals not taking a direct part in hostilities, noting:

> In contrast, civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve

3. Through the Lens of the U.S. Functionality Test Drug Traffickers Support the Taliban, but Perhaps Do Not Fulfill a Critical Military Function

Reviewing the importance of a civilian's function or contribution,[105] one finds that the drug traffickers in Afghanistan serve an important role for the Taliban. Providing $200 to $400 million in annual revenue,[106] the traffickers provide resources to the Taliban and potentially fund tens of thousands of insurgents.[107] From this perspective, the drug traffickers' contributions fulfill an important function.

However, in a report to Secretary Gates, General McChrystal notes:

> Narcotics activity also funds insurgent groups; however, the importance of this funding must be understood within the overall context of insurgent financing, some of which comes from other sources. Insurgent groups also receive substantial income from foreign donors as well as from other criminal activities within Afghanistan such as smuggling and kidnapping for ransom. Some insurgent groups "tax" the local population through check points, demanding protection money, and other methods. Eliminating insurgent access to narco-profits—even if possible, and while disruptive—would not destroy their ability to operate so long as other funding sources remain intact.[108]

From General McChrystal's report, one can see that eliminating the Taliban's profits from narcotics, while perhaps necessary, is not sufficient to undermine Taliban insurgent activities. Additionally, General McChrystal's report indicates that only one of the three major

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> acts of violence which pose an immediate threat of actual harm to the adverse party.

INTER-AM. COMM'N ON HUMAN RIGHTS *Third Report on the Human Rights Situation in Columbia*, ¶ 56, OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (Feb. 26, 1999).

[105] Law of War Memo, *supra* note 41, at 4; Moore, *supra* note 72, at 21.

[106] U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2.

[107] It costs only about $10 a day to fund an insurgent in Afghanistan. Risen, *supra* note 9, at A1.

[108] McChrystal Memo, *supra* note 95, at 2-8.

insurgent groups participates in the drug trade.[109] Accordingly, if all drug trafficking ceased, two of the three main insurgent groups would see zero loss of revenue. The third group would lose some revenue, but perhaps not enough to significantly impact operations, as General McChrystal indicates the insurgents are not solely dependent on the narcotics trade.

Since General McChrystal filed his assessment, news reports suggest that trafficking is not the leading source of income for the Taliban. Rather, foreign donors make up the largest source of income for the Taliban.[110] In fact, reports indicate that the United States may find it impossible to cut off the narco-profits flowing to the Taliban.[111]

Regardless, the United States has apparently made a policy decision that these fifty drug traffickers can be lethally targeted because they serve a critically important function. This may, however, conflict with the functionality test. The functionality test was derived by analyzing the status of civilians operating "sensitive, high value equipment, such as a weapon system."[112] In Afghanistan, however, the fifty "nexus" traffickers do not appear to be operating any weapon system for the Taliban. Stretching the functionality test to include these drug traffickers disconnects the test from its origin; this stretched interpretation seems to no longer require any performance of a military function.

Ultimately, with no binding definition of direct participation in international law, the interpretation of direct participation comes down to a policy decision. The U.S. functionality test merely reflects changeable U.S. policy; however, how the U.S. interprets direct participation for targeting of Afghan civilians should probably mirror how the U.S. interprets direct participation for targeting of U.S. civilians.

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[109] Only the Quetta Shura group participates in the opium trade, and they also receive support from foreign donors. *Id.* at 2-6.

[110] Craig Whitlock, *Taliban's Diverse Funding Defies Interdiction*, WASH. POST, Sept. 26, 2009, at B1. The story indicates the CIA has recently greatly reduced its estimate of nacro-profits going to the Taliban, while still estimating that foreign donors contributed $106 million to the Taliban over the past year. *Id.*

[111] *Id.*

[112] Law of War Memo, *supra* note 41, at 4.

III. Narcotics Materiel: Criminal Contraband, but also a Military Objective?

In addition to targeting drug traffickers, the United States also kinetically targets processed opium, opium processing facilities, and the poppy plants themselves.[113] Military forces, however, can only target those objects and locations that are valid military objectives.[114] This section will review the legal standard defining military objectives and will apply that standard to U.S. military targeting of narcotics materiel in Afghanistan. This section analyzes the targeting through the lens of Additional Protocol I and the lens of the U.S. definition of military objective found in the Military Commissions Act of 2009 (MCA)[115] and the U.S. Navy's *Commander's Handbook on the Law of Naval Operations (Navy Commander's Handbook)*.[116]

A. Distinction Applies to Both People and Objects

As discussed above in Part II, distinction is a fundamental principle of the law of war.[117] Article 48 of Additional Protocol I directs that combatants will at all times "distinguish . . . between civilian objects and military objectives and accordingly shall direct their operations only

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[113] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 12 (recounting an incident where U.S. forces "bombed an estimated 300 tons of poppy seeds"); *see also* BBC NEWS, *NATO to Attack Afghan Opium Labs*, Oct. 10, 2008, http://news.bbc.co.uk/2/hi/7663204.stm (noting that NATO planned to attack "opium factories and distribution networks").

[114] Protocol I, *supra* note 29, art. 48.

[115] Military Commissions Act of 2009, *supra* note 41. The original (2006) Military Commissions Act was passed in response to *Hamdan v. Rumsfeld* where the Supreme Court found the then existing military commissions to be unconstitutional. 548 U.S. 557 (2006). In response to the Supreme Court, the Congress passed the Military Commissions Act of 2009 (MCA) to provide the president with statutory authority to convene the military commissions in essentially the same form. *See* JONATHAN MAHLER, THE CHALLENGE, *HAMDAN V. RUMSFELD* AND THE FIGHT OVER PRESIDENTIAL POWER 299–301 (2008) (discussing the political maneuvering after *Hamdan v. Rumsfeld*).

[116] U.S. DEP'T OF NAVY & DEP'T OF HOMELAND SECURITY, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.yA, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 5.3.1 (July 2007) [hereinafter COMMANDER'S HANDBOOK].

[117] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

against military objectives."[118] This principle of distinction applies in both international and non-international conflicts.[119]

The principle of distinction turns on the definition of military objective. Additional Protocol I provides one definition of military objective,[120] considered by the ICRC to be customary international law applying in both international and non-international armed conflict.[121] The United States, while perhaps partially accepting the Additional Protocol I definition,[122] disagrees that customary international law limits military objectives to items providing a purely military advantage.[123] Although a definitive U.S. definition does not exist, the Military Commissions Act of 2009 provides one potential definition. The definition in the MCA closely parallels the definition of military objective found in the *Navy Commander's Handbook.* The next sections discuss these competing definitions.

B. Differing Definitions of Military Objective

1. Additional Protocol I

Additional Protocol I defines military objective as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction,

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[118] Protocol I, *supra* note 29, art. 48.

[119] DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 614 (Deiter Fleck ed., 2d ed. 2008); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW RULES 3 (2005) (listing the rule of distinction as rule number one, applicable to both international and non-international armed conflict).

[120] Protocol I, *supra* note 29, art. 52(2).

[121] 1 HENCKAERTS & DOSWALD-BECK, RULES 29, *supra* note 119 (stating the Additional Protocol I definition as customary international law applicable in all conflicts).

[122] *Id*. at 31 (noting that "the United States accepts the customary nature of the definition contained in Article 52(2) . . . [but its position is] that this definition is a wide one which includes areas of land, objects screening other military objectives and war-supporting economic facilities").

[123] Parks, *supra* note 28, at 141 ("The principal problems with the definition of military objective contained in Article 52 are the phrases requiring that any attack make an 'effective contribution to military action' and constitute a 'definite military advantage.'"). Mr. Parks describes the Protocol I definition and customary international law as being "miles apart." *Id*. at 144. Assumingly the United States does not object to the nature, location, purpose, and use construct for analysis. *See* DESKBOOK, *supra* note 41, at E-3–E-5 (discussing the nature, location, purpose, and use prongs).

capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[124] The commentary to the Additional Protocols provides interpretive guidance on the nature, location, purpose, and use prongs.

a. Nature

The nature prong focuses on the inherent nature of an object; the commentary to Article 52 explains "nature" as those items or objects that are "directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres etc."[125] Yoram Dinstein restates this as requiring that an "object . . . must be endowed with some inherent attribute which *ep ipso* makes an effective contribution to military action."[126] The ICRC notes that a "tank, . . ., an artillery emplacement, an arms depot, or a military airfield" can be "presumed to be a military objective."[127]

b. Location

The location prong addresses terrain and identifies times when terrain itself can become a valid military objective. The commentary to Additional Protocol I notes that terrain may be a military objective because of "special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it."[128] Yoram Dinsten notes that "there must be a distinctive feature turning a piece of land into a military objective (e.g., an important mountain pass, a trail in the jungle

[124] Protocol I, *supra* note 29, art. 52(2).
[125] PILLOUD ET AL., *supra* note 36, at 636.
[126] DINSTEIN, *supra* note 26, at 88.
[127] KALSHOVEN & ZEGVELD, *supra* note 44, at 100.
[128] PILLOUD ET AL., *supra* note 36, at 636. The commentary notes that "because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it." *Id*.

or in a swamp area; a bridgehead; or a spit of land controlling the entrance of a harbor)."[129]

c. Purpose

The purpose prong looks not at the object itself, but at the enemy's intended future use of the object.[130] Dinsten notes that "purpose is deduced from an established intention of a belligerent as regards to future use."[131] Looking at the future employment, objects that presently appear to be civilian objects may in fact become valid military objectives.

d. Use

The use prong focuses on the current employment of an object or "its present function."[132] Almost every object, including apparently completely civilian objects, can be used by a military force.[133] Dinstein notes that it "does not depend necessarily on its original nature or on any (later) intended purpose."[134] While Article 52(3) of Additional Protocol I notes that objects should be presumed to be civilian objects,[135] Dinstein argues that this rebuttable presumption applies only in cases of doubt.[136]

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[129] DINSTEIN, *supra* note 26, at 92. A.P.V. Rogers notes, "If an area of land has military significance, for whatever reason, it becomes a military objective." ROGERS, *supra* note 92, at 39.

[130] PILLOUD ET AL., *supra* note 36, at 636 (noting that "'purpose' is concerned with the intended future use of an object").

[131] DINSTEIN, *supra* note 26, at 89.

[132] PILLOUD ET AL., *supra* note 36, at 636.

[133] *Id.* ("Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives.").

[134] DINSTEIN, *supra* note 26, at 90.

[135] Protocol I, *supra* note 29, art. 52 ("In cases of doubt whether an object . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.").

[136] DINSTEIN, *supra* note 26, at 91. ("The degree of doubt that has to exist prior to the emergence of the (rebuttable) presumption is by no means clear. But surely that doubt has to arise in the mind of the attacker, based upon 'circumstances ruling at the time.'").

2. The Military Commissions Act of 2009 and Its "War-Fighting or War-Sustaining Capability" Language

The United States accepts as customary international law the principle of discrimination,[137] which requires combatants to distinguish between civilian objects and military objectives.[138] The United States, however, deviates from the Additional Protocol I definition of military objective.[139] Mr. Hays Parks severely criticizes the Additional Protocol I definition of military objective as not reflecting customary international law, noting that it unduly limits military objective to targets with a "nexus to a 'military' rather than strategic, psychological, or other possible advantage."[140] Although the United States views the Additional Protocol I definition as too narrow, no clear U.S. definition exists. One commentator, describing the United States' almost complete disregard of Additional Protocol I, asked, "What is the U.S. definition of military objective?"[141]

The MCA contains one potential definition. Although the MCA governs criminal trials of "alien unprivileged enemy belligerents,"[142] the MCA defines many terms in the law of war. Assumingly, these definitions apply to all belligerents and not just captured enemy belligerents. Additionally, to forestall claims of retroactive lawmaking,

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[137] Letter from J. Fred Buzhardt, Gen. Counsel, Dep't of Def., to Sen. Edward Kennedy, Chairman, Subcomm. on Refugees of the Comm. on the Judiciary (Sept. 22, 1972) *reprinted in Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT'L L. 122, 123–24 (1973); *see also* Parks, *supra* note 28, at 113 ("Article 48 states the fundamental principle of discrimination, a principle with which there should be no disagreement.").

[138] Protocol I, *supra* note 29, art. 48.

[139] Mr. Parks pans the Additional Protocol I definition of military objective. Parks, *supra* note 28, at 135–144 (noting customary practice of targeting economic targets, power generation target, industrial targets, and transportation target). Additionally, even the Matheson remarks only endorsed the Additional Protocol's protection of civilians, without specifically adopting the definition of military objective. Matheson Remarks, *supra* note 48, at 426. Even this partial embrace of Additional Protocol I may no longer be valid. Charles Garraway, *"England Does Not Love Coalitions?" Does Anything Change?*, *in* 82 INTERNATIONAL LAW STUDIES, THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 233, 238 (Anthony M. Helm, ed. 2006) ("It appears the Matheson analysis is no longer considered 'authoritative.'").

[140] Parks, *supra* note 28, at 141.

[141] Garraway, *supra* note 139, at 238; *see also* Geoffrey S. Corn, Hamdan, *Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1, 6 (noting a "general 'rollback' by the executive branch of the treatment of Additional Protocol I provisions.").

[142] Military Commissions Act of 2009, *supra* note 41, § 948(b).

Congress clearly states that the MCA does not make new law but that it merely "codif[ies] offenses that have traditionally been triable under the law of war."[143] Accordingly, although the MCA does not explicitly apply to U.S. targeting decisions, the MCA states a position on the law of war. Passed by Congress and signed by the President, the MCA contains a definition of military objective that warrants examination. Examining the MCA definition reveals that it differs from Additional Protocol I only slightly in form, but significantly in meaning.

a. MCA Definition

The MCA defines military objectives as follows:

> [C]ombatants and those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability of an opposing force and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack.[144]

While similar in form and style, the MCA definition differs significantly in meaning from that of the Additional Protocol I. Notably, Additional Protocol I requires objects to make an "effective contribution to military action,"[145] while the MCA requires objects to "effectively contribute to the war-fighting or war-sustaining capability of an opposing force."[146] This slight change significantly expands the reach of military objective; numerous objects could contribute to the war-fighting or war-sustaining capability without contributing to any particular military action.[147]

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[143] *Id.* § 950(p).

[144] *Id*. The 2009 definitions made several non-substantive grammatical changes to the 2006. Military Commissions Act of 2006, Pub. L. No. 109-366, § 950v, 120 Stat. 2600, 2625, *invalidated by* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2606.

[145] Protocol I, *supra* note 29, art. 52.

[146] Military Commissions Act of 2009, *supra* note 41, § 950(p).

[147] A.P.V. Rogers raises these objections while discussing the Navy's definition, noting that it will "widen considerably the range of targets that might be attacked, including some of the targets that are problematic under Protocol I, especially economic, leadership and propaganda targets." ROGERS, *supra* note 92, at 81.

The MCA leaves unexplained the meaning of war-fighting and war-sustaining capabilities; however, several similar definitions preceded the MCA. These earlier expanded definitions of military objective help flesh out the potential meaning of the war-sustaining language.

b. Targeting Cotton: The Navy Commander's Handbook, Annotated Supplement to the Navy Commander's Handbook, and Joint Doctrine

The *Navy Commander's Handbook* includes a definition of military objective very similar to the MCA, defining military objective as follows:

> An object is a valid military objective if by its nature (e.g., combat ships and aircraft), location (e.g., bridge over enemy supply route), use (e.g., school building being used as an enemy headquarters), or purpose (e.g., a civilian airport that is built with a longer than required runway so it can be used for military airlift in time of emergency) it makes an effective contribution to the enemy's war fighting/war sustaining effort and its total or partial destruction, capture, or neutralization, in the circumstance at the time, offers a definite military advantage.[148]

While the *Navy Commander's Handbook* uses the same "war-sustaining" language as the MCA, the *Navy Commander's Handbook* provides further discussion of possible military objectives, noting that "economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked."[149]

The Navy's *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (*Annotated Supplement*) provides supporting information. This annotated supplement notes:

> Proper economic targets for naval attack include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing

[148] THE COMMANDER'S HANDBOOK, *supra* note 116, at 5-2–5-3.
[149] *Id*. at 8-3.

> war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.[150]

The *Annotated Supplement* justifies enlarging the definition of military objective with a footnote citing the destruction of the South's cotton crop by the Union Army during the American Civil War.[151] This supplement notes that "the sale of cotton provided funds for almost all Confederate arms and ammunition."[152] The critical nature of the cotton exports to the Southern economy certainly explains the targeting decision, but this reasoning appears to permit targeting based solely on the economic value of an object.

One commentator limits the broad language of the *Navy Commander's Handbook* by positing that war-sustaining targets must have some military link, noting that "some nexus to military capability is required."[153] This commentator, however, also argues that targeting economic resources is a legitimate and legal undertaking when these assets are at sea.[154] If an economic export could be a military objective while at sea, arguably, it would also be valid target while still on land. The commodity is the same, regardless of location; being located at sea does not seem to provide any nexus to military capability. Accordingly, it remains unclear what this nexus to military capability could mean.

Looking elsewhere for clarification, Joint Publication 3-60, *Joint Doctrine for Targeting* (Joint Pub. 3-60), also adopts economic targets as potentially valid. Joint Pub. 3-60 notes that valid targets "may include economic targets that indirectly but effectively support and sustain the

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[150] U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, INT'L L. STUD. NO. 73, at 8-3 (A.R. Thomas & James C. Duncan, eds., 1997) [hereinafter ANNOTATED SUPPLEMENT].

[151] *Id*. at 8-3 n.11.

[152] *Id.*

[153] Lieutenant David A. Melson, *Targeting War-Sustaining Capability at Sea: Compatibility with Additional Protocol I*, ARMY LAW., July 2009, at 44, 51. Lieutenant Melson notes that "war-sustaining targets should be defined according to careful economic analysis of a belligerent's military and industrial capacity." *Id*. While economic analysis may assist in application of this standard, better application of a standard does not logically justify the proffered standard.

[154] *Id.* at 45. ("Denying naval forces a traditional and legal target set through the application of rules of warfare derived from state practice on land denies military planners a useful strategy and risks prolonging conflicts.").

adversary's warfighting capability."[155] While this language seems analogous to the MCA and *Navy Commander's Handbook*, other language in the same paragraph suggests some restrictions. Joint Pub. 3-60 notes, "Economic targets (i.e., factories, workshops, and plants) that make an effective contribution to an adversary's military capability are considered legitimate military targets."[156] This additional language appears to require objects to contribute to the military capabilities of an adversary before an object can become a military target. This suggests that general support to a regime does not contribute to the military capabilities of that regime.

This U.S. definition is not without criticism. Yoram Dinstein argues that the definition in the *Navy Commander's Handbook* is a "slippery-slope" because "almost every civilian activity might be construed by the enemy as indirectly sustaining the war effort (especially when hostilities are protracted)."[157] W. Hays Parks, however, argues that the Additional Protocol I definition displays "a serious ignorance of the art of war."[158] Mr. Parks argues that the historic practice of nations makes clear that the Additional Protocol I definition is too narrowly drawn.[159] Parks argues that World War II demonstrates that valid military objectives include much more than just those permitted by the Additional Protocol I definition.[160]

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[155] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT DOCTRINE FOR TARGETING, at A-3 (Jan. 17, 2002) [hereinafter JOINT PUB. 3-60].

[156] *Id*. at 3-30.

[157] DINSTEIN, *supra* note 26, at 87 (noting that there "must exists a proximate nexus to military action").

[158] Parks, *supra* note 28, at 139.

[159] *Id*. at 139–44. In addition to the targeting of cotton mentioned in the ANNOTATED SUPPLEMENT, *supra* note 150, at 8-3 n.11, the Lieber Code provides another Civil War example that suggests economic targeting is acceptable. Headquarters, U.S. Dep't of Army, Gen. Order No. 100, sec. 17 (24 Apr. 1863), *reprinted in* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1898), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Instructions-gov-armies.pdf ("War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.").

[160] Parks, *supra* note 28, at 21. One commentator would disagree, and notes that "humanitarian considerations on which the principle of distinction are rooted must be a necessary complement to the principle of economy in the use of force as a key criterion in the interpretation of the notion of military objective." HECTOR OLASOLO, UNLAWFUL ATTACKS IN COMBAT SITUATIONS: FROM THE ICTY'S CASE LAW TO THE ROME STATUTE 138 (2008). In other words, the limits on military objectives must be in addition to a commander's self imposed logistical limits—otherwise, the principle of military objective means very little at all.

The full reach of the U.S. definition remains unclear. The discussion above illustrates that the U.S. definition is not coterminous with Additional Protocol I. The U.S. definition reaches considerably farther, but exactly how far remains unclear.

C. Can We Smoke the Weed? Application to Poppy Plants and Opium Processing Laboratories

Having reviewed the abstract definitions of military objective, this article now applies the Additional Protocol I and U.S. definitions to targeting actions in Afghanistan, using the same facts discussed in Part II.

1. Additional Protocol I Standard: Are Narcotics-Related Objects Military Objectives Because of Their Nature, Location, Purpose, or Use?

Under the Additional Protocol I definition of military objective, narcotics-related materiel cannot be targeted. The drugs and processing centers, while perhaps valuable to drug traffickers and the Taliban, do not make an effective contribution to military action by their nature, location, purpose, or use.

No inherent characteristic of poppy plants, processing equipment, or refined opium makes them military objects. None of these items is "directly used by the armed forces."[161] Although some traffickers are connected to the Taliban and the Taliban may provide labor for the processing and trafficking,[162] this processing by "military" personnel does not make them inherently military objects. These "military" forces are merely providing manual labor unrelated to their militant functions. Accordingly, the narcotics do not by their nature contribute to military action.

Likewise, the opium processing laboratories and the fields planted with poppy plants are not locations of military importance. Some of these

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[161] PILLOUD ET AL., *supra* note 36, at 636. These narcotics materials are not any of the examples given by the commentary. *Id.* (listing examples of "weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.").

[162] PETERS, *supra* note 21, at 12.

processing labs or fields may happen to be on militarily significant terrain, but any significance of the terrain is independent of these narcotics related items. In short, the sites have no "special importance for military operations,"[163] and, therefore, the narcotics do not by their location contribute to military action.

The narcotics trade items also do not serve a military purpose, as the insurgents apparently do not intend to put the objects to a future military use.[164] The traffickers and the Taliban appear to treat narcotics as they would treat wheat—a commodity that can be consumed or sold for cash. Neither personal consumption nor export for sale can be considered a military use. Nevertheless, one potential military use of opium could be to undermine the opposition's military strength by facilitating the addiction of enemy soldiers to heroin. President Reagan once favorably considered undermining the Soviets in Afghanistan by "flooding them with hard drugs."[165] However, there appears to be no indication that the Taliban uses or intends to use opium to undermine the military readiness of international troops in Afghanistan.

Finally, the same analysis applies to the Taliban's current use of poppy plants, processing centers, and refined opium. Just as there exists no planned future military use of opium, there appears to be no current use of opium for military purposes in "its present function."[166] Accordingly, the use does not contribute to military action.

In conclusion, the narcotics materiel does not make a military contribution by its nature, location, purpose, or use; narcotics materiel cannot be considered valid military objectives. Commentators have addressed similar issues involving the targeting of exported goods. One commentator opined that targeting the coffee or banana exports of a country that relied almost entirely on those exports would not be permissible.[167] Another commentator noted that targeting of a merchant ship that was carrying oil for export would not be permissible.[168]

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[163] PILLOUD ET AL., *supra* note 36, at 636. It likewise does not fit any of the examples given by Dinstein. DINSTEIN, *supra* note 26, at 92 ("[A]n important mountain pass, a trail in the jungle or in a swamp area; a bridgehead; or a spit of land controlling the entrance of a harbor.").

[164] The commentary notes that "'purpose' is concerned with the intended future use of an object." PILLOUD ET AL., *supra* note 36, at 636.

[165] PETERS, *supra* note 21, at 45.

[166] PILLOUD ET AL., *supra* note 36, at 636.

[167] A.P.V. Rogers makes an argument about a hypothetical coffee-growing country:

2. The MCA "War-Sustaining" Standard

This section analyzes the narcotics materiel in Afghanistan using the MCA definition. Although the MCA definition uses the same nature, location, purpose, and use construct, this section will not readdress those issues as the analysis would mirror the previous section. Instead, this section applies the "war-sustaining" standard to the targeting. This section also looks for potential insights from the charging decisions at the Military Commissions and from the U.S. Army's field manual on the law of war.

a. Is the Opium Trade a "War-Sustaining" Activity?

The narcotics materiel in Afghanistan may in fact effectively contribute to the war-sustaining or war-fighting capabilities of the Taliban. As noted above, narcotics trafficking provides the Taliban with several hundred million dollars in annual revenue.[169] While narcotics trafficking may no longer be (if it ever was) the leading source of the Taliban's income, [170] the narcotics trade still provides a significant share

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> If a country relies almost entirely on, say, the export of coffee beans or bananas for its income and even if this income is used to great extent to support its war effort, the opinion of the author is that it would not be legitimate to attack banana or coffee bean plantations or warehouses. The reason for this is that such plants would not make an effective contribution to military action nor would their destruction offer a definite military advantage. The definition of military objectives thus excluded the general industrial and agricultural potential of the enemy. Targets must offer a more specific military advantage.

ROGERS, *supra* note 92, at 70–71. Substitute opium for coffee, and this quote could be describing Afghanistan. The opium plants and the material supporting the narcotics trade do not offer a "specific military advantage."

[168] DINSTEIN, *supra* note 26, at 102–03 n.131 (noting that "a private tanker cannot be attacked as a military objective when carrying oil exported from a belligerent oil-producing State, even though the revenue derived from the export may prove essential to sustaining the war effort").

[169] U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2. Things improved slightly in 2009, with a decrease in farm gate receipts for opium from $730 million in 2008 to $438 million in 2009, but opium is still a significant source of revenue. U.N. OFFICE ON DRUG & CRIME, *supra* note 15, at 1.

[170] Whitlock, *supra* note 110, at B1. The CIA has recently greatly reduced its estimate of narco-profits going to the Taliban, but estimating that foreign donors contributed $106 million to the Taliban over the past year. *Id.*

of the Taliban's revenue.[171] Additionally, aiming to protect their profits, the Taliban may now focus more on protecting their lucrative narcotics trade than on recapturing Kabul.[172]

Providing the Taliban significant monetary resources, the narcotics trade certainly provides support to the Taliban that might increase their war-fighting or war-sustaining capability. If the Taliban were solely an armed group, then arguably all money going to the Taliban goes to an opposing force. As noted above, however, the Taliban runs a shadow government throughout much of Afghanistan and even cooperates with the United Nations.[173] Accordingly, the Taliban appears not to use all of its resources for armed attacks, making it unclear if narcotics are war sustaining.

Utilizing the *Navy Commander's Handbook* definition of economic targets, one finds that the opium materiel may make an effective contribution.[174] As economic objects, the opium-related items may "indirectly but effectively support and sustain the [Taliban's] war-fighting capability."[175] Although the Taliban may get more of its resources from foreign donors, this does not devalue the money they garner from the opium trade. The millions of dollars they collect by taxing opium can still fund a significant number of insurgents.[176] However, as General McChrystal noted in his report, "Eliminating insurgent access to narco-profits—even if possible, and while disruptive—would not destroy their ability to operate so long as other funding sources remain intact."[177] General McChrystal's comments indicate that narco-profits are not a "but for" causation of the insurgency. Perhaps this indicates—depending on one's definition of "effectively"—that opium does not "effectively" support the Taliban's war-sustaining capability.

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[171] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2; U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at *2*.
[172] PETERS, *supra* note 21, at 12 (noting that "battles are more often diversionary attacks to protected big shipments, rather than campaigns for strategic territorial gain").
[173] Trofimov, *supra* note 83, at A14 (outlining the efforts of the Taliban to assist the U.N. anti-polio program).
[174] COMMANDER'S HANDBOOK, *supra* note 116, at 5-2 to 5-3.
[175] ANNOTATED SUPPLEMENT, *supra* note 150, at 8-3.
[176] *See* discussion *supra* Part I.
[177] McChrystal Memo, *supra* note 95, at 2-8.

Applying the Joint Pub. 3-60 definition, one reaches the same inconclusive result. Although Joint Pub. 3-60 explicitly condones targeting of economic targets, it requires economic targets "make an effective contribution to an adversary's military capability."[178]

As discussed in the previous paragraph, one cannot clearly conclude that the narcotics trade makes an effective contribution to the Taliban's military capabilities. The money could go to a variety of non-military uses, and narcotics are not the sole source of resources for the insurgents. Additionally, as only one of three major insurgent groups participates in the narcotics trade,[179] opium does not effectively contribute to the military capabilities of the other two insurgent groups.

The *Annotated Supplement* uses the targeting of cotton during the Civil War as justification for economic targeting,[180] and the targeting of cotton in the antebellum South provides an interesting analogy. The American South was dependent on cotton for cash.[181] Afghanistan has only $327 million in legitimate exports while the opium trade collects $3 billion a year.[182] By a multiple of 10, opium is Afghanistan's most valuable export, indicating Afghanistan is similarly dependent on opium for cash.

Afghanistan's opium differs from the South's cotton in two notable ways. First, the American South was completely dependent on the sale of cotton to purchase arms and equipment,[183] while insurgents in Afghanistan survive on more than just the opium trade. This difference suggests that opium is not nearly as important as cotton was to the South. Accordingly, the narcotics trade provides less of an effective contribution than cotton contributed to the South.

Cutting the other way, the second major difference is opium's lack of legitimate civilian use. Once opium is processed into heroin, opium becomes contraband. Arguably, heroin can be targeted because it retains no legitimate civilian use.

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[178] JOINT PUB. 3-60, *supra* note 155, at 3-30.
[179] McChrystal Memo, *supra* note 95, at 2-8.
[180] ANNOTATED SUPPLEMENT, *supra* note 150, at 8-3 n.11.
[181] *Id.*
[182] CIA, THE WORLD FACT BOOK: AFGHANISTAN (Jan. 15, 2010), https://www.cia.gov/library/publications/the-world-factbook/geos/af.html (last visited Jan. 15, 2010) ($327 million in exports in 2007); U.N. OFFICE ON DRUG & CRIME, *supra* note 13, at 2–5.
[183] ANNOTATED SUPPLEMENT, *supra* note 150, at 8-3 n.11.

Focusing on the illegality of the substance, however, reverses the presumption that objects are civilian unless demonstrated to have a military function.[184] Additionally, this argument summarily equates "illegal" with military objective, which is not a supportable conclusion. Many things can be illegal without having any military association or use. While an object's civilian treatment may factor into a proportionality analysis (e.g., destruction of contraband may cause minimal civil damage), the mere absence of a legal civilian use does not make this object a valid military target.

Ultimately, one reaches an inconclusive result using the MCA and *Navy Commander's Handbook*. While the narcotics trade supports the Taliban, it may not make an effective contribution to military capability. Regardless, the Department of Defense Law of War Chair in the Office of the General Counsel believes that all economic targets are valid with the "degree of contribution establish[ing] the priority of attack, not the legality of the target."[185] From that perspective, the narcotics trade is a valid target, just perhaps not a high priority target.

b. Good for the Goose? The Charging of Khalid Sheikh Mohammed (KSM) at the Military Commissions

While the previous section applies the MCA definition of military objective to U.S. targeting in Afghanistan, review of the Military Commissions' charging documents uncovers a potential U.S. double standard.[186] At the Military Commissions, the United States charged KSM (and alleged accomplices) with "intentionally engage[ing] in attacks on civilian property, to wit: the World Trade Center (New York, New York) . . . that is property that was not a military objective."[187]

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[184] The MCA definition limits military objectives to items that "effectively contribute." Military Commissions Act of 2009, *supra* note 41, § 950(p). This necessarily means that items are valid military objects by what they do for the enemy and not by an absence of civilian use.

[185] Parks, *supra* note 28, at 55.

[186] A plethora of articles undertake to attack or support the Military Commissions. Regardless of one's opinion about the Military Commissions, how the MCA is applied at the Military Commissions demonstrates how the United States believes the MCA should be interpreted, and, at least arguably, what the United States accepts as valid military objectives.

[187] U.S. DEP'T OF DEF., Referred Charges Khalid Sheikh Mohammed 21 (May 9, 2008), http://www.defense.gov/news/d20080509Mohammed.pdf. Although the charging documents also charge Khalid Sheikh Mohammed with attacking civilians at the World

While KSM and accomplices clearly attacked the World Trade Center using illegal means and killed innocent civilians, the United States based this particular charge on the selection of the World Trade Center as the target.

While the 9-11 attacks were clearly acts of terrorism, potentially affecting the entire United States population, could one consider the World Trade Center to be a valid military objective using the U.S. economic targeting analysis? Does Wall Street contribute to the war-fighting or war-sustaining capability of the United States? How different is the contribution of the narcotics trade to the war-fighting and war-sustaining ability of the Afghanistan insurgency? Neither Wall Street nor the opium trade provides direct military assistance; rather, both merely provide financial resources to institutions that wield power through other activities and organizations.[188]

Charging KSM with targeting the World Trade Center, arguably an economic object, the United States undermines its claim that the Taliban's economic base is a valid military objective. The World Trade Center, much like the Internal Revenue Service and the Treasury Department, "indirectly but effectively support and sustain" the United States. Likewise, the narcotics trade indirectly supports the Taliban. Should the United States be permitted to criminally charge KSM with targeting an economic object, but then simultaneously target a Taliban economic object?[189]

This potentially disparate treatment of economic targeting may illustrate a warning found in the commentary to Additional Protocol I.

Trade Center, Shanksville, Pennsylvania, and the Pentagon, the charging documents do not refer to the Pentagon as a civilian object. *Id.*

[188] Although narcotics may be illegal, they are used as a financial resource by the Taliban. One could also argue that narcotics are merely *malum prohibitum* rather than *malum in se*. Also, not everything that happens on Wall Street is legal, and some acts are in fact *malum in se*. *See* George Packer, *A Dirty Business*,THE NEW YORKER, June 27, 2011 http://www.newyorker.com/reporting/2011/06/27/110627fa_fact_packer.

[189] Since narcotics are contraband, the United States and the Government of Afghanistan may be able to destroy narcotics materiel through a variety of legally permissible means. Regardless, just because narcotics could be destroyed legally, one cannot justify treating narcotics as military objectives. Whatever the justification, outside observes can likely conclude that dropping 1,000-pounds bombs on poppy seeds is military targeting. CNN, *U.S. Bombs Poppy Crop to Cut Taliban Drug Ties*, July 21, 2009, http://www.cnn.com/2009/WORLD/asiapcf/07/21/afghanistan.poppy.strike/index.html#cnnSTCText ("show of force designed to break up the Taliban's connection to heroin").

The commentary notes that opinions on the limits of the military objective have often "differed considerably, depending on whether the territory concerned was their own territory, enemy territory, or territory of an ally occupied by enemy forces."[190] One could argue that the U.S. definition of military objective fluctuates, depending on whether the potential target lies in Kandahar or New York.

c. Field Manual 27-10 and Its Language Parallel Additional Protocol I

Although the MCA, *Navy Commander's Handbook*, and Joint Pub. 3-60 all offer reinforcing definitions of military objective, another U.S. publication closely parallels the Additional Protocol I definition. The Army Field Manual 27-10 (FM 27-10), *The Law of Land Warfare*, defines military objectives as follows:

> [T]hose objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage—are permissible objects of attack (including bombardment). Military objectives include, for example, factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations[191]

Mirroring the "effective contribution to military action" language found in Additional Protocol I, FM 27-10 also provides informative examples that conflict with Joint Pub. 3-60. Joint Pub. 3-60 notes that factories may be valid military objectives;[192] Field Manual 27-10, however, limits military objectives to factories producing military

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[190] PILLOUD ET AL., *supra* note 36, at 631.
[191] U.S. DEP'T OF ARMY, FIELD MANUAL (FM) 27-10, THE LAW OF LAND WARFARE 5 (15 July 1976) [hereinafter FM 27-10].
[192] JOINT PUB. 3-60, *supra* note 155, at A-3.

supplies.[193] Similarly, Joint Pub. 3-60 notes that workshops may be valid objectives;[194] Field Manual 27-10, however, limits it to warehouses "storing munitions and military supplies."[195] Likewise, FM 27-10's definition of military objective would allow targeting of ports and railroads—but only such facilities "used for the transportation of military supplies."[196]

Interestingly, the World War II era version of FM 27-10 similarly suggests that military objectives are limited to purely military targets. The 1940 version of FM 27-10 has a paragraph entitled "Train Wrecking" that notes, "Train wrecking and burning of camps or military depots are legitimate means . . . . Wrecking of trains should be limited strictly to cases which tend directly to weaken the enemy's military forces."[197] This paragraph explicitly limits train wrecking to weakening of an opponent's military, suggesting that it is not permissible to wreck trains carrying purely economic objects.[198] Accordingly, the 1940 version suggests economic targeting is not permitted.

In summary, under Additional Protocol I, the narcotics industry is not a valid military objective, while using the MCA definition the narcotics might be a valid target. The narcotics trade might effectively contribute to the war-fighting or war-sustaining capability of the Taliban, but so might Wall Street contribute the war-sustaining capability of the United States. The charging of KSM at the Military Commissions and FM 27-10 also seem to conflict with the U.S. targeting of narcotics in Afghanistan. While the U.S. definition of military objective may differ from the Additional Protocol I definition, the U.S. definition should not differ based on the geographic location of the target.

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[193] FM 27-10, *supra* note 191, at 5 ("factories producing munitions").
[194] JOINT PUB. 3-60, *supra* note 155, at A-3.
[195] FM 27-10, *supra* note 191, at 5.
[196] *Id.*
[197] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 10 (Oct. 1, 1940).
[198] Of course, it does limit burning of depots to "military" depots, but it may be assumed that all depots are military materiel. *Id*. Of note, the prohibition in the 1940s uses the word "should" and not "must" without explanation or reference—but it also uses the words "limited strictly," also without explanation.

IV. More Than Legally Problematic: Kinetic Targeting of Drugs and Traffickers Conflicts With Counterinsurgency Doctrine, Unwisely Encourages the Targeting of Economic Objectives, and Undermines the Limits on Military Necessity

Thus far, this article has identified several problematic areas. The U.S. targeting of traffickers certainly conflicts with the understanding of direct participation expressed by the Additional Protocols and the ICRC. The targeting also suggests an overextension of the U.S. functionality test. Similarly, the U.S. targeting of narcotic materiel conflicts with the Additional Protocol I definition of military objective while possibly reflecting an overstretching of the U.S. definition.

Regardless, even if the targeting were universally accepted as legal and consistent with established policy, the targeting would still be unwise. Counterinsurgency doctrine, reciprocity, and desires to limit the power of military necessity—all these arguments suggest that kinetic targeting of the narcotics trade risks unwelcomed results.

A. Counterinsurgency Doctrine Calls for Host Nation Handling of Security Through the Criminal Justice System

Field Manual 3-24 (FM 3-24), *Counterinsurgency*, provides the U.S. Army and Marine Corps doctrine for counterinsurgency warfare.[199] Assembled by General David Petraeus, FM 3-24 directs and focuses Marines and Soldiers conducting counterinsurgency warfare.[200] Written for a military audience, FM 3-24 has nonetheless also been widely distributed by civilian publishers, including 1.5 million electronic downloads the first month after release (and even a review in the *New York Times*).[201]

Discussing the counterinsurgent's focus, FM 3-24 states that ultimate success depends on the local population "taking charge of their own

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[199] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24].
[200] *Id.*
[201] Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, at 7-1 (calling FM 3-24 the book to begin with in devising a strategy for the 21st century).

affairs and consenting to the government's rule."[202] Accordingly, the manual notes that the "primary objective of any COIN operation is fostering development of effective governance."[203] The manual notes that the rule of law greatly increases the legitimacy of a government.[204]

The field manual also instructs leaders to establish security through the rule of law, highlighting the importance of building "sustainable security institutions"—police, courts, and prisons—"perceived by the local populace as fair, just, and transparent."[205] Accordingly, FM 3-24 calls for commanders to move quickly from combat to law enforcement and to handle criminals in the local criminal justice system to provide the host government with added legitimacy.[206] The field manual also warns that "unjustified or excessive use of force" undermines the legitimacy of the government.[207]

Applying the U.S. counterinsurgency doctrine to the Afghan narcotics trade, the United States should work with the Afghan government to arrest and prosecute the traffickers. The coalition in Afghanistan has spent tens of millions of dollars to establish a semi-functional Afghan drug court,[208] and this court has heard hundreds of cases and convicted 259 drug defendants in a one-year period.[209] Unfortunately, to date, the court has thus far convicted mostly low-to medium-level actors.[210]

Despite disappointing initial returns, the prosecution of some drug traffickers, both in Afghanistan and in the United States,[211] demonstrates

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[202] FM 3-24, *supra* note 199, at 1-1. This paragraph also notes, "Over time, counterinsurgents aim to enable a country or regime to provide the security and rule of law that allow establishment of social services and growth of economic activity." *Id.*
[203] *Id*. at 1-21.
[204] *Id*. at 1-22.
[205] *Id*. at D-8.
[206] *Id*. at 1-23 to 1-24.
[207] *Id*.
[208] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 11; Farah Stockman, *Karzai's Pardons Nullify Drug Court Gains*, BOSTON GLOBE, July. 3, 2009, at A1.
[209] STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 11 (citing prosecutions between March 2008 and March 2009).
[210] *Id*. Some of these offenders were pardoned by President Karzai during the run-up to the Afghan election. Stockman, *supra* note 208, at A1. Some convicts did not need to be pardoned as they bribed their way out of prison shortly after arrival. Thomas Schweich, *Is Afghanistan a Narco-State?*, N.Y. TIMES MAG., July 27, 2008, at 45.
[211] Two major drug traffickers were tricked into leaving Afghanistan and then brought to the United States for prosecution. Clearly not an Afghan solution, this action is

the possibility of law enforcement actions. The United States should build on this initial progress. In addition to imprisoning traffickers, prosecutions would provide the Afghan government with additional legitimacy.

Working to develop an Afghan rule of law solution, the U.S. military would demonstrate one of the identified "Paradoxes of Counterinsurgency Operations." The paradox holds that "The Host Nation Doing Something Tolerably Is Normally Better than Us Doing It Well."[212] Accordingly, getting the Afghans to tolerably address their narcotics problem through their justice system is probably better than military targeting by the United States.

Kinetic targeting also risks appearing excessive and unjust, which could undermine the counterinsurgency effort. When traffickers are killed, local Afghans may view the deaths as innocent civilian casualties, even if the targeting was fully justified. On the contrary, when traffickers are arrested and prosecuted, the process demonstrates the legitimacy of the counterinsurgents and the host nations.

In summary, getting the Afghans to address the opium trade through Afghan criminal courts makes more sense from a counterinsurgency doctrine perspective, than targeting the opium trade with U.S. military force.

B. Turnabout is Fair Play: The Wisdom of Legitimizing Economic Targeting

Possessing the "largest and most technically powerful economy in the world,"[213] the United States owns the most economic objects that could "indirectly but effectively support and sustain [its] warfighting

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particularly difficult without an extradition treaty with Afghanistan. STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *supra* note 2, at 16.

[212] FM 3-24, *supra* note 199, at 1-27 to 1-28. The field manual takes this from T.E. Lawrence who said,"Better the Arabs do it tolerably than you do it perfectly. It is their war, and you are to help them, not win it for them." T.E. Lawrence, *Twenty-Seven Articles*, ARAB BULL., Aug. 20, 1917, *available at* http://wwi.lib.byu.edu/index.php/The_27_Articles_of_T.E._Lawrence.

[213] CIA, THE WORLD FACT BOOK: UNITED STATES (Jan 12, 2010), https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last visited Jan 12, 2010).

capability."[214] Facing no current threat of economic targeting, the United States may view economic targeting in Afghanistan as a costless expansion of military objective. This shortsighted view presents risks. The United States may face far different adversaries in the future, and future adversaries may have the desire and means to strike economic targets in the United States.

For example, Chinese military theory embraces non-linear and asymmetrical attacks against economic targets.[215] Noting the power of financial warfare, Chinese military theorists observe that an "economic crisis . . . [can] weaken [an adversary's] overall power, including its military strength."[216] This theory even notes that "heavy economic losses . . . would certainly be better than a military strike."[217] Other nations have probably also noticed such possibilities.

Targeting economic resources in Afghanistan, the United States may legitimize and encourage such thinking and planning for economic warfare. The Taliban may be unable to militarily strike U.S. economic interest (although Al Qaeda demonstrated they could on 9-11),[218] but future adversaries may have the capability.

C. No Reciprocity: Targeting Asymmetry Encourages the Taliban to Ignore the Laws of War

W. Hays Parks notes, "The law of war succeeds only insofar as it does not provide, or appear to provide, an opportunity for one party to gain a tactical advantage over another."[219] This requirement for reciprocity in the law of war may be lacking in Afghanistan, and may provide further incentives for the Taliban to ignore the law.

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[214] JOINT PUB. 3-60, *supra* note 155, at A-3.
[215] *See* LIANG & XIANGSUI, *supra* note 1, at 39–41, 165–68 (discussing asymmetric economic targeting).
[216] *Id.* at 167.
[217] *Id.*
[218] U.S. DEP'T OF DEF., Referred Charges Khalid Sheikh Mohammed 4 (May 9, 2008), http://www.defense.gov/news/d20080509Mohammed.pdf (Between 1996 and 2001, Khalid Sheikh Mohammed . . . decided to target economic, political, and military buildings in the United States and Western Pacific.").
[219] Parks, *supra* note 28, at 15.

The U.S. targeting of narcotics and narcotics traffickers may provide a tactical advantage in Afghanistan. If the law of war—at least how the United States interprets the law of war—sanctions the targeting of narcotics and trafficker (which are economic assets of the Taliban), then the Taliban may view the law as providing an advantage to the United States.[220] Because the Taliban cannot directly target U.S. economic assets, the Taliban is disadvantaged by the United States being permitted to target the Taliban's economic assets.

Although this targeting asymmetry results mostly from difference in conventional military capabilities,[221] the law may have some effect. Policy makers should consider whether targeting narcotics and narcotics traffickers encourages the Taliban to continue to disregard the laws of war.

D. The Bothersome Broadening of Military Necessity by Manipulating the Meaning of Military Objective

Military necessity and military objective are linked by definition. Military necessity is defined as "that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."[222] Since international law strictly limits targeting to military objectives,[223] the definition of military necessity (for targeting purposes) becomes "that principle which justifies [targeting of military objectives] which are indispensable for securing the complete submission of the enemy."[224]

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[220] The ICRC, in their direct participation recommendations, notes the corrosive effects of disparate treatment when addressing the potential asymmetry from abuse of the "revolving door" of civilian protections. INT'L COMM. FOR THE RED CROSS, *supra* note 32, at 72 (noting that "the confidence of the disadvantaged party in the capability of IHL to regulate the conduct of hostilities satisfactorily would be undermined, with serious consequences ranging from excessive liberal interpretations of IHL to outright disrespect for the protections it affords").

[221] U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 4 (June 2008), *available at* http://www.defense.gov/news/2008%20National%20Defense%20Strategy.pdf ("U.S. dominance in conventional warfare has given prospective adversaries, particularly non-state actors and their state sponsors, strong motivation to adopt asymmetric methods to counter our advantages.").

[222] FM 27-10, *supra* note 191, at 4.

[223] Protocol I, *supra* note 29, art. 52; Parks, *supra* note 28, at 32.

[224] FM 27-10, *supra* note 191, at 5 (with substituted words).

Because of these linked definitions, the larger the set of objects considered military objectives, the greater the power of military necessity. If military objective was an empty set, then military necessity would prohibit all targeting. Conversely, if military objective contained every conceivable object and person, then military necessity would permit all targeting. Accordingly, changes to the definition of military objective affect the meaning of military necessity. This link could permit states to quietly and nefariously expand the power of military necessity by expanding the reach of military objective.

Although international humanitarian law constrains the power of military necessity, individuals and groups occasionally attempt to avoid these restrictions by "citing the exigencies of necessity."[225] Historically, states have used necessity arguments to defend their actions by claiming a lack of alternatives.[226] Over time, the acceptability of these calls to military necessity has ebbed and flowed, with an impact on the conduct of war.[227]

As the most powerful state, the United States will drive the behavior of other states, influencing whether they use or accept a broad definition of military objective to increase the power of military necessity.[228] The U.S. targeting in Afghanistan implicitly sanctions such a broadening of military objective.

The U.S. targeting could cause impacts far outside of Afghanistan in conflicts not involving the United States. Some would argue that the global hegemony is obliged to consider these secondary effects of its

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[225] Gregory A. Raymond, *Military Necessity and the War Against Global Terrorism*, *in* THE LAW OF ARMED CONFLICT: CONSTRAINTS ON THE CONTEMPORARY USE OF MILITARY FORCE 1, 2 (Howard M. Hensel ed., 2007). Raymond notes, "Appeals to necessity challenge the wrongfulness of an act on the basis that it was the only means of safeguarding an essential interest against a grave and imminent period." *Id.*

[226] *Id*. at 4.

[227] *Id*. at 8-11. Raymond tracked the ebb and flow of the power of necessity by cataloging how international law scholars of particular periods referred to military necessity. Raymond tracked the power of necessity as strong during the era of Napoleon and then declining until a spike in the mid-1800s followed by another period of decline that again spiked during the World Wars of the 20th century followed by another period of decline until 9/11. *Id.*

[228] Raymond, *supra* note 225, at 13. Raymond argues, "Throughout history, the behavior of the powerful has exerted a major impact on whether prevailing international norms were permissive or restrictive. . . When the reigning hegemony justifies certain behavior, it alters the frame of reference for virtually everyone else." *Id.*

targeting decisions.[229] This may overstate the case, but the United States should recognize the far-reaching impacts of its targeting decisions in Afghanistan.

V. Murky Through Many Lenses: A Tenuous Application of Military Objective and Military Necessity

The U.S. targeting of the Afghan narcotics industry raises many problematic issues. This article first viewed the targeting of the traffickers through several lenses to determine if the traffickers were taking a direct part in hostilities. Looking through the lenses of Additional Protocol I and the ICRC, one would find the targeting illegal because the traffickers are not taking a direct part in hostilities. Looking through the lens of the U.S. functionality test, one finds the issue murky, requiring a stretch of the functionality test to justify targeting. Ultimately, the interpretation of direct participation is a policy matter. The U.S. interpretation, however, may not be the best policy choice as it suggests an interpretation of Afghan civilian direct participation different from the interpretation applicable to U.S. civilians.[230]

Next, this article analyzed the targeting of narcotics materiel through several lenses to determine if the opium and opium-related materiels were valid military objectives. Viewing these objects through the Additional Protocol I definition, the materiel fails to make a direct contribution to the military capability of the Taliban. Accordingly, the narcotics trade should not be considered a valid military objective. Viewing the opium through the U.S. war-sustaining definition, however, one finds a less clear picture. While narcotics contribute to the Taliban, the propriety of the targeting may depend on the meaning of war-sustaining capability. A narrow reading, as applied to KSM at the Military Commissions, suggests economic objects, such as the opium trade in Afghanistan, remain civilian objects. A broader reading, as outlined in the *Navy Commander's Handbook*, suggests narcotics-related objects are valid military objectives.[231]

All of this raises several policy concerns. First, U.S. kinetic targeting conflicts with counterinsurgency theory. Under counterinsurgency

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[229] *Id*. at 13–14.
[230] *See* discussion *supra* Part II.
[231] *See* discussion *supra* Part III.

doctrine, the Afghans should address the narcotics trade as a criminal matter. Second, the targeting legitimizes economic-based targeting, which potentially harms the United States in future conflicts. Third, the targeting asymmetry encourages the Taliban to further disregard the laws of war. Fourth, by expanding the definition of military objective, the United States increases the power of military necessity, and potentially increases human suffering in times of war.[232]

VI. Conclusion

Although the narcotics trade may provide hundreds of millions of dollars to the insurgency, military targeting of fifty drug traffickers with peripheral ties to the Taliban may not be worth the total costs. The world is watching: U.S. targeting in Afghanistan legitimizes economic targeting, further encourages insurgent groups to disregard the laws of war, and increases the breadth, scope and power of military necessity—presenting an unsettling example for other belligerents.

The targeting of the Afghanistan narcotics trade by the United States exposes more civilians and objects to the harms of war by using less limited measures to achieve limited objectives. These measures tumultuously stretch legal constructs dangerously close to their breaking point, and threaten to hinder counterinsurgency efforts in Afghanistan. Targeting the narcotics trade leaves in its wake a ripple effect far removed from the Afghanistan battlefield. Left unobstructed, these waves could lead other belligerents to use unlimited measures to pursue limited objectives, not unlike Sherman's burning and plundering.

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[232] *See* discussion *supra* Part IV.

FROM NADIR TO ZENITH: THE POWER TO DETAIN IN WAR

MAJOR CHRISTOPHER M. FORD*

Remarkably . . . the state of the law regarding the scope of the President's authority to detain . . . remains unsettled.[1]

I. Introduction

On January 30, 2009, the United States charged Mohammed Jawad with attempted murder for an attack on a U.S. military patrol in December 2002.[2] Six months later, the U.S. District Court for the District of Columbia ordered his release from custody for lack of evidence. The court's order mandated that the Government delay Jawad's release until "15 days following the submission of . . . information to the Congress."[3] On its face, the order is paradoxical—essentially, the court ordered Jawad's release and, in the same stroke of the pen, his detention. The Supplemental Authorization Act (SAA) of 2009 created this apparent paradox by prohibiting appropriated funds from being used "to transfer or release an individual detained at Naval Station, Guantanamo Bay, Cuba . . . unless the President submits to the Congress" certain information.[4]

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* Judge Advocate, U.S. Army. Presently assigned as Group Judge Advocate, 1st Special Forces Group (Airborne), Joint Base Lewis-McChord. LL.M., The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia; J.D., 2002, University of South Carolina School of Law, Columbia, South Carolina; B.A., 1999, Furman University, Greenville, South Carolina. Previous assignments include Trial Defense Service, Fort Carson, Colorado, 2008–2009; Assistant Professor, U.S. Military Academy, West Point, New York, 2005–2008; Brigade Judge Advocate, 5th Brigade Combat Team, 1st Cavalry Division, Baghdad, Iraq, 2004–2005; Administrative and Operational Law Attorney, 1st Cavalry Division, Fort Hood, Texas, 2003–2004; Legal Assistance Attorney, 2003, 1st Cavalry Division, Fort Hood, Texas. Member of the bar of South Carolina. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course. The author would like to thank Major Robert E. Barnsby for his assistance with this article.

[1] Gherebi v. Obama, 609 F. Supp. 2d 43, 45 (D.D.C. 2009).

[2] Charge Sheet, Bacha v. Obama, No. 05-2385, 2009 WL 2365846 1 (D.D.C. Jan. 30, 2008).

[3] Order, Bacha v. Obama, No. 05-2385, 2009 WL 2365846 (D.D.C. July 30, 2009).

[4] Supplemental Authorization Act of 2009, Pub. L. No. 111-32, § 14102(e), 123 Stat. 1859 (2009).

This application of the SAA implicates significant separation of powers concerns. Most fundamentally, who controls the detention of individuals on the battlefield? [5] Assuming the President possesses some inherent authority to detain—as this article does—to what extent can Congress prescribe the President's authority? Could Congress go so far as to direct the detention of a particular individual or class of individuals; or, conversely, could they prohibit the detention of the same? Though these questions involve fundamental constitutional issues and have been the focus of four Supreme Court rulings[6] and more than 200 federal court opinions since 2001,[7] the issue remains decidedly unsettled. This article argues that the President possesses some inherent power to detain, the breadth of which, relative to Congress, is a function of two factors: the location of detention (e.g., whether it occurs outside or inside the United States and its territories) and the nature of the detention (e.g., the intensity of the conflict in which the detention occurs).[8]

Part II of this article explores the authority to detain individuals on the battlefield under both international and domestic law. Both treaty law and Customary International Law (CIL) provide reasonably clear authority to detain individuals during the conduct of armed conflict.[9] Domestically, the authority is more uncertain.[10] Given the constitutional allocation of war powers generally, and the absence of an express allocation of detention authority specifically, the existence and parameters of powers in this area remain fiercely contested issues.[11] Broadly stated, Presidents have historically exercised detention authority

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[5] The terms "detain" and "detention" as used in this article reference the initial physical apprehension of an individual who is a non-U.S. citizen. They do not refer to the continued internment or detention of the individual. The point at which the power to initially detain transmutes into indefinite detention power (or lack thereof) is not clear. This distinction, however, is beyond the scope of this article. The term "on the battlefield" refers to a detention made by a member of the military for other than law enforcement purposes. It has no geographic limitations; that is, an individual can be detained "on the battlefield" inside or outside the United States. For a discussion on the separation of war powers and the detention of U.S. citizens, see Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 164 (2004).

[6] Hamdi v. Rumsfeld, 542 U.S. 507 (2004), Boumediene v. Bush, 553 U.S. 723 (2008), Rasul v. Bush, 542 U.S. 466 (2004), Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[7] Search by author on November 24, 2009 on WestLaw for federal cases containing the terms "Guantanamo" and "Habeas" revealed 275 results.

[8] *See infra* Part IV.

[9] *See infra* Part II.

[10] *See infra* Part II.

[11] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004), *Boumediene*, 553 U.S. 573 (2008), Rasul v. Bush, 542 U.S. 466, (2004), Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

without congressional authorization, and Congress has largely acquiesced.[12] This is not, however, universally true.[13]

Building on the foundation established in Part II, Part III examines not what limitations Congress *can* impose, but what limitations they *have* imposed since September 11, 2001 (9/11). Specifically, this section examines the Authorization for the Use of Military Force (AUMF),[14] the Authorization for the Use of Force Against Iraq (AUMF Iraq),[15] the Detainee Treatment Act,[16] the Military Commissions Act,[17] the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001(PATRIOT Act),[18] and the Supplemental Appropriations Acts of 2009 and 2010.[19] This section concludes that to the extent these statutes are limitations, they only limit actions which occur *after* the detention. None of these acts directs, prescribes, or regulates the President's authority to detain.[20]

Part IV of the of the article provides a framework to analyze these current issues as well as the broader issue of the extent to which Congress may restrict the President's inherent detention authority. The framework finds that the President enjoys maximum detention powers during open and active conflict, termed "high conflict," occurring outside of the United States.[21] The President's detention powers ebb to their minimum level—and Congress's powers stand at their high point—during reduced or inactive conflict, or "low conflict," inside the United

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[12] *See infra* Part II.
[13] *See id.*
[14] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].
[15] Authorization for the Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1497–1502 (2002) [hereinafter AUMF Iraq].
[16] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739 (2005) [hereinafter Detainee Treatment Act].
[17] Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (2006) [hereinafter Military Commissions Act].
[18] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter PATRIOT Act].
[19] Supplemental Authorization Act of 2009, Pub. L. No. 111-32 § 14,102, 123 Stat. 1859 (2009) [hereinafter SSA]. The pertinent language in the 2009 Act is identical to the language in the 2010 Act. *See* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3468 (2010) [hereinafter DoD Appropriations Act, 2010].
[20] *See infra* notes 191–235 and accompanying text.
[21] *See infra* Part IV.

States.[22] Circumstances mixing the factors, such as "low conflict" outside the United States, produce an Executive versus Legislative balance of powers falling somewhere between those extremes.[23] Consequently, the power of the President relative to Congress is presented on a spectrum, rather than in rigidly defined categories.[24]

The issue of separation of war powers is both extraordinarily broad and endlessly contentious. Countless books, articles, laws, and judicial decisions have attempted to wrest with the nature of presidential war powers. Given the breadth of the issues addressed, this article has inherent limitations. While this article does discuss some historical treatment of the issue, it does not purport to provide a comprehensive examination of the historical development of presidential war powers.[25] Second, when discussing separation of war powers, it is impossible to fully avoid the debate as to the existence and scope of preclusive or unitary Executive powers.[26] This article necessarily addresses the debate,

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[22] *See infra* Part IV.

[23] *See id.*

[24] *See id.*; *see also* Appendix (graphically illustrating the framework).

[25] Several articles comprehensively explore the historical aspect of this topic. *See, e.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1545–55 (1997) [hereinafter Calabresi & Yoo, *The Unitary Executive During the First Half-Century*]; Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003) [hereinafter Calabresi & Yoo, *The Unitary Executive During the Second Half-Century*]; David J. Barron & Martin Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 712-20 (2008).

[26] Inherent power refers to powers of the President which can be found in the Constitution. The phrase "preclusive powers" or "unitary executive" refer broadly to the concept that some of the President's inherent powers are preclusive, that is, they cannot be reviewed or limited by any other branch. *See generally* Calabresi & Yoo, *supra* note 25 (discussing the history of the unitary executive). This article does not endorse a preclusive theory of war powers, or the unitary executive theory. Neither constitutional history nor a broad reading of the cases addressing the issue support the idea that the President has exclusive authority over any war powers. *See, e.g.*, THE FEDERALIST No. 75, at 467 (Alexander Hamilton) (G.P. Putnam's Son ed., 1888) ("The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interest of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."). *See also* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003). Further, while the Court has at times endorsed a broad theory of Executive war powers; see, e.g., *Ex parte* Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring) and

but does not seek to provide a comprehensive review or discussion of the issue. To the extent the article discusses inherent powers, it is strictly in the context of the Executive's detention authority. Further, where the framework presented in Part IV provides guidance concerning the extent of the Executive's detention authority, it does not purport to provide definitive answers to every situation, particularly in the current conflict. As has been previously noted, "[t]here are inherent uncertainties associated with applying legal rules developed in other contexts to the war on terrorism . . . ."[27]

II. Authority to Detain

A. Authority to Detain Under International Law

It has long been assumed—without much examination or explanation—that the capture and detention of an enemy on the battlefield is "universally" accepted as an "important incident of war."[28] The Court in *Hamdi v. Rumsfeld*[29] addressed the issue, holding that "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[30] Citing *Ex parte Quirin*,[31] *Hamdi* found that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[32] This perfunctory analysis is not without precedent.[33]

Fleming v. Page, 50 U.S. 603, 615 (1850), this has not been a uniform and consistent reading of the constitution. Additionally it seems as though this was not the understanding of the early Congress. Vladeck, *supra* note 5, at 164 (noting that The Militia Act of 1792, as amended in 1795, Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424, gave the President power to respond to invasion or "imminent danger." If the President possessed any preclusive Commander-in-Chief powers, then certainly responding to a domestic invasion would be one of them).

[27] Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2056 (2005).

[28] *Ex parte* Quirin, 317 U.S. 1, 28–31 (1942).

[29] 542 U.S. 507 (2004).

[30] *Id.* at 518–19 (citing *Ex parte* Quirin, 317 U.S. at 28-30), Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002), WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920).

[31] 317 U.S. 1 (1942).

[32] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

[33] *See, e.g*, *In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946) ("Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war.").

This assumption—that persons on the battlefield may be captured by the opposing force—has its roots in history, treaty law, and customary international law. When addressing the authority to detain on the battlefield, courts have routinely relied on William Winthrop's treatise on Military Law written in 1896.[34] In that work, Winthrop writes that "[t]he time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death by virtue simply of his capture."[35] Winthrop provides only slightly more analysis than the modern courts, citing as authority an obscure publication entitled Manual, *Laws of War, Part II*[36] and Francis Lieber, author of the Lieber Code, the first codification of the laws of war.[37]

The base source of wartime detention authority in modern jurisprudence is treaty law.[38] All four Geneva Conventions and both Additional Protocols plainly contemplate detention of individuals during armed conflict.[39] This is hardly surprising as the drafters of these treaties

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[34] *See e.g. Quirin*, 317 U.S. at 32; *Application of* Yamashita, 327 U.S. 1, 10 (1946), *Hamdi*, 542 U.S. at 518); Hamdan v. Rumsfeld, 548 U.S. 557, 590 (2006); *In re* Territo, 156 F.2d at 145.

[35] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1228 (Little, Brown and Company rev. 2d ed. 1896).

[36] This is apparently a reference to a publication entitled *The Laws of War on Land*, published by the International Law Institute in 1880. *See* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 314 & n.107 (2005). The manual, drafted in the form of a treaty or statute, holds without citation to authority that "[i]ndividuals who accompany an army, but who are not a part of the regular armed force of the State, such as correspondents, traders, sutlers (sic), etc., and who fall into the hands of the enemy, may be detained for such length of time only as is warranted by strict military necessity." International Law Institute, *The Laws of War on Land* (1880), *available at* http://www1.umn.edu/humanrts/instree/1880a.htm.

[37] FRANCIS LIEBER, U.S. DEP'T OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863). *See also* RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR (1983) (providing extensive background on Francis Lieber and the intellectual genesis for the code).

[38] *See, e.g., In re* Territo, 156 F.2d 142 (9th Cir. 1946) (upholding the detention of an Italian prisoner of war under the 1929 Geneva Conventions).

[39] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 5, 19, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 4, 5, 6, 42, 43, 45, 46, & 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of Aug.12, 1949, and Relating to the Protection of Victims of International Armed Conflicts

drew heavily from the Lieber Code.[40] Authority to detain under treaty law is, however, limited to circumstances of "declared war or . . . any other armed conflict . . . between two or more High Contracting Parties."[41] Where armed conflict does not exist, International Law may still be applicable in one of two circumstances. The first is when the United Nations Security Council has passed a Resolution which would establish a legal authority to detain.[42] For instance, Security Council Resolution 1386, concerning Afghanistan post-invasion, authorized "the Member States participating in the International Security Assistance Force to take all necessary measures to fulfill its mandate."[43] This has been construed to authorize detentions in Afghanistan.[44]

Further, as a second circumstance, some have argued that in the absence of armed conflict, and application of the full Geneva Conventions, CIL would apply to provide detention authority.[45] This argument holds that in order for States to comply with other accepted provisions of CIL (e.g., humane treatment, prohibition against arbitrary detention, non-refoulment), States must be allowed to detain in accordance with CIL.[46] Finally, as *Hamdi* appeared to acknowledge, it could be argued that detention on the battlefield has itself become CIL.[47]

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arts. 11, 42, 44, 45, 46, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 5, June 8, 1977, 1125 U.N.T.S. 609.

[40] HARTIGAN, *supra* note 37, at 1 ("The Hague and Geneva Conventions were indebted directly to [the Lieber Code].").

[41] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *but cf.*, Benjamin J. Priester, *Who is a "Terrorist"? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1255, 1293 (2008) (arguing that "Common Article 3 contemplates the detention of both noncombatants and former combatants during the conflict.").

[42] *See generally* Major Robert E. Barnsby, *Yes, We Can: The Authority to Detain as Customary International Law*, 202 MIL. L. REV. 132, 145, 165 (Winter 2009).

[43] S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001). The "mandate" of the Member States is expressed in S.C. Res. 1383, U.N. Doc. S/RES/1383 (Sept. 22, 2001) and S.C. Res. 1378, U.N. Doc. S/RES/1378 (Sept. 14, 2001).

[44] Major Olga Marie Anderson & Major Katherine A. Krul, *Seven Detainee Operations Issues to Consider Prior to Your Deployment*, ARMY LAW. May 2009, at 7, 9–10 ("ISAF's detention authority appears to stem from the language in the UNSCR that directs ISAF to 'take all necessary measures to fulfill its mandate.'") (citations omitted).

[45] Barnsby, *supra* note 42, at 133 ("regardless of the type of conflict in which states are engaged, the authority to detain individuals rises to the level of [Customary International Law].").

[46] *Id*. at 132.

[47] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

B. Authority to Detain Under Domestic Law

1. The Inherent Tension

Where the authority to detain under international law is relatively clear and undisputed, the authority under domestic law is markedly more complex. The authority to detain enemy combatants is an example of what Justice Rehnquist has referred to as the "never-ending tension between the President . . . and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances."[48] That tension has its origins in the roots of the revolution, and the Founding Fathers' fundamental distrust of both the military and a strong executive.[49]

At the Constitutional Convention, George Mason proposed adding language to the Constitution warning against the dangers of standing armies in peacetime.[50] Writing in the *Federalist Papers*, Alexander Hamilton envisioned a Commander-in-Chief who would hold only "occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union."[51] Further, he noted that while the President would be Commander-in-Chief of the military, the President's power "would be nominally the same with that of the king of Great Britain, but in

[48] Dames & Moore v. Regan, 453 U.S. 654, 654 (1981).

[49] Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civil Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 344 & n.15 (1999) ("The mandate of civilian control of the military pervades our constitutional structure and stems from the deep distrust on the part of the Founding Fathers of a standing army. Such a distrust was based on European and American experiences of great power wielded by a permanent armed force" (citing J. Bryan Echols, *Open Houses Revisited: An Alternative Approach*, 129 MIL. L. REV. 185, 200 (1990)).

[50] James Madison, Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1878, vol. 5, at 544 (Jonathan Elliot ed., U.S. Gov't Printing Office 1845) ("Mason, being sensible that an absolute prohibition of standing armies in time of peace might be unsafe, and wishing at the same time to insert something pointing out and, guarding against the danger of them, moved to preface the clause (art. I sect. 8) 'To provide for organizing, arming and disciplining the Militia &c" with the words "And that the liberties of the people may be better secured against the danger of standing armies in time of peace'"). *See generally* JOHN R. GRAHAM, A CONSTITUTIONAL HISTORY OF SECESSION 132 (2002) (providing Elliott's Debates, pp. 544–45, Tansill's documents, pp. 725–26, and 2 Ferrand's Records 616–17).

[51] THE FEDERALIST No. 69, at 460 (Alexander Hamilton) (Henry Holt and Company ed., 1898).

substance much inferior to it."[52] In essence, the Commander-in-Chief power would "amount to nothing more than supreme command and direction of the military and naval forces . . . ."[53]

The same concerns were shared by James Madison. Writing in the *Federalist Papers*, Madison warned:

> [T]he liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision.[54]

Madison reiterated these concerns in the Third Congress, where he introduced a motion that would have required "that the troops should only be employed for the protection of the frontier."[55] Madison, Mason, and Hamilton's distrust of the military was not uncommon, but it was the exception, not the rule: only 26 of the 135 delegates voted for Madison's motion.[56] Plainly, this is a debate with deep history and divergences of opinion.

2. Presidential Power

Despite the long-standing tension over the separation of war powers, there has been little consistency of opinion and even less consensus on how war powers are divided between the branches.[57] This debate has

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[52] *Id*.
[53] *Id*.
[54] THE FEDERALIST, NO. 41, at 265 (James Madison) (Cass Sunstein ed., 2009).
[55] HOWARD WHITE, EXECUTIVE INFLUENCE IN DETERMINING MILITARY POLICY IN THE UNITED STATES 115 (1979) (quoting 3 ANNALS OF CONG. 1515 (1795)).
[56] *Id*. (noting that no less an authority than George Washington warned against "mercenary armies, which have at one time or another subverted the liberties of almost all the countries . . . ."); *see also* Reid v. Covert, 354 U.S. 1, 24 n.43 (1955) (quoting 26 THE WRITINGS OF GEORGE WASHINGTON, SENTIMENTS ON A PEACE ESTABLISHMENT (May 2, 1783), *in* THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 388 (John C. Fitzpatrick ed., U.S. Gov't Printing Office 1931)).
[57] William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696–97 (1997).

manifested frequently in recent history: the Japanese-American internments in the Second World War (W.W.II.),[58] Truman's steel plant seizures,[59] the War Powers Resolution,[60] various intelligence improprieties which gave rise to the Church Committee hearings,[61] and the Iran-Contra affair.[62] Not surprisingly, Presidents have often sought broad inherent powers, arguing that such breadth is necessary to effectively wage war.[63] For instance, after President Truman seized the nation's steel mills in 1952, he gave a press conference extolling the powers of the President, an office which has "very great inherent powers to meet great national emergencies."[64] He cited a litany of previous

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> The roster of scholars engaged in the controversy over the original understanding of the warmaking power reads like a who's who of constitutional scholars and scholars of foreign affairs. On one side of the debate—the pro-Congress side—are such academics as Raoul Berger, Alexander Bickel, John Hart Ely, Louis Fisher, Harold Koh, Leonard Levy, Charles Lofgren, Arthur Schlesinger, Jr., and William Van Alstyne. . . . In contrast, other scholars have adopted a pro-Executive stance. These include Phillip Bobbitt, Robert Bork, Edward Corwin, Henry Monaghan, Eugene Rostow, Robert Turner, W. Michael Reisman, and John Yoo, among others."

Id. (citations omitted).

[58] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

[59] *See generally* Charles E. Egan, *Impeachment Step on Truman Asked for* Steel Seizure, N.Y.TIMES, 1 (Apr. 20, 1952) ("Congressional action looking to possible impeachment proceedings against President Truman because of his seizure of the steel mills was demanded today of the House of Representatives by George L. Bender, Republican member-at-large from Ohio.").

[60] *See generally* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984), and Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864–66 (1972).

[61] *See generally* Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721 (2007) (discussing the history of congressional oversight of intelligence operations).

[62] *See* 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 555 (1993) ("The Iran/contra prosecutions illustrate in an especially stark fashion the tension between political oversight and enforcement of existing law.").

[63] *See, e.g.*, President George W. Bush, Signing Statement (Sept. 18, 2001) (In signing into law the Authorization for the Use of Military Force, President Bush issued a signing statement which noted, "Senate Joint Resolution 23 recognizes the seriousness of the terrorist threat to our Nation and the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States. In signing this resolution, I maintain the longstanding position of the Executive branch regarding the President's Constitutional authority to use force, including the Armed Forces of the United States and regarding the Constitutionality of the War Powers Resolution.").

[64] President Harry S. Truman, Press Conference (Apr. 24, 1952).

Presidents who had taken similar actions, including Presidents Jefferson, Tyler, Polk, Lincoln, Johnson, and Franklin Roosevelt.[65] Presidents have cited a variety of constitutional provisions as the source of their war powers. Most fundamentally, it has been widely noted that the grant of powers in Article II is inherently permissive, granting the President "[t]he Executive Power."[66] This is in contrast to the restrictive language found in Article I, which provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[67] The Constitution further vests in the President the power to "take care that the laws be faithfully executed."[68] Additionally, the Presidential oath demands that the President "preserve, protect and defend the Constitution of the United States."[69] Presidents have also cited as authority for their powers cases that declare the President to be the "sole organ" in foreign affairs.[70]

Finally, and central to most Executive war powers claims, the Constitution clearly establishes the President as "Commander-in-Chief."[71] Historically, the courts have given broad deference to the President when acting under the Commander-in-Chief power, a power which the Court has recognized as "something more than an empty title."[72] In *Fleming v. Page*, the Court held that "[a]s commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces . . . and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[73] Similarly, in discussing the powers of a military commander on the battlefield in *Reid v. Covert*, the Court held that "[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons

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[65] *Id*.
[66] U.S. CONST. art. II, § 1. *See also* Calabresi & Yoo, *supra* note 25 (discussing the history of the unitary executive).
[67] U.S. CONST. art. II, § 1.
[68] *Id.* art. II, § 4.
[69] *Id.* art. II, § 4, cl. 8.
[70] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936). ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (citations omitted); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (noting that the conduct of foreign affairs is one of the "central Presidential domains."); *see also infra* notes 249–50 and accompanying text.
[71] U.S. CONST. art. II, § 2.
[72] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 641 (1952) (Jackson, J. concurring).
[73] Fleming v. Page, 50 U.S. 603, 615 (1850).

on the battlefront."[74] The Commander-in-Chief power does not, however, afford the President unconstrained authority to conduct war and detain individuals on the battlefield; such powers must be weighed against congressional war-making powers.[75]

3. Congressional Power

There are several war-making powers which support congressional regulation of detention operations, specifically the power to "provide for the common Defence,"[76] "[t]o raise and support Armies,"[77] "[t]o provide and maintain a Navy,"[78] "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[79] and "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[80] Further, the Constitution provides that Congress shall "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[81] Collectively, these powers provide a robust claim on the authority to direct detention policy.

C. The Interplay of Congressional and Presidential Powers

1. Generally

The extent of the President's authority to detain in wartime—with or without congressional consent—has been fiercely debated between the branches of government, in the courts, and among the people since the founding of the nation. The courts have provided little guidance on this issue, and have rarely addressed the separation of powers question in the context of detention authority. Where they have addressed tangential issues, their opinions offer little consistency or certitude.

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[74] Reid v. Covert, 354 U.S. 1, 33 (1957).
[75] *See infra* notes 82–188 and accompanying text.
[76] U.S. CONST. art. II, § 8, cl. 1.
[77] *Id.* art. II, § 8, cl. 12.
[78] *Id.* art. II, § 8, cl. 13.
[79] *Id.* art. II, § 8, cl. 14.
[80] *Id.* art. II, § 8, cl. 11.
[81] *Id.* art. II, § 8, cl. 18.

Most fundamentally, a President's actions—whether seizing steel mills during the Korean War or detaining terrorists in the present conflict—"must stem either from an act of Congress or from the Constitution itself."[82] Commentators have noted that the Constitution expressly provides certain war-making powers to Congress (e.g., to declare war, to establish a military justice system); whereas the Executive arguably "lacks any exclusive war or military powers."[83] Additionally, where the Constitution expressly grants powers to Congress, these powers are necessarily exclusive.[84]

Thus, textually, war-making powers "not granted exclusively to Congress are vested concurrently with the President and Congress, meaning that either can exercise such authorities."[85] It has been argued that "[w]hen congressional statutes conflict with presidential orders within this area of overlap, the former always trumps the latter."[86] The Court confirmed this in the context of military detention, explaining "[w]hether or not the President has independent power . . . he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[87] This passage, of course, does not preclude the argument that the President possesses some inherent war powers.

2. Congressional Action/Inaction

Youngstown Sheet & Tube Co. v. Sawyer provides the core discussion of congressional and Executive separation of powers, and proves a useful

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[82] Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579, 585 (1952).

[83] Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 305 (2008); *see also* Barron & Lederman, *The Commander in Chief at Lowest Ebb—A Constitutional History*, *supra* note 25, at 947 ("Aside from the President's prerogative of superintendence over the armed forces and the federally conscripted militia, the evidence does not reveal an original understanding that the Commander in Chief enjoyed preclusive authority over matters pertaining to warmaking.").

[84] Prakash, *supra* note 83, at 306.

[85] *Id*. at 304.

[86] *Id*.

[87] Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (citing *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring)); *see also* Brown v. United States, 12 U.S. 8 (Cranch) 110, 147 (1814) ("If, indeed, there be a limit imposed as to the extent to which hostilities may be carried by the Executive, I admit that the Executive cannot lawfully transcend that limit.").

analog to the issue of detention authority. Both *Youngstown* and the current question of Executive detention authority concern powers not expressly delegated in the Constitution, actions taken by Congress on the periphery of the core issue,[88] and claims of inherent Executive powers.[89] In his seminal *Youngstown* concurrence, Justice Jackson established the three zones in which the President may act: with congressional authority, against congressional authority, or in the "zone of twilight in which [the President] and Congress may have concurrent authority, or when its distribution is uncertain." [90] He found that that where "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[91] Conversely, he found where "the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . ."[92] In the "zone of twilight" where Congress has not acted, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[93]

Dames & Moore v. Regan[94] addressed issues similar to those addressed in *Youngstown*, but in a foreign affairs context. Recalling that Justice Jackson himself thought the three categories "a somewhat over-simplified grouping," Justice Rehnquist reinterpreted Jackson's taxonomy as a spectrum of authority "running from explicit congressional authorization to explicit congressional prohibition."[95]

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[88] In *Youngstown Sheet and Tube*, Congress never passed legislation prohibiting the President from seizing domestic industries. Rather, Congress had earlier considered and rejected such legislation. *Youngstown Sheet and Tube*, 343 U.S. at 600 ("a general grant of seizure powers had been considered and rejected in favor of reliance on ad hoc legislation"). In the current conflict, Congress has never prescribed the President's authority to detain. All legislation has concerned issues which occur after the initial detention. *See infra* Part III.

[89] *Id.* at 586 (noting that "[t]he contention is that presidential power should be implied from the aggregate of his powers under the Constitution.").

[90] *Youngstown Sheet &Tube*, 434 U.S. at 637 (Jackson, J., concurring).

[91] *Id.* at 635.

[92] *Id.* at 637.

[93] *Id.*

[94] 453 U.S. 654 (1981).

[95] *Id.* (quoting *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring)).

3. Inherent Authority to Detain?

a. History of Presidential Detention Authority

Presidents have historically exercised detention authority without Congressional authorization. Congress has rarely challenged this power, and the courts have been reluctant to interfere. The history of this issue provides crucial context to understanding the current paradigm and predicting and resolving future conflicts concerning detention authority.

(1) Pre-Civil War

In their examination of the historical evolution of the Commander-in-Chief power, Professors David J. Barron and Martin S. Lederman assert that from the very first act concerning the military, Congress has limited the President's ability to conduct war—including, arguably, the detention of individuals on the battlefield. [96] And indeed, this act provides extensive regulations on the composition and conduct of the force, prescribing the number of soldiers, height requirements, age requirements, staffing of units, pay, rations, and the oath of service.[97] The Act was passed, however, at the behest of President Washington[98] and did not direct the day-to-day operations of the military or delineate the rules of detention. Only after finding the act "agreeable," did President Washington submit a list of officers for congressional

[96] Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 955 (The Act "did not signal a desire to leave the President free of statutory encumbrances in exercising his powers of command in battle. Instead, it imposed on the armed forces themselves the rules promulgated in the Articles of War that the preconstitutional Congress had enacted in 1775 and 1776.").

[97] THE PUBLIC AND GENERAL STATUTES PASSED BY THE CONGRESS OF THE UNITED STATES OF AMERICA FROM 1789 TO 1827, at 90–92 (Joseph Story ed. 1828).

[98] *See* WHITE, *supra* note 54, at 98. On August 10, 1789, President Washington sent a letter to congress concerning the pre-constitutional army, which had been established "in order to protect the frontiers from the depredations of the hostile Indians, to prevent all instructions on the public lands, and to facilitate the surveying and selling of the same for the purpose of reducing the public debt." Letter from George Washington, President of the United States, to the United States Senate (Aug. 10, 1789), *reprinted in* 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 60 (Bureau of Nat'l Literature and Art ed., 1908) [hereinafter Washington Letter]. In that letter, President Washington implored the Senate to bring the military establishment into conformity with the laws of "the Constitution of the United States." *Id*. Congress responded by passing the above-mentioned statute the next month. WHITE, *supra* note 54, at 98.

commission.[99] Months after passage of this legislation in 1790, President Washington tested the limits of presidential war powers by raising an army and deploying them against Native Americans in the Wabash River region without congressional consent.[100] He did so after attempting to work with Congress on establishing an army for the campaign.[101] Impatient with Congress's anemic response to his request for troops, Washington went forward without Congressional cooperation.[102] Only later that year did the President inform Congress that the Wabash River tribes were making "aggravated provocations" and that he had "accordingly authorized an expedition . . . ."[103] While some in Congress were upset that "war [had] been undertaken . . . without any authority of Congress," they took no action to limit Washington's actions.[104]

Less than a decade later, between 1798 and 1800, the United States became engaged in an undeclared sea war with France sometimes called the "imperfect war."[105] That conflict resulted in several Supreme Court cases which largely affirmed Congress's ability to limit or control the President's military operations—including, arguably, wartime detentions. In the first case, *Bas v. Tingy*,[106] the Court held that Congress has the power to define the nature and extent of war, both declared and undeclared.[107] In *Talbot v. Seeman*, the Court examined the right of Captain Talbot to salvage the captured vessel *The Amelia*.[108] Writing for the court, Chief Justice Marshall found that "[t]he whole powers of war, by the constitution of the United States, vested in congress . . . ."[109]

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[99] Washington Letter, *supra* note 98 at 63; *but cf*., Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 958 ("Washington, Adams, and Jefferson administrations were marked throughout by pitched struggles over how much leeway the executive branch enjoyed to use appropriations as it thought most efficacious").

[100] ALEXANDER DECONDE, PRESIDENTIAL MACHISMO: EXECUTIVE AUTHORITY, MILITARY INTERVENTION, AND FOREIGN RELATIONS 15 (2000).

[101] WHITE, *supra* note 55 at 98.

[102] *Id*.

[103] George Washington, U.S. President, Second Annual Address to Congress (Dec. 8, 1790), *reprinted in* THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, 1789–1846, at 37 (Edwin Williams ed., 1846).

[104] JOURNAL OF WILLIAM MACLAY 349 (New York, Edgar Maclay ed., 1890) (quoting Pennsylvania Senator William Maclay).

[105] SEA POWER: A NAVAL HISTORY 87–89 (Elmer Belmont Potter ed., 2d ed. 1981).

[106] Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

[107] *Id*.

[108] Talbot v. Seeman, 5 U.S. 1 (1 Cranch) (1801).

[109] *Id.* at 28–29.

Three years later, the court again addressed the issue in *Little v. Berreme*,[110] which concerned the capture of the Danish vessel, *The Flying Fish*, pursuant to a Presidential order which allowed U.S. ships to seize American ships "bound to *or from* French ports . . . ."[111] This authority exceeded the authority provided in a Congressional authorization, which allowed for seizure of American ships if they are "bound or sailing *to* any port or place within the territory of the French Republic . . . ."[112] Writing again for the court, Chief Justice Marshall found the seizure unlawful.[113] Marshall provided scant analysis for his decision, remarking only that:

> It is by no means clear that the president of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.[114]

Some commentators have argued this passage suggests the President may have inherent war powers in the absence of Congressional action.[115]

Several years later, *Brown v. United States*[116] addressed the related issue of the Executive's war making powers in the face of Congressional action. The Court noted that "[i]f, indeed, there be a limit imposed as to

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[110] 6 U.S. 170 (1804).
[111] Little v. Berreme, 6 U.S. 170, 171 (1804) (emphasis added).
[112] *Id.* (emphasis added).
[113] *Id.*
[114] *Id*. at 177 (citing U.S. CONST. art. II, § 4).
[115] Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 969 ("Chief Justice Marshall held, in effect, that even though the President might well have had the inherent Constitutional power to issue such an order in the absence of a statute, that did not matter because federal statutory law had prohibited the seizure by implication."). *But cf*. John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, at 23, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539257 (noting that "Marshall did not search for a preclusive core of presidential or commander-in-chief power over the navy, over national wartime policy.").
[116] 12 U.S. (8 Cranch) 110 (1814).

the extent to which hostilities may be carried by the Executive, I admit the Executive cannot lawfully transcend that limit . . . ." However, the Court concluded, "if no such limit exist, the war may be carried on according to the principles of modern law of nations, and enforced when, and where, and on what property the Executive chooses."[117]

On the eve of the Battle of New Orleans in December, 1814, General Andrew Jackson took the Court's holding to its Constitutional extremes. During a period of martial law before the Battle of New Orleans,[118] General Jackson detained a newspaper reporter who wrote an unfavorable article, and the federal judge who granted the reporter's writ of habeas corpus.[119] Congress had not authorized these detentions, yet it did nothing to limit or punish Jackson's application of his detention authority.[120]

In 1817, General Jackson again pushed the limits of Executive war powers when he invaded Spanish Florida without congressional approval.[121] During the campaign, Jackson detained two British citizens who were advising the Seminoles.[122] He tried the two at courts-martial and then executed both.[123] This action caused a great national debate about Jackson's authority to invade, as well as his authority to detain and execute the British advisors.[124] The Military Committee of Congress censured him for the execution, though the full Congress declined to take

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[117] Brown v. United States, 12 U.S. 110, 147, (1814) (February 1814 term).
[118] JON MEACHAM, AMERICAN LION 31 (2008).
[119] WILLIAM GRAHAM SUMNER, AMERICAN STATESMAN: ANDREW JACKSON 55 (New York, Houghton, Mifflin & Co. 1882).
[120] After the Judge was released from jail, he fined Jackson a $1000, which he paid. Abraham Lincoln, Letter to Erastus Corning and Others, June 12, 1863, *reprinted in* THE ESSENTIAL LINCOLN: SPEECHES AND CORRESPONDENCE 139 (Orville Vernon Burton, ed. 2009). Thirty years later, Congress repaid the fine with interest. At the time the fine was paid, several Congressmen defended Jackson's unauthorized detentions, noting that he "imposed no restraint that any man devoted to the country would regret . . . ." 15 THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 52 (New York, D. Appleton & Co. 1863) (1856).
[121] ROBERT VINCENT REMIMI, ANDREW JACKSON 83 (1999).
[122] ROBERT VINCENT REMINI, THE LIFE OF ANDREW JACKSON 119–20 (1990).
[123] *Id.*
[124] *See, e.g.*, 6 THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 228 (New York, D. Appleton & Company 1859) (1856) (reflecting the debate in Congress over Jackson's actions and the great variety of opinion on the propriety of his conduct).

any action against him.[125] In this instance, not only had Congress not approved of the detentions, it had not even approved of the campaign under which the detentions occurred.[126] Notably, Congress did nothing to Jackson for either incident[127] and passed no laws limiting or even regulating the President's detention authority. Congress's actions, or lack thereof, suggest an implied endorsement of the Executive's authority to detain individuals during conflict without congressional approval.

(2) Civil War

During the Civil War, both President Lincoln and the Congress took several unprecedented actions which tested the limits of their Constitutional war powers generally and detention powers specifically. The first test of Presidential war powers came when the Court considered the *Prize Cases*.[128] Addressing the constitutionality of Lincoln's order to blockade the Southern ports, the majority held that the President, "in fulfilling his duties as Commander-in-chief," has the power to determine the method of waging war.[129] The Court noted that Congress had ratified the President's blockade order, but it did not address whether the President's action would be upheld absent the ratification.[130] In 1861, President Lincoln suspended the writ of Habeas Corpus.[131] This action gave rise to several significant cases which more directly discussed

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[125] *Id.* at 247 (recalling that Henry Clay, then Speaker of the House, came out forcefully against Jackson's actions, warning of a military uncontrolled by Congress. Drawing allusions to Alexander the Great, Julius Cesar, and Napoleon, Clay warned the Congress of the dangers of popular military men operating without constraint. He concluded his remarks with a stark warning: "[Jackson's supporters] may carry him triumphantly through this House. But, if they do, in my humble judgment, it will be a triumph of the principle of insubordination—a triumph of the military over the civil authority—a triumph over the powers of this House—a triumph over the constitution of the land.").

[126] REMIMI, *supra* note 121, at 83.

[127] *See* John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521 (2008) (noting that after the invasion of Florida, "[a]s Jackson journeyed to Washington to personally manage his defense, public opinion turned strongly in his favor.").

[128] 2 U.S. 635 (1863).

[129] *Id.* at 670.

[130] *Id.* at 695 ("Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse.").

[131] Letter from Abraham Lincoln, U.S. President, to General Winfield Scott, Commanding General, Army of the United States (July 2, 1861), *in* 5 THE WRITINGS OF ABRAHAM LINCOLN 316 (Arther Brooks Lapsley ed., 1906).

executive war powers including *Ex parte Merryman*[132] and *Ex parte Milligan.*[133] *Ex parte Merryman* provides a particularly powerful admonishment of the President's unilateral detention policies. On May 25th, 1861, John Merryman was detained without trial by military authorities at Fort McHenry, Maryland.[134] Merryman had been detained pursuant to President Lincoln's order of the suspension of Habeas Corpus on April 27, 1861.[135] The Court ruled the suspension unconstitutional and ordered *Merryman* released. Writing for the court, Chief Justice Taney warned the Government:

> I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.[136]

Merryman was later released, but President Lincoln continued the suspension and detained thousands more.[137] President Lincoln defended his measures in part on the actions of Andrew Jackson in the War of 1812.[138]

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[132] 17 Fed.Cas. 144, 152 (1868).
[133] 71 U.S. 2, 139 (1866).
[134] THE CIVIL WAR ARCHIVE: THE HISTORY OF THE CIVIL WAR IN DOCUMENTS 821 (Henry Steele Commager & Erik A. Bruun eds., 2000) (1950).
[135] *Id.*
[136] *Ex parte* Merryman, 17 Fed.Cas. 144, 152 (1868).
[137] Of historical (and constitutional) note, there are some who believe that President Lincoln was prepared to arrest Chief Justice Taney as a result of his opinion in *Merryman*. In his biography of Taney, Samuel Tyler, *Memoir of Roger Brooke Taney, LL.D*, 427 (New York, John Murphy & Co. ed. 1872), Samuel Tyler wrote that "as he left the house of his son-in-law . . . [Taney] remarked that it was likely he should be imprisoned in Fort McHenry before night; but he was going to the court to do his duty."
[138] THE ESSENTIAL LINCOLN: SPEECHES AND CORRESPONDENCE 140 (2009).

> First, that we had the same Constitution then as now; secondly, that we then had a case of invasion, and now we have a case of rebellion; and, thirdly, that the permanent right of the people to public discussion, the liberty of speech and of the press, the trial by jury, the law of evidence, and the habeas corpus suffered no detriment

Five years after *Ex parte Merryman*, the Court addressed the President's authority to create and carry out military tribunals in *Ex parte Milligan*.[139] The Court found the President did not have the power to "institute tribunals" without the consent of Congress.[140] Having no authorization from Congress, and finding no authority in the Constitution, the Court struck down the President's actions.[141] Chief Justice Chase dissented in part, noting that Congress's war power "necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief."[142] Chase found the authority to establish tribunals was "within the power of Congress . . . ."[143]

The significance of *Milligan* remains unclear. In their analysis of military tribunals, Professors Katyal and Tribe note that *Milligan* leaves "the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system."[144] A close reading of the case, however, suggests a contrary conclusion.

> whatever by that conduct of Gen. Jackson, or its subsequent approval by the American Congress.

Id.

[139] *Ex parte* Milligan, 71 U.S. 2 (1866).

[140] *Id.*

[141] *Id.* at 3.

> Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.

Id.

[142] *Id.* at 136.

[143] *Id.* at 140 (Chase, C.J., concurring).

[144] Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1279–80 (2002) ("This general principle of *Milligan*—a principle never repudiated in subsequent cases—leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice.").

Arguing for Milligan, attorney David D. Field suggested that the President's power as Commander-in-Chief should extend only to members of the military and camp followers.[145] As Professors Katyal and Tribe suggest, if the Court intended to proscribe an inherent authority to try and detain, then the Court could simply have adopted Mr. Field's argument. It did not. Instead, it crafted a much narrower rule, providing that the President has no independent authority to "institute tribunals." Interestingly, Katyal and Tribe do not conclusively argue that the President lacks authority to detain. They note that *Milligan* leaves "little unilateral freedom," which implies some inherent (or unilateral) authority exists.[146] Further, their critique is expressly applicable to the detention and "indefinite warehousing or trial" of individuals.[147] It is notable that in *Milligan*, neither Chief Justice Chase nor the majority addressed the President's inherent authority to detain. Indeed, the Supreme Court has never squarely addressed the question.[148]

Merryman is remembered for the Court striking down the President's suspension of the writ of Habeas Corpus, while *Milligan* stands for the proposition that a U.S. citizen cannot be subject to a military tribunal when the civilian courts are functioning.[149] Largely forgotten is that both

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[145] *Milligan*, 71 U.S. at 20.
[146] Katyal & Tribe, *supra* note 144, at 1280.
[147] *Id*.
[148] The court has acknowledged the issue, but has never ruled on the issue. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 682 (2006) ("Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so."); Hamdi v. Rumsfeld, 542 U.S. 507, 587 (2004) ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so."); Greene v. McElroy, 360 U.S. 474, 496 (1959) ("But the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress exercised such a power and delegated to the Department of Defense the authority to fashion such a program."); *but cf.*, United States v. Heinszen, 206 U.S. 370, 378 (1907) ("Indeed, the civil government, as established in the islands by the President, either in virtue of his inherent authority or as a result of the power recognized and conferred by the act of Congress approved March 2, 1901 . . ."); Loving v. United States, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (noting that under the commander-in-chief power, the President's "inherent powers are clearly extensive.").
[149] *Id*. at 1292–93 ("Nevertheless, [*Ex parte Quirin*] makes clear that, under the *Milligan* principle, when military tribunals are substituted for available civil alternatives, specific authorization is necessary even when Congress has supposedly codified judicial precedent purporting to discern authority in preexisting statutes.").

cases are ostensibly detention authority cases. The suspension came in the form of an order from Lincoln to General Winfield Scott, who directed that if he, Scott, found "resistance" between New York and Washington that he could "suspend the writ of habeas corpus for the public safety."[150]

Three days after Lincoln's order, he issued a statement to Congress.[151] Three days after Lincoln's order, he issued a statement to Congress. In the statement, Lincoln offered a defense of his action and appeared to defer to Congress, noting the decision to legislate on this issue "is submitted entirely to the better judgment of Congress." Barron and Lederman read this passage to suggest Lincoln had ceded control to Congress on the issue.[152] It is important to note that Lincoln never claimed the right to suspend was a preclusive right.[153] Further, while their reading of Lincoln's July 4 address may be accurate and relevant, equally pertinent is Congress' reaction to Lincoln's suspension. It took Congress one year, seven months, and twenty-six days to craft a response to Lincoln's action.[154] When it did take action on March 3, 1863, Congress did not declare the President's actions illegal.[155] Indeed, Congress used carefully crafted language designed to avoid finding the President culpable;[156] in effect, as one commentator has noted,

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[150] Letter from Abraham Lincoln, U.S. President, to General Winfield Scott, Commanding General, Army of the United States (July 2, 1861), *in* 5 THE WRITINGS OF ABRAHAM LINCOLN 316 (Arther Brooks Lapsley ed., 1906).

[151] Abraham Lincoln, Special Session Message (July 4, 1861), *in* EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA, DURING THE GREAT REBELLION 123-29 (4th ed., 1882) (1864). *See* George C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 3 BULL. OF THE U. OF WIS. HISTORICAL SERIES 217, 223 (1907) (recalling that Lincoln's message was dated July 4, 1861, it was not read to the Congress until July 5, 1861).

[152] Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 1000–01.

[153] Abraham Lincoln, Special Session Message (July 4, 1861), *in* MCPHERSON, *supra* note 151, at 126 ("Now it is insisted that Congress, and not the Executive is vested with [the power to suspend Habeas Corpus]. But the Constitution itself is silent as to which or who is to exercise this power.").

[154] The time between the date on which Congress read Lincoln's July 4 Address, July 5, 1861, and the date on which it took action, March 3, 1863. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863).

[155] *Id.* The Government later argued this point in support of its position in *Ex parte Milligan.* William G. Howell, *Wartime Judgments of Presidential Power: Striking Down But Not Back*, 93 MINN. L. REV. 1778, 1796 n.104 (2009).

[156] Sellery, *supra* note 151, at 264 (referencing the carefully worded text of the legislation, Dr. Sellery notes that "[t]his phraseology is not accidental; it is the product of

recognizing "the President's right to suspend."[157] Less well known than *Milligan* and *Merryman*, but no less significant, was Congress's role in the conduct of the war itself. In December 1861, Congress established the Joint Committee on the Conduct of the War to investigate the Union defeat at Ball's Bluff.[158] The Committee quickly expanded its scope "to cover military operations throughout the country."[159] The Committee, staffed with political opponents of Lincoln, exerted tactical control over the conduct of military operations. As one commentator has noted, the Committee "trenched closely upon authority of the president."[160] Despite this, Lincoln chose to cooperate with the committee, perhaps out of a fear of political retribution or embarrassment.[161] The Committee represents perhaps the high-water mark of congressional involvement in the conduct of combat operations.

(3) Post-Civil War

The issue of detention authority lay largely dormant until the advent of the Second World War. The issue was first addressed in *Ex parte Quirin*,[162] where the Court considered the validity of military commissions applied to Nazi saboteurs who had been captured in the United States.[163] At its core, *Quirin* concerns the propriety of the commissions rather than the propriety of detentions.[164] Commentators

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a prolonged process of refinement, commencing July 6, 1861, in which the dominating motive was unquestionably a desire not to deny the President's right to suspend.").

[157] *Id*. at 264–65 ("Congress, in passing the act, asserted its right to take control of the suspension of the privilege of the writ. If the first section was a recognition by Congress of the legality of Presidential suspension, the remainder of the act was an assertion of the jurisdiction of Congress over the matter of habeas corpus suspension.") (citations omitted).

[158] REPORT OF THE JOINT COMMITTEE ON THE CONDUCT OF THE WAR pt. II, at 9 (1863). *See also* DAVID HERBERT DONALD, LINCOLN 326 (1995).

[159] DONALD, *supra* note 158, at 326.

[160] Michael Les Benedict, *The Perpetuation of Our Political Institutions: Lincoln, The Powers of the Commander in Chief, and the Constitution*, 29 CARDOZO L. REV. 927, 955–56 (2008).

[161] *Id*. *See also* Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 1010 (noting that the committ micromanaged "the conduct of the war by use of the threat of negative publicity and exposure of malfeasance, rather than through statutory or other formal enforcement mechanisms.").

[162] 317 U.S. 1 (1942).

[163] *Id.*

[164] *Ex parte* Quirin, 317 U.S. 1, 18 (1942) (The decision of the Court concerned the legality of the commission even though the Court phrased the issue as whether the detention of petitioners by respondent for trial by Military Commission . . . is in

have rightly noted that the court appears to have upheld the commissions because they were undertaken in accordance with laws previously passed by Congress.[165] The Court discusses exclusively the acts of Congress relating to the establishment of commissions under the Articles of War.[166] The court does not address previous congressional attempts to prescribe the power of the President to detain individuals. Furthermore, the Court notes that the commissions were established by the President under "authority conferred upon him by Congress," and under "such authority as the Constitution itself gives the Commander-in-Chief.[167] This suggests the Court's contemplation of some inherent Executive war power.

The next year, the Court addressed the myriad of issues concerning the internment of Japanese-Americans in *Hirabayashi v. United States*[168] and *Yasui v. United States.*[169] A year later, the Court decided two more internment cases: *Korematsu v. United States*[170] and *Ex parte Endo.*[171] Of the four cases, only *Ex parte Endo* addressed the detention power.[172] In

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conformity to the laws and Constitution of the United States.). Attorneys for the defendants never argued the President lacked authority to detain them. *See* Transcript of Record at 2869–2908, *Ex parte* Quirin, 317 U.S. 1 (1942).

[165] *Quirin*, 317 U.S. at 11 ("By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander-in-Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.").

[166] *Id*. at 10.

> By the Articles of War . . . Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. . . . But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial.

Id.

[167] *Id*. at 11.

[168] 320 U.S. 81 (1943).

[169] 320 U.S. 115 (1943).

[170] 323 U.S. 214 (1944).

[171] 323 U.S. 283 (1944).

[172] Vladeck, *supra* note 5, at 174 ("[O]nly *Endo* invoked the detention power itself. The other three—Hirabayashi, Yasui, and Korematsu—all involved challenges to criminal convictions for violating exclusion orders, an offense Congress criminalized via statute.") (citations omitted).

Endo, the court held that the Government could not detain a citizen that they themselves did not consider a threat.[173] The Court analyzed the authorities granted to the War Relocation Authority under Executive Order 9066 and congressional legislation which "ratified and confirmed Executive Order No. 9066."[174]

The Court began its analysis in *Endo* by noting that "the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully."[175] It is noteworthy that the Court endorsed broad constitutional war making powers for both the President and Congress. The Court continued:

> We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. *The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking.* Some such power might indeed be necessary to the successful operation of the evacuation program. . . . But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied.[176]

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[173] *Ex parte* Endo, 323 U.S. 283 (1944).

[174] *Id*. at 287 (citing 18 U.S.C. § 97(a) (1942)).

> That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Id.

[175] *Id*. at 298–99 (citing Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 93 (1943)).

[176] *Id*. at 301–02 (emphasis added).

This passage is remarkable in that, like *Quirin*, it suggests a latent, implied power to detain; or, at the very least, does not dismiss the idea that Congress or the President may have implied detention powers.

b. The Bush Administration

Given the historical record, the Bush Administration's claims on inherent powers were not historically unique. What was unique was the scope of the claimed powers.[177] Specifically, the Administration maintained that it had the "inherent authority to detain those who take up arms against this country pursuant to Article II, Section 2, of the Constitution . . . ."[178] In their brief to the court in *Padilla v. Rumsfeld*, the administration argued that this authority was "at the heart of [the President's] Constitutional powers as Commander-in-Chief."[179] They made the same argument in *Hamdi v. Rumsfeld*, arguing that the Court had "long recognized that the commander-in-chief power 'is not limited to victories in the field and the dispersion of the insurgent forces,' but

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[177] Barrron & Lederman, *The Commander in Chief at Lowest Ebb—A Constitutional History*, *supra* note 25; *see also* Barron & Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, *supra* note 25, at 712–20 (noting that "the Bush Administration has repeatedly made striking assertions of preclusive war powers"); Elizabeth M. Iglesias, *Foreword, Article II: The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181 (2008) (noting that the Bush administration in *Hamdi* and Hamdan argued a "breathtaking array of asserted Executive powers"); Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335 (2005) (noting that the government's arguments in the Padilla case were "perhaps, the boldest assertion of Executive authority since Truman's seizure of the steel mills more than half a century earlier.").

[178] The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL (OLC) 34726560 (Sept. 25, 2001) ("We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States."); Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004); *see also* Brief for the Respondents, Padilla v. Rumsfeld, 542 U.S. 426 (2004) (No. 03-1027) ("The Government maintains that no explicit authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution.").

[179] Brief for the Petitioner at 27, Padilla v. Rumsfeld, 542 U.S. 426 (2004) (No. 03-1027).

'carries with it inherently the power to guard against the immediate renewal of the conflict?"[180]

Neither the majority in *Padilla* nor the plurality in *Hamdi* addressed the President's claims of inherent powers.[181] Justice Thomas, writing in dissent in *Hamdi*, addressed the issue and found that "[t]he Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations."[182] Citing historical precedent, Justice Thomas noted that "[t]his Court has long recognized these features and has accordingly held that the President has Constitutional authority to protect the national security and that this authority carries with it broad discretion."[183]

The Second Circuit also addressed the claim in *Padilla*, finding that "[t]he Constitution's explicit grant of the powers authorized in the Offenses Clause, the Suspension Clause, and the Third Amendment, to Congress is a powerful indication that, absent express congressional authorization, the President's Commander-in-Chief's powers do not support Padilla's confinement."[184] Similarly, the Fourth Circuit addressed the issue of inherent detention authority in *al-Marri v. Pucciarelli*.[185] The plurality applied the *Youngstown* framework to

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[180] Government's Brief to the Court, Hamdi v. Rumsfeld, 542 U.S. 507 (Mar. 2004) (quoting Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1870)) (citing *In re* Yamashita, 327 U.S. 1, 12 (1946)).

[181] The Court in *Hamdi v. Rumsfeld*, however, had no problem exploring the President's authority over enemy combatants. They did so in the context of the AUMF, while largely ignored the President's claims of "plenary authority to detain pursuant to Article II of the Constitution." Hamdi v. Rumsfeld, 542 U.S. 507, 516–517 (2004). Justice Souter did address this claim tangentially in a concurring opinion, writing: "in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen [without Congressional approval] if there is reason to fear he is an imminent threat to the safety of the Nation and its people." *Id.* at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[182] *Id.* at 580 (Thomas, J., dissenting).

[183] *Id.* (Thomas, J., dissenting) (citing 10 ANNALS OF CONG. 613 (1800)) (emphasis in original), *Prize Cases*, 2 Black 635, 668, 670 (1863), Fleming v. Page, 9 How. 603, 615 (1850), United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936), Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

[184] Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004).

[185] al-Marri v. Pucciarelli, 543 F.3d 213 (4th Cir. 2008), *vacated and remanded*, al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (To assess claims of presidential power, the Supreme Court has long recognized, as Justice Kennedy stated most recently, that courts look to the "framework" set forth by Justice Jackson in *Youngstown Sheet and Tube Co. v.*

examine the President's claims that he had "inherent Constitutional power" to detain Ali aleh Kahlah al-Marri, a Qatari national and legal resident of the United States, who was detained in Illinois as an enemy combatant.[186] The court found that "[i]n contrast to the AUMF, which is silent on the detention of asserted alien terrorists . . . in the PATRIOT Act . . . Congress carefully stated how it wished the Government to handle aliens believed to be terrorists who were seized and held within the United States."[187]

Writing in dissent in *al-Marri*, Chief Judge Williams seems to accept the government's inherent authority argument, noting that the AUMF combined with "some inherent Article II power to wage war" provides ample authority to detain al-Marri.[188] The plurality opinion in *al-Marri*—to the extent that it stands after being vacated by the Supreme Court—applies only to "resident aliens" not enemy combatants.[189]

III. The War on Terror

As noted by the court in *al-Marri*, since 9/11, Congress has taken several measures to limit or prescribe the President's detention authority.[190] The resulting laws, however, merely regulate, to some extent, what occurs *after* the detention. Neither Congress nor the courts have attempted to prescribe or regulate the Executive's power to detain on the battlefield.

Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (Kennedy, J., concurring)).

[186] *al-Marri*, 543 F.3d at 221.

[187] *Id.* at 248.

[188] *Id.* at 288 (Williams, Chief Judge, dissenting in part) (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.").

[189] *Id.* at 250 (noting that their holding does "not question the President's wartime authority over enemy combatants").

[190] *Id.* at 248 ("In contrast to the AUMF, which is silent on the detention of asserted alien terrorists . . . in the PATRIOT Act . . . Congress carefully stated how it wished the Government to handle aliens believed to be terrorists who were seized and held within the United States.").

A. AUMF and *Hamdi v. Rumsfeld*

Beyond claims of inherent Article II powers, both the Bush and Obama administrations have found express authorization for detention under two Congressional joint resolutions: The AUMF[191] and the AUMF Iraq.[192] The AUMF provides an extremely broad grant of authority to the President to wage war against those responsible for 9/11:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[193]

The AUMF does not, however, expressly include the power to detain. The authority to detain under the AUMF was the issue addressed by the Court in *Hamdi v. Rumsfeld*.[194]

In 2001, Yaser Esam Hamdi was detained by U.S. forces in Afghanistan.[195] He was transferred to Guantanamo, and in June 2002, his father filed a Habeas petition on his behalf.[196] The Government moved to dismiss the petition, submitting a policy memorandum in support of its motion.[197] This memorandum—commonly known as the Mobbs Declaration after its author, Michael Mobbs—asserted that detention was proper because Hamdi was a member of the Taliban and surrendered on the battlefield to U.S.-allied forces.[198] The district court found this declaration insufficient and ordered the production of several documents

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[191] AUMF, *supra* note 14.
[192] AUMF Iraq, *supra* note 15.
[193] AUMF, *supra* note 14.
[194] Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004). Some have argued that the AUMF "arguably authorizes the President to do whatever [Law of Armed Conflict] permits . . . ." Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2653 (2005) (citing Bradley & Goldsmith, *supra* note 27, at 2047).
[195] *Hamdi*, 542 U.S. at 511.
[196] *Id.*
[197] *Id.*
[198] *Id.* at 513.

for *in camera* review.[199] The Government appealed this production order, and the Fourth Circuit granted its appeal.[200]

In a wide-ranging opinion, the Fourth Circuit held that because Hamdi was detained in a "zone of active combat in a foreign theater of conflict," there existed a sufficient basis for detention.[201] As summarized by the Supreme Court, the Fourth Circuit found that "separation of powers principles prohibited [the court] from 'delv[ing] further into Hamdi's status and capture . . . .'"[202] The Supreme Court disagreed, granted certiorari and decided the case. Indeed, Justice Thomas alone accepted the Fourth Circuit's logic that the case was beyond review by the courts.[203]

In its briefs and at oral argument, the Government argued that the President's "plenary authority to detain pursuant to Article II of the Constitution" was sufficient to authorize his actions; in other words, congressional authorization was not required. [204] The Court refused to address this issue, instead agreeing "with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF."[205] The Court explained, noting that the detention of individuals "engaged in armed conflict against the United States . . . in active combat . . . is so fundamental and accepted as incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[206]

Despite this seemingly broad language, the decision was limited to "individuals who fought against the United States in Afghanistan as part

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[199] *Id.*
[200] *Id.*
[201] Hamdi v. Rumsfeld (*Hamdi III*), 316 F.3d 450, 459 (4th Cir. 2003).
[202] *Hamdi*, 542 U.S. at 514–15 (quoting *Hamdi III*, 316 F.3d 450 (4th Cir. 2003)) (citations omitted).
[203] *Id.* at 579 (Thomas, J., dissenting) ("The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case.").
[204] *Id.* at 516–17.
[205] *Id.*
[206] *Id.* at 518 (Justices Souter and Ginsburg offered a concurring opinion which accepted the principle that the AUMF could provide authority to detain in accordance with the "laws of war." However, they argued, Hamdi was not treated as a Prisoner of War and thus the government could not invoke this authority.).

of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks . . . ." [207] Further, the court declined to define the term "enemy combatant," noting that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[208] Thus, the scope of this "fundamental and accepted" power "incident to war" remained an open question. Indeed, as one district court addressing the issue noted in April, 2009, "[R]emarkably, despite the years that have passed since these habeas corpus petitions were filed, the state of the law regarding the scope of the President's authority to detain the petitioners remains unsettled."[209]

B. Other Congressional Actions

1. The PATRIOT Act

The PATRIOT Act sought to "deter and punish terrorist acts in the United States and around the World, to enhance law enforcement investigatory tools, and for other purposes."[210] Where the AUMF is silent on detention of suspected terrorists, the PATRIOT Act explicitly authorizes certain detentions.[211] Section 412 of the PATRIOT Act mandates "mandatory detention of suspected terrorists."[212] The Act further details which individuals the Attorney General is required to detain, and the procedures for release.[213] Thus, the Act is permissive rather than restrictive. Furthermore, the Act does not limit the President's authority to detain individuals on foreign battlefields. While the Act does not include any geographic limitations on its application, given that the Act is an amendment to the Immigration and Nationality Act and its limited application to "alien" terrorists, these sections are implicitly limited to the detention of individuals within the United States. [214]

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[207] *Id.*
[208] *Id.* at 522.
[209] Gherebi v. Obama, 609 F. Supp. 2d 43, 45 (D.D.C. 2009).
[210] Pub. L. No. 107-56, 115 Stat. 272, 272 (2001).
[211] *Id.* § 412.
[212] *Id.*
[213] *Id.*
[214] *Id.*

2. Detainee Treatment Act and Military Commissions Act

The Detainee Treatment Act of 2005 (Detainee Treatment Act) and the Military Commissions Act of 2009[215] (Military Commissions Act) regulate actions which occur after the battlefield detention. The Detainee Treatment Act dictates how the Department of Defense (DoD) will treat detainees, and includes guidance on how they should be interrogated.[216] The Military Commissions Act regulates how detainees will be tried after their detention. [217] Neither act addresses the authority of the President to detain.[218] Both acts do, however, contemplate that the Executive will detain individuals in the course of military operations.

3. Supplemental Appropriations Act

The SAA of 2010[219] contained several limitations on the ability of the President to conduct detention operations.[220] Specifically, the Act prohibited the use of appropriated funds to facilitate the release of any detainee from "Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia."[221] More constitutionally troubling, the Act also prohibited the use of any appropriated funds to release any detainee from Guantanamo to any location in the world until "the President submits to the Congress, in classified form fifteen days prior to such transfer" certain information.[222]

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[215] The Department of Defense Authorization Act, 2010, HR 2647-385, amended the Military Commissions Act of 2006.
[216] *Id.*
[217] *Id.*
[218] Detainee Treatment Act, *supra* note 16.
[219] Pub. L. No. 111-32, 123 Stat. 1859 (June 24, 2009).
[220] These provisions were first introduced in the Supplemental Appropriations Act (SSA) of 2009. *Id.*
[221] Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3468.
[222] *Id*. The SAA presents other constitutional issues beyond the scope of this article. Most notably, the act may represent an unconstitutional suspension of the Writ of Habeas Corpus. *See* Petitioner's Response to Notice that Respondents Will No Longer Treat Petitioner As Detainable Under the AUMF and Request for Appropriately Tailored Relief at 4 n.2, Al-Halmandy et. al. v. Obama et. al., No. 05-2385 (D.D.C. 2009) (citing INS v. Cyr, 533 U.S. 289, 312 (2001), Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978)) ("Indeed, the Supplemental Appropriations Act cannot have altered this Court's authority to order the most central of habeas remedies: Petitioner's immediate release. It is well established that an act of Congress does not constrict the scope of habeas by implication.).

As with the Detainee Treatment Act and Military Commission Act, the SAA does not purport to control or limit the President's ability to detain individuals on the battlefield.

C. Resolving the Scope of Powers Issue in the War on Terror

Plainly, Congress has taken a number of actions relating to the President's authority to detain. As discussed, with the possible exception of the 2010 SSA, these actions are most likely constitutional legislative acts. Accepting the constitutionality of these actions, the question becomes one of breadth: what is the scope of the AUMF and related legislation; and has Congress so completely spoken as to preclude the exercise of an inherent presidential authority? The lower courts are struggling with the former question, while the broader question of inherent presidential authority remains open and largely unaddressed.[223]

Courts addressing the President's authority to detain in the current conflict have exclusively addressed the question in the context of the AUMF. No court has suggested the Detainee Treatment Act, Military Commissions Act, or Supplemental Appropriations Act restrict the President's authority to detain on the battlefield. *Gherebi v. Obama* was the first of several cases in the District Court of the District of Columbia attempting to determine "whether the AUMF authorizes the President to detain anyone incidental to the government's conflict with any organization . . . [and] assuming such authority exists . . . [what is the scope of the authority]."[224] *Gherebi v. Obama* was a consolidated *Habeas*

[223] None of these congressional actions attempted to limit or prescribe the President's detention power. Further, none of these acts addressed Bush Administration claims that such detention powers were inherent (or even preclusive). *See, e.g.*, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL (OLC) 34726560 (Sept. 25, 2001) ("We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States."); Brief for the Petitioner at 27, Padilla v. Rumsfeld, 542 U.S. 426 (2004) (No. 03-1027) (Powers of detention are "at the heart of [the President's] Constitutional powers as Commander in Chief." Brief for the Petitioner at 27, Padilla v. Rumsfeld, 542 U.S. 426 (2004) (No. 03-1027)).

[224] Gherebi v. Obama, 609 F. Supp. 2d 43, 54 (D.D.C. 2009); *see also* Hamlily v. Obama, 616 F. Supp. 2d 63, 66 (D.D.C. 2009) (noting that the instant issue was the "scope of the government's authority to detain . . . detainees pursuant to the Authorization for the Use of Military Force.").

case of more than a dozen Guantanamo detainees who challenged the legality of their confinement and sought immediate release.[225] Judge Walton issued a memorandum opinion addressing only "the question of the scope of the President's authority to detain all the petitioners [under the AUMF]."[226] Judge Walton found that the AUMF "functions as an independent basis in domestic law for the President's asserted detention authority, and adopts the basic framework advanced by the government for determining whether an individual is subject to that authority."[227]

Hamlily v. Obama addressed the same issues as *Gherebi*.[228] In response to a court order, the Government provided a "definitional framework" which detailed their position on the President's authority to detain under the AUMF:

> The President has the authority to detain persons that the President determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States . . . .[229]

This was essentially the same framework advanced by the government, and accepted by the court, in *Gherebi*.[230] *Hamlily*, however, found "no authority in domestic law or the law of war . . . to justify the concept of 'support' as a valid ground for detention."[231] The *Hamlily* court came to this conclusion even after expressly accepting the

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[225] *Gherebi*, 609 F. Supp. 2d at 45.
[226] *Id.* at 55 n.7; *see also id.* at 53 ("Under the Bush administration, the government had repeatedly asserted that it could detain individuals pursuant to the President's authority as Commander in Chief under Article II, sec. 2, clause of the Constitution . . . [t]hese contentions are absent from the government's most recent memorandum of law.").
[227] *Id.* at 55.
[228] *Id.* at 63.
[229] *Id.*
[230] *Id.* ("The government suggests that in non-international armed conflicts, the President can detain anyone who is a member of a 'dissident armed force[ ]' or 'other organized armed group [ ]' engaged in hostilities with the United States.") (quoting Gov't Mem., *Gherebi v. Obama*, at 9).
[231] *Id.* at 69.

traditional "deference accorded to the Executive in this realm . . . ."[232] Two subsequent district courts have expressly adopted Judge Bates's rationale in Hamlily.[233]

It is noted that *Gherebi*, *Hamlily*, and related cases addressed only the President's authority under the AUMF. Before *Gherebi* was argued, the Bush administration had consistently argued that it "could detain individuals pursuant to the President's authority as Commander-in-Chief . . . ."[234] *Gherebi* did not address this argument and before *Hamlily* was argued, the Obama administration "clarified that it believes that its detention authority arises solely from the AUMF."[235]

IV. Framework

Given the history discussed above, the courts and Congress have often acknowledged some inherent Presidential authority to detain on the battlefield during times of war. This proposition is hardly revelatory, as the power to detain is necessarily attendant to the conduct of military operations.[236] Where, as noted above, Congress has taken actions which limit or prescribe the President's authority to detain, the question becomes: what remains of the President's inherent power? The answer to that question examines the President's inherent detention authority as a function of both the location and nature of the conflict.

A. Location of the Detention

1. Generally

The phrase "location of the detention" refers to whether the detention occurs inside or outside the geographic United States. Courts and

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[232] *Gherebi*, 609 F. Supp. 2d at 69.
[233] Al Odah v. United States, 2009 WL 2730489, 4 (D.D.C. 2009) ("the Court shall adopt the reasoning set forth in Judge John D. Bates's decision in *Hamlily v. Obama*); Anam v. Obama, No. 04-1194, 2009 WL 2917034 (D.D.C. 2009) ("The Court hereby adopts the *Hamlily* opinion.").
[234] *Gherebi*, 609 F. Supp. 2d at 53 n.4 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 516–17 (2004) and al-Marri v. Pucciarelli, 534 F.3d 213, 221 (4th Cir. 2008).
[235] *Id.*
[236] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) ("detention to prevent a combatant's return to the battlefield is a fundamental incident to waging war.").

legislation have both frequently drawn distinctions in war powers cases between exercises of war powers domestically vice those exercised outside the United States. Though rarely addressed explicitly by the courts or legislatures, the reasons are twofold. First, courts and legislatures recognize that domestic exertions of power pose a greater threat to civil liberties than foreign exertions. The second reason courts and laws draw a geographic distinction has its roots in the historical and legal maxim that the President's powers in foreign affairs are more broad than in domestic affairs.

2. Civil Liberties

It is natural that courts are more distrustful of domestic exercises of Executive power than foreign exercises of the same. The Founding Fathers and the courts both have been wary of a tyrannical Executive wielding unchecked power over the population.[237] Naturally, the closer geographically to the United States the Executive exercises its power, the greater the likelihood for infringement on citizens' civil liberties. The courts and Congress have long recognized this distinction, and have subjected the Executive to more scrutiny where its power has been exercised domestically. In *Youngstown*, Justice Jackson summarized the heightened fears of domestic applications of war-making powers by the President:

> I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. [238]

Jackson seems to acknowledge the increased role of Congress when the President exerts war powers domestically. He notes that the President's

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[237] THE FEDERALIST No. 33, at 192 (Alexander Hamilton) (G.P. Putnam's Son ed., 1888) ("[I]f the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.").

[238] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 645–46 (1952) (Jackson, J., concurring).

"command power" is not "absolute" and must be "subject to limitations consistent with a Constitutional Republic whose law and policy-making branch is a representative Congress."[239]

The distinction between exercising war powers inside versus outside the United States is a recurring issue in the conduct of intelligence operations. The Church and Pike Committees, which led to a dramatic contraction of the President's authority to conduct intelligence operations in the 1970s, were largely precipitated by domestic improprieties and concern for civil liberties.[240] In *Laird v. Tatum*,[241] the Supreme Court addressed issues related to a domestic Army covert surveillance program.[242] In dissent, Justice Douglass painted a stark picture of unconstrained war-making powers exercised domestically:

> The First Amendment was designed to allow rebellion to remain as our heritage. . . . The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance. When an intelligence officer looks over every nonconformist's shoulder in the library, or walks invisibly by his side in a picket line, or infiltrates his club, the America once extolled as the voice of liberty heard around the world no longer is cast in the image which Jefferson and Madison designed, but more in the Russian image. . . .[243]

While perhaps not fully agreeing with Justice Douglass, the Executive has at times embraced the concept that war powers exercised

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[239] *Id.*

[240] *See* S. Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, S. REP. NO. 94-755, 94th Cong. 2d Sess. (1976).

[241] Laird v. Tatum, 408 U.S. 1 (1972).

[242] The Court did not address the constitutionality of the program. *Id*. at 10 (limiting their review by noting that "a complainant [may] allege[] that the exercise of his First Amendment rights [are] being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.").

[243] *Id.* at 28–29 (Douglass, J., dissenting).

domestically present a greater threat to civil liberties than those powers exercised outside the United States. Executive Order 12,333 concerns intelligence activities of the U.S. Government.[244] The Department of Defense (DoD) regulation which implements this order notes that its purpose is to conduct effective intelligence operations "while ensuring their activities that affect United States persons are carried out in a manner that protects the Constitutional rights and privacy of such persons."[245] Concerns for domestic violations of civil rights are so great that the regulation presumes individuals located physically inside the United States are U.S. persons.[246] The regulation also draws a distinction between U.S. persons inside or outside of the United States.[247] The regulation provides the greatest restrictions on operations directed at U.S. persons located in the United States.[248]

3. Presidential Power in Foreign Affairs

While the extent of the President's powers may be subject to debate, it is widely accepted that the President exercises more expansive powers in foreign affairs than domestically.[249] This principle was most notably established in *United States v. Curtiss-Wright Export Corp*.[250] There, the majority found the President can act in foreign affairs under both Congressional authorization and "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[251] The apparent breadth of this holding has been rigorously attacked by commentators as being dicta and historically incorrect.[252] Further, the weight of *Curtiss-*

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[244] Exec. Order 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 (2006).
[245] U.S. DEP'T OF DEFENSE, INSTR. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS § 1.2 (1982).
[246] *Id.*
[247] *Id.*
[248] *Id.* §§ 5.1 to 9.1.
[249] *See, e.g.*, Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 206 (2006) ("But putting to one side the normative element of this debate, it should be undisputed that as a descriptive matter the President exercises broad power in these areas, far broader than those he has in domestic affairs.").
[250] 299 U.S. 304 (1936).
[251] *Id.* at 320.
[252] HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWERS AFTER THE IRAN-CONTRA AFFAIR 94 (1990) ("*Curtiss-Wright* has received withering criticism.").

Wright and its progeny have been the subject of academic debate.[253] This article does not seek to resolve this debate; it simply acknowledges the greater breadth of Executive power in foreign affairs.[254] Regardless of the reasons or the historical development, Presidents wield more power—and conversely, Congress wields less power—in foreign affairs. This reality should apply with equal force to the scope of the President's authority to detain domestically versus the authority to detain outside the borders.

4. Judicial Treatment

Looking at the detention authority cases chronologically, *Ex parte Milligan* is the first to draw a clear distinction based on where the detention occurred. The Court noted that Milligan's conduct occurred "within . . . the theatre of military operations. . . ."[255] The Court held that martial law must be limited to circumstances where the courts are closed and where the detention occurs in "the theatre of active military operations, where war really prevails . . . ."[256] The Court did not so expressly address geography in *Ex parte Merryman*. There, the court limited its holding to the President's power over "life, liberty or property" of a "private citizen."[257] While this does not strictly represent a geographic distinction, it does implicitly acknowledge a distinction between those inside the United States (generally citizens) and those outside the United States (generally not citizens).

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[253] *Compare* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 488, 496 (2002) (arguing that "the vesting of the Executive, commander-in-chief, and treaty-making powers in the Executive branch has been understood as granting the President plenary control over the conduct of foreign relations"), *with* KOH, *supra* note 252, at 94–95 (arguing that "[a]s elaborated by the Framers and construed through the first three eras of American foreign policy, the National Security Constitution envisioned a narrowly limited realm of exclusive presidential power in foreign affairs.").

[254] Despite his misgivings concerning *Curtiss-Wright*, even Professor Koh acknowledges that "the president almost always seem[s] to win in foreign affairs." KOH, *supra* note 252, at 117 ("Executive initiative, congressional acquiescence, and judicial tolerance explains why the president almost invariably wins in foreign affairs.").

[255] *Ex parte* Milligan, 71 U.S. 2, 8 (1866).

[256] *Id.*

[257] 17 Fed.Cas. 144, 149 (1868).

In *Ex parte Quirin* the Court famously held that detained individuals are no "less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations . . . ."[258] This passage, in isolation, appears to dispense with any significance attached to the location of the conduct. However, the location of the detention was central to the decision. The Court found that the petitioners became "unlawful belligerents" only when they "passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose"[259] and the offense became complete when the petitioners "entered . . . our territory in time of war."[260] Plainly, the Court contemplates a geographic aspect to the authority of the President to detain (and try) the petitioners.[261]

In *Johnson v. Eisentrager*,[262] the breadth of the President's powers and the propriety of his actions were based largely on the location of the detainees' capture.[263] The Court found that U.S. courts had no jurisdiction over the plaintiffs because, unlike in *Quirin*, "[N]one of the places where they were acting, arrested, tried or imprisoned were, it was contended, in a zone of active military operations, not under martial law or any other military control, and no circumstances justified transferring them from civil to military jurisdiction."[264]

Reid v. Covert addressed the constitutionality of the detention and trial of civilians by military courts-martial in occuppied Japan and England. The Court noted that several lower courts had "upheld military trial of civilians performing services for the armed forces 'in the field' during time of war."[265] The Court then declined to apply that rationale to the instant case, noting that "[e]xperts on military law, the Judge Advocate General and the Attorney General have repeatedly taken the

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[258] *Ex parte* Quirin, 317 U.S. 1, 38 (1942).
[259] *Id.*
[260] *Id.*
[261] *But cf.* Johnson v. Eisentrager, 339 U.S. 763, 795 (1950) (Black, J., dissenting) ("*Quirin* . . . lend[s] no support to that conclusion, for in upholding jurisdiction they place no reliance whatever on territorial location.").
[262] 339 U.S. 763.
[263] *Id.* at 795 (Black, J., dissenting) (noting that the majority relies only on whether the belligerents "were captured, tried and imprisoned outside our territory.").
[264] *Id.* at 780.
[265] Reid v. Covert, 354 U.S. 1, 33 (1955) (citations omitted).

position that 'in the field' means in an area of actual fighting."[266] *Reid* echoes Justice Jackson's concurrence in *Youngstown Sheet & Tube v. Sawyer*, where he plainly draws a distinction between domestic and foreign exercises of Presidential power. [267]

By its terms, the AUMF applies without geographic limitation; it simply provides authority to "use all necessary and appropriate force against" certain "nations, organizations, or persons . . . ."[268] *Hamdi v. Rumsfeld* and its progeny, however, have largely discussed this authorization in a geographic context. The plurality in *Hamdi* was careful to note that the opinion concerned only "individuals who fought against the United States *in Afghanistan* . . . ."[269] In formulating this limited opinion, the plurality noted that "because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of necessary and appropriate force, Congress has clearly and unmistakable authorized detention in the [instant case]."[270] The phrase "return to the battlefield" is a geographic limitation which implies the individual was captured on the battlefield. Similarly, the Fourth Circuit made its determination based simply on the fact that Hamdi was detained in a "zone of active combat in a foreign theater of conflict."[271]

The Second Circuit in *Padilla v. Rumsfeld* also acknowledged the Court's longstanding distinction between internal and external

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[266] *Id.* (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 100–02 (2d ed., reprint 1920); GEORGE B. DAVIS, MILITARY LAW 478–79 (3d ed. 1915); EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURES OF COURTS-MARTIAL 413– 414 (2d ed. 1908); 14 Ops. Att'y. Gen. 22; 16 Ops. Att'y. Gen. 48; Dig. Op. JAG 151 (1912); *id.* (1901) 56, 563; *id.* 76, 325–326, 599– 600 (1895); *id.* 49, 211, 384 (1880)).

[267] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

> I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.

Id.

[268] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[269] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (emphasis added).

[270] *Id.* at 519.

[271] Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003).

Presidential actions, noting that "separation of powers concerns are heightened when the Commander-in-Chief's powers are exercised in the domestic sphere."[272] Similarly, the Fourth Circuit in *al-Marri v. Pucciarelli* looked carefully at whether the individual detained was detained inside or outside the United States.[273]

Applying the location of the conflict as a criterion in analyzing the President's powers is not novel or unique to this article.[274] For example, Professors Derek Jinks and David Sloss recently argued that "in the absence of international legal rules, the President as Commander-in-Chief would have the exclusive power to control battlefield operations during wartime."[275] Using location of the conflict as a criterion of Presidential power is not without its critics. Professors Barron and Lederman argue that the asymmetric and international character of current warfare makes it difficult to draw a distinction between actions taken in the "field" with those taken "outside the field."[276]

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[272] Padilla v. Rumsfeld, 352 F.3d 695, 713 (2nd Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004).

[273] al-Marri v. Pucciarelli, 543 F.3d 213, 250 (4th Cir. 2008) ("'[T]he fact that the petitioners in this case were not captured on or near the battlefields of Afghanistan, unlike the petitioner in *Hamdi*, is of no legal significance to this conclusion because the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists. To find otherwise 'would contradict Congress's clear intention.'").

[274] Barron & Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, *supra* note 25, at 753 ("[O]ne classic means of attempting to distinguish permissible statutes from impermissible ones relates to whether they purport to regulate troops in the 'field of battle.'").

[275] Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions*?, 90 CORNELL L. REV. 97, 169 (2004).

[276] Barron & Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, *supra* note 25, at 753 ("In the war on terrorism, for example, the distinction between the "field" and actions "outside the field" is potentially thin, given the President's contention that the line between the home front and the battlefield has faded to insignificance."). Professor Ingrid Brunk Wuerth has also notably critiqued this criterion. Writing on the relevance of the War of 1812 on today's detention paradigm, Professor Wuerth found that detention cases from the War of 1812 "suggest that it is incorrect to place so much importance on whether the capture occurred on the 'battlefield' (or the 'zone of combat') or on whether the capture took place in the United States or abroad." Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons From Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1587 (2004). Professor Worth's analysis is, however, limited to the detention of U.S. citizens. Furthermore, as Professor Worth acknowledges, the War of 1812 cases "did not formally consider . . . distinctions [based on geography]."

Unlike the Bush administration, this article does not argue that we are engaged in a boundless war.[277] Pragmatically, a framework which recognizes a spectrum of authority based on location of the conflict reflects counterinsurgent warfare, which is comprised of a spectrum of degrees of conflict.[278] Where a conflict is open, pervasive, violent, and widespread,[279] or what can be termed "high" conflict, the President's inherent detention authority is at its zenith. Conversely, where the conflict is sporadic and low grade,[280] or "low" conflict, the President's authority is reduced.

B. Nature of the Detention

The "Nature of the Detention" refers broadly to the intensity or "nature" of the conflict in which the detention occurs. Taken collectively, the decisions discussed below draw clear distinctions based on the nature of the conflict in which detention occurs. Where the conflict is more intense, the courts afford the President more latitude to conduct military operations, including detentions. This legal paradigm is largely a function of the nature of Congress and the Executive. In short, the structure and organization of Congress does not lend itself to their involvement in tactical details during high intensity combat.

With the notable exception of the Joint Committee on the Conduct of the War, Congress's role in the conduct of war has been strategic in nature. Congressional involvement is typified by declarations of war, authorizations for the use of force, and passage of large-scale

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[277] George W. Bush, U.S. President, Address to the Nation (Aug. 29, 2001) ("Our war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.").

[278] *See generally* Peter W. Chiarelli & Patrick R. Michaelis, *Winning the Peace: The Requirement for Full-Spectrum Operations*, MIL. REV., July–Aug. 2005.

[279] For instance, the Second Battle of Falluja, Iraq in late 2004. *See, e.g.*, DEXTER FILKINS, THE FOREVER WAR 190–210 (2009) (recounting the Second Battle of Falluja).

[280] For example, the "War on Terror" physically occurs in part inside the United States. Detaining a suspected terrorist on U.S. soil would represent the nadir of presidential detention authority. And indeed, all individuals detained within the United States on terrorist related charges have been detained by civil rather than military authorities. Resulting prosecutions have also been conducted through the civil justice system rather than through the military justice or military commissions system. *See* Press Release, U.S. Department of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System (June 9, 2009), *available at* http://www.justice.gov/opa/pr/2009/June/09-ag-564.html.

appropriations bills.[281] Congress has not directed individual troop movements, drafted battle plans, established targeting lists, determined when and where to move troops, or exerted any other similar tactical control.

War requires actions that are quick, decisive, deliberate, secretive, and politically perilous—actions not commonly attributed to Congress. Alexander Hamilton recognized this reality, noting "[O]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[282] Hamilton continued, stating that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree that the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[283] These qualities, frequently attributed to the Executive, lend themselves to the tactical minutia of combat, including which individuals to detain and how to detain them. Congress, conversely, is deliberate, methodical, more closely attuned to citizenry, and better adapted to strategic, long-term, policy-making.

Since Congress is not consumed by the day-to-day conduct of war, it can consider ancillary issues raised by detention operations, such as international comity and core national values. Thus, where the conflict is a "low" conflict, it is relatively unproblematic for Congress—if it chose—to establish detention policy. Conversely, where the conflict becomes more heated, it becomes markedly more difficult and unwise for Congress to control detentions.[284] In a "high" conflict where soldiers are literally fighting for their lives, it is imprudent and virtually impossible for Congress to dictate the actions of individual soldiers and commanders.

The courts have implicitly recognized this reality. Dissenting in *Johnson v. Eisentrager*, Justice Douglass noted that "[a]ctive fighting forces must be free to fight while hostilities are in progress. . . . When a

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[281] *See supra* Part II.B.3.
[282] THE FEDERALIST No. 74, at 463 (Alexander Hamilton) (G.P. Putnam's Son ed., 1888).
[283] *Id.* at 437.
[284] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("[I]n the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved.").

foreign enemy surrenders, the situation changes markedly."[285] In *Ex parte Endo*, the Court also acknowledged the importance of the level of conflict on their analysis. Indeed, the Court expressly notes that their analysis of the internment legislation was inextricably linked to the war: "[T]he purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the *war effort* against espionage and sabotage. *It is in light of that one objective that the powers conferred by the orders must be construed*."[286]

In re Territo, another World War II detention case, arose from the capture of Gaetano Territo in Italy in 1943.[287] The Ninth Circuit upheld his detention under the 1929 Geneva Convention, which authorized his capture "on the field of battle [because at the time] he was a member of the armed forces of a belligerent part."[288] Territo argued that his status as a prisoner of war should change because open hostilities between Italy and the United States had ended.[289] The court implicitly acknowledged the validity of this argument, but ultimately rejected Territo's argument, noting that "no treaty of peace has been negotiated with Italy and petitioner remains a prisoner of war."[290]

Reid v. Covert also expressly considered the nature of the conflict in which the detention took place. Noting that several lower courts had "upheld military trial of civilians performing services for the armed forces 'in the field' during time of war,"[291] the Court held that "[t]o the extent that these cases can be justified . . . they must rest on the Government's 'war powers.' In the face of an *actively hostile enemy*, military commanders necessarily have broad power over persons on the battlefront."[292] The Court then declined to apply that rationale to the instant case, noting that Japan and England in 1953 "could properly be said to be an area where active hostilities were under way at the time Mrs. Smith and Mrs. Covert committed their offenses or at the time they were tried."[293] The Cold War was simply not "hot" enough to justify military courts-martial jurisdiction over civilians.

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[285] Johnson v. Eisentrager, 339 U.S. 763, 796 (1950) (Black, J., dissenting).
[286] *Ex parte* Endo, 323 U.S. 283, 300 (1944) (emphasis added).
[287] *In re* Territo, 156 F.2d 142 (9th Cir. 1946).
[288] *Id*. at 144.
[289] *Id*. at 146–47.
[290] *Id*. at 148.
[291] Reid v. Covert, 354 U.S. 1, 33 (1955).
[292] *Id.* (emphasis added).
[293] *Id.*

The *Hamdi* plurality echoed *Reid v. Covert* and *Quirin*, recognizing that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[294] In weighing the breadth of the authorization contained in the AUMF, the plurality concluded that "[i]f the record establishes that United States troops are still involved in *active combat* in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF."[295]

In the context of international law and the attendant detention authority, the nature of the conflict is of equal importance. The panoply of detention-related rules derived from the Geneva Conventions are only triggered in the case of "declared war or . . . any other armed conflict . . . between two or more High Contracting Parties."[296] While "armed conflict" may be easily discerned in many circumstances, there are an equal number of circumstances in which it is not clear whether "armed conflict" exists. To resolve this issue, courts have looked to the nature of the conflict to determine if the Conventions and attendant detention authorities apply. For instance, in examining this issue in the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted a three part test which looks at "(1) the participants' own understandings and intentions; (2) their level of organization; and (3) the *intensity and duration* of the violence."[297]

V. Conclusion

Wary of a tyrannical Executive, the Founding Fathers sagely provided the legislative body certain powers essential to the conduct of war.[298] At the same time, they realized an elective body of hundreds could not effectively implement the tactical minutia of fighting a war; an endeavor

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[294] Hamdi v. Rumsfeld, 542 U.S. 507, 518–19 (2004).
[295] *Id.* at 521 (emphasis added).
[296] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *but cf.*, Priester, *supra* note 41, at 1293 (arguing that "Common Article 3 contemplates the detention of both noncombatants and former combatants during the conflict.").
[297] Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 376 (2008) (citing Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995)) (emphasis added).
[298] *See infra* p. 94 and note 39. I will re-check this number once I have paginated the entire volume.

which requires secrecy, speed, and decisiveness—traits not commonly associated with a large group of elected politicians.[299] Thus, the Constitution vests the powers of Commander-in-Chief in the President.[300] The extent of this power, relative to Congress's war powers, is a source of unending debate. This is particularly so with regards to the power to detain, a power not among those expressly delegated in the Constitution, and one that does not lend itself to being easily classified as a "Congressional" war power or an "Executive" war power.

The proposed framework necessarily acknowledges some inherent presidential authority to detain during times of war. International and domestic law clearly empower the Executive (acting through the military) to detain individuals on the battlefield. The historical record supports this conclusion. Time and again, presidents have detained persons on the battlefield without implied or express Congressional consent. Successive Congresses and courts have acquiesced to this executive exercise of power. The Court has never ruled the President does not have the inherent power to detain, and Congress has never attempted to "occupy" the field of military detentions by controlling the minutia of battlefield detentions. To the extent Congress has become involved in detention policy, it is decidedly on the periphery of the core issue.

Where Congress has acted, the question becomes to what extent has legislation limited the exercise of inherent Presidential authority? In the current conflict, Congress has acted rather extensively through the AUMF,[301] the AUMF Iraq,[302] the Detainee Treatment Act,[303] the Military Commissions Act,[304] the PATRIOT Act,[305] and the SAA of 2009[306] and 2010.[307] The AUMF, the AUMF Iraq, and the PATRIOT Act, however, are all permissive statutes, empowering rather than restricting the President. The Detainee Treatment Act, Military Commissions Act, and

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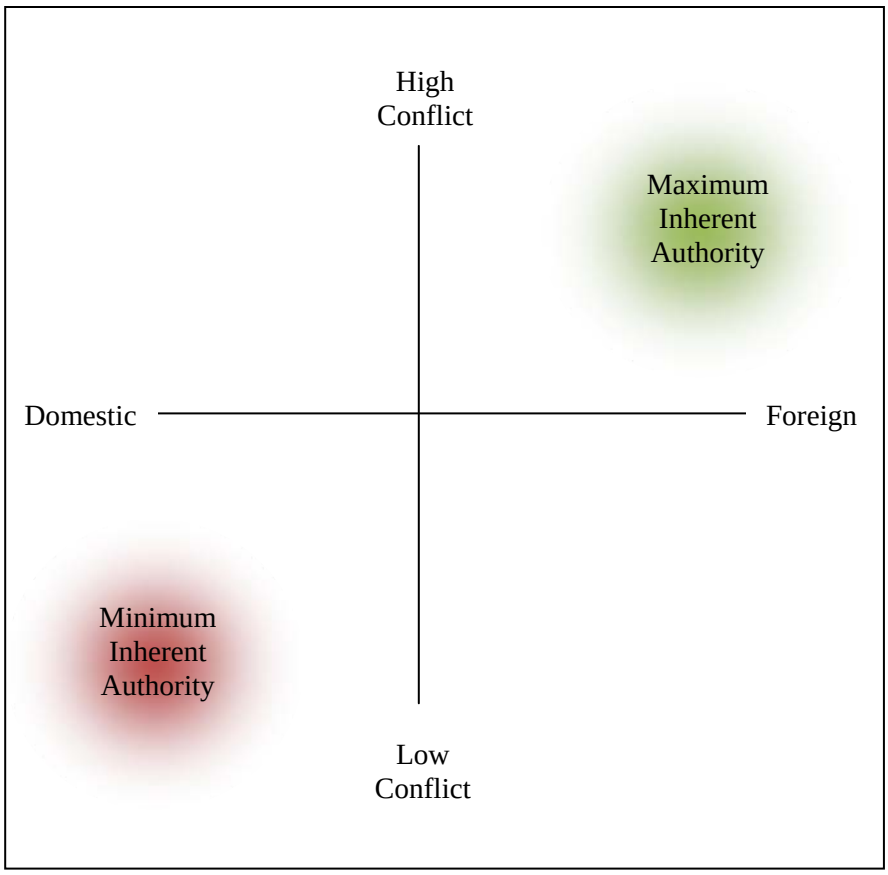
[299] *See* THE FEDERALIST No. 74, at 463 (Alexander Hamilton) (G.P. Putnam's Son ed., 1888) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."). *See also* Jinks & Sloss, *supra* note 275, at 169–70.
[300] U.S. CONST. art. II, § 2.
[301] AUMF, *supra* note 14.
[302] AUMF Iraq, *supra* note 15.
[303] Detainee Treatment Act, *supra* note 16.
[304] Military Commissions Act, *supra* note 17.
[305] PATRIOT Act, *supra* note 18.
[306] Supplemental Authorization Act of 2009, *supra* note 19.
[307] Department of Defense Appropriations Act, 2010, *supra* note 19.

SAA are restrictive statutes, but they only concern what occurs after initial detention. None of these statutes directs, prescribes, or regulates the President's authority to detain. Further, none of these statutes refutes either the broad claims or inherent and preclusive detention authority made (promulgated?) by the Bush Administration.[308]

War is never neat and tidy. Perhaps it is unremarkable that constitutional scholarship on war powers is equally muddled. Nevertheless, for pragmatic, historical, and constitutional reasons, it is clear that the President holds some inherent authority to detain individuals on the battlefield. Equally clear is the supposition that Congress has some role in prescribing the detention paradigm. The extent to which each can act is a simple function of the nature and location of the detention.

[308] *See infra* note 178.

Appendix


High
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VIDEOTAPING CONFESSIONS: IT'S TIME

MAJOR EDWARD W. BERG*

I. Introduction

A. Hypothetical

You are the chief of justice at a large Army installation. One of your trial counsel has just brought you what looks like a confession in a murder case that happened on the installation last weekend. A few things immediately grab your attention. First, the accused signed the rights-waiver form at 0100 and signed the confession at 0930. Second, the narrative portion of the confession appears short and lacking in detail, only three paragraphs long.[1] Third, the statement's question and answer portion between the investigating agent and the accused mostly calls for "yes" or "no" responses to the elements of the crime.[2] When you ask if the confession was videotaped, you find out it was not.[3] When you inquire why it took over eight hours to get this short confession, the answer is that the agent used "rapport building techniques"[4] for the first few hours.

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* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 4-25th Airborne Brigade Combat Team, Fort Richardson, Alaska. LL.M., 2010, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, 2010. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] "Narrative portion" refers to the part of the subject's statement that is his or her own account of what happened regarding the incident in question. This part of a statement normally precedes the question and answer portion between the subject and the investigating agent.

[2] While there is nothing legally wrong with this questioning method, it often fails to develop important facts. For example, instead of asking whether an alleged victim was "incapacitated," it would be more helpful to ask questions that uncover facts such as how much the victim drank; whether the victim slurred her words; whether the victim could have walked without stumbling; and whether the victim could have driven a car, given her condition. While the first question calls for a conclusion, the second set of questions draws out facts so that a judge or panel could make the ultimate conclusion.

[3] *See infra* Part III.B (discussing the fact that there is currently no requirement that custodial interrogations be videotaped in the Army).

[4] *See* Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1321 (Fall 2008) (discussing that "rapport building techniques" refers to the practice whereby government questioners "attempt to put suspects at ease by establishing a congenial, cooperative relationship in a non-threatening atmosphere, which helps suspects to relax and talk freely about the events under investigation as well as gently persuading suspects not to invoke the right to remain silent or to have counsel."). *Id.*

B. The Issues

While the special agent and the trial counsel are relieved to have this "confession," you worry about the gaps. What exactly took place between 0100 and 0930? Why is there so little paperwork resulting from the interrogation? Does the defense have a solid basis upon which to bring a motion to suppress the confession? How will the special agent fare at a suppression hearing about what happened in those early morning hours, especially when the hearing is likely months away?[5] Furthermore, even if the confession comes into evidence at trial, what will the fact-finder think about the manner in which the confession was obtained? Additionally, if the government presents video footage of the crime scene and other technologically advanced evidence at trial, will it reflect poorly on the government that the confession was not recorded?[6]

C. A Way Ahead

One way to mitigate the concerns that arise from the scenario above would be to have a videotape of the entire custodial interrogation. Currently, no such policy is mandated across the uniformed services.[7] This article will argue that the Department of Defense (DoD) should adopt a unified policy requiring videotaping custodial interrogations of felony level crimes by the criminal investigative branches of each service, i.e. Criminal Investigative Division (CID) for the Army, Naval Criminal Investigative Service (NCIS) for the Navy and Marine Corps, and Office of Special Investigations (OSI) for the Air Force.[8] This requirement should extend to recording all aspects of the custodial interrogation, including the initial rapport building phase, the rights-warnings under Article 31, Uniform Code of Military Justice (UCMJ),

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[5] *Id.* at 1307 (discussing that a law enforcement officer may have difficulty recalling details of what occurred during a custodial interview when later testifying about those underlying events, without the benefit of a recording of the interview).

[6] Regarding this type of scenario, defense attorney Charlie Gittins has said, "Well, I have had some fun over the years with agents who didn't record after establishing that they had all the equipment available but simply chose not to use it." Posting of Charlie Gittens to CAAFlog, http://www.caaflog.com/2009/08/26/air-force-osi-to-record-interrogations/ (Aug. 27, 2009, 14:53 EST).

[7] *See infra* Part III.B.

[8] Because the Coast Guard falls under the Department of Homeland Security and not Department of Defense, this article will not discuss the policies of the Coast Guard Investigative Service (CGIS) regarding videotaping custodial interrogations.

and *Miranda v. Arizona*,[9] as well as the entire interview session.[10] Where military exigencies do not permit videotaping, other means of electronic recording should be used.[11] Such a policy should also be coupled with the appropriate funding for the required equipment and training.[12]

In Part II, this article will examine the rationale underlying videotaping interrogations. In Part III, this article will trace the national movement in civilian jurisdictions toward requiring videotaping or otherwise electronically recording custodial interrogations. This article will then consider how the military has responded to this national movement, to include some recent pilot programs instituted by NCIS and OSI. In Part IV, this article will lay out the argument for DoD to adopt a unified policy mandating videotaping custodial interrogations that considers both the benefits for and arguments against such a policy. Finally, in Part V, this article will suggest how DoD should implement such a unified policy as well as detail some of the inherent challenges.

II. Rationale Underlying Videotaping Interrogations

The Supreme Court has never held that the Constitution of the United States requires videotaping or otherwise electronically recording a custodial interrogation.[13] However, commentators and academics have long argued that electronically recording custodial interrogations should be used because such a practice would lead to a more fundamentally fair trial process.[14] Several factors, drawn from civilian cases, civilian

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[9] 384 U.S. 436 (1966).

[10] *See* REPORT OF THE COMMISSION ON MILITARY JUSTICE (Oct. 2009) [hereinafter SECOND COX COMMISSION], *available at* http://www.wcl.american.edu/nimj/documents/Cox CommissionFinalReport.pdf?rd=1x.

[11] *Id.*

[12] Costs would include the equipment itself (hardware and software), installation, and training on how to operate the equipment. A basic "Police Interview Equipment System" package that is GSA approved and comes with a concealed camera (allowing a close-up of the subject and a wider shot of other interrogation participants), two concealed microphones, software, DVD recorder with touch-screen console, powered speaker system, headphones, power supply, cables, and technical support sells online currently for $7,090 for the system. *See, e.g.*, http://www.martelelectronics.com/police-interview-room-dvd.html (last visited Aug. 16, 2011).

[13] *See Miranda*, 384 U.S. at 469–75 (setting out what the Constitution does require for custodial interrogation).

[14] *See generally* Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619 (Summer 2004)

jurisdictions that currently videotape custodial interrogations, commentators, and academics, support the rationale underlying videotaping interrogations and the proposition that videotaping interrogations should be mandated within DoD.[15]

The first factor is accuracy.[16] A videotaped rights-waiver and confession will be more accurate and complete than a signed sworn statement by the investigator and accused or testimony recounting those events by either an investigator or an accused.[17] Even if the special agent investigating the hypothetical murder case above took meticulous notes and had an excellent memory, it would be impossible for him to recount word-for-word what both he and the accused said from 0100 to 0930. Further, even if much of what the accused said might not seem relevant to the crime at issue, some of what the accused said during the interview might turn out to be relevant later, either to the crime at issue or to some

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(discussing that electronically recording interrogations helps limit abusive interrogation tactics, improves fact-finders' ability to judge the voluntariness of confessions, and fosters a better relationship between law enforcement and the community); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771 (Summer 2005) (discussing how mandated recording of interrogations can benefit not only an accused, but can also benefit police officers and prosecutors); Julie R. Linkins, *Satisfy the Demands of Justice: Embrace Electronic Recording of Custodial Investigative Interviews Through Legislation, Agency Policy, or Court Mandate*, 44 AM. CRIM. L. REV. 141 (Winter 2007) (arguing that the benefits of recording interrogations mandates that all such custodial interrogations should be recorded); Sullivan, *supra* note 4 (arguing that empirical evidence regarding recording interrogations supports a policy of requiring all federal investigative agencies to record custodial interrogations).

[15] The four factors that follow are not meant to be exhaustive, but rather to highlight how such considerations derived from civilian cases, civilian law enforcement jurisdictions, commentators, and academics, apply to the military justice system.

[16] *See, e.g.*, Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985) (stating that a recording requirement provides an objective record of the interrogation); Sullivan, *supra* note 4, at 1298 ("Regardless of how experienced, honorable, intelligent, dedicated and talented, no one is able to recount what occurred on a prior occasion with the same accuracy, completeness and descriptiveness of an electronic recording."); Posting of Dwight Sullivan to CAAFlog, http://www.caaflog.com/2007/10/13/ncis-reportedly-considering-policy-requiring-taping-of-interrogations/ (Oct. 14, 2007, 9:57 EST) ("I don't think interrogations should be recorded because they help the defense. Nor do I think interrogations should be recorded because they will help the prosecution. I think they should be recorded because doing so would promote accuracy—and that is a good thing for a judicial system.").

[17] *See* Sullivan, *supra* note 4, at 1298 (discussing how human memory, regardless of good intention, is less accurate than an electronic recording).

other crime.[18] Thus, having an accurate record of the accused's words could prove helpful in this and other investigations.

The second factor is judging credibility.[19] A fact-finder who observes an accused's gestures and facial expressions, and hears an accused's own words, will be better able to judge the credibility of the accused than if the fact-finder had to rely on second-hand testimony recounting what took place.[20] In the military justice system, the fact-finder is given the ultimate responsibility for determining the credibility of witnesses.[21] The instruction given to a panel regarding credibility of witnesses states, "You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court. . . ."[22] If a fact-finder is able to observe the reactions of an accused during an interrogation, to include the accused's gestures, facial expressions, and mannerisms, then the fact-finder can make his or her own judgment about the credibility of the accused from first-hand information. On the other hand, if the fact-finder has to rely on the testimony of a law enforcement agent regarding what the accused said and did, then the fact-finder is left with second-hand knowledge upon which to base a credibility determination.[23] Thus, videotaping interrogations enables a fact-finder to better judge the credibility of both an accused and the law enforcement officials involved.

The third factor is assessing voluntariness.[24] Military courts, following Supreme Court jurisprudence,[25] use a totality of the

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[18] *Id.* at 1307 (discussing, for example, that seemingly unimportant details surrounding a crime might end up linking the accused to other crimes, unknown to law enforcement at the time of the interrogation).

[19] *See, e.g.*, Thurlow, *supra* note 14, at 807 (arguing out that an accused's demeanor and tone of voice may convey as much meaningful insight to a fact-finder regarding an accused's guilt or innocence as the written words of a confession); Sullivan, *supra* note 4, at 1307 (pointing out that a video record may show any physical injuries sustained in the commission of the crime, body language, eye movements, attitude, dress, sobriety, and emotional condition—all of which carries important meaning that would otherwise be lost on a defense counsel, prosecutor, judge, or jury).

[20] Sullivan, *supra* note 4, at 1298.

[21] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-1-1, at 975 (1 Jan. 2010).

[22] *Id.*

[23] Sullivan, *supra* note 4, at 1298.

[24] *See, e.g.*, SECOND COX COMMISSION, *supra* note 10, at 14 (noting that when voluntariness of a confession is in issue and there is no videotape, then significant time and resources are often required to litigate issues that could be readily resolved by such a

circumstances test to determine "whether a confession is the product of an essentially free and unconstrained choice by its maker."[26] On the other hand, if the choice is not free and unconstrained but "instead, the maker's will was overborne and his capacity for self-determination critically impaired, use of the confession would offend due process."[27] If a videotaped rights-warning and confession are available, the military judge can more easily make this threshold voluntariness determination without a lengthy "swearing contest"[28] between the investigator and an accused.[29] The military judge can simply watch the videotape. In the hypothetical above, without a videotape or other electronic recording of what transpired between the accused and the special agent, the military judge at a suppression motion would have to consider the sworn testimony of each party regarding what happened during those early morning hours. A videotape of the rights-warning process and custodial interrogation could substitute for the testimony of both the investigator and the accused, as well as provide a more accurate rendition of what happened.[30] Although a judge may have to review hours of videotape, the end result would be less in-court testimony and a more complete and accurate assessment of voluntariness.

The fourth factor is the integrity of the military justice system.[31] Videotaping interrogations will cast sunlight on the "sausage-making" of gathering a confession. As such, all aspects of the interrogation process

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videotape); Thurlow, *supra* note 14, at 781–84 (discussing Supreme Court jurisprudence on voluntariness and how videotaping custodial interrogations would assist judges determine voluntariness).

[25] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

[26] United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F. 1996) (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

[27] *Id.*

[28] The term "swearing contest" or "swearing match" is used throughout the caselaw and academic literature discussing videotaped confessions to describe the process of a court taking sworn testimony of an accused and law enforcement officials in order to determine the admissibility of confessions. *See, e.g.*, SECOND COX COMMISSION, *supra* note 10, at 14 (noting that significant time and resources often have to be dedicated to litigating these "swearing contests"); Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985) (discussing the fact that courts must resolve "swearing matches" between a defendant and a law enforcement official when voluntariness of a confession is contested).

[29] SECOND COX COMMISSION, *supra* note 10, at 14.

[30] *Id.*

[31] *See generally* Sullivan, *supra* note 4, at 1310 (emphasizing how electronic recording improves the integrity of the civilian judicial system, especially in the public's eye, because as a "superior source of evidence," recorded interrogations help ensure that only the guilty are convicted and deter improper police conduct because their actions are revealed on tape).

are open for the parties to observe, thus promoting the fair and efficient administration of justice.[32] For example, in the vast majority of cases where the investigating agent uses proper techniques, the agent's work will be supported by objective video evidence.[33] This objective evidence would then make it less likely that the voluntariness of the confession would even be attacked. Also, the mere fact that the agent knows that his actions during custodial interrogations are being videotaped serves not only as a deterrent to improper behavior, but also as a tool to critique his performance and improve his technique.[34] For trial and defense counsel, having a videotaped rights-waiver and interrogation means that they can more quickly and efficiently assess and resolve contested issues related to voluntariness.[35] For defense counsel, a damning confession on video could also serve as a means of client control.[36] For trial counsel, an improper rights-warning or involuntary confession could lead to an alternate disposition of the case. For panel members, they will be able to see and hear the actions of the accused and investigating agents for themselves and not have to rely on counsel's arguments about improper versus proper interrogation and investigation techniques. Just as the military justice system supports an open discovery system based on the principle that such openness supports the ends of a just and efficient system,[37] so should the military justice system support videotaped custodial interrogations for those same reasons. Regarding open discovery, the Manual for Courts-Martial (MCM) states:

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[32] *Id.*

[33] Brian P. Boetig et al., *Revealing Incommunicado*, 75 FBI L. ENFORCEMENT BULL., Dec. 2006, at 5 (discussing how recorded interrogations help enhance an investigator's credibility by not only providing an objective record of what happened, but also because the practice indicates to the judge or jury that the investigator used the most complete and accurate method available for collecting the confession and thus that he did not have anything to hide).

[34] Sullivan, *supra* note 4, at 1306 (stating that how investigators who know they are being videotaped become more aware of their words and mannerisms and focus on the interview itself rather than on taking notes).

[35] *Id.* at 1308 (discussing his research in states that have adopted mandatory recording rules that when prosecutors and defense counsel verify a proper rights-warning and confession, or substantiate involuntary ones, that pretrial motions to suppress have been virtually eliminated).

[36] *See* Posting of Marcus Fulton to CAAFLog, http://www.caaflog.com/2007/10/13/ncis-reportedly-considering-policy-requiring-taping-of-interrogations/ (Oct. 14, 2007 16:24 EST) (relating that a videotape of an obviously voluntary confession would be a good tool to convince a client of his guilt).

[37] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 analysis, at A21-33 (2008) [hereinafter MCM].

> Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better-informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential.[38]

The words "to include videotaped custodial interrogations" should be added after the words "broad discovery at an early stage" in the quote above, thus furthering the ends of a just and efficient military justice system.

III. Changing Landscape

A. Evolution in Civilian Criminal Law Regarding Videotaping Interrogations

Currently, fourteen states and the District of Columbia require some form of electronic recording of interrogations through legislation or court action.[39] Additionally, hundreds of local law enforcement departments in all fifty states have begun videotaping or otherwise electronically recording custodial interrogations on a purely voluntary basis.[40] This evolution in civilian criminal law toward videotaping interrogations supports the proposition that DoD can and should itself adopt such a policy.

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[38] *Id.*

[39] Illinois, Maryland, Maine, Nebraska, New Mexico, North Carolina, and Wisconsin are all states with legislation mandating electronic recording of custodial interrogations. *See* Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY app. B, at 215 (Winter 2009). Alaska, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, and Indiana are all states with court-mandated electronic recording of interrogations. *Id.*

[40] *See id.*

1. Judicially Mandated Change

The movement in civilian jurisdictions toward videotaping of custodial interrogations began in the state of Alaska in 1985 with the case of *Stephan v. State*.[41] In this case, the Alaska Supreme Court held that due process under the Alaska constitution required that "police record a suspect's custodial interrogation in a place of detention."[42] The Alaska court noted both that human memory is faulty and that when people testify about past events, they tend to interpret the past events in a light most favorable to themselves.[43] Thus, litigation concerning confessions, the court noted, tended to be a swearing match between the law enforcement officer and the accused where the court resolved which version of events was more credible.[44] The court found that a recorded interrogation would provide an objective and accurate record of what occurred during an interrogation and thus reduce or eliminate the need for these swearing matches.[45]

In 1980, five years before its landmark decision in *Stephan v. State*, the Alaska Supreme Court had ruled that law enforcement officials had a duty to electronically record custodial interrogations "where feasible."[46] The problem was that in many cases, such as in the underlying facts of *Stephan*, law enforcement officers had electronic recording devices available, but still were neglecting to record custodial interrogations.[47] Thus, the Alaska court decided to put teeth behind its mandatory recording policy. The court enforced its rule by holding that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska constitution, and that any statement thus obtained is generally inadmissible."[48] The court did not provide an exhaustive list of what would constitute an excused failure to record an interrogation, but it did mention that an accused refusing to answer questions while being recorded and unavoidable equipment failures are

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[41] 711 P.2d 1156 (Alaska 1985). *See generally* Sullivan, *supra* note 4, at 1310–14 (tracing the evolution of the national movement toward electronically recording custodial interrogations); Thurlow, *supra* note 14, at 784–91 (outling the current state of video recording in the United States).
[42] *Stephan*, 711 P.2d at 1158.
[43] *Id.* at 1161.
[44] *Id.*
[45] *Id.*
[46] Mallot v. State, 608 P.2d 737 (Alaska 1980).
[47] *Stephan*, 711 P.2d at 1157.
[48] *Id.* at 1158.

two instances that would likely suffice.[49] Instead of providing a list, the *Stephan* court said that trial courts would have to look at each proffered excuse for failure to record on a case-by-case basis.[50]

In 1994, the state of Minnesota followed suit with the next important "recording case."[51] The Minnesota Supreme Court, in *State v. Scales*, held that "all custodial interrogation, including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."[52] Much like the Alaska court, the Minnesota Supreme Court had urged state law enforcement officials to electronically record custodial interrogations in a series of cases from 1988 to 1991.[53] Unlike the Alaska court, the Minnesota court did not find that the due process clause of the state constitution required recording.[54] Rather, the Minnesota court exercised its supervisory power to enforce the mandate to electronically record custodial interrogations.[55] Similar to the Alaska court in *Stephan*, the Minnesota court stated that the failure to comply with the recording requirement would subject the confession to exclusion from evidence on a case-by-case basis.[56]

In addition to Alaska and Minnesota, five other states also have judicially created rules mandating electronic recording of custodial interrogations. These states include New Hampshire (2001),[57] Massachusetts (2004),[58] New Jersey (2005),[59] Iowa (2007),[60] and Indiana

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[49] *Id.* at 1162.
[50] *Id.*
[51] State v. Scales, 518 N.W.2d 587 (Minn. 1994). *See* Sullivan, *supra* note 4, at 1311.
[52] *Scales*, 518 N.W.2d at 592.
[53] *See, e.g.*, State v. Robinson, 427 N.W.2d 224 (Minn. 1988) and State v. Pilcher, 472 N.W.2d 333 (Minn. 1991).
[54] *Scales*, 518 N.W.2d at 592.
[55] *Id.*
[56] *Id.*
[57] State v. Barnett, 789 A.2d 629 (N.H. 2001).
[58] Commonwealth v. DiGiambattista, 813 N.E.2d 516 (Mass. 2004).
[59] NEW JERSEY SUPREME COURT ADMINISTRATIVE DETERMINATION RE: REPORT OF THE SPECIAL COMMITTEE ON THE RECORDATION OF CUSTODIAL INTERROGATIONS (2005). This report was created as a response to the court's ruling in *State v. Cook*, 847 A.2d 530 (N.J. 2004).
[60] State v. Hajtic, 724 N.W.2d 449 (Iowa 2007). The court did not adopt an exclusionary rule but strongly encouraged law enforcement to videotape custodial interrogations, thus leaving the impression that failure to videotape or record without justification would be viewed skeptically by the court. *Id.* at 456.

(2009).[61] No state besides Alaska has found that the due process clause of a state constitution requires electronic recording of custodial interrogations in order to secure a fair trial.[62]

2. States with Legislation Requiring Electronic Recording of Custodial Interrogations

Seven states and the District of Columbia have adopted legislation mandating electronic recording of custodial interrogation. These states include Illinois,[63] New Mexico,[64] Maine,[65] Wisconsin,[66] North Carolina,[67] Maryland,[68] Nebraska,[69] and the District of Columbia.[70] Many other states, including Ohio, Montana, Oregon, Missouri, South Carolina, Texas, Connecticut, New York, and Tennessee all have proposed legislation before either their state house of representatives or senate involving electronic recording of custodial interrogations.[71]

Most state legislation mandating electronic recording follows a common structure.[72] First, there is a definitions section for terms such as "custodial interrogation," "electronically record," and "place of detention."[73] Next, there are exceptions for when interrogations will not be required to be electronically recorded.[74] Generally, these exceptions cover instances when the accused refuses to cooperate unless he is not

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[61] The Indiana Supreme Court amended Indiana Rule of Evidence 617 to "prohibit evidence of a suspect's statement taken during police station questioning unless it was electronically recorded." Amendment, at www.court.in.gov/rules (Sept. 15, 2009). The rule applies to all statements make on or after January 1, 2011. *Id.*

[62] Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985). *See* Thurlow, *supra* note 14, at 785.

[63] 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007).

[64] N.M. STAT. § 29-1-16 (2006).

[65] ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2007).

[66] WIS. STAT. ANN. §§ 972.115 (West 2007).

[67] N.C. GEN. STAT. § 15A-211 (2007).

[68] MD. CODE ANN., CRIM. PROC. § 2-402 (LexisNexis 2008).

[69] NEB. REV. STAT. § 29-4501 to 4508 (2008).

[70] D.C. CODE ANN. §§ 5-116.01-03 (LexisNexis Supp. 2008).

[71] *See* Sullivan & Vail, *supra* note 39, at 216–19; *see also* Sullivan, *supra* note 4, at 1311.

[72] *See, e.g.*, Draft Electronic Recordation of Custodial Interrogations Act, National Conference of Commissioners on Uniform State Laws (June 3, 2009), http://www.law.upenn.edu/bll/archives/ulc/erci/ 2009_amdraft.htm [hereinafter Draft Electronic Recordation Act].

[73] *Id.* § 2.

[74] *Id.* §§ 4–9.

recorded, or situations that are out of the investigator's control, such as equipment failure,[75] or a good faith belief that a recording was not required.[76] Finally, there is a listing of the types of crimes that must be electronically recorded.[77]

3. Judicial and Legislative Remedies for Non-Recording

States differ broadly in the remedies that they impose for failure to electronically record custodial interrogations when mandated.[78] On the most severe end are Alaska and Minnesota. These states impose the judicial remedy of excluding the confession from evidence if the court decides that the prosecution lacked a valid reason for failing to record.[79] The most lenient states are Maine, Maryland, and New Mexico. These states impose no remedy or penalty for failure to record.[80] In the middle, the District of Columbia and Illinois impose a rebuttable presumption that a non-recorded custodial interview is involuntary.[81] Finally, a growing number of states are implementing cautionary jury instructions as a remedy for failure to record.[82]

4. Local Jurisdictions that Voluntarily Electronically Record Custodial Interrogations

The most convincing evidence that electronic recording of custodial interrogations has become a national movement lies in the fact that over six hundred local law enforcement offices around the country have voluntarily adopted the practice.[83] A study regarding local jurisdictions

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[75] *Id.* § 9.
[76] *Id.* § 8.
[77] *Id.* § 3. The draft act does not delineate specific crimes. Rather, it leaves the choice to the discretion of the jurisdiction adopting the act. The wording of the draft act reads, "[felony] [crime] [offense]." *Id.*
[78] *See* Sullivan & Vail, *supra* note 39, at 216–19.
[79] Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985), State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).
[80] ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2007); MD. CODE ANN., CRIM. PROC. § 2-402 (LexisNexis 2008); N.M. STAT. § 29-1-16 (2006).
[81] D.C. CODE ANN. §§ 5-116.01-03 (LexisNexis Supp. 2008); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007).
[82] N.C. GEN. STAT. § 15A-211 (2007); WIS. STAT. ANN. § 972.115 (West 2007); NEB. REV. STAT. §29-4501 to 4508 (2008); *Scales*, 518 N.W.2d at 592.
[83] *See* Sullivan & Vail, *supra* note 39, app. B.

that voluntarily began recording custodial interrogations found that none of those jurisdictions believed that the burdens of electronically recording custodial interrogations outweighed the benefits; and none of those jurisdictions decided to go back to conducting custodial interrogations without recording them.[84]

B. Changes in the Military Landscape Regarding Videotaping Interrogations

Change is also afoot within DoD criminal investigative services regarding videotaping of custodial interrogations. In 2008, NCIS began requiring videotaping of custodial interrogations involving "crimes of violence."[85] The NCIS defines crimes of violence as, "homicide, sexual assault, aggravated assault, robbery, and incidents involving weapons."[86] In 2009, the Air Force's criminal investigative service, OSI, also began a pilot program mandating videotaping of custodial interrogations.[87] The Army's CID does not currently have a policy that mandates videotaping of interrogations. However, such recording is authorized at the discretion of the special agent in charge of each field office.[88] Additionally, a CID policy update in December 2009 now requires that if and when an agent does record a custodial interrogation, the agent must record the entire interview process, to include the introduction, the suspect's consent to be recorded, the rights-waiver, the entire interview, and any written statement that the suspect agrees to produce after the oral interview.[89]

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[84] Sullivan, *supra* note 4, at 1305.

[85] *See* Memorandum from U.S. Naval Criminal Investigative Service, to Distribution, subject: Policy Change Regarding Recording of Interrogations (4 Sept. 2008) [hereinafter NCIS Policy Change Memo]; *see also* Andrew Tilghman, *New NCIS Policy Requires Agents to Videotape Suspect Confessions*, MARINE CORPS TIMES, Oct. 5, 2009, at 18.

[86] NCIS Policy Change Memo, *supra* note 85, at 1.

[87] *See* SECOND COX COMMISSION, *supra* note 10, at 13.

[88] E-mail from Captain Brendan Cronin, Admin. Law Attorney, U.S. Army Criminal Investigation Command (Oct. 27, 2009, 11:36 EST) (on file with author). *See also* CRIM. INVESTIGATIVE DIVISION, REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES ch. 5 (3 June 2009).

[89] *See* Memorandum from U.S. Army Criminal Investigation Command, subject: Procedures for Videotaping Suspect/Subject Interviews (2 Dec. 2009) [hereinafter CID Videotaping Procedure Memo].

C. Fiscal Year 2010 National Defense Authorization Act Videotaping Requirement for Detainees

Congress has recently imposed a videotaping requirement for custodial interrogations on the DoD. However, this requirement only applies to intelligence interrogations on the battlefield, and not to criminal interrogations of Soldiers. Section 1080 of the Fiscal Year (FY) 2010 National Defense Authorization Act (NDAA) requires "videotaping or otherwise electronically recording strategic intelligence interrogations of persons in the custody of or under the effective control of the Department of Defense."[90] The legislation specifically excludes from the videotaping requirement Soldiers engaged in direct combat operations and tactical questioning as defined in Army Field Manual 2-22.3.[91] Furthermore, the law also allows for the Secretary of Defense to grant waivers to the videotaping requirement on a "case-by-case basis for a period not to exceed 30 days" and grant temporary suspensions of the videotaping requirement, provided that the Secretary make a written finding that such a suspension is in the "vital national security interests" of the United States and Congress be notified of such a suspension within five days.[92] Section (f) of the bill tasks the Judge Advocates General of the Armed Services to develop and adopt uniform guidelines for the videotaping of these interrogations.[93]

While the persons required to be videotaped by the FY 2010 NDAA are obviously not in the same group as military criminal defendants, the underlying goals of the FY 2010 NDAA are similar to the goals for videotaping custodial interrogations of Soldiers. The sponsor of this legislative requirement, Representative Rush D. Holt (Democrat, New Jersey), stated that he "proposed the videotaping requirement to protect both the prisoners and the interrogators, who would be less likely to face false abuse allegations."[94] If the Judge Advocates General and DoD adopt and implement videotaping policies to protect the rights of

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[90] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1080, 123 Stat. 2190, *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname =111_cong_bills&docid=f:h2647enr.txt.pdf.

[91] *Id.* § 1080(d)(1), (2); U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS para. 1-17, at 1-7 (6 Sept. 2006) (According to Field Manual 2-22.3, tactical questioning is "the expedient initial questioning for information of immediate tactical value.").

[92] *Id.* § 1080(e)(1), (2).

[93] *Id.* § 1080(f).

[94] Scott Shane, *Congress Moves to Require Taped Detainee Sessions*, N.Y. TIMES, Oct. 9, 2009, at A18.

detainees and those that question them (albeit by legislative mandate), it begs the question of whether the same protections should be extended Soldiers and the investigative agents who question them?

IV. Department of Defense Should Mandate Videotaping Interrogations

The DoD should adopt a unified policy requiring videotaping custodial interrogations of felony-level crimes by the criminal investigative branches of each service, i.e., CID, NCIS, and OSI. This requirement should extend to recording all aspects of the custodial interrogation, to include the initial rapport building phase, the rights-warnings under Article 31, UCMJ, and *Miranda v. Arizona*,[95] as well as the entire interview session.[96] Where military exigencies do not permit videotaping, other means of electronic recording should be used, such as audio recording with a voice-recorder.[97] A policy mandating videotaping should be coupled with the appropriate funding for the required equipment and training.

A. Additional Benefits to Mandated Videotaping

In Part I above, this article listed four main factors underlying the rationale for mandating videotaping custodial interrogations: accuracy, judging credibility, assessing voluntariness, and the integrity of the military justice system.[98] While each of these factors provides justification for mandated videotaping, there are additional and more specific benefits to mandated videotaping of custodial interrogations. These benefits include efficiency;[99] improving investigating agents' techniques;[100] enhancing investigating agents' credibility;[101] and ease of implementation.[102]

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[95] 384 U.S. 436 (1966).
[96] SECOND COX COMMISSION, *supra* note 10.
[97] *Id.*
[98] *See supra* Part I.
[99] *See, e.g.*, Sullivan, *supra* note 4, at 1309; *see also* Draft Electronic Recordation Act, *supra* note 72.
[100] Boetig et al., *supra* note 33, at 6.
[101] *Id.* at 5.
[102] *See, e.g.*, Thurlow, *supra* note 14, at 797–98 (noting that how advances in recording technology have brought down the price of video recording equipment and will likely continue to do so in the future).

In the twenty-five years that civilian jurisdictions have been electronically recording custodial interrogations, and in the scholarly literature on the subject, one commonly recognized benefit is improved efficiency.[103] This efficiency manifests itself in fewer suppression motions,[104] quicker resolution of any litigated suppression motions,[105] improved case assessment by prosecutors and defense counsel,[106] and the fact that direct evidence is given first-hand to the fact-finder and is not filtered through the memory of either the investigator or the accused.[107]

Videotaped custodial interrogations can also benefit an investigating agent's techniques.[108] The videotape allows the agent to critique his performance for self-improvement and also allows his or her supervisor to assess and mentor the agent.[109] Furthermore, during the interrogation itself, the agent will have more time and attention to focus on interviewing the accused rather than on taking notes of what the accused says.[110]

Additionally, videotaping can help build an investigating agent's credibility with the fact-finder.[111] The agent and the trial counsel can argue to the panel or military judge that the investigating agent has used the most transparent means and methods of investigative practice available if the agent has videotaped the entire interrogation.[112] With everything transparent, the defense will likely be less successful in arguing that the investigator used underhanded means to gain a confession.[113]

If and when the DoD mandates and funds a mandatory recording policy for custodial interrogations, it will be relatively easy to implement.[114] Videotaping equipment is readily available from commercial sources. Flexibility should be built into the procurement

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[103] *See* Sullivan, *supra* note 4, at 1309; *see also* Draft Electronic Recordation Act, *supra* note 72.
[104] Draft Electronic Recordation Act, *supra* note 72, at 6.
[105] Sullivan, *supra* note 4, at 1309.
[106] *Id.* at 1308–09.
[107] *Id.*
[108] Boetig et al., *supra* note 33, at 6.
[109] *Id.*
[110] Sullivan, *supra* note 4, at 1306.
[111] Boetig et al., *supra* note 33, at 5.
[112] *Id.*
[113] *Id.*
[114] *See* Thurlow, *supra* note 14, at 797–98.

system because installation criminal investigative offices have different requirements than deployed or deployable criminal investigative offices.[115]

B. Arguments Against Videotaping

Since Alaska's recording requirements for custodial interrogations were adopted in 1985, a common core of arguments has arisen against videotaping or otherwise recording interrogations. The most common arguments include the following: that a camera in the room will lead to a decrease in the number of suspects voluntarily making confessions;[116] that recordings may undermine investigators' rapport building efforts;[117] that it will cost too much;[118] and that the costs in terms of confessions suppressed by failure to record will be too high.[119] There are also some military-specific arguments that can be made against video recordings, including the following: that the burden of video recording would impose too large of a strain on a busy criminal investigative system in terms of the increased amount of evidence, i.e. in the form of videotaped interrogations that would have to be reviewed and catalogued for felony level crimes;[120] and that video recordings of interrogations could lead to negative publicity for the services, if disclosed.[121]

As to the objections regarding a "chilling effect" and "rapport building," a response to the critics is that the video cameras do not have to be disclosed to the subject.[122] For example, while the current NCIS policy requires that a sign be posted outside each interrogation room

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[115] Deployed criminal investigative offices would likely need lighter and more easily movable video equipment than a garrison criminal investigative office would need.

[116] *See, e.g.*, Thurlow, *supra* note 14, at 800–01 (finding that most police departments who do not record custodial interrogations cite the perceived "chilling effect" as one of their main rationales); Sullivan, *supra* note 4, at 1323–24 (relating his interviews with police departments who changed from non-recording to recording and that they saw no appreciable decrease in willingness to be interviewed on camera, and even when they did encounter resistance, they merely turned off the camera and interviewed without it).

[117] Sullivan, *supra* note 4, at 1321 (discussing that this was a common theme in the reluctance of the FBI and ATF to record custodial interrogations).

[118] Thurlow, *supra* note 14, at 797.

[119] *Id.* at 805.

[120] Posting of Anonymous to CAAFlog, http://www.caaflog.com/2007/10/13/ncis-reportedly-considering-policy-requiring-taping-of-interrogations/ (Oct. 13, 2007 22:13 EST).

[121] *See Killings at the Canal: The Army Tapes* (CNN television broadcast Nov. 21, 2009).

[122] *See* Sullivan, *supra* note 4, at 1322.

stating that the suspect is subject to being recorded at all times,[123] such a warning sign is not a legal requirement.[124] Furthermore, the research data has shown that those civilian police departments that record openly still have not experienced the so-called "chilling effect."[125] As to the monetary costs, while that might be a significant factor for local police jurisdictions, it is mitigated in a large organization like DoD, with larger overall budgets.[126] Further, on a big-picture level, once the equipment is in place, resources and time will be saved by the fact that fewer suppression motions will have to be litigated. This will save the time of investigating agents, attorneys, and military judges.[127] The argument that the added strain on the efficient processing of the military criminal investigative system due to an increased amount of evidence produced is the most credible argument against videotaping and could present a serious issue. In each felony level case, there would now potentially be a recorded rights-waiver and interview. This would be more evidence for the trial counsel, defense counsel, and chiefs of justice to review and for investigating agents to process as part of each investigative file. Furthermore, when lengthy videotapes are played at motions hearings or courts-martial, court reporters' workload would increase because they must then transcribe the custodial interrogation.[128] As an alternative, the criminal investigative service office could send the video to a private transcription service prior to trial; however, this could potentially result in increased costs and a waste of resources if the case either did not proceed to trial, or the confession was not used at trial.[129]

Finally, there is the potential of unwanted publicity. For example, this phenomenon was demonstrated by the four-day *CNN* special from November 2009 that aired segments from hours of custodial interrogations done by CID in the murder investigation of four Iraqi civilians.[130] While these tapes did not reveal any misconduct by the investigating agents, the show's host did point out that the agents were purposefully misstating the amount of evidence that CID currently had

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[123] *See* NCIS Policy Change Memo, *supra* note 85, at 1.
[124] *See* Sullivan, *supra* note 4, at 1322.
[125] Thurlow, *supra* note 14, at 801.
[126] A rough cost estimate would be approximately $7,000 per interrogation room. *See supra* note 12.
[127] *See* Draft Electronic Recordation Act, *supra* note 72, at 6.
[128] *See* MCM, *supra* note 37, R.C.M. 1103(b) (discussing the requirements for when a verbatim record of trial is required).
[129] For example, if the case resulted in a guilty plea.
[130] *See Killings at the Canal: The Army Tapes* (CNN television broadcast Nov. 21, 2009).

against the suspect in order to coax a confession.[131] While most panel members would likely understand these investigative techniques, this television special report nonetheless brought what was likely unwanted scrutiny on CID's methods of interrogation.

V. Implementation

A. Options

Several options exist for how DoD could implement a unified policy requiring videotaping of custodial interrogations. One alternative would be for DoD to mandate the policy across the investigative services and let each individual service decide how to implement the requirement. For example, the Army may decide not to notify suspects that their custodial interrogations are being videotaped. On the other hand, the Air Force may decide that they will have the video equipment out in the open for the suspect to observe. The benefit to this policy alternative lies in the flexibility it would provide to the investigative services to determine what methods best suit its investigators. Also, this flexibility would allow DoD to determine which practices work best in the field, while still meeting the minimum standard of videotaping custodial interrogations from beginning to end.

Another alternative would be for DoD to issue detailed requirements and a model policy that prescribed exactly how to implement the policy in the field. The benefit to this approach would be uniformity and clarity. While the initial burden might be higher on each investigative arm to train and alter its practices, at the end of the implementation period, there would be a level playing field across the services, thus ensuring that suspects receive uniform treatment. The downside would be the decreased flexibility that each investigative agency would have in conducting investigations.

In either alternative, each service would need operational exceptions to the videotaping requirement. This could be done by building flexibility into the policy. For example, audio recordings should be mandated where video recordings are impractical due to operational necessities, such as in the early stages of a contingency operation.

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[131] *Id.*

B. Minimum Policy Requirements

Certain minimum requirements should be included in any DoD policy requiring videotaping of custodial interrogations. The first, as discussed above, is that the videotape should record from beginning to end, including the rapport building phase, the rights-warning process, and the entire custodial interrogation.[132] The second is that the policy should clearly state what level or status of crimes under investigation would trigger the videotaping requirement. As discussed above, a reasonable guideline would be felony level crimes.[133] This would include almost all crimes within the purview of the investigative services (CID, NCIS, and OSI, as opposed to military police investigators) that have a maximum punishment of over one year confinement and a punitive discharge.[134] Since this policy would cover the vast majority of crimes that CID, NCIS, and OSI investigate, videotaping would become the normal routine and not the exception.[135] The third is that the special agent in charge of each field office should be the one who decides when operational considerations dictate a legitimate reason for not recording a custodial interrogation. Furthermore, the special agent in charge should then be required to put his or her decision and the supporting rationale regarding that decision into the investigative case file.

C. Remedy for Failure to Record

The final issue lies in determining the appropriate remedy for failure to record a custodial interrogation. Again, there are several options, ranging from excluding the confession from evidence to cautionary jury instruction, to no remedy at all.[136] In determining the most appropriate approach for DoD to take, it is again instructive to examine the issue in the civilian context. The preeminent civilian expert on electronic recording of custodial interrogations has recently changed his recommendation from excluding a confession from evidence to providing cautionary jury instructions when a law enforcement agency fails to properly record a custodial interrogation.[137] He had two main

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[132] *See supra* Part IV.
[133] *Id.*
[134] *See* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-3 and app. B (15 May 2009).
[135] *Id.*
[136] *See supra* Part III.A.3.
[137] *See* Sullivan & Vail, *supra* note 39, at 221–22.

rationales. First, he contended that once a law or court directive mandating electronic recording was established, law enforcement agencies complied just as readily in states with or without the inadmissibility remedy because of the often unexpected benefits resulting from electronically recording custodial interrogations.[138] Second, he argued that legislators, law enforcement officers, and prosecutors were much less supportive of mandatory recording laws that contained the inadmissibility provision for fear that a mistake or technical glitch regarding recording would lead to guilty criminals going free.[139] These insights help inform a way forward for DoD in implementing a remedy for failing to record custodial interrogations.

In the military criminal justice system, the best approach would be two-fold. First, DoD should set clear administrative policy guidance in the form of a DoD Instruction requiring videotaped custodial interrogations.[140] Second, the fact-finder should be allowed to consider any violations of this policy and then decide the weight to give such a violation.[141] Thus, the ultimate remedy would be left in the hands of the fact-finder. Non-legitimate reasons for failure to record would go to the weight of the resulting confession and not its admissibility.[142] The fact-finder would be able to weigh any policy violation against all of the other evidence at hand. The remedy would not be exclusion of the confession from evidence, but would be one factor in a totality of the circumstances test to determine how much weight to give the confession. For example, the special agent in charge may have had a valid reason for deciding not to record the interrogation, such as equipment failure or refusal of the subject to be recorded. In this case, the fact-finder would likely give little weight to the absence of a recorded interrogation. Conversely, the agent may have acted in bad faith and not consulted at all with the special agent in charge. In this instance, the fact-finder would likely give more weight to the absence of a recorded interrogation.

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[138] *Id.* at 221.
[139] *Id.* at 222.
[140] *See supra* Part IV.
[141] The fact-finder being a military judge at a suppression motion and either a military judge and/or a panel at court-martial. *See, e.g.*, United States v. Adcock, 65 M.J. 18, 23 (C.A.A.F. 2007) (holding, in the context of sentencing credit, that violation of a service regulation does not create a per se right to sentencing credit under the Uniform Code of Military Justice).
[142] This would be similar to the remedy for chain of custody violations. *See, e.g.*, United States v. Vietor, 10 M.J. 69, 71 (C.M.A. 1980).

VI. Conclusion

For the benefit of investigating agents, prosecutors, defense attorneys, military judges, panels, and accuseds, DoD should mandate a policy of videotaping custodial interrogations from the rapport building phase through the entire interview. Such a policy would allow agents to become more proficient in their interviewing techniques, substantiate agents' proper behavior in cases of false allegations of misconduct, and relieve them of the burden of drawn-out testimony in suppression motion hearings. Prosecutors would benefit because they would have fewer overall suppression motions to argue and have more compelling evidence of the guilt of an accused by having a videotaped confession from the accused's own mouth. Defense attorneys would benefit by having a tool to quickly assess their client's story; potential proof of any investigator misconduct; and a means for increased client-control if the videotaped interrogation is highly persuasive of a client's guilt. Military judges and panels would benefit from first-hand evidence of what happened between an accused and the investigator. Finally, the accused would also benefit from the underlying rationales supporting the move to videoptaped interrogations: accuracy, fairness, and integrity within the military justice system, which ultimately results in a more equitable trial process.

THE LAST STAND: CUSTER, SITTING BULL, AND THE BATTLE OF THE LITTLE BIGHORN[1]

REVIEWED BY MAJOR KEIRSTEN H. KENNEDY[*]

Despite his inconsistencies and flaws, there was something about Custer that distinguished him from most other human beings . . . . He could inspire devotion and great love along with more than his share of hatred and disdain, and more than anything else, he wanted to be remembered.[2]

I. Introduction

What really happened at the Battle of the Little Bighorn and why does General George Armstrong Custer still fascinate Americans over 100 years after his death? These questions, although certainly analyzed in *The Last Stand*, remain unanswered.[3] Nevertheless, Nathaniel Philbrick's brilliant character sketches of Custer and the supporting cast of the military participants in the battle sheds light on how each character's personality and leadership style brought about Custer's last stand. Missing from the author's analysis is a complete and satisfying picture of Sitting Bull and other Indian fighters.[4] Nevertheless, Philbrick skillfully and thoroughly examines Custer and selected superiors and subordinates, assessing their personal and professional strengths and flaws. What results is a superb and comprehensive review of the leadership capabilities of the officers in the Seventh Cavalry and how those capabilities (or inabilities) led to the engagement and its horrific conclusion. An officer in today's military would do well to apply these leadership lessons, especially when viewed through the lens of current

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[*] Judge Advocate, U.S. Army. Presently assigned as Professor and Director, Professional Communications Program, Administrative and Civil Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] NATHANIEL PHILBRICK, THE LAST STAND: CUSTER, SITTING BULL, AND THE BATTLE OF THE LITTLE BIGHORN (2010).

[2] *Id.* at 306.

[3] *Id.* at 310 ("For legions of self-described Custer buffs, the Battle of the Little Bighorn is much like an unsolvable crossword puzzle: a conundrum that can sustain a lifetime of scrutiny and debate.").

[4] *Id.* at 325. Philbrick apologizes somewhat in his notes, pointing out that "[w]riting a balanced narrative involving two peoples with two widely different worldviews is an obvious challenge, especially when it comes to the nature of the evidence." *Id.*

military participation in Iraq and Afghanistan.[5] Leading soldiers is a timeless virtue and core trait which successful leaders embody and has not changed over time. Officers studying the devastating last stand thereby fulfill Custer's ultimate desire: "In defeat the hero of the Last Stand achieves the greatest of victories, since he will be remembered for all time."[6]

In response to the question why Philbrick, known for his award-winning novels "about the ocean and seafaring,"[7] departed from his usual books in working for four years on *The Last Stand*, Philbrick recalls his boyhood fascination with "Custer and the West."[8] Since 1876, beginning with Brigadier General Alfred Terry's debriefing missives to Washington, D.C.,[9] there have been thousands of publications analyzing Custer's actions. What Philbrick adds with *The Last Stand* to the body of "Custerology"[10] is not particularly historically revelatory,[11] but with his "pixel-rich, clear, and startling [narration],"[12] Philbrick expertly reveals the key leadership traits of the officers fighting in battle.

The maps Philbrick provides the reader follow his narrative perfectly and are particularly well-placed throughout the book. Decidedly one of the best comprehensive bibliographies in recent Custer fare makes this

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[5] Interview by Lieutenant Colonel Peter Kilner with Nat Philbrick, Author, in West Point, N.Y., http://www.nathanielphilbrick.com/books/the-last-stand/interview (last visited Aug. 4, 2011) [hereinafter Philbrick Interview].

[6] PHILBRICK, *supra* note 1, at xvii.

[7] Philbrick Interview, *supra* note 5. Conducting research at West Point, Philbrick spoke with "Lieutenant Colonel Peter Kilner . . . who responded to [his] questions about Custer and the Seventh Cavalry by alluding to what's happening today in Iraq and Afghanistan."

[8] *Id.* ("It was the movie 'Little Big Man' that really did it for me, and from the moment I saw that film as a high school freshman, I was hooked."). *See also* PHILBRICK, *supra* note 1, at xvii (discussing his memories of Custer as "the deranged maniac of Little Big Man.").

[9] *Id*. at 284–85 (highlighting the dichotomy of Terry's "two dispatches: one for public distribution that made no attempt to find fault; the other, a more private communication to General Sheridan that blamed the catastrophe on Custer").

[10] MICHAEL A. ELLIOTT, CUSTEROLOGY 2 (2007) (coining the phrase in reference to the "arena of historical interpretation and commemoration [of Custer].").

[11] Custer's actions have been analyzed ad nauseam, arguably more comprehensively than by Philbrick. *See, e.g.*, JAMES DONOVAN, A TERRIBLE GLORY (2008); JAY MONAGHAN, CUSTER: THE LIFE OF GEORGE ARMSTRONG CUSTER (1971); JEFFREY D. WERT, CUSTER: A CONTROVERSIAL LIFE OF GEORGE ARMSTRONG CUSTER (1996).

[12] Daniel Dyer, *Nathaniel Philbrick Moves Inland to Tell "The Last Stand,"* CLEVELAND.COM (May 9, 2010, 6:28 AM), http://www.cleveland.com/books/index.ssf/2010/05/nathaniel_philbrick_moves_inla.html (last visited Aug. 4, 2011).

one of the most extensively researched battle analyses available. [13] Most readers will especially enjoy the footnotes section, written in narrative form, as Philbrick provides even more analysis in a discussion of his research and sources.[14] The most fascinating aspect of the Battle of the Little Bighorn, especially for those already generally familiar with the chronology of the historical blunder, is the leadership lessons Philbrick so skillfully brings to the forefront of the narrative by virtue of his talent for perfectly honed character sketches.

II. Custer and His Supporting Cast

It is misleadingly easy to believe Custer's flaws and idiosyncrasies, which Philbrick packages so neatly, were apparent to all and surely predicted his awful demise. These same "flaws" are the basis for Custer's meteoric rise in the ranks of the military and his moniker, Boy General. Custer's celebrated status as the youngest officer to reach brevet major general[15] reveals his character as an ambitious officer and results-oriented leader whose passion for the battlefield rules his life.[16] Philbrick successfully maintains a neutral tone,[17] and even if there is some discussion of Custer's mistakes, he leaves the reader to draw his own conclusions about the picture he paints of Custer and his relationships with his fellow officers. Philbrick asks if "Custer's luck" merely runs out

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[13] Jerry D. Morelock, *The Last Stand: Book Review*, ARMCHAIR GENERAL (May 5, 2010), http://www.armchairgeneral.com/the-last-stand-book-review.htm [hereinafter Morelock Review] (praising maps and bibliography).

[14] *Id.* Morelock is incensed at the structure of Philbrick's footnotes: "Much less helpful to readers was the egregiously awful decision . . . on how 'footnotes' would be presented. . . . This makes it exceedingly difficult . . . to match what Philbrick writes in the main text to the references that he cites to support it." *Id.* However, Philbrick's target audience is not the historical reader who checks citations, but is rather the reader interested in the masterful story-telling of the battle and the interpersonal relationships of the participants.

[15] Morelock Review, *supra* note 13 (discussing Custer's brevet promotion occurring only two years after graduating last in his class at West Point).

[16] PHILBRICK, *supra* note 1, at xvi ("Custer had come to long for the battlefield. Only amid the smoke, blood, and confusion of war had his fidgety and ambitious mind found peace.").

[17] Custer is a polarizing figure, especially when it comes to assigning blame. *Compare* STEPHEN WEIR, HISTORY'S WORST DECISIONS 91 (2008) (emphasizing Custer's hot-headedness and direct disobedience of General Terry's specific order to wait for reinforcements), *with* THE ARMY (Harold W. Nelson et al. eds,, 2001) (espousing a less harsh view, referencing inadvertent mistakes: "Unaware of Crook's retreat, Lieutenant Colonel George Custer leads the 7th Cavalry against a large Indian village. Custer and five companies are wiped out.").

on June 25, 1876.[18] The better question is what leadership shortcomings and ill-informed decisions,[19] both Custer's[20] and the officers' around him that day, made that luck run out?

Luck is rarely, if ever, associated with great leadership. Characteristics required to lead are purposefully developed through training and over time, and often require a sagacity which Custer fundamentally lacked,[21] as "The main goal of leadership and discipline is to produce cohesion in units . . . . The best way to develop confidence in your innate fairness and good rationale for decisions is to seek and consider the input of your principal subordinates."[22] It is clear that Custer failed to instill this type of confidence in his unit members largely because of his contentious relationships with his immediate superior (General Terry) and his immediate subordinates (Major Reno and Captain Benteen).

A. Leadership of Custer's Subordinates: Major Reno and Captain Benteen

To put it mildly, neither Reno nor Benteen cared for Custer, and the dislike was mutual in both cases. Reno and Benteen's major complaint regarding Custer was his leadership style. Each recognized Custer to be a risk-taking, flamboyant leader and they respected neither Custer's position as their superior nor his impressive Civil War record. In Benteen's case, he attributed his friend's death to Custer's impetuousness: "He not only held a grudge against Custer for the death of Major Elliott at the Washita, he was galled by his low rank relative to what he'd achieved during the Civil War, especially when it required him to serve under inferior sorts like Custer and Reno." Benteen would take every opportunity to undermine Custer and did so at the Battle of the

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[18] Bruce Barcott, *Men on Horseback*, N.Y. TIMES, June 10, 2010 (Sunday Book Review), at BR1, *available at* http://www.nytimes.com/2010/06/13/books/review/Barcott-t.html ("'Custer luck' propelled him up the ranks, and his risk-taking strategies secured an important victory over the Cheyenne in 1868.") (citations omitted).

[19] WEIR, *supra* note 17, at 91–92.

[20] PHILBRICK, *supra* note 1, at 234 (getting too far ahead of the munitions), 259 (dividing his command to pursue the Indians), 272 (citing "Custer's hyperactive need to do too much").

[21] *Id.* at 18 (noting that "no one had done more to undermine Custer's career than Custer himself"). *See also id.* at 105 ("Custer had always lived life at a frenetic pace. He thrived on sensation.").

[22] KEITH E. BONN, ARMY OFFICER'S GUIDE 314–15 (48th ed. 1999).

Little Bighorn when he failed to comply with Custer's order to "Be Quick"[23] in joining Custer and his men as they launched their attack.

This disobedience to Custer's orders is significant in two ways. First, it shows the fundamental lack of respect Benteen had for Custer when he could not be bothered to hurry to his commander's aid after receiving an obviously hastily written missive delivered with great peril to the dispatched soldier. Second, it implies that Benteen fully expected Custer to succeed in his attack; Benteen did not care to play second fiddle to that glory-monger, Custer, whose luck had thus kept him alive despite his carelessness.[24]

Reno, on the other hand, completely lacked the ambition and zeal which Custer sought out and admired in his subordinates.[25] Philbrick discusses the death of Reno's beloved wife and his relationship with his eleven-year-old son to illustrate where Reno's heart and desires truly lay; the military and these Indian Wars kept him from his wife's funeral and were now keeping him from raising his child. Custer could not abide this lack of passion, to the point of excluding him from key planning meetings.[26] Instead of recognizing a weakness in a subordinate and developing Reno as an officer, Custer ostracizes Reno to the extent he can and undermines both Reno[27] and Benteen[28] whenever possible. Custer was too busy chasing his own glory and pursuing his own personal agenda to properly invest the time to develop Reno and Benteen. [29] Custer, aware of the divisive effect his personality and actions had, did nothing to attempt to modify his behavior for the greater good of

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[23] PHILBRICK, *supra* note 1, at 181.

[24] *Id.* at 137 (discussing Benteen's firm belief that "Custer's lust for glory . . . put the entire regiment at risk."). Further, following the battle but before news of the results had filtered in to the rest of the unit, Benteen believed that "[i]n his typically brash and impulsive way, Custer had attacked the village without proper preparation and forethought." *Id.*

[25] *Id.* at 95 (explaining Custer's reaction to Reno failing to engage the Indians when presented with the opportunity during a scouting mission: "Custer was just as angry, but for an entirely different reason. Reno, the coward, had failed to attack!").

[26] *Id.* at 17 ("Even though he was the source of their latest and best information about the Indians, Marcus Reno was not invited to the meeting.").

[27] *Id.* at 97 ("Custer had recently rebuked Reno for not having the courage to follow the trail to its source even though Reno was in violation of Terry's orders.").

[28] *Id.* at 152 ("Almost as soon as the regiment crossed the divide, Custer was finding fault with Frederick Benteen . . . . Once again, [Benteen had] been banished.").

[29] U.S. DEP'T OF ARMY, FIELD MANUAL 6-22 (formerly known as FM 27-100), ARMY LEADERSHIP para. 2-1 (12 Oct. 2006) [hereinafter FM 6-22] ("Army leaders are . . . charged with the responsibility of developing their subordinates.").

his unit and even actively aggravated contentious relationships with his subordinates.[30]

As a rule, a leader should unite rather than divide in order to achieve his cause and accomplish the mission because "An Army leader is anyone who by virtue of assumed role or assigned responsibility inspires and influences people to accomplish organizational goals. Army leaders motivate people . . . to pursue actions, focus thinking, and shape decisions for the greater good of the organization."[31] Wrapped up in his own ambitions, Custer appears to have lost perspective as a military leader, but he was a poorer and less manageable subordinate to General Terry than Custer's men were to him.

B. Leadership of Custer's Superior: General Terry

General Terry was a crafty senior officer[32] who was mostly well liked,[33] evincing little ambition beyond his current rank and position and even less interest in doing any actual fighting in any wars. Philbrick presents an emotionally charged analysis of General Terry[34] when he argues, "Terry has slunk back into the shadows of history, letting Custer take center stage in a cumulative tragedy for which Terry was, perhaps more than any other single person, responsible."[35] This is, notably, one of Philbrick's few departures from the neutral tone he maintains throughout the narrative. But such criticism is too harsh: Terry's only true leadership flaw is his inability to lead and inspire soldiers. Moreover, none of Terry's actions were the decisive factor in the decimation of Custer's men; for no Custer superior could have tempered that commander's ill-fated, rash decisions during this engagement.[36]

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[30] PHILBRICK, *supra* note 1, at 115 ("If Custer had hoped to build the morale of his junior officers by casting aspersions on Benteen . . . and Reno . . . he had failed miserably.").
[31] FM 6-22, *supra* note 29, para. 1-1.
[32] PHILBRICK, *supra* note 1, at 100 ("Terry had a lawyer's talent for crafting documents that appeared to say one thing but were couched in language that could allow for an entirely different interpretation should circumstances require it.").
[33] *Id.* at 17 (referring to Terry's reputation for having a "congenial manner, but he was no fool.").
[34] Morelock Review, *supra* note 13.
[35] PHILBRICK, *supra* note 1, at 103.
[36] *Id.* at 217 ("Custer was once again alone in the midst of excessive and exhilarating danger, attempting to extricate himself from a mess of his own devising. It was exactly where a deep and ungovernable part of him liked to be.").

In fact, Terry attempted to use Custer's shortcomings to his advantage when he gave Custer carte blanche to attack if he could, but at the same time outlining in front of witnesses the written plan for Custer to work his way south around the village and wait for reinforcements.[37] The simple fact is this: General Terry did not realize the profound problems with his battle plan, nor the devastating effect Custer's poor relationships with Reno and Benteen would have, until it was too late.[38] But none of these leadership issues among the officers of the Seventh Cavalry are as devastating as the effect the battle would have on U.S. Indian policy in the political aftermath.

C. National Leadership: Political Policy-Makers

An important point to bear in mind is that Custer led his troops to war on orders from the U.S. Government,[39] a fact which Philbrick drives home brilliantly in his discussion of Government-Indian relations and the fallout of the Battle of the Little Bighorn, particularly its effect on future Government policy with regard to the Indians.[40] Philbrick subtly prods the reader to conclude that "[t]he tragedy of both their lives is that they were not given the opportunity to explore those alternatives [to negotiate]."[41] It was the national agenda of expansion into the West that prevented any attempt to negotiate peace,[42] a negotiation which Sitting Bull would likely have welcomed in the moments leading up to the battle.[43]

III. Sitting Bull Juxtaposed to and Compared with Custer

Philbrick's riveting account of the battle, pieced together largely with Seventh Cavalry members' accounts, and his expert analysis of

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[37] *Id*. at 104.
[38] *Id*. at 256.
[39] *Id.* at 3 (explaining that "the Grant administration was in desperate need of a way to replenish a cash-starved economy" in the years leading up to the battle; discovery of gold in the Black Hills was the impetus).
[40] *Id.* at 309.
[41] *Id.* at xix.
[42] *See generally* MICHAEL HOWARD, CLAUSEWITZ: A VERY SHORT INTRODUCTION 36 (2002) (proposing that there are two types of wars—either "to destroy the enemy . . . or else to prescribe peace terms to him") (internal quotation marks omitted).
[43] PHILBRICK, *supra* note 1, at 312 ("But at the Little Bighorn, he did not want to fight. He wanted to talk. This may be his most important legacy.").

Custer's character, serve only to underscore what Philbrick fails to deliver as promised: a parallel analysis of Sitting Bull. Philbrick maintains, "This is the story of the Battle of the Little Bighorn, but it is also the story of two Last Stands, for it is impossible to understand the one without the other."[44] Despite this assertion, the reader becomes enthralled from the start in the mythical General Custer. This is purposefully done, as Philbrick entrances the reader with his first lines of well-crafted prose, telling the story of Custer thrillingly hunting his first buffalo;[45] the author highlights Custer's unbridled, unabashed passion from those opening pages. Philbrick never fully attains that level of insight into Sitting Bull; the historical record is simply too lacking for as full and expertly drawn a picture of Sitting Bull as the reader enjoys in Custer's case.[46] The premise Philbrick attempts to disprove -"[w]hen it comes to the Little Bighorn, most Americans think of the Last Stand as belonging solely to [Custer]"[47]- is never expelled in favor of viewing it also as the "last stand" of the Indian Nation.

IV. Conclusion

Outstanding leadership hinges upon knowing one's subordinates, flaws and all. Terry knew Custer enough to develop a perfect written plan, while still allowing Custer to do what (Terry knew) Custer did best. This is exactly where Custer failed as a leader: he did not take into account the personalities and motivations of his two key subordinates; when he realized he needed their obedience to his orders to win the battle,[48] it was too late. "In Philbrick's view, both men were guilty of neglect of duty, inspired by personal animosity toward Custer."[49] However, every officer in a leadership position has encountered that difficult subordinate: the one who will disobey orders merely to

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[44] *Id.* at xvii–xviii. The premise Philbrick attempts to disprove that "[w]hen it comes to the Little Bighorn, most Americans think of the Last Stand as belonging solely to George Armstrong Custer" is never expelled in the book in favor of viewing it as the "last stand" of the Indian Nation. *Id.*

[45] *Id.* at xv–xvi.

[46] *Id.* at 325 (explaining that "[w]hen it comes to our understanding of Sitting Bull, there is the underappreciated problem of evidence," referring to the oral tradition of storytelling of the Native American).

[47] *Id.* at xvii.

[48] *Id.* at 181 (noting that "[Custer] hated to admit it, but he needed Frederick Benteen.").

[49] Steve Raymond, *The Last Stand: an End for Custer, Sitting Bull, and a Way of Life*, SEATTLE TIMES, May 15, 2010, *available at* http://seattletimes.nwsource.com/html/books/2011850128_br16philbrick.html.

undermine the officer. As the U.S. military continues to engage in the fight against terrorism, officers simply must excel at leadership and interpersonal relationships (with both subordinates and superiors) to effectively command soldiers. It is that failing for which Custer should be remembered.[50]

[50] PHILBRICK, *supra* note 1, at xviii (emphasizing Custer's most objectionable leadership quality: "By refusing to back down in the face of impossible odds, [Custer] project[s] an aura of righteous and charismatic determination. But when does resistance to the inevitable simply become an expression of personal ego or, even worse, of narrow-minded nostalgia for a vanished past?").

THE UNFORGIVING MINUTE: A SOLDIER'S EDUCATION[1]

REVIEWED BY MAJOR LAKEYSIA R. HARVIN

> *My part of the contract, the responsibility that came with the privilege of leadership, was to never spend their lives cheaply. I carried the weight of the responsibility on every patrol, yet unlike a rucksack or a Kevlar helmet I could never slip it off when we came back inside the wire. It was there when I woke up at midnight to check how they were faring in their lonely guard towers. It was there when I walked through their tent that night and when I returned to my cot for a night of restless sleep, turning every hour on a narrow cot. This was the price of a salute.*[2]

The above quote from the *Unforgiving Minute: A Soldier's Education* by Craig Mullaney insightfully describes the weight an effective military leader bears when he or she decides to take an oath to lead soldiers.[3] It drives home the message that a salute is more than just a gesture that a soldier gives to a military leader, but a salute is earned through hard work, sound judgment, and a genuine concern for soldiers.[4]

In the *Unforgiving Minute*, Mullaney gives a remarkable chronological account of how his background, education, and military training shaped him into a military leader. The author takes the reader on a journey through the valuable lessons he learned in preparing to lead soldiers. His leadership abilities and training would ultimately be put to the test in Afghanistan.[5] While assigned as a platoon leader in Afghanistan, Mullaney is faced with a serious tactical decision during a

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* Judge Advocate, U.S. Army. Currently assigned as Deputy Staff Judge Advocate, Office of the Staff Judge Advocate, Headquarters, U.S. Army South (ARSOUTH), Fort Sam Houston, Texas.

[1] CRAIG M. MULLANEY, THE UNFORGIVING MINUTE: A SOLDIER'S EDUCATION (2008).

[2] *Id.* at 268.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 285.

fire fight.[6] This fire fight ends in the death of one of his soldiers.[7] He calls this experience the "unforgiving minute."[8]

Mullaney's intent in writing this book is to provide insight into military life with the hope to either encourage someone to serve in the military or to create an appreciation for military service.[9] Throughout the book, Mullaney describes his experiences with such vivid imagery and intricate detail, the reader feels as though he or she is standing right beside him. Although the focus of the book leads up to the unforgiving minute, this book provides many military leadership lessons and touches on legal concepts which are relevant to judge advocates. It also gives an honest look at the conflicts military leaders grapple with both externally and internally.

Throughout the book, Mullaney seeks to answer whether the combination of his education, experience, and military training will be enough at the time it matters the most—when his soldiers' lives are on the line.[10] In developing his book, Mullaney divides the writing into three sections—Student, soldier, and Veteran.[11] These sections could also be described in military terms, with which soldiers are intimately familiar, such as the training phase, execution phase, and the After Action Review (AAR). In the first section, Mullaney describes his indoctrination into military life as a student while attending West Point and Ranger School.[12] In the second section of the book, Mullaney applies the knowledge and training he has learned from West Point, the University of Oxford ("Oxford"), and Ranger School in a deployed environment. Finally, in the third section, he reflects on his military experiences and endeavors to teach others.

Although other authors have written about the West Point experience, few capture it as well as Mullaney.[13] Mullaney begins the book describing his first day at West Point. Immediately, he questions whether he made the right decision in choosing West Point.[14] During this first

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[6] *Id.*
[7] *Id.*
[8] *Id.* at 285–91.
[9] *Id.* at inside flap.
[10] *Id.*
[11] *Id.* at contents.
[12] *Id.* at 3–213.
[13] *See* DAVID LIPSKY, ABSOLUTELY AMERICAN: FOUR YEARS AT WEST POINT (2003).
[14] MULLANEY, *supra* note 1, at 217–341.

section, the reader also learns more about the author's background and his motivations for attending West Point. Mullaney did not come from a military family, but grew up in a "working-class family."[15] His decision to attend West Point was not only based on his own desire for self-improvement but also on his desire to obtain his father's approval.[16] He initially describes his relationship with his father with admiration and credits his father with instilling in him the principles of hard work and responsibility.[17]

These principles would be necessary for him to survive West Point, Airborne School, Oxford, and Ranger School. Each day at West Point, the cadets are taught a new skill or lesson in the race to quickly convert them from civilian life to military life. Many of the cadets' lessons are learned through trial and error which the author describes so clearly, the reader will undoubtedly find them comical.[18] He also learns critical skills such as the importance of staying focused under pressure, paying attention to details, and being prepared for any contingency.[19] Further, Mullaney and the other cadets are taught the importance of teamwork. To survive West Point, the cadets must work together and depend on one another to be successful.[20] Unbeknownst to Mullaney at the time, teamwork and the ability to become cohesive with members of different backgrounds prove to be a very valuable skill in combat.

As he progresses through his years at West Point, he transforms from an underclassman who was a follower to an upperclassman responsible for leading others. Not surprisingly, his view of leadership begins to shift when he becomes a squad leader.[21] As an underclassman, he was not able to fully comprehend the reasons his squad leaders had such strict rules until he was placed into a leadership position.[22] When he became a leader, he realized these standards were necessary for success of the mission.

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[15] *Id.* at 13.
[16] *Id.* at 16–18.
[17] *Id.* at 13–17. His relationship with his father would later change when he father abandons the family and seeks a divorce. *See id.* at 209–13.
[18] *Id.* at 4–13.
[19] *Id.* at 24.
[20] *Id.* at 23.
[21] *Id.* at 57–60.
[22] *Id.*

After West Point and Airborne School, Mullaney attends Ranger School. Ranger School trains students to "[e]xhaustion, pushing them to the limits of their minds and bodies."[23] In his book, Mullaney describes the rigorous training required to obtain his Ranger tab. The training seems almost unorthodox, given the lack of sleep and food, in addition to the poor accommodations; however, it is just the opposite. The training is designed to teach soldiers to survive in the most austere conditions. In the end, the training develops Mullaney's self confidence to deal with complex situations. Mullaney also learns that the failure to be alert and at his best could cost his or his soldier's life. [24]

The author uses a great quotation in his book that captures what Ranger School attempts to accomplish. Quoting the book by S.L.A. Marshall "Men Against Fire," Mullaney states, "The far object of a training system is to prepare the combat officer mentally so that he can cope with the unusual and unexpected as if it were the altogether normal and give him poise in a situation where all else is in disequilibrium."[25] Ultimately, Ranger School prepares him for combat.

Ranger School does not come without hardships. Mullaney experiences failure during an exercise and is recycled in that phase of training.[26] From that experience he learned how to persevere and recover from failure, even when he wants to quit both physically and mentally.[27] The following words from his ranger instructor make a lifelong indelible impression on him and will later serve to motivate him while deployed:

> You are here for the troops you are going to lead. You are responsible for keeping them alive and accomplishing whatever mission you're given. I don't care if you're tired, hurt, or lonely. This is for them. And they deserve better. You owe them your Ranger tab. . . . [T]his isn't about you.[28]

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[23] Soldier's Life, Ranger School, http://goarmy.com/life/ranger_school.jsp (last visited Sept. 8, 2009).
[24] MULLANEY, *supra* note 1, at 42.
[25] *Id.* at 33 (quoting S.L.A. MARSHALL, MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND 116 (2000)).
[26] *Id.* at 109–11.
[27] *Id.*
[28] *Id.* at 102.

Similar to Mullaney's experience at Ranger School, judge advocates must also persevere through adversity. If a judge advocate has ever stayed up late or missed events because of preparing for trial, writing a motion, or answering a legal issue for a commander, then that judge advocate has tapped into that same dogged determination described in this book. As judge advocates, we owe it to our client, whether it is the Government or a soldier, to be the best advocate that we can. We have to persevere and perform our jobs well, not just for our own personal accomplishment, but for the stage that we set for the judge advocates who come after us.

The judge advocate's ability to be accurate becomes even more important in a combat environment, where soldiers' lives are on the line. We should always seek to gain the confidence of our commanders regarding legal issues because it will allow commanders to focus on their many other tasks. Providing accurate and timely advice is not optional for judge advocates, but something judge advocates owe to the clients they serve. Consequently, perseverance is one of the many leadership lessons that judge advocates can learn from Mullaney's book.

Following West Point and Ranger School, Mullaney is selected to attend the University of Oxford as a Rhodes Scholar.[29] During this part of the book, the author devotes several chapters, repetitively, discussing his various adventures while attending Oxford. Although his experiences at Oxford fit chronologically, these pages are a very slow read and contributes very little to showing how this experience relates significantly to his military growth or success. Instead, this section could be much more concise. The reader only learns that Oxford gives Mullaney more independence and the ability to think more in-depth.[30] The author describes this experience by stating, "Where the military academy had taught me how to answer questions, Oxford taught me what to ask."[31] The remaining chapters develop his relationship with a woman, who later becomes his wife.[32] Overall, the author devotes too much time to his Oxford experience, which ultimately distracts the reader from his underlying message of how his military experiences shaped him as a leader.

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[29] *Id.* at 75–79.
[30] *Id.* at 136.
[31] *Id.*
[32] *Id.* at 150–86.

The author's graduation from Oxford and reentry into regular military life is a welcomed event for the reader because it picks up the pace of the book. Following Oxford and the basic course, he moves to Fort Drum to begin preparations for his deployment to Afghanistan.[33] As a platoon leader, he is also forced to become a problem-solver as he experiences many of the issues that commanders deal with every day, such as assisting soldiers with financial, family, and legal issues.[34] Fortunately, he is assigned an experienced platoon sergeant to assist him in leading the platoon. Mullaney is smart enough to know that his success as a platoon leader is greatly depends on the skill of his platoon sergeant.[35] Consequently, Mullaney listens to his platoon sergeant and learns skills which cannot be adequately taught in a classroom, but are derived from years of experience.[36]

The second section of the book discusses the author's deployment and showcases the execution of his military training. This section is the highlight of the book and definitely a page-turner. The chapters within this section cover many legal concepts of interest to a judge advocate such as the rules of engagement, the law of war, humanitarian aid, and international relations.[37] Beyond the legal issues, the book introduces the reader to the human side of war and the myriad of emotions soldiers experience while deployed in a combat zone. Mullaney openly discusses his fears and self-doubt.[38] Accordingly, he skillfully sets the scene to lead to the unforgiving minute.

Mullaney is faced with the question, "What do we do now, Sir?"[39] by his soldier during the fire fight in Afghanistan. At that moment, Mullaney's crew has just killed three Taliban men and is being ambushed.[40] As a platoon leader, Mullaney has to decide whether to instruct his men to follow the commander toward the ambush or to stand still and return machine gun fire from Lozano Ridge.[41] He chooses to stand his ground. As a junior officer, Mullaney does not have many real-life military experiences to draw upon in this situation. He also does not

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[33] *Id.* at 190–204.
[34] *Id.* at 198–99.
[35] *Id.* at 193.
[36] *Id.*
[37] *Id.* at 238–39, 299–300, 249–56, 325.
[38] *Id.* at 267.
[39] *Id.* at 285.
[40] *Id.* at 284–85.
[41] *Id.*

have a lot of time to make a decision. Accordingly, he must trust his training.

Commanders often ask this same question of judge advocates when seeking legal advice. Judge advocates may be in positions where they are junior officers advising a senior commander on a time-sensitive matter in which they have little experience. Similar to Mullaney, judge advocates must also trust in their training and legal abilities. It is impossible for any military school or training to address every scenario regarding what judge advocates will face in the field, but judge advocates must draw upon their education, experience, and training to provide sound legal advice.

After the fire-fight, the author should be given credit for not ending the story abruptly after the purpose of the book is achieved. Mullaney completes the story and goes a step further to expose the emotions both he and his soldiers experience after the death of a fellow soldier: guilt, pity, and loss.[42] Mullaney also describes the overwhelming guilt he feels as a leader for the loss of his soldier.[43] He expertly brings war into perspective when he conveys the message that war does not stop after a loss.[44] Mullaney concludes that soldiers have to still continue with the mission, without really having significant time to grieve or heal.[45]

In the final section and chapters of this book, the author primarily reflects on his experiences in Afghanistan. He discusses his return from Afghanistan, the effects of deployment, and the end of his military career. He appropriately titles the first chapter in this section "Dislocated" because he has to readjust from a combat to a normal life.[46] He also touches on the post-traumatic stress disorder he experiences by describing how various daily events trigger his memories of Afghanistan. His memories of the events which occurred in Afghanistan also carry over into his classroom. In his last military assignment, he serves as a professor at the Naval Academy in Annapolis, Maryland.[47] At first he refuses to discuss his time in Afghanistan with his students, but this later changes.[48] He realizes that he has an obligation to share his experiences,

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[42] *Id.* at 292–97.
[43] *Id.* at 292, 295.
[44] *Id.* at 298.
[45] *Id*.
[46] *Id.* at 345.
[47] *Id.* at 359.
[48] *Id.* at 361–63.

to include his mistakes, with his students because that experience may save their lives one day.[49]

Mullaney will probably replay the unforgiving minute many times in his head and always be left with the question of whether he made the right decision. Unfortunately, this is a recurring thought that far too many commanders have to face when a soldier is lost. Mullaney realizes that he cannot change the outcome, but he can give back by sharing his experiences with others. The greatest victory really emerges at the end of the book, when Mullaney goes to the grave of the soldier who died on his watch and forgives himself.[50]

This book warrants two rave reviews and is a highly recommended read. It seamlessly weaves together the author's life, while providing and expounding upon solid military leadership principles. This book has received favorable reviews from both the military and civilian communities. In Colonel (Retired) Kingseed's review of this book, he states that it "[S]hould be mandatory reading for every junior officer that dons the uniform."[51] The New York Times describes this book as "[O]ne man's story, warmly, and credibly told." [52] Overall, Mullaney succeeds in his objective to explain military life and inspire others to serve.[53]

The lessons Mullaney dwells on are timeless and universal, for all leaders in any walk of life, whether or not they must experience that dreaded unforgiving minute. Mullaney expertly advises the reader how to forgive and how to parlay the experience into teaching others.

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[49] *Id.* at 361–62.
[50] *Id.* at 367–68.
[51] Cole C. Kingseed, Book Review, *An Officer's Coming of Age*, ARMY MAG., Mar. 2009, *available at* http://www.ausa.org/publications/armymagazine/armyarchive/may 2009/Pages/AnOfficer%E2%80%99sComingofAge.aspx.
[52] Janet Maslin, Book Review, *The Battlefield Can Be an Unforgiving Teacher*, N.Y. TIMES, Feb. 25, 2009, *available at* http://www.nytimes.com/2009/02/26/books/26masl. html.
[53] MULLANEY, *supra* note 1, at author's note.

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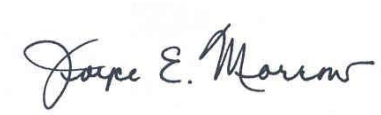

JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
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