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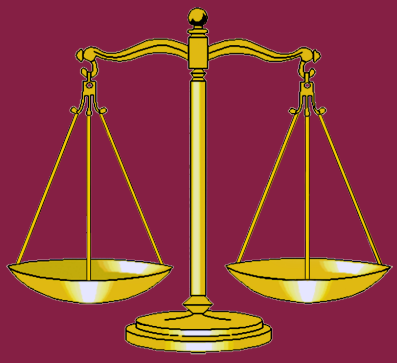

Military Law Review

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Department of the Army Pamphlet 27-100-223

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Book Review

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Military Law Review

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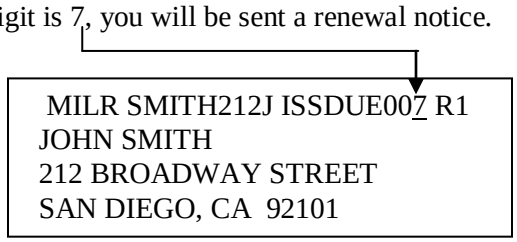

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MILITARY LAW REVIEW

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THE FRENCH MILITARY INTERVENTION IN MALI, COUNTER-TERRORISM, AND THE LAW OF ARMED CONFLICT©

DAN E. STIGALL*

I. Introduction

Non-state armed groups are increasingly a source of global insecurity.[1] Developing and fragile states in Africa are especially vulnerable to myriad terrorist groups and transnational criminal organizations that seek to exploit the inability of poorer countries to contain them.[2] The threats in these regions are, however, not only dangers to those on the African continent. As the 1998 bombings of the U.S. Embassies in Kenya and Tanzania demonstrated with brutal

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The author wishes to thank Dr. Michael Shurkin, a political scientist and expert at the RAND Corporation, for sharing his valuable insight and expertise on Mali and conflict in the Sahel. The author also wishes to thank his dear friend (and former JAG) Professor Eric Talbot Jensen for taking the time to read an earlier draft of this article. In addition, the author wishes to thank his colleagues on the faculty of The Judge Advocate General's Legal Center and School (TJAGLCS) for their peer review.

[1] *See* ROBERT MANDEL, DARK LOGIC: TRANSNATIONAL CRIMINAL TACTICS AND GLOBAL SECURITY 1, 17 (2011).
[2] *Id.* at 23.

lethality, Africa-based terrorist groups can also threaten the interests of the United States and other countries.[3] In that regard, the region in Africa known as the Sahel[4] represents a growing international security concern due to its ungoverned spaces in which transnational criminal networks, extremist groups, narcotraffickers, and terrorist organizations operate.[5] Emphasizing the dangers faced in the region, the U.N. Security Council, in a resolution focusing on peace and security in Africa, has expressed "serious concern about the insecurity and rapidly deteriorating humanitarian situation in the Sahel region, which is further complicated by the presence of armed groups and terrorist groups and their activities," as such malevolent elements "threaten the peace, security and stability of regional States."[6]

The Republic of Mali is a specifically important Sahalean country, which has been plagued for decades by cycles of violence and insecurity.[7] Mali has long been considered the Sahelean country that is

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[3] *See* Office of the Press Secretary, *Fact Sheet: Partnering to Counter Terrorism in Africa*, WHITE HOUSE (Aug. 06, 2014), http://www.whitehouse.gov/the-press-office/2014/08/06/fact-sheet-partnering-counter-terrorism-africa (noting, "As the 1998 bombings of the U.S. Embassies in Kenya and Tanzania underscored, Africa-based terrorists threaten the interests of the United States in addition to those of our African partners").

[4] Chester A. Crocker & Ellen Laipson, *The Latest Front in a Long War*, N.Y. TIMES, Mar. 7, 2013, http://www.nytimes.com/2013/03/08/opinion/global/the-sahel-is-the-latest-front-in-a-long-war.html?_r=0 (The Sahel divides the Sahara desert from the grasslands to the south. The unstable region stretches 3,400 miles west to east across parts of Senegal, Mauritania, Mali, Algeria, Niger, Chad, Sudan, South Sudan and Eritrea. Militias roam the region trafficking in drugs and arms, seizing hostages for ransom, and trading livestock.) The Sahel is a semi-arid area that "marks the physical and cultural divide between the continent's more fertile south and Saharan desert north." *See SAHEL: Backgrounder on the Sahel, West Africa's poorest region*, IRIN (June 2, 2008), http://www.irinnews.org/report/78514/sahel-backgrounder-on-the-sahel-west-africa-s-poorest-region. The word "Sahel" is derived from the Arabic word "sahil," which means shore. *Id.*

[5] *See* John Campbell, *Does Washington Have a Stake in the Sahel?*, COUNCIL ON FOREIGN RELATIONS (Jan. 14, 2014), http://www.cfr.org/africa-sub-saharan/does-washington-have-stake-sahel/p32195; President Barrack Obama, State of the Union Address to the Congress of the United States (Jan. 28, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address. ("In Yemen, Somalia, Iraq, and Mali, we have to keep working with "partners to disrupt and disable [terrorist] networks.").

[6] *See* S.C. Res. 2056, U.N. Doc. S/RES/2056 (July 5, 2012) (Peace and security in Africa).

[7] *See* Johnnie Carson, Assistant Sec'ty, Bureau of African Affairs, U.S. State Dep't, Testimony before the House Committee on Foreign Affairs (Feb. 14, 2013), *available at* http://www.state.gov/p/af/rls/rm/2013/204778.htm; *see also* Edward Cody, *France's*

the most prone to Islamist destabilization[8] – and the events that occurred in 2012-2013 validated that assertion.[9] The internal conflict that erupted in Mali during that time, in which terrorist groups exploited existing identity cleavages and tore the country in two, serves as a fascinating study in 21st century conflict and counter-terrorism.[10] Although an internal conflict, its origins were, in many ways, transnational – and resulted in the eventual intervention by French military forces. The ensuing military operation, in which French forces aligned with the Malian government against a complex grouping of non-state armed groups and terrorist organizations, provides a worthy object of study for military strategists and counter-terrorism experts.[11] In addition, as this article demonstrates, the French intervention in Mali is notable from an international legal perspective. This is because the legality of the French intervention in Mali rests, in part, on international legal concepts that straddled the shadow line between accepted international legal norms and the *lex ferenda* of the law of armed conflict, specifically: (a) the U.N. Security Council's implied authorization for the intervention, which was based on ambiguous language in various U.N. Security Council resolutions, and (b) the notion of intervention by invitation in an internal armed conflict. Both the ideas of "implied authorization" and "intervention by invitation" as bases for the use of military force are

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Hollande sends troops to Mali, WASH. POST, Jan. 11, 2013 ("The slide into political chaos in northern Mali concerns the West for several reasons, including the possible spillover of militancy and weapons to neighboring nations and the relative ease with which West Africa-based militants might attack Europe.").

[8] *See* Anouar Boukhars, *The Paranoid Neighbor: Algeria and the Conflict in Mali*, *in* PERILOUS DESERT: INSECURITY IN THE SAHARA 89 (Frederic Wehrey & Anouar Boukhars eds., 2013)

[9] *See* Magdalena Tham Lindell & Kim Mattsson, *Transnational Threats to Peace and Security in the Sahel: Consequences in Mali*, SWED. DEF. RESEARCH AGENCY (June 2014), http://www.foi.se/Documents/Tham%20Lindell%20och%20Mattsson,%20Transnational%20Threats%20to%20Peace%20and%20Security%20in%20the%20Sahel,%20FOI-R--3881--SE,%202014.pdf (noting that violent separatism, armed Islamism and transnational organized crime "form a complex nexus that led to the collapse of state control in northern Mali in 2012 and that now complicates the re-establishment of state authority and contributes to insecurity in the wider region").

[10] *See, e.g.*, Michael A. Sheehan & Geoff D. Porter, *The Future Role of U.S. Counterterrorism Operations in Africa*, COMBATING TERRORISM CTR. (Feb. 24, 2014), https://www.ctc.usma.edu/posts/the-future-role-of-u-s-counterterrorism-operations-in-africa ("France's Operation Serval in Mali may provide many lessons for how to contain the threat by using carefully coordinated coalition operations.").

[11] *Id.*

contested concepts in international law. This has led some commentators to express doubts regarding the legality of the French intervention. [12]

This article posits that while criticism based on the seeming selectivity of U.N. approval may be warranted,[13] the changing nature of armed conflict and the threats posed by non-state armed groups and terrorist organizations operating in ungoverned spaces has led, prudentially, to a more generous view of the legality of the use of military force by intervening states against non-state armed groups in weak states or ungoverned spaces, both in terms of accepting invitation as a legal basis for the use of force and in permitting implied authorization for the use of force. Otherwise stated, the new paradigm of armed conflict has served as a catalyst for a degree of international legal evolution. In that regard, Vidan Hadzi-Vidanovic, a lawyer in the Registry of the European Court of Human Rights, has asserted that the specific approach seen in the French intervention in Mali "presents a fine mixture of a long-awaited effective and responsive collective security system and the preservation of the importance of state sovereignty."[14]

Through an analysis of the conflict in Mali and the legal authority for the French military intervention, this article explores the contours of this changing international legal landscape. This article examines relevant provisions of the France-Mali Status of Forces Agreement (SOFA) to analyze what state practice can be derived from that document, and posits that the French intervention in Mali represents a subtle shift in

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[12] *See, e.g.*, Isaline Bergamaschi & Mahamadou Diawara, *French Military Intervention in Mali*, *in* PEACE OPERATIONS IN THE FRANCOPHONE WORLD: GLOBAL GOVERNANCE MEETS POST-COLONIALISM 143 (Bruno Charbonneau and Tony Chafer eds., 2014); *see also* Brian Lee Crowley & Robert Murray, *Is the French intervention in Mali even legal?*, THE RECORD (Jan. 16, 2013), http://www.therecord.com/opinion-story/2621676-is-the-french-intervention-in-mali-even-legal-/ ("Mali highlights once more that interventionism is an inherently selective strategy with little grounding in law or international institutions. As fighting intensifies, and calls for more western states to assist their allies become louder, the Security Council may be asked to rule on intervention yet again, but with no clearer principles this time than before."); *see also* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 151 (2009) (noting "the United Nations' lack of reaction against France's ouster of the head of the former Central African Empire").

[13] *See, e.g.*, Crowley & Murray, *supra* note 12.

[14] *See* Vidan Hadzi-Vidanovic, *France Intervenes in Mali Invoking both SC Resolution 2085 and the Invitation of the Malian Government – Redundancy or Legal Necessity?*, EJIL: TALK! (Jan. 23, 2013), http://www.ejiltalk.org/france-intervenes-in-mali-invoking-both-sc-resolution-2085-and-the-invitation-of-the-malian-government-redundancy-or-legal-necessity/#more-7474.

international law vis-à-vis military force in counter-terrorism operations. This article then considers the implications of that subtle shift for U.S. counter-terrorism operations when U.S. forces are arrayed against non-state armed groups in ungoverned spaces.

II. The Rise of the Conflict in Mali

Before analyzing the international legal characteristics of the French intervention, it is worth detailing the history of the conflict in Mali. The crisis in northern Mali, as is the case with almost any armed conflict, is rooted in the history of the region. The course of events that led to the crisis in northern Mali and subsequent French intervention, however, is most immediately traced to the political upheaval (commonly referred to as "the Arab Spring") that occurred throughout North Africa and the Middle East in 2011. The effects of that phenomenon produced forces that overwhelmed the capabilities of the Malian state and permitted non-state actors to rise to dominance.

A. The Tuareg, the Arab Spring, and the MNLA

The Tuareg are a nomadic group that inhabit much of northern Mali, as well as neighboring Algeria, Niger, and Libya, and have generally dominated the central Sahara desert. In most cases, the Tuareq live alongside other ethnic groups, above all Arabs and Songhay, who sometimes ally with, and sometimes fight against, the Tuareg. In the Sahelian states (Mali and Niger), Tuareg and Arabs have had turbulent relations with the post-colonial states, and some Tuareg factions, seeking autonomy, have led several rebellions. The Tuareg, of course, are not a monolithic group. Rather, they are divided by clan, tribe, and caste, and are only loosely organized into tribal confederations, each with political and social hierarchies.[15] Certain Tuareg factions have consistently

[15] STEPHANIE PEZARD & MICHAEL SHURKIN, TOWARD A SECURE AND STABLE NORTHERN MALI: APPROACHES TO ENGAGING LOCAL ACTORS 6 (2013), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR296/RAND_RR296.pdf ("Tuaregs have historically organized themselves into confederations divided by caste and clan and both horizontal and vertical hierarchies. In brief, each confederation consists of numerous clusters of noble clans, with each cluster associated with clusters of subordinate clans as well as artisan clans and former slave clans. At the top of the system is a (usually elected) chief known as an amenokal. Some noble clans and amenokals have derived their legitimacy historically from their warrior status—they protected

agitated for autonomy in northern Mali and have been the source of numerous rebellions since colonial penetration into Africa,[16] though Stephanie Pezard and Michael Shurkin caution that "it is seldom, if ever, the case that all Tuaregs or Arabs make common cause and rebel. On the contrary, Mali's Tuareg rebellions have always been the work of a few specific clans seeking specific objectives."[17] References to the Tuareg as a general group, therefore, must take into account a degree of internal diversity and political individuation.[18]

The Tuareg were pushed, in recent decades, "into a state of nearly perpetual crisis"[19] caused by environmental factors, such as drought, and neglect by the Malian government. This prompted many Tuareg to travel to Libya, where the government of Muammar Qadhafi actively recruited them to serve in his military due to their reputation for desert warfare – assigning them into special brigades within the Libyan army. Qadhafi would eventually incorporate the Tuareg into a paramilitary force called the Islamic Legion,[20] which saw active combat in Chad, the Middle East, and South Asia.[21] Peter Gwin notes that Qadhafi considered the Tuareg

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vassals—while others combined warrior status with prestige associated with Islamic credentials and pretensions to descent from Islamic notables close to the Prophet Mohammed.").

[16] Berny Sèbe, *A Fragmented and Forgotten Decolonization: The End of European Empires in the Sahara and Their Legacy*, *in* THE ART OF CREATING A STATE 113, 119 (2014), *available at* http://www.bak-utrecht.nl/media/attachments/W1siZiIsIjU0NWNiNTBmMzU0MWRlZjdhOTAwMDAwOCJdXQ?sha=3f12582d.

[17] *See* PEZARD & SHURKIN, *supra* note 15, at 7.

[18] LIEUTENANT COLONEL KALIFA KEITA, CONFLICT AND RESOLUTION IN THE SAHEL: THE TUAREG INSURGENCY IN MALI 6 (1998), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/pub200.pdf ("Though they have a common language and recognize a shared ethnicity, Tuaregs are divided by tribe and clan. Tuareg society also is highly stratified by caste, including well-defined categories of nobles, freemen, and slaves. In traditional Tuareg society, nobles and freemen depended on their slaves for manual labor. Tuareg histories suggest that until the advent of the colonial era, tribes and clans constantly were engaged in shifting coalitions of alliance and hostility as they competed with each other (and with neighboring peoples) for scarce water, grazing, and control of the trans-saharan trade routes.").

[19] *See* PEZARD & SHURKIN, *supra* note 15, at 5.

[20] *See* Laura Grossman, *Into the Abyss in Mali*, J. INT'L SEC. AFFAIRS, Dec. 16, 2013, at 66.

[21] Azam Jean-Paul et al., CONFLICT AND GROWTH IN AFRICA: THE SAHEL 168 (1999); *see also* Keita, *supra* note 18, at 13 ("Qadhafi incorporated some Tuareg volunteers into his regular military forces. Others, he inducted into a Libyan sponsored Islamic Legion from which he subsequently dispatched Islamic militants to Lebanon, Palestine, and Afghanistan. By the mid 1980s, some of Qadhafi's Tuareg volunteers had acquired

to be "the military cornerstone for his dream of building a united Muslim state in North Africa."[22]

> Long before AQIM arrived in northern Mali and began cultivating its relationships with the Berbiche tribes, Muammar Qaddafi had been building deep relationships with Mali's Tuareg communities, which have long felt disenfranchised by the ruling powers in Bamako. In the 1980s, he broadcast radio appeals to young Tuareg from Mali and Niger to come to Libya to join his military. Thousands responded and were organized in isolated training camps and deployed in special units loyal to Qaddafi personally.[23]

Emphasizing the interconnected nature of the regional political landscape, the catalyst for the most dramatically effective Tuareg rebellion would not originate from within Mali or Libya but, instead, would occur in a distant country to the north. On December 17, 2010, a young Tunisian man named Mohammed Bouazizi, in an act of protest, set himself on fire in front of the local government offices in the town of Sidi Bouzid,[24] setting in course the Arab Spring[25] and its destabilizing political shockwaves. As the disruptive effects of that phenomenon pulsed out from its Tunisian epicenter, protests began in Libya against Qadhafi's brutal and autocratic rule. On October 20, 2011, Libyan

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considerable combat experience in the various conflicts of the Near East and South Asia.").

[22] *See* Peter Gwin, *Former Qaddafi Mercenaries Describe Fighting in Libyan War*, PULITZER CTR. ON CRISIS REPORTING (Aug. 2011), http://pulitzercenter.org/reporting/libya-qaddafi-tuareg-rebels-war-obama.

[23] *Id.*

[24] *See* MARC LYNCH, THE ARAB UPRISING: THE UNFINISHED REVOLUTIONS OF THE NEW MIDDLE EAST 7 (2012) ("The uprisings that have profoundly shaped the Middle East began in a remote outpose of southern Tunisia on December 17, 2010, with the self-immolation of an unknown young man named Mohammed Bouazizi in protest against abusive and corrupt police."); *see also* Wyre Davies, *Doubt over Tunisian 'martyr' who triggered revolution*, BBC NEWS, June 16, 2011.

[25] *See* LYNCH, *supra* note 24; *see also* Asher Susser, *The "Arab Spring": The Origins of a Misnomer*, FOREIGN POLICY RESEARCH INST. (Apr. 2012), http://www.fpri.org/articles/2012/04/arab-spring-origins-misnomer ("The tumultuous events that have swept through the Middle East during the last year or so were widely referred to in the West as the 'Arab Spring'").

rebels, with the assistance of NATO countries, killed Gaddafi and extirpated all remnants of Qadhafi and his government.[26]

The fall of Qadhafi, however, unleashed a variety of unforeseen political forces and created tertiary effects, which would have negative consequences for regional stability.[27] When the Libyan revolution ousted Qadhafi, large numbers of Tuareg returned from Libya to Mali, many of whom were trained and armed as a result of their time serving in Libya's military.[28] As one scholar described it:

> As his regime disintegrated, thousands of Tuareg, fearful of a backlash, began returning to northern Mali and Niger, putting immense pressure on already impoverished communities. As they left, many Tuareg fighters were able to smuggle weapons out of Libya's well-stocked armories.[29]

Qadhafi's fall meant the end of Libyan support of the Tuareg and, consequently, a return to the territory of a sovereign many Tuareg had come to despise. This bears a resemblance to an earlier armed exodus of Tuareg after the dissolution of the Libyan-financed Islamic Legion in the 1980s, which also brought armed and trained Tuareg back to Mali – a factor that is credited with laying the groundwork for the Tuareg rebellion in Mali in 1990.[30] It is also not difficult to draw parallels between the return of militarized Tuareg to Mali and the foreign fighter phenomenon that is now of acute concern to the United States and European countries.

The post-Qadhafi wave of armed Tuareg returnees from Libya vitalized already-existing non-state armed groups in northern Mali and

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[26] *See Libyan Law Enforcement Trained on TiP,* U.N. OFFICE ON DRUGS AND CRIME, http://www.unodc.org/middleeastandnorthafrica/en/web-stories/libyan-law-enforcement-trained-on-tip-and-som.html (noting, "Having recently emerged from a historic revolution inspired by the Arab Spring, Libya is going through a delicate post -conflict transitional period that offers both opportunities and challenges") (last visited Apr. 29, 2015).

[27] *See* Gwin, *supra* note 22 (describing a conversation with a Tuareg officer in the Malian army in which the Tuareg officer stated, "If Qaddafi goes, it's going to be very bad for Mali" and that "[i]f Qaddafi is killed or loses power, [the Tuareg] will all have to leave. The Arabs won't let them stay").

[28] *See* Grossman, *supra* note 20, at 66.

[29] *See* Gwin, *supra* note 22.

[30] See Keita, *supra* note 18, at 1, 14.

exacerbated tensions in the region. One of these groups was the Movement for the Liberation of Azawad (MNLA), a Tuareg rebel group that was formed for the stated purpose of creating an independent state in northern Mali.[31] The MNLA has been described as a "secular separatist Tuareg rebel group" and is led by Bilal Ag Cherif, an Ifoghas Tuareg, and his deputy, Mahamadou Djeri Maiga, who is an ethnic Songhay.[32] This group, "composed of a mosaic of armed groups bound by loose loyalties and conditional alliances,"[33] launched a rebellion against the government of Mali in 2012.[34] The MNLA found assistance in its cause from Islamist and terrorist organizations operating the region, namely al-Qaeda in the Islamic Maghreb (AQIM),[35] Ansar Dine,[36] and the Movement for Oneness and Jihad in West Africa (MUJWA). These combined forces succeeded in posing a far greater challenge to the Malian military than had been the case in earlier insurrections.[37] Their convergence marked a significant point in the downward spiral that would result in Mali's fracturing.

B. Captain Sanogo's Coup and Mali's Downfall

An African proverb states that a village without a leader is destroyed by a single enemy[38] – and this ancient saying would prove prescient in

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[31] Grossman, *supra* note 20, at 66.

[32] *See* May Ying Welsh, *Making sense of Mali's armed groups*, ALJAZEERA (Jan. 17, 2013), http://www.aljazeera.com/indepth/features/2013/01/20131139522812326.html. The Songhai are an African ethnic group that primarily inhabit southeastern Mali. The Songhai include many regional subgroups and are mostly subsistence farmers. See 2 ANTHONY APPIAH & HENRY LOUIS GATES, ENCYCLOPEDIA OF AFRICA 404 (2010).

[33] *See* Boukhars, *supra* note 8, at 91.

[34] *See* Grossman, *supra* note 20, at 67.

[35] *See* DONA J. STEWART, WHAT IS NEXT FOR MALI? THE ROOTS OF CONFLICT AND CHALLENGES TO STABILITY 41 (2013) ("AQIM pursued an integration strategy in Mali; marriage with locals has proven effective in developing strong, local ties. For example, Mokthar Belmokhtar, an Algerian AQIM leader, married a Tuareg woman, the daughter of one of the chiefs of the Arab Barabicha tribe in Northern Mali.")

[36] *Id*. at 42 ("Ansar Dine, also known as 'Defenders of the Faith,' rose out of a splintering inside the Tuareg nationalist movement. The group was founded in November 2011 and led by the influential Tuareg nationalist leader, Iyad ag Ghali. Ag Ghali had become a follower of the fundamentalist Islamist group, Tabligh I Jumaat, and was subsequently sidelined by the broader nationalist movement. Ag Ghali rejected the MNLA goal of independence, instead stating that the imposition of sharia, rather than independence should be the primary goal.").

[37] *See* Boukhars, *supra* note 8, at 91.

[38] *See* JOHN PAUL II, OUR COUNTRY – OUR RIGHTS AND RESPONSIBILITIES: A CIVIC EDUCATION GUIDE FOR SECONDARY SCHOOL TEACHERS AND STUDENTS IN UGANDA 32,

Mali, where internal political developments exacerbated the process of state implosion. In March 2012, a Malian Army captain named Amadou Sanogo launched a coup against the Malian government, ostensibly motivated by the lack of perceived support by the Malian government for the Malian military effort against the Tuareg rebellion.[39] Captain Sanogo and his followers were able to seize power and proceeded to suspend Mali's constitution, but they were not able to mount an effective counteroffensive against the MNLA and the other the non-state armed groups in northern Mali. Moreover, the coup was the source of extensive international criticism, resulting in Mali's ostracization on the international stage. Mali was, as a result, suspended from the Economic Community of West African States (ECOWAS) and sanctions were imposed.[40]

On March 22, 2012, the deposed Malian president, Amadou Toumane Toure, officially resigned. With his resignation, Malian army leaders stepped down and began the transition back to democratic rule.[41] Thereafter, Dioncounda Traore, the head of Mali's national assembly (and a former Malian army paratrooper), took over as Mali's interim president.[42] But the political transition could not fully assuage the negative effects of the disarray in Mali's government, and the amalgam of non-state armed groups opportunistically seized on this moment of frailty.

> Taking advantage of the political upheaval in Bamako, the MNLA pressed its advantage. On April 2nd, the MNLA seized major cities in the north, including Gao, Kidal, and Timbuktu. Days later, the group announced a cease-fire, claiming that they had enough land to form their own state of Azawad. The country was thus effectively split in two, with Bamako in control of the south and the rebels holding the north.[43]

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available at http://jp2jpc.org/downloads/Manual%20for%20Civi%20Education%20.pdf (undated).

[39] *See* Grossman, *supra* note 20, at 67.

[40] *Id.*

[41] *See Profile: Mali's Dioncounda Traore*, ALJAZEERA (Apr. 12, 2012), http://www.aljazeera.com/news/africa/2012/04/20124917549965212.html.

[42] *Id.*

[43] *See* Grossman, *supra* note 20, at 67.

Soon after the rebel victories in the north, on May 26, 2012, the MNLA and Ansar Dine merged to form an Islamist state in Mali's north, imposing a variant of Islamic law on its inhabitants.[44] Ansar Dine, however, then splintered from the more secular MNLA and, with the help of MUJAO, pushed MNLA out of key cities like Gao, taking control of northern Mali.[45] With Ansar Dine's ascendance came a more radical interpretation of Islamic law, which included severe punishments for those violating its precepts, the enforcement of strict codes of dress, and the destruction of cultural property.[46] Further indications were that these non-state armed groups would not be content with controlling Azawad in the north. At the beginning of January 2013, elements of various terrorist groups moved towards the south, capturing the town of Konna and threatening the city of Mopti.[47]

C. Diplomatic Engagement and U.N. Response Before the French Intervention

The months preceding the French intervention were marked by robust diplomatic engagement by Malian authorities, as well as their European and U.S. counterparts.[48] Malian leadership acutely understood the gravity of the situation and began aggressively seeking military assistance. The interim president reached out to ECOWAS shortly after taking power[49] and, as noted, would eventually reach out to France as well. France, in turn, was also engaging on the diplomatic front.[50]

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[44] *Id.* at 68.
[45] *Id.*
[46] *Id.* at 67.
[47] *Mali*, FR. AT THE UNITED NATIONS, http://www.franceonu.org/france-at-the-united-nations/geographic-files/africa/mali-1202/article/mali [hereinafter France, Mali].
[48] *See* Anne Gearan, *U.S. pushes Algeria to support military intervention in Mali*, WASH. POST, Oct. 29, 2012, http://www.washingtonpost.com/world/us-pushes-algeria-to-support-military-intervention-in-mali/2012/10/29/fee8df44-21a3-11e2-92f8-7f9c4daf276a_story.html ("The United States joined France in a diplomatic lobbying campaign Monday to win key Algerian support for an emergency military intervention in northern Mali, where al-Qaeda-linked militants are waging a terror campaign that the Obama administration warns could threaten other nations.").
[49] *See Mali requests military assistance to free north: France*, REUTERS (Sept. 4, 2012), http://www.reuters.com/article/2012/09/05/us-mali-ecowas-troops-idUSBRE88403120120905.
[50] *See UN Security Council backs French intervention in Mali*, DW (Jan. 15, 2013), http://www.dw.de/un-security-council-backs-french-intervention-in-mali/a-16521496 [hereinafter *UN Backs French in Mali*]; *see also* Faith Karimi & Katarina Hoije,

The international community and U.N. machinery began to react. On October 12, 2012, the U.N. Security Council passed U.N. Security Council Resolution 2012, which called upon member states to "provide as soon as possible coordinated assistance, expertise, training and capacity-building support to the Armed and Security Forces of Mali, consistent with their domestic requirements, in order to restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by AQIM and affiliated groups[.]"[51]

This was repeated on December 20, 2012, when the U.N. Security Council passed resolution 2085, which called on member states to "provide coordinated assistance" to Malian forces in order to "restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by terrorist organizations and associated groups" and that further invited those states "to regularly inform the Secretariat of their contributions[.]"[52] That same resolution called for "an African-led International Support Mission in Mali (AFISMA)," which was to be deployed "for an initial period of one year" and which was "[t]o support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations, including AQIM, MUJWA and associated extremist groups, while taking appropriate measures to reduce the impact of military action upon the civilian population."[53]

International leaders push for military intervention in Mali, CNN (Oct. 19, 2012), http://www.cnn.com/2012/10/19/world/africa/mali-intervention-meeting.

[51] S.C. Res. 2071, ¶ 9, U.N. Doc. S/RES/2071 (2012).

[52] S.C. Res. 2085, U.N. Doc. S/RES/2085 (2012) ("Urges Member States, regional and international organizations to provide coordinated assistance, expertise, training, including on human rights and international humanitarian law, and capacity-building support to the Malian Defence and Security Forces, consistent with their domestic requirements, in order to restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by terrorist organizations and associated groups, further invites them to regularly inform the Secretariat of their contributions[.]").

[53] *See* Grossman, *supra* note 20, at 68.

On January 10, 2013, terrorist groups attacked Konna, which placed them only 48 hours away from Bamako, Mali's capital city.[54] The French response was immediate.[55]

> France responded within a matter of hours by redirecting [nearby Special Forces] assets to do what they could to stop the Islamist offensive and, in effect, pushing the button that set in motion the French military's emergency-alert system and focused France's military resources around the Herculean task of getting forces to the fight and sustaining them.[56]

On that same day, the U.N. Security Council issued a press statement in which it noted that "[t]he members of the Security Council reiterate their call to Member States to assist the settlement of the crisis in Mali and, in particular, to provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups."[57] The very next day, on January 11, 2013, [58] France began to deploy additional military personnel to the region to assist Malian efforts against the rebels – and Operation Serval began.[59]

Michael Shurkin, in his detailed analysis of Operation Serval, notes that while France had no forces in Mali on January 10, there were French military assets stationed nearby, including 250 soldiers in Dakar, Senegal; 950 troops and Mirage 2000D fighter jets based in Ndjamena, Chad; 450 soldiers in Côte d'Ivoire; and a special-operations contingent in the region, which was part of a counter-terrorism operation known as Operation Sabre and which was based in Ouagadougou, Burkina Faso.[60] As a consequence, France was able to immediately redirect its nearby special-operations forces (Sabre) to Mali even as it began to deploy

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[54] MICHAEL SHURKIN, FRANCE'S WAR IN MALI: LESSONS FOR AN EXPEDITIONARY ARMY 7 (2014), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR700/RR770/RAND_RR770.pdf.

[55] *Id.*

[56] *Id.*

[57] *See* Press Release, Security Council, Press Statement on Mali, U.N. Press Release SC/10878-AFR/2502 (Jan. 10, 2013), *available at* http://www.un.org/News/Press/docs//2013/sc10878.doc.htm [hereinafter Security Council Press Statement].

[58] *See* France, Mali, *supra* note 47.

[59] *See* Grossman, *supra* note 20, at 69.

[60] *See* SHURKIN, *supra* note 54, at 7.

conventional forces.[61] France also started facilitating the movement of allied African forces into the battle space.[62] Shurkin notes that "[t]he French deployment topped out at 4,000, while the combined African forces reached 6,400—2,300 of which were Chadians."[63]

French diplomatic efforts persisted through the initial deployment of French troops. As French military forces touched down in Mali, French diplomats were engaging with U.S. and European partners, as well as the U.N.[64] Almost immediately after the initial deployment of French troops, Gerard Araud, French Ambassador to the United Nations, announced that he had met with all members of the Security Council and obtained the support of all 14 members for the French intervention.[65]

D. Epilogue to a Counter-terrorism Effort

During the course of Operation Serval, French armed forces conducted major combat operations and, through the use of military force, curtailed the operational capabilities of the non-state groups and terrorist organizations that had threatened Mali. "Key militant logistical and operational bases were destroyed in ground and air operations, while drug-trafficking networks, considered a significant revenue-generating industry for Sahel- and Maghreb-based terrorist groups, were similarly dismantled."[66] In the course of French operations, numerous terrorists were killed, including Ahmed el Tilemsi, founder of MUJAO, leader of Belmokhtar's Al-Murabitoun group in Mali, and a U.S.-declared "specially designated global terrorist."[67]

The opposing alliance of non-state armed groups also degraded and splintered. The relationship had already begun to deteriorate between the more secular MNLA and the more Islamist groups, Ansar Dine and

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[61] *Id.* at 13.
[62] *Id.*
[63] *Id.* at 16.
[64] *UN Backs French in Mali*, *supra* note 50.
[65] *Id.*
[66] *See* Ryan Cummings, *Mali's Elusive Peace*, THE GLOBAL OBSERVATORY (Oct. 17, 2014), http://theglobalobservatory.org/2014/10/mali-elusive-peace-minusma-serval/.
[67] *See* Bill Roggio & Caleb Weiss, *French troops kill MUJAO founder during raid in Mali*, THE LONG WAR J., Dec. 11, 2014; *see also* Press Release, U.S. Dep't of State, Terrorist Designations of the Movement for Unity and Jihad in West Africa, Hamad el Khairy, and Ahmed el Tilemsi (Dec. 7, 2012), *available at* http://www.state.gov/r/pa/prs/ps/2012/12/201660.htm.

MUJAO – and, after a schism emerged, the Islamists expelled MNLA from the city of Gao.[68] Reports further indicate that Ansar Dine and MUJAO began fighting one another.[69] In fact, by the time the French were intervening in Mali, Anar Dine had abandoned Timbuktu to MUJAO, and MNLA was openly seeking an alliance with French forces.[70]

In July 2014, the French ended Operation Serval and transitioned to a new counter-terrorism operation called Operation Barkhane,[71] which spanned the wider Sahel region.[72] Operation Barkhane's mission, which is ongoing at the time of this article's publication, is to deploy French forces in support of the armed forces of France's partners in the Sahel to counter "armed terrorist groups" and to prevent the reconstitution of terrorist sanctuaries in the region.[73] It consists of 3,000 French soldiers who are deployed across two permanent support bases in Gao (Mali) and N'Djamena (Chad).[74] Operations are generally carried out jointly with the Malian armed forces and have helped to neutralize hundreds of terrorists.[75] Operation Barkhane, therefore, has decidedly counter-terrorism focus. Day-to-day security in Mali is now the responsibility of a 6,500-strong United Nations stabilization force, which is known by its French acronym, MINUSMA.[76]

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[68] STEPHEN A. HARMON, TERROR AND INSURGENCY IN THE SAHARA-SAHEL REGION: CORRUPTION, CONTRABAND, JIHAD, AND THE MALI WAR OF 2012-2013, at 183 (2014) (quoting a Malian government official as stating, "MNLA started the rebellion. MNLA asked MUJAO to help them. MUJAO had bases across West Africa: Chad, Mauritania, Mali, Niger, especially Mauritania. MNLA did not have an Islamic agenda. They robbed, looted, and raped the people. MUJAO turned on MNLA because the people complained about the abuses of MNLA. MUJAO fought MNLA near Gao. Many MNLA fighters were killed, buried in mass graves, some of which are a few kilometers from Gao in the desert. The rest were driven from Mali. They [MNLA] fled to Burkina. The MNLA spokesman fled to France").

[69] *Id.* at 203.

[70] *Id.* at 207.

[71] *See* Caleb Weiss, *9 UN troops killed in Mali ambush*, THE LONG WAR J. (Oct. 4, 2014), http://www.longwarjournal.org/archives/2014/10/un_troops_killed_in.php#ixzz3PYiVw400.

[72] *See France to deploy troops across Africa's Sahel region*, ALJAZEERA (July 14, 2014), http://america.aljazeera.com/articles/2014/7/14/france-end-mali-offensive.html.

[73] *See Opération Barkhane*, FR. MINISTRY OF DEF. (Nov. 8, 2014), http://www.defense.gouv.fr/operations/sahel/dossier-de-presentation-de-l-operation-barkhane/operation-barkhane.

[74] *Id.*

[75] *Id.*

[76] *François Hollande's African adventures*, THE ECONOMIST, July 19, 2014.

Established by Security Council resolution 2100, MINUSMA seeks to support the Malian political process by "carry[ing] out a number of security-related stabilization tasks[.]"[77] It is worth noting that in its description of MINUSMA, the U.N. states that MINUSMA will be engaging in military operations against hostile elements in Mali.

> The Mission would operate under robust rules of engagement with a mandate to use all necessary means to address threats to the implementation of its mandate, which would include protection of civilians under imminent threat of physical violence and protection of United Nations personnel from residual threats, within its capabilities and its areas of deployment. This could include the conduct of operations on its own or in cooperation with the Malian defence and security forces. French forces deployed in Mali were also authorized to intervene in support of MINUSMA when under imminent and serious threat upon request of the Secretary-General.[78]

Reports indicate that MINUSMA continues to engage with hostile forces in Mali.[79] For instance, in January 2015, MINUSMA confirmed it used force in response to machine-gun fire directed at its troops and a town inhabited by civilians.[80]

Although French troops remain, providing a "parallel force alongside MINUSMA,"[81] MINUSMA has been viewed as an insufficient replacement for the higher numbers of French forces that were deployed

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[77] *See United Nations Stabilization Mission in Mali*, UNITED NATIONS, (http://www.un.org/en/peacekeeping/missions/minusma/background.shtml (last visited Apr. 29, 2015).

[78] *Id.*

[79] *See* Weiss, *supra* note 71 ("Although most UN deaths in Mali have been caused by IEDs or landmines detonated under vehicle convoys, at least 15 suicide bombing attacks have taken place in Mali since the first one in February 2013. In addition to the 12 suicide attacks in Mali tallied by The Long War Journal as of May 2013, suicide attacks were also carried out in September 2013 and in July and August of this year. Al Qaeda in the Islamic Maghreb (AQIM), al Qaeda's official affiliate in North Africa, took responsibility for the Aug. 16 suicide bombing that killed two UN troops in Ber, a town close to Timbuktu.").

[80] *See Mali: UN mission wards off rebel attack; urges armed groups to respect ceasefire*, UNITED NATIONS (Jan. 21, 2015), http://www.un.org/apps/news/story.asp?NewsID=49866.

[81] *See* Peter Nadin, *UN Peacekeeping in Mali: A Pre-history*, UNITED NATIONS UNIV. (July 29, 2013), http://unu.edu/publications/articles/un-peacekeeping-in-mali.html.

during Operation Serval. Only 1,000 French soldiers remain deployed in Mali in comparison to the 4,000 that were deployed during Operation Serval.[82] Citing ongoing security concerns, the decreased French troop level, and the limited nature of MINUSMA's mandate, commentators note that the successes of Operation Serval may not be maintained.[83]

III. The United Nations and the Legal Language of Collective Security

Since the termination of World War I, the global international security framework has been based on the concept of "collective security."[84] This security framework is centered around the United Nations, which (in theory) maintains a degree of primacy over the use of force by member states. Article 2(4) of the U.N. Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." The authority to control the use of force finds expression in the United Nations Security Council,[85] which, under the Charter, may authorize member states to use armed force in the territory of another if it determines that there is a "threat to the peace, breach of the peace, or act of aggression."[86]

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[82] *François Hollande's African adventures*, *supra* note 76.

[83] *See* Cummings, *supra* note 66 ("The inevitable void which has accompanied the French withdrawal from northern Mali is simply not being filled by MINUSMA. While the peacekeeping mission has established a presence in several northern towns and settlements, a lack of human and logistical resources, particularly that of aerial capabilities, is severely hampering its effectiveness. Its deficiencies are also unlikely to be resolved in the interim."); *see also* Sofia Sebastian, *Why Peace Negotiations in Mali Will Not Succeed*, INT'L RELATIONS AND SECURITY NETWORK, Apr. 27, 2015 ("From an operational standpoint, while the UN Security Council resolution that authorized MINUSMA acknowledged the roles of transnational crime and terrorism in the Malian conflict, the mission was not mandated to address these issues (given that peacekeeping missions are often over-extended and under-resourced, this was, to a certain degree, understandable). The mission's police, for example, have no authority to arrest suspected criminals or to assist with border security. Instead, they are assisting local police with capacity-building through a UN Police Transnational Organized Crime Cell co-located with Malian counterparts, but progress has been slow. The UN Secretary-General observed in December 2014 that transnational organized crime units in Mali remained ineffective due to a lack of resources.").

[84] *See* RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY 32-33 (2006).

[85] *Id.*

[86] *See* U.N. Charter art. 39.

Initially, the United Nations Charter envisioned that the use of armed force by member states would be channeled through the United Nations, which, pursuant to Article 43 of the Charter, would have at its disposal armed forces contributed by member states that were coordinated through U.N. organs.[87] Since the Charter's signing, the model for how the international community permits the use of force has evolved from one in which the U.N. would maintain international security through use of military forces at its disposal (a U.N. military force) to one in which the UN legitimates the use of force by individual member states (ad hoc coalitions of the willing).[88] Even so, it is worth noting that, under international law, the U.N. Security Council still retains legal primacy with regard to the legitimization of the use of force. As Dinstein notes, "the Council is empowered to employ force in the name of collective security, and the degree of latitude bestowed upon [the Security Council] by the Charter is well-nigh unlimited."[89] Indeed the "enlargement of the notion of threat to the peace," some commentators argue, has allowed the Security Council to authorize the use of force by member states for the purposes of "restoring democracy or public order."[90]

The first instance of the Security Council authorizing a Member State to use force against another member state was U.N. Security Council Resolution 678, which was passed in reaction to Iraq's invasion of Kuwait in 1990.[91] This authorization of military eviction and enforcement of sanctions was a significant step for the U.N. Security Council in which it "cross[ed] the conceptual Rubicon"[92] by authorizing Member States to take direct military action against Iraq without any semblance of U.N. coordination over that action. Importantly that resolution authorized member states to use "all necessary means" to accomplish this goal – imbuing special significance on this phrase as indicating, in Security Council parlance, that military force was expressly authorized.[93] As Christine Gray notes, "Subsequent resolutions use either the phrase 'all necessary means' or 'all necessary measures'. There is no obvious significance in the distinction."[94]

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[87] *See* FRANCK, *supra* note 12, at 23-25.
[88] *Id.*
[89] *See* YORAM DINSTEIN, WAR AGGRESSION AND SELF DEFENSE 308 (2011).
[90] ANTONIO CASESSE, INTERNATIONAL LAW 347 (2005).
[91] S.C. Res. 678, U.N. Doc. S/RES/678 (1990).
[92] *See* THAKUR, *supra* note 84, at 34.
[93] *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 328 n.5 (2008).
[94] *Id.*

On occasion, however, even when such language is absent, member states have based their use of force against another member state, basing the legality of that use of force on the Security Council's "implied authorization."[95] The first attempt to rely on this theory was in 1993, when the United States and the United Kingdom established no-fly zones inside Iraqi territory.[96] Both the United States and United Kingdom argued that their military actions were consistent with U.N. Security Council resolution 688 – a resolution passed under Chapter VI (rather than Chapter VII). Despite the resolution's condemnation of "the repression of the Iraqi civilian population in many parts of Iraq,"[97] demand to end that repression, and insistance that Iraq permit humanitarian organizations access to those in need,[98] it did not expressly authorize the use of force. Although international criticism of this reliance on implied authorization was limited, due in part to the "power and influence of the United States and the unpopularity of Saddam Hussein,"[99] the idea of implied authorizations was far from being legitimated.

There have, nonetheless, been repeated instances of reliance on this theory since that time. For instance, the United States, the United Kingdom, and France relied on the theory of implied authorization as a basis for the use of force against Yugoslavia in 1999.[100] In that situation, the countries relied upon three Security Council resolutions (1160, 1199, and 1203) all of which were passed under Chapter VII of the U.N. Charter[101] but none of which expressly authorized the use of military force.[102] Another more controversial example is the U.S. reliance on Security Council resolutions 1441, 678, and 687 to justify intervention in Iraq in 2003.[103]

Gray notes that the doctrine of implied authorization remains controversial and posits that reliance upon it by member states is problematic, as it could result in fewer resolutions passed under Chapter

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[95] *Id.* at 366.
[96] *Id.*at 348-349.
[97] S.C. Res. 688, U.N. Doc. S/RES/688 (1991).
[98] *Id.*
[99] *See* MICHAEL BYERS, WAR LAW 40 (2005).
[100] *See* GRAY, *supra* note 93, at 366.
[101] *Id.* at 352.
[102] *Id.*
[103] *See* Ian Johnstone, *Implied Mandates*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 240-42 (Marc Weller ed., 2015) [hereinafter OXFORD HANDBOOK].

VII of the U.N. Charter because the Security Council will not wish to permit such a resolution to impliedly authorize the use of military force.[104] Others, however, have viewed reliance on implied authorization as a prudential device that the international system accepts out of necessity. Otherwise stated, "deliberate ambiguity can protect international law from permanent harm by cushioning it from the effects of deep political differences."[105] As this article demonstrates, however, the situation in Mali represents an example of how implied authorization can emerge from its status as a tolerated nebulosity to a viable basis for the use of force by a member state with express Security Council approval.

IV. The France-Mali Status of Forces Agreement

The status of French forces in Mali is governed by a status of forces agreement between France and Mali, which was signed in Bamako on March 7, 2013, and at Koulouba on March 8, 2013 (the France-Mali SOFA).[106] In the exchange of letters, both countries note that they are "[g]ravely concerned by the situation currently affecting the North of the territory of the Republic of Mali and anxious to respect [Mali's] territorial integrity, bearing in mind the Charter of the United Nations and resolutions 2056 (2012), 2071 (2012) and 2085 (2012) of the Security Council, and the express request of the Malian Government[.]"[107] The agreement, therefore, enacted less than two months after the initial phase of the French intervention, sets forth the legal bases upon which the intervention rests and goes on to prescribe the

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[104] *See* GRAY, *supra* note 93, at 366.

[105] *See* Johnstone, *supra* note 103, at 243.

[106] *See* Décret n° 2013-364 du 29 avril 2013 portant publication de l'accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force "Serval", signées à Bamako le 7 mars 2013 et à Koulouba le 8 mars 2013 [Decree No. 2013-368 of 29 April 2013 Concerning the Publication of the Agreement in the Form of an Exchange of Letters between the Government of the French Republic and the Government of Mali determining the Status of Force "Serval"], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 30, 2013, p. 7426, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027376103 [hereinafter the France-Mali SOFA].

[107] *Id.* (author's translation of "Gravement préoccupés par la situation qui affecte actuellement le Nord du territoire de la République du Mali et soucieux du respect de son intégrité territoriale, Ayant à l'esprit la Charte des Nations unies et les résolutions 2056 (2012), 2071 (2012) et 2085 (2012) du Conseil de sécurité, et la demande expresse du Gouvernement malien[.]").

rules that will govern the conduct of military operations during the intervention.

Pursuant to this agreement, during the deployment of French troops in Mali, French troops are obligated to abide by the domestic law of Mali[108] but have a degree of immunity from prosecution by Malian authorities. Specifically, French troops in Mali are afforded the same privileges and immunities as those afforded to "experts on mission" under the U.N. Convention on Privileges and Immunities of 1946.[109] Such provisions are not uncommon in status of forces agreements and are a staple of the sorts of agreements associated with U.N. peacekeeping operations.[110] Article VI, Section 22 of that Convention states that such personnel "performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions."[111] This includes, "Immunity from personal arrest or detention and from seizure of their personal baggage."[112] This type of immunity, however, is functional immunity (rather than full diplomatic immunity) and has limits.[113] For instance, such functional immunity is only extended for

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[108] *Id.* art. 1

[109] *Id.*

[110] *See* Frederick Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 108-109 (2002) ("While military personnel are not covered by the 1946 Convention, they are usually granted immunities under Status of Forces agreements. In the cases of East Timor and Kosovo, where there is no host state, these guarantees are contained in agreements negotiated between the contributing states and the UN. Under the terms of Status of Forces or Military Technical Agreements, military forces in peacekeeping operations remain under the jurisdiction of the sending States, which retain the sole authority to waive immunity. In addition to the immunities granted to officials and experts under the Convention, individual agreements for Civilian Police [UNCIVPOL] are often negotiated between the sending State and the UN, which grant them additional immunity protections, up to and including absolute immunity.").

[111] *See* Convention on the Privileges and Immunities of the United Nations art. VI, § 22, Feb. 13, 1946, 1 U.N.T.S. 15.

[112] *Id.*

[113] *See* Veronica L. Maginnis, *Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 BROOKLYN J. INT'L L. 989, 1013 (2003) ("Under the UN Convention there are four groups that receive immunity. The first group includes high level personnel, such as the Secretary-General and Assistant Secretaries-General, as well as representatives of Member States. These individuals receive diplomatic immunity. The second, third, and fourth categories include the organization itself, officials of the UN, and experts on mission. These three groups have functional immunity, rather than diplomatic immunity.").

acts exercised in the performance of the relevant person's official duties. Potential exposure for French troops to Malian judicial process is still technically possible for acts that are not exercised in the performance of official duties.

Under the France-Mali SOFA, French military personnel are permitted to enter Mali without a visa, instead simply needing a military identity card.[114] Under the agreement, French troops remain entirely under French command and are subject exclusively to French disciplinary authority;[115] are permitted to travel without restriction throughout Mali (including through Malian airspace);[116] and are permitted to maintain and carry the arms and munitions needed in execution of their mission.[117] Both France and Mali mutually renounced causes of action for damage incurred to their personnel and equipment, with the exception of cases in which there was intentional damage by one of the parties or *faute lourde* (serious fault).[118]

Notably, the France-Mali SOFA also states that French troops will treat persons detained by French forces in accordance with both the law of armed conflict and international human rights law ("du droit international humanitaire et du droit international des droits de l'homme"),[119] and it specifically refers to Additional Protocol II of the Geneva Conventions and the Convention Against Torture.[120] This is notable because Additional Protocol II of the Geneva Conventions expressly regulates non-international armed conflicts.[121] Malian authorities are also obligated to treat detained persons in the same manner, and in cases where a person is transferred from French to Malian custody, Malian authorities may not carry out the death penalty or a punishment that is deemed cruel or inhumane even if such penalties are otherwise authorized under Malian law.[122] Similarly, no person detained by French forces and transferred to Malian custody can be extradited to a third country without prior approval from French

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[114] *See* France-Mali SOFA, *supra* note 106, art. 2.
[115] *Id.* art. 3.
[116] *Id.* art. 5.
[117] *Id.* art. 6.
[118] *Id.* art. 9; *see* JASON BELL, SOPHIE BOYRON, & SIMON WHITAKER, PRINCIPLES OF FRENCH LAW 193 (1998) (defining *faute lourde* as serious fault).
[119] *See* France-Mali SOFA, *supra* note 106, art. 10.
[120] *Id.*
[121] *See* Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT'L L. STUD. 696, 705 (2013).
[122] *See* France-Mali SOFA, *supra* note 106, art. 10.

authorities.[123] Likewise, the France-Mali SOFA expressly provides that the International Committee of the Red Cross (ICCR) and other human rights groups shall have access to such detained persons.[124] Under the agreement, therefore, the applicable legal regimes to govern the treatment of detainees are the rules relating to non-international armed conflict and international human rights law.

The France-Mali SOFA is, therefore, remarkable in a number of ways. It serves as a formal legal document that memorializes the countries' agreement that this intervention is permitted both pursuant to various U.N. Security Council resolutions and at the express invitation of the Malian government. It also provides French forces a wide range of permissible activity to facilitate military operations, while preserving Malian sovereignty through references to Malian law and compensation for damages occasioned, and through retaining the possibility for (albeit limited) assertions of Malian criminal jurisdiction. The agreement, thus, imbued the French intervention with a more cooperative character. Mali was not occupied; it was a partner with France against a shared threat. This framework helps legitimate the notion that French forces are present in Mali at the invitation of the Malian government and served to mute international legal objection to the French military intervention.

V. The Legal Bases for the Use of Force in Mali

French officials have asserted a number of legal bases to justify their military intervention into Mali. At the outset, vague references were made to international legal instruments, though no clear articulation of a solid legal basis for action was ever noted. The initial reference was

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[123] *Id.* Media reports confirm that persons captured by French forces have been transferred to Malian authorities for extradition and deportation to third countries. *See, e.g.*, *Le djihadiste Gilles Le Guen déféré devant la justice*, LE MONDE (May 17, 2013), http://www.lemonde.fr/afrique/article/2013/05/17/le-djihadiste-gilles-le-guen-defere-devant-la-justice_3298534_3212.html ("Le djihadiste français Gilles Le Guen, arrêté au Mali fin avril, était présenté vendredi 17 mai à un juge d'instruction en vue d'une mise en examen pour association de malfaiteurs en relation avec une entreprise terroriste."); *see also* Press Release, Fed. Bureau of Investigation, Malian National Indicted For Murder Of U.S. Diplomat To Be Arraigned Today In Brooklyn Federal Court (Mar. 13, 2014) (noting, "a Malian citizen charged with the murder and attempted murder of United States Embassy personnel stationed in Niamey, Niger, in December 2000, will be arraigned today at 2:00 p.m. in the Eastern District of New York. Mohamed was extradited to the United States by the Malian government").

[124] France-Mali SOFA, *supra* note 106, art. 10.

simply to the United Nations Charter as a whole: "France, at the request of the President of Mali, and with respect for the Charter of the United Nations, has undertaken to support the Malian army against the terrorist aggression that threatens all of West Africa."[125] French officials, thereafter, cited Article 51 of the U.N. Charter as the basis for military action.[126] Later arguments referred back to U.N. Security Council resolution 2085 as a basis for the intervention.[127] In turn, the chapeau language of the status of forces agreement[128] cites to Security Council resolutions 2056, 2071, and 2085, and "the express request of the Malian Government."[129] This practice of citing to myriad legal bases to justify state action – a shotgun approach – is relatively common. Sifting through the various bases given, one finds that some are of sufficiently greater value than others.

In this instance, reliance on self-defense under Article 51 is sufficiently meritless to eliminate the need for extensive discussion and does not, in any case, appear in the chapeau language of the France-Mali SOFA. On the other hand, the invitation by Malian authorities and the language of the U.N. Security Council resolutions relating to Mali do provide meritorious legal bases for French military action.

A. Intervention by Invitation

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[125] *See* President Françios Hollande, President of the Republic of France, Déclaration du Président de la République à l'issue du Conseil restreint de défense (Jan. 12, 2013), *available at* http://www.elysee.fr/declarations/article/declaration-du-president-de-la-republique-a-l-issue-du-conseil-restreint-de-defense/.

[126] *See* THOMAS FLICHY, OPÉRATION SERVAL AU MALI: L'INTERVENTION FRANÇAISE DÉCRYPTÉE 54 (2013); *see also U.N.'s Ban hopes French intervention halts latest offensive in Mali*, REUTERS, Jan 14, 2013 ("French U.N. Ambassador Gerard Araud said Paris was acting under article 51 of the U.N. Charter, which discusses nations' right to collective and individual self-defense.") [hereinafter *U.N.'s Ban*]; *see also* M. Laurent Fabius, Minister of Foreign Affairs, Speech before the Senate of France, Paris, Fr., Mali/Government (Jan. 16 2013) ("France is acting in response to the Malian authorities' request for help, in accordance with Article 51 of the UN Charter. Indeed, the UN Secretary-General welcomed our response to this sovereign request by Mali. At the Security Council, a large majority of member states lauded the swiftness of our response. Its appropriateness and legality are indisputable.").

[127] *See* Bergamaschi & Diawara, *supra* note 12, at 143.

[128] *See* France-Mali SOFA, *supra* note 106.

[129] *Id.*

The practice of third states intervening militarily at the invitation (or purported invitation) of a government is not new.[130] In fact, France has intervened militarily based, in part, on invitations from host nation governments on multiple occasions.[131] Notably, in 2002, France intervened in Côte d'Ivoire at the invitation of that government against rebels who were threatening to overcome it.[132] The rebels, consisting mainly of renegade soldiers, sought to depose the sitting government headed by then-president Laurent Gbagbo.[133] The result was a complex civil war, which effectively split the government in half, dividing it between the rebels who controlled northern Côte d'Ivoire and the recognized government, which controlled the south. Almost immediately, however, French troops – with the agreement of the Ivorian government – were sent to Côte d'Ivoire to augment the French forces already on the ground and military operations began, such as the rescue of western hostages from Bouaké by French forces.[134]

In that case, French authorities noted that the intervention was in in order to protect French citizens.[135] In addition to French forces, ECOWAS forces were also deployed quickly, and roughly four months later, an agreement between the rebels and the government was reached. Thereafter, in February 2003, the U.N. Security Council passed Resolution 1464, which invoked Chapter VII of the U.N. Charter and "welcome[ed] the deployment of ECOWAS and French troops" in Côte d'Ivoire.[136] That same resolution then "authorizes Member States . . . together with the French forces supporting them to take the necessary steps to guarantee the security and freedom of . . . their personnel and to ensure . . . the protection of civilians immediately threatened with

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[130] *See* GRAY, *supra* note 93, at 84 ("Many states have relied on an invitation by a government to justify their use of force; they have claimed that their intervention was lawful because they were merely dealing with limited internal unrest or, at the other end of the spectrum, that they were helping the government respond to prior intervention by other states.").

[131] *See* Anna Gueye, *Gabon to Mali: History of French Interventions in Africa*, GLOBAL VOICES (Jan 18, 2013), http://globalvoicesonline.org/2013/01/18/gabon-to-mali-history-of-french-military-interventions-in-africa/.

[132] *See* GRAY, *supra* note 93, at 334-336.

[133] *See* LANSANA GBERIE & PROSPER ADDO, CHALLENGES OF PEACE IMPLEMENTATION IN CÔTE D'IVOIRE 6 (Aug. 2004), *available at* http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=118328.

[134] *Id.* at 15.

[135] *See La France et la Côte d'Ivoire*, FRANCE DIPLOMATIE (Jul. 31, 2014), http://www.diplomatie.gouv.fr/fr/dossiers-pays/cote-d-ivoire/la-france-et-la-cote-d-ivoire/.

[136] S.C. Res. 1464, U.N. Doc. S/RES/1464 (2003).

physical violence."[137] Thus, French forces were only briefly on the ground in Côte d'Ivoire without express U.N. authorization and, as an intervening force, were not clearly supporting either side to the conflict.[138]

In contrast, in the 2013 intervention in Mali, France was able to base its intervention, in part, on the express invitation of the Malian government to intervene militarily. In a letter sent to the Security Council on January 11, 2013, France stated:

> France has responded today to a request for assistance from the Interim President of the Republic of Mali, Mr. Dioncounda Traoré. Mali is facing terrorist elements from the north, which are currently threatening the territorial integrity and very existence of the State and the security of its population. . . . [T]he French armed forces, in response to that request and in coordination with our partners, particularly those in the region, are supporting Malian units in combating those terrorist elements. The operation, which is in conformity with international law, will last as long as necessary.[139]

Immediately, the distinction between the Côte d'Ivoire and Malian interventions becomes clear in that the intervention in Mali is specifically to support the government against terrorist elements. Rather than protection of French citizens or the implementation of a peace process, France intervened in Mali for purposes of engaging in a counter-terrorism operation against non-state armed groups who opposed the Malian government.

This basis, however, has been the subject of challenge from various commentators. Bergamaschi and Diawara, notably, assert that the French intervention was ultimately unilateral in nature and question its legality, in part, because the inviting authority, President Diacounda

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[137] *Id.*

[138] *See* Fabienne Hara & Comfort Ero, *Ivory Coast on the Brink*, THE OBSERVER, Dec. 15, 2002 ("Paris is not keen to be seen to support Gbagbo, who officials privately see as arrogant and poorly advised, but neither can it endorse an armed insurgency. Ideally, France would like to hand responsibility for the crisis to a proposed ECOWAS peacekeeping force.").

[139] Permanent Representative of France to the U.N., Letter dated Jan. 11, 2013 from the Permanent Representative of France to the Secretary-General, U.N. Doc. S/1013/17.

Traoré, was "the head of an *interim* and not a democratically elected government" when he invited France to intervene.[140] In addition, the authors cite to Hadzi-Vidanovic of the European Court of Human Rights for the contention that "once the internal disturbances evolve into an internal armed conflict in which an organised rebel armed group controls a significant portion of a state's territory . . . foreign states cannot intervene by the invitation of any side of such conflict."[141] Similarly, Dr. Theodore Christakis and Dr. Karine Bannelier, both professors at the University Grenoble-Alpes (France), have also posited that such an intervention is prohibited "when the objective of this intervention is to settle an exclusively internal political strife in favor of the established government which launched the invitation."[142]

Such opinions highlight a school of thought in international law that argues that states should not be permitted to aid another government's military in order to suppress rebellion "when a civil war [is] taking place and control of the state's territory was divided between warring parties."[143] Professor Oscar Schachter notes, "[M]any legal scholars (and some U.N. resolutions, by implication) support the proposition that direct or indirect armed intervention on either side in a civil war is illegal. Under article 2(4) intervention constitutes a use of force 'against the political independence' of the state in question because it interferes with its people's right to determine their own political destiny."[144] Some commentators narrow the scale of this prohibition, positing that the nature of civil war required to trigger the prohibition is one in which the opposing forces control territory, mirroring the requirements in Additional Protocol II, which set that threshold for its application.[145]

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[140] *See* Bergamaschi & Diawara, *supra* note 12, at143-144.
[141] *Id.* at 144
[142] *See* Theodore Christakis & Karine Bannelier, *French Military Intervention in Mali: It's Legal but… Why? Part I*, EJIL: TALK! (Jan. 24, 2013), http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/. Both Christakis and Bannelier agree, in part II of that article, however, that "[e]xternal intervention by invitation should be deemed in principle unlawful when the objective of this intervention is to settle an exclusively internal political strife in favor of the established government which launched the invitation." Theodore Christakis & Karine Bannelier, *French Military Intervention in Mali: It's Legal but… Why? Part II: Consent and UNSC Authorisation*, EJIL: TALK! (Jan. 25, 2013), http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unsc-authorisation/.
[143] *See* GRAY, *supra* note 93, at 81.
[144] *See* Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 137 (1996).
[145] *See* GRAY, *supra* note 93, at 81 n.70.

An opposing view, however, sees the permissibility of intervention by invitation as far less restricted. To be sure, Georg Nolte notes that "State practice from the Holy Alliance (1815) to the Spanish Civil War (1936–39) is inconclusive as to whether governments had the right to invite foreign troops to help dealing with internal unrest. Thus, until the coming into force of the United Nations Charter, no clear pertinent rule of customary international law existed, despite a tendency in favour."[146] Even so, the contemporary jurisprudence of the International Court of Justice (ICJ) has recognized the validity of military intervention if an invitation for such intervention is extended by a legitimate State authority. In that regard, while the ICJ has held that "no general right of intervention, in support of an opposition within another State, exists in contemporary international law,"[147] the court has accepted that that such intervention by invitation on behalf of the State is allowable as a matter of contemporary international law.[148] Thus, commentators note that "[i]n stark contrast to opposition groups, there is generally no prohibition on assisting recognized governments"[149] and that, "[i]n general, governments have the capacity to consent on behalf of the state and opposition forces do not."[150]

With specific regard to Mali, Karine Bannelier asserts the validity of the Malian invitation and concomitant French consent.[151]

> The government of President Traoré was indeed internationally recognized as the only government representing Mali and nobody ever suggested recognizing instead the three Islamist groups ruling in the north of the country. This case therefore has no

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[146] *See* Georg Nolte, *Intervention by Invitation*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (Jan. 2010), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?rskey=UZxXqA&result=2&prd=EPIL.

[147] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), ¶ 209.

[148] *See* Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19).

[149] *See* Joseph Klinger, *Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law*, 55 HARV. INT'L L.J. 483, 487 (2014).

[150] *See* Gregory H. Fox, *Intervention by Invitation*, *in* OXFORD HANDBOOK, *supra* note 103, at 821.

[151] *See* Karine Bannelier, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26 LEIDEN J. OF INT'L L. 855 (2013).

> similarities with former cases (such as the US intervention in the Dominican Republic in 1965) where concurrent governments claim to represent the state. The partial lack of effectiveness of the Malian authorities was not relevant either. The internationally recognized government of Traoré was still controlling the south of Mali, including the capital, Bamako. This situation thus has no similarities with cases such as Somalia in 1992. The events following the beginning of Operation Serval showed that both Traoré′s government and his decision to invite the French troops enjoyed widespread popular support. And no state ever questioned the representativeness of the Malian authorities. It is therefore clear that the invitation was valid. [152]

It must be recalled that, at the moment of the French intervention, non-state armed groups had seized major cities in northern Mali – including Gao, Kidal, and Timbuktu – and had bifurcated Mali between the south controlled by the government in Bamako and the northern areas, which they controlled and wished to form into their own state of Azawad.[153] The opposition, therefore, controlled significant territory and wished to carve out an independent state. These facts, under the more restrictive theory of intervention by invitation, would seem to trigger the prohibition on intervention.

Instead, however, subsequent U.N. statements have recognized its enduring legality. For instance, the U.N. Secretary General almost immediately expressed support for the intervention, noting roughly three days after French forces intervened that "[t]he secretary-general welcomes that bilateral partners are responding, at the request and with the consent of the government of Mali, to its call for assistance to counter the troubling push southward by armed and terrorist groups[.]"[154] The legality of the French intervention by invitation was further underscored in April 2013, when the Security Council passed resolution 2100, which mandated the United Nations Multidimensional Integrated Stabilization

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[152] *Id.*

[153] *See* Grossman, *supra* note 20, at 67.

[154] *See U.N.'s Ban*, *supra* note 126 ("The secretary-general welcomes that bilateral partners are responding, at the request and with the consent of the government of Mali, to its call for assistance to counter the troubling push southward by armed and terrorist groups[.]").

Mission in Mali (MINUSMA). This resolution authorized French forces on Mali "to use all necessary means . . . to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General." In addition, this resolution expressly approved of the French intervention at the invitation of the Malian government:

> Welcoming the swift action by the French forces, *at the request of the transitional authorities of Mali*, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali and commending the efforts to restore the territorial integrity of Mali by the Malian Defence and Security Forces, with the support of French forces and the troops of the African-led International Support Mission in Mali (AFISMA)[.][155]

The U.N. Security Council, therefore, condoned the intervention by invitation in this instance. Bannelier posits that the lesson derived from this experience is that external intervention by invitation is generally permissible under international law so long as the purpose of the intervention is "not to settle an internal political strife in favour of the established government, but to realize other objectives, such as helping the requesting government in the fight against terrorism."[156] Accordingly, according to this view, the invitation by President Diacounda Traoré to France to intervene served as a valid basis for the use of force by French forces in the territory of Mali. This is true even though the opposition controlled a significant amount of territory in northern Mali. What possible international legal objections may still exist to invitation as a legal basis, therefore, are authoritatively overcome at least insofar as that invitation is for the military intervention of a third state to assist in a counter-terrorism effort.

Another area where the French intervention illuminates state practice in a somewhat unsettled area of international law is with regard to the classification of conflicts in situations in which a third state intervenes in an internal conflict by invitation of the sitting government. Sivakumaran notes that there are two principal approaches to characterization of an

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[155] S.C. Res. 2100, U.N. Doc. S/RES/2100 (2013).
[156] *See* Bannelier, *supra* note 151, at 855-874.

internal conflict in situations in which an outside state has intervened.[157] The first – the theory of pairings – holds that an intervention by an outside state on the side of the government "does not transform the conflict into an international one because the fighting remains between a state and a non-state armed group."[158] Dinstein supports this view.

> If a non-international armed conflict is raging in Rurutania, and Atlantica assists the central Government of Ruritania in combatting those who rise in revolt against it, the domestic upheaval does not turn into an inter-State war. In such a case, two States (Ruritania and Atlantica) are entangled in military operations, but since they stand together against the Ruritanian insurgents, the internal nature of the conflict remains intact. Conversely, if Atlantica joins forces with the insurgents, supporting them against the central Government of Ruritania, this is no longer just a 'civil war': it is a fully fledged war in the sense of international law.[159]

The second approach – the theory of "complete internationalization" – maintains that the intervention of an outside state renders the conflict international in character no matter which side the intervening state supports.[160] This approach has not generally received support by states but has been supported by some authoritative commentators and was also put forth as a proposal by the International Committee for the Red Cross (ICRC) in the 1970s.[161]

As noted, the France-Mali SOFA provides that French troops will treat persons detained by French forces in accordance with both the law of armed conflict and international human rights law,[162] specifically referring to the Convention Against Torture and Additional Protocol II of the Geneva Conventions[163] – the protocol that expressly regulates non-

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[157] *See* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 222 (2012).
[158] *Id.* at 222-223.
[159] *See* DINSTEIN, *supra* note 89, at 6.
[160] *See* SIVAKUMARAN, *supra* note 157, at 223.
[161] *See* ELIZABETH WILMSHURST, INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 7.2 (2011).
[162] *See* France-Mali SOFA, *supra* note 106, art. 10.
[163] *Id.*

international armed conflicts.[164] The France-Mali SOFA, therefore, is an expression of state practice that such conflicts involving the military intervention by an outside state on the side of the government remain non-international in character.

B. The U.N. Security Council Resolutions and Implied Authorization for Intervention

Aside from the invitation by the Malian government, French authorities also based the legality of the intervention on the language of the various Security Council resolutions related to Mali. The first of these, U.N. Security Council Resolution 2056, passed on July 5, 2012, addressed the security situation in the Sahel generally and the situation in Mali specifically.[165] This resolution invoked Chapter VII and called upon member states to "to assist efforts to undertake reform and capacity building of the Malian security forces in order to reinforce democratic control of the armed forces, restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by AQIM and affiliated groups [.]"[166] Throughout the language of resolution 2056, the focus is on the role of potential ECOWAS and African Union (AU) action rather than any potential European or Western military force.[167] It did not, however, expressly call on any member state to intervene, nor do the phrases "all necessary means" or "all necessary measures" appear in the language of the resolution.

The second of these, U.N. Security Council resolution 2071, was passed on October 12, 2012; it also invokes Chapter VII of the U.N. Charter and iterates the Security Council's grave concern regarding the deteriorating security and humanitarian situation in northern Mali, as well as "the increasing entrenchment of terrorist elements including Al-Qaida in the Islamic Maghreb (AQIM), affiliated groups and other extremist groups, and its consequences for the countries of the Sahel and beyond[.]"[168] The resolution then goes on, as context, to note a letter from the transitional authorities of Mali "dated 18 September 2012

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[164] *See* Radin, *supra* note 121, at 705.
[165] S.C. Res. 2056, U.N. Doc. S/RES/2056 (2012) (Peace and Security in Africa)
[166] *Id.* ¶ 9.
[167] *Id.*
[168] S.C. Res. 2071, U.N. Doc. S/RES/2071 (2012).

addressed to the Secretary-General, requesting the authorization of deployment through a Security Council resolution of an international military force to assist the Armed Forces of Mali acting under Chapter VII as provided by the United Nations Charter, to recover the occupied regions in the north of Mali." Thereafter, among other provisions, the resolution calls upon member states to provide a wide range of military assistance to Mali.

> [The resolution calls] upon, in this context, Member States, regional and international organizations, including the African Union and the European Union, to provide as soon as possible coordinated assistance, expertise, training and capacity-building support to the Armed and Security Forces of Mali, consistent with their domestic requirements, in order to restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by AQIM and affiliated groups[.][169]

As with the previous resolution, however, resolution 2071 does not expressly call on any member state to intervene, nor does it contain either of the usual phrases used for authorizing the use of military force.

The third key resolution, Security Council resolution 2085, was passed on December 20, 2012. It too invokes Chapter VII and calls on member states to "provide coordinated assistance" to Malian forces in order to "restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by terrorist organizations and associated groups, [and] further invites them to regularly inform the Secretariat of their contributions[.]"[170] That same resolution called for "an African-led International Support Mission in Mali (AFISMA)," which was to be

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[169] *Id.*

[170] S.C. Res. 2085, U.N. Doc. S/RES/2085(2012) ("Urges Member States, regional and international organizations to provide coordinated assistance, expertise, training, including on human rights and international humanitarian law, and capacity-building support to the Malian Defence and Security Forces, consistent with their domestic requirements, in order to restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by terrorist organizations and associated groups, further invites them to regularly inform the Secretariat of their contributions[.] ")

deployed "for an initial period of one year" and which was "[t]o support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations, including AQIM, MUJWA and associated extremist groups, while taking appropriate measures to reduce the impact of military action upon the civilian population."[171] Although resolution 2085 did authorize AFISMA to "take all necessary measures, in compliance with applicable international humanitarian law and human rights law and in full respect of the sovereignty, territorial integrity and unity of Mali," it had no language authorizing anyone other than AFISMA to do so.

A reading of these various Mali-related Security Council resolutions that adheres to orthodoxy could well give rise to the view that they did not permit intervention by a third state. After all, the usual language customarily used to authorize the use of force (such as the phrase "all necessary means")[172] is absent from all of the resolutions that preceded the intervention with the exception of resolution 2085 – and then such language was only with regard to AFISMA.

The French reliance on those resolutions, therefore, is clearly one of implied authorization – an assertion that the resolutions permit the use of force by France in spite of the fact that they lack the standard language that might permit it. In that regard, Bergamaschi and Diawara assert that the legal grounds for French intervention were lacking because resolution 2085 authorizes only an "African-led mission" to "support efforts by national authorities to recover the north,"[173] rather than a French military intervention. The press statement by the Security Council on the day of the French intervention, however, tacitly endorses the reliance upon the previous resolutions as bases for the use of force.[174]

> The members of the Security Council recall resolutions 2056 (2012), 2071 (2012) and 2085 (2012) adopted under Chapter VII of the Charter of the United Nations,

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[171] *See* Grossman, *supra* note 20, at 68.

[172] *See UN Peace Operations and 'All Necessary Means'*, ASIA PACIFIC CTR. FOR THE RESPONSIBILITY TO PROTECT (2013), http://www.r2pasiapacific.org/docs/R2P%20Ideas%20in%20Brief/UN_Peace_Operations_and_All_Necessary_Means.pdf.

[173] *See* Bergamaschi & Diawara, *supra* note 12, at 143.

[174] *See* Johnstone, *supra* note 103, at 243.

> as well as the urgent need to counter the increasing terrorist threat in Mali.
>
> The members of the Security Council reiterate their call to Member States to assist the settlement of the crisis in Mali and, in particular, to provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups.[175]

Christakis and Bannelier note, with regard to resolution 2085, in spite of it lacking any of the ordinary language used to authorize military force, that "both the UN Security Council and other international organizations clearly interpreted from the beginning this Resolution as authorizing the French intervention."[176] And, in fact, one publication by the United Nations University (UNU) flatly states that Operation Serval and the French intervention was authorized by resolution 2085.[177] Thus, though somewhat obscured by the "shotgun" approach of listing out multiple legal bases, one may view the international response to the French intervention as indicating a degree of emerging consensus that the usual language, such as the phrases 'all necessary means' or 'all necessary measures,' is not always necessary to permit the use of force and that authorization for military action may, in certain circumstances, be inferred from other language in the text of U.N. Security Council resolutions. When such inferences are permitted may still be subject to debate, but an analysis of the international and U.N. reaction vis-à-vis the French intervention in Mali indicates that such inferences can be permissibly drawn when the use of force is for the purposes of assisting a government in a counter-terrorism effort against a non-state armed group.

VI. Conclusion

Commentators note that "Africa's Sahel is fast becoming more salient for the outside world."[178] As "the challenges of radical Islam,

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[175] Security Council Press Statement, *supra* note 57.
[176] Christakis & Bannelier, *supra* note 142.
[177] *See* Nadin, *supra* note 81.
[178] John Campbell, Ralph Bunche, & J. Peter Pham, *Does Washington Have a Stake in the Sahel?*, COUNCIL ON FOREIGN RELATIONS (Jan. 14, 2014), http://www.cfr.org/africa-sub-saharan/does-washington-have-stake-sahel/p32195.

narcotics trafficking and other criminal networks, and growing environmental stress"[179] continue to test the capacity of Sahelian governments, threats to regional security – and U.S. national security – will continue to increase. As this article has demonstrated, these new transnational pressures have served as catalysts for subtle transformations in international law, reflecting the international community's need for effective solutions to evolving threats.

On that score, the French military intervention in Mali is a notable example of the successful use of military force by an outside country for purposes of counterterrorism. Aside from the various operational lessons to be drawn from this conflict, from a legal perspective, the intervention represents an interesting moment at which a subtle shift in international law can be discerned – one which sees, with regard to counter-terrorism operations, a tilt toward a more permissive attitude vis-á-vis the extraterritorial use of military force.

This evolution in international law seems to be occasioned, at least in part, by the revolutionary shifts in the capabilities of modern non-state armed groups, many of which now have new capabilities derived from new weapons and information technologies. As Yoram Schweitzer notes, "Throughout the world, technological advances are becoming increasingly available to the highest or most cunning bidder – military, civilian, or terrorist."[180] These new capabilities permit non-state armed groups to effectively challenge legitimate state authorities (and, thus, the contemporary international system)[181] in ways that are, since the dawn of the modern sovereign, unparalleled. To draw upon a prominent example, the group calling itself the Islamic State of Syria and Iraq (ISIS) has made such successful use of social media and modern information technology that it has been able to amass a terrorist force that is estimated by the U.S. Central Intelligence Agency to be roughly 31,000 strong – and to consist of many foreign recruits.[182] A modern non-state

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[179] *Id.*

[180] *See* Yoram Schweitzer, *Terrorism: The Next Five Years*, GLOBAL BRIEF, Spring/Summer 2015, at 5.

[181] *See* J.W. Burton, SYSTEMS, STATES, DIPLOMACY, & RULES 28 (1968) ("In International Relations and Diplomatic History it has been customary to treat world society as though it consists of relations between the States within it. Two assumptions have been implied. The first is that States and relations between them along comprise world society[.]")

[182] *Battle for Iraq and Syria in maps*, BBC NEWS (Apr. 24, 2015), http://www.bbc.com/news/world-middle-east-27838034.

armed group may, therefore, recruit and regenerate its fighting forces by utilizing information technology, drawing in fighters from across the globe. This means that groups like ISIS may now amass a numerically challenging fighting force and, thereafter, regenerate that force at a pace equal or greater than the ability of countries in the region to degrade it. In such an international security context, capable states will need to be able to react quickly to intervene where fragile states are at risk of falling to terrorist groups and the forces of violent extremism. As technology becomes more accessible, this unsettling trend of increasingly empowered non-state armed groups will only continue – as will the threat to Western interests and global stability.[183] Analysis of the international community's adaptive behavior vis-à-vis technologically empowered non-state armed groups is, therefore, important.

From an operational perspective, Sheehan and Porter note that Operation Serval "may be seen as a template for future counterterrorism engagements: a threat is perceived, it is quickly acted on, and objectives are clearly delineated."[184] Acting quickly through the use of military force, however, is problematic, as such actions are constrained by the international legal framework articulated above. The legal template for the French intervention in Mali, therefore, is worthy of note to legal advisors and policymakers charged with the responsibility of confronting threats posed by non-state armed groups operating in the Sahel and elsewhere. The ability to effectively address such threats in a way that is both effective and legally sustainable is critical, as the primary counter-terrorism challenge in the Sahel will be preventing offensives by non-state armed groups such as that which occurred in Mali.[185] Such a challenge is a daunting one, as – Operation Serval's relative success notwithstanding – terrorist activity in the Sahel is only increasing.[186]

> Violent non-state actors and terrorist groups' cross-border connections add a north-south arc of instability to the commonly understood one that stretches east-west across the Sahara. Boko Haram may be linking with AQIM which may be linking with Ansar al-Shari`a in Libya and also the Uqba ibn Nafi Brigade in Tunisia.

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[183] *See* Schweitzer, *supra* note 180 ("[I]n the absence of successful containment, the continuing turmoil plaguing the Middle East, Africa, and parts of Asia will set the stage for growing violence that will increasingly spill over into the West.").
[184] *See* Sheehan & Porter, *supra* note 10.
[185] *Id.*
[186] *Id.*

> Militant groups in southern Libya have revived ties to northern Niger. Mokhtar Belmokhtar's al-Murabitun Brigade appears to be as adept at moving north and south as it is at moving east and west. The impact that these groups can have on their home countries means that not only is there a potential east-west instability axis, but there is a north-south one as well. Taken together, the vectors of instability and insecurity morph and multiply.[187]

Future counter-terrorism operations in the Sahel are, therefore, likely – and the lessons learned from the French intervention in Mali must guide policymakers faced with similar future challenges in the region. Understanding the subtle shifts in international law vis-à-vis the use of force in counter-terrorism operations will be essential to formulating approaches for successful counterterrorism operations in the Sahel and elsewhere. Through understanding the success of the French approach, legal advisors who carefully analyze the international legal developments surrounding Operation Serval can help facilitate the rapid responses required in contemporary counter-terrorism operations.[188]

With regard to the concept of intervention by invitation in an internal armed conflict, the French intervention in Mali demonstrates a unique circumstance in which the U.N. expressly, and even enthusiastically, approved of such a military operation, condoning France's reliance on an invitation from an embattled government as a permissible basis for military intervention. This is true even though the non-state armed groups seeking to topple the Malian government controlled significant territory. Arguments that such interventions are prohibited under international law, therefore, can now be authoritatively overcome – at least insofar as the intervention is to support a counter-terrorism effort against a non-state armed group or a violent extremist organization. Moreover, from a practical perspective, the French intervention demonstrates the importance of robust diplomatic engagement before (and concomitant with) military preparation and deployment – engagement which facilitated both the express invitation by the host country and the acquiescence of the U.N. Security Council.

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[187] *Id.*
[188] *Id.*

With regard to the concept of implied authorization for the use of force, the French intervention in Mali demonstrates an equally unique circumstance in which the U.N. Secretary General and post-hoc statements by the U.N. validate reliance on language in a Security Council resolution to infer authorization for the use of force. This is not to essentialize or overstate the importance of such U.N. statements, but as Oscar Schachter notes, while the judgments of U.N. political organs are not always legally binding, "they remain an important means for the international community to express its collective opinion of state claims."[189] The standard phrases 'all necessary means' or 'all necessary measures,' therefore, can no longer be considered absolutely necessary prerequisites for state action. Further U.N. statements in the aftermath of the intervention – lauding the French military action and citing to the resolutions discussed above – demonstrate a degree of inference is permissible.

Moreover, looking at the France-Mali SOFA, the French intervention represents an example of state practice in which an intervention on behalf of a recognized government against a non-state armed group was deemed to retain its non-international character under international law, thus carrying implications for future interventions and conflict classification. That SOFA is also noteworthy in the degree to which Malian sovereignty is preserved in its provisions, underscoring, in turn, the degree to which the French intervention was far more of a partnership (rather than an occupation). Vidan Hadzi-Vidanovic posits that "[w]hile this approach preserves the Council's ultimate authority for deciding on the intervention, it also gives a much more active role to the affected state, giving it (somewhat) greater control over the foreign intervention on its territory."[190] Such elements made the French intervention far more palatable to both the international community and the U.N. institutions that render authoritative opinions on the legality of military actions.

These legal observations are of interest at an academic level as they provide some insight into how international law can develop in a changing international security environment and how the legal architecture in similar circumstances can be successfully constructed. The French intervention in Mali, therefore, is of heuristic value to international legal scholars and students of armed conflict. Study of the

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[189] *See* Schachter, *supra* note 144, at 122.
[190] *See* Vidan, *supra* note 14.

conflict in Mali, however, is also of value to military lawyers and other legal advisors whose advice will inform future counter-terrorism responses, such as potential responses to ISIS and other non-state armed groups. Faced with these emerging threats, military commanders and policy makers will need a fulsome understanding of the current state of international law as it relates to the use of force against such groups so that decisive action can be taken where appropriate. As the analysis above demonstrates, the evolution of international law is inching toward a more permissive paradigm – providing capabilities and options that may not have existed previously or in other contexts. Effective use of these options – as was the case in Mali – may well be required to halt the ascendance of violent extremist organizations. Given the complexity of modern conflicts, the challenges that non-state armed groups continue to pose to the international legal system, and the legal developments occasioned by the impact of these phenomenal forces on the legal universe, the informed advice of observant international lawyers will be critical as countries make decisions about military intervention, the use of force, and counterterrorism measures. As it is said in Timbuktu, "The ink of a scholar is more precious than the blood of a martyr."[191]

[191] *See* Afua Hirsch, *Mali: Timbuktu's literary gems face Islamists and decay in fight for survival*, THE GUARDIAN, May 21, 2013, http://www.theguardian.com/world/2013/may/20/mali-literary-treasures-battle-survival.

THE ABUSE OF DISCRETION STANDARD OF REVIEW IN MILITARY JUSTICE APPEALS©

COLONEL JEREMY STONE WEBER*

I. Introduction

No subject is more critical yet more neglected in appellate practice than standards of review. Standards of review guide appellate decision-making by setting forth the "degree of deference given by the reviewing court to the decision under review."[1] Standards of review should therefore play an important role in determining the outcome of a case. The reality, though, is often quite different. At best, standards of review frequently serve only as a loose framework for appellate analysis. At worst, they seem to operate as nuisances to be worked around when they do not support the desired outcome. Sometimes, standards of review are overlooked altogether. As one scholar has argued, standards of review may be "ignored, manipulated, or misunderstood."[2] Regrettably, military appellate practice is not immune from this condition.

"Abuse of discretion" is perhaps the most important standard of review, but it is also the least understood. Abuse of discretion is the prescribed standard for the vast majority of appellate issues that arise from court-martial convictions. In fact, it is the most common standard applied to review of trial court decisions in military justice practice.[3] Yet appellate counsel and judges often fail to fully address and apply this standard in their pleadings, arguments, and opinions. This is unfortunate because more attention to the standard would provide immeasurably greater insight into appellate decision-making.

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[1] Martha S. Davis & Steven A. Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 465 (1986).

[2] Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 233 (2009).

[3] Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections – the Why and How*, ARMY LAW., Mar 2003, at 10, 17 ("The most common standard of review – and that applied to nearly all evidentiary rulings – is abuse of discretion.").

This article attempts a first step toward a closer examination of the abuse of discretion standard in military appellate practice. The intent is not to criticize case law addressing the abuse of discretion standard or advocate for any particular change in the law.[4] This article also does not seek to provide a comprehensive catalog either of standards of review generally or the abuse of discretion standard outside the military justice context. Several scholars have offered thorough treatments of these topics.[5] Rather, this article focuses on explaining how the abuse of discretion standard functions in military appellate practice, both on paper and in practice. After a brief overview of the subject, this article offers nine observations from a former appellate counsel and current appellate judge about how the abuse of discretion standard has (and has not) been defined, detailed, and employed in military appellate practice. Hopefully, this article will prompt greater clarity and transparency in appellate jurisprudence under the abuse of discretion standard.

II. Standards of Review

Appellate practice revolves around standards of review. Standards of review frame nearly every issue at the appellate level and often determine the outcome of the controversy. Numerous commentators have noted their crucial nature in appellate advocacy and outcomes. For example, the standard of review has been called "essential to every appellate court decision,"[6] "the . . . language of appeals,"[7] "the power of

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[4] The author is mindful of the requirements of the *Air Force Uniform Code of Judicial Conduct* contained in Air Force Instruction 51-201, *Administration of Military Justice*, Attachment 5 (6 June 2013). Nothing in this article should be construed as a comment upon the author's position in any case that may be brought before him, or as a judgment as to the correctness or incorrectness of any decision by any military appellate court. This article is strictly observational about the development of the abuse of discretion standard and the only change the article advocates for is greater attention to and development of this standard.

[5] *See, e.g.*, STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (4th ed. 2010); Martha S. Davis, *Standards of Review: Judicial Review or Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47 (2000); J. ERIC SMITHBURN, APPELLATE REVIEW OF TRIAL COURT DECISIONS (2009); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11 (1994); Amanda Peters, *supra* note 2; Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978); Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231 (1991).

[6] Kunsch, *supra* note 5, at 12.

the lens" used to review a lower court's decision,[8] and the "keystone to court of appeals decision-making."[9] Identifying the proper standard of review "should be the starting point for the resolution of each separate issue in an appeal."[10] Indeed, counsel have been warned: "Woe unto the lawyer and litigant who urges the wrong standard or no standard at all!"[11]

Essentially, standards of review represent "yardstick phrases," "meant to guide the appellate court in approaching both the issues and the trial court's earlier procedure or result."[12] A standard of review measures the "appellate court's depth of review," asking "what is necessary to overturn the decision?"[13] Stated differently, a standard of review "sets the height of the hurdles over which an appellant must leap in order to prevail on appeal"[14] or, to use a different metaphor, it "indicate[s] the decibel level at which the appellate advocate must play to catch the judicial ear."[15]

Standards of review matter because many appellate issues are close calls. Trial judges are often called upon to rule on issues when more than one "right" answer may be possible; reasonable people in the trial judge's situation may all agree on the correct legal framework for the issue but reach different conclusions. At the heart of the matter, the standard of review determines what the appellate court is doing when it reviews a trial judge's actions. Is the appellate court simply determining the right "law" to apply to the issue, or is it making a judgment call about the trial judge's determination? Does the appellate court consider the issue important enough that it must review the issue with a clean slate or do other interests dictate granting the trial judge some latitude in

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[7] STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW ix (3d ed. 1999).

[8] Robert L. Byer, *Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. OF PITT. L. REV. xvi, xvi (1987).

[9] MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL RESEARCH AND WRITING 493 (2005).

[10] Timothy P. O'Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U. L.J. 51, 51 (1992).

[11] Hon. Henry A. Politz, *Foreword*, *in* 1 S. CHILDRESS & M. DAVIS, FEDERAL STANDARDS OF REVIEW (2d ed. 1992).

[12] CHILDRESS & DAVIS, *supra* note 7, § 1.01 at 1-2.

[13] Smithburn, *supra* note 5, at 7.

[14] Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991).

[15] Alvin B. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 873 (1983).

determining a course of action? Ultimately, then "a standard of review answers two similar, yet different, questions: (1) How 'wrong' the lower court has to be before it will be reversed[,] and (2) What is necessary to overturn the [lower court's] decision?"[16] Standards of review essentially decide who is permitted to make what types of decisions; they represent "the crucial question of how power is allocated among the decision-makers in the criminal system."[17] This, in turn, provides some measure of structure to the appellate process by signaling who has the primary decision-making authority over a given issue:

> What level of deference will the appellate court give to the judge, the jury, the prosecutor, and the defendant, and to the other participants in the process? What are the boundaries that mark the extent of the power of the participants; or perhaps more legalistically, in what area do those boundaries move about? Once those boundaries, or boundary areas, are defined, appeal becomes more predictable, and even the choice whether to appeal at all can be made more rationally.[18]

These abstracts represent what standards of review are *supposed* to do. The reality appears far messier. Many civilian commentators have opined that the lofty goals of standards of review do not translate neatly into practice. Standards of review, it has been observed, are used in seemingly conflicting ways, or are glossed over without truly being utilized in an issue's analysis. Some suspect that while standards of review are meant to seem meaningful on surface, they actually contain "no more substance at the core than a seedless grape."[19] One commentator bluntly stated:

> It would be difficult to name a significant legal precept that has been treated more cavalierly than standard of review. Some courts invoke it talismanically to authenticate the rest of their opinions. Once they state the standard, they then ignore it throughout their analysis

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[16] Todd J. Bruno, *Say What?? Confusion in the Courts Over What is the Proper Standard of Review for Hearsay Rulings*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 1, 8 (2013) (further citations and quotations omitted).

[17] O'Neill, *supra* note 10, at 53-54.

[18] DAVIS & CHILDRESS, *supra* note 1, at 464.

[19] Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975).

> of the issues. Other courts use standard of review to create an illusion of harmony between the appropriate result and the applicable law. If an appellate court wants to reverse a lower tribunal, it characterizes the issue as a mixed issue of law and fact, thereby allowing de novo review. If the court wants to affirm, it characterizes the issue as one of fact or of discretion. It then applies a higher (more deferential) standard of review to the lower tribunal's decision. Finally, some courts disregard standard of review in their analysis entirely.[20]

Despite these criticisms, standards of review are discussed in nearly every appellate decision. As a result, perhaps they carry *some* sort of meaning in determining an appeal's outcome. At a minimum, these standards provide the appellate court a general sense of which party faces an uphill struggle, how closely the reviewing court will scrutinize the trial court's ruling, and how much latitude the higher court will grant the trial court before intervening.

Standards of review, according to Professors Childress and Davis in their definitive work on the subject, "actually matter."[21] It may be true that standards of review serve as mere generalized phrases that have little substance until they are applied to individual cases. As Childress and Davis note, "The formulations do not say much until the appeals court, in discussion and application, gives them life. . . . [W]ord meaning often boils down to the fact of power and expertise rather than a theory of natural significance."[22] Yet, even general phrases may help shape an outcome by serving as guideposts for how those phrases are to be translated into practice. "Even when the slogans have no real internal meaning, in many cases it is clear that the issue framing or assignment of power *behind* the words is the turning point of the decision."[23]

Standards of review are no less significant in military justice practice than elsewhere. Judge Wiss of the United States Court of Military Appeals – the forerunner of today's Court of Appeals for the Armed Forces (CAAF) – declared that the standard of review issue is "one in which appellate courts must take care to be precise in articulation and

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[20] Kunsch, *supra* note 5, at 12.
[21] CHILDRESS & DAVIS, *supra* note 5, § 1.01 at 1-2.
[22] *Id.*
[23] *Id.* (emphasis in original).

application – and one, as well, which appellate counsel before this Court should uniformly address at the outset of their pleadings on any issue."[24] CAAF itself has acknowledged and rejected the perception "that it tilts with windmills to quarrel whether something is a question of fact reviewable for clear error, a question of law reviewable de novo, a mixed question, and so forth."[25] The court has recognized that the standard of review can be "critical to the outcome."[26] In short, standards of review are no less imperative in the military justice system than they are in appellate practice generally.[27] For this reason, military appellate advocates are required to state up front the standard of review that applies to each issue presented.[28]

For purposes of this article, military appellate courts generally recognize four standards of review. The first is plain error. Plain error review is typically appropriate when the party alleging an error did not timely object at trial and thus has surrendered the right to full appellate review of that alleged error, although the appellate courts will still review the issue to some degree.[29] To obtain relief under the plain error standard, the appellant must demonstrate an error was committed, the error was plain or obvious, and the error materially prejudiced a substantial right of the appellant.[30]

If the issue is properly preserved through a timely objection – or in some special instances when case law does not require the appellant to have preserved the issue – one of three remaining standards will apply. The least deferential to the trial court is de novo review. De novo review occurs when appellate courts review pure matters of law, such as whether the military judge properly instructed the court members or whether an

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[24] United States v. White, 36 M.J. 284, 289 (C.M.A. 1993) (Wiss, J., concurring).
[25] United States v. Siroky, 44 M.J. 394, 399 n.1 (C.A.A.F. 1996)
[26] United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011).
[27] Ham, *supra* note 3, at 16 (asserting that standards of review "are absolutely critical in appellate practice").
[28] U.S. CT. OF APPEALS FOR THE ARMED FORCES R. 24(a); CTS. CRIM. APP. ATCH. 2 (1 May 1996).
[29] *See, e.g.*, United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (distinguishing between forfeiture as the failure to timely assert a right and waiver as the intentional relinquishment of a known right, and holding that forfeited issues are reviewed under a plain error standard while waived issues are extinguished and may not be raised on appeal).
[30] United States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008).

article of the Uniform Code of Military Justice is constitutional.[31] The service courts of criminal appeals also employ the de novo standard when judging the factual and legal sufficiency of the appellant's conviction and the appropriateness of the appellant's sentence; CAAF likewise uses this standard for its legal sufficiency reviews.[32] The phrase de novo means "anew" or "from the beginning,"[33] requiring the appellate court to decide the matter for itself without regard for the trial court's determination.

However, even when the de novo standard is used, the appellate court may (and sometimes, must) defer to the military judge's underlying findings of fact.[34] This is the third standard of review: specifically when the issue revolves around historical facts, those factual findings are reviewed to determine if they are "clearly erroneous," a standard that grants "substantial deference" to the military judge's findings of fact.[35] Examples of issues reviewed under the clearly erroneous standard include a finding that an appellant had a subjective expectation of privacy in an area searched[36] or a finding that an appellant was mentally competent to stand trial.[37] A finding is clearly erroneous when "although there [may be] evidence to support it, the reviewing court on the entire

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[31] Kunsch, *supra* note 5, at 27 (citing Pierce v. Underwood, 487 U.S. 552, 558 (1988)); *see also* United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008) ("Whether a panel was properly instructed is a question of law reviewed de novo."); United States v. Prather, 69 M.J. 338, 341 (C.A.A.F. 2011) ("The constitutionality of a statute is a question of law we review de novo.").

[32] *See generally* United States v. Nerad, 69 M.J. 138, 142 n.1 (C.A.A.F. 2010) (summarizing the legal and factual sufficiency standards); United States v. Roach, 66 M.J. 410, 412 (C.A.A.F. 2008) (noting that a court of criminal appeals "conducts a de novo review under Article 66(c) of the facts as part of its responsibility to make an affirmative determination as to whether the evidence provides proof of the appellant's guilt of each offense beyond a reasonable doubt. The court also conducts a de novo review of the sentence under Article 66(c) as part of its responsibility to make an affirmative determination as to sentence appropriateness") (citations omitted); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (Article 66(c), UCMJ, "requires the Courts of Criminal Appeals to conduct a de novo review of legal and factual sufficiency of the case.").

[33] BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

[34] United States v. Melanson, 53 M.J. 1, 2 (C.A.A.F. 2000); United States v. Owens, 51 M.J. 204, 209 (C.A.A.F. 1999).

[35] United States v. Danylo, 73 M.J. 183, 186 (C.A.A.F. 2014); *see also* United States v. Barreto, 57 M.J. 127, 130 (C.A.A.F. 2002); United States v. Melanson, 53 M.J. 1, 2 (C.A.A.F. 2000).

[36] United States v. Maxwell, 45 M.J. 406, 417 (C.A.A.F. 1996).

[37] United States v. Fry, 70 M.J. 465, 470 (C.A.A.F. 2012); United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993).

evidence is left with the definite and firm conviction that a mistake has been committed."[38] Under this standard, the appellate court will uphold any reasonable finding of fact, "even though it is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[39] Further, CAAF has held that a finding of fact is clearly erroneous only when it is "unsupported by the record," a standard that "is a very high one to meet."[40] Put more colorfully, CAAF has stated that before it would overturn a factual finding as clearly erroneous, "it must strike us as wrong with the force of a five-week-old, unrefrigerated dead fish."[41] Regardless of the court's colorful language, under this standard, the court examines whether there is "some evidence" to support the military judge's findings of fact,[42] and whether "the military judge's findings of fact are . . . within the range of evidence permitted under the clearly-erroneous standard."[43]

Finally, the fourth standard of review that military appellate courts employ is the abuse of discretion standard, which forms the basis for the remainder of this article.

III. Abuse of Discretion in Military Appellate Practice – Nine Observations

A full listing of trial-level rulings reviewed under the abuse of discretion would be exceedingly lengthy. To state but a few, the abuse of discretion standard applies to the military judge's decision to: admit or exclude evidence;[44] issue non-mandatory instructions to members;[45] accept a guilty plea as provident;[46] sustain or overrule objections to argument;[47] grant or deny relief for unreasonable multiplication of

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[38] United States v. Martin, 56 M.J. 97, 106 (C.A.A.F. 2001) (quoting United States Gypsum Co., 333 U.S. 364, 395 (1948)).
[39] Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985).
[40] United States v. Leedy, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007).
[41] United States v. French, 38 M.J. 420, 425 (C.M.A. 1993) (quoting Parts and Electric Motors Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988)).
[42] *See id.* (noting the many definitions of clearly erroneous).
[43] United States v. Norris, 55 M.J. 209, 215 (C.A.A.F. 2001).
[44] United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008).
[45] United States v. Barnett, 71 M.J. 248, 249 (C.A.A.F. 2012).
[46] United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008).
[47] United States v. Briggs, 69 M.J. 648, 650 (A.F. Ct. Crim. App. 2010) (citing United States v. Macklin, 104 F.3d 1046, 1049 (8th Cir. 1997)).

charges or merge charges and specifications for sentencing purposes;[48] grant or deny a continuance;[49] grant or deny relief on a motion for illegal pretrial confinement;[50] limit voir dire;[51] deny discovery;[52] exclude individuals from the courtroom;[53] sequester witnesses;[54] and grant or deny a mistrial,[55] along with numerous other issues decided by the military judge.[56]

The abuse of discretion standard recognizes that trial judges require some amount of discretion to perform their duties. Every case presents unique issues. Trial judges must receive some latitude or else the specter of appellate correction would hang over every judgment call a trial judge makes. As the Supreme Court has stated, "A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process."[57] The abuse of discretion standard is one of the primary tools used to empower the trial judge to carry out his or her role. For this reason, more deference is given to the trial judge under this standard than other standards, such as clearly erroneous review, at least in theory.[58]

Normally, a military judge abuses his or her discretion (1) when the findings of fact upon which he or she predicates the ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his or her application of the correct legal principles to the facts is clearly unreasonable.[59] As a general matter, "the abuse of

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[48] United States v. Campbell, 71 M.J. 19, 22-25 (C.A.A.F. 2012).
[49] United States v. Weisbeck, 50 M.J. 461, 464 (C.A.A.F. 1999).
[50] United States v. Wardle, 58 M.J. 156, 157 (C.A.A.F. 2003).
[51] United States v. Williams, 44 M.J. 482, 485 (C.A.A.F. 1996).
[52] United States v. Jones, 69 M.J. 294, 298 (C.A.A.F. 2011).
[53] United States v. Short, 41 M.J. 42, 44 (C.M.A. 1994).
[54] United States v. Roth, 52 M.J. 187, 190 (C.A.A.F. 1999).
[55] United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990).
[56] For a thorough, but somewhat dated, catalogue of issues reviewed under the abuse of discretion standard, as well as other standards of review, see Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1220-24 (1997).
[57] Geders v. United States, 425 U.S. 80, 86 (1976).
[58] Kevin Casey et. al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIRCUIT B.J. 279, 286 (2002) ("The most lenient standard of review is abuse of discretion."); Peters, *supra* note 5, at 243 (noting that the abuse of discretion standard "is the most deferential to trial court decisions").
[59] United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010).

discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."[60] Military appellate courts speak of the abuse of discretion standard as "a strict one, calling for more than a mere difference of opinion." [61] In order for the challenged action to be overturned, the military judge's action must be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[62]

This summary of the abuse of discretion standard may make it seem as if appellate review under this standard is a fairly straight-forward matter, with a high likelihood that the trial judge will be upheld. In reality, though, the abuse of discretion standard can be difficult to understand and apply. Numerous formulations of the standard exist, and some seem to directly contradict each other. The "abuse of discretion" label is used as if it were one all-encompassing benchmark, but certain rulings by trial judges seem to receive more deference than others. Sometimes appellate courts indicate that they should grant the trial judge a measure of deference but then seem to do anything but this in their analysis. Even for the most well-intentioned counsel and judges, trying to decode the abuse of discretion standard proves so difficult that it simply proves easier to gloss over the standard and proceed directly to the substantive analysis about the "right" resolution of the appeal.

Appellate counsel and courts must not close their eyes to the darker recesses of the abuse of discretion standard. A cursory approach to the standard of review bypasses some foundational questions of appellate decision-making: what is discretion, why should the trial court have it, and how much discretion should be granted in a given case. To assist counsel and courts in the struggle to restore the abuse of discretion to the central role it deserves, the following nine observations are offered about the abuse of discretion standard, specifically as it translates to appellate practice in the military justice system.

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[60] United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing United States v. Wallace, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)).
[61] United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010).
[62] United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997); United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987)).

A. Abuse of Discretion is a Catch-All Phrase that Encompasses Review of Several Distinct Types of Issues

Marine Corps Private First Class Larry Holmes absconded with a car from the Camp Pendleton "lemon lot" on a joy ride that included a brief trip to Mexico. He was stopped at the border re-entering the United States and lied to a U.S. Customs agent about the identity of the car's owner. He also lied to a California Highway Patrol officer about how he acquired the car and later repeated the fabrication to a military investigator. At a special court-martial, he pled guilty to three specifications of making a false official statement and one specification of wrongful appropriation.[63]

On appeal, he asserted his guilty plea to two of the false official statement specifications were improvident because the statements to the customs agent and the highway patrol officer were not "official."[64] Before reaching the merits of this issue, though, the Navy-Marine Corps Court of Criminal Appeals recognized that the appellant's claim presented two surprisingly difficult questions. The first concerned whether the appropriate standard of review was de novo or abuse of discretion, as CAAF had previously issued seemingly conflicting decisions on this point.[65] The Navy-Marine court determined abuse of discretion was the appropriate standard. However, even this did not resolve the question about how much deference to grant the military

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[63] United States v. Holmes, 65 M.J. 684, 685 (N-M. Ct. Crim. App. 2007).

[64] To be punishable under Article 107 of the Uniform Code of Military Justice, a false statement must be "official," that is, "made in the line of duty." MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 31c.(1) (2012). CAAF has repeatedly decided cases about the limits of what is considered "official" under this article. *See, e.g.*, United States v. Passut, 73 M.J. 27 (C.A.A.F. 2014) (statements to Army and Air Force Exchange Service employees were official); United States v. Capel, 71 M.J. 485 (C.A.A.F. 2013) (statements to civilian police officer denying use of another service member's debit card were not official statements); United States v. Spicer, 71 M.J. 470 (C.A.A.F. 2013) (false statements to civilian law enforcement officials about the purported kidnapping of the accused's infant son were not official); United States v. Day, 66 M.J. 172 (C.A.A.F. 2008) (false statements to civilian firemen who were members of base fire department charged with performing an on-base military function qualified as false official statements).

[65] *See* United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing United States v. Gallegos, 41 M.J. 446 (C.A.A.F. 1995)) (abuse of discretion review for providence of a guilty plea); United States v. Phillippe, 63 M.J. 307, 309 (C.A.A.F. 2006) (abuse of discretion review); United States v. Pena, 64 M.J. 259, 267 (C.A.A.F. 2007) (citing United States v. Harris, 61 M.J. 391, 398 (C.A.A.F. 2005)) ("We review claims as to the providence of a plea under a de novo standard.").

judge's decision to accept the plea. Rather, the court recognized that military appellate courts have used the phrase "abuse of discretion" in distinct, ill-defined ways:

> In general, "abuse of discretion" as a standard of review is commonly used in two different ways. Sometimes, "abuse of discretion" is a conclusory label, such as when it is said a lower court abused its discretion because its findings of fact were clearly erroneous or because it was mistaken on the law. In such cases, factual findings have been reviewed under a "clearly erroneous" standard, and legal determinations under a *de novo* standard. To say the lower court abused its discretion may be a technically correct usage of this "term of art," but it can obscure the true standard of review.
>
> On the other hand, "abuse of discretion" may also indicate the appellate court will defer to a lower court's discretionary decision so long as that decision was within a range of reasonable possible decisions. Often, such situations arise where a lower court must apply the law to a set of facts, such as occurred in this case. The appellate court will normally review *de novo* the law applied by the lower court, and will generally reverse only a clearly erroneous factual finding. It will, however, often review the lower court's discretionary act of applying the law to the facts under a standard affording the lower court some degree of deference, though something short of the clearly erroneous standard by which it examines factual findings. Such is the case when a military judge decides there is a factual basis to accept a guilty plea.[66]

In some situations, the court noted, *no* military judge could accept an accused's plea because the plea lacked a factual basis or because matters existed in the record that were inconsistent with the plea. At the other extreme, the court recognized, there may be some situations where the factual basis clearly supports the plea and the military judge must accept it. The court then found that "[i]n between these two extremes, however,

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[66] *Holmes*, 65 M.J. at 686-87 (citations omitted).

the military judge has discretion to accept or reject the plea."[67] Having determined that the military judge's decision to accept Private First Class Holmes' plea was entitled to some degree of deference because this case lay in between those two extremes, the court nonetheless found that the military judge exceeded the scope of that deference because there was simply no basis to establish the official nature of the appellant's statements.[68]

As the *Holmes* court recognized, military appellate courts use the phrase "abuse of discretion" in differing ways without always recognizing that they are doing so. However, even the Navy-Marine Corps court may not have realized the full scope of the problem because it seems as if military appellate courts utilize the standard in at least *four* distinct ways rather than just two.

First, as the *Holmes* court recognized, abuse of discretion may simply be used as a conclusory label. If the military judge is clearly erroneous in his or her findings of fact, or misstates or misapplies the law, the military judge is said to have abused his or her discretion. In this sense, the abuse of discretion term is an umbrella term used in place of the more precise standard of review for the sub-issue. Thus, military courts sometimes summarize the abuse of discretion standard this way: "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law."[69] Phrased slightly differently, "a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect."[70] Likewise, the Air Force court has held: "On questions of fact, [we ask] whether the decision is reasonable; on questions of law, [we ask] whether the decision is correct. If the answer to either question is 'no,' then the military judge abused his discretion."[71]

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[67] *Id.* at 687.
[68] *Id.* at 689-90.
[69] United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008); *see also* United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002) (holding that under the abuse of discretion standard, "We will reverse if the findings of fact are clearly erroneous or if the military judge's decision is influenced by an erroneous view of the law").
[70] United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004); United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).
[71] United States v. Terry, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008) (quoting United States v. Baldwin, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000)).

This approach essentially conceives of abuse of discretion review in binary fashion – either the trial court's action consists of a finding of fact (which is entitled to significant deference) or it is a conclusion of law (which is reviewed de novo, or receiving no deference). The military judge receives some deference under this approach because his or her findings of fact are reviewed under a clearly erroneous standard even if the ultimate conclusion is reviewed de novo. Military courts have taken this approach to analyze issues like the exclusion of evidence under Military Rule of Evidence 412,[72] admission or suppression of evidence seized pursuant to an allegedly unlawful search,[73] admission or suppression of evidence on hearsay grounds,[74] and admission or suppression of an allegedly unlawfully-obtained confession.[75]

Secondly, "abuse of discretion" sometimes focuses on the military judge's stated rationale for his or her ruling. Under this approach, the challenged action must be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous" to constitute an abuse of discretion.[76] Alternatively stated, an abuse of discretion exists where "'reasons and rulings of the' military judge are 'clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice.'"[77] Accordingly, the appellate court grants a significant amount of deference to the military judge; it need not agree with the military judge's rationale to uphold the decision. Rather, under this approach, the military judge is permitted to be "wrong" to a certain degree and still be upheld so long as his or her decision is not outside this range of reasonableness. To find an abuse of discretion in this sense "does not imply an improper motive, willful purpose, or intentional wrong."[78] It merely recognizes that the trial judge has ventured beyond, as phrased by one former federal judge, "a pasture in which the trial judge is free to graze."[79]

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[72] United States v. Ellerbrock, 70 M.J. 314, 317 (C.A.A.F. 2011); United States v. Roberts, 69 M.J. 23, 26 (C.A.A.F. 2010).
[73] United States v. Cote, 72 M.J. 41, 44 (C.A.A.F. 2013); United States v. Monroe, 52 M.J. 326, 330 (C.A.A.F. 2000).
[74] United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002).
[75] United States v. Chatfield, 67 M.J. 432, 437 (C.A.A.F. 2009).
[76] United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010)).
[77] United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (quoting Guggenmos v. Guggenmos, 359 N.W.2d 87, 90 (Neb. 1984)) (further citations omitted).
[78] *Id.*
[79] Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 173 (1978).

In a third but somewhat similar sense, occasionally the abuse of discretion standard is employed when the military judge has selected from among a range of lawful options to address a given situation. For example, where a military judge has determined that unlawful command influence exists, the military judge must craft a remedy to remove the taint of the unlawful command influence. The military judge enjoys "broad discretion" under the abuse of discretion standard in selecting the appropriate remedy.[80] In these situations, the reviewing court will only find an abuse of discretion if it possesses a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[81] This approach "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."[82] Therefore, for example, even though the dismissal of charges with prejudice upon a finding of unlawful command influence is a "drastic remedy" that requires military judges to "look to see whether alternative remedies are available,"[83] the military judge's decision will be upheld so long as he or she considered alternative remedies. At that point, the appellate court only examines whether the military judge's election was "within the range of remedies available and not otherwise a clear error of judgment."[84]

Finally, the abuse of discretion standard grants enormous latitude for certain matters most innately considered the province of the trial judge. Military judges are generally given wide latitude to control their courtrooms and dockets, and in their rulings on matters such as severance and joinder,[85] continuances,[86] mode of witness interrogation,[87] and

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[80] United States v. Douglas, 68 M.J. 349, 350 (C.A.A.F. 2010).
[81] United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004) (quoting United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993)).
[82] *Id.* (citing United States v. Wallace, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)).
[83] *Id.* (citing United States v. Cooper, 35 M.J. 417, 422 (C.M.A. 1992)).
[84] *Id.* at 189.
[85] United States v. Duncan, 53 M.J. 494, 497-98 (C.A.A.F. 2000) (holding that a military judge's decision to deny severance will not be held to constitute an abuse of discretion unless "the defendant is able to show that the denial of a severance caused him actual prejudice in that it prevented him from receiving a fair trial; it is not enough that separate trials may have provided him with a better opportunity for an acquittal") (quoting United States v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998)).
[86] United States v. Wellington, 58 M.J. 420, 425 (C.A.A.F. 2003) (recognizing that trial judges enjoy "broad discretion" on matters of continuances) (quoting Morris v. Slappy, 461 U.S. 1, 11 (1983).

excluding witnesses.[88] These are issues that deal primarily with control of the proceedings and ensuring an orderly courtroom, areas in which the appellate courts are loathe to undercut the efforts of trial judges. In many jurisdictions outside the military justice context, the term "abuse of discretion" is applied primarily to these type of procedural matters, while other standards of review apply to more substantive legal issues.[89] Such decisions are very rarely overturned.

While military appellate jurisprudence uses the abuse of discretion standard in these four senses, cases generally evince no awareness that the phrase carries different meanings in different contexts. Often, appellate briefs will borrow language courts used to analyze one sense of the phrase when addressing an issue that falls under a different aspect. Courts, unfortunately, are not immune from this condition. Counsel and courts could add clarity to this area simply by distinguishing between the term's uses.

B. Abuse of Discretion Represents a Spectrum of Deference, Not One Fixed Standard

Because the phrase "abuse of discretion" applies to several distinct situations, it necessarily implies that varying levels of deference are granted depending on the specific type of situation presented. How much discretion "abuse of discretion" review entails depends upon a number of factors, which in turn relate to the reasons trial judges receive discretion in the first place.

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[87] United States v. Brown, 72 M.J. 359 (C.A.A.F. 2013) (finding no abuse of discretion in military judge's decision to allow a support person to accompany a 17-year-old victim on the stand).

[88] United States v. Langston, 53 M.J. 335, 337 (C.A.A.F. 2000) (holding that while a military judge must sequester a witness if none of the exceptions of Military Rule of Evidence 615 applies, a military judge's decision as to whether those exceptions is present is reviewed under an abuse of discretion standard).

[89] Peters, *supra* note 2, at 243 ("The abuse of discretion standard, which is the most deferential to trial court decisions, is often used to review procedural matters decided by the trial court."); *see also* Timothy P. O'Neill, *Taking Standards of Appellate Review Seriously: A Proposal to Amend Rule 341*, 83 ILL. B.J. 512, 514-15 (1995) (reviewing the general standards of review applicable to appeals and stating that the abuse of discretion standard applies to "discretionary matters," which encompasses decisions made by a trial court judge in orchestrating a trial, supervising the litigation process, or overseeing the court docket").

As an initial matter, civilian courts differ as to exactly how much deference trial judges receive under the abuse of discretion standard. Some jurisdictions treat the standard as if it was one fixed level of discretion; others utilize gradations of abuse of discretion review; some add language to the standard in an attempt to more clearly define it; some hold that abuse of discretion involves an action actually outside the scope of the applicable law; and still others hold that the standard is met and "a reversal is warranted only if the trial court's decision was arbitrary or irrational."[90]

Commentators have remarked that these diverse approaches are not used in any coherent manner, leading to little to no guidance as to how much discretion is warranted in a given case. The standard is called "often vague and open-ended"; "courts have some difficulty writing about discretion and its review, and have set out slightly different tests with each passing case."[91] The standard, in the words of one notable scholar, "is used to convey the appellate court's disagreement with what the trial court has done, but does nothing by way of offering reasons or guidance for the future. . . . It is a form of ill-tempered appellate grunting and should be dispensed with."[92] Courts even criticize themselves for failing to articulate what abuse of discretion means. Judicial observations of the standard include that it "defies an easy description"[93] and "is so amorphous as to mean everything and nothing at the same time and [is] virtually useless as an analytic tool."[94]

While the utility of such a broad standard may not be immediately obvious, the gradations of this standard serve a purpose. Judge Henry J. Friendly, a long-time judge on the Second Circuit Court of Appeals, observed:

> There are a half dozen different definitions of "abuse of discretion," ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ

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[90] Peters, *supra* note 2, at 244.

[91] CHILDRESS & DAVIS, *supra* note 7, § 7.06[4], 7-85.

[92] Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 659 (1971).

[93] Arneson v. Arneson, 670 N.W.2d 904, 910 (S.D. 2003).

[94] Hurtado v. Statewide Home Loan Co., 167 Cal. App. 3d 1019, 1022 (Cal. Ct. App. 1985).

> from the definition of error by only the slightest nuance, with numerous variations between the extremes.[95]

Judge Friendly once thought these "wildly different definitions of abuse of discretion could not be defended and that we ought to pick one . . . and apply it across the board."[96] However, he came to realize that "the differences are not only defensible but essential. Some cases call for application of the abuse of discretion standard in a 'broad' sense and others in a 'narrow' one."[97] Abuse of discretion, Judge Friendly learned, is not designed to be a fixed standard, and counsel and judges should not fall into the trap of treating it as one. Rather, the term connotes a range of discretion afforded to trial judges: the issue being reviewed and a variety of other factors may call for more or less deference to be afforded in a given case. Judge Friendly advocated: "It should be clear, then, that there are at least weak and strong senses of 'discretion' and in reality 'abuse of discretion' may invoke a broad spectrum of review standards and applications."[98]

Judge Friendly has not been alone in this view. One commentator asserts that abuse of discretion is intended to be "a highly flexible and malleable term that is applied to widely differing circumstances with equally differing results."[99] Another has observed:

> Clearly there is no such thing as *one* abuse of discretion standard. It is at most a useful generic term. Even within review of discretionary calls (or perhaps because sometimes different types of calls have a varying amount of real judgment to them), this standard of review more accurately describes a *range* of appellate responses. In practice, however, while courts cite "the" abuse of discretion standard in varying contexts, most imply awareness that varying kinds of review follow, whether by firmly applying the factors applicable to the discretionary choice, or by giving a stronger

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[95] Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982).
[96] *Id.* at 754.
[97] *Id.*
[98] Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 294 (1995).
[99] Hon. Andrew M. Mead, *Abuse of Discretion: Maine's Application of a Malleable Appellate Standard*, 57 ME. L. REV. 519, 520 (2005).

> presumption to one set of applications, or even by blatantly stating that several abuse of discretion standards may be involved.[100]

Still another observer notes the vastness of the abuse of discretion spectrum:

> [T]he abuse of discretion standard of review spans the spectrum of deference. At one extreme, it is a standard so deferential that it has been described as a "virtual shield" or "rubber stamp" of trial court rulings; but at the other end of the spectrum, when it is defined to necessarily include de novo review of legal conclusions, it is a standard that owes no deference to a trial court ruling.[101]

There may be widespread recognition that abuse of discretion represents a range of appellate deference to trial judge rulings, but a more difficult task remains: determining where along the spectrum a given issue falls. A good first step is to determine exactly what type of issue is being presented, as outlined in the section above. Is the appellate court reviewing a military judge's choice of remedy, his or her management of the court proceedings, or a substantive legal ruling? A military judge's ruling on a matter of courtroom management will receive a great deal of deference compared to a determination of what the law is in a given area. Matters involving the selection of an appropriate remedy from a range of options or the weight given to a series of factors, or situations in which the appellate court is asked to review the military judge's decision-making process, may fall somewhere in the middle.

However, the analysis does not end there. One must examine the underlying reasons why trial judges receive deference before determining where along the spectrum of deference a given issue falls. Once again, Judge Friendly eloquently summarized this matter:

> When we look at the spectrum of trial court decisions, we find a wide variance in the deference accorded to them by appellate courts. In some instances the trial court is accorded broad, virtually unreviewable

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[100] Davis, *supra* note 35, at 77-78 (emphasis in original) (citation omitted).
[101] Bruno, *supra* note 16, at 29.

> discretion, as is still the case with criminal sentencing in the federal system. In others, the trial judge's decision is accorded no deference beyond its persuasive power, as in the case of determinations of the proper rule of law or the application of the law to the facts. Our concern is with determinations where the scope of review falls somewhere between these extremes. How much deference should be accorded to various determinations along this continuum? Just as the answer to the constitutional inquiry "what process is due?" depends upon the costs and benefits of procedural safeguards in different instances, defining the proper scope of review of trial court determinations requires considering in each situation the benefits of closer appellate scrutiny as compared to those of greater deference.[102]

One approach to this analysis is that of Professor Maurice Rosenberg. In an attempt to fashion a more intelligible structure for organizing the abuse of discretion spectrum, Professor Rosenberg emphasized the role of choice in discretion. He asserted that a decision cannot be considered "discretionary" without multiple possible outcomes placed before the decisionmaker.[103] Thus, Professor Rosenberg differentiated between "primary" or "true" discretion – where the trial court is not bound by any overriding principles or guidelines and thus is truly free to select its own decision – and "secondary" or "guided" discretion – which deals with the limitations of the appellate court's ability to substitute its discretion for that of the lower court.[104] Professor Rosenberg noted that an abuse of primary or true discretion would be unlikely to occur because there is no "right" answer in the absence of overriding criteria; therefore, abuse of discretion occurs only in the secondary or guided sense. There, an abuse of discretion takes place when the trial judge has failed to correctly apply factors handed down from the appellate court, or when the trial judge's choice is contrary to the evidence or experience or is even "so arbitrary, on its own terms, that the appellate court feels compelled to reject the actual choice."[105]

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[102] Friendly, *supra* note 95, at 755-56.

[103] Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636 (1971), *cited in* CHILDRESS & DAVIS, *supra* note 7, § 7.06[2][a], 7-67.

[104] *Id.*

[105] *Id.* (citing Motor Vehicles Manufacturers Ass'n v. State Farm Ins. Co., 463 U.S. 29, 43 (1983)).

Commentators and case law generally agree on two primary reasons for vesting the trial court with discretion, both with varying degrees of deference attached to them. First and most obviously, the trial judge has the advantage of being physically on the spot as the facts are gathered and applied to the law. The trial judge can look the witness in the eye, hear the quiver in his or her voice, and have a sense of the flow of the proceedings that a cold record can never replicate. Indeed, appellate courts have consistently cited the trial court's better position to evaluate evidence as a reason to grant discretion to the trial court.[106] Professor Rosenberg also deems this one of the two "good" reasons for granting trial judges discretion.[107] Because a unique, fact-bound determination is necessary to resolve certain types of issues – a determination that is almost, by definition, beyond that of an appellate court – a greater degree of deference to the trial court is often necessary.

The second "good" reason for granting trial judges discretion is that the issue under review is not amenable to general rules formulated by the appellate court or is too novel to be the subject of such rules.[108] In this vein, Professors Childress and Davis state that two of the four determiners of how much deference the trial court enjoys are: 1) If the trial court's decision is part of an evolving area of the law, is there

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[106] *See, e.g.*, Mason v. United States, 244 U.S. 362, 366 (1917) (holding, in the context of reviewing a trial court's order imposing a fine for contempt in refusing to answer questions during a grand jury investigation, "[o]rdinarily, [the trial judge] is in much better position to appreciate the essential facts than an appellate court can hold, and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject"); Christmas v. City of Chicago, 682 F.3d 632, 641 (7th Cir. 2012) ("Because we are confined to reading the trial court's transcript and cannot duplicate the district judge's experience of the trial, we defer to the district judge and find no abuse of discretion occurred."); Fox v. Hayes, 600 F.3d 819, 839 (7th Cir. 2010) ("A district judge, at the controls of an emotional, gut-wrenching trial like this, is in a far better position than appellate judges to weigh the competing factors that go into a probative value versus unduly prejudicial calculus. A trial judge's call on these types of issues can only be upset if we are convinced that the judge has clearly abused the wide discretion he enjoys."); Greenleaf v. Garlock, Inc., 174 F.3d 352, 363 (3d Cir. 1999) ("[W]e recognize that in matters of trial procedure . . . the trial judge is entrusted with wide discretion because he or she is in a far better position than we to appraise the effect of the improper argument of counsel.").

[107] CHILDRESS & DAVIS, *supra* note 7, §2.06[2][a] at 7-67 (citing Rosenberg, *supra* note 5, at 660-65); *see also* SMITHBURN, *supra* note 13, at 285-319 (listing trial court vantage point as one of several reasons for granting discretion to trial court rulings).

[108] CHILDRESS & DAVIS, *supra* note 7, §2.06[2][a] at 7-67 (citing Rosenberg, *supra* note 5, at 662).

enough precedent to show a pattern of decision, and if so, what is that pattern?, and 2) Is the appellate court ready to state a rule based on any pattern?[109] The Supreme Court has likewise picked up on this theme. In *Pierce v. Underwood*,[110] the Court set forth helpful considerations to help decide how much deference to grant a decision regarding whether to allow attorney fee shifting in an action under the Equal Access to Justice Act. The Court acknowledged that in many situations, "a long history of appellate practice" must define the appropriate standard of review.[111] However, when no such history exists, "it is uncommonly difficult to derive from the pattern of appellate review . . . an analytical framework that will yield the correct answer."[112] The Court then laid out facts that may call for more or less deference, including "whether the issue demands flexibility because it presents a "multifarious and novel question, little susceptible, for the time being at least, of useful generalization; and likely to profit from the experience that an abuse-of-discretion rule will permit to develop."[113] It makes sense that appellate courts will be hesitant to intervene where an issue is novel, or involves a unique fact pattern. In these situations, there is little reason to believe appellate courts are better positioned to decide such issues than trial judges. Appellate courts are also generally less concerned about individual cases that have no application to other disputes, and they may be reluctant to intervene on novel issues until they see how trial judges handle them.

At some point, however, a pattern develops, and appellate courts may sense the need to lay down markers to apply in future cases. At that point, the matter is likely to receive more scrutiny. As Professors Childress and Davis state:

> [This reason for conferring discretion]—issues that defy formulation—causes this concept of discretion to be in a constant state of flux. Some issues originally thought by the appellate courts to be incapable of governance by general rules of decision are, after a time and a number of decisions on cases with similar facts, found to be addressable by such rules. When, over time a pattern of decision with regard to similar facts emerges, it becomes

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[109] *Id.* § 7.06[4], 7-88.
[110] 487 U.S. 552 (1988).
[111] *Id.* at 558.
[112] *Id.*
[113] *Id.* at 562.

> in effect a rule of law, and that "corner of the pasture" is removed from the discretionary field. Failure to follow the rule of law then becomes legal error rather than a discretionary decision, even though the decisionmaking may continue to be labeled as discretionary. The same is true when some novel issue arises. The appellate courts may leave the decision to lower court discretion at least long enough to permit "experience to accumulate at the lowest court level" until the appellate courts see a pattern allowing a prescribed rule. Various issues will be, at any given time, at different stages in this evolutionary process.[114]

In addition to these two primary reasons for granting discretion, Professor Rosenberg and others have identified several "lesser" reasons for granting a trial court discretion, which may influence the degree of deference an appellate court grants to the trial court in some cases but which do not "provide clear clues as to which trial court rulings are cloaked with discretionary immunity of some strength."[115] These lesser reasons include judicial economy, trial court morale, and finality of the decision. Another study repeats many of these themes.[116]

Military appellate courts seem to utilize the same considerations in determining how much discretion a military judge's ruling receives. CAAF has noted that under the abuse of discretion standard, it will be more likely to defer to the military judge's ruling when the military judge's first-hand observation is particularly important.[117] Military

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[114] CHILDRESS AND DAVIS, *supra* note 7, § 7.06[2][a], at 7-69 to 70 (quoting Rosenberg, *supra* note 5, at 650, 662-63).

[115] CHILDRESS & DAVIS, *supra* note 7, § 7.06[2][a], at 7-69 to 70 (quoting Rosenberg, *supra* note 5, at 660-65).

[116] SMITHBURN, *supra* note 13, at 285-319.

[117] For example, *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012), held that the following in reviewing a military judge's determination on the issue of actual bias on the part of a court member:

> Appellate courts will review the military judge's ruling for abuse of discretion. "Because a challenge based on actual bias involves judgments regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,' a military judge's ruling on actual bias is afforded great deference." "'Great deference' is not a separate standard." Rather it is our recognition that the legal question of

appellate courts have also occasionally demonstrated a willingness to defer to fact-specific rulings, at least until a decipherable pattern of issues susceptible to appellate guidance emerges. For example, the principle prohibiting the government from an unreasonable multiplication of charges is well established in military law.[118] For decades, appellate case law supplied little guidance as to what constituted an unreasonable multiplication of charges. The result was this: "Lacking more particular guidance, military appellate courts simply defer to the judgment of military judges. Whether the charges against an appellant have been 'piled on,' so as to be unreasonable, is a question for the military judge in the exercise of his sound discretion."[119] Thus military judges were essentially vested with equitable powers largely considered beyond appellate review to remedy perceived issues with unreasonable multiplication of charges.[120] Over time, however, patterns began to emerge, and appellate judges began to see a need for more definitive appellate guidance that would narrow the field of military judges' discretion in this area.[121] By the turn of the century, the Navy-

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> actual bias rests heavily on the sincerity of an individual's statement that he or she can remain impartial, an issue approximating a factual question on which the military judge is given greater latitude of judgment. The standard, however, remains an abuse of discretion.

See also United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996); United States v. White, 36 M.J. 284, 287 (C.M.A. 1993)).

[118] United States v. Quiroz, 55 M.J. 334, 336-37 (C.A.A.F. 2007); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 27 (1949) ("One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person."); United States v. Oatney, 41 M.J. 619, 623 (N-M. Ct. Crim. App. 1994) ("The military judge retains discretion to dismiss specifications brought in contravention of this policy.").

[119] Lieutenant Colonel Michael J. Breslin & Lieutenant Colonel LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed*, 45 A.F. L. REV. 99, 123 (1998).

[120] *See, e.g.*, United States v. Erby, 46 M.J. 649, 652 (A.F. Ct. Crim. App. 1997) (discussing the military judge's power to adjust the maximum sentence in a given case based on equitable considerations).

[121] In *United States v. Baker*, Judge Cook argued:

> That multiplicity for sentencing is a mess in the military justice system is a proposition with which I believe few people familiar with our system would take issue. Servicemembers are often forced to make the fundamental decision whether to contest a case or to plead guilty, possibly in conjunction with a pretrial agreement, without the slightest appreciation of the risks at stake. By the same token, cases are often overturned years after trial simply because some higher level of review selected a different test for multiplicity from that

Marine Corps Court and then CAAF had seen enough, and set forth factors military appellate courts (and therefore military judges) would consider in analyzing unreasonable multiplication of charges issues.[122] Unreasonable multiplication of charges issues are still reviewed under the abuse of discretion standard, but the pasture of trial judge discretion has narrowed considerably.

Military appellate courts also evince a recognition of the remaining reasons for conferring deference to the trial judge. Therefore, military appellate courts will sometimes grant a greater degree of deference to trial judge decisions based on concerns such as protecting the function and morale of the trial judge, judicial economy and efficiency, finality in the administration of justice, and reducing the size of the appellate docket.[123]

Inside or outside the military justice system, simply determining that an issue is reviewed under the abuse of discretion standard does not answer the question of how much discretion the trial judge receives. Even if appellate courts do not always specifically state as such, the presence or absence of certain underlying reasons for granting trial judges discretion may move the appellate court to any one of an infinite number of spots along a spectrum of deference.

> agreed upon by the trial participants. The instant case is such an example. This is not justice; this is chaos!

14 M.J. 361, 372 (C.M.A. 1983) (Cook, J., dissenting).

[122] United States v. Quiroz, 52 M.J. 510 (N-M. Ct. Crim. App. 1999), *set aside and remanded*, 55 M.J. 334 (C.A.A.F. 2001). CAAF set aside and remanded the service court's decision in *Quiroz* based on one word the lower court used in the factors it developed. Otherwise, CAAF approved of the factors the service court utilized.

[123] *See, e.g.*, United States v. Adcock, 65 M.J. 18, 29 (C.A.A.F. 2007) (Stucky, J., dissenting):

> At trial, military judges will face protracted litigation concerning the minutiae of confinement programs and whether a particular facility or guard violated some provision of a service regulation. Appellate court dockets will be flooded with pleas that military judges abused their discretion in not granting additional credit. Ultimately, this Court may find itself the de facto supervisor of substantive conditions of confinement involving members of the armed forces – a function that we are exceedingly ill suited to perform.

C. Military Appellate Courts Have Not Solved the Mixed Questions Challenge

The abuse of discretion standard faces a particular dilemma in the case of "mixed questions." A mixed question "simply presents the decision maker with the task of applying the law to the facts of the case."[124] Many appellate issues require the trial judge to first determine what occurred: what the facts are that give rise to the motion for relief. The trial judge must then determine the correct legal standards that apply to the motion, accurately noting any governing legal authorities, including those that require him or her to analyze certain factors in reaching a decision. Finally, the trial judge must then apply the facts to the law to make a ruling. The staple of appellate work involves reviewing these types of rulings. As Professor Rosenberg put it, "All appellate Gaul . . . is divided into three parts: review of facts, review of law, and review of discretion."[125]

At first glance, appellate review of such questions may seem to be a fairly easy task. Reviewing courts merely need to separate the trial judge's ruling into its component parts, apply the correct standard to each component, and determine whether to affirm or reverse the trial court's ruling. A military judge's findings of fact are generally reviewed under the clearly erroneous standard, while an appellate court reviews de novo whether the military judge applied the correct legal principles to the ruling. Therefore, appellate courts need only to separate fact from law and apply the appropriate standard to reviewing each part of the trial judge's decision.

In practice, however, review of mixed questions is not nearly so simple. For one thing, determining what is a finding of fact and what is a conclusion of law is often surprisingly difficult. By definition, a finding of fact is empirical – it concerns itself with events that actually take place – while conclusions of law concern rules or principles.[126] These definitions seem straight-forward but lead to some surprisingly difficult determinations. For example, if a ruling calls for determining whether two people were married at the time of the charged act, this determination might include both factual (was there a marriage

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[124] Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 235 (1991).

[125] Rosenberg, *supra* note 5, at 173.

[126] *See* Hofer, *supra* note 14, at 235-39 (summarizing various approaches to defining facts versus law).

certificate) and legal (was the marriage valid under state law) components.[127] Similarly, questions of the reasonableness of an action or belief often present difficulties in the law versus fact determination.[128] As one work notes:

> The importance of the law-fact distinction is surpassed only by its mysteriousness. On the one hand, it is the legal system's fundamental and critical distinction. Significant consequences attach to whether an issue is labeled "legal" or "factual" – whether a judge or jury will decide the issue; if, and under what standard, there will be appellate review; whether the issue is subject to evidence and discovery rules; whether procedural devices such as burdens of proof apply; and whether the decision has precedential value. On the other hand, the distinction continues to bedevil courts and commentators alike. In recent times, the Supreme Court has referred to the distinction as "elusive," "slippery," and as having a "vexing nature" – while acknowledging that its decisions have "not chartered an entirely clear course" and that no rule or principle will "unerringly distinguish a factual finding from a legal conclusion."[129]

Because distinguishing between facts and law can be so difficult, and because labeling a matter as a fact or law may determine the outcome of the appeal, some commentators have skeptically asserted that the fact or law label is applied not based on any rational distinction. Rather, they assert, the label is used merely to support an outcome the court wants to reach.[130]

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[127] *Id.* at 234-35.

[128] *Id.* at 244-45.

[129] Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) (quoting Miller v. Fenton, 474 U.S. 104, 113 (1985); Thompson v. Keohane, 516 U.S. 99, 110-111 (1995); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982); Williams v. Taylor, 529 U.S. 362, 385 (2000)).

[130] *See* Randolph E. Paul, Dobson v. Commissioner*: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 811-12 (1944) (noting the "crazy quilt of contradiction" in courts' labeling of matters as law or fact, summarizing various commentators' difficulties squaring judicial decisions labeling such matters, and noting scholars' views that matters are labeled as law or fact based on the courts' disposition to review the issues); *see also* Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 239-40 (1955):

In military practice, CAAF has similarly recognized that "the distinction between a question of law and a question of fact is not always clearly defined . . . ."[131] A dissenting judge on the Navy-Marine Corps court also recognized this difficulty:

> In reviewing factual determinations made by a trial judge—an empirical type process to establish the who-what-why-when-and-how factors in a case—appellate courts should pay a high degree of deference to the trial court, which is in the better position to evaluate and weigh the pertinent evidence relating to factual issues, while making credibility determinations during the live, in-court testimony of witnesses. Legal conclusions, however, require no such logical deference, as the appellate court, without the immediate and pressing duties and responsibilities involved in a live, ongoing trial, is in a just-as-good, or perhaps in a better position to examine questions of law with its collaborative, deliberative process.
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> Applying the fact-law distinction is complicated, however, in cases such as this one, with its mixed question of fact and law. The difficulty exists in attempting to "unmix" the issues, in order to be able to apply the clearly-erroneous standard to the factual aspects or issues, while reviewing the legal issues *de novo*.[132]

The problem of mixed questions does not end with separating facts from law. A more problematic issue is determining what standard

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> It is often said that in many situations it is difficult, perhaps indeed impossible, to make a clean distinction between fact and law; that the difference is one of degree, that the relation of fact and law can be described as a spectrum with finding of fact shading imperceptibly into conclusion of law. It is sometimes said that a question is fact or law depending on whether the court chooses to "treat" it as one or the other.

[131] United States v. Lowry, 2 M.J. 55, 58 (C.M.A. 1976).

[132] United States v. Daniels, 58 M.J. 599, 608 (N.M. Ct. Crim. App. 2003) (Villemez, J., dissenting). CAAF later overturned the majority in the case, siding with Judge Villemez that the warrantless search of the accused's bedside nightstand violated the Fourth Amendment. United States v. Daniels, 60 M.J. 69 (C.A.A.F. 2004).

applies to the trial judge's application of the facts to the law. For example, where the appellate court reviews a trial judge's determination that probable cause supported a search warrant, the trial judge will develop findings of fact about what information was presented to the magistrate and will make conclusions of law, citing cases that define probable cause. However, a third step remains: the trial judge must make an ultimate conclusion that probable cause did or did not exist, applying the facts to the law. Is this application a finding of fact (reviewed under the clearly erroneous standard), a conclusion of law (reviewed de novo), or a third category involving application of facts to law that warrants its own standard of review?

Civilian courts are widely split on this issue.[133] Some courts label this application of facts to law a question of law to be reviewed under a de novo standard.[134] Under this view, even if the ultimate standard of review for the mixed question is labeled abuse of discretion, the court really reviews the matter without deference because the heart of the matter being reviewed is the application of the facts to the law, and this application is considered a question of law. Other courts label such applications as matters of law to be decided de novo but nonetheless grant some discretion to the trial court's ruling if the decision involves the application of facts to settled areas of the law.[135] Still another

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[133] *See* Kunsch, *supra* note 5, at 27 (citing Pullman-Standard v. Swint, 456 U.S. 273, 290 n.19 (1982)) (noting there is "substantial authority in the Circuits on both sides" of the question of what standard of review to apply to mixed questions); United States v. McConney, 728 F.2d 1195, 1200 (9th Cir. 1984) (noting a "disarray in standard of review jurisprudence [that] appears to be pervasive" concerning the issue of mixed questions). *See also* Lee, *supra* note 124, at 235-36:

> One group of circuits generally reviews findings on [mixed] questions on a non-deferential, de novo basis; another group generally reviews them on a highly-deferential, "clearly erroneous" basis; a third group varies the standard of review depending on the "mix" of the question; and a fourth group has yet to establish a clear pattern. The Supreme Court, despite clear opportunity, has never undertaken to resolve the conflict.

[134] Davis, *supra* note 35, at 48. For a good example of this approach with enlightening analysis, see Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102-03 (3d Cir. 1981).

[135] *See* Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIRCUIT B.J. 279, 281 (2001-2002) (asserting that under the de novo standard, the trial court's opinion will nonetheless receive deference when the trial court has simply applied settled law to the facts).

approach explicitly defers to the trial judge's application of the facts to the law and will only reverse it if that discretion has been abused.[136] No consensus has emerged.[137]

In the federal circuits, a popular approach analyzes whether the mixed question is based more in law or fact and then adopts the standard that corresponds with the predominant issue in the mixed question. In the Tenth Circuit, for example, the court reviews mixed questions "under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles."[138] Similarly, the Sixth Circuit grants "significant deference" to the trial court when the mixed question is "highly fact-based,"[139] and

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[136] *See* Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error: A New Paradigm for Criminal Cases*, 43 CRIM. LAW BULLETIN 955 (2007).

> To the extent the trial court's determination turns on an interpretation of a rule of evidence, i.e., a mistake of law, the review is plenary, frequently called de novo. Where the trial court has made a factual finding, the standard of review is clearly erroneous. Under this standard a finding of fact will be reversed only if it is completely devoid of a credible evidentiary basis or bears no rational relationship to the evidence in support. Finally, application of a rule of evidence to the facts is reviewed applying the abuse of discretion standard. Reversal will occur only if the ruling is manifestly erroneous, i.e., the trial court commits a clear error of judgment.

Id.

[137] In addition, a state high court's effort to resolve the mixed question conundrum is notable. In *State v. Pena*, 869 P.2d 932 (Utah 1994), the court reviewed a trial court's denial of a defense motion to suppress statements and the results of a strip search at a jail. The court recognized that such mixed issues present "thorny issues" for appellate courts, and held that the trial judge is entitled to some deference in applying the legal standard to a set of facts. *Id.* at 936-37. The court analogized review of mixed questions along a "spectrum" or in terms of a "pasture" in which the trial court is free to roam, and held that with fact-intensive issues incapable of broad legal rules, this pasture would be larger. *Id.* at 937-38. The court ultimately concluded that the standard of review for reasonable-suspicion determinations is a determination of law and is reviewable de novo; however, the trial judge receives "a measure of discretion" when applying the reasonable suspicion standard to a given set of facts. *Id.* at 939. This case was later abrogated and has been modified to some degree. *See, e.g.*, State v. Levin, 144 P.3d 1096 (Utah 2006) (describing that mixed questions of law and fact require a "determination of whether a given set of facts comes within the reach of a given rule of law"). However, *Pena* continues to be cited positively in state court decisions. For a good overview of the *Pena* case, see Andrew F. Peterson, *Ten Years of Pena: Revisiting the Utah Mixed Question Standard of Appellate Review*, 19 BYU J. PUB. L. 261 (2004).

[138] Armstrong v. Comm'r, 15 F.3d 970, 973 (10th Cir. 1994).

[139] United States v. Hazelwood, 398 F.3d 792 (6th Cir. 2005).

the Second Circuit reviews mixed questions "either de novo or under the clearly erroneous standard[,] depending on whether the question is predominantly legal or factual, and exercises of discretion for abuse thereof."[140] The Seventh Circuit takes a slightly different approach. When "the only question is the legal significance of a particular and nonrecurring set of historical events," the court reviews the trial judge's application of the facts to the law under the clearly erroneous standard because the appellate court's "main responsibility is to maintain the uniformity and coherence of the law," a responsibility not triggered for facts unique to a given case.[141] The First Circuit also uses the clearly erroneous standard for mixed questions based on a similar rationale to that of the Seventh Circuit.[142] Often, courts have no cohesive framework for deciding the standard used in such application issues.[143]

The Supreme Court has been unwilling to prescribe one standard of review for all mixed questions, preferring instead a functional approach in which the Court decides, on a case-specific basis, whether the trial judge or the appellate court is in a better position to determine the matter because it more closely resembles a factual or legal conclusion.[144] The Court has stated that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[145] One factor the Court appears to consider in deciding which approach to take in a given situation "is a sense in which the matter appears to be discretionary, i.e., does it smack of judgment, choice, sensitivity, and presence, or is instead somewhat informed by broader concepts that seem legal?"[146] Despite this general guidance, no definitive Supreme Court guidance exists as to when a trial court's application of the facts to the law is to be granted some measure of deference.

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[140] United States v. Thorn, 446 F.3d 378, 387 (2nd Cir. 2006).
[141] Mucha v. King, 792 F.2d 602, 605-06 (7th Cir. 1986).
[142] Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 109 n.2 (1st Cir. 1979).
[143] *See* Lee, *supra* note 124, at 245-47 (surveying federal circuits in which courts follow "no discernable pattern" in treating mixed questions).
[144] Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 15 (1997).
[145] Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).
[146] CHILDRESS & DAVIS, *supra* note 7, §7.06[3][b] at 7-77.

Mixed questions therefore remain, as the Court of Claims once characterized them, "elusive abominations."[147] In the words of one commentator, mixed questions "[have] become a sort of catch-all, an amorphous box into which courts place any issue or combination of issues that cannot nearly be labeled law or fact. Hence, the lack of clarity and coherence."[148] The end result is the appellate court "sit[s] precisely at the midpoint between the Scylla of allowing errors to go uncorrected and the Charybdis of judicial inefficiency."[149]

Scholars likewise disagree on the best approach to resolve this issue. One commentator surveyed the various approaches the circuits have taken regarding mixed questions, and concluded that the clearly erroneous standard is the best approach, at least for application issues that are case-specific and not likely to establish broad precedent.[150] Another has advocated for the standard of review to be determined based on whether the issue is primarily factual or primarily a question of law.[151]

One commentator proposed an intriguing solution: recognize that there is no one best approach for applying the standard of review to mixed questions. Rather, this author noted that what are broadly termed "mixed questions" really consist of three primary and distinct "issue-types."[152] The first type of mixed question is an "evaluative determination" that requires the trial court to make a judgment about a person's knowledge or belief, such as reasonableness. Evaluative determinations would receive more or less deference based on whether the issue is recurring or unique to a given fact pattern.[153] Another type of mixed question is a question of "definitional application": an issue that requires the decision-maker to determine whether a particular set of facts falls within a legal definition. This would likewise have varying standards of review based on whether the reviewing court is being asked to refine the definition in a way that is generally applicable to other cases, or if it is simply a question of whether the facts of a particular case

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147 S & E Contractors, Inc. v. United States, 433 F.2d 1373, 1378 (Ct. Cl. 1970).
148 Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 102 (2005).
149 Lee, *supra* note 124, at 236.
150 *Id.*
151 Peterson, *supra* note 137, at 271-75.
152 Warner, *supra* note 148, at 128-41.
153 *Id.* at 131-32.

fall within an established definition.[154] Still other mixed questions are "compound questions" – questions that consist of multiple sub-issues that involve questions of law, fact, or otherwise. These questions should be separated into their components and each sub-issue should be reviewed under its own standard rather than applying one standard of review to the entire matter.[155] As appealing as this multi-faceted approach is, it has not gained traction in appellate decisions.

In military appellate practice, CAAF has established the standard of review for mixed questions as abuse of discretion.[156] The "abuse of discretion" label for such questions is often misleading, however, because the real issue being reviewed – the application of the facts to the law – is often held to be a conclusion of law and reviewed de novo.[157] For example, a decision regarding the admission of evidence is reviewed for an abuse of discretion, but CAAF has nonetheless held that the ultimate issue is a question of law.[158] Likewise, the entitlement to confinement credit for illegal pretrial punishment is recognized as a mixed question of law and fact, but appellate courts review de novo the ultimate question of whether an appellant is entitled to credit for a violation of Article 13 of the Uniform Code of Military Justice.[159] Military courts have applied a de novo review to the ultimate conclusion in several other mixed scenario questions, such as resolution of a marital privilege issue[160] and whether probable cause existed for a search.[161] CAAF has demonstrated a willingness to review even heavily fact-specific issues under a de novo standard. For example, in one recent decision, the court found the military judge abused his discretion in two respects: by concluding that an individual involved in an initial viewing and collecting of evidence from a friend's computer was acting as an agent of the government, and by using this erroneous conclusion as the basis for suppressing the evidence from two laptop computers and a flash drive.[162] Under this approach, the only area of mixed questions in which the military judge receives deference involves findings of fact. If the

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[154] *Id.* at 133-35.
[155] *Id.* at 139-42.
[156] United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).
[157] *See, e.g.*, United States v. Rose, 71 M.J. 138, 143 (C.A.A.F. 2012); United States v. Durbin, 68 M.J. 271, 273 (C.A.A.F. 2010).
[158] United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008).
[159] United States v. Mosby, 56 M.J. 309, 310 (C.A.A.F. 2002).
[160] Durbin, 68 M.J. at 273.
[161] United States v. Gallo, 53 M.J. 556, 561 (A.F. Ct. Crim. App. 2000).
[162] United States v. Buford, No. 14-6010/AF, 2015 CAAF LEXIS 308 (C.A.A.F. Mar. 24, 2015).

true issue being reviewed involves the application of the facts to the law rather than the findings of fact themselves – the normal situation on appeal – the military judge receives no deference.

In some cases, however, military courts take a slightly different approach. Courts sometimes lay out the clearly erroneous and de novo aspects of the standard but then add language indicating some measure of deference is warranted.[163] This is particularly true in cases involving the admission of expert testimony. In *United States v. Ellis*,[164] for example, CAAF reviewed a military judge's admission of expert testimony on the appellant's risk of recidivism. The court noted decisions to admit or exclude expert testimony are reviewed for an abuse of discretion, and a military judge "abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence in record; (2) if incorrect legal principles were used; or *(3) if his application of the correct legal principles to the facts is clearly unreasonable*."[165] Similarly, CAAF has held in a case reviewing the admission of expert testimony that "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[166] The CAAF has also stated that for mixed questions involving admission of expert testimony, "[a]s long as a military judge properly follows the appropriate legal framework, we will not overturn a ruling for an abuse of discretion unless it was 'manifestly erroneous.'"[167] Thus, in a case reviewing the military judge's admission of a physician's examination of a child victim, the court granted deference to the military judge's ruling and upheld it despite voicing some concerns about certain aspects of the ruling.[168] In all of these mixed question cases, the court granted the military judge significant deference in his or her application of the facts to the law.

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[163] *See, e.g.*, United States v. Wicks, 73 M.J. 93 (C.A.A.F. 2013); United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011).
[164] 68 M.J. 341, 344 (C.A.A.F. 2010).
[165] *Id.* at 344 (citing United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)) (emphasis added).
[166] United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993) (citation omitted).
[167] United States v. Sanchez, 65 M.J. 145, 149 (C.A.A.F. 2007) (quoting United States v. Griffin, 50 M.J. 278, 284 (C.A.A.F. 1999)).
[168] *Id.* at 153.

This willingness to grant deference to application of facts to law is not limited to cases involving the admission of expert testimony. In a government appeal of a military judge's ruling to suppress a urinalysis result – a mixed question – CAAF held that a military judge abuses his discretion "when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[169] In another formula for analyzing application issues that indicates something other than a de novo standard, the court held that even when "the evidence in [the] record may well have supported the [military judge's] decision," the military judge may nonetheless have abused his discretion where the military judge's ruling was based on a "misapprehension of the applicable law" and the military judge's findings failed to address the relevant considerations.[170]

It is difficult to decipher a pattern as to when the military judge receives some deference in the application component of mixed questions and when he or she does not. Military appellate courts have not attempted to resolve their different pronunciations on this issue, and sometimes it is simply not clear which standard the court chooses.[171] Occasionally, however, military courts have at least recognized that labeling the standard of review of mixed questions under the term "abuse of discretion" standard is confusing when the ultimate issue is usually reviewed de novo. In one case holding the appellant's Article 31 rights were not violated, Judge Sullivan of CAAF concurred based on his understanding that "use of the 'abuse-of-discretion' terminology to [such claims] does not accurately respond to the standard of review which this

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[169] United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008) (citing United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)).

[170] United States v. Cokeley, 22 M.J. 225, 229 (C.M.A. 1986).

[171] *See, e.g.*, United States v. McCarthy, 47 M.J. 162 (C.A.A.F. 1997). In this case, CAAF held that the issue of whether a pretrial prisoner suffered unlawful punishment presents a mixed question of law and fact, which qualifies for "independent review." *Id.* at 165 (quoting Thompson v. Keohane, 516 U.S. 99 (1995)). The court then held that for "basic, primary, or historical facts" that essentially dictate the outcome of the military judge's ruling, such as purpose or intent to punish an accused, it would reverse only for a clear abuse of discretion. *Id.* (quoting Thompson, 516 U.S. at 109-113). Judge Effron, concurring, noted that he was not sure what standard of review the majority settled upon: "In this case, although the majority asserts that it is applying an 'abuse of discretion' standard, the majority's detailed analysis of the historical events reflects a de novo review." *Id.* at 168 (Effron, J., concurring).

Court employs in reviewing suppression motions denied by military judges":[172]

> A military judge has no discretion to admit an involuntary confession or one taken in violation of Article 31, Uniform Code of Military Justice; or one prohibited by *United States v. McOmber*, 1 M.J. 380 [(C.M.A. 1976)], or the version of Mil. R. Evid. 305 (e) . . . in effect at the time of trial; or one taken in violation of the Fifth or Sixth Amendment.
>
> Admittedly, in *United States v. Ayala*, [43 M.J. 296, 298 (C.A.A.F. 1995)], this Court employed this umbrella term [abuse of discretion] in the suppression context. However, it specifically defined this term to include clearly-erroneous factfinding review and de novo legal determinations, which definition also applies to mixed questions of fact and law. I agree that these particular standards of review are appropriate for determining suppression-motion appeals. However, I do not believe "abuse of discretion" adequately captures the full breadth of the legal review required of this Court on such matters. On resolution of the legal questions raised in a suppression motion, we do not defer to a military judge's discretion.[173]

Judge Sullivan's depth of explanation remains the exception rather than the rule. Normally appellate courts either do or do not grant deference to a military judge's application of the facts to the law, without elucidation. Military case law would benefit from further exploration of this area. Consistent with the approach of some courts and commentators, mixed questions that involve a case-specific application of facts to well-settled law in a way that is unlikely to change the definition of a legal standard could receive some amount of deference, regardless of whether that application is labeled as a "conclusion of law." Conversely, applications that ask the military judge to make a ruling with broader impact, such as a determination about whether a widely-used law enforcement tactic *per se* renders a confession involuntary, could be reviewed under scrutiny approaching a de novo standard. In this latter

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[172] United States v. Payne, 47 M.J. 37, 44 (C.A.A.F. 1997) (Sullivan, J., concurring).
[173] *Id.*

situation, a military judge's findings of fact will receive deference and will frame the legal issue to be decided, but the reviewing court will conduct its own application of the facts to the law to reach an independent decision. Of course there will be some cases that may lie in the middle of these two extreme types of mixed questions, in which case appellate counsel should be prepared to argue why a given case lies closer to one extreme than the other.

D. Military Appellate Courts Are Generally Less Deferential Than Their Civilian Counterparts in Employing the Abuse of Discretion Standard

Abuse of discretion involves a spectrum of deference, but as a general matter, the standard is supposed to be highly deferential to the trial judge's decision. An appellate court may uphold a decision under this standard even if it disagrees with that decision. In the military justice system, however, the principle of deference is less likely to influence the appellate court if it perceives an injustice has occurred that deserves remedying. The military justice system is often labeled "paternalistic," meaning appellate courts are more willing to protect the interests of the accused or a convicted servicemember than their civilian counterparts might be in an effort to ensure that the discipline aspect of the military justice system does not come at the expense of justice.[174] To be sure, there is support for the proposition that the military justice system has grown less paternalistic over time,[175] and in particular, it has been noted that CAAF has "increasingly settled" on an "overwhelmingly . . . narrow" approach to standards of review and may be heading to a point

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[174] *See, e.g.*, David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 39 (2013) ("Some have viewed the military justice system as being paternalistic"); Eugene R. Fidell, *Zen and the Jurisprudence of the U.S. Court of Appeals for the Armed Forces*, 54-MAY FED. LAW. 28, 29 (2007) ("[W]hat is the jurisprudence of the U.S. Court of Appeals for the Armed Forces? It continues to be one of paternalism"); United States v. Sunzeri, 59 M.J. 758, 762 (N-M. Ct. Crim. App. 2004) ("The military justice system, as it is currently designed and has developed – with its post-World War II philosophy, revisions, and implementation of the Uniform Code of Military Justice – is quite paternalistic in some regards, with its numerous built-in safeguards to protect the individual servicemember in his or her quest to navigate, in his or her best interests, the treacherous waters of military discipline.").

[175] *See, e.g.*, Hon. Robinson O. Everett, *Specified Issues in the United States Court of Military Appeals*, 123 MIL. L. REV. 1, 5 (1989) (stating that "paternalism is on the wane" and referring to "a bygone era of paternalism in military justice"); United States v. Rivera, 44 M.J. 527, 530 (A.F. Ct. Crim. App. 1996) (suggesting the military justice system has grown less paternalistic in recent years).

in which it defers significantly more to trial court rulings than its civilian counterparts.[176] However, the fact remains that military appellate courts – particularly the service courts – sense a special responsibility to protect the system in actuality and in appearance. As a result, they may be inclined to grant less deference to the military judge than their civilian counterparts would regardless of the stated standard of review.

As will be discussed *infra*, the service courts of criminal appeals have broad authority under Article 66(c), UCMJ, to substitute their judgment for that of the military judge. But although CAAF does not enjoy this same authority and is therefore bound by the abuse of discretion standard when applicable,[177] and despite the appearance of embracing a narrower standard of review, CAAF has often demonstrated a willingness to pierce the deference afforded by the abuse of discretion standard. Despite a docket that results in only about 40 opinions annually in recent years,[178] CAAF typically issues several decisions each term finding that a military judge abused his or her discretion. Just since 2011, CAAF found that military judges abused their discretion by:

- Accepting an appellant's guilty plea of possessing images of "nude minors and persons appearing to be nude minors" when the plea contained unresolved inconsistencies, and when the military judge failed to adequately elicit the appellant's understanding of the distinction between criminal and constitutionally protected conduct and incorrectly stated the law.[179]
- Admitting an accused's statement to investigators without contextually analyzing whether he could and did knowingly and intelligently waive his right to counsel, and instead focusing solely on the question of voluntariness, and in addressing whether the accused's waiver was knowing and intelligent solely as a conclusory finding of fact, rather than as a conclusion of law.[180]

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[176] Fidell, *Going on Fifty*, *supra* note 56, at 1224.

[177] United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990) ("This Court would be required to use an 'abuse of discretion' test should the military judge enjoy any discretion in his ruling.").

[178] *See Annual Reports*, U.S. CT. OF APPEALS FOR THE ARMED FORCES (Apr. 1, 2015), http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm.

[179] United States v. Moon, 73 M.J. 382 (C.A.A.F. 2014).

[180] United States v. Mott, 72 M.J. 319 (C.A.A.F. 2013).

- Admitting evidence under Military Rule of Evidence 413 of prior sexual assaults committed by the appellant for which he had previously been acquitted, without mentioning or reconciling the appellant's important alibi evidence and with little to no weight given to the fact of the prior acquittal.[181]
- Accepting the appellant's guilty plea to kidnapping a minor without questioning the defense counsel to ensure the appellant's knowledge of the sex offender registration consequences of her plea.[182]
- Failing to excuse a member for actual bias after that member asked a question of a witness that suggested the member believed the accused was a pedophile.[183]
- Admitting a green detoxification drink bottle as demonstrative evidence where the bottle had minimal to no probative value, the demonstrative evidence was not helpful, the bottle was not an accurate representation of bottles described by witnesses, and the bottle failed a balancing test under Military Rule of Evidence 403.[184]
- Prohibiting a pretrial review of evidence of receipt of child pornography without sufficient justification, where the parties had agreed to such a review, and there was no argument that the scheduled pretrial review would have interfered in the trial proceedings.[185]

This is not a complete list of CAAF's findings of abuse of discretion during this period. CAAF undoubtedly had valid reasons to find abuses of discretion in these cases, and there is no statistical comparison available to determine if CAAF is more willing to find an abuse of discretion than other similar courts (especially ones that enjoy discretionary review as does CAAF). However, it can safely be said that CAAF is not shy about exercising its "supervisory role as the highest court in the military justice system."[186] The CAAF has specifically recognized its responsibility to "continuously bear in mind that to perform its high function in the best way justice must satisfy the

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[181] United States v. Solomon, 72 M.J. 176 (C.A.A.F. 2013).
[182] United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013).
[183] United States v. Nash, 71 M.J. 83 (C.A.A.F. 2012).
[184] United States v. Pope, 69 M.J. 328 (C.A.A.F. 2011).
[185] United States v. Jones, 69 M.J. 294 (C.A.A.F. 2011).
[186] United States v. Dowty, 60 M.J. 163, 175 (C.A.A.F. 2004).

appearance of justice."[187] By its own words, CAAF is willing to bend standards of review to prevent an unjust result and to protect the military justice system.[188]

Military appellate courts have a special responsibility to protect the fairness of the military justice system, both in reality and in appearance. As a result, a deferential standard of review has not always prevented them from intervening to reach what they believe is a just result.

E. The Unique Authority of the Courts of Criminal Appeals Allows for Increased Appellate Scrutiny

A military judge's findings of fact are reviewed under the clearly erroneous standard of review,[189] but as noted above, the clearly erroneous standard is often subsumed under the abuse of discretion standard for mixed questions. Many questions analyzed under the abuse of discretion standard involve findings of fact made by the military judge, and appellate review of findings of fact is typically exceedingly deferential to the trial judge. Therefore, CAAF has held that, in reviewing a military judge's findings of fact, "[W]e will not substitute our judgment for that of the military judge who was present in the courtroom and familiar with the sense of what was happening at the time of the [events]."[190]

However, the service-level courts of criminal appeals are empowered to do exactly what CAAF said it may not – to substitute their judgment for that of the military judge on findings of fact. For example, in *United States v. Cole*,[191] the accused pled guilty to two specifications of committing indecent acts with two juvenile females; a pretrial agreement provided that the four remaining indecent-act specifications and one

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[187] United States v. Greatting, 66 M.J. 226, 232 (C.A.A.F. 2008) (quoting Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988)).

[188] United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983) ("In view of the policy clearly stated in Article 37[(a), UCMJ], we have never allowed doctrines of waiver to prevent our considering claims of improper command control. Indeed, to invoke waiver would be especially dangerous, since a commander willing to violate statutory prohibitions against command influence might not hesitate to use his powers to dissuade trial defense counsel from even raising the issue.").

[189] Ham, *supra* note 27, at 17.

[190] United States v. Travers, 25 M.J. 61, 63 (C.M.A. 1987).

[191] 31 M.J. 270 (C.M.A. 1990).

specification of sodomy with a juvenile female would be dismissed.[192] In sentencing proceedings, the defense called an expert clinical psychologist to testify that lengthy confinement was not appropriate since the accused was amenable to out-patient treatment for his issues concerning sexual behavior with children. Trial counsel then cross-examined the expert about the progression of sexual activity that the accused had engaged in with the victims, and the expert's answers at least hinted at the misconduct referred to in the dismissed specifications.[193] Despite the defense counsel's objection, the military judge permitted the cross-examination. The Air Force court, in a 2-1 decision, found that the military judge erred in overruling the defense's objection.[194] The Judge Advocate General then certified for review by the Court of Military Appeals the question of whether the Air Force court failed to apply the appropriate abuse of discretion standard.

The Court of Military Appeals held that whether such rulings are reviewed under the abuse of discretion standard is irrelevant because service courts possess broad powers under Article 66(c) of the UCMJ[195] that allow a service court to "substitute its judgment" for that of the military judge. Therefore, the service court may review the admissibility of uncharged misconduct de novo even though the normal standard for review of this issue is abuse of discretion.[196] The service court may apply the normal abuse of discretion standard if it chooses, or it may elect not to do so, the court held.[197]

Following *Cole*, service courts of criminal appeals on rare occasions have elected to exercise their Article 66(c) authority to substitute their judgment for that of the military judge even when the normal appellate standard of review is abuse of discretion.[198] Appellate practitioners

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[192] *Id.* at 270-71.
[193] *Id.* at 271.
[194] United States v. Cole, 29 M.J. 873 (A.F.C.M.R. 1989).
[195] 10 U.S.C. § 866(c) (2012).
[196] United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990).
[197] *Id.*
[198] *See* United States v. Olean, 56 M.J. 594 (C.G Ct. Crim. App. 2001) (electing not to apply the abuse of discretion standard to a military judge's ruling allowing the introduction of evidence of the victim's knowledge of the accused's uncharged misconduct but finding no error in substituting its judgment for that of the military judge). *Cf.* United States v. Anderson, 36 M.J. 963, 981 n. 29 (A.F.C.M.R. 1993) (warning military judges that explaining their balancing analysis regarding admissibility of uncharged misconduct threatens the deference they enjoy under the abuse of discretion

should always remember when advocating for a particular level of deference at the court of criminal appeals that these courts possess special powers "designed to benefit an accused."[199] In fact, they have "*carte blanche* to do justice."[200] Following this lead, service courts have often stressed their willingness to right perceived wrongs, no matter how deferential the standard of review is.[201] In fact, the courts of criminal appeals' broad authority allows them to act as "the proverbial 800-pound gorilla when it comes to their ability to protect an accused."[202]

Article 66(c) of the UCMJ not only grants service-level military appellate courts the power to disregard standards of review, it also bestows up on them broad fact-finding authority to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."[203] "This awesome, plenary, de novo power of review grants unto the [court of criminal appeals] authority to, indeed 'substitute its judgment for that of the military judge.'"[204] The statutory responsibility of the courts of criminal appeals under Article 66(c) is "one of the broadest and most unusual of any criminal appellate court in this country."[205]

This authority is not unlimited. In granting the service courts fact-finding authority, "Congress intended a court of criminal appeals to act as factfinder in an appellate-review capacity and not in the first instance as a trial court."[206] A service court has "fact-finding power on collateral claims," but it may not "determine innocence on the basis of evidence

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standard, and "that deference need not be permanent" under the authority granted the service courts by the *Cole* decision).

[199] United States v. Smith, 39 M.J. 448, 451 (C.M.A. 1994).

[200] United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991).

[201] *See, e.g.*, United States v. White, NMCCA 200200803 (N.M. Ct. Crim. App. 31 August 2006) (unpub. op.), at *6 (noting that although security determinations of confinement officials normally receive great deference on appeal, "we will not hesitate to hold the Government accountable" where such determinations are based on improper reasons); United States v. Harris, 34 M.J. 1213, 1216 (A.C.M.R. 1992) (noting that while admission of evidence under the Mil. R. Evid. 403 balancing test is normally "within the sound discretion of the trial court," if the court's mandate in Article 66(c), UCMJ, "requires us to reverse a case because of an erroneous discretionary ruling by the trial judge, then we will not hesitate to do so").

[202] United States v. Parker, 36 M.J. 269, 271 (C.M.A. 1993).

[203] 10 U.S.C. §866(c) (2012).

[204] *Cole*, 31 M.J. at 272.

[205] United States v. Bauerbach, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001).

[206] United States v. Ginn, 47 M.J. 236, 242 (C.A.A.F. 1997).

not presented at trial."[207] Therefore, if a court of criminal appeals wishes to rely upon information not presented at trial to establish particular facts, it often must resort to remanding the case to the trial level for a post-trial fact-finding hearing.[208] In addition, the service courts may not find as fact any allegation in a specification for which the trial court found the accused not guilty.[209] In general, however, courts of criminal appeals possess broad fact-finding authority not seen in other appellate courts:

> Under [Article 66(c)], the basic character of review by the [Courts of Criminal Appeals] is both original and appellate. It is appellate because it involves a general power to examine and revise the judgment of a military or naval trial court, or court martial, an original-jurisdiction tribunal. It is original because the last two sentences of the statute explicitly empower the [courts of criminal appeals] to examine and determine *anew* both the facts of the case and the law, albeit from a written record only, in arriving at their own decisions independently of any trial-court determination of fact or law.[210]

As a general matter, CAAF and the courts of criminal appeals employ the same standards of review. For example, both CAAF and all the service courts review a military judge's denial of a motion for a mistrial for an abuse of discretion.[211] However, the service courts can examine the factual findings underpinning the denial of a mistrial much more closely than can CAAF, leading to a greater basis for the courts of

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[207] *Id.*

[208] *Id.* at 248 (setting forth principles to guide the courts of criminal appeals in deciding whether to order a post-trial fact-finding hearing when post-trial affidavits are filed); United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967) (recognizing the authority of the appellate courts to order a post-trial fact-finding hearing).

[209] United States v. Walters, 58 M.J. 391, 395 (C.A.A.F. 2003); *see also* United States v. Augspurger, 61 M.J. 189, 192 (C.A.A.F. 2005); United States v. Seider, 60 M.J. 36, 38 (C.A.A.F. 2004).

[210] Hon. John Powers, *Fact Finding in the Courts of Military Review*, 44 BAYLOR L. REV. 457, 460 (1982).

[211] United States v. Coleman, 72 M.J. 184, 186 (C.A.A.F. 2013); United States v. Behenna, 70 M.J. 521, 529 (A. Ct. Crim. App. 2011); United States v. Dossey, 66 M.J. 619, 629 (N.M. Ct. Crim. App. 2008); United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998); United States v. Bridges, 58 M.J. 540, 549 (C.G. Ct. Crim. App. 2003).

criminal appeals to overturn trial court rulings. These courts exercise this authority judiciously, remaining aware that the military judge had the opportunity to personally see and hear the witnesses.[212] Nevertheless, occasionally the courts of criminal appeals will employ their unique fact-finding authority to correct a military judge's findings of fact where CAAF could not. For example, in *United States v. Hynes*,[213] the Coast Guard court reviewed a military judge's ruling that the appellant's statements were voluntary. This determination was based on factual findings normally reviewed under a clearly erroneous standard. The Coast Guard court, however, observed that it possessed additional fact-finding authority that permitted it to "substitute its own judgment on factual issues."[214] Noting that the military judge was present and heard the witnesses, the court nonetheless exercised its broad fact-finding authority by weighing the evidence for itself to determine whether it agreed with the military judge's conclusion.[215] The court analyzed the evidence that formed the basis for the military judge's factual conclusions, stated that it was "persuaded differently on this particular issue," and overturned the military judge's ruling.[216]

Where necessary, courts of criminal appeals will invoke their Article 66(c) authority to conduct their own independent fact-finding when reviewing other mixed questions under the abuse of discretion standard.[217] Normally, courts of criminal appeals will defer to the

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[212] *See, e.g.*, United States v. Ellis, 54 M.J. 958, 964 (N-M. Ct. Crim. App. 2001) ("Although the military judge made essential findings of fact in ruling on the appellant's suppression motion, we are not bound by his findings under our Article 66(c), review authority. However, we are generally inclined to give such findings deference, so long as they are adequately supported by the evidence of record."); United States v. Hall, 54 M.J. 788, 789 (A.F. Ct. Crim. App. 2001) ("Although we are authorized to find facts under Article 66(c), we normally defer to the military judge unless his findings are clearly erroneous."); United States v. Baldwin 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, J., concurring) (stating that the courts of criminal appeals "have the authority to perform our own fact-finding under Article 66(c) . . . , [but] we normally defer to the military judge's findings of fact").

[213] 49 M.J. 506 (C.G. Ct. Crim. App. 1998).

[214] *Id.* at 509.

[215] *Id.*

[216] *Id.* at 510. CAAF did not review the Coast Guard court's decision.

[217] *See, e.g.*, United States v. Weston, 65 M.J. 774, 776 (N-M. Ct. Crim. App. 2007), *rev'd on rehearing*, 66 M.J. 544 (N-M. Ct. Crim. App. 2008) (reviewing a decision to admit evidence of a warrantless search of the accused's residence and adopting the military judge's finding of facts as not clearly erroneous, but noting that it would "invoke our authority under [Article 66(c), UCMJ] to supplement those facts from the record in order to resolve the issues before us."); United States v. Benton, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001) (declining to apply an abuse of discretion standard to review of a

military judge's findings of fact unless they are clearly erroneous, but they possess the authority to invoke their fact-finding authority where appropriate and review the military judge's findings of fact under a less deferential standard. A mixed question that is highly fact-centric normally warrants considerable deference to the trial judge, but courts of criminal appeals need not simply defer to those findings of fact and may review the issue with little to no deference.

F. Government Interlocutory Appeals Involve a Special Class of Abuse of Discretion Review

The fact-finding authority enjoyed by the courts of criminal appeals does not exist when the government brings an interlocutory appeal of a ruling by the military judge. Under Article 62, UCMJ,[218] in any trial in which a punitive discharge may be adjudged, the United States may appeal certain orders or rulings such as a ruling that terminates the proceedings with respect to a charge or specification or that excludes evidence that is substantial proof of a fact material in the proceeding.[219] However, unlike the fact-finding authority in Article 66(c) of the UCMJ, Article 62(b) states, "In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law . . . ."[220]

This exclusion of fact-finding authority significantly limits the intermediate appellate courts' review of military judges' factual determinations in interlocutory appeals. Where the court is limited to reviewing matters of law, "the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'"[221] The court of criminal appeals may not find facts in addition to those found by the military judge, and must conclude that any factual finding by the military judge is "unsupported by the evidence of record or was clearly erroneous" in

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military judge's ruling excluding evidence because the military judge failed to issue findings of fact, and finding the facts itself to uphold the military judge's ruling); United States v. Agosto, 43 M.J. 745, 748 (A.F. Ct. Crim. App. 1995) ("Where the military judge's findings are silent or clearly erroneous, we may exercise our statutory authority under [Article 66(c), UCMJ] and find the facts ourselves.").

[218] 10 U.S.C. § 862 (2012).

[219] 10 U.S.C. § 862(a)(1)(A), (B) (2012).

[220] 10 U.S.C. § 862(b) (2012).

[221] United States v. Gore, 60 M.J. 178, 185 (C.A.A.F. 2004) (quoting United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985)).

order to overturn the finding.[222] Therefore, in reviewing government interlocutory appeals for issues decided under an abuse of discretion standard, the service court may not rely on its fact-finding authority to overturn a factual finding by the military judge. The overall standard of review may remain the same, but where factual determinations are involved, courts of criminal appeals are much more limited in their review and therefore are more deferential to military judges' rulings.

United States v. Baker[223] provides an illustration of this limitation. In *Baker*, the military judge granted a motion to suppress evidence of an initial photo identification and later in-court identification made by the victim of the accused's alleged indecent exposure and assault. The military judge issued extensive findings of fact that summarized the manner in which the police conducted the photo identification, ruling that, under the Supreme Court's five-factor test for determining the admissibility of pretrial and in-court identifications,[224] the photo identification was unnecessarily suggestive and subject to a substantial likelihood of misidentification.[225]

The Army Court of Criminal Appeals held the military judge's findings of fact were not clearly erroneous, but also held the military judge abused his discretion because he "committed a clear error of judgment in the conclusions [he] reached upon weighing of the relevant factors."[226] In this respect, the court's holding would have been relatively unremarkable had it come in the context of an Article 66 appeal. Because this was an Article 62 appeal, however, CAAF reversed, expressing concern about the Army court's action. Noting that, when reviewing a ruling on a motion to suppress, the court considers the evidence in the light most favorable to the prevailing party at trial,[227] CAAF held that this application of the facts to the law itself was reviewed under the clearly erroneous standard.[228] In concluding that the military judge did not abuse his discretion, CAAF stated:

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[222] *Id.*; United States v. Middleton, 10 M.J. 123, 133 (C.M.A. 1981).
[223] 70 M.J. 283 (C.A.A.F. 2011).
[224] Neil v. Biggers, 409 U.S. 188, 199-200 (1972).
[225] United States v. Baker, 70 M.J. 282, 286 (C.A.A.F. 2011).
[226] *Id.* at 287 (quoting United States v. Baker, ARMY MISC 20100841 (A. Ct. Crim. App. 7 March 2011) (unpub. op.)).
[227] *Id.* at 288 (citing United States v. Cowgill, 68 M.J. 388, 390 (C.A.A.F. 2010)).
[228] *Id.* at 291-92.

> Even if another court may have drawn other findings based on the evidence, the military judge's decision cannot be reversed based on a mere difference of opinion or an impermissible reinterpretation of the facts by appellate courts. Further, the Army court's decision to vacate the military judge's ruling was based to a large degree on impermissible findings of fact.
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> . . .
>
> Again, even if reasonable minds could differ about the application of the facts to the law, we cannot say that the military judge's decision to suppress the identifications was arbitrary or fanciful.[229]

The *Baker* decision may or may not represent an outlier holding, both in terms of the deference granted the military judge in the application portion of a mixed question and in the limitations it places on the courts of criminal appeals in overturning military judges' factual findings. Clearly, CAAF's decision was motivated in part by a concern that the Army court did not recognize its more limited role in interlocutory appeals. Nonetheless, service courts have cited the opinion numerous times to hold that they were restrained in their review of a military judge's ruling during a government interlocutory appeal.[230] It seems apparent that when the courts of criminal appeal lack fact-finding authority, they are required to be at least somewhat more deferential to military judges' rulings, particularly where the military judge has issued detailed and supportable findings of fact.

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[229] *Id.* at 292. Judges Baker and Ryan dissented, in part based on the majority's application of the abuse of discretion standard. The dissenting judges opined that the military judge abused his discretion by omitting critical aspects of the victim's testimony from his review of the relevant factors, by misapplying the law to the facts, and by not following the appropriate structure for addressing situations that might raise the risk of misidentification. *Id.* at 292-95 (Baker and Ryan, JJ., dissenting).

[230] *See, e.g.*, United States v. Cooper, Army Misc. 20110914 (A. Ct. Crim. App. 14 September 2012) (unpub. op.) ("It is neither fanciful nor clearly unreasonable to conclude that the government failed to scrupulously honor appellee's right to remain silent under the circumstances and failed to establish by a preponderance of the evidence that appellee's statements were voluntarily rendered."); United States v. Murray, NMCCA 201200295 (N-M. Ct. Crim. App. 21 August 2012) (unpub. op.) (rejecting the government's contention in an interlocutory appeal that the military judge misstated facts and misapplied the law in excluding evidence obtained during a search of the accused, and reviewing the military judge's ruling under a deferential standard).

G. The Abuse of Discretion Standard Does Not Cover Review of Decisions by the Courts of Criminal Appeals

Military judges receive substantial deference in their fact-finding under the clearly erroneous standard, and as detailed above, their application of the facts to the law in mixed questions sometimes receives a significant measure of deference as well. However, the appellate military judges of the courts of criminal appeals do not enjoy this same deference when their decisions are reviewed.

In *United States v. Siroky*,[231] the accused was accused of the rape and sodomy of his young daughter, among other offenses. When the child's mother reported the alleged abuse, a psychotherapist examined the child. The child eventually verbalized and demonstrated sexual abuse by the accused.[232] The prosecution sought to introduce the statements the child made to the psychotherapist, and the military judge admitted the statements as made for the purpose of obtaining medical diagnosis or treatment. The Air Force Court of Criminal Appeals reversed in part, holding that the military judge abused his discretion in admitting the hearsay statements.[233] The Air Force court noted the lack of specific findings of fact concerning the child's expectation of promoting her well-being through the statements and held that, to the extent the military judge made such findings of fact, they were clearly erroneous.[234]

The acting Air Force Judge Advocate General certified the case to CAAF. The court quickly noted an "important question at the outset of this appeal," namely, "What is the standard of review regarding [the child's expectation of facilitating a diagnosis and treatment] – and to whose decision do we apply the standard?"[235] The court reviewed a prior decision clearly stating that the existence of an actual expectation of receiving medical treatment on the part of the out-of-court declarant presents a question of fact, which is reviewed under the clearly erroneous standard, but noted that this decision left "somewhat cloudy whose

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[231] 44 M.J. 394 (C.A.A.F. 1996).
[232] *Id.* at 397.
[233] United States v. Siroky, 42 M.J. 707 (A.F. Ct. Crim. App. 1995).
[234] *Id.* at 713.
[235] *Siroky*, 44 M.J. at 398.

decision this court reviews – the military judge's or the lower appellate court's."[236] The court also noted that civilian intermediate appellate courts had struggled with this issue but seemed to generally substitute their judgment for that of the lower appellate court to directly review the trial judge's ruling.[237] The court then concluded that it would follow its normal course of action:

> That is, when determining the correctness of the decision of the now-Court of Criminal Appeals, we typically have pierced through that intermediate level and have examined the military judge's ruling for clear error; then, on the basis of that examination, we have decided whether the Court of Criminal Appeals was right or wrong in its own examination for clear error.[238]

Piercing through the court of criminal appeals' ruling, CAAF nonetheless affirmed the Air Force court.[239]

The CAAF has continued this approach in a number of cases since *Siroky* and reviewed the trial court's ruling without deference to the intermediate court's opinion.[240] It is not entirely clear, however, whether CAAF will *always* adopt this approach, or whether it might grant the courts of criminal appeals some deference when a mixed issue is fact-centric and the service appellate court has exercised its own fact-finding power. For instance, Judge Gierke, concurring in the *Siroky* decision, stated: "I agree that in most cases we must pierce the Court of Criminal Appeals' decision and examine the military judge's ruling, but I am concerned with the majority's apparent lack of deference to the court below where it has exercised its independent fact-finding power."[241] Normally, CAAF grants the service courts a great deal of independence

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[236] *Id.* at 398-99 (citing United States v. Quigley, 40 M.J. 64, 66 (C.M.A. 1994)).
[237] *Id.* at 399 (quoting STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (2d ed. 1992)).
[238] *Id.*
[239] *Id.* at 401.
[240] *See* United States v. Wuterich, 67 M.J. 63, 70 (C.A.A.F. 2008); United States v. Cabrera–Frattini, 65 M.J. 241, 246 (C.A.A.F. 2007); United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007); United States v. Stephens, 64 M.J. 200 (C.A.A.F. 2006) (summary disposition); United States v. Shelton, 64 M.J. 32, 37 (C.A.A.F. 2006); United States v. Feltham, 58 M.J. 470, 474-75 (C.A.A.F. 2003); United States v. Benner, 57 M.J. 210, 212 (C.A.A.F. 2002); United States v. Harris, 55 M.J. 433, 438 (C.A.A.F. 2001).
[241] *Siroky*, 44 M.J. at 401 (Gierke, J., concurring in part and in the result).

in exercising their unique powers under Article 66(c).[242] Therefore, when a mixed question of fact and law particularly turns on a determination of some factual matter, it is possible the courts of criminal appeals may enjoy a considerable measure of deference in resolving the issue.[243] However, in general terms, when applying the facts to the law, the service appellate courts apparently enjoy no such deference. As CAAF has stated, "Although a Court of Criminal Appeals has broad fact-finding power, its application of the law to the facts must be based on a correct view of the law."[244]

H. Military Judges Can Take Certain Steps to Increase the Amount of Deference Their Rulings Enjoy

Military appellate courts are less likely to find an abuse of discretion exists when the military judge has thoroughly developed the record on an issue, cited the correct legal guidelines in reaching a ruling, and generally ruled on the matters before him or her in a logical, even-handed manner. For instance, CAAF has stated: "We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law. While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted."[245] Put more simply: "[A] reasoned analysis will be given greater deference than otherwise."[246] Appellate courts consistently cite to the thoroughness of a military judge's ruling in

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[242] *See, e.g.*, United States v. Winckelmann, 73 M.J. 11, 15 (C.A.A.F. 2013) (noting the "broad discretion" the courts of criminal appeals possess when reassessing sentences, and noting that such reassessments would only be disturbed "in order to prevent obvious miscarriages of justice or abuses of discretion") (quoting United States v. Harris, 53 M.J. 86, 88 (C.A.A.F. 2000)); United States v. Brooks, 49 M.J. 64, 69 (C.A.A.F. 1998) (holding that when considering a petition for a new trial, the courts of criminal appeals "'are free to exercise . . . . [t]heir fact-finding powers.' The only limit on their fact-finding powers is that their 'broad discretion must not be abused'") (quoting United States v. Bacon, 12 M.J. 489, 492 (C.M.A. 1982)); United States v. Brock, 46 M.J. 11, 13 (C.A.A.F. 1997) (noting that CAAF does not possess the fact-finding authority of the courts of criminal appeals and therefore would examine the service courts' decisions on sentence appropriateness for an abuse of discretion).

[243] *See Wuterich*, 67 M.J. at 70 (noting that CAAF reviewed the military judge's ruling directly without deference to the service court because "this case involves an issue of law that does not pertain to the unique fact-finding powers of the Court of Criminal Appeals").

[244] United States v. Weatherspoon, 49 M.J. 209, 212 (C.A.A.F. 1998).

[245] United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002).

[246] United States v. Winckelmann, 73 M.J. 11, 16 (C.A.A.F. 2013).

upholding rulings at trial. The following excerpts represent typical analysis where military appellate courts find no abuse of discretion in a military judge's ruling:

> "We find no abuse of discretion in the military judge's thorough, reasoned ruling."[247]

> "We commend the trial judge for setting out in detail his findings of fact and conclusions of law concerning this issue. We are in complete agreement with his ruling and find no abuse of discretion."[248]

> "In this case, the military judges made thorough and detailed findings of fact and their findings were amply supported by the evidence. . . . Accordingly, the military judges did not abuse their discretion in denying the appellant's motion to suppress."[249]

> "[W]e find the military judge's findings of fact and conclusions of law to be detailed, concise, and correct. We adopt them as our own, supplemented by our own careful review of the record. . . . We further find that the military judge's rulings were fully supported by the evidence, and he did not abuse his discretion in ruling as he did."[250]

When an appellate court is convinced that the military judge earnestly and meticulously considered the issue being appealed, the appellate court is less likely to find that an abuse of discretion occurred even if the appellate court might have ruled differently. Conversely, a military judge who fails to give a matter careful attention is more likely to be found to have abused his or her discretion, as the appellate court will more closely scrutinize the ruling. The Army Court of Criminal Appeals summarized this principle as follows:

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[247] United States v. Hudgins, ACM 38305 (A.F. Ct. Crim. App. 3 April 2014) (unpub. op.).

[248] United States v. Daniels, 23 M.J. 867, 868 (A.C.M.R. 1987).

[249] United States v. Koebele, ACM 37381 (A.F. Ct. Crim. App. 2010) (unpub. op.). The reference to more than one military judge is correct, because the military judge was replaced during the proceedings due to a scheduling conflict.

[250] United States v. Savoy, 65 M.J. 854, 857 (A.F. Ct. Crim. App. 2007).

> When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we have no factual findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion . . . .[251]

Likewise, CAAF has repeatedly found that a military judge abused his discretion, not because the decision reached was wrong but because the military judge's analysis was insufficient. In *United States v. Cokeley*,[252] the court held a military judge's determination that a witness was unavailable constituted an abuse of discretion. The court observed that the evidence in the record might have supported the military judge's ruling given "the substantial discretion reposed in the military judge" on this issue. [253] However, the court concluded that the military judge either misapprehended the law or did not weigh the relevant considerations because his ruling lacked sufficient detail for the appellate court to have confidence that the military judge correctly understood the law and considered the correct factors.[254] Likewise, in another case, CAAF held that a military judge abused his discretion by admitting an accused's statements without first "contextually analyzing" whether the appellant could and did knowingly and intelligently waive his right to counsel.[255] The court declined to decide whether the appellant did in fact knowingly and intelligently waive his right to counsel; rather the court held that the military judge's abuse of discretion lay in his lack of analysis.[256]

Recently CAAF provided an excellent example of this principle. In *United States v. Flesher*,[257] the court considered whether the military judge abused his discretion when he allowed a sexual assault response

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[251] United States v. Benton, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001) (citations omitted); *see also* United States v. Reinecke, 30 M.J. 1010, 1015 (A.F.C.M.R. 1990) ("Without a proper statement of essential findings, it is very difficult for an appellate court to determine the facts relief upon, whether the appropriate legal standards were applied or misapplied, and whether the decision amounts to an abuse of discretion or legal error.").

[252] 22 M.J. 225 (C.M.A. 1986).

[253] *Id.* at 229.

[254] *Id.* at 229-30.

[255] United States v. Mott, 72 M.J. 319, 321 (C.A.A.F. 2013).

[256] *Id.* at 326.

[257] 73 M.J. 303 (C.A.A.F. 2014).

coordinator (SARC) to testify as an expert witness at trial. A divided court found an abuse of discretion existed, and the majority's analysis focused on the defects in the military judge's handling of the issue. The court found "the military judge did not handle in a textbook manner the issues of whether the SARC was truly an expert, the subject and scope of her testimony, whether her testimony in this case was relevant and reliable, and whether its probative value outweighed its potential prejudicial effect."[258] The military judge, CAAF found, failed to rule on matters presented to him, failed to thoroughly articulate his rationale for allowing the expert testimony, failed to develop the record by exploring the SARC's testimony in an Article 39(a), UCMJ, session, and failed to stop the government when the SARC's testimony exceeded the limits the military judge had established. The court, therefore, was "left with a limited understanding of the military judge's decision-making process and, accordingly, [gave] his decisions in this case less deference than [it] otherwise would."[259] Conducting its own review of the matter under scrutiny approaching de novo review, CAAF reversed the military judge and set aside the findings of guilty on the aggravated sexual assault charge to which the SARC testified.[260]

The abuse of discretion standard can significantly protect a military judge's rulings from reversal. To receive the full benefit of this standard, though, a military judge must convince the appellate court that he or she thoroughly, logically, and fairly considered the matter at issue. When the military judge does so by developing the record, issuing supported findings of fact, correctly citing the relevant legal authorities, and reaching a conclusion that falls within a range of reasonable decisions, the abuse of discretion standard will generally favor upholding the military judge's ruling. Where the military judge fails to take these steps, the appellate court will view the military judge's ruling with more

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[258] *Id.* at 307.

[259] *Id.* at 312.

[260] *Id.* at 318. Chief Judge Baker dissented from the opinion, finding that the military judge did not abuse his discretion under the liberal standard of admission granted expert testimony. However, he did acknowledge that "the record is succinct and sometimes hurried on how the military judge applied the [relevant] factors." *Id.* at 319 (Baker, C.J., dissenting). Judge Ryan separately dissented, stating that the military judge's actions were even worse than the majority concluded but finding no prejudice from the error. Judge Ryan complained that the military judge wholly failed to act as the "gatekeeper" on this matter, stating, "The standards for gatekeeping and admissibility are low, but they are not nonexistent – a military judge engaging in no inquiry under the applicable law, even though asked to, and relying entirely on past experts who testified in other cases, is not enough." *Id.* at 324 (Ryan, J., dissenting).

scrutiny. Commentators have noted the same tendency in civilian appellate courts. An appellate court "will not tolerate an exercise of discretion when the trial tribunal fails to explain its reasons. Findings adequate to permit meaningful review of the trial court's exercise of discretion are essential."[261]

I. Abuse of Discretion Review is Inherently Tied to the Issue of Prejudice

Article 59 of the UCMJ prohibits military appellate courts from holding a finding or sentence incorrect on the ground of a legal error unless the error materially prejudices the substantial rights of the accused.[262] Therefore, appellate courts often assume error because the matter can be more easily settled by finding a lack of material prejudice.[263] The requirement to demonstrate material prejudice "recognizes that errors are likely to occur in the dynamic atmosphere of a trial, and that prejudice must be shown before reversing the findings or sentence."[264]

The requirement to demonstrate prejudice is not unique to the military justice system, and like the abuse of discretion standard of review, it reflects the reality that errors take place in trials. Even constitutional errors do not necessarily require reversal so long as the error is a "trial error"; that is, one "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[265] The harmless-error doctrine preserves the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually

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[261] Casey et al, *supra* note 135, at 28.
[262] 10 U.S.C. § 859(a) (2012).
[263] *See, e.g.*, United States v. Allende, 66 M.J. 142, 145 (C.A.A.F. 2008) (assuming error in appellate delay by finding no prejudice resulted); United States v. Seider, 60 M.J. 36, 41 (C.A.A.F. 2004) ("Even assuming error in the military judge's instructions to the members, such action did not materially prejudice Appellant."); United States v. Glover, 53 M.J. 366, 368 (C.A.A.F. 2000) (assuming error in the military judge overruling defense objections and admitting accused's prior state convictions during sentencing proceedings but finding any such error did not result in prejudice).
[264] United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007).
[265] Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991).

inevitable presence of immaterial error."[266] Only when an error is "structural," "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," is prejudice presumed.[267]

The abuse of discretion test is distinct from the requirement to demonstrate material prejudice to a substantial right of the appellant. The Air Force court has recognized this: "[A]t least in the context of rulings on evidence, 'abuse of discretion' only measures the extent to which the appellate court disagrees with the ruling of the trial judge. Article 59(a), UCMJ, . . . requires that we evaluate the impact of that ruling in light of all the other evidence properly admitted."[268] However, the two tests are related and easily mixed. For example, CAAF has stated in the context of a denial of a continuance that an abuse of discretion exists when "'reasons or rulings of the' military judge are 'clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice . . . .'"[269] This formulation of the abuse of discretion standard was originally limited to review of a denial of a continuance, but military appellate courts have occasionally cited it as the applicable standard in their review of other issues reviewed under the abuse of discretion standard as well.[270] Occasionally, military appellate courts use the conflated term "prejudicial abuse of discretion" to describe the standard by which they review a military judge's ruling.[271]

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[266] Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

[267] *Fulminante*, 499 U.S. at 310.

[268] United States v. Simmons, 44 M.J. 819, 823 (A.F. Ct. Crim. App. 1996).

[269] United States v. Weisbeck, 50 M.J. 461, 464 (C.A.A.F. 1999) (quoting United States v. Miller, 47 M.J. 352, 358 (1997)) (further citations and quotations omitted).

[270] *See, e.g.*, United States v. Flesher, 73 M.J. 303, 311 (C.A.A.F. 2014) (reviewing military judge's decision to permit sexual assault response coordinator to testify as expert witness); United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (reviewing military judge's decision not to close trial to the public upon motion of an accused); United States v. Moore, 55 M.J. 772, 781 (N.M. Ct. Crim. App. 2001) (reviewing military judge's determination to take judicial notice); United States v. Laborde, No. 200001654 (N.M. Ct. Crim. App. 31 October 2003) (unpub. op.) at *4 (reviewing military judge's decision to admit evidence).

[271] *See, e.g.*, United States v. Meghdadi, 60 M.J. 438, 442 (C.A.A.F. 2005) (overturning a military judge's denial of a defense motion for a post-trial evidentiary session to examine allegations of misconduct by a government witness, finding that "the military judge's reasons and rulings were clearly untenable and that they constitute a prejudicial abuse of discretion"); United States v. True, 41 M.J. 424, 427 (C.A.A.F. 1995) (finding "no prejudicial abuse of discretion" in the military judge's decision to exclude evidence of the accused's alleged peaceable nature); United States v. Munoz, 32 M.J. 359, 360 (C.M.A. 1991) ("We find no prejudicial abuse of discretion by the military judge in this case and affirm.").

Many rulings of the military judge reviewed under the abuse of discretion are, practically speaking, beyond the scope of appellate review because such rulings are extremely unlikely to result in material prejudice to a substantial right of the accused. For example, a military judge's ruling on an objection to the use of leading questions is unlikely to be overturned, not just because such a ruling receives substantial discretion but because such rulings are extremely unlikely to result in material prejudice.[272] Military appellate courts can dispose of an issue by assuming an abuse of discretion occurred but find that it was harmless. Both for expediency's sake and the desire to avoid ruling on issues they need not reach, courts often do so. It should be apparent that the reverse is also true: matters that are more likely to impact the outcome of a trial will be viewed more closely precisely because they are so important. The Supreme Court has recognized this, holding that a trial judge may receive more deference based on "the liability produced by the District Judge's decision."[273] Where a ruling carries with it "substantial consequences, one might expect it to be reviewed more intensively."[274]

IV. Conclusion: The Need for Greater Attention to the Abuse of Discretion Standard in Military Appellate Practice

Study of these nine propositions should provide a deeper understanding regarding how the abuse of discretion standard of review plays out in military appellate practice. Abuse of discretion is a generic label that actually encompasses review of several distinct types of issues. As a result, the term does not represent one immovable level of deference but actually a flexible spectrum of discretion offered to trial judges. Despite the fact that mixed questions make up a large percentage of appellate issues, military appellate courts struggle along with their civilian counterparts in developing a coherent framework for determining when trial judges' application of the law to the facts receives some

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[272] *See* United States v. Yerger, 3 C.M.R. 22, 24 (C.M.A. 1952) (finding "[r]epeated violations of fundamental rules of evidence [that] cannot be condoned" but noting: "Isolated and minor errors in receiving hearsay testimony and using leading questions appear in many criminal trials, both civilian and military, and ordinarily such deviations would not be substantially prejudicial and hence would not concern us as an appellate court").

[273] Pierce, 487 U.S. 552, 563 (1988).

[274] *Id.*

measure of deference. As a general matter, military appellate courts are likely to be less deferential to trial court rulings than their civilian counterparts. The unique fact-finding authority of the intermediate service courts of criminal appeals partially accounts for this increased level of scrutiny. This fact-finding authority, however, does not carry over to government interlocutory appeals, which represent their own category of abuse of discretion review. Despite the fact-finding authority generally possessed by the service courts, their decisions do not receive deference on review by CAAF. Military judges can increase the amount of deference their rulings receive by issuing thorough rulings that accurately cite relevant legal provisions. Finally, issues may receive closer or lesser scrutiny based on the likelihood that the decision affected the outcome of the trial, meaning the abuse of discretion standard is inherently linked to the requirement to demonstrate prejudice.

A tenth observation rounds out this analysis: better appellate advocacy and more detailed judicial analysis is necessary to properly flesh out the abuse of discretion standard. Venturing behind the "abuse of discretion" curtain is not for the faint of heart. Exploring the intricacies of the standard is difficult, tricky work. Closer attention may lead to the conclusion that the phrase has been misapplied, requiring an upsetting of precedent. It may not lead to more questions than definitive answers. Painstaking work may be necessary to specify exactly what the appellate court is being asked to do, what are the reasons why it should grant the lower court more or less discretion, and how to define that discretion into a workable formula. Advocates and courts may need to take on the seemingly-unsolvable mixed questions dilemma. However, it is critical that appellate practitioners and courts roll up their sleeves and address the abuse of discretion standard to a degree they have not yet explored.

The hard work would be worth it. Consider the following two hypothetical examples (citations omitted) that address the standard of review for a military judge's decision to admit evidence over a Military Rule of Evidence 403 objection:

1: A military judge's decision to admit or deny evidence is reviewed for an abuse of discretion. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

2: A military judge's decision to admit or deny evidence is generally reviewed for an abuse of discretion. "Abuse of discretion" is a broad term used to describe review of a variety of trial-level rulings. While definitions of the exact degree of deference afforded trial judges under the abuse of discretion standard differ, the standard generally recognizes that appellate courts are willing to uphold the trial court's ruling even if the appellate court disagrees with the ruling to some extent. A number of factors support the need to grant trial judges with deference. Here, two reasons indicate this court should grant the military judge considerable deference. First, Military Rule of Evidence 403 is intended to afford the military judge considerable latitude to ensure the fairness and flow of trial proceedings. A military judge who is immersed in trial proceedings has a better sense of the "flow" of the trial and how the proffered evidence would affect the proceedings than the appellate court could have. Second, rulings under Military Rule of Evidence 403 involve a well-established legal test and are by necessary implication fact-specific. The exact contours of the rule are not easily subject to appellate guidance, and must be shaped at the trial level by military judges on the basis of the facts before them. Therefore, this court should not upset the military judge's ruling on this issue unless it finds the military judge's ruling was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. The military judge thoroughly and logically analyzed this issue, offering this court a solid understanding of his ruling and providing even more reason for this court to grant significant deference to his ruling. Even assuming error, the military judge's ruling resulted in no material prejudice, meaning this court need not closely scrutinize this ruling. Nothing about this ruling was so unjust to warrant this court exercising its Article 66(c) authority to review the military judge's decision without deference.

The first example is typical of appellate briefs and decisions in the military justice system. The second represents a degree of analysis not often seen but that would better inform appellate decision-making.

Military courts and counsel must consciously decide to more comprehensively explore the abuse of discretion standard. The standard forms the backdrop behind many of the appellate decisions that shape the law of military justice. It covers fundamental matters of division of power within the military judiciary and who is best qualified to make certain kinds of decisions. Given the standard's crucial role in military appellate case law, appellate counsel and judges should be motivated to clearly define what the standard means and when and how it is used. A

decision to better define the abuse of discretion standard would result in increased confidence in appellate decision-making, better advocacy, and more predictability. Such a decision is supportable under even the most exacting standard of review.

HE DID IT, BUT SO WHAT? WHY PERMITTING NULLIFICATION AT COURT-MARTIAL RIGHTFULLY ALLOWS MEMBERS TO USE THEIR CONSCIENCES IN DELIBERATIONS

MAJOR MICHAEL E. KORTE*

I. Introduction

Lieutenant Colonel (LTC) John Smith sits nervously at the table, wiping beads of sweat off his forehead. His mind is racing. His hands are shaking. Dreading what may happen to him; his twenty-year military career is on the line. Lieutenant Colonel Smith is the accused at a General Court-Martial, sitting next to his military defense counsel, who appears equally concerned. Evidence has been introduced, witnesses have testified, and arguments have been made. The military judge instructed the members, who just completed three hours of deliberations. The bailiff abruptly yells "all rise!" and an eerie silence fills the courtroom. Lieutenant Colonel Smith fears that everyone in the courtroom can hear the pounding of his rapidly beating heart as the members file in to announce his fate. After hours of trial testimony, the question remains: Could they really convict him simply for breaking curfew by ten minutes?

Momentarily, LTC Smith flashed back to the events that led him to this perilous position. Assigned to the 65th Medical Brigade,[1] he was the

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[1] The 65th Medical Brigade is a subordinate command of Eighth Army. United States

Officer-in-Charge of a medical clinic located on Camp Walker, Republic of Korea. Three months ago, LTC Smith was alone in his clinic conducting a brigade-directed 100% supply inventory late into the night. It was 2345, and he was to give a status brief to the Brigade Commander at 0600. While finishing up, LTC Smith accidentally knocked over a poorly-secured container of hydrogen peroxide, which fell on him and ruined his only clean uniform. He quickly completed the inventory and hurried to an off-post laundry facility at 0030 to ensure he had a clean uniform for his early morning briefing. He lost track of time, and at approximately 0110, members of the courtesy patrol spotted LTC Smith at the facility and contacted the military police, who coordinated with the Korean police, who detained him. He was in violation of the United States Forces-Korea (USFK) Curfew Policy,[2] a punitive general order, which places all servicemembers in Korea on a curfew, prohibiting them from being off-installation between 0100 and 0500 unless they are inside a private residence or in their approved place of lodging for the evening.[3] Wanting to make an example out of a senior officer to curb the rise of unit indiscipline,[4] LTC Smith's chain of command took his ten-minute curfew violation and set it on a path towards a general court-martial (GCM), opting against several traditional, lower-level dispositions.[5] Now LTC Smith waits to find out if his poor time-management will result in a criminal conviction. He waits to find out if he will become a felon.

Back at the defense table, LTC Smith's counsel prepares to stand with

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Forces–Korea (USFK) has administrative jurisdiction over all Eighth Army units.

[2] Memorandum from USFK Commanding General to USFK personnel, subject: General Order Regarding Off-Installation Curfew (14 Jan. 2013).

[3] *Id*. para. 7. The memorandum states it is a punitive general order and that "[s]ervice members who fail to comply with the provisions of this general order are subject to punishment under the UCMJ, as well as adverse administrative action authorized by applicable laws and regulations." Thus though unstated in the memorandum, a violation of this order could be punishable under Article 92, Uniform Code of Military Justice (UCMJ), as a failure to obey a lawful general order. *Id.*

[4] Curfew violations in Korea had recently spiked and the timing of Lieutenant Colonel (LTC) Smith's curfew violation coincided with a rash of off-post criminal activity by young Soldiers, which had angered local Korean citizens and caused tension within the USFK/Korean alliance.

[5] Lower-level dispositions include non-judicial punishment in accordance with Article 15 or a General Officer Memorandum of Reprimand (GOMOR), pursuant to U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION paras. 3-4(a)(2)(c), 4 (19 Dec. 1986) [hereinafter AR 600-37] (any general officer who is senior to the recipient of a letter of reprimand has the authority to issue and direct the filing in the recipient's military personnel records jacket).

his client as the military judge reviews the findings. The frustration of having his most senior client face the most severe forum for disposition in the military for mere carelessness was matched only by his feeling of helplessness in defending him.[6] Lieutenant Colonel Smith's counsel knew he had neither the facts nor the law on his side, and the prosecution's case met the elements of Article 92, Uniform Code of Military Justice (UCMJ), as charged.[7] After failing for months to convince the Staff Judge Advocate to recommend to the Commanding General a less severe disposition, LTC Smith's counsel struggled to craft his defense. Ultimately the defense counsel determined that the only way to defend his client was to ignore the facts and attack the curfew policy as unreasonable when applied to LTC Smith's late-night laundry.

Unfortunately for LTC Smith, his counsel was prohibited from employing this strategy, which is known as "nullification." Simply put, nullification is not a recognized defense to a charged offense. Rather, nullification is "a mechanism that permits a jury, as community conscience, to disregard the strict requirements of law where it finds that those requirements cannot justly be applied in a particular case."[8] During voir dire, the military judge prevented counsel from asking the members whether they would be able to acquit LTC Smith if they disagreed with the curfew policy or how it applied to LTC Smith's actions. Efforts to argue that LTC Smith should be acquitted of violating a lawful general order because he lacked criminal intent were quickly met with government objections, which the military judge sustained, adding a judicial instruction to the members that LTC Smith's intent was irrelevant. Later, the military judge rejected the defense-requested findings instructions regarding the panel's ability to acquit if they had a reasonable doubt as to the wisdom of the curfew policy, stating that there was no right to a nullification defense.[9] Finally, when the members

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[6] The USFK Curfew Policy no doubt applied to LTC Smith and required that he be home by 0100. He was found and detained at the laundry facility at 0110.

[7] Under the UCMJ art. 92 (2012), the government must prove three elements: (1) that there was in effect a certain lawful general order or regulation; (2) that the accused had a duty to obey it; and (3) that the accused violated or failed to obey the order or regulation. *Id*.

[8] United States v. Dougherty, 473 F.2d 1113, 1140 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

[9] United States v. Hardy, 46 M.J. 67, 75 (C.A.A.F. 1997). *See infra* Part III. The determination of lawfulness is an issue for the military judge, not the panel, and consequently even that avenue of argument is foreclosed. *United States v. New*, 55 M.J. 95, 105 (C.A.A.F. 2001) (concluding that lawfulness of an order is a question of law for the military judge to determine).

returned to court during deliberations to ask if they were obligated to render a guilty verdict if all elements were proved, the judge instructed them in the affirmative.

The members struggled in deliberations for three hours. They agreed that LTC Smith violated the USFK Curfew Policy. However, they also believed that the policy was not intended to criminalize LTC Smith's actions but to prevent serious crimes within Korea that historically occurred during the night by junior Soldiers. Further, after discussions, the members believed that a criminal conviction at a GCM was too severe a consequence.

Though it may appear excessive to convene *United States v. Smith* for a ten-minute curfew violation, the scenario of a factually-guilty accused who lacks specific intent is not uncommon in the military-justice system. If strictly interpreting the facts and law necessarily leads to a decision to convict, but the thought of convicting LTC Smith conflicts with their consciences, how should the panel members resolve this case?

In such cases, military judges should grant defense counsel latitude to advocate by confronting the law underlying the case, and panel members should be told that they may use their common sense and that their conscience may guide them along with the law and the evidence admitted at court-martial. The history of jury trials is rich with individual examples of nullification, a practice meant to bring about a just result or signal a change in the community conscience. Over time, the practice has become disfavored; civilian and military judges have prohibited nullification tactics in voir dire,[10] arguments,[11] and instructions.[12] Yet present panel guidance tells members to decide cases through consideration of the law, the evidence, and each members own conscience. And consequently, despite the military's emphasis on strict obedience to the law, discretion exists within its justice system to allow members to hear arguments on the merits of both the facts and laws charged. Military judges should use this discretion and allow

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[10] United States v. Smith, 27 M.J. 25, 29 (C.M.A. 1988) (affirming Army Court decision supporting judge's prohibition of defense voir dire questions that were "obviously designed to induce 'jury nullification'").

[11] United States v. Trujillo, 714 F.2d 102 (11th Cir. 1983); *Smith*, 27 M.J. at 29. *But see Dougherty*, 473 F.2d at 1139–40 (Bazelon, C.J., concurring in part and dissenting in part) (finding considerable harm in the "deliberate lack of candor" in barring defense counsel from alerting the jury of their nullification power).

[12] *Hardy*, 46 M.J. at 75.

nullification in appropriate cases, such as LTC Smith's.

To explore the present-day dilemma that exists in LTC Smith's case, and others, where members are forced to choose between applying a strictly judge-defined law or the dictates of their consciences, the next section will discuss nullification through the evolution of the jury.[13] Part II explores the civilian criminal-justice system, which has transitioned the role of the jury from that of a "community conscience," which is tasked to judge both the facts and the law to a group whose considerations are limited by judicial interpretation of applicable law. With that transition, overt nullification has been all but eliminated in trial practice; nullification is now carried out secretly in the deliberation room.

Following a look at the evolution of the jury, Part III views the unique attributes of the military-justice system to determine the extent to which the military can allow nullification argumentation and instruction at court-martial. The military's selection process for panel members who determine the findings and the sentence, and the present standard instructions that support the conscience-based philosophy are among the differences that justify arguments in Part IV that nullification arguments and instructions should be a growing practice. The arguments in Part IV supporting increased use of the nullification doctrine also define the scope of its appropriate use; the type of case, the phase of trial, and the extent of the use of nullification are case-specific and will be delineated to ensure consistency with both legal precedent and justice.

After making the argument for expanded use of nullification in military-justice practice, the appendices provide the necessary guidance for implementation in trial practice. Specifically, Appendix A contains sample voir dire questions; Appendix B contains a sample instruction; and Appendix C contains a sample consent form. Implementation will include guidance to modify military-justice doctrine, accounting for the general, practical, judicial, ethical, and military-specific concerns of nullification opponents, with LTC Smith's hypothetical serving as a guide.

The ultimate issue is not how LTC Smith's curfew-related court-martial should end. More significant is how to repair a military-justice system that prevents a defense counsel from asking the fact-finder and

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[13] *See infra* Part II.

sentencing authority the only question available to mount a winning defense: "He did it, but so what?"

II. Nullification Throughout the History of the Trial by Jury

> *The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge.*[14]

Today we review the doctrine of nullification "as a mechanism that permits a jury . . . to disregard the strict requirements of law where it finds that those requirements cannot be justly applied . . ."[15] Jurors in early American history, however, did not apply nullification routinely, formally, or deliberately. Rather, in particular cases one or more jurors, acting as a "community conscience," applied moral judgments that superseded those of strict judgments based on the application of facts presented to law as charged. Early history contains several famous examples of juries leveraging their plenary powers to decide cases, often to their detriment. Though history is rife with anecdotal examples of such juries, beginning the late 19th century, judicial opinions have consistently refused to encourage or permit nullification, arguing that such a practice is incompatible with the concept of an impartial jury. Ultimately, federal judges have settled on an uneasy truce; Judges acknowledge juries' power to covertly[16] disregard their lawful instructions while refusing to allow overt observance of nullification – or even open acknowledgment of its existence. Consequently, anecdotal evidence exists to indicate that nullification is occurring in secret, as jurors, acting on their own conscience, occasionally hang juries or return not-guilty verdicts.

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[14] *Dougherty*, 473 F.2d at 1140.

[15] *Id.*

[16] With few exceptions, what happens in the deliberation room stays in the deliberation room. *See, e.g.*, FED. R. EVID. 606(b) (prohibiting inquiry into the validity of a verdict or indictment through juror testimony regarding statements or incidents occurring during the jury's deliberations); MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (2012) (containing substantially the same protections for the secrecy of court-martial panel deliberations).

A. The High Cost of Pre-Constitution Not Guilty Verdicts

Modern juries were not always able to decide cases according to their beliefs, at least without personal cost. In 1554, a jury acquitted Sir Nicholas Throckmorton on treason charges,[17] and the jury was punished by the court.[18] Later in what is commonly referred to as "Bushel's Case" in 1670,[19] jurors in a criminal trial were punished for their verdict.

In Bushel's case, William Mead and William Penn[20] faced trial for violating the Conventicle Act by holding a religious gathering among Quakers (and not the government-approved Church of England).[21] Before deliberations, the jury instructions amounted to a summary of the facts that supported the court's view of Mead and Penn's guilt, calling on the jury to "keep to" the facts and reminding them of the "peril" they faced as a sworn juror.[22] Unmoved by this apparent threat, the jury failed to return a guilty verdict.[23]

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[17] ANNABEL PATTERSON, THE TRIAL OF NICHOLAS THROCKMORTON 81 (1998). Despite being found not guilty, Throckmorton was taken away rather than be discharged because there were "other matters to charge him with." *Id.*

[18] *Id.* at 82. The prosecuting attorney sought a five-hundred pound fine for each juror, who had "strangely acquitted the prisoner of his treasons." Juror Whetston pleaded: "I pray you, my lords, be good to us, and let us not be molested for discharging our consciences truly." *Id.*

[19] *Bushell's Case*, (1670) 124 Eng. Rep. 1006.

[20] Penn, a Quaker, often wrote on the topic of the need for religious freedom and was consequently persecuted through imprisonment and trials, where rights afforded to others were routinely denied to him. *See, e.g.*, Alex Holtzman, *Freedom Through Compromise: William Penn's Experiment in Religious Freedom*, HERODOTUS J. OF HIST. (2012).

[21] *See, e.g.*, BONNELYN YOUNG KUNZE, MARGARET FELL AND THE RISE OF QUAKERISM 179 (1994). The Conventicle Act sought to destroy Quaker meetings in the area by fining and imprisoning those who gathered to practice their faith.

[22] The bench instructed the jury:

> You have heard what the Indictment is, it is for preaching to the people, and drawing a tumultuous company after them, and Mr. Penn was speaking; if they should not be disturbed, you see they will go on; there are three or four witnesses that *have proved this*, that he did preach there; that Mr. Mead did allow of it: . . . now *we are upon the matter of fact, which you are to keep to*, and observe, as what hath been fully sworn *at your peril*.

JEFFREY B. ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 71 (1994) (emphasis added).

[23] The jury angered the court by initially finding Penn "Guilty of speaking in Gracechurch-street," which stopped short of answering the ultimate question of whether he committed the act of unlawful assembly as charged. *Id.*

Perhaps predictably, the bench disagreed. After the verdict was read, a judge orally attacked juror Edward Bushel for his conduct.[24] Further, the court ordered that the jury be imprisoned without food, water, heat, or tobacco until it reached a "proper verdict."[25] After spending two nights imprisoned, the jury rendered "not guilty" verdicts against both Penn and Mead, and the court fined them for rendering a decision contrary to the evidence and their instructions.[26] Juror Bushel refused to pay the fine, and Sir John Vaughan, Chief Justice of the Court of Common Pleas, ruled against such jury coercion, holding that a juror could not be punished based solely on returning a proper verdict.[27]

Perhaps *Bushel's Case* was instructive not only because it illuminated the coercive relationship between judges and juries in the 17th century, but also because it was an early example of jury-nullification advocacy. William Penn invited the jury to assess for themselves the law he was being charged with violating, imploring them to use their consciences.[28] They ultimately did.

In 1649, another historical case of jury nullification occurred as John Lilburne was on trial for high treason for his role in inciting a rebellion against Oliver Cromwell, Lord Protector of the Commonwealth of England, Scotland, and Ireland.[29] The popular Lilburne defended

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[24] John Robinson, judge, was reported to have told Edward Bushel: "Mr. Bushel, I have known you near this 14 years; you have thrust yourself upon this jury, because you think there is some service for you: I tell you, you deserve to be indicted more than any man that hath been brought to the bar this day." Lloyd Duhaime, *1670: The Jury Earns its Independence (*Bushel's Case*)*, DUHAIME (Oct. 19, 2011), http://www.duhaime.org/LawMuseum/LawArticle-1335/1670-The-Jury-Earns-Its-Independence-Bushels- case.aspx (last visited Nov. 25, 2013).

[25] ABRAMSON, *supra* note 22, at 71–72.

[26] *Id.* at 72.

[27] *See generally* JOHN HOSTETTLER, CRIMINAL JURY OLD AND NEW: JURY POWER FROM EARLY TIMES TO THE PRESENT DAY 72 (2004).

[28] ABRAMSON, *supra* note 22, at 70. After asking the court "to 'produce' for the jury the law upon which the indictment was based, so that the jury could judge for itself whether Quaker meetings constituted unlawful assemblies," the court responded that "common law" formed the lawful basis for the charges against him. Penn's responses – "Where is that common law?" and "for if it be common, it should not be so hard to produce" – highlighted his defense, which he was later prohibited to make: namely, that he was not guilty because the law was unjust.

[29] EDUARD BERNSTEIN, SOZIALISMUS UND DEMOKRATIE IN DER GROSSEN ENGLISCHEN REVOLUTION (1895), *translated in* H. J. STENNING, CROMWELL AND COMMUNISM: SOCIALISM AND DEMOCRACY IN THE GREAT ENGLISH REVOLUTION 154–56 (1963), *available at* https://www.marxists.org/reference/archive/bernstein/works/1895/cromwell/

himself, despite evidence that he offered to pay others to overthrow Cromwell, and the jury acquitted him; each of the jurors were immediately and separately examined about their "not guilty" verdict, but all stood by their decision.[30] Lilburne invoked nullification when he spoke to the jury, reportedly advising them of their roles as "judges of law as well as fact" and raising their importance relative to the court, which he referred to as "only the pronouncers of their [jury's] sentence, will, and mind."[31]

A tradition of jury independence came to the shores of the New World. In 1734, John Peter Zenger used his paper, the *New York Weekly Journal*, to print materials negative to the Governor, resulting in criminal charges of seditious libel. Imprisoned and represented at trial by Andrew Hamilton, Zenger had public opinion on his side, but not the law – at the time, truth was no defense.[32] Hamilton argued against the law itself, without denying the underlying facts of the case against Zenger.[33] Hamilton argued that the facts in the newspaper were truth and that only publishing *false* information should be libelous;[34] Peter Zenger was found not guilty.[35]

11-levellers.htm).

[30] BERNSTEIN, *supra* note 29, at 156. Afterwards, the "Little Parliament" that adjudged him was dissolved and a new constitution was created that expanded Cromwell's powers to near King levels. Lilburne, who the jury had just acquitted, was not free; he was kept jailed for the "seditious" statements made in the course of his defense at trial. *Id.*

[31] Lilburne's argument was interrupted by Lord Keble, a member of the court, who told Lilburne that the jurors were judges of fact only and that the opinion of the court was that they were not judges of matters of law. NORMAN J. FINKEL, COMMONSENSE JUSTICE: JUROR'S NOTIONS OF THE LAW 26 (2001). *Commonsense Justice* details the Lilburne trial and questions whether the outcome was an act of nullification based on disdain for the law or for the punishment if a guilty verdict was rendered. *Id.*

[32] "But it has been said already, that it may be a Libel, notwithstanding it may be true." LIVINGSTON RUTHERFURD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS 79 (1904).

[33] *Id.* at 69. In relation to the libel charge, Andrew Hamilton told the court: "I cannot think it proper for me to deny the Publication of a Complaint, which I think is the Right of every free-born Subject to make, when the Matters so published can be supported with Truth . . . ." *Id.*

[34] *Id.* at 206 (The prosecuting attorney maintained that precedents made no distinction between controversial and negative works that were true or false. The Chief Justice concurred that truth was not a defense: "a Libel is not to be justified; for it is nevertheless a Libel that it is true.").

[35] *Id.* at 241.

B. The Constitutional Protections of the Modern U.S. Jury

These cases of judicial coercion and retribution against jurors whose verdicts run counter to their learned opinions represent the type of abuses of authority that led to the Revolution and subsequent Constitution and Bill of Rights. The Sixth Amendment to the Constitution, ratified in 1791, established the right to a trial by an impartial jury in all criminal prosecutions.[36] The Fourteenth Amendment later ensured the jury trial is applicable in state courts.[37] A jury trial removes the possibility of conviction and subsequent loss of life or liberty by judicial determination, historically feared as biased towards and beholden to the government prosecuting the defendant. The Fifth Amendment contains a prohibition against double jeopardy, which protects an individual from being subjected to trial and possible conviction more than once for an alleged offense.[38] This prevents an accused from being prosecuted by the State repeatedly as a measure to ensure (eventual) conviction.[39] But

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[36] U.S. CONST. art. VI; Patton v. United States, 281 U.S. 276, 288 (1930) ("A trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted."); Williams v. Florida, 399 U.S. 78, 86–92 (1970) (examining the historical rule, which is no longer required under the interpretations of the Sixth Amendment, requiring a twelve-person panel). Impartiality in common law meant that jurors had no *direct* ties to the case; it was assumed that because they came from the same area, that they knew about either the case or the participants of the case. *See* Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1618–19 (2011) (citing Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1674 (2000)) (describing the scope of "impartiality" throughout history); *see also* Duncan v. State of La., 391 U.S. 145, 154 (1968) (noting the jury trial's strong support, inclusion in all states as a right for serious criminal cases, and lack of State efforts to eliminate the right).

[37] *See, e.g.*, *Duncan*, 391 U.S. 145, 156 (1968) ("The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.").

[38] As described by the Court in *Crist v. Bretz*, Article V provides, in part

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"; The guarantee against double jeopardy "derived from English common law, which followed then, as it does now, the relatively simple rule that a defendant has but put in jeopardy only when there has been a conviction or an acquittal-after a complete trial.

437 U.S. 28, 33 (1978).

[39] Unfortunately, the prohibition against double jeopardy would not have benefitted John Lilburne, who was acquitted for treason but immediately kept detained for seditious comments made during his own trial. BERNSTEIN *supra* note 29, at 156.

despite the strong constitutional basis of the jury, the role of the jury has been progressively narrowed.

C. The Limited Role of Present-Day Juries to Decide Facts

In 1828, a "jury" was defined as a group empanelled and sworn to inquire into and try any matter of fact, and to declare the truth on the evidence given them in the case.[40] In criminal prosecutions, these juries consisted of twelve men who decided both the law and the facts.[41] But by 2009, the criminal "jury" definition was that of a "group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them."[42]

The removal of any mention of juries deciding the law at trial may be a reflection of case law that (re-)defined the roles of the juries as they related to judges. In 1794, U.S. Supreme Court Justice John Jay told a jury "[Y]ou have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."[43] But later post-revolution judges, independent and learned, have used instructions to assert themselves into the process, resulting in a departure from the jury right to judge the law along with the case facts.[44]

One of the crucial features of the modern criminal jury is the rule requiring a general verdict when the jury decides which party prevails on each charge without listing specific findings on disputed issues. This grants juries a "general veto power" that is not influenced or hindered by a judicial requirement to "answer in writing a detailed list of questions or explain its reasons" for their verdict.[45] The general-verdict requirement

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[40] The word "jury" comes from the Latin word "juro" meaning "to swear." *Jury*, NOAH WEBSTER, 1828 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (2013), *available at* http://1828.mshaffer.com/d/word/jury.

[41] *Id.*

[42] BLACK'S LAW DICTIONARY Jury (9th ed. 2009).

[43] Georgia v. Brailsford, 3 U.S. 1, 4 (1794); *see, e.g.*, Christopher C. Schwan, *Right Up to the Line: The Ethics of Advancing Nullification Arguments to the Jury*, 29 J. LEGAL PROF. 293, 294 (2005).

[44] *See, e.g.*, United States v. Moylan, 417 F.2d 1002, 1005–06 (4th Cir. 1969).

[45] United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980). "In general, special verdicts are not favored [in criminal cases] and 'may in fact be more productive of confusion than of clarity.'" *Id.* at 444; *see also* United States v. Reed, 147 F.3d 1178, 1180 (9th Cir.1998) ("This rule is fashioned to protect the rights of the criminal defendants by preventing the court from pressuring the jury to convict.").

originates from the string of egregious cases of judicial abuse of power over juries during English rule, when jury verdicts differing from the judge's views resulted in interrogations, threats, fines, and even imprisonment.[46] The general verdict safeguards the modern jury because juries that return not-guilty verdicts may not be compelled to explain why.[47]

In 1895, the U.S. Supreme Court in *Sparf v. United States* set forth the relative roles of juries and the judge in a criminal trial,[48] and in so doing, the Court also described how the general verdict conceals whether juries properly found the facts in accordance with the instructed law.[49] To be sure, the Court stated that juries find the case's facts using the law as the judge instructs them.[50] But the Court also noted that, in a limited sense, the jury *does* have a power and legal right to "pass upon both the law and the fact." It reasoned that: (1) "[t]he law authorizes the jury to

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[46] "In other words, the rule against special verdicts seemingly stems from the common law right of the jury to nullify without being reversed by the king's judges." United States v. Blackwell, 459 F.3d 739, 766 (6th Cir. 2006) (citing *Wilson*, 629 F.2d at 443).

[47] *Cf.* State v. Collier, 90 N.J. 117, 121–22 (1982) (trial court committed reversible error in directing through instructions a verdict of guilty on charge of contributing to the delinquency of a minor in violation of defendant's constitutional rights).

[48] 156 U.S. 51, 68–69 (1895). In a murder trial where the defendants were denied a manslaughter instruction due to the judge's view that the evidence was insufficient, the jury returned with questions. After a juror asked in multiple ways whether they could consider a finding of guilt for manslaughter rather than murder as charged, and the judge answered in the negative, the following dialogue ensued:

> Juror: If we bring in a verdict of guilty, that is capital punishment?
> Court: Yes.
> Juror: Then there is no other verdict we can bring in except guilty or not guilty?
> Court: In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated, and even in this case you have the physical power to do so; but, as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.

Id.

[49] *Id.*at 69. The Court acknowledged of the existence of jury nullification, noting that a general verdict either to convict or acquit embodies the result of both law and fact, and that there is no way to ascertain whether the jury passed their judgment on the law, or only on the evidence. *Id.*

[50] *Id.* at 69; *see also* United States v. Carr, 424 F.3d 213 (2d Cir. 2005) (finding no error in judge's instruction to the jury that it has a duty to find a guilty verdict if it concludes the government has proven its case beyond a reasonable doubt); United States v. Pierre, 974 F.2d 1355 (D.C. Cir. 1992).

adjudicate definitively on the evidence;" (2) "the law presumes that they acted upon correct rules of law given then by the judge;" and therefore (3) "[t]he verdict . . . stands conclusive and unquestionable, in point both of law and fact."[51] This interpretation recognizes how the jury can use the facts *in conjunction with the law. Sparf* did not discuss whether the jury can be made aware of its power to disregard the law and nullify lawful instructions.

D. Jurors as Fact-finders; Overt Nullification Barred

Modern courts have rejected the practice of nullification in many forms. Counsel are prohibited from arguing jury nullification during their closing arguments.[52] There, in arguing the law to the jury before findings deliberations, arguments are limited to "principles that will later be incorporated and charged to the jury."[53] Courts and counsel are required to refrain from encouraging jurors to violate their oaths.[54]

The primary justification for the downfall of nullification came in a D.C. Circuit Court of Appeals decision *United States v. Dougherty*. Again appreciating nullification's significant purpose in defeating distrusted judges, who were appointed and removable by the king, it was

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[51] *Id.* at 80. The Court quotes Justice Samuel Chase, whose position was that while it was the criminal courts duty to state the law arising on the facts, the jury's duty was to decide "both the law and facts, on their consideration of the whole case." *Id.*

[52] United States v. Dougherty, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972); *see also* United States v. Moylan, 417 F.2d 1002, 1005–09 (4th Cir. 1969). The dissenting opinion in *Dougherty* understands that some criminal prohibitions lack specific criminal intent. These "faultless crimes" make difficult cases and require juries to use their status as the final check on the community conscience to determine whether the accused should be found guilty, regardless of whether the facts demonstrate guilt on the charge. *Id. at 1142.* Courts have used numerous terms to instruct on guilt and blameworthiness, including 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'willfulness,' and 'scienter'. *See* Morissette v. United States, 342 U.S. 246, 252 (1952). However, some criminal offenses have a *mens rea* requirement that falls well below mental culpability or "evil purpose." Nullification, contemplated and carried out by deliberating juries, is often employed to deny a criminal label for a defendant whose conduct runs afoul of the plain language of the charged offense but occurred in the absence of the criminal intent that makes the guilty truly guilty.

[53] United States v. Trujillo, 714 F.2d 102, 106 (11th Cir.1983) (citing United States v. Sawyer, 443 F.2d 712, 714 & n.11 (D.C. Cir. 1971) ("Before stating a legal principle, counsel should be sure that it will in fact be included in the charge.")).

[54] *Id.* The court simultaneously recognized that a jury may render a verdict at odds with the evidence or the law.

actually the strength of the new republic that halted nullification.[55] The D.C. circuit court pointed to an 1835 opinion in *Battiste* as the crucial case that marked the turning point from juries that decided facts and made its own law to accepting that the democratic process outside the courtroom was the better avenue for changing the law.[56]

Later federal courts dispensed with this careful nostalgia for nullification before rejecting its modern-day application.[57] The jury retained its role as a "buffer between the accused and the state," however it was important to distinguish between a jury's right to reach verdicts that are not aligned with the law and a court's duty to impartially apply and uphold the law.[58] Following that duty, courts have upheld judicial decisions to remove jurors who stated that they did not have to follow the law and refused to engage in deliberations, or whose actions raised doubts as to whether the juror would follow the law after specific instructions.[59]

Efforts to argue for nullification based on the potential for an unjust sentence, such as state-imposed mandatory minimums or severe collateral consequences, are also prohibited. Courts have consistently held that barring argument regarding potential sentences is appropriate "when a jury has no sentencing function" so that the jury can "reach its verdict without regard to what sentence might be imposed."[60] This prohibition and the secrecy regarding the sentencing consequences of a

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[55] *Dougherty*, 473 F.2d at 1132.

[56] United States v. Battiste, 24 F.Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545) (holding that the jury must accept the law as given by the judge). *Battiste* differed significantly from *United States v. Wilson*, 28 F. Cas. 699, 708 (CC ED Pa 1830) ("[Y]ou will distinctly understand that you are the judges of both of the law and the fact in a criminal case, and are not bound by the opinion of the court.").

[57] "To have given an instruction on nullification would have undermined the impartial determination of justice based on law." United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (holding that "[a] jury's 'right' to reach any verdict it wishes does not, however, infringe on the duty of the court to instruct the jury only as to the correct law applicable to the particular case).

[58] *Id.*

[59] United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001) (removal proper when jurors reported to judge that one juror outwardly rejected the law and was generally abrasive); *see also* People v. Williams, 21 P.3d 1209 (Cal. 2001) (juror properly removed after refusal to participate in deliberations in statutory rape case because he believed the law was wrong; record demonstrated the juror was "unable or unwilling to follow the court's instructions").

[60] Shannon v. United States, 512 U.S. 573, 579 (1994) (quoting Rogers v. United States, 422 U.S. 35, 40 (1975)).

guilty verdict is based on relevancy grounds, as the disposition of the defendant "tend[s] to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided."[61] This rationale also explains a key function of the jury system: after the jury has arrived at a guilty verdict, the *judge* imposes a sentence.[62]

Though nullification has been barred in federal courts, state courts in Maryland and Indiana provide criminal juries with the constitutional right to decide both law and fact, though this right is not absolute.[63] New Hampshire courts provide juries with the equivalent of a jury-nullification instruction through its "*Wentworth* instruction", which specifically instructs that juries *must* find the defendant not guilty if they have a reasonable doubt but *should* find the defendant guilty if there is no reasonable doubt.[64] The effect of the word "should" in the instruction is nullification because it allows for a scenario when the jury finds all elements of the charge have been proven beyond a reasonable doubt but acquits the defendant anyway.[65]

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[61] Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962) (barring evidence related to statutory sentences, availability or likelihood of future probation, parole eligibility, or other matters).

[62] *Shannon*, 512 U.S. at 579. "Providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities and creates a strong possibility of confusion." *Id. See also* Rogers v. United States, 422 U.S. 35, 40 (1975) (judges should admonish juries that they have no sentencing function, and that they should reach their verdict without regard to what sentence might be imposed as a result of a conviction).

[63] *See* IND. CONST. art. 1, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."); MD. CONST. DECL. OF RIGHTS art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."). Indiana has limited this right, stating in *Critchlow v. State*, 346 N.E. 2d 591, 596 (Ind. 1976), that while the jury judges facts and law, "this does not mean that a jury is free to disregard existing law of the state and legislate on its own in each case." Maryland, in *Hebron v. State*, 627 A.2d 1029, 1036 (Md. 1993), limited the jury's role in finding the law to "resolving conflicting interpretations of the law of the crime and determining whether that law should be applied in dubious factual situations."

[64] State v. Wentworth, 395 A.2d 858 (N.H. 1978). The New Hampshire Supreme Court later stated that "jury nullification is neither a right of the defendant, nor a defense recognized by law" but simultaneously held that the decision to provide nullification instructions beyond the *Wentworth* instruction "lies within the sound discretion of the trial court." *State v. Paul*, 104 A.3d 39, 45 (2014); *see also* State v. Sanchez, 883 A.2d 292 (N.H. 2005) (finding no abuse of discretion in rejection of defense-requested nullification instructions where general *Wentworth* instruction was sufficient).

[65] *Sanchez*, 883 A.2d at 296.

E. Nullification Carried out Secretly in the Deliberation Room

Courts of various jurisdictions have weighed in negatively on the issue of nullification argument, instruction, and practice. Many of those courts also acknowledge, however, that significant but anecdotal evidence exists that the practice is carried out on behind the closed doors in the deliberation room.[66] Because juries do not have to reveal their analysis or support for their verdicts, it is difficult to determine when or how often an acquittal is based on the nullification of an unpopular law or a law unjustly applied to the particular defendant, or when true reasonable doubt as to guilt exists. Nonetheless, nullification occurs – likely as a hidden factor in deliberation. While courts refuse to actively support it, nullification likely continues, especially when the defendant lacks malicious intent for the actions that run afoul of the law as charged.

Though reasonable minds can disagree over whether jury nullification in the modern era is an express right or an implied or technical right, the *ability* of a jury to nullify has never been in dispute.[67] The Supreme Court admitted as much in *Morissette v. United States* in which the Court stated that "juries are not bound by what seems inescapable logic to judges," understanding apparently that they could have acquitted the defendant simply because they did not want to "brand" the accused "as a thief."[68] In *United States v. Wilson*, the Sixth Circuit stated that in criminal cases, "a jury is entitled to acquit the defendant because it has no sympathy for the government's position."[69] In *United States v. Moylan*, the Fourth Circuit recognized that the requirement for a general verdict necessarily results in a power to acquit a defendant through

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[66] *See generally* PAULA L. HANNAFORD-AGOR & VALERIE P. HANS, *Nullfication at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249 (2003) (analyzing the theory that nullification is increasing through mistrials via deadlocked juries, as highlighted through high-profile cases, while undergoing the difficult task of reviewing methodologies of studies that purport to determine when jury nullification has taken place).

[67] Recent court opinions regarding the jury power to nullify mirror that of the 1794 Supreme Court in *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) ("It is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.").

[68] 342 U.S. 246, 276 (1952) ("Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges . . . . They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.").

[69] United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980).

nullification:[70] "[i]f the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion," the court must abide by their decision.[71]

These cases tend to support the argument that acquittals are an acceptable outcome, even where the government has the facts and law on its side, if the jury disagrees that the defendant should be convicted of the crime as charged. This is known as "the power to bring in a verdict in the teeth of both law and facts," or a "technical right" to decide against the law and the facts, overriding the judge's duty-bound instructions on both.[72] The dissenting view in *Doughtery* continues to power this jury-nullification argument.[73] In it, the Chief Judge looks at the jury and the legislature in their complimentary roles as community consciences:

> The legislative function is to define and proscribe certain behavior that is generally considered blameworthy. That leaves to the jury the responsibility of deciding whether special factors present in the particular case compel the conclusion that the defendant's conduct was not blameworthy.[74]

The 1974 trial of the "Camden 28" demonstrated nullification in action during the tumultuous Vietnam era.[75] The twenty-eight defendants, a group of Vietnam War opponents, were charged with breaking into a Camden, New Jersey building to destroy draft records from the local draft board.[76] They defended themselves through two separate nullification arguments. First, they argued for acquittals

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[70] General verdicts prevent the court from "search[ing] the minds of the jurors to find the basis upon which they judge." United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969). However, the court simultaneously rejected the argument that the jury should be instructed and made aware of its power to nullify. *Id.*

[71] *Id.*

[72] Horning v. D.C., 254 U.S. 135, 139 (1920).

[73] United States v. Dougherty, 473 F.2d 1113, 1140 (D.C. Cir. 1972).

[74] *Id.*

[75] United States v. Anderson, Crim. No. 602-71 (D.N.J. 1973); J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 239–40 (1977) (containing the "Camden 28" defense attorney's closing statement, which is a direct and explicit call for nullification based on government overreaching and opposition to the unpopular Vietnam War).

[76] MARK EDWARD LENDER, THIS HONORABLE COURT: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 1789–2000, at 230 (2006).

because the government used an inside informant to plan and perpetrate the break-in, arguing "overreaching government participation" in their admitted acts.[77] The informant provided roughly ninety percent of the break-in tools, taught others to use them safely, used a vehicle with FBI-provided gasoline, and had food expenses for himself and the group paid for by the FBI.[78] Second, the "Camden 28" pled for sympathy from the jury based on the defendants' popular antiwar positions.[79] The district court judge made an uncharacteristically supportive invitation to jury nullification,[80] telling the jury that they had no power to ignore the law when deciding on a verdict but that juries had done so anyway and that verdicts were "entirely up to" them.[81] All defendants, who made no attempts to deny the facts of their involvement in the crimes, were acquitted despite clear factual guilt.[82]

Later history also contains positive examples of juries in the United States applying nullification by acquitting in cases involving obvious guilt of unpopular laws. Many juries acquitted defendants who helped slaves in violation of the Fugitive Slave Law,[83] though history also contains unfortunate instances of nullification involving cases with unpopular victims (e.g., lynching cases where whites acquitted by juries unsympathetic to black victims).[84] More recently, a jury-nullification appeal was seen in the closing arguments of the double-murder trial of O.J. Simpson. In the midst of a reasonable-doubt argument, defense

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[77] *Id.*

[78] Hardy Aff. 4, Feb. 28, 1972; United States v. Anderson, 356 F. Supp. 1311 (D.N.J. 1973).

[79] LENDER, *supra* note 76, at 230.

[80] District Judge Clarkson S. Fisher, as an Army veteran appointed by President Richard Nixon who sat during several years of the Vietnam War, would not have been the defendants' likely first choice as judge for their trial. *Fisher, Clarkson Sherman*, FED. JUDICIAL CTR, http://www.fjc.gov/servlet/nGetInfo?jid=758&cid=999&ctype=na&instate=na (last visited May 8, 2015).

[81] LENDER, *supra* note 76, at 230.

[82] *Id.*

[83] *See, e.g.*, H. ROBERT BAKER**,** THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR (2006). This book describes civilian resistance to the Fugitive Slave Law of 1850. After the capture of escaped runaway slave Joshua Glover in 1854, citizens formed a mob, rescued Glover from jail, and assisted him in fleeing to Canada. Members who freed him were then tried criminally. Ruby West Jackson & Walter T. McDonald, *Finding Freedom: The Untold Story of Joshua Glover, Runaway Slave*, 90 WIS. MAG. OF HIST. 48–52 (providing excellent background on the Joshua Glover capture that led to civil unrest).

[84] *See generally* KIMBERLY HOLT BARRETT & WILLIAM H. GEORGE, RACE, CULTURE, PSYCHOLOGY, AND LAW (2005).

attorney Johnny Cochran sprinkled nullification terminology throughout his closing arguments, calling for the jury to acquit his client of murder in part because of alleged police misconduct during the investigation.[85] Referring to lead police detective Mark Fuhrman's use of racial slurs, Cochran told the jury that "in the jury room" they should find attitudes condoning racial slurs as "not acceptable as the conscience of this community," and he "empowered" them to send a message about police misconduct through their verdict.[86] Mr. Simpson was acquitted, though at no point did any juror claim that the acquittal was an act of nullification.

A nullification argument usually results in a sustained objection when counsel overtly argues it. Despite this, nullification occurs across the country as a means for juries to reach just results.[87] Because it is impossible to determine how often it occurs,[88] the practice is allowed to continue virtually unnoticed, in both the civilian and military justice systems.

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[85] VINCENT BUGLIOSI, OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER 253 (1996). The nullification theme of finding an accused not guilty to send a message is not new. Referring to specific allegations of police misconduct, Cochran implored the jury: "Who then police the police? You police the police. You police them by your verdict. You are the ones to send a message. Nobody else is going to do it in our society . . . nobody has the courage. . . . Maybe you are the right people at the right time at the right place to say no more. We are not going to have this." *Id.*

[86] *Id.* at 253–54. "You are empowered to say we are not going to take that anymore. I'm sure you will do the right thing about that." The author notes that the prosecution failed to object to this argument. Additionally, the prosecution discussed the police misconduct nullification argument in their rebuttal argument; the jury was told that they would not resolve racism through a not-guilty verdict. This tactic failed to inform the jury that they had no right to find Mr. Simpson not guilty in order to "send a message" if they believed the evidence supporting conviction beyond reasonable doubt. *Id.*

[87] JOHN WESLEY HALL, JR., PUTTING ON A JURY NULLIFICATION DEFENSE AND GETTING AWAY WITH IT, 8 FULLY INFORMED JURY ASS'N (2003). "Often, jurors may not even realize they are nullifying—they may simply rationalize reasonable doubts into a fully proven case, if they are convinced 'not guilty' is the only reasonable verdict." *Id.*

[88] HARRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY 55–62 (1966) (finding that jury research believe that 3%–4% of criminal jury trials result in nullification-based verdicts); *see also* CLAY CONRAD, USING THEORIES AND THEMES TO ACQUIT THE GUILTY (1998). According to Conrad, "prosecutors tend to believe that jury nullification occurs far more frequently than it does. This is because defense lawyers want to believe that they have created objectively reasonable doubts in the minds of the jurors; prosecutors want to believe that they have proven their case beyond any objectively reasonable doubt." *Id.*

III. The Military Justice System and Nullification

The principles of jury nullification that have existed throughout history remain applicable in the military-justice system today. Several types of cases, similar to those in the civilian system, warrant consideration for nullification. Military courts have followed the civilian courts' prohibition on overt or judicially-assisted nullification practices. The most significant case involving nullification in military law, *United States v. Hardy*,[89] nearly closed the issue permanently by stating that there was no right to nullification. The differences between the civilian and military systems, from the selection of panel members, how they are instructed, what they deliberate and vote on, and the number of members required for a conviction, all affect the nullification debate. Military defense counsel's latitude to advocate for nullification ultimately rests on judicial discretion.

The military is a "specialized community governed by a separate discipline,"[90] which relies on obedience and the imposition of discipline.[91] Courts have held these necessities allow for the curtailment of certain rights afforded to the civilian accused.[92] The Army, as the Supreme Court held, is "an executive arm" and "not a deliberative body."[93] Further, "[i]ts law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."[94]

The military, therefore, is governed by different procedures for selecting those who judge the accused at courts-martial, how they vote, how many votes are needed for conviction, and what may be asked of them after the verdict is rendered.

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[89] 46 M.J. 67 (C.A.A.F. 1999).
[90] Able v. United States, 155 F.3d 628, 633 (2d Cir. 1998); Orloff v. Willoughby, 345 U.S. 83, 94 (1953); Parker v. Levy, 417 U.S. 733, 744 (1974).
[91] Toth v. Quarles, 350 U.S. 11, 17 (1955).
[92] Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); Greer v. Spock, 424 U.S. 828 (1976) (finding no generalized constitutional right to make political speeches or distribute leaflets on military reservation).
[93] United States v. Grimley, 137 U.S. 147, 153 (1890).
[94] *Id.*

A. By Statute, Court-Martial Panels Are Composed of the Best Qualified

Being selected to sit on a military court-martial panel is significantly different from that of a civilian jury. In civilian courts, jury pools of citizens are selected at random,[95] and juries themselves must be "reasonably representative" of the community or a "cross-section of the community."[96] Military panel members are personally selected by the convening authority, acting under the advice of the staff judge advocate, in accordance with the criteria of Article 25.

Article 25(d)(2) statutorily mandates that the convening authority detail members of the armed forces who are, in the convening authority's opinion, best qualified "by reason of age, education, training, experience, length of service, and judicial temperament."[97] There is no right "to a trial by a jury of one's peers."[98] The requirement for members to have a positive "judicial temperament" is a critical difference between the military and civilian systems,[99] yet it has not been formally defined or discussed in military case law. The term has been defined in legal arenas outside of criminal jurisprudence as "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law."[100] The most fundamental protection that an accused has from unfounded charges is the convening authority's duty to nominate only fair and impartial members.[101] The members, by nature of

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[95] 28 U.S.C.A. §§ 1861 (West 2014). According to the U.S. policy on jury selection in federal courts, all citizens are initially considered for the random jury selection; this jury pool is limited by removing exempted public employees (§ 1863(b)(6)), illiterates (§ 1865(b)(2–3)), those with mental or physical infirmities (§1865(b)(4)), and those with certain criminal convictions or those pending similar charges (§1865(b)(5)).

[96] Taylor v. Louisiana, 419 U.S. 522 (1975).

[97] UCMJ art. 25(d)(2) (2012); *see also* MCM, *supra* note 16, R.C.M. 502(a) (2012) [hereinafter MCM]. This rule, along with Article 25(d)(1), requires that the accused be junior in rank or grade to each sitting court-martial panel member, essentially ensures that the members are *not* reasonably representative of the (military) community.

[98] *See, e.g.*, Kahn v. Anderson, 255 U.S. 1, 8–9 (1921).

[99] *See infra* Part IV.A.

[100] AM. BAR ASS'N, STANDING COMM. ON THE FED. JUDICIARY, WHAT IT IS AND HOW IT WORKS 3 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/scfed jud/federal_judiciary09.authcheckdam.pdf. This reference discusses the evaluation criteria used by the American Bar Association's Standing Committee on the Federal Judiciary for prospective Federal Judiciary nominees.

[101] United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring); *see also* United States v. Dowty, 60 M.J. 163, 170 (C.A.A.F. 2004). The selection of fair and impartial panel members extends not only to the convening authority who selects the

the judicial temperament and other qualities which formed the basis for their selection, are well suited to judge the justice of the law that they are tasked to apply in the more extreme cases.

B. Panel Instructions Allow for Common Sense and Conscience-based Findings

Deciding cases and weighing evidence in military courts-martial involves more than just strict adherence to the rules of evidence and the law as military judges instruct. Both the initial oath that panel members swear to before being seated and the military judge's closing instructions before deliberation on findings refer to trying the case according to a members' conscience. The panel oath creates three foundations for the panel to base their decisions on and impartially try the case of the accused before them: (1) the evidence; (2) their conscience; and (3) the laws applicable to trials by court-martial.[102] The inclusion of a member's conscience is unique to the military-justice system when compared to the civilian system.[103] In the military judge's closing substantive instructions on findings, members are instructed that they "must impartially decide whether the accused is guilty or not guilty according to the law [the judge has] given you, the evidence admitted in court, and your own conscience."[104]

Despite complex and lengthy judicial instructions, panel members at court-martial may also rely on their common sense in their deliberations. While cautioning that members should only consider matters properly before the court, members are instructed before they deliberate on findings that they "are expected to use" their own common sense and

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members from the pool of servicemembers in his or her command; the subordinates of the commander, to include the staff judge advocate, must assist in the screening of members to protect the judicial integrity of a court-martial.

[102] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ¶ 2-5, at 84 (1 Jan. 2010) [hereinafter DA PAM. 27-9]. Panel members, in their oath, must swear or affirm that they will "faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court . . . ." *Id.*

[103] *See, e.g.*, State v. McClanahan, 212 Kan. 208, 216 (1973) (disapproving nullification instructions because "[t]he administration of justice cannot be left to community standards or community conscience but must depend upon the protections afforded by the rule of law.").

[104] DA PAM. 27-9, *supra* note 102, ¶ 2-5-12, at 53.

"knowledge of human nature and the ways of the world."[105] This use of common sense is not a substitute for the standard of proof for a criminal conviction.[106]

The military judge's responsibilities include instructing the members on questions of law and procedure that may arise.[107] The *Military Judge's Benchbook* (*Benchbook*) is used to "assist military judges . . . in the drafting of necessary instructions to courts. Since instructional requirements vary in each case, the pattern instructions are intended only as guides."[108] A military judge is required to tailor instructions to fit the facts of the case.[109] The *Benchbook* specifically instructs judges to go beyond the pattern instructions for the offenses and definitions when instructing panels before their deliberations.[110]

Court members "are presumed to follow the military judge's instructions,"[111] but like the civilian jury, members do not always follow them or render verdicts aligned with them.[112]

C. Deliberations, Voting, and Findings Procedures

After the military judge instructs the panel, the panel conducts two critical phases of trial: findings and sentencing, each of which contains

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[105] *Id.* ¶ 8-3-11, at 1129.

[106] *See also* United States v. Catano, 65 F.3d 219, 228 (1st Cir. 1995), *supplemented*, 66 F.3d 306 (1st Cir. 1995) (finding proper instructions that the jury use its common sense in deliberations where instructions draw "a distinction between common sense, as methodology, and the beyond-a-reasonable-doubt standard, as a quantum of proof."); *see also* United States v. DeMasi, 40 F.3d 1306, 1317–18 (1st Cir. 1994); United States v. Ocampo–Guarin, 968 F.2d 1406, 1412 (1st Cir. 1992).

[107] MCM, *supra* note 16, R.C.M. 801(a)(5) ("Preliminary instructions to the members concerning their duties and the duties of other trial participants and other matters are normally appropriate."); *id.* R.C.M. 801(e)(1)(A) (stating that "any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final")

[108] DA PAM. 27-9, *supra* note 102, ¶ 1-1b, at 3.

[109] MCM, *supra* note 16, R.C.M. 920(a); United States v. Baker, 57 M.J. 330, 333 (C.A.A.F. 2002); United States v. Jackson, 6 M.J. 261, 263 n.5 (C.M.A. 1979); United States v. Groce, 3 M.J. 369, 370–71 (C.M.A. 1977); United States v. Martinez, 40 M.J. 426 (C.M.A. 1994).

[110] DA PAM. 27-9, *supra* note 102, ¶ 1-2, at 4.

[111] United States v. Holt, 33 M.J. 400, 408 (C.M.A. 1991); United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000).

[112] Morissette v. United States, 342 U.S. 246, 276 (1952).

deliberations, voting, and announcement.[113] The rules for these phases generally mirror federal rules, but some are modified for military application. Consequently, like the federal system, there is room for panel nullification.

The military provides for substantially the same protections for the secrecy of court-martial panel deliberations as the federal system. Deliberations during courts-martial are to be kept secret, with very limited exceptions.[114] This ensures open discussion among the members and maintains the integrity of the process.[115] Military Rule of Evidence (MRE) 606(b) is a "blanket prohibition on juror testimony to impeach a verdict."[116] The military rule on secrecy in deliberations, however, provides additional protections for the accused which allow inquiry into whether there was unlawful command influence into the findings or sentence of a court-martial panel.[117]

In *United States v. Loving*, the Court of Appeals of the Armed Forces (CAAF) held the deliberative secrecy rule applies equally to matters of voting. In *Loving*, the panel convicted the accused of premeditated murder, felony murder, attempted murder, and five specifications of robbery.[118] The members entered sentencing deliberations, selecting between either life imprisonment or death.[119] Post-trial affidavits from three members, to include the panel president, revealed the possibility that the members failed to follow many of the required voting

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[113] If the panel votes to acquit the accused of all charges and their specifications, and the accused had not previously pled guilty to any charges or specifications, the court-martial is terminated without further proceedings.

[114] MCM, *supra* note 16, MIL. R. EVID. 509.

[115] *Id.* MIL. R. EVID. 606(b). This military rule of evidence strikes a balance "between the necessity for accurately resolving criminal trials in accordance with rules of law on the one hand, and the desirability of promoting finality in litigation and of protecting members from harassment and second-guessing on the other hand." United States v. Hardy, 46 M.J. 67, 73 (C.A.A.F. 1997) (quoting S. SALTZBURG, L. SCHINASI & D. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 633 (3d ed. 1991)).

[116] United States v. Loving, 41 M.J. 213, 237 (C.A.A.F. 1994), *opinion modified on reconsideration*, 42 M.J. 109 (C.A.A.F. 1995), *aff'd*, 517 U.S. 748 (1996) (quoting Tanner v. United States, 483 U.S. 107 (1987)); MCM, *supra* note 16, R.C.M. 923.

[117] Members may be questioned about whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. MCM, *supra* note 6, MIL. R. EVID. 606(b).

[118] *Loving*, 41 M.J. at 229.

[119] UCMJ art. 118(1). Premeditated murder requires a death resulting from an act or omission of the accused, an unlawful killing, and a premeditated design to kill.

procedures.[120] After reviewing MRE 606(b) and its federal counterpart, the CAAF held that affidavits or testimony relating to voting will not be reviewed by the appeals courts even if it is alleged that the members or jurors failed to follow voting procedure instructions.[121]

In addition, while the civilian criminal courts require unanimous verdicts,[122] no servicemember may be convicted of an offense in a court-martial without two-thirds concurrence of the members present when the vote is taken.[123] An acquittal cannot be withdrawn or disapproved even if it is deemed "mistaken or wrong".[124] The military requirement for a two-thirds vote to convict a servicemember precludes the need for post-announcement individual member polling present in the civilian system.[125] Post-announcement polling to determine whether members concur with the verdict is prohibited, and members may not be

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[120] *Loving*, 41 M.J. at 232. It was alleged that the members (1) failed to vote on all aggravating factors; (2) failed to follow the correct procedures for proposing specific sentences, (3) failed to vote first on the least severe sentence proposal; (4) voted on proposals for life imprisonment and the death sentence simultaneously; and (5) reconsidered a less than unanimous vote to impose the death penalty without following proper reconsideration procedures.

[121] *Id.* at 237; United States v. Ortiz, 942 F.2d 903, 913 (5th Cir. 1991) (holding that that voting was a component of deliberation such that it rejected an affidavit of a juror alleging that the jurors improperly voted orally and voted on all counts together rather than voting on each count presented against each defendant as instructed), *cert. denied*, 504 U.S. 985 (1992); United States v. Ford, 840 F.2d 460, 465 (7th Cir. 1988) (refusing to inquire into the jury's deliberative process, to include votes, in the absence of a claim of external influence, despite allegation that votes were taken before all evidence was reviewed and that votes were cast verbally); *see also* United States v. Bishop, 11 M.J. 7, 9 (C.M.A. 1981); United States v. West, 48 C.M.R. 548 (C.M.A. 1974) (finding that "that the great weight of authority is that a verdict cannot be impeached by a member of the jury who claims that the jury failed to follow the court's procedural or substantive instructions").

[122] FED. R. CRIM. P. 31(a).

[123] UCMJ art. 52(a)(2) (2012). For offenses for which the death penalty is made mandatory by law, any conviction must be supported by all of the members of the court-martial present at the time the vote is taken. *Id.* art. 52(a)(1); MCM, *supra* note 16, R.C.M. 921(c)(2)(B).

[124] United States v. Hitchcock, 6 M.J. 188, 189 (C.M.A. 1979); Fong Foo v. United States, 369 U.S. 141, 143 (1962).

[125] FED. R. CRIM. P. 31(d) ("After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury."). The right for a party to request for and receive permission to have the jury polled is an "undoubted right." Humphries v. D.C., 174 U.S. 190, 194 (1899). The purpose of jury polling is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id.*

questioned about their deliberations and voting.[126] The prohibition on, essentially, any inquiry into a panel's decision – outside of the issues of command influence or extraneous information – further insulates a military panel, creating room for nullification.

D. Nullification Law in the Military Justice System

Military courts have treated the issue of nullification similar to that of their civilian counterparts, rejecting it as a valid defense and refusing to instruct while also acknowledging its existence and acquiescing to its use in courts-martial in unique cases. Cases have raised issues covering nullification opportunities throughout the period trial, from its use at voir dire to member instructions. Overall, while appellate courts disfavor the practice, its rationale mirrors that of the civilian system of yielding to the discretion of the trial court.

1. General Nullification Law in the Military

Generally, nullification is disfavored in military courts-martial. The CAAF has held that while "court-martial members always have had the power to disregard instructions on matters of law given them by the judge, *generally* it has been held that they need not be advised as to this power, even upon request by a defendant."[127]

2. Military Judges May Decline to Give Nullification Instructions

Similar to the tradition of not advising court-martial panels of their power to acquit an accused despite sufficient evidence to convict, military courts have deferred to the discretion of the trial judges when it comes to legal instructions relating to nullification.[128]

In *United States v. Hardy*, the court resolved the issue of nullification

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[126] MCM, *supra* note 16, R.C.M. 922(e).

[127] United States v. Hardy, 46 M.J. 67, 70 (C.A.A.F. 1997) (quoting United States v. Mead, 16 M.J. 270, 275 (CMA 1983)) (emphasis added). At issue in *Mead* was whether a military judge could take judicial notice of a general service regulation in a revision proceeding. It was not a case that advocated for, nor fully discussed, panel nullification as a military justice concept.

[128] *Id.* at 74.

instructions by firmly declaring that there is no "right" of jury nullification, and therefore, the military judge did not err by declining to give a nullification instruction or instruct the panel on their power to nullify his instructions.[129] In that case, the panel asked the military judge after hours of deliberations whether they necessarily had to find the accused guilty of the charge if they found all of the elements were present.[130] The defense contended that the panel's question asked for guidance on jury nullification and requested the judge instruct the panel that they could "review the wisdom of the charges" in using their discretion to find the accused not guilty.[131] The military judge disagreed, declined to give further instructions, and sent the panel back where they deliberated and found the accused guilty of forcible oral sodomy.[132] On appeal, the CAAF reviewed whether the military judge erred to the deprivation of the appellant's due process right to a fair trial, and found no error.

Military appellate courts distinguish between (1) a panel's right to reach any verdict, guilty or not guilty, which may seem counter to clear law; and (2) the court's duty to instruct the jury with only the correct and applicable law.[133] This distinction ensures the court, through its instructions, does not promote deliberate disregard of its instructions. The CAAF held in *Hardy* that nullification occurs as a collateral consequence of the rule protecting the secrecy of deliberations, the requirement for a general verdict, the prohibition against a directed guilty verdict, and the protection against double jeopardy.[134] These protections of the panel members and the accused, however, do not create a legally-recognized right to engage in panel nullification such that a court must

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[129] *Id.* at 75; United States v. Wagner, No. 20111064, 2013 WL 3946239 (A. Ct. Crim. App. July 29, 2013) ("Appellant has no right to a compromise verdict or any instruction that is tantamount to a request for jury nullification."); *see, e.g.*, United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997) ("[I]n language originally employed by Judge Learned Hand, the power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent.").

[130] *Hardy*, 46 M.J. at 68.

[131] *Id.* at 69.

[132] *Id.*

[133] *Id.* at 70; United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); *see also* United States v. Boardman, 419 F.2d 110, 116 (1969) ("Today jurors may have the power to ignore the law, but their duty is to apply the law as interpreted by the court, and they should be so instructed.").

[134] *Hardy*, 46 M.J. at 75.

provide legal instructions that include the concept of nullification.[135]

What *Hardy* does not conclude, however, may provide sufficient room for defense counsel to successfully argue for acquittals despite factual guilt, even receiving judicial cooperation in the form of explanatory instructions. The unwillingness to outright prohibit nullification advocacy and instructions from trial by courts-martial or apply military-specific prohibitions may and should provide opportunities to convince future courts to grant the latitude for advocacy.

3. Military Judges May Prohibit Nullification-Inducing Voir Dire *Questions*

The Court of Military Appeals (CMA) partially closed the door to nullification advocacy in voir dire in *United States v. Smith.*[136] The purpose of voir dire is to enable the court to select an impartial jury.[137] In support of that purpose, voir dire is utilized to lay a foundation so that challenges can be wisely exercised.[138] Members, when being examined with a view to challenge, may be asked any pertinent question tending to establish a disqualification for court duty.[139] These disqualifications include statutory disqualifications, implied bias, actual bias, or other matters which have "some substantial and direct bearing on an accused's right to an impartial court."[140] Counsel should not purposefully use voir dire to present factual matter that will not be admissible or to argue the case.[141]

In *Smith*, the accused was facing a contested trial for premeditated murder;[142] the defense petitioned the court for permission to advise members of the panel that a premeditated murder conviction carried with it a mandatory life sentence.[143] Thus the defense sought to inquire into

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[135] It remains unclear whether the military judge can deny the existence of nullification, if asked.

[136] 27 M.J. 25, 27 (C.M.A. 1988).

[137] Mu'Min v. Virginia, 500 U.S. 415, 431 (1991).

[138] *Smith*, 27 M.J. at 29; United States v. Nixon, 30 M.J. 501, 504 (A.F.C.M.R. 1989); *see also* United States v. Parker, 19 C.M.R. 400, 405 (1955) (for challenges to be exercised, the accused should be allowed considerable latitude in examining members).

[139] *Smith*, 27 M.J. at 29 (quoting United States v. Parker, 19 C.M.R. 400, 405 (1955)).

[140] *Id.*

[141] MCM, *supra* note 16, R.C.M. 912(d) discussion.

[142] UCMJ art. 118 (2012).

[143] *Smith*, 27 M.J. at 26.

members' position on punishments while specifically informing them that if the accused was convicted, a mandatory life sentence would be enforced.[144] Defense counsel specifically wished to "place them on notice . . . of their responsibility" of this mandatory sentence, reasoning that, for members unaware of the requirement, it may "affect their judgment."[145]

The military judge ruled that he would not inform the members that a conviction would result in a mandatory life sentence and stated that he would ask counsel to refrain from informing the members of the fact in voir dire and arguments.[146] The CMA, in affirming the military judge's decision, agreed with the service court that the defense request was an attempt to advocate for nullification and rejected it as "totally unacceptable" and inconsistent with case law.[147]

4. Relevancy Rules Limit Nullification Evidence and Arguments

Opening and closing arguments are counsel's best opportunities to advocate their case to a court-martial panel. Similarly, the defense case-in-chief serves as the opportunity to introduce evidence and testimony that serves as the basis for the panel decision and the foundation for the counsel arguments. Therefore, opposing counsel and military judges, through objections and rulings, ensure that testimony offered and evidence admitted at trial meets the standards of relevancy.[148]

Evidence that is not relevant is not admissible.[149] Witness opinions presented at trial that a law or policy was widely unpopular or should not be enforced against a military accused would be unlikely to withstand an objection. For that reason, nullification advocacy rarely occurs during the evidence-gathering phase of trial.

There is no requirement that the military judge allow arguments

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144 *Id.*
145 *Id.*
146 *Id.* at 27.
147 *Id.* at 29.
148 MCM, *supra* note 16, MIL. R. EVID. 401. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.*
149 *Id.* MIL. R. EVID. 402.

"obviously designed to induce jury nullification."[150] Closing arguments are not evidence; rather, they are "an exposition of the *facts* by counsel for both sides as they view them."[151] Arguments are made to assist the panel in understanding and evaluating the evidence.[152] Courts find implied advocacy of deliberate disregard of the law unacceptable but have been amenable to advocacy designed to promote serious and thoughtful consideration of guilt or innocence.[153]

IV. He Did It, But So What? The Case for Expanded Nullification Use

Nullification, which occurs when a panel acquits an accused despite sufficient guilt to convict, is not a practice that occurs or should occur frequently. However, nullification is not only within the inherent power of the court-martial panel, but it can and should occur when the members' conscience compels it and when justice demands it.[154]

In the limited circumstances of the factually guilty but morally blameless accused,[155] nullification is an appropriate exercise of the discretion and trust entrusted to a panel comprised of those the convening authority hand-selected for their judicial temperament and experience. A power that is undiscovered is rarely exercised. Thus, in limited circumstances when nullification is appropriate[156] the military judge should candidly and appropriately explain the contours of the panel power to acquit and military defense counsel should advocate for members to vote in accordance with their conscience.

Court precedents on nullification supply military judges with the legal cover to deny nullification in their courtrooms while also acknowledging their discretion to allow it. The purposeful decision to avoid an outright

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[150] *Smith*, 27 M.J. at 29 (Everett, C.J., concurring).

[151] DA PAM. 27-9, *supra* note 102, ¶ 2-5-13 (emphasis added).

[152] *Id.*

[153] *Smith*, 27 M.J. at 29; United States v. Jefferson, 22 M.J. 315, 329 (C.M.A.1986).

[154] Duncan v. State of La., 391 U.S. 145, 157 (1968) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966) ("[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.").

[155] Offenses such as violations of punitive policies or lawful regulations can occur without malicious intent.

[156] The D.C. Circuit Court in *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972), cautioned against the widespread use of nullification, stating that "[w]hat makes for health as an occasional medicine would be disastrous as a daily diet." *Id.*

prohibition on nullification advocacy, coupled with the express language in their standard instructions that charge members to use their conscience along with the evidence and instructions in their deliberations, provide the opening for today's military judges to allow significant latitude for advocacy. Where the panel *must* acquit if they have reasonable doubt but *should* convict if they have no reasonable doubts, nullification is implicitly built into the military justice system. Military judges can provide latitude to advocate for verdicts which contemplate an important question for a panel charged with reaching both a verdict and an appropriate sentence: He did it, but so what?

A. Judicial Temperament Requirement Promotes Independent Judgment

Military court-martial panels are different than civilian juries. Court-martial panel members, selected personally by the convening authority by virtue of their age, education, training, experience, length of service, and judicial temperament, are given special authority to judge on behalf of the military commander.[157] The difference between the randomly-selected civilian juror and the panel member hand-picked by the commander for their special skills and traits under Article 25 is the most crucial argument supporting a panel's ability to engage in nullification where appropriate.

The civilian courts' position that nullification arguments or instructions could lead to rampant nullification and virtual chaos,[158] when viewed in light of the Article 25 qualifications of a court-martial panelist, is dubiously applied to the military. The military panel member is presumably more intelligent, older, fairer, and more knowledgeable on the issues relevant to both the convening authority and the military accused in the case before them. Article 25 heightens the responsibilities of panel members and their authority to carry out their duties based on the high hurdle of being among the chosen few from a large military unit who are capable of serving in the role.

Of the required traits for a panel member that do not exist in the more paternalistic and judge-controlled civilian system is that of "judicial

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[157] UCMJ art. 25(d)(2) (2012).

[158] United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969) ("To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos.").

temperament." The term is without a firm legal definition, but those with the right judicial temperament are often characterized as compassionate, open-minded, free from bias, and decisive. Comparing those characteristics with the civilian jury, selected from a pool of random non-felon citizens, the military court-martial panel member is in a special position to fairly judge a criminal case. Simply put, the court-martial panel member is better qualified to properly weigh evidence. This fact alone diminishes the argument popularized in civilian opinions that nullification advocacy or judicial instructions would lead to "anarchy" or "chaos" within the justice system.

B. Judicial Discretion and Nullification Instructions

United States v. Hardy is one of the most cited military nullification opinions.[159] Specifically regarding nullification instructions, the court held that the "fact that a jury has the power to acquit . . . by disregarding the instruction of the judge on matters of law does not mean that the panel *must* be told that it is permissible for them to ignore the law."[160] But the language used in this holding, when carefully construed, does not prohibit a military judge from giving nullification instructions. Rather, it concludes that the military judge is not obligated to give the instructions even if the defense requests them. The distinction between not being obligated to instruct on nullification and not being permitted to instruct on nullification is crucial to the argument that military judges have the discretion to give nullification instructions if they deem it reasonable. Knowing judges have this discretion, counsel must convince military judges on a case-by-case basis that nullification instructions are appropriate, and that the judge should tailor instructions accordingly.[161]

C. The Case for Nullification Instructions in Response to Specific Questions

While the military judge is under no obligation to provide instructions that encourage nullification, the power to acquit a military accused

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[159] 46 M.J. 67 (C.A.A.F. 1997).
[160] *Id.* at 74 (emphasis added).
[161] Military judges are required to tailor instructions to the particular facts and issues in a case. United States v. Baker, 57 M.J. 330, 333 (C.A.A.F. 2002); United States v. Jackson, 6 M.J. 261, 263 n.5 (C.M.A. 1979); United States v. Groce, 3 M.J. 369, 370–71 (C.M.A. 1977).

despite a belief that they committed the offense remains. Occasionally during deliberations, panel members will have questions about their role vis-à-vis the military judge's instructions, which hint at their desire to engage in nullification. To maintain panel impartiality, the standard *Benchbook* instructions given before findings deliberations should remain intact, implicitly allowing nullification but avoiding an explicit mention or encouragement of the practice. However, if members ask for clarification regarding whether they *must convict* or *may acquit*, military judges should rely on a standard *Benchbook* response that adequately and honestly explains the issue. This is a middle ground between a policy of "hiding the ball" on nullification and judicial promotion and encouragement of the power to disregard the facts and law of a case.

1. United States versus Hardy *As Poor Test Case for Military Nullification Law*

Before the introduction of new *Benchbook* instructions for clarifying the nullification issue for a panel that requests guidance, we must first examine the origin of the current posture. As noted above, *United States v. Hardy* is relied upon as a significant case in military nullification law, but it is an unfortunate example of the age-old axiom that "bad facts make bad law."[162] Scrutiny of the facts and circumstances in *Hardy* reveals that it was never a nullification case; analyzing *Hardy* as a nullification case was detrimental to the cause, as the analysis and conclusions have served as precedent for military courts.

The nature of the charged offenses against Specialist Hardy (SPC), the evidence provided in the defense case-in-chief, and the defense theory was inconsistent with nullification. The trial judge's denial of the defense-proposed instructions was inevitable given the case facts, as were the appellate court decisions upholding the judge's ruling. To properly lay the foundation for a true test case on the nullification argument, a case must possess certain factors that move the nullification argument thoughtfully.

First, the right test case should contain one or more specifications where nullification is a reasonable argument. As nullification is the intentional disregard of strong evidence supporting a charge, a strong test

[162] United States v. Sanders, 66 M.J. 529, 532 (A.F. Ct. Crim. App. 2008) (upholding appellant's conviction based on the doctrine of inevitable discovery despite questionable tactics used by government investigators to obtain evidence against the accused).

case should contain a charge that leads the panel to ask, "He did it, but so what?" Cases involving only universally accepted criminal charges are ill-advised for nullification argumentation.[163]

Second, the evidence presented either through the defense presentation of the evidence or testimony gleaned on cross-examination must support an eventual nullification argument. Because instructions serve as legal guidance based on evidence admitted at trial, counsel should not expect special nullification instructions where the defense strategy at trial focuses solely on raising reasonable doubt as to guilt.

Finally, to properly build a case that would lead to a balanced court discussion on nullification, the defense argument itself must contain the hallmarks of a nullification argument.[164] These arguments include explicit appeals to the members' conscience, reminders of the direct consequences of conviction (felony conviction in a federal court), and open questioning of the law or policy charged.

Applying these factors to SPC Hardy leads to a conclusion that it was never a nullification case. First, SPC Hardy faced court-martial for rape,[165] forcible sodomy,[166] and attempted sodomy,[167] all allegedly committed on February 26, 1994.[168] None of these charges, by themselves, are of a nature to bring about panel nullification. These charges require a level of *mens rea* that, absent other circumstances, support a criminal conviction. Completed or attempted rape and forcible sodomy contain viable legal defenses that could be employed, such as consent or mistake of fact as to consent. They rarely raise a "he did it, but so what?" argument – at least not a particularly compelling one. Second, the defense evidence in *Hardy* failed to raise the issue of nullification. In fact, the defense rested its case-in-chief without calling a single witness or presenting any evidence to counter the accuser's

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[163] For example, the O.J. Simpson double-murder trial may have appeared to be an acquittal based on jury nullification, but it could not be said that the not guilty verdict was based on dissatisfaction of the law against murder or that the law was being twisted and misapplied to O.J. Simpson.

[164] *See e.g.*, Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68, 98 (2002).

[165] UCMJ art.120 (2012).

[166] *Id.* art. 125.

[167] *Id.* art. 80.

[168] The defense did cross-examine government witnesses. United States v. Hardy, 46 M.J. 67 (C.A.A.F. 1997); Specialist Hardy was convicted of forcible sodomy, and found not guilty of rape and attempted sodomy. *Id.*

statement that she was raped.[169] Finally, the defense argument on findings failed to contain elements of a nullification argument. Instead, the lengthy closing argument focused on raising reasonable doubt, highlighted by the argument that "[t]he prosecution hasn't proven their case . . . ."[170] Hardy's defense counsel discredited the alleged victim's character, [171] noted the lack of physical evidence,[172] and specifically alleged victim fabrication.[173] The members subsequently found the appellant guilty of Charge II, forcible sodomy, and not guilty of rape and attempted sodomy.

The significance of the case facts to the holding in *Hardy* cannot be underestimated: the CAAF in this case held that there is no right to instructions on nullification, in part, because at no point did the facts of the case warrant such an instruction.[174] The military judge properly refused to give additional nullification instructions because nullification was never introduced at trial in any way. The record in *United States v. Hardy* lacked the nullification theories or concepts necessary to bring forth an opposing viewpoint; this deficiency inevitably led to the one-sided analysis and holding. *Hardy* failed to spur a balanced nullification discussion; three decades later the argument lays virtually dormant.

2. Additional Standard Nullification Instructions Unnecessary

Assuming *arguendo* that the facts of *United States v. Hardy* had built

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[169] *Id.*

[170] *Id.*

[171] *Id.* at 267. Defense counsel described the victim to the panel as "[a] 19 year old soldier, sexually active and very adventuresome; one who obviously doesn't discriminate at all. At all. An individual who brings so much psychological baggage to the witness stand, that she's not only not credible of belief, she doesn't even know what reality is or is not."

[172] *Id.* at 268.

[173] *Id.* at 272. "She's making this up because she's compromised the hell out of herself as a human being. She's compromised her dignity and it's hard to live with, guys"; Counsel further argued that "she came up with this thing because she was trying to manipulate the audience, the crowd that basically was going to label her as a slut, a girl that will screw anybody. Excuse my French." *Id.* at 277.

[174] The lack of discussion during trial relating to nullification also raises the clear question of whether the panel member question to the military judge concerning whether they necessarily had to find the defendant guilty if they found all of the elements present was actually a nullification question or one about deliberation and findings procedures. This is yet another reason why *United States v. Hardy* was not a helpful test case factually for the nullification issue.

a solid foundation for a full legal analysis on nullification as a legitimate defense tactic, the resulting opinion might not hold that nullification instructions beyond the current standard *Benchbook* instructions were necessary. Instructions, both during the oath and before closing arguments on findings, mandate that members try the accused in accordance with their own consciences. This directive, by itself, is a quasi-nullification argument in that it demands that members make a judgment call based on their own view of what is it the proper outcome (and go beyond the law and evidence of the case). Military judges, even those sympathetic to nullification as a practice, may find the instructions already sufficient because they include "conscience" as a factor in impartially trying a case. Further, the standard instructions state that members *must* acquit if they have a reasonable doubt as to guilt but only *should c*onvict if they have no reasonable doubt as to guilt.[175] With these current instructions, counsel are free to argue to panel members that they need to vote their conscience and that they are not forced to convict the accused even if they believed he committed the offense.[176]

3. Nullification Instructions as a Response to Questions Are Necessary

In some instances, panels need and seek clarification on the legal instructions that the military judge has given them. Where their questions relate directly or indirectly to nullification (i.e., their ability to acquit no matter what the circumstances of the case), the military judge should be ready, willing, and able to provide an answer in response that is both honest and accurate.

The dissenting opinion in *United States v. Dougherty* noted a "deliberate lack of candor" when the trial judge refused to instruct on or allow mention of nullification at trial.[177] The opinion found considerable

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[175] DA PAM. 27-9, *supra* note 102, ¶ 2-5-12, at 53. The state of New Hampshire has a similar instruction. State v. Wentworth, 395 A.2d 858 (N.H. 1978) (holding that the effect of 'should' in the "*Wentworth* instruction" provides the equivalent of a jury nullification instruction that even if the jurors found that the State proved beyond a reasonable doubt all the elements of the offense charged, they could still acquit the defendant).

[176] In this strategy, counsel would be wise to not mention to the panel arguments regarding the strength of the evidence in the case or the laws and elements of the charges as instructed to them.

[177] United States v. Dougherty, 473 F.2d 1113, 1140 (D.C. Cir. 1972).

harm in not telling the jury of its power to nullify the law in this particular case, especially because at trial "the defendants made no effort to deny that they had committed the acts charged" and their defense was "obviously designed to persuade the jury that it would be unconscionable to convict them of violating a statute whose *general* validity and applicability they did not challenge."[178]

A power given to a jury is of little value when: (1) the jurors are ignorant of the power; and (2) the legally-trained parties to the case either refuse to inform them or are restricted from doing so. Conceding only that courts are not eager to encourage nullification, when a panel member asks the military judge about nullification, the military judge should respond rather than evade or deny its existence.[179] The standard answer in response to a nullification question, to balance the requirement for candor and the desire to not encourage nullification, should (1) succinctly answer the question asked; (2) repeat the guidance contained in the oath and pre-deliberation instructions about the need to use their consciences to guide deliberations along with admitted evidence and law as instructed; (3) reiterate the judge's role to inform on all matters of law; and (4) ensure the panel has no further questions regarding the standards or their role before sending them back to continue deliberations.

D. The Case for Nullification in Voir Dire After Anti-Nullification Questions

Trial advocacy does not begin at closing arguments; the strongest advocacy begins early. Judge advocates may agree that voir dire is the first opportunity counsel has to "make their case" to the panel. The Rules for Court-Martial (RCM), case law, and military judges look negatively on the use of voir dire to advocate on behalf of a military accused. Expansion of nullification-related questions in the voir dire phase, however, would, in limited situations comport, with both policy and law, ultimately increasing fairness in courts-martial practice.

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[178] *Id.* (emphasis added). The defendants were convicted of malicious destruction and unlawful entry after breaking into the offices of Dow Chemical Company and vandalizing them. They were not arguing that the law against malicious destruction or unlawful entry was morally or legally questionable; rather that it would be unconscionable to convict them. *Id.* at 1118.

[179] Military judges sitting as the fact-finders know of their power to nullify, even if most by temperament and judicial training do not use it.

1. Voir Dire Phase Not (Typically) Appropriate for Nullification Advocacy

The CAAF in *United States v. Smith* only partially closed the door on defense-requested nullification questions during voir dire. The appellate court upheld the military judge's decision to restrict counsel from discussing the mandatory life sentence *if* the accused was convicted of premeditated murder.[180] Because there is no requirement for the military judge to allow questions or arguments obviously designed to induce jury nullification, it was not legal error to restrict the questions. A lack of a requirement to allow is not the same as a blanket prohibition; the trial judge in *Smith* may have lawfully used his discretion to allow questions or commentary during voir dire relating to issues that touch upon nullification.

Chief Judge Everett's concurring opinion in *Smith* made a careful distinction based on counsel intent to advocate for nullification, reaffirming the permissibility of referring to mandatory sentences for particular crimes when counsel has a non-nullification purpose.[181] Courts have held that "to the extent that such an argument may impress on the members the seriousness of their decision on findings, it is not inappropriate."[182]

Voir dire is a trial phase utilized to lay foundations for wisely exercised challenges,[183] ensuring the court selects an impartial jury.[184] The discussion to RCM 912(d) cautions against counsel purposefully using voir dire to argue their case.[185] Voir dire is preceded by the military judge's preliminary instructions,[186] which inform the members

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[180] United States v. Smith, 27 M.J. 25, 27 (C.M.A. 1988). The restrictions were placed because the court believed counsel was seeking to make a nullification argument during voir dire and closing arguments, based on counsel's justification that he wished to "place them on notice" of the sentence, which may "affect their judgment." *Id.* The court held that nullification efforts in voir dire were "totally unacceptable" and inconsistent with case law. *Id.*

[181] *Id.* at 28 (Everett, C.J., concurring).

[182] United States v. Jefferson, 22 M.J. 315, 329 (C.M.A. 1986); State v. Walters, 240 S.E. 2d 628, 630 (N.C. 1978).

[183] *Smith*, 27 M,J. 25, 29; United States v. Nixon, 30 M.J. 501, 504 (A.F.C.M.R. 1989); *see also* United States v. Parker, 19 C.M.R. 400, 405 (1955) (for challenges to be exercised, the accused should be allowed considerable latitude in examining members).

[184] Mu'Min v. Virginia, 500 U.S. 415, 431 (1991).

[185] MCM, *supra* note 16, R.C.M. 912(d) discussion.

[186] DA PAM. 27-9, *supra* note 102, ¶ 2-6-1, at 85–88.

that they "must keep an open mind throughout the trial." This instruction is made more difficult to follow if counsel, before the substantive portions of trial begin, seeks to inform the members of their power to disregard the law as instructed. Although with careful phrasing and a secondary (unspoken) non-nullification purpose, it is possible to weave nullification concepts into voir dire;[187] as a whole, it is not an appropriate place for nullification advocacy.

If not restricted, a voir dire that is rife with nullification themes could confuse members as to their role vis-à-vis the military judge and their instructions before evidence is admitted and witness testimony is provided. This has the effect of debilitating the impartiality of the panel. If nullification is to be embraced, a far more appropriate venue for it would be findings arguments, where zealous counsel can fulfill their role as advocates.[188]

2. Proposal: Allow Nullification Voir Dire Questions to Counter Opposition

The analysis on nullification in voir dire, however, does not end with a blanket prohibition on counsel using nullification-themes. Voir dire

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[187] *See* JOHN WESLEY HALL, JR., PUTTING ON A JURY NULLIFICATION DEFENSE AND GETTING AWAY WITH IT, 12 FULLY INFORMED JURY ASS'N (2003). Where courts are hostile to the practice of nullification questions in voir dire, the author provides tips and quotes from *Taylor v. La.*, 419 U.S. 522, 530 (1975):

> Courts will not generally allow the defense to raise the issue of nullification directly, so the defense must find permissible or protected ways to get this information before the venire. One of the least objectionable techniques may be to quote the Supreme Court's decisions describing the role of the criminal trial jury and to get the venire members talking about them. For example, counsel may inform the venire that 'a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community, as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.

Id.

[188] DA PAM. 27-9, *supra* note 102, ¶ 2-5-13. The military judge instructs the members before findings arguments by counsel, which are "an exposition of the facts by counsel for both sides as they view them." The judge further instructs that "the arguments of counsel are not evidence" and that arguments are "made by counsel to assist you in understanding and evaluating the evidence . . . ." *Id.*

questions that touch upon nullification are widely accepted—by the government—and are already included as acceptable and even recommended in Judge Advocate General's Corps doctrine.[189] One such question, proposed for trial counsel on behalf of the government, asks "Will you follow the law as the judge instructs you, even if you disagree?"[190] Another question may ask whether panel members could convict the accused of an offense where there was no named victim. Government voir dire questions that implicitly attack the notion of nullification should open the door to defense questions that invoke nullification themes, such as using common sense when evaluating a case and following one's conscience before findings.

In the hypothetical trial of LTC Smith for his unfortunate laundry-related curfew violation, the playing field should be level. During voir dire, if the trial counsel probes the members by asking whether they can convict LTC Smith even if they do not personally agree with the command's curfew policy, defense counsel should be permitted to ask the members whether they are willing to use their consciences to reach a verdict after deliberations at a GCM.[191] Those unable or unwilling to use their consciences should be subject to a challenge for cause, similar to those members who intend to disregard instructions before trial.

Further, to adequately counter a trial counsel voir dire question that asks whether the panel could convict LTC Smith if the government proved its case beyond reasonable doubt, the defense counsel should be permitted to: (1) inform the panel that they *must* acquit LTC Smith if they have reasonable doubts as to his guilt but that they *should* convict him if they have no reasonable doubts as to his guilt; and (2) ask whether they agree with the different standards that do not allow them to convict if there is reasonable doubt but do not require them to convict LTC Smith even if there is no reasonable doubt as to guilt.

Allowing nullification-type voir dire questions as a counter to

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[189] THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, ARMY (1999).

[190] *Id.* at C-1-52. A panel member who answers in the negative would be subject to a causal challenge for admitting an unwillingness to follow instructions at trial. *Id.*

[191] *See infra* Appendix A (sample defense voir dire nullification questions). Specifically mentioning "General Court-Martial" in this voir dire question is a subtle reminder that the government has elected to forgo multiple lower-levels of disposition in order to bring LTC Smith before the highest level of military discipline, a reminder which becomes important when the panel learns that LTC Smith simply lost track of time while doing emergency laundry.

government anti-nullification questions promotes fairness in the system and is consistent with case law.[192] Absent a defense counter to a government voir dire question about convicting despite disagreement with the underlying law or policy, if faced with that scenario, the panel would rightfully believe that they were "boxed in." This would undermine the directive to use their consciences, along with the evidence and instructions, in reaching a verdict.

E. The Case for Latitude to Advocate Nullification in Closing Arguments

1. Nullification Is Not Prohibited by Law; Use Subject to Judicial Discretion

The federal court opinions on nullification that do not support increased use of nullification advocacy have many similarities, which are outlined in *United States v. Trujillo*.[193] First, they acknowledge that juries may reach a verdict at odds with the evidence or the law.[194] Second, they look to the role of the judge and counsel and determine that they should not encourage jurors to violate their oath to follow the law as instructed.[195] Finally, they conclude that defense counsel may not argue jury nullification.[196]

There is no argument that juries sometimes reach verdicts that appear to be acts of nullification because those verdicts are squarely against the great weight of the evidence and law. The problem with the *Trujillo* analysis comes from the conclusion that because counsel *should* not encourage nullification, they *may not* do so. The use of the word "should" speaks to a commonly-applied belief that the practice is disfavored. Though appellate judges disfavor nullification for the

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[192] A military judge's use of discretion to grant latitude for advocacy would not run afoul of *Smith*. In *Smith*, the defense was the first to introduce the notion of a mandatory life sentence, with an obvious aim to raise nullification for those who object to the mandatory sentence. If, however, the *government* had first asked the panel about their personal views on mandatory life sentences for premeditated murder as a way to challenge those who expressed disagreement with the rule, the defense could have then discussed the concepts of conscience and commonsense to ensure the panel would also consider them, as they are required to do.

[193] 714 F.2d 102, 105-06 (11th Cir.1983).

[194] *Id.*

[195] *Id.*

[196] *Id.*

obvious reason that it puts juries in a role to overrule the legal instructions of judges, an appellate court's caution against nullification advocacy should not be confused with a legal mandate that prohibits it.

2. Conscience as the Key to Nullification-Based Acquittal

Even if the opinion in *Trujillo* had stated that neither the court nor counsel *may* encourage jurors to violate their oaths in making a jury nullification argument, counsel in military courts-martial would still be able to make nullification arguments that appeal to members' consciences because panels in the military must try cases according to their consciences. Before each member hears evidence in a case, their oath requires them to swear that they *will* faithfully try the case according to his or her conscience.[197] Before the panel leaves the courtroom to deliberate on findings, they are instructed that they are to use their own consciences, along with the law and admitted evidence, to impartially decide whether the accused is guilty.[198]

3. Must versus Should; How Current Instructions Support Nullification

As discussed, anti-nullification court opinions denounce nullification by defining it as the deliberate disregard of the law. The military judge's standard *Benchbook* instructions, however, allow panels the opportunity to acquit even when there is no reasonable doubt as to guilt. This opportunity is written into the standard instructions relating to the instructions on findings.[199] These instructions state that where there is reasonable doubt as to the guilt of the accused, "that doubt *must* be resolved in favor of the accused, and (he) (she) *must* be acquitted . . ."[200]

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[197] DA PAM. 27-9, *supra* note 102, ¶ 2; United States v. Hardy, 46 M.J. 67, 68 (C.A.A.F. 1997) ("The military judge also instructed the members that they had the responsibility to 'impartially resolve the ultimate issue as to whether the accused is guilty or not guilty in accordance with the law, the evidence admitted in court, and your own conscience.'").

[198] DA PAM. 27-9, *supra* note 102, ¶ 8-3-11, at 1129. Panel members are also expected to use their own common sense and knowledge of human nature and the ways of the world. This is a departure from civilian criminal courts, which mandate that jurors follow only the evidence admitted and law as instructed. *Id.*

[199] *Id.* ¶ 2-5-12.

[200] *Id.* (emphasis added); *see, e.g.*, State v. Wentworth, 395 A.2d 858 (N.H. 1978) (The court reaffirmed the holding that the effect of "should" in the "*Wentworth* instruction" provides the equivalent of a jury nullification instruction that even if the jurors found that

The instructions continue, describing the alternate scenario: "However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then you *should* find the accused guilty."[201]

The significance of the differing standards cannot be understated. The rules for courts-martial protect the accused by mandating a "not guilty" verdict when more than one-third of the panel members have reasonable doubts as to guilt.[202] The same rules, as delineated in the standard *Benchbook* instructions, do not expressly require a "guilty" verdict when the members have no reasonable doubt as to guilt. Thus, panel members who find that the government has met the elements beyond reasonable doubt have latitude to find the accused "not guilty" because the members merely *should* find the accused guilty. This deliberate language allows for nullification in the limited cases where the panel members find that the accused committed the offense, but they do not wish to convict. These instructions are not inconsistent with Article 51(c), which does not specifically require instructions on panel obligations where all elements are met, opting instead for a clear instruction that the accused is presumed innocent until guilt is established by evidence beyond reasonable doubt.[203]

4. LTC Smith's Counsel, and Others, Should Be Given Latitude to Advocate

The military judge retains discretion to allow or disallow nullification arguments. As demonstrated by the determinate language that counsel "should not" encourage nullification and that panels "should" find an accused guilty if the government has proved all elements, there is room

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the State proved beyond a reasonable doubt all the elements of the offense charged, they could still acquit the defendant.); State v. Brown, 567 A.2d 544 (N.H. 1989).

[201] *Id.* (emphasis added). The trial judge in *United States v. Hardy* used the standard language of the *Benchbook* instructions by stating that the members "should" return a finding of guilty if the elements were proved, specifically refusing to give the instructions that trial counsel proposed stating that the members "must" return a guilty verdict if the elements were proved. *Hardy*, 46 M.J. at 69. *But see* United States v. Sanchez, 50 M.J. 506, 509 (A.F. Ct. Crim. App. 1999) (no legal error where the accused failed to object to military judge's findings instructions that the panel must find the accused guilty if they were firmly convinced that the accused was guilty of the offense charged, counter to the standard instruction that states they *should* convict).

[202] UCMJ art. 52(a)(2) (2012).

[203] *Id.* art. 51(c).

for counsel to argue nullification and for panels to acquit an otherwise guilty accused if their consciences dictate the result. While courts will uphold a judge's decision to limit or prohibit nullification arguments, the trial judge is free to provide latitude for counsel to carefully advocate for nullification in closing arguments.

Lieutenant Colonel Smith, facing a hypothetical contested general court-martial for his violation of the commanding general's curfew policy, should be permitted to have his counsel argue for an acquittal for any reason. This latitude includes arguing that LTC Smith may have been off-post after 0100 in a place other than his residence, but he should not be convicted because it is unconscionable to make a felon out of a highly decorated officer who merely lost track of time while preparing for his early meeting with his supervisor. Judicial discretion is key: the military judge has the option to allow this argument. If the military judge refuses to allow counsel to argue nullification, the appellate courts will not interfere with that decision. However, nothing prohibits the trial judge from permitting the argument, and the panel from finding LTC Smith and any other accused not guilty after deliberating on the evidence, the law, and their own consciences.

In situations such as LTC Smith's, it is clear that an acquittal would only result if a panel decided based on their consciences. The military judge does not require an equal one-third balance of panel member considerations between the evidence, the law, and their consciences. It would be appropriate and logical that the panels' primary consideration in LTC Smith's case would be that finding him guilty of a criminal offense in this case would violate their consciences. Even if he violated a punitive policy, he was not criminally culpable.

F. The Effect of Nullification on Member Oaths, Impartiality, and Respect

1. The Panel Oath

A key concern is determining whether a panel member who votes to acquit based on nullification is violating their oath as a court-member. An addition concern asks whether a panel engaging in nullification remains an impartial panel. A reading of the oath itself, along with the plain language of the instructions they are given, leads to the conclusion that acquitting based on nullification is not a violation of the panel

oath.[204] Further, so long as the panel does not enter the case with prejudice either through personal knowledge of the case, personal biases for or against the accused, or strong feelings about the type of the case such that they cannot separate their beliefs from the case before them, there is a diminished risk that nullification interferes with panel impartiality.

Article 42(a) contains the requirement that court-martial members take an oath "to perform their duties faithfully."[205] The oath each member is to swear to before a contested panel case requires only that they will faithfully and impartially try, according to the evidence, their consciences, and the laws applicable to trials by court-martial, the case of the accused. The CMA in *United States v. Miller*[206] believed this was an obligation to "undertake to administer justice, not according to his own private views of justice or his personal opinion as to what the law should be, but in strict compliance with" the law and on the basis of the evidence duly laid before the court.[207] This interpretation, however, is in clear conflict with the plain language of the instructions, which requires faithful adherence to their consciences as well as evidence and court-martial procedures.

2. Impartiality and Respect for the Rule of Law

The requirement for impartiality connotes an assurance that the member discloses any personal interests the member may have in the case. It does not require a panel member, selected to sit by virtue of his positive reputation for judicial temperament in accordance with Article 25, to have the same personal views of justice as the military judge who instructs them, the trial counsel who advocate to them, or the convening authority who placed them on the panel.

The argument that a military judge's nullification instruction "might breed disrespect for the rule of law"[208] is unconvincing on its face.

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[204] In the civilian criminal justice system, where conscience is not a delineated factor in deliberations, one can reasonably argue that a juror engaging in nullification by ignoring the law and facts is violating his or her oath.

[205] 10 U.S.C.A. § 842(a) (West 2014).

[206] United States v. Miller, 19 M.J. 159, 164 (C.M.A. 1985).

[207] *Id.* (citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 233–34 (2d ed. 1920 Reprint)).

[208] United States v. Hardy, 46 M.J. 67, 74 (C.A.A.F. 1997).

Hardy does not state that nullification itself threatens to breed disrespect for the rule of law.[209] A consequence of disrespect for the rule of law would be to disregard some or all instructions a military judge provides *out of a belief that the process is illegitimate*. A court-martial panel member who hears, processes, and follows a nullification instruction from the military judge is actually *respecting* the rule of law, regardless of her or his vote on findings.

Consider two scenarios: (1) a member inclined to acquit for reasons of conscience votes to acquit after hearing a nullification instruction; or (2) a member inclined to acquit for reasons of conscience, unaware of his power to nullify, votes to convict out of a feeling of obligation to follow the instructions to the letter. After the conclusion of trial, in which scenario is the panel member more likely to feel contempt for the rule of law? The former would allow for a verdict applicable to the present case that is aligned with the member's conscience, while the latter would substitute conscience for strict application of elements. Surely, being compelled to act against one's conscience in a case creates significant tension, especially when a conviction results in significant consequences for the accused.

The *Hardy* opinion further states that military personnel are trained to obey the law, which includes judge's instructions, and links instructions to the protections of individual rights for servicemembers.[210] This attempt by the court to equate following instructions with protecting servicemembers is less persuasive given the purpose of nullification to acquit factually guilty servicemembers out of a sense of fairness or justice. In *United States v. Moylan*, Judge Sobeloff opined that "[t]o encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos."[211] This rationale is flawed because a jury sitting in judgment of a defendant is not determining which laws to obey but instead are determining which laws to enforce criminally against an accused in a particular case with a particular set of

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[209] If the court believes that instructing on nullification breeds disrespect for the rule of law, the actual practice of nullification would be a demonstration of a panel's disrespect for the law.

[210] *Hardy*, 46 M.J. at 74.

[211] 417 F.2d 1002, 1009 (4th Cir. 1969). *United States v. Hardy* relies on *Moylan*, among other cases, in its holding that nullification is not a right. *Hardy*, 46 M.J. at 73–76.

facts and circumstances.[212]

G. The Ethics of Making a Nullification Defense

Nullification is a permissible act by a military panel; despite the volumes of case law opinions, military judges have the discretion to allow nullification in limited forms in various phases of courts-martial. For the military-justice practitioner, questions may arise as to the ethics of nullification. First, is it ethical to make a nullification defense? Second, what are the ethical issues surrounding the attorney/client relationship and nullification advocacy?

1. Is It Unethical to Make a Nullification Argument?

An advocate may have reservations about making a nullification argument in a court-martial. The ethical debate regarding the decision to make a nullification argument pits the defense counsel's duty to the client to provide zealous representation against the duty of the military defense counsel to perform as a military officer, sworn to uphold the law. Would defense counsel violate their oaths as officers by making a deliberate attempt to prevent the UCMJ from being enforced? Panel nullification is not designed to eradicate the law or command policies but rather to selectively apply it to the facts of particular cases.[213] For that reason, counsel arguing nullification are not in danger of explicitly violating their oaths as military officers.

Implicated in this discussion is the American Bar Association (ABA) *Rules of Professional Conduct* regarding diligence and zeal,[214]

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[212] Judge Sobeloff is correct in the real-world sense. Outside the courtroom, to encourage individuals to decide for themselves which laws to obey *would* invite chaos. Allowing panels to act as a conscience of the community belies "chaos"; they are actually and directly regulating the power of the sovereign.

[213] *See, e.g.*, W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075 (1996).

[214] MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2013) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). This rule is mirrored in U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS ¶ 1.3 (1 May 1992) [hereinafter AR 27-26].

meritorious claims,[215] and candor toward the tribunal.[216] The Sixth Amendment guarantees criminal defendants a right to trial by jury and the assistance of counsel.[217] Concomitant with the right to counsel is the minimal performance standard of "reasonable competence"[218] and ethical standard of "zealous representation."

The DC Bar weighed in on the issue of nullification arguments in criminal law advocacy, holding that good-faith arguments with incidental nullification effects do not violate the *Rules of Professional Conduct*.[219] Finding that defense counsel defending a criminal case are "authorized to engage in conduct that, in other contexts, might seem inconsistent with the spirit of the Rules," the opinion leans on the requirement for zealous representation and assurance that a defendant may present a defense.[220] Similarly, military opinions on nullification decry the practice, citing opinions that equate encouraging the disregarding of laws as an invitation for chaos.[221] But military courts stopped short of alleging that the practice is in violation of the *Rules for Professional Conduct*.

The DC Circuit held that in some cases, mounting a defense aimed at seeking jury nullification is reasonable where no other defense exists, and may help avoid claims of ineffective assistance of counsel.[222] This

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[215] MODEL RULES, *supra* note 214, R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."). This provision is consistent with its Army equivalent, AR 27-26, *supra* note 214, ¶ 3.1.

[216] MODEL RULES, *supra* note 214, at R. 3.3 ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); AR 27-26, *supra* note 214, ¶ 3.3.

[217] U.S. CONST. art. VI.

[218] United States v. Strickland, 466 U.S. 668, 687 (1984).

[219] D.C. Bar, Formal Op. 320 (May 2003), *available at* http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion320.cfm (last visited Dec. 15, 2014). This is a general discussion and opinion. Whether a particular jury nullification argument violates ethical rules requires a case-specific analysis.

[220] *Id.* The D.C. Bar, acknowledging its rules are more permissive than other jurisdictions, notes that resolution of the underlying question regarding nullification advocacy would be the same in other jurisdictions.

[221] United States v. Hardy, 46 M.J. 67, 71 (C.A.A.F. 1997) (quoting United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969)).

[222] United States v. Sams, 104 F.3d 1407 (D.C. Cir. 1996) ("[I]t may be possible for a defense lawyer to satisfy the *Strickland* standard while using a defense with little or no basis in the law if this constitutes a reasonable strategy of seeking jury nullification when no valid or practicable defense exists.").

may be a step too far. Under the *Strickland* standard, the attorney's performance must be so deficient that his or her errors constituted a deprivation of a fair trial the results of which are reliable.[223] Given the fact that nullification is generally not recognized as a defense, failing to argue nullification would not likely constitute ineffective assistance. Indeed, standing ethical guidelines require zeal in advocacy but do not require pressing for every advantage that might be realized.[224] A decision to *refrain* from arguing nullification is reasonable in light of the infrequency of nullification in trial advocacy and its relative disdain among the judiciary. Defense attorneys, however, are not prohibited from using nullification advocacy for the benefit of the client and case.

2. Ethical Concerns Raised by Making Nullification Arguments

Even if nullification arguments in general are not *per se* unethical, some concerns still remain vis-à-vis the attorney/client relationship. Many contested courts-martial are defended with little hope for an acquittal, but counsel defend them without telling the panel that. The most notable concern when deciding whether a nullification argument *should* be employed is whether the client consents to the increased conviction risk.[225] The risk exists because to make a true nullification argument, the members must be led to ask the question, "He did it, but so what?" In this case, therefore, *an attorney must first admit their clients' factual guilt*. To concede factual guilt without the client making a knowing, informed, and voluntary waiver would place defense counsel in an ethically perilous position. Thus, the ethical issues triggered by a nullification argument involve the scope of representation[226] and communication.[227]

The first question in the analysis is whether the decision to make a nullification argument is a client or attorney decision. The second question is whether an attorney must inform the client along the way. Generally, ABA Model Rule 1.2 provides that lawyers "shall abide by a

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[223] *Strickland*, 466 U.S. at 687; United States v. Marshall, 45 M.J. 268, 269 (C.A.A.F. 1996).
[224] AR 27-26, *supra* note 214, ¶ 1.3.
[225] Note that nullification is an *argument*, and not a recognized defense. Nullification is employed in the absence of a qualified, recognized, legal defense to an offense.
[226] MODEL RULES, *supra* note 214, R.1.2; AR 27-26, *supra* note 214, ¶ 1.2.
[227] MODEL RULES, *supra* note 214, R. 1.4 (2013); AR 27-26, *supra* note 214, ¶ 1.4.

client's decisions concerning the objectives of representation".[228] The rule also notes the basic communication requirement to "consult with the client as to the means by which they are to be pursued." Ultimately, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation, and the only mandatory client decisions relate to the plea to be entered, whether to waive jury trial and whether the client will testify."[229]

A decision to make a particular argument typically is implicitly authorized in a decision to carry out the representation of a criminal accused. Nullification, however, presents the unique problem of conceding factual guilt. If the court-martial members decline to participate in panel nullification, they enter deliberations with the government arguing guilt and the defense conceding guilt. This, in effect, is the equivalent of a guilty plea – carried out by the defense counsel on behalf of the client. If the attorney has not communicated her or his intent to the client and received consent to make a nullification argument to the panel that concedes some or all of the facts at issue, it could be argued that counsel has violated Rule 1.2 by unilaterally making a client decision as to the plea.[230]

American Bar Association Rule 1.4(b) requires that a lawyer explain a matter to permit the client to make informed decisions about the representation. The client should have information sufficient to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be pursued.[231] In litigation, a lawyer "should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others."[232] In the context of a strategy to argue nullification, the attorney should advise on the risks: the strategy has a low probability of success and that by making it, the defense is implicitly conceding the factual issues the government must prove.[233] This advice

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[228] MODEL RULES, *supra* note 214, R. 1.2.
[229] *Id.*
[230] *See, e.g.*, *In re* Garnett, 603 S.E.2d 281 (Ga. 2004) (disciplining a lawyer who refused his client's instructions to enter a guilty plea).
[231] MODEL RULES, *supra* note 214, R. 1.4(b) cmt.
[232] *Id.*
[233] *See infra* Appendix C. Appendix C contains a sample Defense Counsel Assistance Program (DCAP) nullification waiver, whereby the accused, after discussions with the attorney, agrees to allow his defense to argue nullification at trial if the attorney believes it is appropriate for the case. The knowing, intelligent, and voluntary waiver also

would reasonably fulfill client expectations for information and ensure that the attorney is acting in the client's best interests.

3. The Ethics of Arguing Nullification for LTC Smith

In the hypothetical case of LTC Smith, facing court-martial for a violation of the commander's punitive curfew policy, arguing for nullification would be counsel's last best hope for an acquittal. The policy memorandum language was explicit, and the facts of his violation were uncontroverted. His counsel would want to argue the following to the panel: LTC Smith should not be convicted because (1) the curfew policy was intended to deter off-post criminal activity, not outlaw late-night laundry; (2) a conviction would effectively end LTC Smith's lengthy and exemplary military career; and (3) ending LTC Smith's military career over his relatively minor curfew violation would be grossly excessive and unjust.

Before making this argument, counsel should take steps to ensure this strategy fits within the ethical guidelines. First, even if nullification is the intended strategy, counsel should confront witnesses and challenge government evidence to ensure LTC Smith's rights are being protected and that the government fully makes their case. Waiver of such rights could constitute a concession of guilt and open counsel up to claims of ineffective assistance of counsel.[234] Second, counsel should get client consent from LTC Smith to argue nullification. This example nullification argument, standing alone, is an implicit concession of guilt,[235] as it fails to deny that the government's evidence establishes all of the elements necessary to convict LTC Smith.[236] If LTC Smith signed

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explicitly permits counsel to admit facts which ordinarily the trial counsel would have had to be prove in the course of the government case. *Id.*

[234] *See, e.g.*, Brookhart v. Janis, 384 U.S. 1, 6 (1966) (conviction reversed where defendant failed to intelligently and knowingly waive his right to confront and cross-examine witnesses in trial which served as practical equivalent of guilty plea).

[235] *See, e.g.*, Peter A. Joy & Kevin C. McMunigal, *Conceding Guilt*, 23 CRIM. JUST. (Fall 2008), *available at* http://www.americanbar.org/content/dam/aba/ publishing/ criminal_ section_newsletter/crimjust_cjmag_23_3_joy.authcheckdam.pdf. .

[236] It would not be possible, by virtue of the language of the curfew policy language, to argue that the policy did not apply directly to LTC Smith because it was formed as a result of rampant off-post misconduct occurring in the late hours by junior enlisted Soldiers. Any attempt to argue that the policy was not applicable to the accused would likely meet with both sustained government objections and verbal instructions from the military judge to the panel that the policy applied to all Soldiers assigned or on duty in

a statement knowingly, intelligently, and voluntarily waiving his rights, counsel could freely and directly utilize the nullification argument instead of making vague allusions to it under the guise of reasonable doubt. The rights that LTC Smith would practically relinquish include having his defense counsel challenge government-introduced facts, cross-examine witnesses against him, or otherwise attempt to advocate for an acquittal based on an established legal defense or a showing that the government failed to prove its case.

V. Conclusion

Since the 1895 Supreme Court opinion in *Sparf v. United States*, courts in the civilian criminal justice system have discouraged nullification in every phase of trial. Though the military followed the rationale of civilian courts in its discouragement of nullification, the differences between the two systems provide an opportunity for nullification. Hiding in plain sight, language in the standard instructions for panel members already allows nullification and requires members to vote with their conscience.

In voir dire, the defense should be permitted to utilize nullification advocacy in a limited form: not to advocate for a deliberate disregard of the law but to counter any government voir dire question aimed at strict adherence to following the instructions and law that fail to account for the requirement that the members use their conscience and common sense throughout deliberations. In arguments, counsel should be given significant latitude to advocate nullification; counsel should maximize present opportunities by emphasizing the role of the members' consciences in deliberations. Regarding instructions, military judges should understand that they have the discretion to give nullification instructions, and do so if appropriate for the case. Further, where panels request clarification, judges should prepare an accurate and neutral standard instruction to respond to nullification questions.

When military judges utilize their discretion to permit nullification advocacy and counsel use the opportunity to present conscience-based arguments to advocate for their clients, the system is better served. The proposed moderate changes in the practice of judicial discretion increase the use of nullification advocacy. They revert back to our nation's

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the Republic of Korea.

historical practice, comport with current military law and current instructions, and allow counsel to raise the simple but essential issue in the defense of their clients: He did it, but so what?

Appendix A

Sample Nullification *Voir Dire* Questions

Q: Does any member feel that as a panel member your conscience should never play a role in deliberations?

Q: If the military judge instructs you to use your conscience, along with the evidence in the case and the law the military judge gives you, will all members consider their consciences before making a finding of guilty or not guilty?

Q: The military judge will instruct you that you *must* acquit the accused if you have a reasonable doubt as to guilt. Does any member feel that they should be able to convict the accused if they believe he is *probably* guilty?

Appendix B

Adding Conscience to "Findings Argument" Instruction

To maintain consistency of instructions, this modification of instruction at DA PAM 27-9, ¶ 2-5-13 adds the language "in accordance with your conscience" to the instructions given to the panel before counsel arguments. This language maintains the consistency of the panel oath and findings deliberations instructions, which direct members to use their conscience along with the evidence admitted and law as instructed in their deliberations. In addition to maintaining consistency between the instructions, placing this language in the findings argument section allows the members to take in the findings arguments in its proper context.

2-5-13. FINDINGS ARGUMENT

MJ: At this time you will hear argument by counsel, which is an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you *in accordance with your conscience*. As the government has the burden of proof, Trial Counsel you may open and close.

Appendix C

DCAP Nullification Waiver, United States v. LTC Smith

Date: 1 January 2015

1. I am LTC John Smith, the accused in United States v. LTC Smith, which has been referred to a General Court-Martial. Having consulted with my attorney, MAJ Michael Korte, on the law, the facts of my case, and court-martial procedures, I authorize MAJ Korte and his defense team to employ a "panel nullification" strategy as part of my defense trial strategy if they believe it is in my legal interest.

2. **Nullification**. Panel nullification results when the military panel acquits an accused even though they believe the accused has committed the act(s) forming the basis for the offense(s) charged. Defense counsel argues for an acquittal based on nullification when, based on the circumstances, a vote to convict would go against the members' consciences.

3. **Risks**. An attorney arguing for panel nullification on behalf of an accused necessarily admits factual guilt – that the accused committed the acts that form the basis for the charged offense(s). Such an admission provides the government with a tactical advantage because the government is required to prove all elements of each offense beyond a reasonable doubt.

4. **Waiver**. Having discussed panel nullification with my attorney and the risks of employing nullification as a defense strategy, I authorize my defense counsel and my defense team to make nullification arguments on my behalf at trial in support of my defense if they feel it necessary. Along with this authorization is explicit permission to concede some or all facts of the case that the government would otherwise have to prove in support of its case against me. I understand that nullification is not a legally recognized defense, and that a panel will be instructed to follow the law.

JOHN H. SMITH
LTC, USA
Accused

On 1 January 2015, I advised the accused, LTC John Smith, about panel nullification as a court-martial defense strategy. This discussion included the risks of conceding facts that form elements of the offenses the government must prove. I agree that nullification argumentation will only be used if it is determined to be in the best interests of the accused.

MICHAEL E. KORTE
MAJ, JA
Defense Counsel

CYBERTERRORISTS: THE IDENTIFICATION AND CLASSIFICATION OF NON-STATE ACTORS WHO ENGAGE IN CYBER-HOSTILITIES

MAJOR ANDREA C. GOODE*

The very technologies that empower us to lead and create also empower those who would disrupt and destroy.[1]

I. Introduction

Sometime in the near future, the 31st Marine Expeditionary Unit (31st MEU), onboard the United States Ship (USS) *Bonhomme Richard*, pulls into port in Singapore, Malaysia. That same day, there is a devastating terrorist attack in Subic Bay, Philippines, which results in an unknown number of deaths and casualties. The 31st MEU receives orders to deliver critical disaster relief supplies to the victims of the attack and provide a presence within Subic Bay to deter and defeat additional attacks. Meanwhile, a sailor from the USS *Bonhomme Richard*, contrary to the directives of the numerous security briefings that he received before departing the ship, purchases an Universal Serial Bus (USB) flash drive from a port vendor, which contains thirty pirated new release movies. Eager to watch the latest Michael Bay action film, he plugs the thumb drive into his government computer as soon as he returns to the ship. Unbeknownst to him, as the action on the screen unfolds, action of a more sinister sort begins as a worm infiltrates the

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[1] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (May 2010) [hereinafter 2010 NATIONAL SECURITY STRATEGY], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

onboard computer systems. The worm then does exactly what it was designed to do: it infiltrates the ship's navigation system and places the radar that controls the navigation system under the complete control of a computer hacker who goes by the alias LulzKhat. As a result, the ship is unable to navigate into Subic Bay's narrow harbor and the 31st MEU is unable to complete its mission.

This hypothetical scenario is not beyond the realm of possibility.[2] The use of cyber capabilities to impact military operations has been increasingly and vigorously addressed at the national level within the last five years. Notable examples include: the establishment of the National Cybersecurity and Communications Integration Center in 2008;[3] the publication of the Cyberspace Policy Review in 2009;[4] the appointment of an Executive Branch Cybersecurity Coordinator that same year;[5] and the creation of U.S. Cyber Command in 2010.[6] In 2011, the White House issued the United States' first International Strategy for Cyberspace, which outlines national strategy for operating in cyberspace using diplomatic, informational, military, and economic means.[7] While national initiatives have risen to the challenge of combating a cyber

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[2] *See, e.g.*, *USB Memory Sticks and Worms*, UNIV. OF CAMBRIDGE, http://www.ucs.cam.ac.uk/support/windows-support/winsupuser/usbinfections (last visited Feb. 4, 2014); Elliot Bentley, *Tomcat Worm Puts Servers Under Attacker's Remote Control*, JAX MAG. (Nov. 21, 2013), http://jaxenter.com/tomcat-worm-puts-servers-under-attacker-s-remote-control-48983.html.

[3] *The National Cybersecurity and Communications Integration Center*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/about-national-cybersecurity-communications-integration-center (last visited Feb. 12, 2014) (established to protect United States' infrastructure and agency networks from cyber threats).

[4] THE WHITE HOUSE, CYBERSPACE POLICY REVIEW: ASSURING A TRUSTED AND RESILIENT INFORMATION AND COMMUNICATIONS INFRASTRUCTURE (2009), *available at* http://www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf.

[5] *The Comprehensive National Cybersecurity Initiative*, THE WHITE HOUSE, http://www.whitehouse.gov/issues/foreign-policy/cybersecurity/national-initiative (last visited Feb. 12, 2014).

[6] *About Us*, U.S. CYBER COMMAND, https://www.cybercom.mil/default.aspx (last visited Jan. 31, 2014); *see also* 2010 NATIONAL SECURITY STRATEGY, *supra* note 1 (The first National Security Strategy to effectively address the ongoing threat that cyber activities pose to national security).

[7] THE WHITE HOUSE, INTERNATIONAL STRATEGY FOR CYBERSPACE: PROSPERITY, SECURITY, AND OPENNESS IN A NETWORKED WORLD (May 2011) [hereinafter INTERNATIONAL STRATEGY FOR CYBERSPACE], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf.

attack, international law has not—in large part due to the untraditional nature of cyber warfare.[8]

Cyber war is one of the many types of contemporary conflicts that resist traditional classification. Largely gone are the days of interstate conflicts in which one State's uniformed force confronts another State's uniformed force, while the civilian population remains, in large-part, hidden within shuttered houses until the hostilities are over. The emergence of high-technology warfare—to include cyber war—has changed the battlefield. New technologies have created opportunities for civilians to participate in hostilities at a time when the line between civilians and combatants is increasingly blurred.[9]

The civilianization of armed conflict is further accentuated by the growing rise and potential of stateless groups—such as the Islamic State of Iraq and the Levant, or ISIL—to engage in both inter- and intra-state armed conflict with little regard for geographical borders.[10] In such conflicts, the battlefield encompasses more than a town or valley; terrorism is a global campaign in information operations, where an attack committed in one place may be with the intent to spread fear on a global level.[11] The internet and other cyber assets are effective weapons in this campaign; they can be used to distribute subversive propaganda and disinformation, publicize attacks, and recruit.

To put it simply, computers can be, and are, used for more than information operations. Just as in the opening hypothetical, malware can be created and deployed as a weapon to damage an enemy computer or computer system, disrupt an enemy's communications capabilities, or even disable critical infrastructure. Despite this significant (and growing) potential, as well as the ubiquitous nature of the "weapon," what remains uncertain is the question of how we can respond to such attacks under the law of armed conflict (LOAC).

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[8] *See, e.g.*, *id.* at 9 ("[The increases in cyber activity] have not been matched by clearly agreed-upon norms for acceptable state behavior in cyberspace.").

[9] Andrea Wenger & Simon J. A. Mason, *The Civilianization of Armed Conflict: Trends and Implications*, 90 INT'L REV. OF THE RED CROSS 872, 838 (Dec. 2008).

[10] *Id*. at 847; *see also* Victor D. Cha, *Globalization and the Study of International Security*, 37 J. OF PEACE RES. 3, 391–403 (2000).

[11] IVAN ARREGUIN-TOFT, HOW THE WEAK WIN WARS: A THEORY OF ASYMMETRIC CONFLICT (2005).

The recent publication of the *Tallinn Manual on International Law Applicable to Cyber Warfare* (*Tallinn Manual*) provides some guidance on this issue.[12] However, many questions remain unanswered or unexplored.[13] One particular example is the question of how to identify and classify non-state hostile cyber actors, such as the fictional LulzKhat so that they can be targeted within the boundaries of international law.

This article defines cyberterrorists as non-state actors who use cyber assets to directly participate in hostilities in support of terrorist organizations, such as al-Qaeda, the Taliban, and associated forces, to include ISIL; suggests that these individuals should be classified as unlawful combatants; and concludes that these individuals can be targeted or captured and detained without receiving the rights and privileges that are afforded lawful combatants.

This article begins with a discussion of the history and concept of direct participation in hostilities. It then analyzes how this concept has been interpreted generally and discusses the applicability of those interpretations to cyber activities. Using that discussion as a foundation, this article addresses the classification of identified hostile cyber actors, or cyberterrorists, under LOAC and argues that these individuals should appropriately be classified as unlawful combatants. It concludes with a brief discussion of legally viable actions available to our armed forces when cyberterrorists are identified.

Ultimately, it is the hope of the author to offer commanders answers to the following three questions: (1) What is a cyberterrorist (as opposed to a cybercriminal)?; (2) Do I need to treat him or her as a civilian or as an unlawful combatant?; and (3) What may I lawfully do to/with an identified cyberterrorist?

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[12] TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL], *available at* https://ccdcoe.org/tallinn-manual.html .

[13] *See e.g.*, Michael N. Schmitt, *Cyberspace and International Law: The Penumbral Mist of Uncertainty*, 126 HARV. L. REV. F. 176 (2013), *available at* http://www.harvard lawreview.org/issues/126/march13/forum_1000.php (addressing what Dr. Michael Schmitt, primary author and editor of the *Tallinn Manual*, has termed the "penumbral mist" that surrounds the applicability of international law to cyber war).

II. The Identification of Non-State Hostile Cyber Actors

A. Summary of the History and Concept of Direct Participation in Hostilities

The primary aim of International Humanitarian Law (IHL) is to protect the victims of armed conflict and regulate the conduct of parties to an armed conflict. A pillar of IHL is the principle of distinction, the requirement that military attacks should be directed at combatants and military targets, not civilians or civilian property.[14] In turn, whether a person is a "civilian" turns, in part, on whether that person participated directly in hostilities.

The concept of "direct participation in hostilities" was originally derived from the following language in Common Article 3 of Geneva Conventions I through IV:

> Persons taking *no active part in the hostilities*, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[15]

This concept is found again in Article 51(3) of Additional Protocol I, signed in 1977. It states that civilians shall not be the object of attack

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[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[15] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter GC I]; Convention on the Wounded, Sick and Shipwrecked of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (emphasis added); *see also* INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 1013 (Nils Melzer ed., 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE], *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf.

"unless and for such time as they take a direct part in hostilities."[16] Whereas Common Article 3 applies to non-international armed conflicts, Article 51(3) of Additional Protocol I is applicable to international armed conflicts; both are considered customary international law.[17]

A definition of what specifically constitutes direct participation in hostilities, however, is not provided in either the Geneva Conventions or Additional Protocols. The International Committee of the Red Cross (ICRC) Commentary on Additional Protocol I suggests a definition, stating that "[d]irect participation means 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."[18] This strict—and controversial—interpretation is not found in any treaty, however, and is not customary international law.[19]

The lack of clear guidance regarding what acts comprise direct participation in hostilities becomes increasingly troublesome in modern conflicts. Developments in weapons technology and the asymmetric nature of many armed conflicts have resulted in a growing number of civilians directly participating in hostilities; for example the farmer-by-day-but-fighter-by-night civilian technical specialists who is effectively intermingled with armed forces, as well as the contractors who are the beneficiaries of the outsourcing of military functions.[20] This has led to uncertainty as to how to distinguish between legitimate military targets and persons protected from direct attack. For this reason, the ICRC held

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[16] AP I, *supra* note 14, art. 51.3.

[17] ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 1013–14; *see also* U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS sec. 8-2 (2007) [hereinafter NWP 1-14M]. *But see* PRESIDENT RONALD REAGAN, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, S. TREATY DOC NO. 100-2, at III-IV (Jan. 29, 1987) (noting that the United states "cannot ratify . . . Protocol I," which "is fundamentally and irreconcilably flawed," because, in part, it "would grant combatant status to irregular forces even if they do not satisfy the traditional requirements" of the law of armed conflict).

[18] INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987) [hereinafter ICRC COMMENTARY].

[19] Ian Henderson, Letter to the Editor: Status of the ICRC Commentaries, JUST SEC., Nov. 20, 2013, *available at* http://justsecurity.org/2013/11/20/letter-editor-status-icrc-commentaries/.

[20] *See* Michael N. Schmitt, *War, Technology, and International Humanitarian Law*, PROGRAM ON HUMANITARIAN POL. AND CONFLICT RESEARCH AT HARV. UNIV. 2005, at 5 (Occasional Paper Series, Ser. No. 4, 2005).

five meetings between 2003 and 2008 at The Hague and in Geneva in order to come to a consensus on how to define direct participation in hostilities.[21]

1. ICRC Interpretive Guidance

In order to achieve an international consensus on a definition of direct participation in hostilities, the ICRC brought together fifty experts in IHL from international organizations and military, governmental, and academic circles.[22] They were asked to address the following three questions: "(1) Who is considered a civilian for the purposes of conducting hostilities?; (2) What conduct amounts to direct participation in hostilities?; and (3) What are the precise modalities according to which civilians directly participating in hostilities lose their protection against direct attack?"[23]

The product of these discussions was the *ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (*ICRC Interpretive Guidance*), published in 2009. This guidance proposes a far more expansive definition of direct participation in hostilities than that proffered in the 1987 ICRC Commentary on Additional Protocol I. Instead of limiting direct participation to acts that are likely to cause actual harm, the ICRC Interpretive Guidance states: "In order to qualify as direct participation in hostilities, a specific act must . . . be 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."[24] Once this threshold of harm is reached, the *ICRC Interpretative Guidance* argues that those individuals lose their protected status as civilians and are no longer entitled to protection against direct attack for the duration of the hostile act.[25]

In addition to the threshold of harm, the *ICRC Interpretative Guidance* suggests that there are two additional cumulative criteria that

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[21] *Civilian "Direct Participation in Hostilities": Overview*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/participation-hostilities/overview-direct-participation.htm.
[22] *Id.*
[23] *Id.*, *see also* ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 991–92.
[24] ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 995.
[25] *Id.* at 996.

must be met to qualify as direct participation in hostilities: direct causation and belligerent nexus. Direct causation refers to the causal link between the act and the harm likely to result from that act. Belligerent nexus refers to the concept that the act must be specifically intended to directly cause the required threshold of harm to the detriment of a party to the conflict. Also of note is that the *ICRC Interpretative Guidance* states that the commission of an act of direct participation in hostilities includes the time for preparatory measures, as well as the time necessary to return from the location of its execution. However, once the act is complete, the *ICRC Interpretative Guidance* argues, that individual regains his or her protected status as a civilian and can no longer be targeted.[26]

2. Criticism of ICRC Interpretive Guidance

Following the publication of the *ICRC Interpretive Guidance*, several of the experts who participated in the meetings that led to its publication publically criticized the final product. The majority of the criticism was directed at two topics that are not addressed in this article: the guidance's discussions of status-based identification and restraints on the use of force.[27] But there are two relevant criticisms of the criteria.

With regards to the first criterion—threshold of harm—one valid criticism is that the requirement that the act must be likely to "adversely affect" military capacity illogically excludes certain civilian actions.[28] Specifically, the language excludes inverse scenarios—specific acts likely to favorably affect military capacity. Dr. Michael Schmitt, who

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[26] *Id.*

[27] *See, e.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC'Y J. 5, 8 (2010) *available at* http://harvardnsj.org/2010/05/the-interpretive-guidance-on-the-notion-of-direct-participation-in-hostilities-a-critical-analysis/ (stating that discussions during the formation of the guidance regarding the status-based distinction of civilians participating in organized armed groups was "the greatest source of controversy" and that restraints on the use of force "attracted the greatest criticism"); W. Hays Parks, *Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT'L L. & POL. 769 (2010) (referring to the section in the ICRC Interpretive Guidance that addresses restraints on force); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010) (criticizing the ICRC Interpretive Guidance treatment of membership in organized groups).

[28] Schmitt, *supra* note 27, at 9; ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 1016.

was a member-turned-critic of the process of creating the *ICRC Interpretive Guidance*, highlights this distinction with the example of IEDs. The current threshold of harm would include burying an IED on a road used by opposing forces because the act would adversely affect opposition military capacity. However, the threshold would not include providing training to friendly forces on how to assemble and use Improvised Explosive Devices (IEDs).[29]

A closely-aligned criticism can be made against the belligerent nexus criterion. The *ICRC Interpretive Guidance* defines the nexus as an act "in support of a party to the conflict and to the detriment of another," but Dr. Schmitt proposes that the language "be framed in the alternative: an act in support or to the detriment of a party"; this would, he argues, include specific acts designed to adversely affect one party to the conflict without intending "to assist its opponent."[30] Arguably, assisting one party would almost always be a detriment the other; therefore, this criticism is relatively benign.

Although major criticism of some aspects of the *ICRC Interpretive Guidance* exists, the absence of major criticism of the three criteria proposed by the guidance to determine direct participation in hostilities is a testament to their usefulness. The three criteria are an effective tool for identifying civilians who are directly participating in hostilities under the LOAC. The criteria establish a workable baseline for accepted norms of state behavior, even though those criteria have not been accepted by any state, to include the United States.[31]

3. The United States' Position on Direct Participation in Hostilities

The United States' position on what specific acts constitute direct participation in hostilities must be gleaned from several sources. Each branch of the armed services has definitions that differ slightly from each other in this area. The Standing Rules of Engagement (SROE) that apply to all services provide an analysis based on hostile act and hostile

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[29] Schmitt, *supra* note 27, at 10.
[30] *Id.* at 34.
[31] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, THE LAW OF ARMED CONFLICT DESKBOOK 145 (2013).

intent.[32] Read holistically, the U.S. position on direct participation in hostilities sets a higher threshold than the criteria proposed by the *ICRC Interpretive Guidance* and lacks the functional clarity of the three criteria test.

a. Service Doctrine

With regards to the concept of direct participation in hostilities, the Army Field Manual on the *Law of Land Warfare* contains language similar to that addressed in the *ICRC Interpretive Guidance*. However, the Army Field Manual uses broad language without further explanatory guidance. Specifically, the manual states that if "an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour [*sic*] of such individual person, be prejudicial to the security of such State."[33] Additionally, the manual states that:

> Persons who, without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . commit hostile acts about or behind the lines of the enemy are not to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment. Such acts include, but are not limited to, sabotage, destruction of communications facilities,

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[32] CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005) [hereinafter SROE].

[33] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 550 (18 July 1956) [hereinafter FM 27-10], *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm27_10.pdf. The full text reads:

> A neutral cannot avail himself of his neutrality:
>
> a. If he commits hostile acts against a belligerent.
>
> b. If he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties. In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

Id.

> intentional misleading of troops by guides, liberation of prisoners of war, and other acts not falling within Articles 104 and 106 of the Uniform Code of Military Justice and Article 29 of the Hague Regulations.[34]

The threshold of harm established by the Army Field Manual is therefore the commission of either a hostile act or of activities hostile to the security of the State—language that is more vague, as well as more restrictive, than the definition proposed in the *ICRC Interpretive Guidance*.

The U.S. Air Force does not directly address the treatment of civilians who participate in hostilities. The Air Force operations doctrine briefly discusses the principles of LOAC in its annex pertaining to targeting. The discussion, however, mainly states that targeting civilians is prohibited without delving into the nuances of direct participation.[35]

The U.S. Navy doctrine pertaining to civilian combatants, contained in the *Commander's Handbook on the Law of Naval Operations*, offers the most thorough discussion of civilian participation in armed conflict. This doctrine is also applicable to the U.S. Marine Corps and U.S. Coast Guard.[36] Specifically, the publication states: "[u]nlawful combatants who are not members of forces or parties declared hostile but who are taking a direct part in hostilities may be attacked while they are taking a direct part in hostilities, unless they are *hors de combat*."[37] Although the publication does not directly define 'a direct part in hostilities,' it does provide examples of qualifying actions. The examples are: "taking up arms"; attempting to "kill, injure, or capture enemy personnel"; destroying property; "serving as lookouts or guards"; and serving as "intelligence agents."[38] It further states that the determination should be made on a "case-by-case basis" based on "the person's behavior, location and attire, and other information available at the time."[39] This definition

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[34] *Id.* para. 81.
[35] U.S. DEP'T OF AIR FORCE, DOCTRINE DOC. 3-60, TARGETING para. 33 (8 June 2006) [hereinafter AFDD 3-60]. *But see* GEORGE N. WALNE, INTERNATIONAL LAW-THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, *in* U.S. DEP'T OF AIR FORCE, PAM 110-31, Professional Paper 457, November 1987, *available at* http://www.cna.org/sites/default/files/research/5500045700.pdf (stating that civilians enjoy protection of the law until "such time as they take a direct part in hostilities").
[36] NWP 1-14M, *supra* note 17.
[37] *Id.* para. 8.2.
[38] *Id.*
[39] *Id.*

provides more clarity than what is found in Army and Air Force doctrine. It is nonetheless more restrictive than the ICRC position. By using the term "enemy personnel," the Navy definition does not include acts of harm against other civilians. Nor does the definition include other acts likely to adversely affect military operations or military capacity.[40]

The differences in each Armed Service's treatment of direct participation in hostilities, as well as their shared failure to adequately define what acts would constitute direct participation in hostilities, beyond several non-inclusive examples, creates a persuasive argument in favor of using the definition contained in the *ICRC Interpretive Guidance*. However, the SROE, promulgated by the Chairman of the Joint Chiefs of Staff and applicable to all Armed Services, avoids the slippery definition of "direct participation" by ignoring it all together.[41]

b. Standing Rules of Engagement

The SROE applies to all U.S. forces engaged in military operations outside of the United States and within the United States in the case of homeland-defense missions.[42] The SROE was designed to be consistent with LOAC; however, because the rules also reflect national policy, "they often restrict combat operations far more than do the requirements of international law."[43] The rules of engagement pertaining to conduct-based targets illustrate this restriction.

The rules allow for conduct-based engagement of individuals who commit a hostile act or demonstrate a hostile intent against U.S. forces. A hostile act is defined as: "an attack or other use of force against the United States, U.S. forces or other designated persons or property [and] force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital [United States Government] property."[44] This definition is similar to the definition proposed by the *ICRC Interpretive Guidance*, specifically as it pertains to actions that directly affect military operations. However, the

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[40] ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 996.
[41] SROE, *supra* note 32.
[42] *Id.* at 1.
[43] NWP 1-14M, *supra* note 17, para. 4.4.
[44] SROE, *supra* note 32, encl. A. Although many portions of the SROE are classified, Enclosure A, which contains the specific rules of engagement, is unclassified.

ICRC Interpretive Guidance interprets LOAC to also permit any actions likely to adversely affect military operations, which is broader in scope than the SROE definitions of hostile act or hostile intent.

The SROE defines hostile intent as: "the threat of imminent use of force against the United States, U.S. forces or other designated persons or property [and] the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property."[45] Although this definition addresses individual conduct that has the intended effect of impeding military operations, it is nonetheless more restrictive than the "likely to" standard found in the *ICRC Interpretive Guidance*. The notable restriction in this definition is that an individual who intends his or her actions to impede a military mission cannot be engaged unless his or her actions pose an "imminent" threat. The definition of what constitutes an imminent threat, however, is unclear. The SROE defines imminent use of force as "not necessarily . . . immediate or instantaneous."[46] This implies that the threatened use of force could be less than immediate; however, the SROE contains no further clarification other than stating that the determination of whether a threat is imminent should be "based on an assessment of all facts and circumstances known to U.S. forces at the time."[47]

By qualifying hostile intent with imminent threat, the SROE places more restrictions on military personnel than the LOAC. Although the phrase "direct participation in hostilities" does not appear in the SROE, the definitions of hostile act and hostile intent are similar to the definitions proposed by the *ICRC Interpretive Guidance* and are, therefore, well within the boundaries of the law of armed conflict.

B. The Applicability of Direct Participation in Hostilities Analysis to Cyber Acts

1. U.S. Policy

The U.S. position on the application of LOAC to cyberspace was first articulated in the 2011 White House International Strategy for Cyberspace, which stated that, "[T]he development of norms for state

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[45] *Id.*
[46] *Id.*
[47] *Id.*

conduct in cyberspace does not require a reinvention of customary international law, nor does it render existing international norms obsolete. Long-standing international norms guiding state behavior—in times of peace and conflict—also apply in cyberspace."[48]

This position was further affirmed during an address by State Department Legal Adviser Harold Koh at the 2012 Cyber Command Legal Conference. He stated that the U.S. government's position is that existing international laws of armed conflict apply to cyberspace and that this should be the starting place for any further analysis on how those laws will practically apply to cyberspace.[49]

A glimpse into how the government views the applicability of LOAC to cyber hostilities that are committed by non-state actors is contained in a memorandum from the Vice Chairman of the Joint Chiefs of Staff containing a list of cyberspace terminology.[50] Included in the list are definitions of hostile act and hostile intent that have been tailored to cyber operations.

In that memorandum, hostile act is defined as:

> Force or other means used directly to attack the U.S., U.S. forces, or other designated persons or property, to include critical cyber assets, systems or functions. It also includes force or other means to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. Government property.[51]

The definition is essentially a duplicate of the definition of hostile act located in the SROE, except that it adds "cyber assets, systems or

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[48] INTERNATIONAL STRATEGY FOR CYBERSPACE, *supra* note 7, at 9.

[49] Harold Honhgu Koh, Legal Advisor of the Dep't of State, International Law in Cyberspace, Address to the USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012), *available at* http://www.state.gov/s/l/releases/remarks/197924.htm; *see also* U.S. DEP'T OF AIR FORCE, DOCTRINE DOC. 3-12, CYBERSPACE OPERATIONS (30 Nov. 2011) (stating that the law of armed conflict applies to the "employment of cyberspace capabilities").

[50] Memorandum from Vice Chairman of the Joint Chiefs of Staff to Chiefs of the Military Services, Commanders of the Combatant Commands, and Directors of the Joint Staff Directorates, subject: Joint Terminology for Cyberspace Operations (Nov. 28, 2010) [hereinafter Joint Terminology for Cyberspace Memo].

[51] *Id.* at 9.

functions." Thus, if a non-state actor were to attack a cyber asset, system, or function, such as a shipboard navigation system, that would be considered a hostile act to the same extent as an attack on the ship itself.

Hostile intent is defined as:

> The threat of an imminent hostile act. Determination of hostile intent in cyberspace can also be based on the technical attributes of an activity which does not meet the hostile act threshold but has the capability, identified though defensive countercyber or forensic operations, to disrupt, deny, degrade, manipulate, and/or destroy critical cyber assets at the will of an adversary (such as a logic bomb or 'sleeper' malware). Because an individual's systems may be used to commit a hostile act in cyberspace without their witting participation, the standard for attribution of hostile act/intent for defensive counter-cyber purposes is "known system involvement," and is not witting actor or geography-dependent.[52]

Only the first sentence of this definition reflects the SROE; what follows is additional language apparently tailored to meet the challenges of stopping attacks before they occur in an environment where an attack can be launched and executed in nanoseconds. An arguable example would be if a counter-cyber operation identifies that a known hacker named Q-T has developed the capability to create a worm that can disable the navigation systems of U.S. naval vessels—prior to him actually completing the worm or loading it onto a USB flash drive—Q-T would be demonstrating hostile intent. The language in the definition suggests that when determining hostile intent in cyberspace, the mere possession of the capability to adversely affect critical cyber assets will satisfy the imminence requirement.

The policy remarks and cyber terminology provide a starting point for applying a direct-participation-in-hostilities analysis to cyber hostilities committed by civilians. More is needed, however, in order to identify these individuals with any degree of certainty within a LOAC construct. The *Tallinn Manual* is helpful in developing a baseline for a LOAC construct as it pertains to cyber warfare.

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[52] *Id.* at 10.

2. Tallinn Manual

As discussed briefly in the introduction, the previously unexplored world of cyber law as applied to LOAC has recently been examined in detail by a group of international experts, who subsequently published the *Tallinn Manual*. Published in 2013, the *Tallinn Manual* takes, *inter alia*, the concepts of distinction and direct participation in hostilities and applies them to cyber scenarios.[53] The international group of experts who prepared the *Tallinn Manual* took a position in line with former State Department Legal Adviser Harold Koh's comments at the 2012 Cyber Command Legal Conference by fully applying the existing international legal regime to cyber warfare.[54] The manual also borrows heavily from the *ICRC Interpretive Guidance* in the area of civilian participation in hostilities.[55] It therefore bridges U.S. policy and the *ICRC Interpretive Guidance*, providing a useful tool in evaluating hostilities in cyberspace under LOAC.

Rule 34 of the *Tallinn Manual* delineates four groups of persons who may be the object of cyber attacks: (1) members of the armed forces; (2) members of organized armed groups; (3) civilians taking a direct participation in hostilities; and (4) civilians participating in a *levée en masse* in an international armed conflict.[56]

The first two classifications are status-based distinctions; the latter two are conduct-based distinctions.[57] Whereas the *ICRC Interpretive Guidance* concluded that civilians may only be targeted based on conduct, the *Tallinn Manual* offers an interesting exception concerning civilian contractors. The participants agreed that individual civilian contractors may only be targeted if they are directly participating in hostilities; however, the commentary to Rule 34 identifies a divide

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[53] TALLINN MANUAL, *supra* note 12, at 4–6.

[54] *See* Koh, *supra* note 49; Schmitt, *supra* note 13; *see also* Michael N. Schmitt, *International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed*, 54 HARV. INT'L L.J. ONLINE 13 (2012), *available at* http://www.harvardilj.org/2012/12/online-articles-online_54_schmitt/.

[55] TALLINN MANUAL, *supra* note 12, at 119 nn.63–65.

[56] *Id.* at 115.

[57] The International Group of Experts who prepared the *Tallinn Manual* was divided over the distinction of members of an organized armed group. Some participants argued that mere membership in an organized armed group suffices for individual members to be targeted. However, others argued, consistent with ICRC guidance, that only members who are continuously performing a combat function within those groups may be targeted. *See id*. at 116.

between the participants on the issue of whether this is also true for civilian companies that have been contracted by a party to the conflict to perform cyber attacks in support of military operations. The majority agreed that these companies would qualify as an organized armed group such that they can be targeted at any time based on their status.[58] The minority view is that a contractual relationship is an insufficient basis to classify such companies as organized armed groups. The minority view nonetheless acknowledged that individual members of such a company could be targeted if and when they became direct participants in hostilities.[59]

In defining what acts qualify as direct participation in hostilities, the participants in the *Tallinn Manual* generally agreed with the three criteria set forth in the *ICRC Interpretive Guidance*: threshold of harm, causal link, and belligerent nexus.[60]

a. Threshold of Harm

The first criterion for determining whether a civilian has directly participated in hostilities, discussed above, is the threshold for harm. The *Tallinn Manual* definition of this criterion is closely aligned with the definition proposed by the *ICRC Interpretive Guidance*: "the act (or closely related series of acts) must have the intended or actual effect of negatively affecting the adversary's military operations or capabilities, or inflicting death, physical harm, or material destruction on persons or objects protected against direct attack."[61]

The one notable difference between the *Tallinn Manual* definition and the *ICRC Interpretive Guidance* is the *Tallinn Manual*'s use of the word "intent." The *ICRC Interpretive Guidance* refers instead to actions "likely to" affect military operations.[62] By directly referring to the *ICRC Interpretive Guidance* definition, the *Tallinn Manual* appears to treat the difference in language as semantic; however, the *Tallinn Manual* is

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[58] *Id.* at 117-18.
[59] *Id.*
[60] *Id.* at 119; *see also* ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 47, 51, 58.
[61] TALLINN MANUAL, *supra* note 12, at 102; *see also* ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 47.
[62] ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 995.

broader in scope. [63] For example, a worm can be designed with the intent to disrupt military capabilities but have no likelihood of success due to a fault in its design. Under the *Tallinn Manual* definition, the intended effect would satisfy the threshold of harm. But because the worm was not likely to—or even, could not—actually affect military operations, it would not satisfy the *ICRC Interpretive Guidance* definition.

Applying this criterion to cyber activities, the *Tallinn Manual* suggests that civilians engaging in cyber operations that disrupt the enemy's command and control would be lawful targets. A less obvious minority view is that acts that enhance one's own military cyber assets would also be included because the logical result of those acts would be a weakening of the adversary's relative position.[64] Expanding on this view, one can envision a number of seemingly non-belligerent scenarios that could qualify as direct participation in hostilities. For example, a civilian information technology specialist who loads updates to a military network in order to enhance its security could theoretically be a lawful target – at least if the remaining two criteria are met.

Applying the threshold of harm to the hypothetical attack on the USS *Bonhomme Richard*, the act of using a worm to control and disrupt the ship's navigation system had the actual effect of adversely affecting both the ship's military operations and the military capability of the 31st MEU. The actions of LulzKhat would therefore satisfy the first criterion for determining direct participation in hostilities.

There are two additional hypothetical participants whose actions should be considered in this scenario: the individual who created the worm and the individual who sold the USB drive to the unsuspecting sailor. Assume for this scenario that LulzKhat is an associate of an individual who operates under the alias Q-T. Q-T designed the worm for the express purpose of infiltrating U.S. Navy navigation systems. Tony Chee operates a small shop near the Singapore port that caters to sailors and was the one who sold the infected USB drive to the sailor attached to the USS *Bonhomme Richard*. The actions of both Q-T and Tony Chee—by respectively creating the worm and selling the device that transported the worm—had the actual effect of adversely affecting the military operations and the 31st MEU. Therefore, the actions of those individuals would also meet the threshold of harm.

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[63] TALLINN MANUAL, *supra* note 12, at 119 n.63.
[64] *Id.* at 120.

b. Causal Link

The second criterion that must be met is a causal link, meaning that there must be a causal link between the harmful act and the intended or actual results of that act. The manual offers a single broad example, a cyber operation (the act) that directly results in the disruption of an enemy's command and control network (the result). [65] Additional examples could include creating and uploading malware that directly results in the shutdown of an enemy's electric grid; gathering information on enemy operations through cyber means that directly assists one's own forces; or designing malware that identifies and exploits vulnerabilities in the enemy's computer system.

The actions of LulzKhat represent a clear causal link between act and result. The act committed by LulzKhat is his use of the worm to take control of the USS *Bonhomme Richard*'s navigation system, directly resulting in the system being rendered inoperable. Establishing a causal link between the actions of the other two hypothetical actors is not as succinct.

Consider this alternative: Q-T created the worm days before the attack, however, he did so knowing only that it was going to be used for an attack generally, and had no knowledge of the specifics of the attack. The *Tallinn Manual* addresses a similar scenario and acknowledges that no clear consensus was reached amongst the participants as to whether a causal link could sufficiently be established under these circumstances. The direct participation in hostilities analysis provided by the U.S. Navy *Commander's Handbook on the Law of Naval Operations* is more useful in this context. The handbook states that "an honest determination" should be made based on information available at the time to determine whether a person is directly participating in hostilities. [66] An honest determination can be made that there is a causal link between Q-T's actions and the resulting harm based on temporal proximity, the tailored construction of the worm, and the relationship between Q-T and LulzKhat.

The third hypothetical actor, Tony Chee, acted by selling the infected USB drive to the U.S. sailor. The infiltration of the ship's computer systems was directly caused by the sale of the USB drive to a sailor

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[65] *Id.* at 119–20.
[66] NWP 1-14M, *supra* note 17.

belonging to that ship. Thus there is a casual link. Despite that link, though, Tony Chee's knowledge—or lack thereof—of the presence of a worm on the drive or its purpose is relevant to the final criterion.

c. Belligerent Nexus

The third criterion is a belligerent nexus—that the acts are directly related to hostilities in situations of international or non-international armed conflict. As noted in the *ICRC Interpretive Guidance*, the concept of direct participation in hostilities cannot refer to conduct occurring outside of either an international or non-international armed conflict.[67] For example, if a civilian uses cyber assets to siphon a large amount of funds from a party to a conflict for personal gain, that act does not meet the belligerent-nexus criterion. This remains true even if the theft causes a direct adverse affect to the victim's military capability because the purpose of the act was not to support one party to the conflict by harming another. However, if the purpose of the theft was to benefit a belligerent party to the conflict (e.g., to buy weapons for ISIL or purchase IED-making equipment for an insurgent group), the civilian committing the theft would be directly participating in hostilities and would lose his protected civilian status.[68]

Why does this distinction matter? In the first scenario, the thief would be classified as a criminal and would, therefore, be subject to the pertinent criminal-justice system. In the second scenario, the thief would be a direct participant in an armed conflict and would therefore be a lawful target.

Objectively, the actions of the pseudonymous LulzKhat directly disrupted the capability of the 31st MEU to conduct their mission. Whether a belligerent nexus exists between his actions and the resulting disruption depends upon LulzKhat's subjective intent. If, for example, LulzKhat's intent was to simply demonstrate his ability to subvert a military network for the purpose of gaining credibility amongst his peers, he would not be a direct participant in hostilities. Getting into the mind of an individual—especially an individual sequestered behind a computer terminal in an unknown location—is not a straightforward task. Again, the U.S. Navy's "honest determination" standard is most helpful in these

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[67] ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 1012.
[68] *See* TALLINN MANUAL, *supra* note 12, at 120.

or similar scenarios.[69] An examination of the information available to U.S. forces following the attack about LulzKhat's associates, communications, and previous activities, for example, could result in an honest determination that he disabled the navigation systems to aid the terrorist organization that committed the attack on Subic Bay.

A similar analysis could be made to determine the subjective motives of the worm designer, Q-T, and the shop vendor, Tommy Chee. It is possible to conclude that even if Tommy Chee was aware that the items he sold contained malware, if his main motivation for selling those items was to make a personal profit, he may not be considered a direct participant in hostilities.

Neither the *Tallinn Manual* nor the *ICRC Interpretive Guidance* provides specific tools for determining a civilian participant's subject intent. Commanders and other lawful combatants engaged in hostilities must rely on honest judgment and make decisions based on available information. However, decisions in cyberspace must be made swifter than those on a conventional battlefield. Because of the speed at which a hostile act can occur via cyber assets, determining the duration of a civilian's participation in cyber hostilities can be complex.

d. Duration of Participation

The *Tallinn Manual*, adopting the language of the *ICRC Interpretive Guidance*, proposes that a civilian is "targetable for such time as he or she is engaged in the qualifying act of direct participation."[70] The *ICRC Interpretive Guidance* concluded that the targeting window encompasses the act, the preparatory time to commit the act, and the travel to and from the place where the act was committed.[71] For example, a civilian who leaves his shop and picks up his rifle at sunset, walks several miles to an enemy road block and fires upon it, walks home, and then puts his rifle away at sunrise is a lawful target from sunset to sunrise. Applying that guidance to cyber hostilities is more complex.

If, in the above scenario, you exchange 'rifle' for 'thumb drive containing malware' and 'enemy road block' for 'computer with access

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[69] NWP 1-14M, *supra* note 17.
[70] TALLINN MANUAL, *supra* note 12, at 120–21.
[71] ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 996.

to enemy systems,' the sunset to sunrise targeting window would remain unchanged. However, does preparatory time include the time it took to create the malware or the time it took to probe the enemy's systems for vulnerabilities susceptible to malware? The answer is unclear. Equally as vague is the "travelling from" time. As noted in the *Tallinn Manual*, a hallmark of cyber hostilities is their delayed effects.[72] An example provided in the manual is the emplacement of a logic bomb designed to activate at some future point.[73]

There was a split in opinion among the contributors to the *Tallinn Manual* on how to address these targeting-window issues. The majority took the position that direct participation in cyber hostilities begins with mission planning (e.g., probing the enemy's systems) and ends "when the individual terminates *an active role* in the operation."[74] An individual's active role is complete once, for example, the malware is uploaded or logic bomb is emplaced even though the actual damage to the enemy's systems may not occur until a later point in time. The distinction between the majority and minority views is whether direct participation continues after emplacement in cases in which activation is remote. The majority view is, yes; the active role of the participant is not completed until he or she activates the logic bomb.[75] The minority view, however, is that the act of emplacement and the subsequent act of activation are separate acts of direct participation.[76]

Applying this analysis to the introductory scenario, a factor necessary to determine the duration of worm developer Q-T's participation is when he began designing the worm. If he created the worm and delivered it to LulzKhat six months before its use and played no further active role in the operation, Q-T's participation ended once he delivered the malware. If Q-T continued to take an active part in the operation—for example, by monitoring updates to cyber-security systems to update his worm if needed—those actions would lengthen the duration of his participation.

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[72] TALLINN MANUAL, *supra* note 12, at 121.
[73] *Id.*
[74] *Id.* (emphasis added).
[75] However, this is to be distinguished from a logic bomb or other malware that activates automatically based on a predetermined length of time or upon the performance of a particular action by the target system. *See id.*
[76] *Id.*

Despite the existence of opposing majority and minority views within the *Tallinn Manual*, it provides a workable framework for identifying civilian (or non-state actor) participation in cyber hostilities. Whereas the current U.S. policy—that LOAC applies to cyber war—provides a baseline for analysis, the *Tallinn Manual* offers practical interpretations of LOAC applicability based on accepted norms of international law.

C. Once We Have Identified Them, What Should We Call Them?

A civilian who directly participates in hostilities though the use of cyber assets to support terrorism deserves a name less cumbersome than a legal description. This article proposes: cyberterrorist. The use of the term cyberterrorist is often used to describe individuals who should be more accurately termed cybercriminals.[77] In the context of LOAC, a clear distinction must be made between cybercriminals and cyberterrorists because that distinction determines whether an individual can be lawfully targeted under international law—vice arrested and prosecuted pursuant to domestic law. The direct-participation-in-hostilities analyses proposed by the ICRC and the *Tallinn Manual* provide a concise method of distinguishing the two categories of actors.

1. Cybercriminals

The *Webster's New World Hacker Dictionary* defines "cybercriminal" as an individual who commits "crimes completed either on or with a computer."[78] This definition is straightforward but

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[77] *See, e.g.*, Sarah Gordon, *Cyberterrorism*, SYMANTIC SECURITY RESPONSE (2003), *available at* https://www.symantec.com/avcenter/reference/cyberterrorism.pdf (discussing the varying usages and definitions of 'cyberterrorism' found in policy and media).

[78] WEBSTER'S NEW WORLD HACKER DICTIONARY 80 (Bernadette Schell & Clemens Martin eds., 2006) [hereinafter HACKER DICTIONARY]. (The definition provides the following examples: "Cybercrime involves such activities as child pornography; credit card fraud; cyberstalking; defaming another online; gaining unauthorized access to computer systems; ignoring copyright, software licensing, and trademark protection; overriding encryption to make illegal copies; software piracy; and stealing another's identity to perform criminal acts."); *see also* Zeviar-Geese, G., *The State of the Law on Cyberjurisdiction and Cybercrime on the Internet* (2004), *available at* http://law.gongzaga.edu/borders/documents/cyberlaw.htm.

nonetheless too broad to be useful in the context of international armed conflict.

A more useful definition in an international-law context can be determined by applying the *ICRC Interpretive Guidance* to cyber scenarios. Using the *ICRC Interpretive Guidance*, a cybercriminal would be any individual who commits an illegal act that fails one of the three criteria of the ICRC direct-participation-in-hostilities analysis. [79]

If, for example, a cyber actor attacks a civilian computer network that shuts down Amazon.com for a day, causing widespread civilian nuisance and a large profit loss to the American-based company, the actor would be considered a cybercriminal because the act would fail to meet the threshold of harm required to constitute an attack.

If the cyber actor in the above scenario creates a virus intended to disrupt Amazon.com but causes a cascade of events that eventually results in a disruption to a military network, the actor would still be considered a cybercriminal because the direct causation prong would not be met.

Finally if a cyber actor commits an act that meets the previous two prongs (i.e. adversely affects military operations via direct causation) but the intent of the act is for material gain, such as the theft scenario discussed *supra*, the individual remains a cybercriminal.

2. Cyberterrorists

The National Infrastructure Protection Center (NIPC), which is part of the Department of Homeland Security, defines cyberterrorism as "a criminal act conducted with computers and resulting in violence, destruction, or death of targets in an effort to produce terror with the purpose of coercing a government to alter its policies."[80] This definition is inadequate when applied to the realm of international armed conflict because it is based on criminal acts. This article submits that a more applicable definition of a cyberterrorist is a non-state actor who uses

[79] ICRC INTERPRETIVE GUIDANCE, *supra* note 15.
[80] HACKER DICTIONARY, *supra* note 78, at 87.

cyber assets to directly participate in hostilities in support of al-Qaeda, the Taliban, and associated forces, to include ISIL.[81]

The proposed definition is at odds with how the *Tallinn Manual* addresses cyber acts of terror. The *Tallin Manual* addresses "terror attacks" in Rule 36 but only in the context of the principle of distinction as applied to a party to a conflict.[82] Specifically, the *Tallin Manual* defines "terror attacks" as "cyber attacks, or the threat thereof, the primary purpose of which is to spread terror among the civilian population."[83] The commentary to this rule states that it is based on both Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II.[84] As submitted in the *ICRC Commentary to the Additional Protocols*, the purpose of Article 51(2) is "to prohibit acts of violence, the primary purpose of which is to spread terror, *without offering substantial military advantage*."[85] Notably, neither the plain language of Article 51(2) nor the commentary contemplates the actions of a civilian spreading terror among a civilian population during an armed conflict. Both make an assumption that the civilian population need only be protected from armed forces. This assumption does not accord with contemporary reality, wherein non-state actors use suicide vests in markets or threaten the use of bombs on planes for the purpose of spreading terror amongst a civilian population in support of one party to the conflict and to the detriment of the other. Although an attack against civilians for the purpose of spreading terror would constitute direct

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[81] *See, e.g.*, 2010 NATIONAL STRATEGIC STRATEGY, *supra* note 1 (The United States is still in an international armed conflict with the Taliban, al-Qaeda, and associated forces.); Press Release, The White House, Office of the Press Secretary, Fact Sheet: The President's May 23 Speech on Counterterrorism (May 23, 2013) [hereinafter May 23 Speech on Counterterrorism], *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism.

[82] TALLINN MANUAL, *supra* note 12, at 122–24; *see also* AP I, *supra* note 14, art. 51(2).

[83] TALLINN MANUAL, *supra* note 12, at 122–24.

[84] *Id.*; *see also* AP I, *supra* note 14, art. 51(2). The full text of Article 51(2) is, "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. The full text of Article 13(2) is, "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." *Id.*

[85] TALLINN MANUAL, *supra* note 12, at 122–124 (emphasis added); *see also* ICRC COMMENTARY, *supra* note 18, para. 1940.

participation in hostilities under the *ICRC Interpretive Guidance*, a threat of such an attack would not.[86] The result is a gap in the protection for civilians against terror threats.

This gap also appears when juxtaposing the *Tallinn Manual* definition of cyberterror attacks with its definition of a cyber attack that constitutes direct participation in hostilities. For example, a cyber attack committed by a non-state actor can be considered direct participation in hostilities without affecting a military objective if it results in death, injury, or destruction to protected persons or objects.[87] However, an act of cyber terror committed by a party to the conflict, per the *Tallinn Manual* definition, need not actually result in harm—the mere threat of harm made with the purpose of spreading terror among a civilian population is sufficient. The example provided in the commentary to Rule 36 of the *Tallinn Manual* is a threat to use a cyber attack to disable a city's water distribution system.[88] The *Tallinn Manual* places the focus of determining whether the act is a terror attack on the purpose of the attack—to cause fear—not the resulting harm.

The problem with the *Tallinn Manual*'s definition of cyberterror attacks is that it creates two unequal categories of cyber actors: (1) members of an armed force that is a party to the conflict who would be in violation of international law for spreading terror, and (2) non-state actors who, according to the *ICRC Interpretive Guidance* and the *Tallinn Manual*, cannot be lawfully targeted for the same conduct. This is unhelpful to commanders who may encounter a non-state actor who commits an act of cyberterror that does not adversely impact military operations or capacity, or otherwise cause actual harm to civilians or civilian objects. However, because this individual falls through the gap by merely causing widespread terror via a threat of a cyber attack, vice causing actual damage or an imminent threat of damage, he must be considered a cybercriminal not subject to military targeting.

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[86] ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 995.
[87] TALLINN MANUAL, *supra* note 12, at 123.
[88] *Id.* at 123–24.

III. The Classification of Identified Hostile Cyber Actors, or Cyberterrorists, Under the Law of Armed Conflict

A. Summary of the Concept of Classification

The Third Geneva Convention establishes two legal classifications of individuals within the context of an international armed conflict—combatants and civilians.[89] Combatant privilege, namely the right to directly participate in hostilities with immunity from domestic prosecution for lawful acts of war, is afforded only to members of the armed forces of parties to an international armed conflict (except medical and religious personnel), as well as to participants in a *levée en masse*.[90]

Although all privileged combatants have a right to directly participate in hostilities, they do not necessarily have a function requiring them to do so (e.g., admin personnel). However, individuals who assume continuous combat functions outside the privileged categories of persons, as well as in a non-international armed conflict, are not entitled to combatant privilege under the law of armed conflict.[91] This gap in protected groups creates a third classification—unlawful combatants. Although this category of persons is not recognized in the Geneva Conventions or its Protocols, it is recognized under U.S. domestic law.[92]

1. Who is Entitled to Combatant Privilege?

In order to qualify as a lawful combatant, the combatant must fall under one of the categories of lawful combatants listed in Article 4 of the Third Geneva Convention. These categories include members of the armed forces of a party to the conflict, members of militias and organized resistance movements, members of regular armed forces of a government not recognized by the detaining power, persons who accompany the armed forces, and inhabitants of a non-occupied territory who spontaneously take up arms against an invading force.[93]

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[89] GC III, *supra* note 15, art. 4.
[90] *Id.*; AP I, *supra* note 14, art. 43(1).
[91] ICRC INTERPRETIVE GUIDANCE, *supra* note 15, at 1007.
[92] *Ex parte* Quirin, 317 U.S. 1 (1942); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2601.
[93] GC III, *supra* note 15, art. 4. Additionally, in order to qualify as a lawful combatant members of militias or other organized resistance groups must wear a "fixed distinctive

2. Lawful Combatant Privileges

The benefit of being classified as a lawful combatant is the privileges that classification bestows upon an individual who is captured during an armed conflict. Upon capture, lawful combatants obtain prisoner of war (POW) status. Some of the many rights afforded POWs under the Third Geneva Convention include the right to refuse to answer questions other than name, rank, serial number; the right to humane treatment; and the right to immunity from personal culpability and criminal proceedings.[94] And perhaps most importantly, POWs have the right to immediate release and repatriation upon cessation of hostilities.[95]

Having a combatant privilege that distinguishes between uniformed soldiers and civilians is a necessary foundation of the law of armed conflict. As eloquently argued by Michael Walzer in his book *Just and Unjust Wars*, distinguishing between soldiers and civilians by means of external insignia is essential in order to protect civilians from attack because "soldiers must feel safe among civilians if civilians are ever to be safe from soldiers."[96]

3. Presumption of POW Status

When there is doubt as to whether an individual captured during an international armed conflict should be classified as a POW, Article 5 of the Third Geneva Convention mandates that a tribunal be held to determine the individual's status. Until that status is determined, the captured individual must be afforded the protections and privileges of a POW.[97] Article 5 of the Third Geneva Convention therefore creates a

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sign visible at a distance"; must "carry arms openly"; must "form a part of a 'chain of command'"; and must "themselves obey the customs and the laws of war." *Id.*

[94] *Id.*

[95] *Id.* art. 118.

[96] MICHAEL WALZER, JUST AND UNJUST WARS 182 (1977).

[97] GC III, *supra* note 15, art. 5:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

presumption of POW status for belligerents captured during an international armed conflict.[98] This presumption is reflected within U.S. military doctrine.[99] United States Army Regulation 190-8, which pertains to the detention of enemy combatants and has been adopted by all U.S. military services, states:

> In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[100]

The presumption of POW status is also found in Article 45 of Additional Protocol I, which states, in part, that individuals who take part in hostilities and are captured by an adverse party "shall be presumed to be a prisoner of war."[101]

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id.

[98] *See, e.g.*, G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 1971 BRIT. Y.B. INT'L L. 198 (1971).

[99] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-8, OPNAVINST 3461.6, AfJI 31-304, MLO 3461.1, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (Oct. 1, 1997) [hereinafter AR 190-8], *available at* www.au.af/mil/au/awc/awcgate/law/ar190-8.pdf.

[100] *Id.* at 1-6. It further states that

> A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

Id.

[101] AP I, *supra* note 14, art. 45. The full pertinent text reads as follows:

> A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by

However, Article 45 of Additional Protocol I recognizes a third category of belligerent who is not addressed in the Third and Fourth Geneva Conventions, specifically "any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favorable treatment in accordance with the Fourth Convention"—namely, the unlawful combatant.[102]

B. Unlawful Combatants

What are the rights of combatants who do not qualify as privileged combatants and do not qualify as civilians? To answer this question, a definition of the term "civilian" must first be determined. The term "civilian" had no definition under LOAC until the adoption of Additional Protocol I in 1977.[103] Article 50 of Additional Protocol I defines "civilian" as:

> [A]ny person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3), and (6) of the Third Geneva Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[104]

The ICRC espouses the view that the definition of civilian found in this article is established customary international law in both

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> notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

Id.

[102] *See id*. art. 45(3).

[103] *See id*. art. 50.

[104] *Id.* The articles referred to in Article 50 of AP I refers to members of the armed forces, militias and organized resistance movements belonging to a party to the conflict, GC III, *supra* note 15, art. 4(A)(1-2); members of the armed forces of a government not recognized by the Detaining Power, GC III, *supra* note 15, art. 4(A)(3); inhabitants of a non-occupied territory who spontaneously take up arms to resist invading forces, GC III, *supra* note 15, art. 4(A)(6); and all organized armed forces, groups and units under a command responsible to a party to the conflict. AP I, *supra* note 14, art. 43.

international and non-international armed conflicts.[105] But this exclusionary definition appears to run counter to the ICRC position on civilians who directly participate in hostilities. The ICRC database on International Human Rights Law addresses this dissonance by asserting that a civilian who participates directly in hostilities loses protection against attack but does not lose civilian protections upon capture.[106] Under the ICRC view, a civilian who directly participates in hostilities and is captured would not be entitled to prisoner-of-war status and instead must be tried under national law subject to fair trial guarantees.[107] Under the ICRC view, therefore, a civilian who directly participates in hostilities may, during the course of that participation, be lawfully targeted and killed without due process. However, if the adverse party decides to not avail themselves of the option of killing the civilian who is directly participating in hostilities but instead captures and detains that civilian, the civilian should be afforded all of the rights contained in the Fourth Geneva Convention pertaining to the treatment of civilians. One such right would be the right to a trial and prosecution under domestic law. This view paradoxically provides armed forces engaged in international armed conflict an incentive to choose the option to kill civilians directly participating in hostilities instead of taking the lesser means of capture and detention.

This interpretation of international law—that there is no intermediate status—has additional support. First, the Commentary to the Fourth Geneva Convention states that:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war

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[105] *Customary IHL—Rule 5. Definition of Civilians*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (last visited Jan. 4, 2014). Specifically Rule 5 states, "Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians." *Id.*

[106] *Id.*

[107] *Id.* Interestingly, the ICRC definition of civilians does not include a discussion of Article 45 of AP I, *supra* note 14, which specifically states that there can be belligerents who are not entitled to either POW status or GC IV protections. Article 45 further refers to Article 75 of AP I, which lists fundamental rights which should be afforded individuals in this third category, to include humane treatment; prohibitions against murder, torture, corporal punishment, mutilation, and collective punishment; and due process before imposing a sentence for penal offenses. Article 75 of AP I additionally states that "any person . . . detained . . . for actions related to the armed conflict shall be informed promptly of the reasons why these measures have been taken [and] . . . shall be released with minimal delay possible." *Id.*

> and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution - not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.[108]

Second, the International Criminal Tribunal for the Former Yugoslavia has found that there "is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied."[109]

The United States disagrees with the international position that there are only two classes of individuals within an international armed conflict. The first reference to unlawful combatants under United States domestic law appears in the 1942 U.S. Supreme Court case *Ex Parte Quirin*.[110] This case pertained to German soldiers during World War II who infiltrated the Eastern United States in civilian dress for the purpose of committing sabotage to U.S. war industries and facilities.[111] The Court held that these soldiers were not lawful combatants under the Third Geneva Convention and were instead unlawful combatants not entitled to protections under the Geneva Conventions.[112] Following the September

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[108] Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 4 cmt. 4, Aug. 12, 1949, 75 U.N.T.S. 287.

[109] Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21, Judgment, ¶ 271 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); *see also* Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (holding that civilians are "persons who are not, or no longer, members of the armed forces").

[110] 317 U.S. 1 (1942).

[111] *Id.* at 2. The soldiers landed under cover of darkness in their uniforms but then buried their uniforms and supplies and proceeded with their mission in civilian dress.

[112] *See id.* at 30–31 ("By universal agreement and practice, the law of war draws a distinction between . . . lawful and unlawful combatants"); *see also id.* at 35 ("It has long been accepted practice by our military authorities to treat those who, during time of war, pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, as

11, 2001 attacks, President George W. Bush issued a White House memorandum stating that the U.S. government had determined that al-Qaeda terrorists and members of the Taliban captured during the course of the conflict did not meet the requirements of prisoners of war and were therefore not entitled to the protections of the Third Geneva Convention.[113]

The Congress has followed suit. The Military Commissions Act of 2006 uses the term "unlawful enemy combatant," which it defines as an individual who has engaged in or materially supported hostilities against the United States or its allies who is not a lawful enemy combatant.[114] A slightly different term is used in the 2009 amendment to the Military Commissions Act—"unprivileged enemy belligerent."[115] Although the term has changed slightly throughout the years, the current U.S. policy remains the same; specifically, that any individuals who engage in hostilities against the United States or its coalition partners and who do not fall under one of the delineated categories under the Third Geneva Convention are neither POWs nor civilians but members of a third category.[116] For the sake of clarity, this article will continue to refer to them as "unlawful combatants."

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unlawful combatants punishable as such by military commission."). It is important to note, however, that the soldiers at issue in this case were privileged combatants who lost their status based on their conduct of taking off their uniforms for the purposes of committing sabotage. *Id*. at 21, 36. They were not civilians directly participating in hostilities nor were they non-state actors.

[113] THE WHITE HOUSE, HUMANE TREATMENT OF TALIBAN AND AL QAEDA DETAINEES (Feb. 7, 2002), *available at* http://www.pegc.us/archive/WhiteHouse/bushmemo20002 0207ed.pdf.

[114] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2601.

[115] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1802, 123 Stat. 2575.

[116] *Id.* However, see also FM 27-10, *supra* note 33, which is at odds with the current policy:

> The enemy population is divided in war into two general classes:
>
> a. Persons entitled to treatment as prisoners of war upon capture, as defined in Article 4, GPW (par. 61).
>
> b. The civilian population (exclusive of those civilian persons listed in GPW, art. 4), who benefit to varying degrees from the provisions of GC (see chs. 5 and 6 herein). Persons in each of the foregoing categories have distinct rights, duties, and disabilities. Persons who are not members of the armed forces, as defined in Article 4, GPW, who bear arms or engage in other conduct hostile to

C. Classification of Cyberterrorists

As discussed in Part II, this article proposes the following definition of cyberterrorist: a non-state actor who uses cyber assets to directly participate in hostilities. It is assuredly possible for a state actor to commit an act of cyberterror and thereby become a privileged combatant under the Third Geneva Convention. For example, if the United States were to engage in an international armed conflict with Libya, it is not beyond the realm of possibility that a member of the Libyan armed forces could launch a cyber attack or threaten to launch a cyber attack on the Washington, D.C. power grid for the purpose of spreading terror among the civilian population. However, in the context of the current War on Terror, cyberterrorists are more likely to be non-state actors.

A non-state actor who engages in cyberterrorism will in most cases be an unlawful combatant. The very nature of cyberterrorism is that it consists of acts that can be carried out clandestinely in sealed rooms in front of computer screens. Additionally, acts of cyberterrorism can create widespread damage with significantly less resources than those required to conduct a traditional kinetic attack, which makes cyber attacks more attractive to groups with less funds and limited organization.[117]

When examining the framework of terrorist groups such as al-Qaeda or its numerous sympathetic off-shoots, the question must necessarily be raised as to whether the very organization of these groups places their members under the umbrella of privileges guaranteed by the Third Geneva Convention. The Third Geneva Convention creates a category of lawful combatants for members of organized groups that meet the additional four criteria of carrying arms openly, wearing a distinct sign or emblem, operating under a chain of command, and following the rules of armed conflict.[118] An organized terrorist organization may conceivably create lawful combatants if it satisfies those four criteria. However, this is unlikely when discussing cyberterrorism. The virtual nature of cyber activities does not allow for the open carrying of arms or wearing of

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> the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population.

Id.

[117] Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Conscripts*, 43 VAND. J. TRANSNAT'L L. 1011 (2010).

[118] GC III, *supra* note 15.

distinctive signs or emblems to distinguish these actors from protected civilians.[119]

The *Tallinn Manual* agrees that civilians who take a direct part in hostilities via cyber activity are "unprivileged belligerents." Significantly, there is no minority view among the international group of experts regarding the classification of this group of cyber actors. All members agreed that these unlawful combatants "enjoy no combatant immunity and are not entitled to prisoner of war status."[120]

The experts concluded that unlawful combatants who engage in cyber acts are subject to prosecution under domestic law even if the acts would be lawful when committed by a lawful combatant under the law of armed conflict. The commentary within the *Tallinn Manual* makes note that many cyber activities, to include certain types of hacking, have been criminalized under domestic law. The analysis, however, stops short of addressing alternative means of addressing these activities in an international legal framework.[121]

D. Lawful Actions Available to U.S. Armed Forces Against Cyberterrorists

The United States remains in an international armed conflict with al-Qaeda, as well as the Taliban and associated forces, to include ISIL.[122] As a result, as articulated by Harold Hongju Koh, Legal Adviser, U.S. Department of State, at the 2010 Annual Meeting of the American Society of International Law, the United States may use force consistent with its inherent right to self-defense under international law during the pendency of the international armed conflict.[123]

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[119] TALLINN MANUAL, *supra* note 12, at 96–101.
[120] *Id.* at 98.
[121] *Id.* at 96–101.
[122] *See, e.g.*, 2010 NATIONAL STRATEGIC STRATEGY, *supra* note 1 (The United States is still in an international armed conflict with the Taliban, al-Qaeda, and associated forces.); Stephen W. Preston, General Counsel of the Department of Defense, Remarks on the Legal Framework for the United States' Use of Force Since 9/11 (Apr. 10, 2015) (ISIL is an associated force of al-Qaeda.).
[123] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

Because the War on Terror is an international armed conflict made up of a dispersed group of non-state actors and the nature of the conflict makes it more conducive to clandestine acts of terror, commanders are likely to encounter acts of cyberterrorism during the course of this conflict. Once an individual is identified as a cyberterrorist directly participating in hostilities and classified as an unlawful combatant, there are two legally viable options available to commanders: target (use lethal force) or capture and detain. However, these options must be separated into two distinct categories: legally viable actions under LOAC and legally viable actions under U.S. policy.

1. Legally Viable Actions under LOAC

Civilians who directly participate in hostilities during an ongoing international or non-international armed conflict may be lawfully targeted under LOAC. There was a consensus among the international group of experts regarding what actions can be taken against a civilian directly participating in cyber hostilities. In the commentary to Rule 35 of the *Tallinn Manual*, paragraph 3 states:

> An act of direct participation in hostilities by civilians renders them liable to be attacked, by cyber or other lawful means. Additionally, harm to direct participants is not considered when assessing the proportionality of an attack . . . or determining the precautions that must be taken to avoid harming civilians during military operations.[124]

A more complicated question is what to do about attacks from non-state actors on behalf of a state that has not yet been declared belligerent. Consider the case of a hypothetical Iranian computer student who is outraged by the U.S.'s alleged involvement in the Stuxnet worm that crippled Iranian nuclear facilities.[125] In retaliation, on behalf of his state but without state sanction, this student creates a logic bomb designed to shut down the New York City power grid. Could this Iranian student be

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[124] TALLINN MANUAL, *supra* note 12, at 119. The omitted language pertains to a reference to Rule 51 of the *Tallinn Manual* that addresses proportionality.

[125] *See* The Frontline, *U.S. Identified as Stuxnet Perpetrator with Obama's Backing*, V3 (June 1, 2012), http://www.v3.co.uk/v3-uk/the-frontline-blog/2181770/identified-stuxnet-perpetrator-obamas-backing.

targeted by U.S. armed forces? The answer is not clear-cut. The act would not constitute direct participation in hostilities because it did not take place during an international armed conflict. However, the act may rise to the level of a cyberattack that would open the doors to a state's right of self-defense under Article 51 of the United Nations Charter.[126] If the act is considered an armed attack, targeting may be authorized.[127]

A commander may alternatively choose to capture and detain an identified cyberterrorist. Because the cyberterrorist would be classified as an unlawful combatant, the treatment of that cyberterrorist is not bound by the protections found in the Third Geneva Convention or by the protections found in the Fourth Geneva Convention.[128]

2. Legally Viable Actions under U.S. Policy

Although the options to either target or capture and detain cyberterrorists are available to U.S. armed forces, they are restricted pursuant to U.S. policy. On May 23, 2013, President Barack Obama presented the current U.S. policy on counterterrorism during an address at National Defense University, which was codified as Presidential Policy Guidance.[129] The President reaffirmed the U.S. position that the country is "at war with al Qaeda, the Taliban, and their associated forces" and that the use of force is therefore justified under international law. As a matter of policy, however, use of force is restricted in several ways.

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[126] U.N. Charter art. 51.

[127] *Id.*

[128] *See, e.g.*, GC III, *supra* note 15; GC IV, *supra* note 15; AP I, *supra* note 14, art. 45(3) (stating that "[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol."). Additional Protocol I, Article 75 lists "fundamental guarantees." AP I, *supra* note 14, art. 75.

[129] May 23 Speech on Counterterrorism, *supra* note 80. The Fact Sheet contains the following link to the full text of the Presidential Policy Guidance and is available at http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf.

a. Preference for Capture

The President stated that it is the policy of the United States to "not . . . use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots." He qualified this position with the supposition that the operation must first be conducted in accordance with "all applicable law." If capture of a terrorist is not feasible, lethal force is authorized but only under restraints that are still more restrictive than what is required under LOAC.[130]

b. Restraints on Use of Force

In accordance with the policy delineated in the May 23 speech, if capture of a terrorist is not feasible, U.S. forces may only use lethal force "to prevent or stop attacks against U.S. persons, and [when] . . . no other reasonable alternatives exist to address the threat effectively."[131] Using lethal force to prevent or stop attacks is analogous to using lethal force to engage a person committing a hostile act or demonstrating hostile intent excepting the qualifier that the attack or threatened attack must be against U.S. persons. The policy, however, places an additional restriction, not found in the SROE, that a determination must first be made that there are no reasonable alternatives to lethal force. On a conventional battlefield, there are few alternatives to prevent or stop an attack outside of either capture or lethal force, other than perhaps disarmament. In cyberspace, however, alternatives could include disabling a cyberterrorist's capabilities by, for example, destroying or disrupting his cyber assets or access to those assets.

The current U.S. policy places additional restraints on actions against terrorists located outside of the area of hostilities. If an identified terrorist is located outside of "areas of active hostilities," the policy states that lethal force may only be used if the following preconditions are met:

> (1) the terrorist poses a "continuing, imminent threat to U.S. persons;" (2) there is "near certainty" that the terrorist is present; (3) there is "near certainty that non-combatants will not be injured or killed;" (4) "capture is

[130] May 23 Speech on Counterterrorism, *supra* note 81.
[131] *Id.*

> not feasible at the time of the operation;" (5) the government authorities in the country where the terrorist is located "cannot or will not effectively address the threat;" and (6) "no other reasonable alternatives exist."[132]

Returning to the hypothetical LulzKhat, under international law, he could be lawfully targeted with lethal force as a cyberterrorist. Under U.S. policy, however, lethal force could be used only if the capture of LulzKhat was not feasible and the other preconditions were met. The precondition that would likely prevent the greatest obstacle to the use of lethal force is the requirement to assess reasonable alternatives to stop the threat. As discussed above, a cyberterrorist can be effectively disarmed and rendered incapable of posing a further threat by disabling his cyber assets or otherwise preventing his access to those assets. If computer specialists onboard the USS *Bonhomme Richard* are able to isolate and remove the malware, under U.S. policy, lethal force could not be contemplated. United States forces could still capture and detain LulzKhat; and because he is an unlawful combatant, his treatment would not be bound by the protections found in the Third Geneva Convention nor by the protections found in the Fourth Geneva Convention.

IV. Conclusion

In an open hearing of the Senate's intelligence committee in early 2012, Director of National Intelligence James Clapper stated in reference to cyber attacks that non-state actors are increasingly gaining in prominence, and in fact already have "easy access to potentially disruptive and even lethal technology."[133] This warning was echoed by then U.S. Secretary of Defense Leon Panetta in a 2012 address on cybersecurity:

> Cyberspace is the new frontier, full of possibilities to advance security and prosperity in the 21st Century. And yet, with these possibilities, also come new perils and new dangers. The Internet is open. It's highly

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[132] *Id.*

[133] J. Nicholas Hoover, *Cyber Attacks Becoming Top Terror Threat, FBI Says*, INFO. WK., Feb. 1, 2012, *available at* http://www.informationweek.com/security/risk-management/cyber-attacks-becoming-top-terror-threat-fbi-says/d/d-id/1102582.

> accessible, as it should be. But that also presents a new terrain for warfare. It is a battlefield of the future where adversaries can seek to do harm to our country, to our economy, and to our citizens. But the even greater danger—the greater danger facing us in cyberspace goes beyond crime and it goes beyond harassment. A cyber attack perpetrated by nation states [or] violent extremists groups could be as destructive as the terrorist attack on 9/11. Such a destructive cyber-terrorist attack could virtually paralyze the nation.[134]

For these reasons, it is more important than ever to pierce the "penumbral mist" that surrounds the applicability of international law to cyber war, specifically as it pertains to the identification and classification of non-state actors that engage in cyber hostilities.[135]

Although cyber war resists traditional classification, cyberspace is the terrain of modern warfare. The use of cyber technology, which can inflict high amounts of damage using significantly less resources and manpower than traditional kinetic warfare, has created an increasing amount of opportunities for civilians to participate in hostilities in the course of international armed conflict.[136]

As the United States continues to engage extremist groups in the ongoing international armed conflict against al-Qaeda, the Taliban, and associated terrorist organizations, to include ISIL, there is a growing emphasis in combating against cyber attacks.[137] What has been termed "The War on Terror" has no definable battlefield borders but instead is a global asymmetric campaign. Cyberterrorists operate on a global scale to conduct attacks or threats of attacks with the intent to spread terror to achieve their strategic goals.[138] Identifying and classifying individuals who are engaged in acts of cyberterrorism are the first steps in being able to determine the legal courses of action available to members of the U.S. armed forces in combating cyberterrorists. United States military doctrine to date does not provide the tools necessary to successfully identify and classify non-state actors engaged in acts of cyberterrorism.

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[134] Leon E. Panetta, Remarks on Cybersecurity to the Business Executives for National Security (Oct. 11, 2012).
[135] Schmitt, *supra* note 13, at 176.
[136] Wenger & Mason, *supra* note 9, at 838.
[137] *Id.* at 847; *see also* Cha, *supra* note 10, at 400.
[138] ARREGUIN-TOFT, *supra* note 11.

The *Tallinn Manual* provides the most clear-cut guidance on this issue but nonetheless leaves many questions unanswered.[139]

The intent of this article was to address those gaps as they pertain to the identification and classification of cyberterrorists. Cyberterrorists can be identified though an examination of their conduct and the intent behind their conduct using a direct participation in hostilities analysis. Under LOAC, cyberterrorists who directly participate in hostilities can, during the course of that participation, be lawfully targeted with lethal force. United States policy restricts the use of lethal force against terrorists, instead mandating that U.S. forces first assess the feasibility of capture. Under both LOAC and U.S. policy, however, because cyberterrorists are unlawful combatants, they do not qualify for the protections provided by the Third and Fourth Geneva Conventions. These individuals can therefore be detained without being afforded POW status and without receiving the accompanying rights and privileges POW status brings.

The United States and international community, through the Koh speech and *Tallinn Manual*, have appeared to reach a consensus on the applicability of international law to cyber warfare. However, just how that law is to be interpreted is still up for debate. Until such a time that a more thorough consensus is reached, the United States and its armed forces will have to pursue its military strategy as it pertains to cyber warfare within the mists of uncertainty.

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[139] TALLINN MANUAL, *supra* note 12, at 115–16.

KEEP YOUR HANDS TO YOURSELF: WHY THE MAXIMUM PENALTY FOR ASSAULT CONSUMMATED BY A BATTERY MUST BE INCREASED

MAJOR BRIAN J. KARGUS*

I got a little change in my pocket going ching-a-ling-a-ling
Wanna call you on the telephone, baby, give you a ring
But each time we talk, I get the same old thing
Always, "No huggee, no kissee until I get a wedding ring"
My honey, my baby, don't put my love upon no shelf
She said, "Don't hand me no lines and keep your hands to yourself."[1]

I. Introduction

The recent public focus on the military's prosecution of sexual assault cases has brought about a plethora of proposed changes to the way the military handles these types of cases. Whether the proposal is to elevate the disposition authority of many felony-level cases to a higher authority[2] or to revamp the military's sexual assault charging scheme to

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[1] THE GEORGIA SATELLITES, *Keep Your Hands to Yourself*, *on* GEORGIA SATELLITES (Elektra Records 1986).

[2] Military Justice Improvement Act, S. 967, 113th Cong. (2013).

broaden the scope of criminal conduct,[3] none fully address a significant impediment to securing convictions for those accused of sexual assault: the mandatory registration as a sex offender, and the consequent significant disincentive to plead.[4] While certainly not the antidote to all of the problems inherent in prosecuting sexual assault cases, an increase in the maximum penalty for assault consummated by a battery under Article 128, Uniform Code of Military Justice (UCMJ), from six months[5] to one year will give commanders and trial counsel more flexibility in charging and prosecuting sexual assault cases.

To understand the impact of a seemingly small change to the maximum punishment of a non-sexual assault offense, one should look through the lens of an illustrative example.[6] A woman, not wanting to offend, exchanges phone numbers with a Soldier at a party who has taken an interest in her. Despite his calls and text messages, the woman ignores the Soldier's attempts at reaching her.

A few weeks later, the Soldier and the woman happen to encounter each other at a bar. When confronted by the Soldier about why she has ignored his attempts to reach her, the woman kindly explains that she is not interested in having a boyfriend and shortly thereafter leaves the bar with friends. She then heads to a friend's apartment and goes to sleep by herself in a spare bedroom. The Soldier, meanwhile, continues drinking with his friends and, when the bar closes, goes to a rented motel room. Once at the motel, the Soldier and his friends continue drinking, but their behavior causes the manager to ask them to leave. One of the Soldier's friends, however, knows someone who lives in an apartment nearby the motel. By coincidence, this happens to be the same apartment that the woman with whom the Soldier exchanged phone numbers is sleeping.

Once the Soldier reaches the apartment, he discovers that the woman is sleeping by herself in a bedroom. Undeterred by a friend's warning, he ventures into the bedroom, removes most of his clothing, and enters

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[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 45 (2012) [hereinafter MCM].

[4] 42 U.S.C. § 16913 (2006). For a list of military offenses for which a conviction requires sex offender registration, see U.S. DEP'T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY 78–82 (11 Mar. 2013) [hereinafter DODI 1325.07].

[5] MCM, *supra* note 3, pt. IV, ¶ 54e(2).

[6] The facts in this illustration are similar to those in the case of *United States v. Specialist (SPC) David D. Miller*, No. 20130437 (1st Infantry Div. and Fort Riley, Fort Riley, Kan., May 9, 2013). The facts of this case are public record.

the bed with the sleeping woman. He proceeds to kiss her and fondle her genitals until she awakes, frightened and confused by the Soldier's presence and actions. The victim immediately reports the encounter to her friends and to civilian police the following afternoon. The case ultimately ends up with the Soldier's chain of command, who prefer charges against him under Article 120, UCMJ,[7] for sexual assault.

After the Article 32, UCMJ, investigation,[8] the accused offers to plead guilty to assault consummated by a battery in violation of Article 128, UCMJ, in exchange for the government withdrawing and dismissing the charge of violating Article 120. In discussing the offer with the victim, the trial counsel voices reservations, citing the lack of a sex offender registration requirement and the low maximum penalty authorized under Article 128. Despite the trial counsel's recommendation, the victim expresses her desire to move on with her life and asks that the accused's chain of command accept his offer. The convening authority accepts the offer, and the accused is found guilty at court-martial of violating Article 128. He is sentenced to the maximum possible confinement of six months.

While the victim and the accused may be content with the outcome of the case, society loses because not only does the accused in this scenario avoid sex offender registration; he also avoids a period of confinement commensurate with an offense of a sexual nature. Depending on the charging theory, this accused could have faced a maximum period of confinement anywhere between seven years to life.[9] Increasing the penalty for battery to one year would narrow the consequential gap between the charged offense carrying a mandatory sex offense registration and the only alternate charging theory available not carrying registration. This change would make accepting offers to plead guilty to this lesser included offense of sexual assault more palatable to trial counsel advising commanders. Thus, an increase would result in more

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[7] Article 120, Uniform Code of Military Justice (UCMJ), is the statute under which the military prosecutes cases of rape and sexual assault. There are four separate offenses under Article 120, each with multiple theories under which the offenses can be committed: rape, sexual assault, aggravated sexual contact, and abusive sexual contact. MCM, *supra* note 3, pt. IV, ¶ 45.

[8] The National Defense Authorization Act for Fiscal Year 2014 amends Article 32, UCMJ, to make what was formerly an investigation into a preliminary hearing. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954–55 (codified as amended at 10 U.S.C. § 832).

[9] Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 15, 2013).

guilty pleas for offenses of a sexual nature.[10]

To support the recommendation that the maximum confinement for assault consummated by a battery in violation of Article 128 be increased to one year, this article will first address the history behind the offense of assault consummated by a battery. Next, it will cover recent changes to the federal assault statute, the rationale behind those changes, and a comparison of the federal and military assault-and-battery punishment schemes to state jurisdictions. Finally, the article will outline and argue why an increase of the military's maximum punishment for assault consummated by a battery is a welcome and necessary change that will better protect society from those who sexually abuse or batter in the cases when victims want the government to accept an accused's offer to plead to the lesser offense of battery.

II. History of the Offense of Assault Consummated by a Battery

Before exploring why an increase to the maximum confinement penalty for assault consummated by a battery is necessary, one must look to the history of the military offense of assault consummated by a battery to understand why a change is needed. The offense of "assault with intent to do bodily harm" first appeared in the 1916 revision to the Articles of War (AW) as AW 93.[11] However, generic "assault and battery" was still punishable under AW 96, a crime akin to the UCMJ's General Article 134, which was derived from article 62 of the 1806 Articles of War and which authorized punishment for "[a]ll crimes not capital . . . to the prejudice of good order and military discipline."[12] When enacted in 1950, the UCMJ enumerated an offense of "Assault" under Article 128: "[a]ny person subject to this code who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of

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[10] *See* Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573, 1598 (2012) (discussing how the closer the aims of the prosecution and defense are the more likely a criminal prosecution will end with a guilty plea).

[11] Act of Aug. 29, 1916, ch. 418, 39 Stat. 619, 664, *amended by* Act of June 4, 1920, ch. 227, 41 Stat. 759, 787–811, *repealed by* Act of June 24, 1948, ch. 625, tit. II, § 203, 62 Stat. 604, 628.

[12] GOV'T PRINTING OFFICE, COMPARISON OF PROPOSED NEW ARTICLES OF WAR WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 47 (1912), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/A-W_book.pdf.

assault and shall be punished as a court-martial may direct."[13] The language of the offense has not since changed.[14]

While the offense of assault consummated by a battery evolved to become an enumerated offense under the UCMJ, its maximum punishment has remained stagnant during the almost 100 years of its existence. The 1918 *Manual for Courts-Martial* (*MCM*), the first *MCM* to incorporate the 1916 amendments to the AW, provided for a six-month maximum period of confinement for "[a]ssault and battery" in violation of AW 96.[15] Even with the enactment of the UCMJ in 1950, the six-month maximum punishment remained.[16] Despite its elevation to an enumerated offense, the drafters of the 1951 *MCM* intended the punishment for the crime of assault consummated by a battery to remain the same as that in AW 96.[17]

Since 1950, the maximum penalties for certain types of batteries have increased over time based on the instrumentality used to commit the battery, the intent of the accused, and the status of the victim.[18] Not addressed by any of these maximum authorized punishment increases, however, are increases in maximum punishments for domestic and sexual batteries despite the fact that the 1951 *MCM* contemplated that certain offenses of a sexual nature would be prosecuted as batteries.[19] Over time, sexual battery has evolved in military jurisprudence to become abusive sexual contact in violation of Article 120,[20] carrying a

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[13] MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 2 (1951) [hereinafter 1951 MCM].

[14] *See* MCM, *supra* note 3, pt. IV, ¶ 54a.

[15] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XIII, § 4 (1918) [hereinafter 1918 MCM].

[16] 1951 MCM, *supra* note 13, ¶ 127c.

[17] COLONEL WILLIAM P. CONNALLY JR., U.S. DEP'T OF THE ARMY JUDGE ADVOCATE GENERAL'S CORPS, LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL UNITED STATES 200 (1951).

[18] Maximum penalties for violations of Article 128 are increased when an assault or battery is perpetrated using loaded and unloaded firearms, when the victim is an agent of law enforcement, when grievous bodily harm is intended, and when the victim is a child. However, the maximum penalty for a violation of Article 128 for batteries of a domestic or sexual nature have remained at six-months' confinement since the enactment of the UCMJ. *See* MCM, *supra* note 3, app. 23, ¶ 54.

[19] *See* 1951 MCM, *supra* note 13, ¶ 207b (stating "[a] man who fondles against her will a woman not his wife commits a battery . . .").

[20] MCM, *supra* note 3, pt. IV, ¶ 45a(d). Until June 27, 2012, Article 120 also punished an offense of wrongful sexual contact, which is more closely akin to sexual battery and carried a maximum penalty of one year confinement. *Id.* app. 28, ¶ 45a(m), e(7). Even with the lower maximum punishment, however, a conviction of the offense of wrongful

maximum penalty of seven years' confinement[21] and registration as a sex offender.[22] While the evolution of Article 120 reflects society's abhorrence of the "despicable crime"[23] of sexual assault, the usefulness of Article 128 as a lesser included offense[24] is diminished due to the lack of a parallel evolution of its maximum punishment.

III. Assault and Battery in Other Jurisdictions

Before exploring the need for a change under the UCMJ, it is helpful to understand how other U.S. jurisdictions criminalize and punish the UCMJ-equivalent of assault consummated by a battery. First, recent changes to the federal assault statute designed to enhance the ability of prosecutors to handle cases of sexual and domestic assault suggest that parallel considerations may demonstrate a need to increase the maximum punishment for assault consummated by a battery under the UCMJ. Next, a survey of analogous state laws shows that most states either authorize punishment for assault and battery more severe than that of the UCMJ or have increased maximum punishments available in certain circumstances.

A. The Federal Approach to Assault and Battery

As part of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Congress increased the maximum penalty for federal "assault by striking, beating, or wounding" from six months to one year in jail.[25] To be sure, common law battery, that is, battery that does not

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sexual contact still requires sex-offense registration. DODI 1325.07, *supra* note 4, at 81.

[21] Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 15, 2013).

[22] DODI 1325.07, *supra* note 4, at 81.

[23] Sec'y of Def. Chuck Hagel, Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy from the Pentagon (May 7, 2013), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptID=5233.

[24] *See, e.g.*, United States v. Steven H. Bonner, 70 M.J. 1 (C.A.A.F. 2011) (holding that assault consummated by a battery is a lesser included offense of wrongful sexual contact); United States v. Lewis T. Booker, No. 201300325, 2013 WL 5840229, at *5 (N-M. Ct. Crim. App. 2013) (holding that assault consummated by a battery is a lesser included offense of abusive sexual contact); United States v. David A. Aguilar, 70 M.J. 563, 567 (A.F. Ct. Crim. App. 2011) (holding that assault consummated by a battery is a lesser included offense of rape by force).

[25] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 (2013) (codified as amended at 18 U.S.C. § 113(a)(4) (2012)).

fall within the subset of "striking, beating, or wounding,"[26] still carries a six-month confinement maximum.[27] Thus, "an offensive patting, squeezing or groping of a sexual nature would also constitute a common law battery but would not constitute assault by striking, beating, or wounding."[28] Still, the rationale for Congress's increase of the maximum penalty for assaults of striking, beating, or wounding provides insight into why the penalty for assault consummated by a battery under the UCMJ should increase accordingly.

In reports leading up to the passage of VAWA 2013, both the House of Representatives and the Senate cited as the reason behind an increase in the maximum penalty to enable federal prosecutors to combat assault against women on Indian reservations.[29] Further, perhaps more telling of Congress's intent is the Senate report offering these increased penalties as an example of "the meaningful role that federal law enforcement must play in reducing domestic violence, sexual assault, and stalking in Indian country. . . ."[30] Indeed responding to sexual assaults that occur under federal jurisdiction is a permeating theme of both the House of Representatives and Senate reports.[31] In fact, "sexual assault has been one of the core crimes addressed by" the act[32] yet "prosecution and conviction rates for sexual assault are among the lowest for any violent crime."[33] It stands to reason that Congress's intent in increasing the penalty for certain types of assault under federal law, when viewed in the context of the entire VAWA 2013, was aimed at reducing sexual assault violence in addition to curtailing domestic violence.

B. The States' Approach to Assault and Battery

In addition to considering a potential change in the maximum punishment of Article 128 through the lens of federal law, it is also

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[26] United States v. Delis, 558 F.3d 117, 181–82 (2d Cir. 2009) (holding that striking, beating, and wounding under 18 U.S.C. § 113(a)(4) were a subset of actions within the definition of common law battery, so 18 U.S.C. § 113(a)(5) criminalizes and punishes common law battery, not 18 U.S.C. § 113(a)(4)).

[27] 18 U.S.C. § 113(a)(5) (2012).

[28] United States v. Iron Teeth, No. 12-50076, 2013 WL 38970, at *4 n.2 (D.S.D. Jan. 3, 2013).

[29] H.R. REP. NO. 112-480, pt. 1, at 91 (2012); S. REP. NO. 112-153, at 33 (2012).

[30] S. REP. NO. 112-153, at 11.

[31] *See generally* H.R. REP. NO. 112-480; S. REP. NO. 112-153.

[32] S. REP. NO. 112-153, at 4.

[33] *Id.*

useful to compare how various states handle the prosecution and punishment of the similar crime under their laws.[34] However, one cannot simply do an apples-to-apples comparison of the several states and determine that the *MCM* must change. Some states, like the UCMJ, take a direct approach to assault and battery and its maximum punishment. Others, however, separate common law battery from domestic or sexual battery, punishing common law battery less while more severely punishing domestic or sexual battery.

As described in the appendix, at least thirty states that have an assault and battery statute similar to the generic assault consummated by a battery prohibition under Article 128 and penalize the battery with a maximum penalty greater than the *MCM*'s maximum of six months. The spread of maximum punishments in states that comprise this group is quite large, ranging from nine months[35] to ten years.[36] Most states within this subset authorize a maximum penalty for assault and battery of one year.[37]

Of those that remain, thirteen states (including the District of Columbia) prescribe a six-month maximum sentence for assault and battery, while the balance of jurisdictions permit a lower maximum period of confinement.[38] While this penalty is the same as or lower than that of assault consummated by a battery under Article 128, many of these jurisdictions have separate prohibitions and penalties for batteries that are sexual or domestic in nature. For instance, South Carolina only punishes assault and battery with a maximum of thirty days' jail.[39] However, if the battery involved the touching of private parts, defined as "the genital area or buttocks of a male or female or the breasts of a female,"[40] the maximum punishment increases to three years.[41] What is most notable about South Carolina's statutory scheme is that this crime, even when involving the touching of private parts, does not trigger sex-offender registration.[42] Wyoming follows a similar statutory scheme, punishing sexual battery more severely than simple battery with a

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[34] For a survey of how the states punish assault and battery, see the appendix (Assault and Battery by Jurisdiction).
[35] WIS. STAT. § 940.19 (2013).
[36] MD CODE ANN. CRIMINAL LAW, § 3-203 (West 2013).
[37] *See infra* Appendix (Assault and Battery by Jurisdiction).
[38] *Id.*
[39] S.C. CODE ANN. § 16-3-600 (2013).
[40] *Id.*
[41] *Id.*
[42] *See id.* § 23-3-430.

maximum of one-year confinement[43] without requiring sex offense registration.[44] In that same vein, while Oklahoma's prohibition on battery carries only a ninety-day maximum sentence, domestic battery carries a maximum penalty of one year.[45]

In the context of the military, one case stands out as the best illustration of how states handle sexual battery cases differently from the military. The case of Air Force Lieutenant Colonel (Lt. Col.) Jeffrey Krusinski made headlines when he allegedly assaulted a woman in Arlington, Va., by grabbing her breasts and buttocks.[46] Originally, the Commonwealth's Attorney charged the case as a sexual battery but withdrew the charge and instead prosecuted Lt. Col. Krusinski under Virginia's assault and battery statute.[47] What is interesting about this charging decision is that both offenses carry a one-year maximum sentence of confinement,[48] but the sexual battery statute only carries a sex-offender registration requirement after a third conviction.[49] Assuming that Lt. Col. Krusinski does not have prior convictions for sexual battery, he would not have had to register as a sex offender even if he had been convicted under the original charge; yet he would still have faced up to a year in confinement. Moreover, had Lt. Col. Krusinski been convicted, his conviction would have been documented for future cases should he reoffend.

IV. Why an Increase to Article 128's Maximum Authorized Punishment Is Needed

Appreciating the genesis of Article 128 and how other jurisdictions punish similar offenses is key to understanding the need for a change to

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[43] WYO. STAT. ANN. § 6-2-313 (2013).
[44] *Id.* § 7-19-302 (2013).
[45] OKLA. STAT. ANN. tit. 21, § 644 (West 2013). Under the Oklahoma statute, domestic battery is broad enough to include a battery upon someone with whom the offender is in a dating relationship. Presumably, this could include batteries of a sexual nature. *Id.*
[46] Kristin Davis, *Officer's Trial on Groping Charge Set for Nov. 12*, AIR FORCE TIMES (Aug. 27, 2013), http://www.airforcetimes.com/article/20130827/NEWS06/308270033/Officer-s-trial-groping-charge-set-Nov-12.
[47] *Id.* Ultimately, a jury acquitted Lieutenant Colonel Krusinski. Kristin Davis & Brian Everstine, *Jury Acquits Air Force Officer Accused of Groping*, USA TODAY (November 13, 2013), http://www.usatoday.com/story/news/nation/2013/11/13/lt-col-jeffrey-krusinski-military-sexual-assault/3518113/.
[48] VA. CODE ANN. § 18.2-67.4 (West 2013); *id*. § 18.2-57.
[49] *Id.* § 9.1-902 (West 2013).

the *MCM*'s maximum punishment scheme for assault consummated by a battery. Ultimately, an increase will result in more convictions for sexual assault cases, and three separate but interrelated reasons support this outcome. First, sex-offender registration is a significant disincentive to plead, and consequently, guilty pleas to an offense that does not require registration will ultimately increase convictions for crimes of a sexual nature. Second, an increase in the maximum punishment for assault consummated by a battery provides commanders and trial counsel with flexibility in charging decisions and plea negotiations. Finally, the increase in the maximum punishment will empower military judges to use this increased sentencing discretion to appropriately punish assault-and-battery acts of a sexual or domestic nature.

A. Sex-Offender Registration Hinders the Ability of Trial Counsel to Obtain Guilty Pleas in Sexual Assault Cases

Apparent pressure to increase the military's conviction rate for crimes of sexual assault[50] stands in severe conflict with the requirement that those convicted of a qualifying offense must register as a sex offender. As an initial matter, Congress and state legislatures have made considerable reforms to the prosecution of sex crimes that are intended to encourage reporting and increase offender accountability. These reforms include the removal of several barriers to reporting and prosecution: the requirement that a victim be able to corroborate his or her account by either witnesses or medical evidence, evidence of resistance, the exploration of a victim's sexual history, the marital exemption, the prompt complaint doctrine, evidence of the victim's attire during the alleged assault, and other archaic impediments.[51] Congress even amended Article 120 in 2006 and 2011 to make sexual offenses more offender-centric to shift the focus from the victim and consent, and instead place it on the alleged offender.[52]

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[50] *See* Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfalls*, MCCLATCHY NEWSPAPERS, Nov. 28, 2011, *available at* http://www.mcclatchydc.com/2011/11/28/131523/militarys-newly-aggressive-rape.html.

[51] Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 985-1030 (2008).

[52] Major Mark Sameit, *When a Convicted Rape is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 MIL. L. REV. 77, 78 (2013) (questioning the effectiveness of Article 120 changes). For instance, the version of Article 120 enacted by Congress in 2011 goes to great lengths to define consent in an easy-to-apply and offender-centric manner ("[a]

Despite these efforts, the conviction rate for sex-offender registration qualifying offenses remains low. Using the figures most favorable to the critics of the military's handling and prosecution of sexual assault,[53] in fiscal year 2012, the military saw a 13.8% conviction rate for the 1,714 possible cases of sexual assault that could have been tried by the military.[54] Regardless of how one views these statistics, this report does not reflect whether the reported convictions were for offenses that require sex-offender registration, for lesser-included offenses that do not require sex-offender registration, or for collateral misconduct.[55] Thus, it is likely that the actual fiscal year 2012 conviction percentage for sex-offenses that require registration is even lower than 13.8%.[56]

Sex-offender registration carries with it a bevy of onerous restrictions consequential to the conviction, including public notification and residency restrictions, all of which vary depending upon the jurisdiction.[57] The public, and thus prospective panel members, are likely aware, at least to some degree, of these restrictions, especially in light of the intense public scrutiny on the military and political argument about military sexual assault.[58] It is at least possible that panel members'

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sleeping, unconscious, or incompetent person cannot consent" and "[l]ack of consent may be inferred from the circumstances *of the offense*"), MCM, *supra* note 3, pt. IV, ¶ 45(g)(8)(B), (C) (emphasis added), while older versions of Article 120 placed the burden on the victim to show lack of consent ("[i]f the victim in possession of his or her mental faculties fails to make a lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent"), *id*. app. 27, ¶ 45c(1)(b), and even included an enumerated defense of mistake of fact as to consent based on the victim's actions. *See id*. app. 28, ¶ 45(t)(15).

[53] Most notably, these figures and those of previous fiscal years are derided in the film THE INVISIBLE WAR (Chain Cinema Pictures 2012).

[54] 1 U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, at 68, 73 (2013), *available at* http://www.sapr.mil/index.php/annual-reports [hereinafter DOD ANN. REP. ON SEXUAL ASSAULT 2012 VOL. 1].

[55] *See id*. at 71 (citing that 79% of the 302 cases taken to trial in fiscal year 2012 resulted in a conviction "of at least one charge at trial").

[56] This statistic is not a useful barometer of the percentage of military sexual assault convictions in a given fiscal year. For instance, if a convicted servicemember was charged with a crime of a sexual nature and another crime, such as providing a false official statement, the reported statistics do not indicate whether the servicemember was convicted of the sexual assault, the other offense, or both. *See id.*

[57] *See* Klein, *supra* note 51, at 1036–40.

[58] *See, e.g.*, President Barack Obama, Remarks by President Obama and President Park of South Korea in a Joint Press Conference (May 7, 2003), *available at* http://www.whitehouse.gov/the-press-office/2013/05/07/

increased awareness of the collateral consequences of a sex crime conviction may have the effect of reducing the panel's willingness to convict on such offenses.[59] Indeed, assuming that panel members operate similarly to modern jurors,[60] panel members would be less likely to convict an accused in a sexual-assault case than in other types of cases[61] because, in part, of their knowledge of the infinite duration of the punishment meted out not by the actual sentence imposed but rather merely as a consequence of conviction (e.g., sex-offender registration).[62]

Likewise, those accused of crimes for which conviction would require sex-offense registration are less likely to plead guilty to those offenses and will instead risk trial to avoid registration.[63] First, panels may be

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remarks-president-obama-and-president-park-south-korea-joint-press-confe.

[59] *See* Amy Farrell, Liana Pennington & Shea Cronin, *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773, 785 (2013) (finding in a study of the complex relationships between legitimacy of legal authority, race, and legal action that "[j]urors are less likely to favor the prosecution when they believe the consequences of conviction are too harsh").

[60] Although court-martial panels are not formed in the same manner as civilian juries, this assumption is necessary due to specific prohibitions upon the polling of panel members' deliberations and voting. *See* MCM, *supra* note 3, R.C.M. 922, 1007. Because panel members typically hear more than one case, post-trial contact with them about their deliberations is not only inappropriate but could create unlawful command influence issues prohibited by Article 37, UCMJ. Major Holly Stone, *Post-Trial Contact with Court Members: A Critical Analysis*, 38 A.F. L. REV. 179, 188–89 (1994). The prohibitions make difficult efforts to obtain a true measure of panel members' attitudes towards the proving of sexual assault cases.

[61] *See* James A. Billings & Crystal L. Bulges, *Maine's Sex Offender Registration and Notification Act: Wise or Wicked?*, 52 ME. L. REV. 175, 251 n.532 (2000) (identifying that proof problems inherent in sexual assault cases make risking a trial appealing to those accused of sexual assault due to the mandatory registration and high maximum sentences).

[62] *See* Graham, *supra* note 10, at 1588 (arguing that modern juries sometimes balk in trials in which a conviction triggers a severe mandatory sentence); *see also* Martin D. Schwartz & Todd R. Clear, *Toward a New Law on Rape*, 26 CRIME & DELINQ. 129, 145 & 147 (1980), *available at* http://www.sagepub.com/hemmens/study/articles/03/Schwartz_Clear.pdf (arguing that because of the likelihood that high sentences keep juries from convicting in sexual assault cases, a new scheme of assault and battery statutes with lower penalties should replace typical statutes criminalizing sexual assault).

[63] *E.g.*, Marlena Baldacci, *General Won't Plead Guilty If It Means Sex-Offender Registry, Defense Says*, CNN (Mar. 11, 2014), http://www.cnn.com/2014/03/11/justice/jeffrey-sinclair-court-martial/; *see* Graham, *supra* note 10, at 1595; *see also* Marissa Ceglian, Note, *Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries*, 12 J.L. & POL'Y 843, 885 (2004) (arguing that sex-offense registration requirements cause many defendants to opt for a jury trial instead of engaging in plea negotiations).

simply reluctant to find proof beyond a reasonable doubt for reasons not usually found in other types of cases.[64] For instance, many cases involve allegations based solely on a victim's testimony, admissible evidence of a victim's alcohol consumption, a victim's consensual acts with an accused, and delays in victim reporting regardless of expert testimony explaining post-traumatic stress.[65] These problems make an acquittal in sexual assault cases more likely, and given the significant (often, lifelong) impact of a conviction for a sex offense, those problems further increase the likelihood that an accused will take his chances at trial instead of pleading guilty to an offense requiring sex-offender registration even for considerable concessions by a convening authority with respect to a confinement cap.[66]

B. The Need for Increased Flexibility

Of course, one possible solution would be to allow trial counsel the ability to negotiate away sex-offender registration. However, without a significant change to the underlying statutory scheme, this is not possible because sex-offender registration is a collateral consequence of a finding

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[64] While the *Manual for Courts-Martial*'s prohibition on polling panels regarding their deliberations and voting prevents a direct analysis of this reluctance, one can look to panel members' questions to the military judge during courts-martial to glean evidence of panels' hesitance to convict an accused of a sexual offense. For instance, in one case involving a charge of abusive sexual contact in violation of Article 120, UCMJ, the panel president asked the military judge mid-deliberations whether there was a lesser included offense to abusive sexual contact that was still sexual in nature but did not include the "abusive" language in its title. In light of that question, the panel may have convicted the accused of assault consummated by a battery in violation of Article 128, UCMJ, because of the lack of such an alternative. United States v. Private (E-2) Reginard Egdar, No. 20121093 (1st Infantry Div. and Fort Riley, Fort Riley, Kan., Dec. 4, 2012). This appears to be an excuse not to convict on a sex offense, however, given that the word "abusive" is not found within any of the instructed elements to the crime of abusive sexual contact. *See* MCM, *supra* note 3, pt. IV, ¶ 45a(d).

[65] *See* Klein, *supra* note 51, at 1049–51; *see also* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 646–47 (2009) (arguing that rape prosecution reforms are generally unhelpful for obtaining justice for victims of date rape because jurors are not prevented from focusing on aspects of acquaintance rape not found in paradigmatic rapes).

[66] The National Defense Authorization Act for Fiscal Year 2014's addition of a mandatory minimum sentence of dishonorable discharge or dismissal for certain sex crimes will likely not affect plea negotiations because the typical accused is more concerned about sex-offense registration than whether he is punitively discharged from the service. Major Megan Wakefield, Lecture to 62d Graduate Course, The Judge Advocate General's Legal Ctr. and Sch. (Jan. 6, 2014).

of guilty to a sex offense.[67] The rationale behind this prohibition is clear: if trial counsel had the authority to dispense with the sex-offender registration requirement, Congress's effort to ensure consistent registration could be swallowed by this exception. Moreover, making the sex-offender registration requirement a subject of plea negotiations would turn a collateral consequence of conviction into a direct consequence, thus transforming the registration itself into a punitive measure, as opposed to the administrative one it is now.[68] Finally even if a convening authority could waive the military's sex-offender registration requirements, such a waiver would have no effect on the requirement for those convicted of sexual offenses due to the patchwork of state-registration laws, some of which exceed the requirements of the Sex Offender Registration and Notification Act,[69] following the conviction.[70]

Instead, the President should give commanders the same flexibility that Congress granted federal prosecutors when it enacted VAWA 2013. When Congress expanded the punishment for federal assault by "striking, beating, or wounding"[71] from six months to one year, it did so to provide flexibility to federal prosecutors trying cases of domestic and sexual assault, particularly those on tribal lands.[72] This is flexibility that is not currently afforded to military commanders and their trial counsel.

Unlike the law in several states and under federal law, the *MCM* does not prescribe enhanced punishments for assaults that occur within a dating or domestic relationship, nor does it penalize more harshly sexual battery in a manner that would allow an accused to plead guilty without sex-offender registration. The UCMJ thus limits the options available to

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[67] *See, e.g.*, People v. McClellan, 862 P.2d 739, 748 (Cal. 1993) (holding "sex offender registration is not a permissible subject of plea agreement negotiation; neither the prosecution nor the sentencing court has the authority to alter the legislative mandate that a person convicted of [a sex crime] shall register as a sex offender").

[68] *See* United States v. Airman First Class Korey J. Talkington, 73 M.J. 212, 212 (C.A.A.F. 2014); *see also* Paisly Bender, Comment, *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*, 19 GEO. MASON L. REV. 291, 292 (2011) (defining collateral consequences as "the consequences of a plea that do not derive from the punishment handed down from the court").

[69] 42 U.S.C. § 16913 (2006).

[70] *See* Jane Shim, *Listed For Life*, SLATE (August 13, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/sex_offender_registry_laws_by_state_mapped.html.

[71] 18 U.S.C. § 113(a)(4) (2012).

[72] *See* S. REP. NO. 112-153, at 11 (2012).

the parties because a proposed reduction in charges is only available if there is another crime under the UCMJ that fits the facts of an allegation.[73] This paradigm places commanders and trial counsel in a tough position in cases involving sexual batteries: try a case with a high maximum confinement and mandatory sex-offender registration but with a decreased likelihood of conviction, or accept a plea for a crime with a low maximum confinement and no sex-offender registration with a nearly guaranteed conviction.

To give commanders and trial counsel the option of a better compromise, the President should increase the maximum penalty for assault consummated by a battery to one year. This will implement, in a broad sense, the approaches taken by the federal government and by many states. Concededly, increasing the penalty for battery will not specifically enumerate sexual and domestic battery as specific enhancers to a sentence resulting in a greater penalty as under schemes in Virginia, Wyoming, South Carolina, or Oklahoma. However, because each state approaches sex-offender registration differently, enumerating a specific crime of "sexual battery" under Articles 120 or 128 may defeat the purpose of this proposal, as some states may nonetheless require registration even if the military would not.[74]

Clearly, commanders already enter into plea agreements that significantly reduce the punitive exposure of those accused of sex crimes.[75] However, under the current maximum punishment scheme, the accused is at an advantageous position in the negotiation.[76] While an

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[73] *See* Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1940, 1953 (2006). Trial counsel are limited in their ability to fashion lesser offenses in ways that civilian prosecutors are not. For instance, an accused must be provident to all offenses for which he pleads guilty. *See* UCMJ art. 45(a) (2012). Additionally, the *MCM* precludes trial counsel from settling plea-negotiation impasses by simply crafting a new charge under Article 134 removing the disputed element from the charge. *See* MCM *supra* note 3, pt. IV, ¶ 60c(5)(a).

[74] *See, e.g.*, KAN. STAT. ANN. § 22-4902b(b)(5), (7) (2013) (requiring those convicted of sexual battery in Kansas in violation of title 21, section 5505 of the Kansas Code or to a similar offense in another jurisdiction be placed on the Kansas sex-offender registry).

[75] *See, e.g.*, United States v. SPC David D. Miller, No. 20130437 (1st Infantry Div. and Fort Riley, Fort Riley, Kan., May 9, 2013); United States v. Private First Class (PFC) Sebastian P. Flores, No. 20130180 (1st Infantry Div. and Fort Riley, Fort Riley, Kan., Feb. 28, 2013); United States v. Staff Sergeant Brandon C. Morrow, No. 20111135, 2014 WL 843582, at *1 n.1 (A. Ct. Crim. App. Feb. 27, 2014).

[76] *See* Graham, *supra* note 10, at 1586 (noting that the more difficult a crime is to prove, the more leverage an accused has to demand a significant sentence discount).

accused who understands his culpability may well readily plead guilty to a lesser offense that does not carry sex-offender registration,[77] he would do so under the current punishment scheme at a significantly reduced risk of lengthy confinement. This makes the convening authority's decision on whether to accept a plea agreement a difficult one. Such difficulty could render accepting the plea unpalatable to commanders who feel that the limited maximum term of confinement available for assault consummated by a battery is too low given the gravity of sex offenses and the scrutiny of the military's sexual-assault prosecution. The possibility of one-year of confinement, on the other hand, gives more flexibility to a commander seeking justice while shifting some of the difficulty of the decision regarding a plea to an accused.[78]

An increase to the maximum punishment for assault consummated by a battery will not likely result in all or even most sexual-assault cases being handled by plea to a lesser offense that does not carry sex-offender registration. Rape and sexual assault are serious offenses, and changes to the punishment scheme of a lesser offense is not a magic solution to all of the problems inherent in prosecuting those cases. Despite the challenges associated with prosecuting sex crimes, a commander may want to proceed with the charged offense to showcase to the unit, and to the public, the unit's commitment to investigating and prosecuting sexual assault cases.[79] However, the President should extend to commanders the flexibility to make assessments of the cases under their commands and seek justice whether by prosecuting cases as sex crimes or accepting plea agreements for lesser offenses that carry commensurate maximum punishments, especially when the victim expresses support in so doing.

Some commentators, however, believe that prosecutors should not be able to negotiate with an accused in order to "plead down" a sex offense to one that does not carry a sex-offender registration requirement.[80] Some who take this stance seem to believe that prosecutors offer and accept these agreements merely to protect their own conviction rates[81]

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[77] Klein, *supra* note 51, at 1051.

[78] *See, e.g.*, Bradley Fox, *Understanding and Managing the Challenges of Sex Crime Cases: Look Beyond the Crime at Sex Offender Status and Registration*, in STRATEGIES FOR DEFENDING SEX CRIMES (Aspatore ed. 2012), *available at* 2012 WL 3278702, at *12.

[79] *See* Graham, *supra* note 10, at 1590.

[80] *See* Patricia A. Powers, Note, *Making A Spectacle of Panopticism: A Theoretical Evaluation of Sex Offender Registration and Notification*, 38 NEW ENG. L. REV. 1049, 1066 (2004).

[81] *See id*.

and not out of a good-faith attempt at reaching a just result. Not only does this opinion ignore the reality of the increased difficulty in prosecuting sexual-assault cases, it is also not applicable to the military justice system.

First, service regulations require trial counsel to discuss proposed plea agreements with victims. Army Regulation (AR) 27-10 requires the trial counsel or some other government representative to consult with victims of a crime concerning negotiations of pretrial agreements.[82] While the victim's input is not dispositive, it is considered by a commander when determining whether to accept a plea.[83] The inclusion of the victim in plea negotiations should not be understated. While the United States Department of Defense (DoD) is implementing "institutionalized prevention efforts and policies"[84] aimed at preventing sexual assaults, a priority of DoD is that "every victim who makes an [u]nrestricted [r]eport [of sexual assault] will want to participate in the military justice process."[85] This is clearly a prosecution-oriented goal. In fiscal year 2012, eleven percent of those who made an unrestricted report of sexual assault declined to participate in the military justice system.[86] To be sure, not all victims will equate conviction with trust in the process or closure for their trauma. But decreasing the need for victim testimony will likely result in an increase in victim willingness to participate in the process, just as it did for the victim in the introductory example.[87]

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[82] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-15 (3 Oct. 2011) [hereinafter AR 27-10]. Additionally, the military has extended to certain victims of sexual assault free legal counsel to assist them in the court-martial process. *See, e.g.*, Policy Memorandum 14-01, The Judge Advocate General, subject: Special Victim Counsel (1 Nov. 2013). Congress later codified this requirement in the 2014 National Defense Authorization Act. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672, 966–71 (codified as amended at 10 U.S.C. § 1044e). Thus, many victims of sexual assault committed by military members will have government-provided counsel to assist in comparing the benefits and pitfalls of a contested court-martial for a sexual assault offense and a plea to a lesser and non-sexual assault offense. The counsel can even assist the victim in communicating with the convening authority about her feelings regarding a potential plea agreement, even when the victim and the government's interests do not align. *Id.*

[83] AR 27-10, *supra* note 81, para. 17-15.

[84] DOD ANN. REP. ON SEXUAL ASSAULT 2012, *supra* note 54, at 6.

[85] *Id.* at 36.

[86] *Id.*

[87] Increasing the disposition options available to trial counsel provides the victim a benefit beyond that of simply ensuring the victim is more involved in the process. Normalizing a tradeoff of sex-offender registration and high maximum punishment in exchange for a sentencing hearing that encourages offenders to take responsibility for their crimes promotes victim healing among those victims receptive to this type of

Second, the role of a trial counsel is much more expansive than that of a prosecutor. Trial counsel are responsible for not only the prosecution of cases in their units but also for providing advice to commanders on operational law issues, adverse administrative actions, and nonjudicial military justice actions.[88] Moreover, commanders, not trial counsel, select which cases are brought to trial.[89] Trial counsel are not evaluated on their conviction rates but rather on their work product and the effectiveness of the advice they give to commanders.[90] This construct allows trial counsel to give candid advice to their commanders because it removes the incentive to protect conviction rates.[91]

C. Empowerment of Military Judges

An increase in the maximum penalty for assault consummated by a battery under Article 128 will close the difference in available sentences between the charging options for sexual assault.[92] Because charges and

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justice. *See generally* Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313 (2013). While this article does not specifically address or endorse the adoption of a restorative justice scheme, certain aspects of the theory of restorative justice can be incorporated into the military justice process as a means to achieve the DoD's goal of changing the culture regarding sexual assault.

[88] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-13 (18 Mar. 2013) [hereinafter FM 1-04].

[89] *See* MCM, *supra* note 3, R.C.M. 407; *see also* UCMJ art. 22–24 (2012).

[90] The supervision of trial counsel is regulated by doctrine and includes evaluation by senior attorneys. While commanders or unit staff officers might be included in a trial counsel's rating scheme, the garrison's senior staff judge advocate interaction with trial counsel "exceeds mere technical supervision" when it comes to military justice matters. FM 1-04, *supra* note 88, para. 4-37. By policy, the staff judge advocate senior rates brigade trial counsel. Policy Memorandum 08-1, The Judge Advocate General, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (17 Apr. 2008).

[91] Additionally, the military's conviction rate seems to be measured by a different metric than that of civilian prosecutors. While the criticism leveled in *Making A Spectacle of Panopticism* relates to a prosecutor's win versus loss record, DoD's metric compares reported cases to convictions. *See, e.g.*, DOD ANN. REP. ON SEXUAL ASSAULT 2012, *supra* note 54, at 68, 73. Thus, an expectation that trial counsel obtain a conviction in every sexual assault case is unrealistic.

[92] Wright & Engen, *supra* note 73, at 1940. The National Defense Authorization Act for Fiscal Year 2014 does not affect plea agreements in which a part of the agreement is to dismiss a greater offense in exchange for a plea of guilty to a lesser included offense. While the amendments to Article 60 prohibit convening authorities from dismissing certain sexual offenses, that limitation only takes effect when there is a finding of guilty for those offenses. There is no limitation on agreements to dismiss charges or

the corresponding maximum penalties bind the parties in a plea negotiation, there are only a small and finite number of possibilities for the agreement. The distance is especially great between the two possibilities of charges under Article 120 and Article 128: a maximum of seven-years-to-life term of confinement and mandatory sex-offender registration versus a six-month maximum confinement.

Inherent in closing this distance is an understanding that military judges are capable of using their discretion to discern between simple battery cases and sexual batteries when determining appropriate sentences for each.[93] The *MCM*'s broad discretionary sentencing scheme shows that the President trusts courts-martial to make the appropriate determination as to sentence. Rule for Courts-Martial (RCM) 1002 allows a court-martial to adjudge "any punishment authorized in [the *MCM*]" as long as a mandatory minimum sentence is not prescribed by the UCMJ.[94] Adding six months of additional discretion to a court-martial's sentencing determination is a reasonable accretion of responsibility, especially considering that Article 128 was originally contemplated to include a prohibition on sexual battery.[95] This increase will allow military judges to more appropriately sentence those who commit sexual batteries and agree to plead guilty to a lesser offense that does not carry sex-offender registration.

Of course, the accused must be provident to the lesser offense in order for the military judge to accept the plea of guilty.[96] This further strengthens the argument that pleas to lesser offenses for sexual crimes are a just result because the military judge must be convinced of an accused's guilt before accepting the plea.[97] The guilty-plea inquiry also

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specifications prior to findings, as is usually the case with plea agreements to lesser included offenses. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 955–56 (codified as amended at 10 U.S.C. § 860).

[93] *Contra* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 434 (2000) (arguing that merging sexual and non-sexual assault and calling for higher penalties for non-sexual assault might result in prison overcrowding).

[94] MCM, *supra* note 3, R.C.M. 1002. The discretion described in RCM 1002 is only limited three times in the UCMJ: death for spying in violation of Article 106, *id.* pt. IV, ¶ 30e, confinement for life for premeditated and felony murder under Article 118, *id.* pt. IV, ¶ 43e(1), and mandatory dishonorable discharge or dismissal for rape, sexual assault, forcible sodomy, and attempts of those offenses under Articles 120, 120b and 125. 10 U.S.C.S § 856(b) (Lexis 2015).

[95] *See supra* text accompanying note 19.

[96] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK chap. 2, sec. 2 (10 Sept. 2014).

[97] *See id.*

demonstrates that the accused is guilty of a crime and that the plea is not merely to avoid the specter of the significant penalties pursuant to a sex crime conviction—a form of penalty in and of itself.

V. Conclusion

In the scenario proposed at the beginning of this article, a Soldier who committed a sexual battery pled down from a sex offense to a simple battery. Based on that plea, the court-martial sentenced the Soldier to six months of confinement, the maximum confinement penalty possible based on the plea of guilty. This scenario is not an isolated or novel fact pattern, but it is one that could have significantly benefitted from an increase in the maximum penalty for battery. But for the scenario's victim's desire to move on with her life, this case could have ended with a contested court-martial heard by panel members, pitting a just result against society's biases against victims of sexual assault.[98] In cases where a sex assault prosecution bears great risk of acquittal, the victim supports a plea to a lesser offense, and the accused submits a plea agreement to a lesser offense, enlarging the confinement penalty portion of the maximum possible sentence for battery is the best way to ensure some modicum of justice is served.

However, not all victims will be like the one in the scenario, and not all commanders will be willing to accept pleas to lesser offenses when the sentencing distance between the gravity of the charged offense and the lesser offense is so great. This lesson appears to be one already learned by other jurisdictions, as most U.S. jurisdictions either penalize common law battery at a maximum of at least twice that of the military or separately criminalize sexual battery in a way that does not immediately require sex-offender registration while maintaining higher maximum punishments.[99]

So too should the military follow this development. By raising the maximum punishment for assault consummated by a battery to confinement for one year, cases of certain types of sexual assault will be more likely to end in plea agreements that are both reasonable to an accused while exposing an accused to enough punitive exposure to satisfy the need for a just result commensurate with the crime committed.

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[98] *See* Gruber, *supra* note 65, at 646–47.
[99] *See infra* Appendix (Assault and Battery by Jurisdiction).

By making an alternative option more palatable to all parties to a court-martial, convictions for sexual batteries will increase.

The military has a long and rich legal history, and this proposal is in no way a repudiation of the development of the military's jurisprudence. This jurisprudence, with its beginnings rooted in the need to maintain good order and discipline, has stayed true to its calling while constantly evolving to better reflect its place in and among a civilized society that seeks justice for both the victims and perpetrators of criminal acts.[100] To that end, the President should increase the maximum punishment for assault consummated by a battery from six months' confinement to one year.

[100] *See* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 4 (2013).

APPENDIX: Assault and Battery by Jurisdiction

Jurisdiction	Assault/Battery Statute	Maximum Penalty Statute	Maximum Confinement (First Offense)
Military	Article 128, Uniform Code of Military Justice (2012)	MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 12 (2012)	6 months
Federal	18 U.S.C. § 113(a)(5) (2013)	18 U.S.C § 113(a)(5) (2013)	6 months
Alabama	ALA. CODE § 13A-6-22 (2013) (3rd Degree – physical injury) ALA. CODE § 13A-11-8 (2013) (Harrassment - touching)	ALA. CODE § 13A-5-7 (2013)	1 year 3 months
Alaska	ALASKA STAT. § 11.41.230 (2013)	ALASKA STAT. § 12.55.135 (2013)	1 year
Arkansas	ARK. CODE ANN. § 5-13-203 (2013)	ARK. CODE ANN. § 5-4-401 (2013)	1 year
California	CAL. PENAL CODE § 242 (West 2013)	CAL. PENAL CODE § 243 (West 2013)	6 months
Colorado	COLO. REV. STAT. § 18-3-204 (2013)	COLO. REV. STAT. § 18-1.3-501 (2013)	2 years (18 months max plus 6 months for "extraordinary risk")
Connecticut	CONN. GEN. STAT. § 53a-61 (2013)	CONN. GEN. STAT. § 53a-61 (2013)	1 year
Delaware	DEL. CODE. ANN. tit. 11, § 611 (2013) DEL. CODE. ANN. tit. 11, § 601 (2013)	DEL. CODE. ANN. tit. 11, § 4206 (2013)	Physical injury: 1 year Touching: 30 days
District of Columbia	D.C. CODE § 22-404 (2013)	D.C. CODE § 22-404 (2013)	180 days (3 years for intentionally, knowingly, or recklessly causing significant bodily injury)
Florida	FLA. STAT. § 784.03 (2013)	FLA. STAT. § 775.082 (2013)	1 year
Georgia	GA. CODE ANN. § 16-5-23 (2013)	GA. CODE ANN. § 17-10-3 (2013)	1 year
Hawaii	HAW. REV. STAT. § 707-712 (2013)	HAW. REV. STAT. § 706-663 (2013)	1 year
Idaho	IDAHO CODE ANN. §	IDAHO CODE ANN §	6 months

	18-903 (2013)	18-904 (2013)	
Illinois	720 ILL. COMP. STAT. 5/12-3 (2013)	730 ILL. COMP. STAT 5/5-4.5-55 (2013)	1 year
Indiana	IND. CODE § 35-42-2-1 (2013)	IND. CODE § 35-50-3-3 (2013)	Touching: 6 Months Bodily Injury: 1 Year
Iowa	IOWA CODE § 708.1 (2013)	IOWA CODE § 708.2 (2013) (serious misdemeanor); IOWA CODE § 903.1 (2013)	1 year
Kansas	KANSAS STAT. ANN. § 21-5413 (2013)	KANSAS STAT. ANN. § 21-6602 (2013)	6 months
Kentucky	KY. REV. STAT. ANN. § 508.030 (West 2013)	KY. REV. STAT. ANN. § 532.090 (West 2013)	1 year
Louisiana	LA. REV. STAT. ANN. § 14:33 (2013)	LA. REV. STAT. ANN. § 14:35 (2013)	6 months
Maine	ME. REV. STAT. tit. 17, § 207 (2013)	ME. REV. STAT. tit. 17, § 1252 (2013)	1 year
Maryland	MD. CODE ANN., Criminal Law, § 3-203 (West 2013)	MD. CODE ANN., Criminal Law, § 3-203 (West 2013)	10 years
Massachusetts	MASS. GEN. LAWS ch. 265, § 13A (2013)	MASS. GEN. LAWS ch. 265, § 13A (2013)	2 ½ years
Michigan	MICH. COMP. LAWS § 750.81 (2013)	MICH. COMP. LAWS § 750.81 (2013)	93 days
Minnesota	MINN. STAT. § 609.224 (2013)	MINN. STAT. § 609.02 (2013)	90 days
Mississippi	MISS. CODE ANN. § 97-3-7 (2013)	MISS. CODE ANN. § 97-3-7 (2013)	6 months
Missouri	MO. REV. STAT. § 565.070 (2013)	MO. REV. STAT. § 558.011 (2013)	Physical Injury: 1 year Touching: 15 days
Montana	MONT. CODE ANN. § 45-5-201 (2013)	MONT. CODE ANN. § 45-5-201 (2013)	6 months
Nebraska	NEB. REV. STAT. § 28-310 (2013)	NEB. REV. STAT. § 28-106 (2013)	1 year
Nevada	NEV. REV. STAT. § 200.481 (2013)	NEV. REV. STAT. § 193.150 (2013)	6 months
New Hampshire	N.H. REV. STAT. ANN. § 631:2-a (2013)	N.H. REV. STAT. ANN. § 625:9 (2013)	1 year

New Jersey	N.J. STAT. ANN. § 2C:12-1 (2013)	N.J. STAT. ANN. § 2C:43-8 (2013)	6 months
New Mexico	N.M. STAT. ANN. § 30-3-4 (2013)	N.M. STAT. ANN. § 30-1-6 (2013)	6 months
New York	N.Y. PENAL LAW § 120.00 (McKinney 2013)	N.Y. PENAL LAW § 70.15 (McKinney 2013)	1 year
North Carolina	N.C. GEN. STAT. § 14-33 (2013)	N.C. GEN. STAT. § 15A-1340.23 (2013)	Class 2: 45 days If male 18+y/o assaulting female (Class A1): 60 days
North Dakota	N.D. CENT. CODE § 12.1-17-01 (2013)	N.D. CENT. CODE § 12.1-32-01 (2013)	30 days
Ohio	OHIO REV. CODE ANN. § 2903.13 (West 2013)	OHIO REV. CODE ANN. § 2929.24 (West 2013)	6 months
Oklahoma	OKLA. STAT. tit. 21, § 644 (West 2013)	OKLA. STAT. tit. 21, § 644 (West 2013)	90 days If is/was in dating relationship: 1 year
Oregon	OR. REV. STAT. § 163.160 (2013)	OR. REV. STAT. § 161.615 (2013)	1 year
Pennsylvania	18 PA. CONS. STAT. § 2701 (2013)	18 PA. CONS. STAT. § 1104 (2013)	2 years
Rhode Island	R.I. GEN. LAWS § 11-5-3 (2013)	R.I. GEN. LAWS § 11-5-3 (2013)	1 year
South Carolina	S.C. CODE ANN. § 16-3-600 (2013)	S.C. CODE ANN. § 16-3-600 (2013)	30 days Moderate bodily injury/private parts: 3 years
South Dakota	S.D. CODIFIED LAWS § 22-18-1 (2013)	S.D. CODIFIED LAWS § 22-6-2 (2013)	1 year
Tennessee	TENN. CODE ANN. § 39-13-101 (2013)	TENN. CODE ANN. § 40-35-111 (2013)	Bodily injury: 11 months, 29 days Touching: 6 months
Texas	TEX. PENAL CODE ANN. § 22.01 (2013)	TEX. PENAL CODE ANN. § 12.21 (2013)	1 year
Utah	UTAH CODE ANN. § 76-5-102 (West 2013)	UTAH CODE ANN. § 76-3-204 (West 2013)	6 months
Vermont	VT. STAT. ANN. tit.	VT. STAT. ANN. tit.	1 year

	13, § 1023 (2013)	13, § 1023 (2013)	
Virginia	VA. CODE ANN. § 18.2-57 (2013)	VA. CODE ANN. § 18.2-11 (2013)	1 year
Washington	WASH. REV. CODE § 9A.36.041 (2013)	WASH. REV. CODE § 9A.20.021 (2013)	364 days
West Virginia	W. VA. CODE § 61-2-9 (2013)	W. VA. CODE § 61-2-9 (2013)	1 year
Wisconsin	WIS. STAT. § 940.19 (2013)	WIS. STAT. § 939.51 (2013)	9 months
Wyoming	WYO. STAT. ANN. § 6-2-501 (2013) WYO. STAT. ANN. §6-2-313 (2013) (Sexual Battery)	WYO. STAT. ANN. § 6-2-501 (2013) WYO. STAT. ANN. § 6-2-313 (2013)	6 months 1 year

DUTY: MEMOIRS OF A SECRETARY AT WAR[1]

REVIEWED BY CAPTAIN SEAN P. MAHARD©*

> *I consider myself personally responsible for each and every one of you as though you were my own sons and daughters. And when I send you in harm's way, as I will, I will do everything in my power to see that you have what you need to accomplish your mission—and come home safely.*[2]

I. Introduction

On June 30, 2011, President Barack Obama presented then-Secretary of Defense Robert M. Gates with the Presidential Medal of Freedom—the highest award a president can bestow upon a civilian.[3] It was a recognition of Gates's career in public service, which spanned eight presidents and countless conflicts.[4] *Duty: Memoirs of a Secretary at War* (*Duty*) primarily recounts Gates's service as Secretary of Defense across President George W. Bush's and President Barack Obama's administrations. The book made quite a splash in political circles when it hit the shelves, and pundits quickly highlighted the juicy, behind-the-scenes political details Gates revealed.[5] Gates's memoir, however, is

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1 ROBERT M. GATES, DUTY: MEMOIRS OF A SECRETARY AT WAR (2014).

2 *Id.* at 467 (quoting Gates's remarks to military-academy cadets).

3 Molly O'Toole, *Obama Awards Defense Chief Gates Medal of Freedom*, REUTERS (June 30, 2011, 3:06 PM), http://www.reuters.com/article/2011/06/30/us-gates-farewell-idUSTRE75T4LC20110630 (describing Gates's farewell ceremony).

4 *See id.* ("Obama teased Gates—who has served eight presidents—saying he 'loves' the Washington spotlight, but also highlighted his achievements as secretary.").

5 *See, e.g.*, Max Boot, *Why Is Robert Gates Angry? The former Defense Secretary: Indignant, effective, and often wrong*, NEW REPUBLIC (Feb. 25, 2014), http://www.newrepublic.com/article/116500/duty-memoirs-secretary-war-reviewed-max-boot ("With no desire for future government employment, [Gates] is letting his inner Hulk out for a roar."); Greg Jaffe, *Book review: 'Duty: Memoirs of a Secretary at War'*

much more than a political tale. He epitomizes the best qualities of a values-based leader—selfless-service, integrity, duty—and his book illustrates how these values arguably made him the best Secretary of Defense since World War II.[6]

This review focuses on the qualities that make Gates such a competent leader, which underscores why his book is such a worthwhile read. From his deep commitment to the men and women who served to his willingness to admit mistakes, *Duty* stands as a treatise on effective leadership. The top spot at defense imposes a heavy burden on any secretary, but Gates managed it with a deft hand, never losing sight of what mattered most—the troops. He also rose above the day-to-day minutia that consumes so many in the Pentagon, choosing to focus on the future sustainability of the Defense Department's budget, technology, and personnel management. *Duty* teaches readers what it takes to manage an organization as complex as the Defense Department while keeping the people—Soldiers and Civilians—who work there the top priority.

II. Five Years, Two Presidents: A Historical Tenure at Defense

Duty covers Gates's time at defense from 2006 to 2011, spanning two presidential administrations. It starts with his selection by George W. Bush to succeed Donald Rumsfeld as the Defense Secretary. On Sunday, November 5, 2006, President Bush met secretly with Gates at his ranch in Crawford, Texas—Bush wanted to avoid the attention a meeting at the

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by Robert M. Gates, WASH. POST (Jan. 7, 2014), http://www.washingtonpost.com/opinions/book-review-duty-memoirs-of-a-secretary-at-war-by-robert-m-gates/2014/01/07/0d8acad0-634d-11e3-a373-0f9f2d1c2b61_story.html (discussing Gates's criticisms of Vice President Joe Biden); Fred Kaplan, *Robert Gates' Primal Scream: The furious, brilliant, bridge-burning memoir of the most effective cabinet secretary of our time*, SLATE (Jan. 14, 2014, 1:47 PM), http://www.slate.com/articles/news_and_politics/war_stories/2014/01/robert_gates_duty_the_defense_secretary_s_criticisms_of_obama_and_bush.html ("Gates seems to have written this book in part to dissuade any politician from asking him to join an administration ever again."); Thomas E. Ricks, *In Command: 'Duty,' a Memoir by Robert M. Gates*, N.Y. TIMES (Jan. 13, 2014), http://www.nytimes.com/2014/01/19/books/review/duty-a-memoir-by-robert-m-gates.html ("The former defense secretary is naming names.").

[6] *See* Jaffe, *supra* note 5 (noting that Gates is "widely considered the best defense secretary of the post-World War II era").

White House would bring.[7] Gates loved his job as president of Texas A&M University, and he was reluctant to leave but graciously accepted President Bush's offer to head defense.[8] He understood how difficult the position would be; the United States was fighting two wars on two fronts in 2006.[9] But his country needed him, and Gates answered that call.[10]

Gates came to the Pentagon no stranger to D.C. He began his career as an analyst for the Central Intelligence Agency (CIA) in 1966 after earning undergraduate and graduate degrees in history.[11] Gates worked his way up to the National Security Council staff and then to Deputy Director of the CIA from 1986 until 1989.[12] After the election of President George H.W. Bush, Gates served as Assistant to the President and Deputy National Security Advisor from 1989 until 1991.[13] Eventually he became Director of the CIA in 1991 and was the only Director to date who started as an entry-level employee.[14] After an impressive public-service career, Gates had the résumé and experience necessary to lead the Defense Department.

Under President Bush's administration, Gates's first priority was Iraq.[15] In fact, the day after Gates was sworn in as Secretary, he flew to Iraq to meet with the U.S. commanders there.[16] He faced many obstacles in prosecuting Operation Iraqi Freedom—from politicians in D.C. to the bureaucracy at the Pentagon to a lack of quality care for the troops at home.[17] He worked tirelessly to overcome each challenge. And, of

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[7] GATES, *supra* note 1, at 5-9 (recounting his private meeting with President Bush at Crawford, Texas).

[8] *Id.* at 4, 7-8 (noting that Gates told the White House he would not accept the job as Secretary of Defense, but changing course when President Bush himself asked him to take the position).

[9] *Id.* at 4, 6-8 ("'We have kids dying in two wars. If the president thinks I can help, I have no choice but to say yes. It's my duty.'").

[10] *Id.* at 8 ("The president then said he knew how much I loved Texas A&M, but that the country needed me more.").

[11] *Robert M. Gates '65, Chancellor*, WILLIAM & MARY UNIV., http://www.wm.edu/about/administration/chancellor/ (last visited April 9, 2015) (Gates's biography).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] GATES, *supra* note 1, at 25 ("My highest priority as secretary was to turn the situation around in Iraq.").

[16] *Id.* at 40-41.

[17] *See id.* at 49-57, 109-19, 135-42 (discussing the "Washington Battlespace" difficulty in changing the Pentagon's culture, and wounded-warrior issues).

course, Iraq was not the only concern. The Bush administration would have to deal with Russia, Syria, and Iran.[18] Yet, Gates's ability to maneuver between issues and to prioritize responses exemplifies what leaders must do to manage large organizations effectively.

Gates faced a difficult decision at the end of President Bush's term in 2008. Gates, by his own admission, was spent: "I had too many rocks in my rucksack: foreign wars, war with Congress, war with my own department, one crisis after another."[19] Despite his wariness, Gates accepted President-Elect Obama's offer to stay on as Secretary, an unprecedented historical move.[20] Gates, a Republican, initially worried about the decision to remain—President Obama was twenty years Gates's junior and most of the Obama appointees had been in college or high school when Gates was Director of the CIA for President George H.W. Bush.[21] Maybe in recognition of this fact, Gates picked up a new nickname from the incoming team: Yoda.[22]

With myriad challenges and as a relative outsider in a new administration, Gates could not afford to waste any time. He had to address one of President Obama's top concerns: the responsible withdrawal of U.S. troops from Iraq.[23] Gates managed the drawdown while also tackling another top presidential priority, Afghanistan. The President's cabinet was divided on how to proceed with the "good war," and *Duty* exposes how Gates navigated the intense, internal debate among administration officials.[24]

Gates's tenure with President Obama was not limited to war. He encountered stubborn allies, China,[25] natural disasters, the Haitian

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[18] *See id.* at 153-93 (chronicling the issues with Russia, Syria, and Iran during the Bush administration).

[19] *See id.* at 258 (admitting that Gates did not enjoy his job at defense).

[20] *Id.* at 268-76 (describing Gates's initial meeting with President-Elect Obama and his eventual acceptance to stay on as Secretary of Defense).

[21] *See id.* at 287-88 (acknowledging that Gates was not familiar with most of the personalities in the new administration and felt like an "outsider").

[22] *See id.* at 288 ("Because of the difference in our ages and careers, we had very different frames of reference."). Yoda is the Jedi master from the *Star Wars* series. *Id.*

[23] *See id.* at 323-24 (noting that Iraq was the topic of the first National Security Council meeting under President Obama).

[24] *See id.* at 335-86 (chronicling the countless meetings and discussions that took place in Obama's administration regarding Afghanistan and the appropriate U.S. strategy there).

[25] *See id.* at 413-20 ("Improving the military-to-military relationship with Beijing was a high priority.").

Earthquake,[26] and internet debacles, such as WikiLeaks,[27] to name only a few. He also oversaw the elimination of Don't Ask, Don't Tell—an historical milestone in the Defense Department[28]—and "spent more time on the defense budget in 2010 than on any other subject."[29]

Throughout two presidential administrations, Gates juggled the nation's security challenges with skill and patience. The issues he faced in both administrations came in addition to "the crushing effect of dealing daily with multiple problems, pivoting on a dime every few minutes from one issue to another, having to quickly absorb reporting from many sources on each problem, and then making decisions, always with too little time and too much ambiguous information."[30] Gates managed the highest ranking general officers and admirals in the United States military, which included the occasional, unenviable task of firing some.[31] He had to maintain relationships with foreign militaries, including China, whose global influence and power has increased significantly in the past twenty years.[32] Add these commitments to high-level mandatory meetings—at NATO, for example[33]—and one quickly appreciates the monumental challenges faced by the Secretary of Defense.

Ultimately, *Duty* traverses two presidential administrations and five years in the Department of Defense with exceptional ease. Gates's writing style flows chronologically, describing countless meetings with politicians, military officials, presidents, and Soldiers. His memoir provides a rare look at the inner workings of the largest agency in the

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[26] *See id.* at 420-24 (describing the U.S. military's response to the Haitian earthquake in 2010).

[27] *See id.* at 425-27 (recounting Julian Assange's online organization, WikiLeaks).

[28] *See id.* at 445 (Don't Ask, Don't Tell "was abolished in the American armed forces on September 22, 2011. The transition went as smoothly as anyone could have hoped. We had turned a page in history, and there was barely a ripple.").

[29] *See id.* at 445, 453 (noting that Gates prepared six defense budgets, but Congress did not enact one prior to the start of the new fiscal year).

[30] *Id.* at 412-13.

[31] *See, e.g.*, Ann Mulrine, *Robert Gates' Last Day at Pentagon: Three Reasons He'll be Missed*, Christian Science Monitor (June 30, 2011), http://www.csmonitor.com/USA/Military/2011/0630/Robert-Gates-last-day-at-Pentagon-three-reasons-he-ll-be-missed/Accountability (discussing Gates's efforts to hold senior officers accountable).

[32] *See* GATES, *supra* note 1, at 413-16 (discussing Gates's efforts to build a stronger China–United States relationship).

[33] *See id.* at 193-96 (referring to Gates frequent travel as Secretary of Defense).

United States government. With a no-nonsense perspective, Gates describes the good, the bad, and the ugly.

III. The Soldiers' Secretary[34]

"'I just want to thank you and tell you how much I love you.'"[35] Shortly before Gates uttered those words to 275 Soldiers southwest of Jalalabad, Afghanistan, in 2010, he had met with a platoon that had lost six Soldiers the previous week.[36] By his own admission, he "was barely holding it together."[37] With emotion and passion, Gates admitted, in that same speech, that the Soldiers' commitment to their mission kept him committed to his work in Washington.[38] Gates cared deeply for the troops, and *Duty* illustrates that military leaders can be more effective when they have a true appreciation for what Soldiers endure on the front lines.

Duty portrays a Secretary of Defense with a Soldier-focused mentality, committed to cutting bureaucracy, improving efficiency, and safe-guarding the military's most valuable asset—the Soldier. For example, Gates spearheaded the effort to surge counter-Improvised Explosive Device capabilities to Iraq and Afghanistan.[39] When addressing conflict strategies in either combat zone, Gates always focused on a decision's impact on front-line troops.[40] A zero tolerance for what he termed "bureaucratic [BS]," Gates did not disguise his contempt for government-created obstacles to health care or Family support for Soldiers.[41] Gates's best days were spent thanking military men and women for their service—from Navy SEALs surviving "hell

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[34] *Id.* at 103.

[35] *Id.* at 499 (quoting a speech Gates gave to Soldiers at Forward Operating Base Connolly in Afghanistan).

[36] *Id.* at 498-99.

[37] *Id.*

[38] *See id.* ("'I feel the sacrifice and hardship and losses more than you'll ever imagine. You doing what you do is what keeps me doing what I do.'").

[39] *See id.* at 445-48 (telling the Joint Improvised Explosive Device Defeat Organization: "Money is no object. Tell me what you need.") (quotation marks omitted).

[40] *See id.* at 362, 366 (lamenting that if he could not "take care of the troops," he could not remain as Secretary).

[41] *See id.* at 494 (recounting the only email he sent to a Soldier while Secretary that addressed an issue the Soldier was having with Tricare (the military insurance program) covering his wife while he was deployed).

week" to Marines graduating from basic training.[42] Gates's commitment to servicemembers and their Families can be found in almost every part of *Duty*, highlighting his loyalty to the servicemen and women he led.

Gates recognized, as the best leaders do, that he was personally responsible for those he led. He did not sympathize with Soldiers; he empathized with them: "I feel your hardship and your sacrifice and your burden, and that of your families, more than you can possibly know."[43] In one telling passage, Gates recounts his first visit to Dover, Delaware—the first stopping place for fallen Soldiers returning to U.S. soil—to visit four Americans killed overseas.[44] He had arranged to be alone with the four fallen that evening and described how a wave of emotion overwhelmed him as he knelt beside each casket.[45] These moments reveal Gates's deep respect for Soldiers and his recognition that each Soldier has value—an enduring lesson for any military leader.

Gates's self-awareness proved one of his most notable strengths. Throughout the book, he minces no words when he admits mistakes. He took blame for a prolonged battle over Afghanistan command and control in the Pentagon,[46] including a struggle with the Marine Corps' desire to retain sole operational control of its forces in Helmand Province.[47] Always willing to poke fun at himself, Gates's self-deprecating manner charms readers: he remembers attending a meeting with a number of high-ranking generals but notes that none of the enlisted Soldiers tasked with serving food seemed to notice "the short, white-haired guy in a blue blazer with no stars."[48] Although he may have occasionally gone unnoticed, Soldiers are forever indebted to a man who cared so deeply for their well-being.

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[42] *See id.* at 466 (noting that personally thanking the troops was "one of the greatest honors" of being Secretary).

[43] *See id.* at 561-62 (addressing the troops in Afghanistan for the final time: "'My admiration and affection for you is limitless, and each of you will be in my thoughts and prayers every day for the rest of my life.'").

[44] *Id.* at 308.

[45] *Id.*

[46] *See id.* at 478 ("By late spring, every American in uniform in Afghanistan was under McChrystal's command. It had taken far too long to get there, and that was my fault.").

[47] *See id.* at 340 (commenting that allowing the Marines to maintain operational control of their forces in Helmand with a Marine General in Central Command was his "biggest mistake in overseeing the wars in Iraq and Afghanistan").

[48] *See id.* at 353-54 (recounting a meeting with then-General McChrystal at Chievres Air Force Base, Belgium).

Gates bore a heavy burden in leading defense, and his periods of self-reflection were important reminders of the costs of war. In one passage of *Duty*, he refers to Doris Kearns Goodwin's book *Team of Rivals*, which describes Edwin Stanton—Abraham Lincoln's Secretary of War—as begging "God help me to do my duty" when making decisions that would affect Soldiers' lives.[49] As a solemn prayer for the strength to do his job, Gates kept those words on his desk.[50] In another chapter of *Duty*, Gates describes the funeral service for Specialist Frederick Green, who Army Major Nidal Malik Hasan murdered in the 2009 attack at Fort Hood, Texas.[51] He attended Green's service at the request of his father and "could see . . . other cemeteries in numberless small towns across America, where families and friends had buried local sons who had risked everything and lost everything."[52] Gates understood the consequences that decisions in D.C. would have on young Americans and their families across the country.

IV. A Future Focus for the Pentagon

Gates worked hard to reform the Pentagon's budget, doctrine, and outdated technology. He understood that budget reform was critical in an era of fiscal restraint and worked hard to cut excess from each budget he oversaw.[53] He recognized the need to focus the Pentagon's efforts on current conflicts involving the use of counterinsurgency doctrine, rather than preparing for possible future conflicts involving conventional strategies.[54] Finally, Gates knew that technology was the key to reshaping the force for success in the future.[55] Despite pushback from Congress and the Pentagon, he never lost focus on building a department that could succeed in the future.

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[49] *Id.* at 258.
[50] *See id.* ("I wrote out that passage and kept it in my desk.").
[51] *Id.* at 385-86.
[52] *Id.* at 386.
[53] *See id.* at 546-52 (reforming the military budget to make it more efficient and focused on military capabilities).
[54] *Id.* at 142-46 (expressing frustration with the Pentagon's primary focus on future wars with other nation-states).
[55] *See id.* at 303 (noting that the old paradigms for conventional and unconventional war were no longer adequate). In regard to reshaping the force, Gates wanted "to sustain and modernize . . . strategic and conventional capabilities [as well as] train and equip for other contingencies." *Id.*

Gates recognized the importance of rewarding the best, forward-thinking leaders, which would require reforming the military's personnel-management system. In his own right, he managed the senior officers of defense very well, and when he departed the department in 2011, he felt proud to leave "the president with the strongest possible team of military leaders to face the daunting challenges ahead."[56] He knew that the military would need to retain leaders who rejected the status quo. In a speech at the United States Military Academy, he encouraged the cadets to "reject service parochialism, convention, and careerism and instead 'to be principled, creative, and reform-minded.'"[57] This was—and remains—exceptional advice for young leaders. He went even further and praised earlier officers "who had the 'vision and insight to see that the world and technology changed'" and understood how to use that change to the nation's advantage.[58] Often, he continued, these officers faced "fierce institutional resistance" and overcame the obstacles at significant professional risk.[59] Gates understood the importance of encouraging creative, independent thinkers in the military.

V. Conclusion

Duty provides leadership lessons that apply at any level in the military, from private to general officer. The book stands as a testament to Gates's humble service, describing how "a kid from Kansas, whose grandfather as a child went west in a covered wagon . . . became the secretary of defense of the most powerful nation in history."[60] He gave up a relatively safe position as president of a prestigious institution, Texas A&M University. But he left the Aggies to tackle two wars and an assortment of national-security challenges, continuing his service longer than he anticipated because "there is a debt to the Founders that must be paid."[61]

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[56] *Id.* at 538.
[57] *Id.* at 467.
[58] *Id.* at 466-67.
[59] *Id.* at 466.
[60] *See id.* at 269 (discussing an email he had sent to his family the day after the country elected President Obama).
[61] *See id.* (telling his family in an email that a big decision would come soon on whether to remain with President Obama's administration as Secretary of Defense).

"There is but one just use of power, and it is to serve people."[62] This principle, expressed in then-President George H.W. Bush's inaugural address on Friday, January 20, 1989, captures Gates's service as Secretary of Defense.[63] His selfless-service to the United States and his commitment to the troops saved the lives of countless men and women in uniform. He led defense with one purpose: serve the men and women of the armed services, not vice versa. In doing so, he teaches us that his love and commitment for the troops made him a stronger and more effective leader in Washington. This is a must read for America's military.

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[62] *Inaugural Address of George Bush*, THE AVALON PROJECT, http://avalon.law.yale.edu/20th_century/bush.asp (last visited April 13, 2015).
[63] *Id.*

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